JOTI JOURNAL

(BI-MONTHLY)

AUGUST 2021

MADHYA PRADESH STATE JUDICIAL ACADEMY
JABALPUR

JOTI JOURNAL AUGUST - 2021

SUBJECT- INDEX

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

(ii) क्या भा.द.सं. की धारा 193 के स्पष्टीकरण 2 में ''न्यायिक कार्यवाही के चरण'' धारा 195(1)(ख)(i) द.प्र.सं. के ''किसी भी न्यायालय में कार्यवाही'' का पर्याय है? अभिनिर्धारित, नहीं। **171** **218**

Sections 227, 239 and 397 – Revision petition – Maintainability of – Whether a revision lies against order of framing charge or refusal to discharge? Held, yes.

धाराएं 227, 239 एवं 397 – पुनरीक्षण याचिका – पोषणीयता – क्या आरोप विरचित करने अथवा आरोपमुक्त करने से इंकार करने के आदेश के विरुद्ध पुनरीक्षण पोषणीय है? अभिनिर्धारित, हाँ। **172*** **222**

Sections 258 and 322 – See Section 138 of the Negotiable Instruments Act, 1881.

धाराएं 258 एवं 322 – देखें परक्राम्य लिखत अधिनियम, 1881 की धारा 138। **208** **264**

Section 311 – Power to summon material witness – Exercise of – Deceased died of unnatural death – Medical officer who conducted first post-mortem turned hostile – Material on record revealed that second post-mortem on deceased's body was also conducted – At the fag end of trial, application filed by Public Prosecutor to summon the medical officer who conducted second post-mortem along with relevant records – Held, application deserves to be allowed to uphold the truth.

धारा 311 – महत्वपूर्ण साक्षी को आहूत करने की शक्ति का प्रयोग – मृतक की अप्राकृतिक मृत्यु हुई – पहला शव परीक्षण करने वाले चिकित्साधिकारी पक्षद्रोही हो गए – अभिलेख से प्रकट हूआ कि मृतक के शरीर का दोबारा शव परीक्षण भी किया गया था – विचारण के अंतिम चरण पर, लोक अभियोजक द्वारा दूसरा शव परीक्षण करने वाले चिकित्साधिकारी को सुसंगत अभिलेख के साथ आहूत करने संबंधी आवेदन प्रस्तुत किया गया – अभिनिर्धारित, सत्य प्रकट करने के लिए आवेदन स्वीकार योग्य है। **173*** **222**

Section 320 – Compounding of offence – Grant of leave by Court – Guiding factors for Court to grant or refuse the leave; explained.

धारा 320 – अपराध का शमन – न्यायालय द्वारा अनुमति दिया जाना – न्यायालय द्वारा अनुमति देने अथवा न देने के लिए मार्गदर्शक कारक समझाए गए। **198 (ii)** **254**

Section 357 – Compensation; release of – Whether compensation ordered u/s 357 CrPC be released during pendency of appeal? Held, no – Such release would lead to multiplicity of proceedings.

धारा 357 – प्रतिकर का भुगतान – क्या अपील के लंबित रहने के दौरान धारा 357 द.प्र.सं. के अधीन आदेशित प्रतिकर के भुगतान का आदेश दिया जा सकता है? अभिनिर्धारित, नहीं – इस तरह के भुगतान से कार्यवाहियों की बहुलता होगी। **174*** **223**

हमला किया गया था – अवधारित, यह अपेक्षा नहीं की जा सकती है कि मृतक के सिर के केंद्र पर प्रहार किया गया हो – विरोधाभास महत्वपूर्ण नहीं है।

(ii) वाहन और एक पीड़ित के सोने की चेन की जप्ती का अभाव – प्रभाव – अवधारित, जहां प्रमुख साक्षियों की साक्ष्य सुसंगत, प्राकृतिक और विश्वसनीय पाई गई हो, जप्ती का अभाव उन्हें अस्वीकार करने का कोई आधार नहीं होगा। **195** **250**

Section 3 – See Section 302 of the Indian Penal Code, 1860.

धारा 3 – देखें भारतीय दण्ड संहिता, 1860 की धारा 302। **197** **254**

Sections 3 and 8 – (i) Related witness – Credibility – Being related to the deceased does not necessarily mean that they will falsely implicate innocent persons – The testimony of the related witness, if found to be truthful, can be the basis of conviction.

(ii) Enmity – If the witnesses are otherwise trustworthy, past enmity by itself will not discredit any testimony – In fact the history of bad blood gives a clear motive.

धाराएं 3 एवं 8 – (i) हितबद्ध साक्षी – विश्वसनीयता – मृतक से हितबद्ध होने का अर्थ आवश्यक रूप से यह नहीं है कि वे निर्दोष व्यक्तियों को मिथ्या आलिप्त करेंगे – हितबद्ध साक्षी की साक्ष्य यदि सत्यता से युक्त पाई जाती है, दोषसिद्धि का आधार हो सकती है।

(ii) रंजिश – यदि साक्षीगण अन्यथा विश्वसनीय हों, तो पूर्व रंजिश अपने आप में उनकी साक्ष्य को अविष्वसनीय नहीं करती है – वास्तव में पूर्व आपसी रंजिश का इतिहास एक स्पष्ट हेतुक देता है। **194** **249**

Sections 3, 8, 10 and 106 – Deceased was newly wedded bride and was returning to her parental home as pillion rider on the scooter with her brother-in-law accused-S – Allegedly, on the way she was ambushed and taken to a sugarcane field by two armed miscreants and shot from close range and looted – Accused-S then drove the scooter to deceased's parental home, informed her father about the incident and returned to his home and informed his brother and father, who are co-accused persons – FIR was lodged by father of deceased against accused persons alleging maltreatment of deceased – Prosecution relied upon motive, last seen, criminal conspiracy and burden of proving facts within knowledge – Held, accused-husband was unhappy with deceased wife for her looks does not provide strong enough motive to conspire to kill her – Accused-S never fled and on being confronted with armed miscreants, chose to not to be valiant and drove down to inform deceased's father; this is a plausible human conduct – Evidence on record does not establish any agreement between accused persons, therefore, conspiracy cannot be inferred – In absence of any acceptable evidence against accused, burden cannot be shifted on accused with aid of Section 106 – Several components are missing in the chain of circumstantial evidence; accused persons held, are entitled to acquittal.

धारा 3, 8, 10 एवं 106 – मृतका नवविवाहित वधु थी और अपने देवर अभियुक्त–एस के साथ स्कूटर से अपने पैतृक घर लौट रही थी – कथित रूप से रास्ते में दो हथियारबंद बदमाशों द्वारा उसे एक गन्ने के खेत में ले जाया गया और नजदीक से गोली मारकर लूट कारित की –

अभियुक्त–एस मृतका के माता–पिता के घर स्कूटर ले गया, उसके पिता को घटना की सूचना दी और अपने घर लौटकर अपने भाई और पिता को सूचित किया, जो सह–अभियुक्त हैं – मृतका के पिता द्वारा प्रथम सूचना रिपोर्ट दर्ज कराई गई और अभियुक्तगण द्वारा मृतका के साथ दुर्व्यवहार का आक्षेप लगाया – अभियोजन ने हेतुक, अंतिम बार साथ देखा जाना, आपराधिक षडयंत्र और ज्ञान के भीतर के तथ्यों को साबित करने के भार पर निर्भरता दर्शायी – अवधारित, अभियुक्त–पति की मृतका पत्नी की सुंदरता से अप्रसन्नता उसे मारने का षडयंत्र रचने के लिए पर्याप्त प्रबल हेतुक उत्पन्न नहीं करती है – अभियुक्त–एस कभी नहीं भागा और सशस्त्र बदमाशों से सामना होने पर उसने कोई बहादुरी नहीं दिखाने का चुनाव किया और मृतक के पिता को सूचित करने के लिए चला गया, यह एक संभाव्य मानव आचरण है – अभिलेख पर आई साक्ष्य अभियुक्तगण के मध्य किसी सहमति को स्थापित नहीं करती है, इसलिए, षडयंत्र का अनुमान नहीं लगाया जा सकता है – अभियुक्त के विरुद्ध किसी भी स्वीकार्य साक्ष्य के अभाव में धारा 106 की सहायता से अभियुक्त पर सबूत का भार स्थानांतरित नहीं किया जा सकता है – परिस्थितिजन्य साक्ष्य की श्रृंखला में कई घटक अनुपस्थित हैं, अतः अभियुक्तगण दोषमुक्ति के पात्र हैं। **193 246**

Sections 3, 8 and 134 – Non-examination of independent witnesses – Effect of.

Correction in deposition sheet – In cross-examination the words "not true" were struck off and overwritten as "it is true" – Effect and appreciation.

धाराएं 3, 8 एवं 134 – स्वतंत्र साक्षियों का परीक्षण न कराना – प्रभाव।

बयान शीट में सुधार – प्रतिपरीक्षण में ''गलत है'' शब्दों को काट कर ''सही है'' के रूप में अधिलेखित किया गया – प्रभाव और मूल्यांकन। **196 (ii) & (iii) 251**

Sections 3 and 118 – Sexual assault – Veracity of the testimony of disabled witness – Held, testimony of a disabled witness cannot be considered weak or inferior – Court needs to be attentive to the fact that such witness may give evidence in different form – Instantly, prosecutrix was blind, her primary mode of identification of persons around her is sound of their voice – Held, her testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

धाराएं 3 एवं 118 – लैंगिक हमला – दिव्यांग साक्षी की साक्ष्य की सत्यता – अभिनिर्धारित, एक दिव्यांग साक्षी की साक्ष्य को कमजोर या निम्न नहीं माना जा सकता है – न्यायालय को इस तथ्य पर ध्यान देना चाहिए कि ऐसा साक्षी अलग स्वरूप में साक्ष्य दे सकता है – हस्तगत मामले में अभियोक्त्री नेत्रहीन थी, अपने आस–पास के व्यक्तियों की पहचान का उसका प्राथमिक तरीका उनकी आवाज थी – अवधारित, उसकी साक्ष्य एक ऐसी अभियोक्त्री के समान महत्व की है जो अभियुक्त को देखकर पहचानने में सक्षम होती। **181 (ii) 229**

Section 376 – Sexual offences against women and girls with disability – Guidelines issued to make out criminal justice system more disabled-friendly.

धारा 376 – दिव्यांग महिलाओं और बालिकाओं के साथ लैंगिक अपराध – आपराधिक न्याय प्रणाली को दिव्यांगों के लिए और अधिक अनुकूल बनाने के लिए दिशानिर्देश जारी किए गए। **181 (i) 229**

LAND ACQUISITION ACT, 1894
भू–अर्जन अधिनियम, 1894

Section 18 – Land acquisition – Determination of compensation – Method of cumulative annual increase; applicability of – It is one of the methods of determining market value, but valuation based on sale deed is normally the safest method.

धारा 18 – भूमि अधिग्रहण – प्रतिकर का निर्धारण – संचयी वार्षिक वृद्धि की पद्धति की प्रयोज्यता – यह बाजार मूल्य निर्धारित करने की एक पद्धति है, परन्तु विक्रय विलेख के आधार पर मूल्यांकन सामान्य रूप से सबसे सुरक्षित पद्धति है। **199* 256**

LAND REVENUE CODE, 1959 (M.P.)
भू–राजस्व संहिता, 1959 (म.प्र.)

Section 110 – Mutation – Any registered sale deed cannot be set aside by revenue authority on the ground of balance to be paid – Only competent Civil Court can decide the legality of such registered document.

धारा 110 – नामान्तरण – कोई रजिस्टर्ड विक्रय पत्र प्रतिफल भुगतान बकाया होने के आधार पर राजस्व अधिकारी द्वारा अपास्त नहीं किया जा सकता – ऐसे रजिस्टर्ड दस्तावेज की वैधता का निर्धारण मात्र सक्षम अधिकारिता वाले सिविल न्यायालय द्वारा ही किया जा सकता है। **200* 257**

Section 117 – *Khasra* Entries – Evidentiary value – On the strength of *Khasra* entries of certain years, State cannot claim title over the disputed land as it is well settled that an entry in the revenue records is not a document of title.

धारा 117 – खसरा प्रविष्टियाँ – साक्ष्यिक मूल्य – निश्चित वर्षों की खसरा प्रविष्टियों के बल पर राज्य विवादित भूमि पर स्वत्व का दावा नहीं कर सकता, जैसा कि यह सुस्थापित है कि राजस्व अभिलेखों में की गई प्रविष्टि स्वत्व का दस्तावेज नहीं है। **205 (ii) 261**

MOTOR VEHICLES ACT, 1988
मोटरयान अधिनियम, 1988

Sections 2(30) and 147(1) – Motor Insurance – Owner – When any motor vehicle is under possession of a person or corporation under a valid agreement then such person or corporation is called the owner of the vehicle.

PART – IV
(IMPORTANT CENTRAL/STATE ACT & AMENDMENTS)

EDITORIAL

Esteemed Readers,

This month we are celebrating the 75th year of our independence. We still have a long way to go in realising the dreams of those who won freedom for us. Our Constitution adroitly ingeminate those dreams which is in the shape of Justice, Liberty, Equality and Fraternity. We must strive for more equality in an unequal world, more justice in unjust conditions. This can be accomplished by the attentiveness to the social-cultural values encapsulated in our supreme legislation. As Thomas Jefferson said, "the price of liberty is eternal vigilance".

However, we can say with certainty that the Indian Judiciary in these years, has achieved the goal of "independent judiciary" by maintaining justice in promoting and encouraging respect for fundamental freedoms without any discrimination and minifying the gap between the vision which underlines the principles of free justice system and actual situation that appears across the globe.

As resolved in the Seventh United Nations Congress in 1985 and while setting out the basic principles on the independence of judiciary, it was found appropriate that consideration be first given to the role of judges in relation to the justice system and to the importance of their selection, training and conduct. One of the basic principles formulated to assist the Member States in their task of securing and promoting independence of judiciary is thus, "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law." Judicial education and training, therefore, significantly contributes to securing and promoting an autonomous judiciary. It is time that we reiterate our commitment to make and strengthen a free but firm judiciary at the grass-root level.

The Academy in the months of July and August has conducted twelve programmes as continuing education programmes viz. Workshops on Protection of Children from Sexual Offences Act, 2012, Key issues relating to Land Acquisition Laws, Key issues relating to Juvenile Justice, Key issues relating to offence & trial under the Electricity Act and Key issues relating to Anti-Corruption Laws wherein 413 Judges of the District Judiciary participated as well as Special Programme for Advocates on e-Court Project. Apart from these online short-term programmes, two Refresher Courses were also organized online for 203 Civil Judges who have completed five years after their entry into judicial service. The Final Phase of Foundation Course for the

District Judge (Entry Level) was conducted in the Academy as per the old Scheme.

For the past couple of years, Interactive session on Identified Legal Issues is being organized for all the Judges of the District Judiciary of the State. The idea behind organizing these sessions is to discuss the problems the Judges face in their day-to-day court working. This is a very useful programme wherein the problems are effectively and efficiently dealt with. In the recently held session in the month of July, 13 districts of the State participated. This will continue in future also.

Since some semblance of normalcy was restored, a four week-long Institutional Advance Training Course for 66 recently promoted District & Additional Sessions Judges (Entry Level) from the cadre of Civil Judge Senior Division is being conducted in physical mode. The said Course began on 9th August and will conclude in the first week of next month. This Course is being conducted under the new Scheme for Judicial Education and Training which commenced from 1st January 2021. After the devastation that wrecked us during the second wave of the pandemic, it was quite a bold decision to host in-person training programme in the Academy. It took a lot of elbow grease and planning to bring this event to the point at which I can call it a success.

This Journal has been constantly refining and improving upon its last iteration to provide content of the highest quality. In this pursuit of literary perfection, your feedback is of paramount importance. It is due to the feedback of our esteemed readers that we can work on refining the journal. Hence, we thank and request all of you to continue to shower your support by sharing your valuable feedback with us.

On 15th August, we celebrated with fervour Independence Day in the Academy. The tricolor was hoisted by Hon'ble the Chief Justice and Patron Shri Mohammad Rafiq in the premises of the Academy in which Hon'ble Judges of the High Court, Principal Seat Jabalpur and other invitees were in attendance during the ceremony.

We have observed leaps and bounds of progress in the last seven and a half decades and as representatives of one of the pillars of this democracy, we must cement our responsibility towards the citizens of this free nation.

Ramkumar Choubey
Director

GLIMPSES OF THE 75TH INDEPENDENCE DAY CELEBRATION AT MADHYA PRADESH STATE JUDICIAL ACADEMY

Hon'ble Shri Justice Mohammad Rafiq, Chief Justice, High Court of Madhya Pradesh hoisting the National Flag

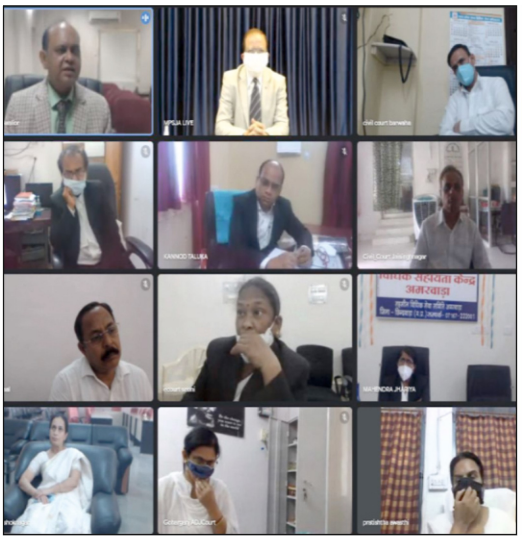
GLIMPSES OF THE 75TH INDEPENDENCE DAY CELEBRATION AT MADHYA PRADESH STATE JUDICIAL ACADEMY

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Inaugural Session of
Final Phase Foundation Course for the District Judge (Entry Level) directly appointed from the Bar (09.08.2021 to 21.08.2021)
&
Institutional Advance Training Course for District & Additional Sessions Judges (Entry Level) (09.08.2021 to 04.09.2021)

GLIMPSES OF EDUCATIONAL PROGRAMMES CONDUCTED ONLINE

Third Phase Induction Training Course for Civil Judges (Entry Level) of 2020 Batch (28.06.2021 to 23.07.2021)



Workshop on – Protection of Children from Sexual Offences Act, 2012 (03.07.2021)

Special Programme for Advocates on e-Court Project (03.07.2021)

GLIMPSES OF EDUCATIONAL PROGRAMMES CONDUCTED ONLINE

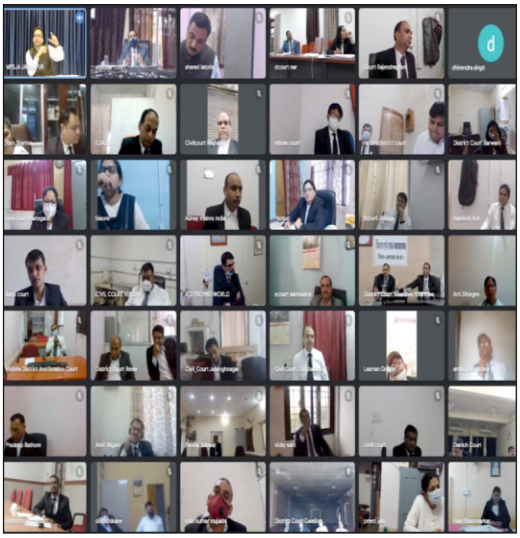
Workshop on – Key issues relating to Land Acquisition Laws (17.07.2021)

Workshop on – Key issues relating to Juvenile Justice for the Principal Magistrates of Juvenile Justice Boards (24.07.2021)

Refresher Course for Civil Judge, Senior Division (Group-1) (26.07.2021 to 30.07.2021)

Interactive Session on – Identified Legal Issues (31.07.2021)

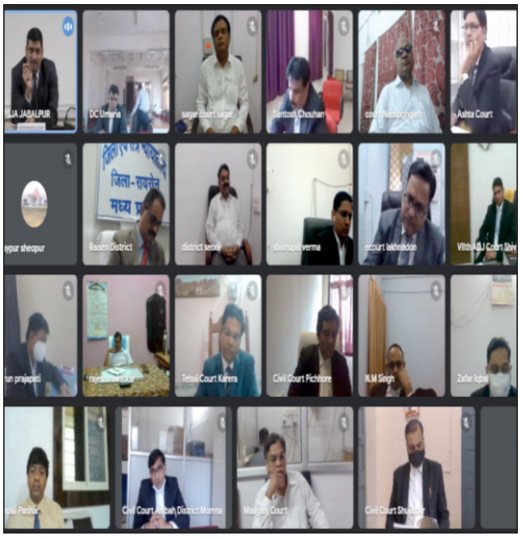
GLIMPSES OF EDUCATIONAL PROGRAMMES CONDUCTED ONLINE



Refresher Course for Civil Judge, Senior Division (Group-2) (02.08.2021 to 06.08.2021)

Interactive Sessions on – Key issues relating to offence & trial under the Electricity Act, 2003 (07.08.2021)

Workshop on – Key issues relating to Anti-Corruption Laws (21.08.2021)



Interactive Sessions on – Key issues relating to offence & trial under the Electricity Act, 2003 (28.08.2021)

APPOINTMENT OF HON'BLE SHRI JUSTICE PRANAY VERMA AS JUDGE OF HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Pranay Verma has been administered oath of office by Hon'ble Shri Justice Mohammad Rafiq, Chief Justice, High Court of Madhya Pradesh on 27th August, 2021 as Judge of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall of South Block of High Court of M.P. at Jabalpur.

Hon'ble Shri Justice Pranay Verma was appointed as Judge of the High Court of Madhya Pradesh. His Lordship was born on 12th December, 1973. His Lordship's father late Hon'ble Shri Justice Bipin Chandra Verma was an Hon'ble Judge of High Court of Madhya Pradesh and thereafter, Hon'ble the Chief Justice of Punjab & Haryana High Court. After obtaining degrees of B.Com. and LL.B., enrolled as an Advocate on 1st July, 1998 and started practice under the able guidance of Shri Ravish Chandra Agarwal, Senior Advocate. For the last 23 years, His Lordship practised in the High Court of Madhya Pradesh, various District Courts as well as Family Courts, Consumer Forum and Debt Recovery Tribunal in civil, criminal, constitutional and service matters.

His Lordship was standing counsel for Hindustan Power Projects Private Limited, Essar Power Private Limited, Jhabua Power M.P. Limited, Prism Johnson Limited, National Fertilizers Limited, Corporation Bank, Commercial Automobiles Limited, M.P. Audyogik Kendra Vikas Nigam Limited, Tega Industries Limited, Metal Scrap Corporation Limited and has also appeared for the State Bank of India in individual cases.

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

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HON'BLE SHRI JUSTICE AKHIL KUMAR SRIVASTAVA DEMITS OFFICE

Hon'ble Shri Justice Akhil Kumar Srivastava demitted office on His Lordship's attaining superannuation.

His Lordship was born on 5th August, 1959 in Bansgaon, District Gorakhpur (U.P.). After obtaining degrees of B.A. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II in the year 1985. His Lordship was promoted to Higher Judicial Services as Additional District & Sessions Judge on 31st May, 1997.

His Lordship, as Judicial Officer, worked in different capacities at various places like Panna, Bhopal, Chhatarpur, Laundi, Satna, Jabalpur, Narsinghpur, Sihora, Khandwa, Rewa, Katni and Sagar. Also held the posts of Deputy Secretary, Additional Legal Remembrancer & Additional Secretary and Secretary, Law and Legislative Affairs Department, Bhopal and Law Officer, State Economic Offences Investigation Bureau. Also served as District & Sessions Judge at Narsinghpur. His Lordship was Principal Registrar (ILR and Examination) at Principal Seat, Jabalpur at the time of elevation.

His Lordship took oath as Judge, High Court of Madhya Pradesh on 19th June, 2018.

During His Lordship's tenure, rendered valuable services as Judge and also a Member of various Administrative Committees.

His Lordship was accorded farewell ovation on 4th August, 2021 in the Conference Hall of South Block, High Court of Madhya Pradesh at Jabalpur.

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

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PART - I

REVERSE BURDEN WITH RESPECT TO DISHONOUR OF CHEQUE

Tajinder Singh Ajmani
OSD, MPSJA

Presumption is a rule of evidence and do not conflict with the presumption of innocence, it introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused.

Provisions

Sections 118 and 139 of the Negotiable Instruments Act, 1881 (in short - "NI Act") provide for presumptions. Relevant part of section 118 reads as under:

> **Section 118. Presumptions as to negotiable instruments. –** Until the contrary is proved, the following presumptions shall be made:
>
> ***(a) of consideration*** **–** that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
>
> .....

Section 139 of the NI Act is extracted below:

> **Section 139. Presumption in favour of holder. –** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

Burden of Proof

A three Judge Bench of Supreme Court in ***Kali Ram v. State of H.P., (1973) 2 SCC 808*** held that there are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption.

Mandatory and Discretionary Presumption

In ***State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61***, the Apex Court observed that it may here be mentioned that the legislature has chosen to use the words 'shall presume' and 'may presume', the former a presumption of law and latter of fact. In case of presumption of law, it is obligatory on the court to

raise this presumption in every case because unlike the case of presumption of fact, presumptions of law constitute a branch of jurisprudence.

In ***Dhanvantrai Balwantrai Desai v. State of Maharashtra, AIR 1964 SC 575,*** the Constitution Bench reiterated the principles enunciated in ***State of Madras v. Vaidyanath Iyer*** (supra) and clarified that in the case of discretionary presumption if drawn may be rebutted by an explanation which might reasonably by true and which is consistent with the innocence of the accused. On the other hand, in the case of a mandatory presumption the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

Reverse Burden

In ***Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513***, the Supreme Court observed that that as soon as the complainant discharges the burden to prove that the instrument was executed by the accused the rules of presumptions under sections 118 and 139 of the NI Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused. A presumption is not in itself evidence, but only makes a ***prima facie*** case for a party for whose benefit it exists. The court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.

A three-Judge Bench Supreme Court in ***Rangappa v. Sri Mohan, (2010) 11 SCC 441*** held that section 139 of the NI Act is an example of a reverse onus

clause. However, it must be remembered that the offence punishable under section 138 can be better described as a regulatory offence. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Presumption mandated by section 139 of the NI Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in ***Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54*** may not be correct.

Presumption when arises:

- Once the issuance and signature on cheque is admitted, there is always a presumption in favour of complainant that there exists legally enforceable debt or liability. ***APS Forex Services Pvt. Ltd. v. Shakti International Fashion Linkers and ors., AIR 2020 SC 945***.
- If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. Existence of fiduciary relationship between payee and drawer does not disentitle payee to the benefit of presumption in absence of evidence of undue influence and coercion. ***Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197***.
- The accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. Mere printed date on cheque by itself cannot be conclusive proof of fact that cheque was issued in 1999. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence. ***T. Vasanthakumar v. Vijayakumari, 2015 CriLJ 2853***.
- Cheques allegedly issued by accused towards repayment of debt The defence of the accused that he had allegedly issued ten blank cheques in 1995 for repayment of a loan, has been disbelieved on the ground that the accused did not ask for return of the cheques for a period of seven years from 1995. This defence was obviously a cover-up and lacked credibility. ***T. P. Murugan (Dead) Thr. L.Rs. v. Bojan, 2018 CriLJ 4315***.
- The observations of the trial court that complainant did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and

his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complainant to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of sections 118 and 139 of the NI Act. It has been held that Trial Court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the accused had successfully rebutted the presumption as envisaged by section 139 of the NI Act. ***Rohitbhai Jivanlal Patel v. State of Gujarat and ors., 2019 CriLJ 2400***.

- The complainant has discharged the initial burden cast upon him that the cheques were issued for the rice bags purchased on credit. Though the complaint contains no specific averments that cheques were issued for the purchase made on credit in the evidence adduced by the complainant, the courts below ought to have raised the presumption under section 139 of the NI Act. The defence of the respondent that though he made payment for the commodities/rice bags, the blank cheques were not returned by the appellant-complainant is quite unbelievable and unacceptable. ***M/s. Shree Daneshwari Traders v. Sanjay Jain and ors., AIR 2019 SC 4003***.
- Once settlement of due amount is admitted, it is presumed that cheques in question were drawn for consideration and the holder of cheques received the same in discharge of an existing debt. ***Uttam Ram v. Devinder Singh Hudan and anr., 2019 (4) Crimes 440 (SC)***.
- Mere denial of the debt by the accused is not sufficient defence of stolen cheque in absence of any evidence shall not discharge the mandatory Presumption in favour of debt or other legal liability. ***Kishan Rao v. Shankargouda (2018) 8 SCC 165***.
- Once the cheque is issued by the drawer a presumption under section 139 of NI Act must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under section 138 of the NI Act by the drawee or the holder of a cheque in due course. ***M/s. Modi Cements Ltd v. Kuchil Kumar Nandi, AIR 1998 SC 1057*** (Three Judge Bench).
- Category of 'stop payment' instruction to the bank where the account holder has sufficient funds in his account to discharge the debt for which the cheque was issued, the said category of cases would be subject to rebuttal as this question being rebuttable, If that be so, then offence under section 138 although would be made out, the same

will attract section 139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of 'stop payment' situation, sections 138 and 139 will have to be given a harmonious construction as in that event section 139 would be rendered nugatory. ***M/s. Laxmi Dyechem v. State of Gujarat and ors., 2013 CRI. L. J. 3288*** (Three Judge Bench).

- Presumption under sections 118 and 139 of the NI Act cannot be rebutted just by recording of statement under section 313 Cr.P.C. by the accused as such statement is not substantive evidence of defence. ***Sumeti Vij v. M/s Paramount Tech Fab Industries, 2021 (1) ANJ (SC) 254***.
- Even after purportedly drawing the presumption under section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. ***Rohitbhai Jivanlal Patel v. State of Gujarat, (2019) 18 SCC 106***.
- The presumption available under section 139 of the NI Act has to be rebutted and that rebuttal can only be done after adducing evidence. This, by itself clearly reflects that the rebuttal presumption cannot be looked into at the stage of the Court taking cognizance of the offence and registering the case: [***Shiv Kumar v. Ramavtar Agrawal, 2016 SCC OnLine Chh 2121*** affirmed in ***Shiv Kumar v. Ramavtar Agarwal, (2020) 12 SCC 500]***.

Burden when discharged

- The complaint alleged that despite the fact that the accused was a defaulted subscriber of two prized chitties, he took personal loan from him in his personal capacity. Accused allegedly issued two cheques in favour of him. In view of the conduct of the parties it would not be prudent to hold that the accused borrowed a huge sum despite the fact that the suits had already been filed against him by the complainant, No document executed, amount advanced also did not carry any interest. Court can take notice of conduct of parties. Presumption raised in terms of section 139 of the NI act is rebutted. ***John K. John v. Tom Varghese and anr., AIR 2008 SC 278***.
- Complainant's case that accused purchased carpets from him, cheques issued for discharge of sale consideration were dishonoured. Defence case is that there was no sale and, therefore, no liability existed. Absence of sale proved by examining officials of Sales Tax Department.

To show that no sale was shown in return bill produced by complainant neither bearing his signature nor signature of accused, account books or stock register not produced by complainant to prove the sale. It has been held that cheques were not issued for discharge of liability, therefore, the accused is entitled to acquittal. ***M/s. Kumar Exports v. M/s. Sharma Carpets, AIR 2009 SC 1518***.

- During the course of cross-examination the complainant deposed that earlier, the accused had furnished two cheques, which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the accused. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction. ***ANSS Rajashekar v. Augustus Jeba Ananth, AIR 2019 SC 942***.

Conclusion

Once the execution of cheque is admitted, section 139 of the NI Act mandates a presumption that the cheque was for the discharge of any debt or other liability. The presumption under section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely. It is not necessary for the accused to come in the witness box in support of his defence as section 139 imposed an evidentiary burden and not a persuasive burden. At the same time presumption has to be rebutted by proof and not by a bare denial or explanation which is more plausible.

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आयुध (संशोधन) अधिनियम, 2019 : प्रभाव एवं प्रक्रिया

यशपाल सिंह
उप संचालक
म.प्र. राज्य न्यायिक अकादमी

प्रस्तावनाः

केन्द्रीय सरकार, गृह मंत्रालय के प्रस्ताव पर अवैध आग्न्यायुधों के उपयोग एवं उनका उपयोग करके किए जाने वाले अपराधों को प्रभावी रूप से नियंत्रित करने के लिए और विधि का उल्लंघन होने पर प्रभावी दण्ड का उपबंध करने के लिए आयुध (संशोधन) अधिनियम, 2019 (जिसे इस आलेख में आगे 'संशोधन अधिनियम' से संबोधित किया गया है) अधिनियमित किया गया है।

उक्त संशोधन अधिनियम केन्द्रीय सरकार, गृह मंत्रालय की अधिसूचना क्रमांक का.आ. 4462(अ) दिनांक 14 दिसम्बर, 2019 के द्वारा दिनांक 14 दिसम्बर, 2019 से प्रवृत्त हो चुका है। संशोधन अधिनियम की मुख्य विशेषताएं निम्नानुसार हैं –

(1) आग्न्यायुध रखने की अधिकतम संख्या में कमी;

(2) आग्न्यायुध प्राप्त करने की अनुज्ञप्ति संबंधी संशोधन;

(3) आग्न्यायुधों पर अतिरिक्त प्रतिबंध;

(4) विभिन्न अपराधों के दण्ड में वृद्धि;

(5) पुलिस अथवा सशस्त्र बलों के आग्न्यायुध को छीनने पर दण्ड;

(6) संगठित अपराध संघों से निपटने हेतु प्रावधान;

(7) आग्न्यायुधों और गोला–बारूद के अवैध दुर्व्यापार से निपटने हेतु प्रावधान;

(8) हर्ष फायरिंग एवं समारोह में गोलाबारी आदि के लिए दण्ड।

प्रमुख संशोधित प्रावधान एवं उनकी व्याख्याः

1. धारा 3

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
3	**आग्न्यायुधों और गोला–बारूद के अर्जन और कब्जे के लिए अनुज्ञप्ति** – कोई भी व्यक्ति कोई आग्न्यायुध या गोला–बारूद तब तक न तो अर्जित करेगा, न अपने कब्जे में रखेगा और न लेकर चलेगा, जब तक कि इस अधिनियम और तदधीन बनाए गए नियमों के उपबन्धों के अनुसार निकाली गई अनुज्ञप्ति इस निमित्त धारित न करता हो :	**आग्न्यायुधों और गोला–बारूद के अर्जन और कब्जे के लिए अनुज्ञप्ति** – कोई भी व्यक्ति कोई आग्न्यायुध या गोला–बारूद तब तक न तो अर्जित करेगा, न अपने कब्जे में रखेगा और न लेकर चलेगा, जब तक कि इस अधिनियम और तदधीन बनाए गए नियमों के उपबन्धों के अनुसार निकाली गई अनुज्ञप्ति इस निमित्त धारित न करता हो :

	परन्तु कोई व्यक्ति स्वयं अनुज्ञप्ति धारित किए बिना किसी आग्न्यायुध या गोला–बारूद को मरम्मत के लिए या अनुज्ञप्ति के नवीकरण के लिए या ऐसी अनुज्ञप्ति के धारक द्वारा उपयोग में लाए जाने के लिए, उस अनुज्ञप्ति के धारक की उपस्थिति में या उसके लिखित प्राधिकार के अधीन, लेकर वहन कर सकेगा। (2) उप–धारा (1) में किसी बात के होते हुए भी कोई भी व्यक्ति, जो उप–धारा (3) में निर्दिष्ट व्यक्ति से भिन्न किसी भी समय तीन आग्न्यायुधों से अधिक न तो अर्जित करेगा, न अपने कब्जे में रखेगा और न लेकर चलेगा : परन्तु ऐसा व्यक्ति जिसके अपने कब्जे में, आयुध (संशोधन) अधिनियम, 1983 के प्रारम्भ पर, तीन से अधिक आग्न्यायुध हैं, अपने पास ऐसे आग्न्यायुधों में से कोई तीन आग्न्यायुध प्रतिधारित कर सकेगा और शेष आग्न्यायुधों के ऐसे प्रारम्भ से नब्बे दिन के भीतर निकटतम पुलिस थाने के भारसाधक ऑफिसर के पास या धारा 21 की उप–धारा (1) के प्रयोजनों के लिए विहित शर्तो के अधीन रहते हुए किसी अनुज्ञाप्त व्यौहारी के पास अथवा जहां ऐसा व्यक्ति संघ के सशस्त्र बलों का सदस्य है, वहां उस उप–धारा में निर्दिष्ट किसी युनिट शस्त्रागार में निक्षिप्त करेगा।	परन्तु कोई व्यक्ति स्वयं अनुज्ञप्ति धारित किये बिना किसी आग्न्यायुध या गोला–बारूद को मरम्मत के लिए या अनुज्ञप्ति के नवीकरण के लिए या ऐसी अनुज्ञप्ति के धारक द्वारा उपयोग में लाए जाने के लिए उस अनुज्ञप्ति के धारक की उपस्थिति में या उसके लिखित प्राधिकार के अधीन लेकर वहन कर सकेगा। (2) उपधारा (1) में किसी बात के होते हुए भी, उपधारा (3) में निर्दिष्ट व्यक्ति के सिवाय, कोई व्यक्ति, किसी समय, दो आग्न्यायुधों से अधिक न तो अर्जित करेगा, न अपने कब्जे में रखेगा या लेकर चलेगा : परन्तु कोई व्यक्ति, जिसके कब्जे में आयुध (संशोधन) अधिनियम, 2019 के प्रारंभ पर दो से अधिक आग्न्यायुध हैं, अपने पास ऐसे आग्न्यायुधों में से कोई दो प्रतिधारित कर सकेगा और शेष आग्न्यायुध को ऐसे प्रारंभ से एक वर्ष के भीतर निकटतम पुलिस थाने के भारसाधक अधिकारी के पास या धारा 21 की उपधारा (1) के प्रयोजनों के लिए विहित शर्तों के अध्यधनी अनुज्ञप्तिधारी व्यौहारी के पास अथवा जहां ऐसा व्यक्ति संघ के सशस्त्र बलों का सदस्य है, वहां उस उपधारा में निर्दिष्ट किसी यूनिट शस्त्रागार में निक्षिप्त करेगा, जिसके पश्चात् पूर्वोक्त एक वर्ष की अवधि के अवसान की तारीख से नब्बे दिन के भीतर उसकी अनुज्ञप्ति को रद्द कर दिया जाएगा : परंतु यह और कि उत्तराधिकार या विरासत के आधार पर आयुध अनुज्ञप्ति अनुदत्त करते समय, दो आग्न्यायुध की सीमा को नहीं बढ़ाया जाएगा।

संशोधित धारा 3 के द्वारा एक आग्न्यायुध अनुज्ञप्तिधारी के द्वारा धारित किए जाने वाले अधिकतम आग्न्यायुधों की संख्या को तीन से घटाकर दो तक सीमित कर दिया गया है। यहां तक कि उत्तराधिकार या विरासत के आधार पर भी आयुध अनुज्ञप्ति अनुदत्त करते समय अधिकतम दो आग्न्यायुधों की सीमा को नहीं बढ़ाया जा सकता है।

संशोधन अधिनियम के प्रारंभ पर अर्थात् दिनांक 14 दिसम्बर, 2019 को यदि किसी आग्न्यायुध अनुज्ञप्तिधारी के आधिपत्य में तीन आग्न्यायुध हों, तो वहां उन्हें एक वर्ष की अवधि का समय दिया गया है, जिसके भीतर शेष आग्न्यायुध को निकटतम पुलिस थाने के भारसाधक अधिकारी के पास अथवा आयुध अधिनियम, 1959 (जिसे इस आलेख में आगे 'मूल अधिनियम' से संबोधित किया गया है) की धारा 21(1) के अनुसार आयुध का आधिपत्य अविधिपूर्ण होने से उक्त प्रावधान में बतलाई प्रक्रिया अनुसार जमा कर दें। उक्त एक वर्ष की अवधि के अवसान की तिथि से अर्थात् दिनांक 13 दिसम्बर, 2020 की तिथि से 90 दिवस की अवधि अर्थात् दिनांक 12 मार्च, 2020 तक की अवधि के भीतर ऐसे शेष आग्न्यायुध की अनुज्ञप्ति को रद्द कर दिया जाएगा।

तात्पर्य यह है कि यदि दिनांक 14 दिसम्बर, 2019 को किसी आग्न्यायुध अनुज्ञप्तिधारी के पास तीन आग्न्यायुध थे और उसने दिनांक 13 दिसम्बर, 2020 तक उक्त एक अतिरिक्त आग्न्यायुध निकटतम पुलिस थाने के भारसाधक अधिकारी के पास अथवा धारा 21(1) के अनुसार विहित प्राधिकारी के पास जमा नहीं किया तो ऐसे एक अतिरिक्त आग्न्यायुध का आधिपत्य वैध अनुज्ञप्ति के बिना हो जाएगा और ऐसा आधिपत्य मूल अधिनियम की धारा 3 का उल्लंघन होते हुए धारा 25(1–बी)(एच) के अधीन दण्डनीय होगा।

2. धारा 5

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
5	**आयुधों और गोला–बारूद के विनिर्माण, विक्रय इत्यादि के लिए अनुज्ञप्ति –** (1) कोई भी व्यक्ति किसी भी आग्न्यायुध या ऐसे वर्ग या वर्णन के किन्हीं भी अन्य आयुधों का, जैसे विहित किए जाएं या किसी गोला–बारूद का तब तक :– (क) न तो, उपयोग में लाएगा, विनिर्माण करेगा, विक्रय करेगा, अन्तरण, संपरिवर्तन, मरम्मत, या परख या परिसिद्धि करेगा; और न	**आयुधों और गोला–बारूद के विनिर्माण, विक्रय इत्यादि के लिए अनुज्ञप्ति –** (1) कोई भी व्यक्ति किसी भी आग्न्यायुध या ऐसे वर्ग या वर्णन के किन्हीं भी अन्य आयुधों का, जैसे विहित किये जाएँ या किसी गोला–बारूद का तब तक – (क) न तो, उपयोग में लाएगा, विनिर्माण करेगा, अभिप्राप्त करेगा या उपाप्त करेगा, विक्रय करेगा, अन्तरण, संपरिवर्तन, मरम्मत, या परख या परिसिद्धि करेगा; और न .....

धारा 5 में संशोधन द्वारा दो नए शब्द ''अभिप्राप्त'' एवं ''उपाप्त'' ("Obtain" and "Procure") आग्न्यायुध के निषेध के संबंध में जोड़े गए हैं।

यहां जोड़े गए इन दो शब्दों ''अभिप्राप्त'' एवं ''उपाप्त'' के निर्वचन को लेकर विचारण न्यायालयों के समक्ष यह समस्या आती है कि धारा 3 में आग्न्यायुध व गोला–बारूद को ''अर्जित करने'' (acquire), ''अपने कब्जे में रखने'' (have in his possession) एवं ''लेकर चलने'' (carry) को निषेधित किया गया है, अतः किन मामलों में धारा 3 का उल्लंघन होना माना जाएगा और किन मामलों में धारा 5 का उल्लंघन होना माना जाए?

यह प्रश्न और भी अधिक महत्वपूर्ण इसलिए हो जाता है क्योंकि जहां एक ओर धारा 3 का उल्लंघन धारा 25(1–बी)(ए) के अधीन अधिकतम 7 वर्ष तक के कारावास से दण्डनीय है, वहीं धारा 5 के उल्लंघन में आयुध 'अभिप्राप्त' या 'उपाप्त' करना धारा 25(1)(ए) के अधीन अधिकतम आजीवन कारावास के दण्ड से दण्डनीय है और अब अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

यह समझना होगा कि ''अर्जित करने (acquire)'', ''अभिप्राप्त करने (obtain)'' एवं ''उपाप्त करने (procure)'' में क्या भिन्नता है। विभिन्न मानक शब्दकोषों एवं लॉ लेक्सिकन में दी गई परिभाषाएं निम्न तालिका से समझी जा सकती हैं –

Dictionary/ Law Lexicon	Acquire	Obtain	Procure
P. Ramanatha Aiyar's The Law Lexicon 3rd Edition, 2012	To become the owner of property; to make property, one's own.	To acquire, to get by effort.	The word "procure" means to acquire for one's self; to cause to come; to obtain by any means; to contrive; to bring about.
Lexis Nexis Wharton's Law Lexicon 16th Edition, 2014 Universal Law Publishing Co., Delhi	**Acquisition,** means, directly or indirectly, acquiring or agreeing to acquire – (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise.	**Obtain,** means to secure or gain (something) as the result of request or effort. **Obtained,** the word 'obtained' would indicate achievement by exertion in spite of opposition. The word "obtains" does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver.	Procure, means to obtain, or get by care; effort or the use of special means; to procure evidence; to bring about especially by unscrupulous and indirect means; to procure secret documents; to obtain (women or girls) for the purpose of prostitution; to act as a procurer or pimp.
K J Aiyar Judicial Dictionary 15th Edition, 2011 Lexis Nexis	**Acquire (s).** 'Acquire' means come into possession of. If the word 'acquire' is assigned, its more generic connotation, namely, that it means to receive or to come into possession of.	**Obtain.** In S. 5(1) of the Prevention of Corruption Act 1947, the word 'obtains', does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver.	**Procure.** 'To obtain for one's self or for another; to bring about; to attact; to urge earnestly; to pander, pimp, to obtain, or get by care; effort or the use of special means; to procure evidence; to bring about esp. by unscrupulous and indirect means.

Black's Law Dictionary Eighth Edition	**Acquire,** vb. – To gain possession or control of; to get or obtain.	-	**Procurement,** the act of getting or obtaining something the act of persuading or inviting another, esp. a woman or child, to have illicit sexual inter-course.
विधि शब्दावली Legal Glossary 2001 भारत सरकार विधि, न्याय और कंपनी कार्य मंत्रालय (विधायी विभाग)	**Acquire** : to gain as one's own; to receive; to come into possession of अर्जित करना; अर्जन करना	**Obtain**: to acquire, to get by effort अभिप्राप्त करना	**Procure** : to bring about; to obtain by care and effort. उपाप्त करना; उपाप्त कराना

''अर्जित करने'', ''अभिप्राप्त करने'' एवं ''उपाप्त करने'' की उपरोक्त परिभाषाओं का सतही अध्ययन करने से तो यही आभास होता है कि तीनों शब्द एक–दूसरे के पर्यायवाची हैं, परन्तु सूक्ष्म अध्ययन एवं व्याख्या की तुलना करने से एक बात तो स्पष्ट हो जाती है कि ''अभिप्राप्त करना'' अथवा ''उपाप्त करना'' कहीं न कहीं अर्जित करने के लिए अतिरिक्त प्रयास का तत्व समाहित करते हैं।

''अभिप्राप्त करना'' (obtain) शब्द भ्रष्टाचार निवारण अधिनियम, 1947 की धारा 5(1)(घ) में प्रयुक्त हुआ था जिसका निर्वचन करते हुए माननीय सर्वोच्च न्यायालय द्वारा न्यायदृष्टांत ***सी.के. दामोदरन नायर विरूद्ध भारत सरकार, (1987) 9 एस.सी.सी. 477*** में यह प्रतिपादित किया गया है कि ''अभिप्राप्त करने'' में कार्य का प्रारंभ उस व्यक्ति द्वारा किया जाता है जो प्राप्तकर्ता है और इसमें कुछ पाना या लाभ अर्जित करना किसी प्रयास का परिणाम होता है। यही निर्वचन माननीय सर्वोच्च न्यायालय द्वारा ***आर. बालकृष्ण पिल्लई विरूद्ध केरल राज्य, (2003) एस.सी.सी. 700*** में भी दोहराया गया है। इसी प्रकार ''उपाप्त करना'' शब्द भारतीय दण्ड संहिता, 1860 की धारा 366–ए में प्रयुक्त किया गया है जहां इसका संदर्भ अवयस्क बालिका को अयुक्त संभोग आदि के लिए उत्प्रेरित करने के अपराध से संबंधित है। यहां भी वांछित परिणाम प्राप्त करने के लिए किसी न किसी प्रकार के अवैधानिक कार्य का किया जाना संकल्पित है। वहीं दूसरी ओर ''अर्जित करने'' में कोई अतिरिक्त प्रयास या परिणाम की वांछा के लिए कृत्य किया जाना आवश्यक नहीं है और मात्र स्वयं के लिए प्राप्त करना ही अर्जित करना है।

उपरोक्त विवेचन के आधार पर प्रथम दृष्टया यह कहा जा सकता है कि आयुध अधिनियम की धारा 3 में प्रयुक्त शब्द ''अर्जित करना'' तथा धारा 5 में संशोधन द्वारा जोड़े गए शब्द ''अभिप्राप्त करना'' एवं ''उपाप्त करना'' एक समान नहीं हैं। धारा 5 के उल्लंघन के अपराध के लिए आयुध रखने वाले व्यक्ति के संबंध में उसके अवैधानिक आधिपत्य को स्थापित करने के लिए आयुध प्राप्त करने का प्रयास करने संबंधी अतिरिक्त साक्ष्य अभिलेख पर होना अपेक्षित है। अनुज्ञप्ति के अभाव में आयुध का आधिपत्य मात्र धारा 3 का ही उल्लंघन होगा।

इस अभिमत का एक अन्य आधार सजाति का सिद्धांत (doctrine of *ejusdem generis*) भी है। जहां आयुध अधिनियम की धारा 3 में ''अर्जित करना'' शब्द, ''आधिपत्य में रखना'' एवं ''लेकर

चलना'' के साथ प्रयुक्त हुए हैं वहीं धारा 5 में ''अभिप्राप्त करना'' एवं ''उपाप्त करना'' के साथ ''उपयोग'', ''विनिर्माण'', ''विक्रय'', ''अंतरण'' आदि शब्दों का प्रयोग हुआ है। दोनों ही धाराएं अनुज्ञप्ति के अभाव में उपरोक्त कार्य को करने से निषेधित करती हैं। स्पष्ट है कि धारा 3 कम गंभीर कार्य और धारा 5 अधिक गंभीर कार्य के लिए अनुज्ञप्ति की अपेक्षा करती है। ऐसे में एक ओर आयुध ''अर्जित करना'' तथा दूसरी ओर ''अभिप्राप्त करना'' व ''उपाप्त करना'' एक समान हो ही नहीं सकते हैं।

इसी प्रकार जहां एक ओर आयुध अधिनियम की धारा 3 के उल्लंघन के लिए दण्ड धारा 25(1–बी)(ए) में सात वर्ष तक के कारावास के लिए प्राविधित है वहीं धारा 5 के उल्लंघन के लिए धारा 25(1)(ए) में आजीवन कारावास तक के दण्ड का प्रावधान है। दण्ड की मात्रा में यह भिन्नता भी यही दर्शाती है कि जहां ''अर्जित करना'' मात्र आधिपत्य से स्थापित हो सकता है वहीं ''अभिप्राप्त करना'' या ''उपाप्त करना'' स्थापित करने के लिए आधिपत्य प्राप्त करने संबंधी प्रयास को स्थापित करने वाली अतिरिक्त साक्ष्य आवश्यक होगी।

3. धारा 6

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
6	गनों के नाल के छोटा किए जाने या नकली आग्न्यायुधों को आग्न्यायुधों में संपरिवर्तित करने के लिए अनुज्ञप्ति – कोई भी व्यक्ति आग्न्यायुध की नाल को छोटा या किसी नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित तब के सिवाय न करेगा जब तक कि वह इस अधिनियम या तदधीन बनाये गये नियमों के उपबन्धों के अनुसार निकाली गई अनुज्ञप्ति इस निमित्त धारित करता हो।	गनों के नाल के छोटा किये जाने या नकली आग्न्यायुधों को आग्न्यायुधों में संपरिवर्तित करने के लिये अनुज्ञप्ति – कोई भी व्यक्ति आग्न्यायुध की नाल को छोटा या किसी नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित या आयुध नियम, 2016 में उल्लिखित आग्न्यायुधों के किसी प्रवर्ग से आग्न्यायुधों के किसी अन्य प्रवर्ग में संपरिवर्तित तब के सिवाय न करेगा जब कि वह इस अधिनियम या तदधीन बनाये गये नियमों के उपबन्धों के अनुसार निकाली गई अनुज्ञप्ति इस निमित्त धारित करता हो।

संशोधन के पूर्व धारा 6 बंदूक की नाल को छोटा करने एवं नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित करने के लिए अनुज्ञप्ति की आवश्यकता का प्रावधान करती थी। आयुध नियम, 2016 के नियम 3 एवं अनुसूची–I के द्वारा आयुधों एवं गोला–बारूद का वर्गीकरण किया गया है; जैसे प्रतिषिद्ध आयुध (prohibit arms), निर्बंधित आयुध (restricted arms), अनुज्ञेय आयुध (permitted arms) आदि।

धारा 6 में संशोधन द्वारा आयुध नियम, 2016 की अनुसूची–I के एक प्रवर्ग में उल्लेखित आयुधों का दूसरे प्रवर्ग के आयुध में संपरिवर्तन भी विनियमित करते हुए इसके लिए अनुज्ञप्ति की आवश्यकता का प्रावधान किया गया है। धारा 6 का उल्लंघन धारा 25(1)(बी) के अधीन न्यूनतम सात वर्ष के अध्यायाधीन रहते हुए आजीवन कारावास एवं अर्थदण्ड से भी दण्डनीय है।

4. धारा 15

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
15	**अनुज्ञप्ति की अस्तित्वावधि और उसका नवीकरण** – (1) धारा 3 के अधीन की अनुज्ञप्ति यदि पहले ही प्रतिसंहृत न कर दी जाए तो वह उस तारीख से, जिसको वह अनुदत्त की जाए, तीन वर्ष की कालावधि के लिए प्रवृत्त बनी रहेगी : परन्तु ऐसी अनुज्ञप्ति लघुतर कालावधि के लिए अनुदत्त की जा सकेगी, यदि वह व्यक्ति जिसके द्वारा वह अनुज्ञप्ति अपेक्षित है, वैसा चाहे या यदि अनुज्ञापन प्राधिकारी उन कारणों से जो लेखन द्वारा अभिलिखित किए जायेंगे, किसी मामले में यह समझे कि अनुज्ञप्ति लघुतर कालावधि के लिए अनुदत्त की जानी चाहिए।	**अनुज्ञप्ति की अस्तित्वावधि और उसका नवीकरण** – (1) धारा 3 के अधीन की अनुज्ञप्ति यदि पहले ही प्रतिसंहृत न कर दी जाय तो वह उस तारीख से, जिसको वह अनुदत्त की जाए पाँच वर्ष की कालावधि के लिए प्रवृत्त बनी रहेगी : परन्तु ऐसी अनुज्ञप्ति लघुत्तर कालावधि के लिये अनुदत्त की जा सकेगी यदि वह व्यक्ति जिसके द्वारा वह अनुज्ञप्ति अपेक्षित है, वैसा चाहे या यदि अनुज्ञापन–प्राधिकारी उन कारणों से जो लेखन द्वारा अभिलिखित किये जायेंगे किसी मामले में यह समझे कि अनुज्ञप्ति लघुतर कालावधि के लिये अनुदत्त की जानी चाहिये : परन्तु यह और कि धारा 3 के अधीन अनुदत्त अनुज्ञप्ति, धारा 9 की उपधारा (1) के खंड (क) के उपखंड (ii) और उपखंड (iii) में विनिर्दिष्ट शर्तों के अध्यधीन होगी और अनुज्ञप्तिधारी, अनुज्ञप्ति को उस तारीख से, जिसको यह अनुदत्त या नवीकृत की जाए, प्रत्येक पांच वर्ष के पश्चात् अनुज्ञापन प्राधिकारी के समक्ष आग्न्यायुध या गोला–बारूद और संबंधित दस्तावेज सहित पेश करेगा।

मूल अधिनियम की धारा 15 अनुज्ञप्ति की अवधि एवं उसके नवीकरण (duration and renewal) का प्रावधान करती है। संशोधन के पूर्व धारा 3 के अधीन जारी आग्न्यायुध की अनुज्ञप्ति तीन वर्ष के लिए जारी किए जाने का प्रावधान था, अब संशोधन द्वारा इसे पांच वर्ष की कालावधि के लिए प्रवृत्त बने रहने का प्रावधान किया गया है।

साथ ही एक परन्तुक जोड़कर प्रत्येक पांच वर्ष के पश्चात् आग्न्यायुध अथवा गोला–बारूद संबंधित दस्तावेज सहित अनुज्ञापन प्राधिकारी (licensing authority) के समक्ष अनुज्ञप्तिधारी द्वारा प्रस्तुत किए जाने का प्रावधान किया गया है।

5. धारा 25(1)(ए), 25(1)(बी) एवं धारा 25(1) की दीर्घ पंक्ति

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
25	**कुछ अपराधों के लिए दण्ड** – (1) जो कोई –	**कुछ अपराधों के लिए दण्ड** – (1) जो कोई –
	(ए) धारा 5 के उल्लंघन में, किन्हीं आयुधों या गोला–बारूद का विनिर्माण, विक्रय, अन्तरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि करेगा, या उसे विक्रय या अन्तरण के लिए अभिदर्शित या प्रस्थापित करेगा या विक्रय, अन्तरण संपरिवर्तन, मरम्मत, परख या परिसिद्धि के लिए अपने कब्जे में रखेगा; अथवा	(ए) धारा 5 के उल्लंघन में किसी भी आयुध या गोला–बारूद का विनिर्माण, अभिप्राप्त, उपाप्त, विक्रय, अन्तरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि करेगा या उसे विक्रय या अंतरण के लिए अभिदर्शित या प्रतिस्थापित करेगा या विक्रय, अन्तरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि के लिए अपने कब्जे में रखेगा; अथवा
	(बी) धारा 6 के उल्लंघन में, किसी आग्न्यायुध की नाल को छोटी करेगा या नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित करेगा; अथवा	(बी) धारा 6 के उल्लंधन में किसी आग्न्यायुध की नाल को छोटी करेगा या नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित या आयुध नियम, 2016 में उल्लिखित आग्न्यायुधों के किसी प्रवर्ग से आग्न्यायुधों के किसी अन्य प्रवर्ग में संपरिवर्तित करेगा; अथवा
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	वह कारावास से जिसकी अवधि तीन वर्ष से कम नहीं होगी, किन्तु जो सात वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा।	वह कारावास से, जिसकी अवधि सात वर्ष से कम की नहीं होगी, किंतु जो आजीवन कारावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने का भी दायी होगा।

मूल अधिनियम की धारा 25(1)(ए) एवं 25(1)(बी) क्रमशः धारा 5 एवं 6 के उल्लंघन के लिए दण्ड का प्रावधान करती हैं। धारा 25(1)(ए) एवं 25(1)(बी) में धारा 5 व 6 में किए गए संशोधन के पारिणामिक संशोधन किए गए हैं।

संशोधन पूर्व जहां न्यूनतम तीन वर्ष के अध्याधीन रहते हुए सात वर्ष तक के कारावास के दण्ड एवं अर्थदण्ड का प्रावधान था, वहीं अब यह न्यूनतम सात वर्ष के अध्याधीन रहते हुए आजीवन कारावास तक के दण्ड एवं अर्थदण्ड से भी दण्डनीय है। अर्थात् धारा 25(1) के अधीन दण्डनीय अपराध अब अनन्यः सत्र न्यायालय द्वारा विचारणीय हो गए हैं।

यहां एक प्रश्न यह उत्पन्न होता है कि पुलिस द्वारा मात्र आग्न्यायुध का वैध अनुज्ञप्ति के बिना आधिपत्य पाए जाने पर यदि धारा 25(1)(ए) के अधीन दण्डनीय अपराध के संबंध में अभियोग पत्र

प्रस्तुत किए जाने पर क्या मजिस्ट्रेट ऐसे अभियोग पत्र पर संज्ञान लेने और मामला सत्र न्यायालय को विचारण हेतु उपार्पित करने के लिए बाध्य है?

इस प्रश्न का उत्तर जानने के लिए पुलिस द्वारा अंतिम प्रतिवेदन प्रस्तुत करने पर मजिस्ट्रेट को उपलब्ध विकल्प एवं उसकी शक्तियां क्या हैं, इस पर विचार किया जाना आवश्यक है। माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत ***संजय बंसल विरूद्ध जवाहरलाल वत्स, (2007) 13 एससीसी 71*** में द.प्र.सं. की धारा 173(2) एवं 190 पर विचार करते हुए यह प्रतिपादित किया गया है कि जब मजिस्ट्रेट के समक्ष पुलिस द्वारा प्रस्तुत अंतिम प्रतिवेदन का निष्कर्ष यह हो कि अभियुक्त के द्वारा अपराध कारित किया गया है तो मजिस्ट्रेट के समक्ष तीन विकल्प उपलब्ध होते हैं –

(1) मजिस्ट्रेट अंतिम प्रतिवेदन के आधार पर अपराध का संज्ञान ले सकता है;

(2) मजिस्ट्रेट अंतिम प्रतिवेदन से असहमत होकर अपराध का संज्ञान लेने से इंकार करते हुए कार्यवाही समाप्त कर सकता है; एवं

(3) मजिस्ट्रेट द.प्र.सं. की धारा 156(3) के अधीन अतिरिक्त अनुसंधान (further investigation) का आदेश कर सकता है।

इस मामले में यह भी प्रतिपादित किया गया है कि मजिस्ट्रेट पुलिस प्रतिवेदन से बंधा हुआ नहीं है और स्वविवेक से तथ्यों के आधार पर संज्ञान लेने अथवा न लेने का आदेश कर सकता है। यही विधि पुनः ***विकास रंजन राउत विरूद्ध राज्य, (2019) 5 एससीसी 542*** में प्रतिपादित की गई है।

अतः यदि पुलिस द्वारा अनुसंधान के दौरान आग्न्यायुध के अवैधानिक आधिपत्य के अतिरिक्त कोई भी अन्य साक्ष्य संकलित न की गई हो और अंतिम प्रतिवेदन आयुध अधिनियम की धारा 25(1)(ए) के अधीन दण्डनीय अपराध के संबंध में प्रस्तुत किया गया हो तो मजिस्ट्रेट उक्त अंतिम प्रतिवेदन पर संज्ञान न लेते हुए द.प्र.सं. की धारा 156(3) के अधीन अभियुक्त द्वारा आग्न्यायुध का अवैधानिक आधिपत्य प्राप्त करने का प्रयास करने संबंधी अतिरिक्त साक्ष्य एकत्रित करने के लिए अतिरिक्त अनुसंधान का आदेश दे सकता है। यही प्रक्रिया उचित होगी।

अतिरिक्त अनुसंधान के उपरांत यदि उपरोक्त अवैधानिक आधिपत्य प्राप्त करने संबंधी प्रयास को स्थापित करने वाली प्रथम दृष्टया साक्ष्य पुलिस द्वारा अभियोग पत्र के साथ प्रस्तुत कर दी जाती है तो मजिस्ट्रेट धारा 25(1)(ए) के अधीन दण्डनीय अपराध का संज्ञान ले सकता है। यदि ऐसा प्रयास स्थापित करने वाली कोई भी प्रथम दृष्टया साक्ष्य संकलित किए बिना पुलिस पुनः अपना प्रतिवेदन प्रस्तुत करती है तो ***संजय बंसल*** (पूर्वोक्त) के न्याय दृष्टांत के अनुसार मजिस्ट्रेट धारा 25(1)(ए) के अधीन दण्डनीय अपराध का संज्ञान लेने के लिए बाध्य नहीं है और अनुसंधान के दौरान संकलित साक्ष्य के आधार पर धारा 25(1–बी)(ए) (धारा 3 के उल्लंघन के लिए) के अधीन दण्डनीय अपराध का संज्ञान लेकर विचारण हेतु अग्रेषित हो सकता है। जब मजिस्ट्रेट पुलिस प्रतिवेदन से सहमत न हो तो उसे अपने कारण अवश्य लेख करने चाहिए।

यहां विशेष ध्यान रखने योग्य बात यह है कि द.प्र.सं. की धारा 156(3) के अधीन अतिरिक्त अनुसंधान का आदेश मात्र एक ही बार दिया जा सकता है, बार–बार नहीं, जैसा कि माननीय मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत ***कुन्तल बरां चक्रबर्ती विरूद्ध पुलिस अधीक्षक व अन्य,***

एमसीआरसी क्रमांक 9969/2016, आदेश दिनांक 03.04.2017 (मुख्य पीठ जबलपुर) में प्रतिपादित किया गया है।

यहीं एक और बात का ध्यान रखना आवश्यक है कि यदि मजिस्ट्रेट द्वारा पुलिस के अंतिम प्रतिवेदन पर एक बार धारा 25(1)(ए) के अधीन दण्डनीय अपराध का संज्ञान ले लिया गया हो, तो मजिस्ट्रेट को मामला सत्र न्यायालय को उपार्पित करना ही होगा और उपार्पण के प्रक्रम पर साक्ष्य के गुणदोष पर विचार कर यह जांच करने की अधिकारिता मजिस्ट्रेट को नहीं है कि धारा 25(1)(ए) का अपराध गठित हो रहा है अथवा धारा 25(1–बी)(ए) का। यह मत माननीय सर्वोच्च न्यायालय के न्याय दृष्टांत ***राज किशोर प्रसाद विरूद्ध बिहार राज्य, (1996) 4 एससीसी 495*** में प्रतिपादित विधि पर आधारित है।

6. धारा 25(1–ए)

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
25 (1–ए)	**कुछ अपराधों के लिए दण्ड –** जो कोई धारा 7 के उल्लंघन में, किन्हीं प्रतिषिद्ध आयुधों या किसी प्रतिषिद्ध गोला–बारूद को अर्जित करेगा, अपने कब्जे में रखेगा या लेकर चलेगा, वह कारावास से दण्ड का भागी होगा, जो पांच वर्ष से कम नहीं होगी, किन्तु जो दस वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा।	**कुछ अपराधों के लिए दण्ड –** जो कोई धारा 7 के उल्लंघन में, किन्हीं प्रतिषिद्धि आयुधों या प्रतिषिद्धि गोला–बारूद को अर्जित करेगा, और अपने कब्जे में रखेगा या लेकर चलेगा, वह कारावास से, जिसकी अवधि सात वर्ष से कम की नहीं होगी, किंतु जो चौदह वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगाः परन्तु न्यायालय, निर्णय में लेखबद्ध किए जाने वाले किन्हीं पर्याप्त और विशेष कारणों से, सात वर्ष से कम की अवधि के कारावास का कोई दण्ड अधिरोपित कर सकेगा।

मूल अधिनियम की धारा 25(1–ए) धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्ध आयुधों अथवा गोला–बारूद को अर्जित करने, अपने आधिपत्य में रखने एवं लेकर चलने के लिए दण्ड का प्रावधान करती है। संशोधन के पूर्व यह अपराध न्यूनतम पांच वर्ष के अध्याधीन रहते हुए अधिकतम दस वर्ष तक के कारावास से एवं अर्थदण्ड से दण्डनीय था जिसे अब न्यूनतम सात वर्ष के अध्याधीन रहते हुए चौदह वर्ष तक के कारावास से एवं अर्थदण्ड से भी दण्डनीय बनाया गया है। इसके साथ–साथ संशोधन के पूर्व न्यूनतम पांच वर्ष के कारावास को कम करने का कोई विवेकाधिकार न्यायालय को नहीं था। अब धारा 25(1–ए) में परन्तुक जोड़कर न्यायालय को यह विवेकाधिकार दिया गया है कि न्यायालय निर्णय में पर्याप्त और विशेष कारण लेखबद्ध करते हुए सात वर्ष से कम अवधि के कारावास का दण्ड भी अधिरोपित कर सकता है।

द.प्र.सं. की अनुसूची–I के भाग–दो के अनुसार धारा 25(1–ए) के अधीन दण्डनीय अपराध संज्ञेय, अजमानतीय एवं अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

7. धारा 25(1–एबी)

धारा	नवीन अंतःस्थापित प्रावधान
25 (1–एबी)	**कुछ अपराधों के लिए दण्ड –** जो कोई बल का प्रयोग करके पुलिस या सशस्त्र बलों से आग्न्यायुध छीन लेता है, ऐसे कारावास से दण्डनीय होगा, जिसकी अवधि दस वर्ष से कम की नहीं होगी, किन्तु जो आजीवन कारावास तक की हो सकेगी और जुर्माने का भी दायी होगा।

संशोधन द्वारा अधिनियम में नवीन धारा 25(1–एबी) जोड़ी गई है जो पुलिस अथवा सशस्त्र बलों से बलपूर्वक आग्न्यायुध छीन लेने को पृथक अपराध बनाती है और उसके लिए न्यूनतम दस वर्ष के अध्याधीन रहते हुए आजीवन कारावास तक एवं अर्थदण्ड के दण्ड का प्रावधान करती है। यह अपराध भी संज्ञेय, अजमानतीय एवं अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

इस संशोधन के पूर्व पुलिस अथवा सशस्त्र बलों से आग्न्यायुध छीन लेने का कोई पृथक अपराध नहीं था और भा.द.सं. की धारा 353, 332 अथवा 392 के अधीन, यथोचित, का ही अपराध पंजीबद्ध हो सकता था। संशोधन अधिनियम के उद्देश्यों एवं कारणों (objects and reasons) में से एक भारत की आंतरिक सुरक्षा को जोखिम से बचाना भी है, अतः यह नवीन अपराध इसी उद्देश्य की प्राप्ति के लिए गठित किया गया है।

8. धारा 25(1–एए)

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
25 (1–एए)	**कुछ अपराधों के लिए दण्ड –** जो कोई धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्धि गोला–बारूद का विनिर्माण, विक्रय, अंतरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि करेगा या उन्हें विक्रय या अंतरण के लिए अभिदर्शित या प्रतिस्थापित करेगा या उन्हें विक्रय, अंतरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि के लिए अपने कब्जे में रखेगा, वह कारावास के, जिसकी अवधि सात वर्ष से कम नहीं होगी किन्तु जो आजीवन करावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा।	**कुछ अपराधों के लिए दण्ड –** जो कोई धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्धि गोला–बारूद का विनिर्माण, विक्रय, अंतरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि करेगा या उन्हें विक्रय या अंतरण के लिए अभिदर्शित या प्रतिस्थापित करेगा या उन्हें विक्रय, अंतरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि के लिए अपने कब्जे में रखेगा, वह कारावास के, जिसकी अवधि दस वर्ष से कम नहीं होगी किन्तु जो आजीवन करावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा।

धारा 25(1–एए) धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्ध आयुधों अथवा गोला–बारूद का विनिर्माण, विक्रय, अंतरण, संपरिवर्तन, मरम्मत आदि के लिए दण्ड का प्रावधान करती है। संशोधन पूर्व न्यूनतम सात वर्ष के अध्याधीन रहते हुए आजीवन कारावास एवं अर्थदण्ड के दण्ड का प्रावधान था। संशोधन द्वारा इस न्यूनतम दण्ड को सात वर्ष से बढ़ाकर दस वर्ष के कारावास तक कर दिया गया है। यह अपराध भी संज्ञेय, अजमानतीय एवं अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

9. धारा 25(1–बी)

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
25 (1–बी)	**कुछ अपराधों के लिए दण्ड –** जो कोई – (क) धारा 3 के उल्लंघन में, कोई आग्न्यायुध या गोला–बारूद अर्जित करेगा, अपने कब्जे में रखेगा या लेकर चलेगा; अथवा (ख) धारा 4 के अधीन अधिसूचना द्वारा विनिर्दिष्ट किसी स्थान में, ऐसे वर्ग या वर्णन के, जो उस अधिसूचना में विनिर्दिष्ट कर दिया गया है, कोई आयुध उस धारा के उल्लंघन में अर्जित करेगा, अपने कब्जे में रखेगा या लेकर चलेगा; अथवा (ग) .... (झ) ..... वह कारावास से, जिसकी अवधि (एक वर्ष) से कम नहीं होगी, किन्तु जो तीन वर्ष तक की हो सकेगी, दण्डनीय होगा तथा जुर्माने से भी दण्डनीय होगा : परन्तु न्यायालय निर्णय में अभिलिखित किसी यथोचित और विशेष कारणों से एक वर्ष से कम अवधि के लिए कारावास का दण्ड अधिरोपित कर सकेगा।	**कुछ अपराधों के लिए दण्ड –** जो कोई – (क) धारा 3 के उल्लंघन में कोई आग्न्यायुध या गोला–बारूद अर्जित करेगा, अपने कब्जे में रखेगा या वहन करेगा; अथवा (ख) धारा 4 के अधीन अधिसूचना द्वारा विनिर्दिष्ट किसी भी स्थान में, ऐसे वर्ग या वर्णन के, जैसा उस अधिसूचना में विनिर्दिष्ट किया गया हो, कोई भी आयुध उस धारा के उल्लंघन में अर्जित करेगा, अपने कब्जे में रखेगा या वहन करेगा; या (ग) .... (झ) ..... वह कारावास से, जिसकी अवधि दो वर्ष से कम की नहीं होगी, किंतु जो पांच वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने का भी दायी होगा : परन्तु न्यायालय निर्णय में अभिलिखित किसी यथोचित और विशेष कारणों से दो वर्ष से कम अवधि के लिए कारावास का दण्ड अधिरोपित कर सकेगा।

अधिनियम की धारा 25(1–बी) में धारा 3, 4, 8, 9, 10, 12 एवं 21 का किसी भी व्यक्ति द्वारा उल्लंघन तथा धारा 44 के अधीन बनाए गए नियमों का विनिर्माता या व्यापारी के द्वारा उल्लंघन करने

पर दण्ड का प्रावधान है। संशोधन के पूर्व यहां न्यूनतम एक वर्ष के अध्याधीन रहते हुए तीन वर्ष तक के कारावास तथा अर्थदण्ड के दण्ड का प्रावधान था, जिसमें अब कारावास को बढ़ाकर न्यूनतम दो वर्ष के अध्याधीन रहते हुए पांच वर्ष तक की अवधि तक कर दिया गया है। यहां यथोचित एवं विशेष कारण लेखबद्ध करते हुए न्यायालय दो वर्ष से कम अवधि का कारावास अधिरोपित कर सकता है।

यह अपराध द.प्र.सं. की अनुसूची–I के भाग–दो के अनुसार न्यायिक मजिस्ट्रेट प्रथम श्रेणी के न्यायालय द्वारा विचारणीय है तथा संज्ञेय एवं अजमानतीय है।

10. धारा 25(6) एवं 25(7)

धारा	नवीन अंतः स्थापित प्रावधान
25 (6)	**कुछ अपराधों के लिए दण्ड** – यदि किसी संगठित अपराध संघ का कोई सदस्य या उसकी ओर से कोई भी व्यक्ति किसी भी समय अध्याय 2 के किसी उपबंध के उल्लंघन में कोई आयुध या गोला–बारूद अपने कब्जे में रखता है या लेकर चलता है, तो वह ऐसे कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं होगी; किंतु जो आजीवन कारावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने का भी दायी होगा।
25 (7)	जो कोई, किसी संगठित अपराध संघ के किसी सदस्य की ओर से या कोई व्यक्ति उसकी ओर से, – (i) धारा 5 के उल्लंघन में किसी आयुध या गोला–बारूद का विनिर्माण करता है, उसे अभिप्राप्त करता है, उपाप्त करता है, उसका विक्रय करता है, अंतरण करता है, उसको संपरिवर्तित करता है, उसकी मरम्मत करता है, उसकी परख करता है या उसे परिसद्ध करता है या अभिदर्शित करता है या विक्रय या अंतरण, संपरिवर्तन, मरम्मत, परख या परिसिद्धि के लिए प्रस्थापित करता है; या (ii) धारा 6 के उल्लंघन में किसी आग्न्यायुध की बैरल को छोटा करता है या किसी नकली आग्न्यायुध को आग्न्यायुध में संपरिवर्तित करता है य आयुध नियम, 2016 में उल्लिखित किसी प्रवर्ग के आग्न्यायुध को किसी अन्य प्रवर्ग के आग्न्यायुध में संपरिवर्तित करता है; या (iii) धारा 11 के उल्लंघन में किसी वर्ग या भांति के किसी भी आयुध या गोला–बारूद को भारत में लाता है या भारत से बाहर ले जाता है, तो वह ऐसे कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं, होगी, किन्तु जो आजीवन कारावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने का भी दायी होगा। **स्पष्टीकरण** – उपधारा (6) और उपधारा (7) के प्रयोजनों के लिए,– (क) ''संगठित अपराध'' से किसी व्यक्ति द्वारा अकेले या सामूहिक रूप से, किसी संगठित अपराध संघ के सदस्य के रूप में या ऐसे संघ की ओर से हिंसा या हिंसा की धमकी

	या अभित्रास या प्रपीड़न या अन्य विधि–विरूद्ध साधनों का प्रयोग करके, धनीय फायदे प्राप्त करने या स्वयं के लिए या किसी व्यक्ति के असम्यक् आर्थिक या अन्य लाभ प्राप्त करने के उद्देश्य से, कोई भी निरंतर विधि–विरूद्ध क्रियाकलाप अभिप्रेत है; (ख) ''संगठित अपराध संघ'' से दो या अधिक व्यक्तियों का ऐसा समूह अभिप्रेत है, जो किसी संघ या गैंग के रूप में अकेले या सामूहिक रूप से किसी संगठित अपराध के क्रियाकलापों में लिप्त होते हैं।

मूल अधिनियम की धारा 25(6) व 25(7) नवीन जोड़े गए प्रावधान हैं और संगठित अपराध संघ (organized crime syndicate) के सदस्यों के लिए दण्ड का विशेष प्रावधान करते हैं। एक ओर धारा 25(6) एवं दूसरी ओर धारा 25(1), 25(1–ए) या 25(1–बी) में यह अंतर है कि सामान्य व्यक्ति द्वारा धारा 3, 5, 7 आदि का उल्लंघन धारा 25(1), 25(1–ए) या 25(1–बी) के अधीन दण्डनीय होगा और वही अपराध यदि संगठित अपराध संघ का सदस्य कारित करे तो उसका कृत्य धारा 25(6) के अधीन दण्डनीय होगा।

धारा 25(7) संगठित अपराध संघ के किसी सदस्य द्वारा अथवा ऐसे संघ की ओर से किसी व्यक्ति द्वारा धारा 5, 6 व 11 के कतिपय उल्लंघन के लिए दण्ड का प्रावधान करती है। दोनों ही प्रावधानों में प्राविधित दण्ड न्यूनतम दस वर्ष के कारावास के अध्याधीन रहते हुए आजीवन कारावास एवं अर्थदण्ड है। यह अपराध भी संज्ञेय, अजमानतीय एवं अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

''संगठित अपराध'' एवं ''संगठित अपराध संघ'' को स्पष्टीकरण में परिभाषित भी किया गया है।

11. धारा 25(8)

धारा	नवीन अंतःस्थापित प्रावधान
25(8)	**कुछ अपराधों के लिए दण्ड** – जो कोई धारा 3; धारा 6, धारा 7 और धारा 11 के उल्लंघन में आग्न्यायुध और गोला–बारूद के अवैध व्यापार में सम्मिलित है या उसमें सहायता करता है, तो वह ऐसे कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं होगी, किंतु जो आजीवन कारावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने का भी दायी होगा। **स्पष्टीकरण** – इस उपधारा के प्रयोजनों के लिए – ''अवैध व्यापार'' से भारत के राज्यक्षेत्र में, उससे या उसके भीतर आग्न्यायुध या गोला–बारूद का आयात, निर्यात, अर्जन, विक्रय, परिदान, संचलन या अंतरण अभिप्रेत है, यदि आग्न्यायुध या गोला–बारूद इस अधिनियम के उपबंधों के अनुसार चिह्नित नहीं हैं या जिनका इस अधिनियम के उपबंधों के उल्लंघन में दुर्व्यापार किया गया है, जिसके अंतर्गत तस्करी किए गए, विदेश में बने आग्न्यायुध या प्रतिषिद्ध आयुध और प्रतिषिद्ध गोला–बारूद भी हैं।

अधिनियम की धारा 25(8) आग्न्यायुध एवं गोला–बारूद के अवैध व्यापार (illicit trafficking) में सम्मिलित व्यक्ति के लिए विशेष दण्ड का प्रावधान करती है। अवैध व्यापार को धारा 25(8) के स्पष्टीकरण में परिभाषित भी किया गया है। इस धारा में भी प्राविधित दण्ड न्यूनतम दस वर्ष के कारावास के अध्याधीन रहते हुए आजीवन कारावास एवं अर्थदण्ड है। यह अपराध भी संज्ञेय, अजमानतीय एवं अनन्यः सत्र न्यायालय द्वारा विचारणीय है।

12. धारा 25(9)

धारा	नवीन अंतःस्थापित प्रावधान
25(9)	**कुछ अपराधों के लिए दण्ड –** जो कोई उतावलेपन या अपेक्षा से कोई अनुष्ठानिक गोलाबारी का उपयोग करेगा, जिससे मानव जीवन या किन्हीं अन्य की वैयक्तिक सुरक्षा संकटापन्न हो जाए, वह कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी या जुर्माने से, जो एक लाख रूपए तक का हो सकेगा या दोनों से दण्डनीय होगा। स्पष्टीकरण – इस उपधारा के प्रयोजनों के लिए ''अनुष्ठानिक गोलाबारी'' से जन सभाओं, धार्मिक स्थानों, विवाह समारोहों या अन्य उत्सवों में गोलाबारी करने के लिए आग्न्यायुध का प्रयोग करना अभिप्रेत है।

विगत कई वर्षों में अनुष्ठानिक गोलाबारी (celebratory gunfire) या हर्ष फायरिंग की अनेकों घटनाएं प्रकाश में आई थीं जिनमें जनहानि भी हुई है। इसी पर रोकथाम के लिए अधिनियम में धारा 25(9) जोड़कर अनुष्ठानिक गोलाबारी में आग्न्यायुध का उपयोग करने का नया अपराध गठित किया गया है जिसके लिए दो वर्ष तक के कारावास अथवा एक लाख रूपए तक के अर्थदण्ड अथवा दोनों के दण्ड का प्रावधान है। धारा के स्पष्टीकरण में ''अनुष्ठानिक गोलाबारी'' को परिभाषित भी किया गया है। यह अपराध संज्ञेय परन्तु जमानतीय है एवं किसी भी वर्ग के मजिस्ट्रेट द्वारा विचारणीय है।

13. धारा 27

धारा	संशोधन पूर्व का प्रावधान	संशोधित प्रावधान
27	**आयुधों आदि के प्रयोग हेतु दण्ड, आदि –** (1) जो कोई धारा 5 के उल्लंघन में किन्हीं आयुध या गोला–बारूद प्रयोग करेगा तो वह कारावास से जिसकी अवधि तीन वर्ष से कम नहीं होगी, किन्तु जो सात वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा। (2) जो कोई धारा 7 के उल्लंघन में, किन्हीं प्रतिषिद्ध आयुधों या किसी प्रतिषिद्ध	**आयुधों को उपयोग में लाने के लिए दण्ड, आदि –** (1) जो कोई धारा 5 के उल्लंघन में किन्हीं आयुधों या गोला–बारूद को उपयोग में लाएगा वह कारावास से, जिसकी अवधि तीन वर्ष से कम की नहीं होगी किन्तु जो सात वर्ष तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा। (2) जो कोई धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्ध आयुधों या प्रतिषिद्ध गोला–बारूद

	गोला–बारूद का प्रयोग करता है तो कारावास से, जिसकी अवधि सात वर्ष से कम नहीं होगी, किन्तु जो आजीवन कारावास की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा। (3) जो कोई धारा 7 के उल्लंघन में किन्हीं प्रतिषिद्ध आयुधों या प्रतिषिद्ध गोला–बारूद का प्रयोग करता है या ऐसा कोई कार्य करता है और ऐसा प्रयोग या कार्य किसी भी व्यक्ति की मृत्यु का कारण बन जाए तो मृत्युदण्ड से दण्डित किया जाएगा।	को उपयोग में लाएगा वह कारावास से, जिसकी अवधि सात वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास तक की हो सकेगी, दण्डनीय होगा और जुर्माने से भी दण्डनीय होगा। (3) जो कोई किन्हीं प्रतिषिद्ध आयुधों या प्रतिषिद्ध गोला–बारूद को प्रयोग में लायेगा या धारा 7 के उल्लंघन में कोई कार्य करेगा और ऐसे प्रयोग या कार्य के परिणामस्वरूप किसी अन्य व्यक्ति की मृत्यु हो जाती है तो वह मृत्युदण्ड या आजीवन कारावास से दण्डनीय होगा और जुर्माने का भी दायी होगा।

मूल अधिनियम की धारा 27 में धारा 5 व 7 के उल्लंघन में आयुध या गोला–बारूद के उपयोग के लिए दण्ड का प्रावधान है। धारा 27(3) में जहां संशोधन के पूर्व एकमात्र दण्ड मृत्युदण्ड का प्रावधान था, उसे संशोधित कर मृत्युदण्ड अथवा आजीवन कारावास के दण्ड एवं अर्थदण्ड से दण्डित बनाया गया है।

यहां एक प्रश्न यह उत्पन्न होता है कि धारा 25(9) एवं 27(1), दोनों ही आग्न्यायुध व आयुध के उपयोग के लिए दण्ड का प्रावधान करती हैं, परन्तु दोनों के दण्ड की मात्रा में बहुत अधिक अंतर है, अतः कब धारा 25(9) एवं कब धारा 27 लागू होगी?

दोनों प्रावधानों, यथा धारा 25(9) एवं धारा 27(1) की तुलना करें तो यह स्थिति स्पष्ट होती है कि धारा 27(1) उस दशा में लागू होगी जहां धारा 5 के उल्लंघन में आयुध का उपयोग किया गया हो। धारा 5 आयुध के उपयोग के लिए अनुज्ञप्ति की अनिवार्यता का प्रावधान करती है। अर्थात् धारा 27(1) वहां लागू होगी जहां बिना अनुज्ञप्ति के आयुध का उपयोग किया गया हो। वहीं दूसरी ओर धारा 25(9) के लिए कोई भी व्यक्ति उत्तरदायी हो सकता है यदि वह अनुष्ठानिक गोलाबारी करता है, चाहे वह अनुज्ञप्तिधारी ही क्यों न हो।

इसे उदाहरण स्वरूप समझते हैं। एक व्यक्ति 'ए' की बारात निकालने के दौरान 'ए' के पिता 'बी' ने अपनी लायसेंसी रिवाल्वर से उतावलेपन व उपेक्षा से हवा में गोली चलाई। पिता के बाद उसी रिवाल्वर से 'ए' के भाई 'सी' ने भी उतावलेपन व उपेक्षापूर्वक हवा में गोली चलाई। यहां 'ए' अनुज्ञप्तिधारी होने के कारण धारा 25(9) के अधीन उत्तरदायी होगा और 'सी' धारा 27 के अधीन उत्तरदायी होगा क्योंकि 'सी' ने बिना अनुज्ञप्ति के आग्न्यायुध का उपयोग किया है।

संशोधन अधिनियम की प्रयोज्यताः

संशोधन अधिनियम के द्वारा मूल अधिनियम में दो प्रकार के संशोधन किए गए हैं – प्रथम, विनियमन संबंधी संशोधन तथा दूसरा, दाण्डिक प्रावधानों का संशोधन एवं नए दाण्डिक प्रावधानों का अंतःस्थापन। संशोधन अधिनियम तो दिनांक 14 दिसम्बर, 2019 से प्रभावी हो चुका है। तब यह प्रश्न उत्पन्न होना स्वाभाविक है कि संशोधित प्रावधान क्या लंबित आपराधिक मामलों में भी लागू होंगे?

इस प्रश्न का उत्तर हमें भारत के संविधान के अनुच्छेद 20(1) द्वारा प्रत्याभूत पश्चातवर्ती विधि से संरक्षण (protection against *ex post facto* law) के मौलिक अधिकार से मिलता है, जिसके अनुसार कोई भी व्यक्ति तत्समय प्रवृत्त किसी विधि के उल्लंघन के सिवाय न तो दोषसिद्ध किया जाएगा और न ही उस दण्ड से अधिक दण्ड से दण्डित किया जाएगा जो तत्समय प्रवृत्त विधि द्वारा प्राधिकृत था, जब ऐसा अपराध किया गया था।

दूसरे शब्दों में कहा जाए तो दाण्डिक विधान सदैव भविष्यलक्षी प्रभाव (prospective effect) रखते हैं। माननीय सर्वोच्च न्यायालय द्वारा भी अनेकों न्याय दृष्टांतों में यही प्रतिपादित किया गया है। सुलभ संदर्भ हेतु ***सोनी देवराजभाई बाबूभाई विरूद्ध गुजरात राज्य, (1991) 4 एससीसी 298*** का निर्णय अवलोकनीय है। अतः आयुध (संशोधन) अधिनियम, 2019 के दाण्डिक प्रावधान भविष्यलक्षी प्रभाव रखेंगे एवं दिनांक 14 दिसम्बर, 2019 को एवं उसके पश्चात् कारित अपराधों पर ही लागू होंगे।

जहां तक विनियमन संबंधी संशोधन का प्रश्न है, जैसे एक अनुज्ञप्ति के अधीन तीन के स्थान पर अधिकतम दो आग्न्यायुध धारित करना अथवा आग्न्यायुध अनुज्ञप्ति की अवधि तीन से बढ़ाकर पांच करना आदि, तो यह भूतलक्षी प्रभाव रखेंगे और पूर्व से जारी अनुज्ञप्तियों पर भी लागू होंगे।

उपसंहारः

उपरोक्त विवेचना के आधार पर यह कहा जा सकता है कि संशोधन अधिनियम के द्वारा अवैध हथियारों के दुर्व्यापार, अवैध आग्न्यायुधों के उपयोग, संगठित अपराध संघ द्वारा अवैध हथियारों की तस्करी, उतावलेपन व उपेक्षापूर्वक की गई अनुष्ठानिक गोलाबारी आदि के लिए जोड़े गए नवीन अपराध तथा पूर्व से प्राविधित अपराधों के लिए वर्धित दण्ड का मूल उद्देश्य भारत की आंतरिक सुरक्षा को सुदृढ़ बनाना है। अतः संशोधित प्रावधानों को लागू करते समय हमें भी इस उद्देश्य को ध्यान में रखना होगा और इन अपराधों के संबंध में बहुत अधिक उदारता विधि के उद्देश्य को विफल कर सकती है।

वैध अनुज्ञप्ति के बिना धारित आग्न्यायुध के संबंध में धारा 3 एवं 5 के उल्लंघन के लिए प्रयोज्य दाण्डिक प्रावधान के बहुतायत मामले न्यायालय के समक्ष आएंगे। ऐसे मामलों में उपयुक्त प्रक्रिया अपनानी होगी अन्यथा न केवल प्रक्रियात्मक त्रुटि की संभावना बनेगी, अपितु सामान्य अपराध को भी सत्र न्यायालय के समक्ष उपार्पित करने से विलंब एवं न्यायहित के विफल होने का खतरा भी बना रहेगा।

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PROCEDURE FOR TRIAL OF COUNTER CASES

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Introduction

We as judicial officers often find ourselves in a situation where we have to apply our legal skills to critically examine the ties by which two criminal cases are tied with i.e. the situation when we have to decode the facts and circumstances of the two different cases to consider them as what we call counter cases or cross cases of each other. The topic of the counter case itself becomes a matter of discussion as the legislature is yet to give this nomenclature a specific definition.

What are counter cases?

A case and its counter case relate to two criminal offences that find their roots in a solitary incident. That means the origin of two different criminal matters is from one genus incident. It should be of a nature that the ordinary prudent man should find the similarity between the facts said to have been occurred together or at the same time, in respect of the offence.

Essential elements of counter cases may be classified as under:-

1) Criminal offence committed;
2) Out of which two separate FIRs are lodged by two different parties (one possibly the accused of the other). Sometimes complaints are also filed by a party in counter to the FIR.

Under these circumstance, a case is described as a counter case to another when it presents an entirely different version of the same incident different from the one presented in the other case by the other party.

Instances when out of open fight, one party lodges an FIR and just after relying on the same incident (open fight) the accused of the previously lodged FIR files another more commonly called as counter FIR, are situations which lead to the formation of counter cases.

Practically date, time and place mentioned in the FIR concerning the offence committed, can be a relevant and important factor to analyze whether the case is falling under the ambit of counter case or not? However, the number of accused involved in both cases is irrelevant. At this instance, another term requires to have a glance is "offences committed in course of the same transaction". It is to be noted that cases which arise out of the same transaction when dealt with the single accused might fall in the category of joinder of charges as explained under section 220 of the CrPC. However, when different FIR/cases are lodged by different persons then it might lead to counter case.

Counter cases and cross cases : Scope

Two different versions of the same incident resulting in two criminal cases

are compendiously called “case and counter case” by some High Courts and “cross cases” by some other High Courts. When two opposite parties file cases against each other out of two different incidents then too their cases are often referred to as cross cases. But they are not counter cases and there is no special procedure for trial of such cross cases.

Procedure for trial of counter cases:

As discussed above, counter cases are cases arising out of the same incident, thus the facts and circumstances of the cases are very much interrelated and connected. Therefore, it is expected that the officer incharge of the case whether proceeding its trial or investigating the offence, remain the same in both the cases to avoid any possible lacuna in the investigation and the possibility of any suppression of facts while the trial is conducted. This version of thought is supported by a Division Bench judgment of Madras High Court in ***Re-Goriparthi Krishnamma-1929, Madras Weekly Notes 881*** way back in 1920 in which it was suggested that a case and counter case arising out of the same effect should always, if practicable, be tried by same court and each party would represent themselves as having been the innocent victims of the aggression of order. The legislature has not provided for such kind of procedure as the criminal trial is governed by Code of Criminal Procedure, 1973 in which chapters XVIII-XXI does not provide any procedure to be followed in the trial of cross cases.

In ***Sudhir v. State of M.P., (2001) 2 SCC 688*** the Supreme Court emphasised the need to follow the above practice and further held that –

> “The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarized thus:
>
> (1) It staves off the danger of an accused being convicted before his while case is before the court.
>
> (2) It deters conflicting judgments being delivered upon similar facts; and
>
> (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.”

So far as the procedure to be followed in the trial of counter cases are concerned, the Apex Court in the landmark judgment passed in the matter of ***Nathi Lal & ors. v. State of U.P., 1990 (Supp) SCC 145*** has delineated the detailed procedural steps which are required to be followed by the courts trying counter cases together. The detailed procedure is as follows:

1. Where there are counter cases, is to direct that the same learned judge must try both the cases one after the other.
2. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment.
3. Thereafter he must proceed to hear the counter case and after recording all the evidence he must hear the arguments but reserve the judgment in that case.

4. The same learned Judge must thereafter dispose of the matters by two separate judgments.
5. In deciding each of the cases, he can rely only on the evidence recorded in that particular case.
6. The evidence recorded in the counter case cannot be looked into. Nor can the judge be influenced by whatever is argued in the counter case.
7. Each case must be decided based on the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the counter case.
8. But both the judgment must be pronounced by the same learned Judge one after the other.

Consideration of evidence recorded in one case in counter case:

As the above mentioned steps make it crystal clear the same court has to try both counter cases, therefore, it is needless to say that the same court has to record evidence in both cases. Another issue arises of how the evidence in both the case is to be considered and used? As explained in the ***Nathi Lal*** (supra) and ***State of M.P. v. Mishrilal (dead) and ors., (2003) 9 SCC 426***, both the case and the counter case have to be decided on its own merits. Just because the trial is conducted by the same court, it in no manner enables the court to use the evidence of one case in the counter case.

Later on, in the matter of ***Lakhan Singh v. State of M.P., 2007 (3) MPLJ 194*** High Court of Madhya Pradesh has reiterated that:

> "Evidence oral or documentary, adduced by the prosecution and the defence in the counter case cannot be considered and looked into in another counter case. Each case is to be decided based on the evidence available on the record of the said case".

However, parties may be often required to rely on the evidence recorded in the case where they are victims to be used in their defence in the case where they are accused. In such situation, parties have to apply for the certified copies of the records such as FIR, MLC reports, site plan and other documentary evidence from one case and then produce such certified copies on the record of counter case. Thereafter, they have to apply for calling the original record at the time of recording of evidence in the counter case and have to submit and exhibit such certified copies of the records. Original record will be exhibited by the court and certified copy will also be marked and kept on record.

When one case is exclusively triable by the Court of Session and the other is triable by the Magistrate:

In the counter case, there exists a fair possibility that one of the cases is exclusively triable by Court of Sessions and the other is triable by a Magistrate. Obviously, the case triable by the Court of Sessions will be committed under section 209 CrPC. The question which bothers us is how to deal with the other matter which, though, is a counter case, but not exclusively triable by Court of Sessions?

This question arose before the Supreme Court in ***Sudhir*** (supra) in which initially the final report was filed u/s 307 read with section 149 of IPC resulting the matters committed to the Court of Sessions, but later on Court of Sessions found that in one of the matters offence u/s 324 read with section 149 IPC is formed. Thus, after framing of charges that matter was transferred to the CJM for trial as per section 228(1) CrPC. Later on, when the matter reached the Supreme Court wherein it was observed that:

> ".....where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the magistrate has, nevertheless, power to commit the case to the court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. ..... Hence the Magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross case also to the Court of Sessions."

A Similar proposition of law was also laid down by Kerala High Court in the case of ***C.H. Abdul Salam v. Sameera and anr., 2007 CriLJ 1877*** as –

> "However, we are of the view that the ideal procedure is to file an application before the Magistrate itself by the Public Prosecutor or by the aggrieved party requesting the Magistrate to commit the case under Section 323 of Cr.P.C. to the Sessions Court where the connected case is pending."

Thus, their is no iota of doubt that under the above circumstances Magistrate court has to commit the counter case u/s 323 CrPC irrespective of the fact that none of the offence is exclusively triable by Court of Sessions.

Procedure to be followed by the Court of Sessions:

Once the matters are committed to the Court of Sessions, then irrespective of the fact that the counter case so committed u/s 323 CrPC by the Magistrate does not involve any offence exclusively triable by a Court of Sessions, the procedure provided under chapter XVIII of CrPC, i.e trial before the Court of Sessions is to be adopted. In ***Sudhir*** (supra), it was held that –

> "Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII."

Withdrawal of counter cases:

It is to be kept in mind that withdrawal of one counter case by prosecution is not permissible, being violative of principles of natural justice. It has been held by Madhya Pradesh High Court in ***Ramnaresh Tyagi and anr. v. Arjun Mohan Singh and ors., 2008 (4) MPHT 109*** that the withdrawal of only one of the two counter cases by the State should not be permitted as this would be compelling one of the two parties to face trial and giving benefit to the other party which will be against the interest of justice.

Counter cases not tried by same Court : Effect

A situation may arise when counter cases are not tried and decided by the same court. Whether such judgments are fatal?

Calcutta High Court in the matter of ***Ananta Deb Singha Mahapatra and ors. v. State of West Bengal, 2007 CriLJ 1705 (Cal)*** has explained the need for accused of the matter, whose case is tried by different court accountable and has held that it is the responsibility of the accused to bring up the facts of counter case before the concerned court. Thus, the accused cannot use this procedure as leverage after the matter is decided on the merits.

Conclusion:

The foremost and important factor with regard to the trial of counter cases is to scrutinize the fact that the two cases are counter cases of each other. Few suggestive measures can be applied while dealing with such matters namely:

- To carefully examine the facts, namely date, time and place of occurrence of an offence while reaching to a conclusion that two cases are counter cases of each other.
- Through various pronouncements it has been made clear that the basic principle of criminal jurisprudence is that each case is to be decided based on its own oral and documentary evidence adduced by either party and no extraneous material can be taken into consideration. [***State of M.P. v. Mishrilal*** (supra)]
- Judgment in both the cross cases should be passed on the same day one after the other.
- Withdrawal of one of the counter cases is not permissible.
- Accused is under responsibility to inform that counter case is also pending and a judgment cannot be challenged on the ground that both the counter cases are not decided by the same Court.

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LAW RELATING TO COUNTER-CLAIM : PRACTICE & PROCEDURE

Tanmay Singh
XXII Civil Judge (Jr. Division)
Jabalpur (M.P.)

RELEVANT PROVISION

Law relating to Counter-claim by defendants is contained in Order 8 Rules 6A to 6G of the Code of Civil Procedure, 1908 (hereafter referred as 'CPC'). Rule 6A provides that –

> **Rule 6A. Counter-claim by defendant –**
> (1) A Defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause action according to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damage or not:

The provision for counter-claim by the defendant has been given a statutory recognition by the CPC (Amendment) Act, 1976 which inserted new rules 6A to 6G to Order VIII of the CPC for admisibility of counter-claim as such by the defendant, that is, a counter-claim made by the defendant to enforce an independent right unconnected with the claim made in the plaint and not intended to be a defence to the claim made in plaint.

COUNTER-CLAIM : MEANING

Counter-claim has not been defined under CPC. However, literal meaning of counter-claim may be understood as a claim made by the defendant in a suit against the plaintiff. It is a claim independent of and separable from the claim of the plaintiff which can be enforced by cross action. Generally, it is a cause of action against the plaintiff but in favour of the defendant. Hon'ble Delhi High Court in the case of ***Gastech Process Engineering (India) Pvt. Ltd. v. M/s Saipem, (2009) 159 DLT 756*** has observed that "counter-claim is a weapon of defence and enables the defendant to enforce a claim against the plaintiff and is allowed to be raised to avoid multiplicity of proceedings". Hon'ble Andhra Pradesh High Court has in the case of ***Surgesan & Co. Pvt Ltd. v. Hindustan Machine Tools Ltd., AIR 2004 AP 428*** has observed that a counter-claim has to be treated as a plaint and is governed by the rules applicable to the plaint. ... A counter-claim is to be treated as a cross-suit which shall contain all the features of a regular suit.

MODES OF FILING COUNTER-CLAIM

There are three modes of pleading or setting up a Counter-claim in a civil suit–

(1) in written statement, or

(2) by way of an amendment in written statement, or

(3) by way of subsequent pleading under O.8, R.9 CPC, after the filing of written statement.

Counter-claim along with the written statement –

Firstly, the written statement filed under O.8, R.1 CPC may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a Counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A.

Counter-claim by way of amendment in written statement –

Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed i.e. by way of an application filed under O.6, R.17 CPC.

Counter-claim by way of subsequent pleading –

Thirdly, a counter-claim may be filed by way of a subsequent pleading under O.8, R.9 CPC. This Rule, in fact, put a restriction on filing of subsequent pleadings after filing of written statement but this restriction under Rule 9 has an exception that such rule does not apply to pleadings which are by way of defence to set-off or counter-claim.

In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vested in the court, either under O.6, R.17 CPC if sought to be introduced by way of amendment, or subject to exercise of discretion conferred on the court under O.8, R.9 CPC if sought to be placed on record by way of subsequent pleading. This has been held by Supreme Court in ***Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350***.

Stage upto which counter-claim may be filed –

Since law permits filing of counter-claim by way of subsequent pleading, Courts were always called upon to deal with the belated counter-claims, some of which filed even after the recording of evidence was over. A reference was made to the larger Bench of Supreme Court wherein clarification was sought as to the interpretation of O.8, R.6A CPC regarding the filing of counter-claim by a defendant in a suit.

Recently, a three Judge Bench of the Supreme Court in ***Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri & ors., (2020) 2 SCC 394*** has answered the reference in following terms:-

"We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counter-claim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

i. Period of delay,

ii. Prescribed limitation period for the cause of action pleaded,

iii. Reason for the delay,

iv. Defendant's assertion of his right,

v. Similarity of cause of action between the main suit and the counter-claim ,

vi. Cost of fresh litigation,

vii. Injustice and abuse of process,

viii. Prejudice to the opposite party,

ix. and facts and circumstances of each case,

x. In any case, not after framing of the issues."

However, in a separate concurring judgment in the same reference ***Ashok Kumar Kalra*** (supra) Hon'ble Shri Justice M.M. Shanthanagoudar opined that in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the court may entertain a counter-claim even after the framing of issues, so long as the court has not started recording the evidence. However, with all humility, author submits that this minority opinion is not binding as precedent.

Therefore, law has now been made clear that a counter-claim can be filed along with the written statement, by way of amendment in the written statements or by way of subsequent pleading. However, the stage upto which filing counter-claim by way of amendment or subsequent pleading may be allowed is upto the stage of framing of issues and not afterwards. Further, while allowing such counter-claim, Courts must take into consideration inter alia the above mentioned factors illustrated by the Supreme Court.

Counter-claim without filing written statement

A counter-claim is a defence which is set up against the plaintiff in the written statement. A counter-claim without filing the written statement is not

maintainable as it cannot be said to be made as per the rules provided under O.8, R. 6A CPC.

The Supreme Court has dealt with this question in the case of ***Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350*** and observed that –

> "A counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record."

PERIOD OF LIMITATION FOR FILING OF COUNTER-CLAIM

There is no limitation prescribed in the CPC or Limitation Act, 1963 for filing of the counter-claim. The time limit prescribed under O.8, R. 6A CPC is for the period during which the cause of action must have arisen. In view of O.8, R. 6A read with O. 7, R. 11(d) of the CPC and Section 3(2)(b) of the Limitation Act, 1963 it can be said that there is a time limit for filing of a counter-claim and the time limit is what is prescribed by the law of limitation in relation to that particular counter-claim.

PAYMENT OF COURT FEES

The High Court of Madhya Pradesh in the case of ***Tower Engg. Works v. Union Bank of India, AIR 2005 MP 47*** has held that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. As such a counter-claim requires payment of court fees.

The Kerala High Court has also in the case of ***Nherapoyil N.P. Moideen v. K. Narayanan, AIR 1997 Ker 318*** has held that where the defendant does not pay the court fees of the counter-claim, the same cannot be entertained by the appellate court. The counter-claim as rejected by the lower court becomes final and shall operate as res judicata.

COUNTER-CLAIM BY AN INDIGENT PERSON

The Allahabad High Court has in the case of ***Vishwanath Lohia v. Allahabad Bank, 1978 SCC OnLine All 551*** made an observation in regard to filing of counter-claim as a pauper in following terms –

> "3. Under sub-rule (3), the plaintiff is entitled to file a written statement to the counter-claim. Order XXXIII, Rule 1 of the Code of Civil Procedure provides that any suit may be instituted by an indigent person. Since in view of Rule 6-A(2) a counter-claim has been given the same effect as a cross

> suit, the legal position is that when the defendant filed a written statement making a counter-claim he files a cross suit and so he is well within the purview of Order XXXIII."

Therefore, a counter-claim by an indigent person is maintainable.

COUNTER-CLAIM AT THE APPELLATE STAGE

The counter-claim is a substantive remedy available to the defendant and is not the procedural remedy so as to be made available to the defendant at any stage including the appellate stage. The defendant must produce their counter-claim at the stage when the cause of action had arisen or before the expiry of the time limited for delivering their defence. The Bombay High Court in the case of ***Suglabai Ravayya Jangam v. Gurusidhya Basayya Jangam, 2001 SCC OnLine Bom 89*** has held that –

> "In the first place no such relief could be entertained by the Appellate Court; in as much as the Appellate Court has no authority to permit the defendant to a raise a counter-claim against the plaintiff at the appellate stage. The counter-claim, if at all, could be permitted, by virtue of O.8, R.6A CPC, before the first hearing of the suit."

SUBJECT-MATTER OF THE COUNTER-CLAIM

The phrase provided for in O.8, R.6A are 'a claim for damages or not'. This itself signifies that a counter-claim need not be for liquidated damages only. It is clear from the words used in Rule 6A that a counter-claim can be made in respect of any claim that could be a subject of an independent suit. The intention of the legislature is to treat the counter-claim as an independent suit heard together with the plaintiff's suit. The cause of action of the counter-claim need not be confined to the money claims or to the cause of action of the same nature as the original action and it need not relate to or be connected with the original cause of action or matter.

COUNTER-CLAIM AGAINST CO-DEFENDANT

The basic law provided under O.8, R.6A CPC is that the counter-claim is to be made against the claim of plaintiff. This rule has, however, over the years been developed by the judicial pronouncements of Supreme Court and different High Courts.

The High Court of Madhya Pradesh in the case of ***Udhavdas Tyagi v. Srimurti Radhakrishna Mandir, 2002 (1) MPWN 31*** has taken a view that the defendant has the right to file a counter-claim only against the plaintiff and the Counter-claim in the form of seeking relief against the co-defendants cannot be entertained by the court. A similar view was taken by High Court of Madhya Pradesh in another case of ***Narendra Kumar v. Manju Agarwal, (2005) 3 MPLJ 186***.

However, the question regarding filing of counter-claim by the defendants against the co-defendants came up for consideration before the Supreme Court in case of ***Rohit Singh v. State of Bihar, AIR 2007 SC 10***. It has been observed that –

> "Normally, a counter-claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counter-claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained."

The High Court of Madhya Pradesh in the case of ***Gulzarilal Jain v. Ravikant Shirke, 2011 (4) MPHT 194 (DB)*** has followed this judgment of Supreme Court.

Thus, it is now clear that a counter-claim must necessarily be directed towards the plaintiff and in a suit a defendant cannot claim any relief only against a co-defendant solely by way of a counter-claim. However, the defendant may file a counter-claim in which he can claim a relief against the plaintiff as well as the co-defendants if it can be claimed incidentally or along with the relief claimed against the plaintiff. But a counter-claim directed solely against the co-defendants is not maintainable.

COUNTER-CLAIM AGAINST THIRD PARTY

There are divergent opinions of different High Courts on this point. Kerala High Court has in case of ***Pulikkipoyil Salsamath Usman v. Pulikkipoyil Moideen Kunhi, 2016 SCC OnLine Ker 28181*** has held that a third party can be impleaded to consider the question of counter-claim, if the Court is of the opinion that their presence is required for proper adjudication of the Counter-claim between the claim of plaintiffs and the counter-claim of defendant.

On the contrary, Delhi High Court in ***Gastech Process Engineering (India) Pvt. Ltd. v. SAIPEM, (2009) 159 DLT 756*** on the question of whether a counter-claim can be filed against a person other than the plaintiff has observed that –

> "Rule 6C vests the right of applying to the court for an order that the counter-claim be disposed of not by way of counter-claim but as an independent suit, only in the plaintiff. If the legislature had intended the counter-claim being made against persons other than the plaintiff also, there is no reason for discriminating between the plaintiff and such other person and by vesting the right for so applying only in the plaintiff and not in such other person. This is also indicative of the legislative intent being of a counter-claim being maintainable against a plaintiff only and not against persons other than the plaintiff."

Therefore, there are conflicting views of different High Courts on the point of counter-claim against a third party. Various High Courts like Bombay High Court, High Court of Karnataka, Madras High Court and Andhra Pradesh have by way of amendments in CPC added "Third Party Procedure" whereby the defendant can apply to the court to issue notice to the person other than the

person who is already a party in the suit if he has any claim against such person along with the claim against the already existing parties in the suit. But, no such amendment has been introduced in Madhya Pradesh by which proceedings against third party in a Counter-claim may be initiated.

The question that whether a counter-claim can be made against a party who is neither a plaintiff nor a co-defendant has still not come under the lens of the Supreme Court. It must be kept in mind that counter-claim is a defence available to the defendant against the claim of the plaintiff and allowing such counter-claim against a non-party to the suit may result in causing delay of the trial. The proper course for the courts may be to proceed under O.8, R.6C CPC to order separate trial of such counter-claim by way of instituting a fresh suit.

POWER OF THE COURT TO ORDER SEPARATE TRIAL

O.8 R.6C CPC provides that the plaintiff may file an application to the court at any time before the issues are settled that such counter-claim may be excluded and the court may on hearing of such application order that the defendant file a new suit against the plaintiff and order a seperate trial. O.8 R.6C also empowers the court to order seperate trial where it considers that such counter-claim would cause complications in the suit or would lead to causing delay in the suit.

The Punjab and Haryana High Court has in ***Kulwant Singh v. Gurcharan Singh, 2002 SCC OnLine P&H 348*** has made the following observation in regard to the power of the court to order separate trial –

> "The provisions of rule 6-C recognises the right of the plaintiff to apply to the Civil Court for exclusion of Counter-claim and also a direction to the defendant to get his Counter-claim settled in an independent suit. Therefore, rule 6 clothes the Court with adequate power to exclude a counter-claim and direct the defendant to file an independent suit in cases where the Court may consider it unfair or where it causes complications and would result in prolonging the trial."

The Supreme Court in ***State Bank of India v. Ranjan Chemicals Ltd. and anr., (2007) 1 SCC 97*** has held that a joint trial could be ordered by the court if it appears to the court that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arises out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial.

However, option of consolidation of suits is always open to the courts while ordering separate trial under O.8, R.6C CPC.

RETURN AND REJECTION OF COUNTER-CLAIM

From the above reading, it is clear that the counter-claim is essentially a plaint filed by the defendant either along with the written statement or in any case before the framing of issues. All the rules applicable to the plaint are applicable to counter-claim as well. Thus, if a counter-claim filed by the defendant

does not fall within the pecuniary or territorial jurisdiction of the court, the court shall have to return the counter-claim under O.7, R.10 CPC to be presented in the court in which it should have been instituted.

The rule provided under O.7, R.1 CPC is equally applicable to the counter-claim s and an application praying rejection of the counter-claim on the grounds provided in O.7, R.11 CPC is maintainable. The High Court of Madhya Pradesh in ***Mohanlal v. Saukhilal, ILR 2002 MP 725*** has made the following observations in this regard –

> "Rejection of the counter-claim can be ordered under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred as CPC), because Order 8 Rule 6A CPC provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

However, the courts while deciding a question regarding rejection of the counter-claim must also keep in mind that whether the effect of rejecting such counter-claim does not have the effect of striking out defence of the defendant i.e. it does not leave the defendant defenceless.

BURDEN OF PROOF

The general rule of evidence as provided under section 101 of the Indian Evidence Act, 1872 is that the burden to prove a certain fact, lies on the person who desires the court to give judgment as to any legal right or liability dependent on the evidence of the facts which he asserts. Since counter-claim is essentially a plaint filed by the defendant where he asserts the existence of certain facts in his favour which he must prove that fact in order to obtain a judgment in his favour from the Court. Therefore, burden of proof in cases of counter-claim lies on the defendant, unless admitted by plaintiff.

RECORDING OF EVIDENCE

The examination-in-chief of the witnesses in the counter-claim shall be on affidavit and copies of the same shall be provided to the plaintiff by the defendant. The recording of evidence in both, the original suit of the plaintiff and the counter-claim filed by the defendant shall be carried out simultanously. Meaning thereby, there shall be only one set of evidence of each party, be it plaintiff, defendant-counter-claim ant, co-defendant prosecuting independently or co-defendant against whom counter-claim is filed.

It should also be borne in mind that while recording evidence in cases involving counter-claim where a counter-claim is filed against a co-defendant also, then such co-defendant must be given an opportunity to cross examine the witnesses of defendant-counter-claim ant.

JUDGMENT IN CASE OF COUNTER-CLAIM

Though a counter-claim is treated as a plaint and it is essentially a cross suit destined to be heard along with the suit of the plaintiff but a single judgment

is supposed to be passed in both the main suit and the counter-claim. The Himachal Pradesh High Court in the case of ***Himachal Fruit Growers Co-operative Marketing and Processing Society Ltd., Simla v. Upper India Food Preservers & Processors (P.) Ltd., Parwanu, 1983 SCC OnLine HP 12***, has made the following observations in this regard –

> "A counter-claim has the effect of a cross-suit but only one final judgment is to be pronounced in the suit on the original claim of the plaintiff and the counter-claim of the defendant. The plaintiff can also file a written statement in answer to the counter-claim of the defendant and for this purpose a counter-claim is to be treated as a plaint and is governed by the rules applicable to the plaints."

CONCLUSION

- A counter-claim is a defence available to the defendant against the claim of the plaintiff.
- It can be for liquidated damages or any other claim i.e. it need not be limited to money claims only.
- A counter-claim may be filed alongwith written statement, or by way of amendment in written statement, or by way of subsequent pleading.
- However, counter-claim by way of amendment in written statement, or by way of subsequent pleading can be entertained only upto the stage of framing of issues and not afterwards.
- Counter-claim must necessarily be directed against the plaintiff. However, if it appears that in order to resolve the issue between the parties a relief is necessary against a co-defendant also, then a counter-claim against the plaintiff along with co-defendant(s) can be allowed.
- A counter-claim against a third person cannot be allowed and the appropriate course would be to proceed under O.8 R.6C CPC and direct a separate trial by institution of a fresh suit.
- The provisions regarding return and rejection of the plaint are applicable to the counter-claim as well.
- A single judgment shall be passed in regard to the original suit of the plaintiff and the counter-claim.

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विधिक समस्यायें एवं समाधान

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

1. क्या हिन्दू विवाह अधिनियम, 1955 के अंतर्गत धारा 13–ख में आपसी सहमति से विवाह विच्छेद हेतु उल्लेखित छह माह की विहित प्रतीक्षा अवधि को कम किया जा सकता है?

हिन्दू विवाह अधिनियम, 1955 में आपसी सहमति से विवाह विच्छेद का प्रावधान वर्ष 1976 में संशोधन द्वारा जोड़ा गया है। धारा 13–ख आपसी सहमति से विवाह विच्छेद हेतु याचिका प्रस्तुत किए जाने से छह माह की अवधि के अवसान पर ही विवाह विच्छेद की डिक्री प्रदान कर सकने का प्रावधान करती है। प्रावधान एक प्रतिबंध के रूप में है जो विवाह के पक्षकारों को अपने निश्चय पर पुनर्विचार करने का मौका देता है और इस प्रतीक्षा अवधि में न्यायालय के समक्ष भी यह स्पष्ट हो जाता है कि पक्षकारों के मध्य अब समझौते की कोई सम्भावना नहीं है। छह माह का प्रतिबंध इसलिए भी है कि विवाह विच्छेद जैसा निर्णय जल्दबाजी में नहीं लिया जावे।

प्रश्न यह कि क्या ऐसी कोई परिस्थिति है जिसमें छह माह की अवधि के अवसान पूर्व भी विवाह विच्छेद की डिक्री प्रदान की जा सके? अप्रत्यक्ष रूप से प्रश्न यह है कि क्या धारा 13–ख में उल्लेखित छह माह की अवधि संबंधी प्रावधान विवेकीय हैं या आज्ञापक हैं? इस सम्बंध में न्यायदृष्टांत ***कैलाश विरूद्ध ननखू, (2005) 4 एससीसी 480*** में अभिमत दिया गया है कि कोई प्रावधान आज्ञापक है या विवेकीय यह केवल उसकी भाषा पर निर्भर नहीं करता बल्कि संदर्भ, विषयवस्तु तथा उद्देश्य पर भी निर्भर करता है।

धारा 13–ख के प्रावधान पर विचार करते हुए माननीय उच्चतम न्यायालय द्वारा ***अमर दीप सिंह विरूद्ध हरवीन, (2017) 8 एससीसी 746*** के मामले में अभिमत दिया गया हैं कि छह माह की विधिक अवधि का न्यायालय द्वारा अधित्याग किया जा सकता है किन्तु इससे पूर्व न्यायालय को इस बिन्दु पर संतुष्ट होना अनिवार्य है कि विवाह के पक्षकार विवाह विच्छेद हेतु पृथक्करण की एक वर्ष की निर्धारित विधिक अवधि से अधिक समय से पृथक रह रहे हैं। पक्षकारों के मध्य समझौते, मीडिएशन, पुनर्वास के सभी संभव प्रयास किए जा चुके हैं और वे असफल रहे हैं। पक्षकारों के पुनः साथ रहने की कोई सम्भावना नहीं है तथा यह प्रतीक्षा अवधि अब केवल पक्षकारों की व्यथा को ही बढ़ाएगी। पक्षकारों ने वास्तविक रूप से भरण–पोषण, बच्चों की अभिरक्षा अथवा अन्य विवाद निपटा लिये हैं। उपरोक्त बिन्दुओं पर संतुष्ट होने के उपरांत ही न्यायालय छह माह की अवधि का अधित्याग कर सकता है। ऐसा आवेदन पक्षकारों के पृथक्करण के एक वर्ष बाद ही प्रस्तुत किया जा सकता है। इस सम्बंध में न्यायदृष्टांत ***माधुरी कुमावल विरूद्ध अभिनव कुमावत, 2021 (3) एमपीएलजे 156*** भी अवलोकनीय है।

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2. (अ) **क्या धारा 138 परक्राम्य लिखत अधिनियम, 1881 के संबंध में माननीय उच्चतम न्यायालय द्वारा Suo Motu Writ Petition (Civil) No. 03 of 2020, In Re : Cognizance for Extension of Limitation में दिये गये निर्देश परिवादी द्वारा अभियुक्त को प्रेषित मांग संबंधी सूचना पत्र मिलने के पश्चात् आरोपी को भुगतान हेतु नियत पंद्रह दिन की अवधि से अतिरिक्त समय प्रदान करते हैं?**

कोविड–19 महामारी का प्रसार होने पर मान्नीय उच्चतम न्यायालय ने पक्षकारों द्वारा याचिकाओं/ आवेदनों/ वादों/ अपीलों/ अन्य सभी कार्यवाहियों के लिए परिसीमा की सामान्य विधि या किसी अन्य विशेष विधि (केन्द्रीय या राज्य) में निर्धारित परिसीमा अवधि में प्रस्तुत किये जाने पर आ रही समस्याओं को दृष्टिगत रखते हुए Suo Motu Writ Petition (Civil) No. 03 of 2020, In Re : Cognizance for Extension of Limitation में दिनांक 23.03.2020 को आदेश दिया था कि याचिकाओं/ आवेदनों/ वादों/ अपीलों/ अन्य सभी कार्यवाहियों को परिसीमा की सामान्य विधि या किसी अन्य विशेष विधि (केन्द्रीय या राज्य) में विहित अवधि में प्रस्तुत किये जाने की परिसीमा दिनांक 15.03.2020 से आगामी आदेश होने तक विस्तारित की जा रही है। तत्पश्चात् माननीय उच्चतम न्यायालय द्वारा दिनांक 06.05.2020 को यह आदेश पारित किया गया कि धारा 138 परक्राम्य लिखत अधिनियम, 1881 से संबंधित परिसीमा भी दिनांक 15.03.2020 से आगामी आदेश तक विस्तारित मानी जाएगी।

माननीय उच्चतम न्यायालय द्वारा आदेश दिनांक 23.03.2020 के प्रभाव को समय–समय पर आगे बढ़ाया गया और दिनांक 08.03.2021 को यह आदेश दिया गया कि कोविड–19 की महामारी की स्थिति में सुधार होने के कारण और देश में लॉकडाउन समाप्त हो जाने के कारण अब आदेश दिनांक 15.03.2020 को आगे बढ़ाया जाना आवश्यक नहीं है और यह भी आदेशित किया गया कि किसी दावे, अपील, आवेदन या कार्यवाही की परिसीमा संबंधी गणना के लिये दिनांक 15.03.2020 से दिनांक 14.03.2021 तक की अवधि गणना में नहीं ली जाएगी और इस अवधि को धारा 138, परक्राम्य लिखत अधिनियम, 1881 के परंतुक (ख) एवं (ग) में उल्लेखित परिसीमा अवधि पर भी लागू होना अवधारित किया गया।

आदेश दिनांक 08.03.2021 के पश्चात् देश में कोविड–19 की महामारी के पुनःप्रसार को दृष्टिगत रखते हुए उपरोक्त रिट याचिका में माननीय उच्चतम न्यायालय द्वारा पुनः आदेश दिनांक दिनांक 27.04.2021 पारित कर पूर्व के आदेश दिनांक 23.03.2020 को पुनर्स्थापित किया गया है और यह भी आदेशित किया गया है कि धारा 138 परक्राम्य लिखत अधिनियम, 1881 के परंतुक (ख) एवं (ग) में उल्लेखित परिसीमा भी दिनांक 14.03.2021 से आगामी आदेश तक गणना में नहीं ली जाएगी। माननीय उच्चतम न्यायालय के आदेश दिनांक 23.03.2020 के अवलोकन से यह स्पष्ट होता है कि यह आदेश महामारी के कारण पक्षकारों को निर्धारित परिसीमा में याचिकाओं/ आवेदनों/ वादों/ अपीलों/ अन्य सभी कार्यवाहियों को प्रस्तुत किये जाने में आ रही परेशानियों को दृष्टिगत रखते

हुए पारित किया गया था जैसा कि आदेश की भाषा से स्पष्ट है। सुसंगत अंश इस प्रकार हैं –

> "This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the Country on account of COVID-19 Virus and resultant difficulties that may be faced by litigants across the country in **filing** their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both central and/or state). To obviate such difficulties and to ensure that lawyers/ litigants do not have to come physically to **file** such proceedings in respective courts/tribunals across the country including this Court, it is here by ordered……."

इस संबंध में माननीय उच्चतम न्यायालय के नवीनतम आदेश दिनांक 27.04.2021 में भी यह उल्लेखित है कि –

> "It is further clarified that the period from 14.03.2021 till further order shall also stand excluded in computing the periods prescribed under …….. and proviso (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribed period (s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay) and termination of proceedings."

अतः यह स्पष्ट है कि उपरोक्त आदेशों के माध्यम से याचिकाओं/आवेदनों/वादों/ अपीलों/ अन्य कार्यवाहियों को संस्थित करने हेतु निर्धारित विभिन्न परिसीमाओं मात्र को ही विस्तारित किया गया है इसलिये यह नहीं माना जा सकता कि उपरोक्त आदेशों के माध्यम से ऐसे किसी व्यक्ति (अभियुक्त) के लिये परिसीमा का विस्तार किया गया है जिसके द्वारा जारी किया गया चेक अनादरित हुआ है और जिसे ऐसे अनादरण पश्चात् परिवादी द्वारा नियत समयावधि में प्रेषित मांग संबंधी सूचना पत्र प्राप्त हो चुका है।

(ब) क्या सर्वोच्च न्यायालय द्वारा Suo Motu Writ Petition (Civil) No. 03/ 2020 In Re : Cognizance for Extension of Limitation में पारित आदेश दिनांक 27.04.2021 के अनुसार परिसीमा अधिनियम, 1963 की धारा 5 के अधीन विलम्ब क्षमा करने के उपरांत ही कोईवाद/आवेदन/अपील/ पुनरीक्षण/याचिका आदि सुनवाई में ली जा सकती है?

कोविड–19 महामारी के कारण आदेशित लॉकडाउन की कठिनाइयों को दृष्टिगत रखते हुए माननीय सर्वोच्च न्यायालय द्वारा उपरोक्त रिट याचिका में दिनांक 23.03.2020 को

आदेश पारित कर भारत के संविधान के अनुच्छेद 142 सपठित 141 की शक्तियों का प्रयोग करते हुए निर्दिष्ट किया गया था कि दिनांक 15.03.2020 से आगामी आदेश होने तक सभी प्रकार की कार्यवाहियों के लिए विहित परिसीमा काल विस्तारित किया जाता है।

पुनः माननीय सर्वोच्च न्यायालय के आदेश दिनांक 08.03.2021 के द्वारा परिसीमा अवधि का उपरोक्त विस्तार दिनांक 15.03.2021 से समाप्त कर दिया गया। परन्तु कोविड–19 महामारी की दूसरी लहर के प्रभाव को देखते हुए माननीय सर्वोच्च न्यायालय ने आदेश दिनांक 27.04.2021 के द्वारा दिनांक 23.03.2020 के आदेश को पुनर्स्थापित करते हुए निर्दिष्ट किया गया है कि सभी न्यायिक या अर्ध–न्यायिक कार्यवाहियों के संबंध में किसी भी सामान्य अथवा विशेष विधि द्वारा निर्धारित परिसीमा काल, चाहे वह क्षमा करने योग्य हो अथवा नहीं, आगामी आदेश तक विस्तारित किया जाता है।

माननीय सर्वोच्च न्यायालय द्वारा उपयोग की गई पदावली "shall stand extended till further orders" है जिसका हिन्दी अनुवाद ''आगामी आदेश तक विस्तारित हो जाएगा'' है। "stand extended" या ''विस्तारित हो जाएगा'' का तात्पर्य है कि परिसीमा काल जो अन्यथा समाप्त हो जाता, अब समाप्त नहीं होगा। जब परिसीमा काल समाप्त ही नहीं होगा तो इसके लिए विलम्ब क्षमा करने का कोई प्रश्न ही उत्पन्न नहीं होता है।

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3. क्या वक्फ़ अधिनियम, 1995 के अंतर्गत सिविल न्यायालय का क्षेत्राधिकार व्यादेश तथा निष्कासन के वादों के सम्बंध में भी वर्जित है ?

वक्फ़ अधिनियम, 1995 का अध्याय 8 न्यायिक कार्यवाहियों से सम्बंधित है जिसकी धारा 83 तथा धारा 85 सिविल न्यायालय के क्षेत्राधिकार से सुसंगत हैं –

> **धारा 83. अधिकरणों, आदि के गठन** – (1) राज्य सरकार, राजपत्र में अधिसूचना द्वारा, इस अधिनियम के अधीन किसी वक्फ़ सम्पत्ति से सम्बंधित किसी विवाद, प्रश्न या अन्य मामले के अवधारण के लिए उतने अधिकरण गठित करेगी जितने वह ठीक समझे और ऐसे प्रत्येक अधिकरण की इस अधिनियम के अधीन स्थानीय सीमाएं और अधिकारिता परिनिश्चित करेगी।
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> **धारा 85. सिविल न्यायालयों की अधिकारिता का वर्जन** – किसी वक्फ़, वक्फ़ संपत्ति या अन्य मामले से संबधित किसी विवाद, प्रश्न या अन्य मामले की बाबत जिसका इस अधिनियम द्वारा या इसके अधीन अधिकरण द्वारा अवधारित किया जाना अपेक्षित है, किसी सिविल न्यायालय में कोई वाद या अन्य विधिक कार्यवाही नहीं होगी।

धारा 83 सिविल न्यायालय के क्षेत्राधिकार के वर्जन से सम्बंधित हैं जिसका सुसंगत अंश– ''इस अधिनियम के अधीन किसी वक्फ़ सम्पत्ति से सम्बंधित किसी विवाद, प्रश्न या अन्य मामले के अवधारण के लिए'' ध्यान देने योग्य है। इसका तात्पर्य यह है कि सिविल न्यायालय के क्षेत्राधिकार का वर्जन केवल उन मामलों तक सीमित है जिसका अवधारण अधिनियम के अन्तर्गत अधिकरण के द्वारा किया जाना है। अतः सिविल न्यायालय में ऐसा वाद प्रचलनशील है जिसका अवधारण अधिकरण द्वारा नहीं किया जाना है। इस सम्बंध में न्यायदृष्टांत ***पंजाब वक्फ़ बोर्ड विरूद्ध शाम सिंह हरिके, (2019) 4 एससीसी 698*** अवलोकनीय है।

अधिकरण कौन से विषयों या विवादों का विनिश्चय करेगा, यह धारा 6 में उल्लेखित है जिसके अनुसार यदि यह प्रश्न उत्पन्न होता है कि कोई विशिष्ट सम्पत्ति, जो वक्फ़ों की सूची में वक्फ़ संपत्ति के रूप में विनिर्दिष्ट है, वक्फ़ संपत्ति है या नहीं अथवा ऐसी सूची में विनिर्दिष्ट कोई वक्फ़, शिया वक्फ़ है या सुन्नी वक्फ़ तो बोर्ड या वक्फ़ का मुतवल्ली अथवा उसमें हितबद्ध कोई व्यक्ति, उस प्रश्न के विनिश्चय के लिए अधिकरण में वाद संस्थित कर सकेगा।

मध्यप्रदेश उच्च न्यायालय द्वारा ***वक्फ़ इमामबाड़ा विरूद्ध श्रीमती खुर्शीदा बी, एआईआर 2009 एमपी 238*** में अभिमत दिया गया कि वक्फ़ सम्पत्ति से किरायेदार के निष्कासन सम्बंधी वाद अधिकरण के समक्ष प्रचलनशील है क्योंकि अधिकरण को अधिनियम के द्वारा सिविल न्यायालय की शक्तियां प्रदान की गई हैं। यह भी आगे कहा गया कि अधिकरण का क्षेत्राधिकार न केवल वक्फ़ सम्पत्ति के स्वत्व सम्बंधी वादों पर है अपितु स्वत्व आधारित निष्कासन के वादों पर भी है। किन्तु उच्चतम न्यायालय द्वारा ***रमेश गोविंद राम विरूद्ध सुगरा हुमायूं मिर्जा वक्फ़, (2010) 8 एससीसी 726*** में अधिनियम की धारा 6 तथा 7 की व्याख्या करते हुये अभिमत दिया गया कि धारा 6 के अन्तर्गत अधिकरण का क्षेत्र व्यापक न होकर सीमित है और अधिकरण को केवल उन्हीं वादों की सुनवाई का अधिकार है जो धारा 6 की परिधि में आते हैं। उच्चतम न्यायालय द्वारा मध्यप्रदेश उच्च न्यायालय के ***वक्फ़ इमामबाड़ा*** (पूर्वोक्त) में दिए निर्णय को निष्कासन सम्बंधी बिन्दु पर अतिष्ठित (overrule) करते हुये अभिमत दिया गया कि वक्फ़ सम्पत्ति से किरायेदार के निष्कासन सम्बंधी वादों की सुनवाई का क्षेत्राधिकार सिविल न्यायालय को है। अतः निष्कासन सम्बंधी वाद केवल सिविल न्यायालय में प्रचलनशील हैं ना कि अधिकरण में। इसी सम्बंध में न्यायदृष्टांत ***फसीला एम. विरूद्ध मुनेरूल इस्लाम, एआईआर 2014 एससी 2064*** भी अवलोकनीय हैं।

जहां तक व्यादेश सम्बंधी वादों का सम्बंध है पंजाब ***वक्फ़ बोर्ड*** (पूर्वोक्त) में दिए अभिमत के आलोक में यह कहा जा सकता है कि मात्र आधिपत्य में हस्तक्षेप सम्बंधी व्यादेश के वाद भी केवल सिविल न्यायालय में प्रचलनशील हैं।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

162. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2(1)(f), 2(2), 9, 28, 44 and 47

COMMERCIAL COURTS ACT, 2015 – Section 10

(i) Seat of arbitration – Choice of parties – Whether two Indian nationals may choose a seat of arbitration outside India? Held, yes.

(ii) Foreign award – Ingredients of – Explained – Whether award by an Arbitral Tribunal situated outside India to which New York Convention applies in a dispute, referred by two Indian nationals, would be a foreign award enforceable in India? Held, yes.

(iii) "International commercial arbitration" – As defined in Section 2(1)(f) and used in Section 2(2) of the Act of 1996 – Distinction – Definition contained in Section 2(1)(f) is limited to Part I of the Act of 1996 whereas phrase used in Section 2(2) refers to arbitrations which take place outside India and awards whereof are enforceable under Part II of the Act of 1996.

(iv) Enforcement of foreign award – Such an award will be enforceable only in High Court u/s 10(1) of Commercial Courts Act and not in District Courts.

माध्यस्थम एवं सुलह अधिनियम, 1996 – धाराएं 2(1)(च), 2(2), 9, 28, 44 एवं 47

वाणिज्यिक न्यायालय अधिनियम, 2015 – धारा 10

(i) मध्यस्थता का स्थान – पक्षकारों की पसंद – क्या दो भारतीय नागरिक भारत के बाहर मध्यस्थता के स्थान का चुनाव कर सकते हैं? अवधारित, हाँ।

(ii) विदेशी पंचाट – आवश्यक तत्व – समझाए गए – क्या भारत के बाहर स्थित एक माध्यस्थम अधिकरण का दो भारतीय नागरिकों द्वारा निर्दिष्ट विवाद में दिया गया पंचाट, जिसमें न्यूयॉर्क कन्वेंशन लागू होता है, भारत में प्रवर्तन योग्य विदेशी पंचाट होगा? अवधारित, हाँ।

(iii) "अंतर्राष्ट्रीय वाणिज्यिक माध्यस्थम" – जैसा कि धारा 2(1)(च) में परिभाषित है और 1996 के अधिनियम की धारा 2(2) में उपयोग किया गया है – विभेद – धारा 2(1)(च) में निहित परिभाषा 1996 के अधिनियम के भाग–I तक सीमित है, जबकि धारा 2(2) में प्रयुक्त वाक्यांश ऐसी मध्यस्थता को संदर्भित करता है जो भारत के बाहर होती है और जिसके पंचाट 1996 के अधिनियम के भाग–II के अधीन प्रवर्तनीय होते हैं।

(iv) विदेशी पंचाट का प्रवर्तन – ऐसा पंचाट मात्र वाणिज्यिक न्यायालय अधिनियम की धारा 10(1) के अंतर्गत उच्च न्यायालय में प्रवर्तनीय होगा न कि जिला न्यायालयों में।

PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited

Judgment dated 20.04.2021 passed by the Supreme Court in Civil Appeal No. 1647 of 2021, reported in AIR 2021 SC 2517 (Three Judge Bench)

Relevant extracts from the judgment:

It is important to note that the expression "international commercial arbitration" is specifically spoken of in the context of a place of arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act. The context of this expression is, therefore, different from the context of the definition of "international commercial arbitration" contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies "unless the context otherwise requires". The four Sub-clauses contained in Section 2(1)(f) would make it clear that the definition of the expression "international commercial arbitration" contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, *inter alia*, be a person who is a national of or habitually resident in any country other than India. On the other hand, when "international commercial arbitration" is spoken of in the context of taking place outside India, it is place-centric as is provided by Section 44 of the Arbitration Act. This expression, therefore, only means that it is an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an "international" commercial arbitration.

x x x

Under section 44 of the Arbitration Act, a foreign award is defined as meaning an arbitral award on differences between persons arising out of legal relationships considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and in one of such territories as the Central Government, by notification, declares to be territories to which the said Convention applies. Thus, what is necessary for an award to be designated as a foreign award under section 44 are four ingredients:

(i) the dispute must be considered to be a commercial dispute under the law in force in India,

(ii) it must be made in pursuance of an agreement in writing for arbitration,

(iii) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile), and

(iv) the arbitration must be conducted in a country which is a signatory to the New York Convention.

Ingredient (i) is undoubtedly satisfied on the facts of this case. Ingredient (ii) is satisfied given clause 6 of the settlement agreement. Ingredients (iii) and (iv) are also satisfied on the facts of this case as the disputes are between two persons, i.e. two Indian companies, and the arbitration is conducted at the seat designated by the parties, i.e. Zurich, being in Switzerland, a signatory to the New York Convention.

x x x

The question that then arises is whether there is anything in the public policy of India, as so understood, which interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India. It can be seen that exception 1 to Section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It is for this reason that this Court in ***Atlas Export Industries v. Kotak and Company, (1999) 7 SCC 61*** referred to the said exception to Section 28 and found that there is nothing in either Section 23 or Section 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India. However, it was argued by the learned Counsel for the appellant, with specific reference to Section 28(1)(a) and Section 34(2A) of the Arbitration Act, that since two Indian parties cannot opt out of the substantive law of India and therefore, ought to be confined to arbitrations in India, Indian public policy, as reflected in these two sections, ought to prevail. We are unable to agree with this argument. It will be seen that Section 28(1)(a) of the Arbitration Act, when read with Section 2(2), Section 2(6) and Section 4, only makes it clear that where the place of arbitration is situated in India, in an arbitration other than an international commercial arbitration (i.e. an arbitration where none of the parties, *inter alia*, happens to be a national of a foreign country or habitually resident in a foreign country), the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India.

It can be seen that Section 28(1)(a) of the Arbitration Act makes no reference to an arbitration being conducted between two Indian parties in a country other than India, and cannot be held, by some tortuous process of reasoning, to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India.

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163. CIVIL PROCEDURE CODE, 1908 – Sections 47, 122 and Order 21 Rules 11, 97 and 98

Execution proceedings – Delay – Trouble of decree holders in not being able to enjoy the fruits of litigation – Supreme Court issued remedial measures to reduce the delay in disposal of execution

petitions in the form of mandatory directions – High Courts directed to update the Rules within one year – Till then these directions shall remain enforceable.

सिविल प्रक्रिया संहिता, 1908 – धाराएं 47, 122 एवं आदेश 21 नियम 11, 97 व 98

निष्पादन कार्यवाही – विलंब – वाद के फल का लाभ प्राप्त करने में आज्ञप्तिधारियों की परेशानी – सर्वोच्च न्यायालय द्वारा निष्पादन याचिकाओं के निराकरण में विलंब को कम करने के लिए उपचारात्मक उपाय के रूप में अनिवार्य निर्देश जारी किए गए – उच्च न्यायालयों को एक वर्ष के भीतर नियमों को अद्यतन करने का निर्देश दिया गया – तब तक ये निर्देश प्रभावशील रहेंगे।

Rahul S. Shah v. Jinendra Kumar Gandhi and ors.

Judgment dated 22.04.2021 passed by the Supreme Court in Civil Appeal No. 1659 of 2021, reported in AIR 2021 SC 2161 (Three Judge Bench)

Relevant extracts from the judgment:

Having regard to urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.

All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions:

1-2. In suits relating to delivery of possession, the court must examine the parties to the suit Under Order X in relation to third party interest and further exercise the power under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

3. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

4. After examination of parties Under Order X or production of documents under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

5. Under Order XL Rule 1 of Code of Civil Procedure, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.

6-7. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

8. In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.

9. In a suit for payment of money, before settlement of issues, the Defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers u/s 151 Code of Civil Procedure, demand security to ensure satisfaction of any decree.

10. The Court exercising jurisdiction u/s 47 or Under Order XXI of Code of Civil Procedure, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

11. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

12. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

13. u/s 60 of Code of Civil Procedure the term "...in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

14. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

15. The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

16. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts.

We further direct all the High Courts to reconsider and update all the Rules relating to Execution of Decrees, made under exercise of its powers Under Article 227 of the Constitution of India and Section 122 of Code of Civil Procedure, within one year of the date of this Order. The High Courts must ensure that the Rules are in consonance with Code of Civil Procedure and the above directions, with an endeavour to expedite the process of execution with the use of Information Technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable.

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164. CIVIL PROCEDURE CODE, 1908 – Section 114 r/w Order 47 Rule 1
Review – Scope – An appellate power cannot be exercised in the guise of power of review and the power of review is not an inherent power – Court can review an order only on the prescribed grounds mentioned in Order 47 Rule 1 CPC.

सिविल प्रक्रिया संहिता, 1908 – धाराएं 114 सहपठित आदेश 47 नियम 1

पुनर्विलोकन – विस्तार – पुनर्विलोकन की शक्ति के रूप में अपीलीय शक्ति का उपयोग नहीं किया जा सकता एवं पुनर्विलोकन की शक्ति अंतर्निहित शक्ति नहीं है – न्यायालय द्वारा एक आदेश का पुनर्विलोकन मात्र आदेश 47 नियम 1 सिविल प्रक्रिया संहिता में उल्लेखित आधारों पर ही किया जा सकता है।

Shri Ram Sahu (Dead) through LRs. & ors. v. Vinod Kumar Rawat & ors.

Judgment dated 03.11.2020 passed by the Supreme Court of India in Civil Appeal No. 3601 of 2020, reported in ILR (2021) MP 4 (SC)

Relevant extracts from the judgment:

To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a

decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review.

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165. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 12 Rule 6 Consent decree; modification of – When permissible? Explained – Held, consent decrees create estoppel by judgment, thus, it can be modified only with the revised consent of all parties – However, this rule is not absolute and consent decree would not operate as estoppel when compromise was vitiated by fraud, misrepresentation or mistake – Further held, in the exercise of inherent powers, court may also rectify any clerical or arithmetical error in the consent decree.

सिविल प्रक्रिया संहिता, 1908 – धारा 151 एवं आदेश 12 नियम 6

सहमतिपूर्ण आज्ञप्ति का संशोधन – कब अनुमेय है ? समझाया गया – अभिनिर्धारित, सहमतिपूर्ण आज्ञप्ति निर्णय द्वारा विबंधन उत्पन्न करती है, अतः, इसे सभी पक्षों की संशोधित सहमति मात्र के द्वारा ही उपांतरित किया जा सकता है – तथापि, यह नियम असीम नहीं है और सहमतिपूर्ण आज्ञप्ति विबंधन उत्पन्न नहीं करेगी यदि समझौता छल, दुर्व्यपदेशन अथवा भूल से विकृत हो – यह भी अभिनिर्धारित कि न्यायालय अपनी अंतर्निहित शक्तियों के प्रयोग में सहमतिपूर्ण आज्ञप्ति में किसी भी लिपिकीय अथवा अंकगणितीय त्रुटि को भी सुधार सकती है।

Compack Enterprises India Pvt. Ltd. v. Beant Singh

Judgment dated 17.02.2021 passed by the Supreme Court in Special Leave Petition (Civil) No. 2224 of 2021, reported in (2021) 3 SCC 702

Relevant extracts from the judgment:

It is well settled that consent decrees are intended to create estoppels by judgment against the parties, thereby putting an end to further litigation between the parties. Resultantly, this Court has held that it would be slow to unilaterally interfere in, modify, substitute or modulate the terms of a consent decree, unless

it is done with the revised consent of all the parties thereto. [***Gupta Steel Industries v. Jolly Steel Industries (P) Ltd., (1996) 11 SCC 678*** and ***Suvaran Rajaram Bandekar v. Narayan R. Bandekar, (1996) 10 SCC 255***]

However, this formulation is far from absolute and does not apply as a blanket rule in all cases. This Court in ***Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31,*** has held that a consent decree would not serve as an estoppel, where the compromise was vitiated by fraud, misrepresentation, or mistake. Further, this Court in the exercise of its inherent powers may also unilaterally rectify a consent decree suffering from clerical or arithmetical errors, so as to make it conform with the terms of the compromise.

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

Joinder of necessary party – If as per the agreement it can be shown that the relief can be claimed against a particular party, whether or not he is signatory to the said agreement, he can be treated as a "necessary party".

सिविल प्रक्रिया संहिता, 1908 – आदेश 1 नियम 10

आवश्यक पक्षकार का संयोजन – यदि अनुबंध के अनुसार यह दर्शित किया जा सकता है कि विनिर्दिष्ट पक्षकार के विरुद्ध अनुतोष का दावा किया जा सकता है, तब भले ही वह कथित अनुबंध का हस्ताक्षरकर्ता हो या न हो वह ''आवश्यक पक्षकार'' के रूप में मान्य किया जा सकता है।

Beyond Malls LLP v. Lifestyle International Pvt. Ltd. and anr.

Order dated 04.11.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 2861 of 2020, reported in ILR (2020) MP 2650 (DB)

Relevant extracts from the order:

If as per the agreement it can be shown that the relief can be claimed against a particular party, whether or not he is signatory to the said agreement, he can be treated to be a "necessary party". As noticed above, Clause-M of Annexure M/3 dated 27.09.2017 in no uncertain terms binds the present petitioner being a lessee and respondent No.2 as lessor and retailer. In this backdrop, if relief claimed in the application filed under section 9 of Arbitration Act is perused, it cannot be said that present petitioner is not a "necessary party". In the case of ***S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Limited and ors., (2011) 1 SCC 320***, as per relevant clauses of agreement, one guarantor was not covered and hence Apex Court ruled against original applicant. In the instant case, clauses of agreement are differently worded and hence said judgment is of no assistance to petitioner. The Bombay High Court in ***Narayan Manik v. Jayawant Patil, (2009) 2 BCR 247*** opined that interim measure application can be filed against such third party despite the fact that he is not signatory to the agreement. We respectfully agree with the principle laid down by Bombay High Court.

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*167. **COURT FEES ACT, 1870 – Section 16**
CIVIL PROCEDURE CODE, 1908 – Section 89
Refund of court fees – Settlement of disputes out of court – Whether parties are entitled to refund of court fees in case of out-of-court settlement of dispute? Held, yes – Where court subsequently finds that the settlement is legally arrived at, parties are entitled to refund of court fees.

न्यायालय शुल्क अधिनियम, 1870 – धारा 16
सिविल प्रक्रिया संहिता, 1908 – धारा 89
न्यायालय शुल्क की वापसी – विवादों का न्यायालय के बाहर समाधान – क्या विवाद के न्यायालय के बाहर समाधान होने पर पक्षकार न्यायालय शुल्क वापस प्राप्त करने के अधिकारी हैं? अभिनिर्धारित, हाँ – जहाँ न्यायालय का बाद में समाधान होता है कि समझौता विधिपूर्ण है, तो पक्षकार न्यायालय शुल्क वापस प्राप्त करने के अधिकारी होंगे।

High Court of Judicature at Madras v. M.C. Subramaniam and ors.
Judgment dated 17.02.2021 passed by the Supreme Court in Special Leave Petitions (C) No. 3063 of 2021, reported in (2021) 3 SCC 560

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168. **CRIMINAL PRACTICE:**
Sentence – Determination of – Sentence should be determined with human approach – Factors irrelevant to decide the guilt of the accused, may also be considered while determining the sentence. (In this particular case, the sentences of co-accused, who only provided vehicle to main accused for kidnapping the minor, were modified by the Appellate Court.)

आपराधिक प्रथा:
दण्डादेश – निर्धारण – दण्डादेश मानवीय दृष्टिकोण अपनाते हुए निर्धारित किया जाना चाहिए – दण्डादेश के निर्धारण हेतु ऐसे तथ्यों पर भी विचार किया जा सकता है जो अभियुक्त को दोषी निर्धारित करने हेतु सुसंगत नहीं होते हैं।
(इस प्रकरण विशेष में सह–अभियुक्त, जिसने अवयस्क के अपहरण हेतु मुख्य अभियुक्त को मात्र वाहन उपलब्ध कराया था, पर आरोपित दण्डादेश अपील न्यायालय द्वारा संशोधित किया गया है।)

K. Prakash and anr. v. State of Karnataka
Judgment dated 19.03.2021 passed by the Supreme Court in Criminal Appeal No. 336 of 2021, reported in 2021 CriLJ 2153

Relevant extracts from the judgment:

Many factors which may not be relevant to determine the guilt, must be seen with a human approach, at the stage of sentencing. While imposing the sentence, all relevant factors are to be considered, keeping in mind the facts

and circumstances of each case. In the present case, the main accusation was against accused no.1, who is convicted for offences punishable under Sections 344, 366, IPC and Section 6 of POCSO Act and sentenced to undergo imprisonment for a period of 10 years. Even in the complaint, it was mentioned that accused no.1 was in love with the victim girl PW-2. It is also the case of the appellants that PW-1 was not a direct witness to the incident and PW-2 has been tutored by PW-1. The alleged incident is of the year 2014 and we are informed that appellants have already served sentence of about three months and paid fine amount. They specifically pleaded that there is no one to take care of their minor son and old age parents.

In view of the peculiar facts and circumstances of the case, while confirming the conviction recorded and fine imposed, we modify the sentence on the appellants for the period already undergone. The appellants be released forthwith unless otherwise their custody is required in connection with any other case.

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169. CRIMINAL PROCEDURE CODE, 1973 – Section 154

FIR – Ingredients – Offence must be clearly specified in FIR and precise location of incident should also be mentioned – Any cryptic information is not equivalent to FIR.

दण्ड प्रक्रिया संहिता, 1973 – धारा 154

प्रथम सूचना प्रतिवेदन – तत्व – प्रथम सूचना प्रतिवेदन में अपराध का स्पष्ट विवरण होना चाहिए और घटना के स्थान का भी उल्लेख किया जाना चाहिए – कोई भी गुप्त सूचना प्रथम सूचना प्रतिवेदन के समतुल्य नहीं होती।

Netaji Achyut Shinde (Patil) and anr. v. State of Maharashtra

Judgment dated 23.03.2021 passed by the Supreme Court in Criminal Appeal No. 121 of 2019, reported in AIR 2021 SC 1655 (Three Judge Bench)

Relevant extracts from the judgment:

A cryptic phone call without complete information or containing part-information about the commission of a cognizable offence cannot always be treated as an FIR. This proposition has been accepted by this Court in ***T.T. Antony v. State of Kerala, (2001) 6 SCC 181*** and ***Damodar v. State of Rajasthan, (2004) 12 SCC 336***. A mere message or a telephonic message which does not clearly specify the offence, cannot be treated as an FIR.

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170. CRIMINAL PROCEDURE CODE, 1973 – Sections 167 and 439(2)

NDPS ACT, 1985 – Sections 22, 28 and 29

Cancellation of default bail – If a person is illegally or erroneously released on bail u/s 167(2) CrPC his bail can be cancelled by passing appropriate order u/s 439(2) CrPC.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 167 एवं 439(2)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 – धाराएं 22, 28 एवं 29

व्यतिकारी जमानत का निरस्तीकरण – यदि एक व्यक्ति अवैध या त्रुटिपूर्ण रूप से दण्ड प्रक्रिया संहिता की धारा 167(2) के अंतर्गत जमानत पर रिहा किया जाता है तो उसकी जमानत दण्ड प्रक्रिया संहिता की धारा 439(2) के अंतर्गत युक्तियुक्त आदेश पारित कर निरस्त की जा सकती है।

Venkatesan Balasubramaniyan v. Intelligence Officer, D.R.I. Bangalore

Judgment dated 20.11.2020 passed by the Supreme Court in Criminal Appeal No. 801 of 2020, reported in 2021 CriLJ 978 (Three Judge Bench)

Relevant extracts from the judgment:

The High Court in the impugned judgment noted that charge sheet having been filed on 06.07.2018, i.e., well within the stipulated period of 180 days, the accused could not have been granted the benefit under Section 167 Cr.P.C. In paragraph 8, following has been observed by the High Court:

> "8. .....It can be culled out from the record that filing of the single charge sheet on 06.07.2018 before the Additional Sessions Court, Omerga, was not brought to the notice of the Metropolitan Sessions Court, Hyderabad for whatever reason may be. Since the factual aspect remains that the charge sheet was filed on 06.07.2018 i.e., well within the stipulated period of 180 days, the respondents-accused are not entitled for the benefit under Section 167(2) Cr.P.C. Under these circumstances, the respondents-accused are entitled for bail in accordance with the provisions laid down under the NDPS Act read with Sections 437 and 439 Cr.P.C. and accordingly they are entitled to work out the remedies under the said provisions."

The proviso to Section 167 itself clarifies that every person released on bail under Section 167(2) shall be deemed to be so released under Chapter XXXIII. Therefore, if a person is illegally or erroneously released on bail under Section 167(2), his bail can be cancelled by passing appropriate order under Section 439(2) CrPC. This Court in ***Puran v. Rambilas, (2001) 6 SCC 338*** has also clarified that the concept of setting aside an unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation.

It is true that two offences, one at Hyderabad being at the instance of D.R.I., Hyderabad namely D.R.I. 48 of 2018 was registered and another case Special NDPS No. 17 of 2018 by the D.R.I., Bangalore, Zonal Unit. A combined complaint taking care of both the offences was filed before the Special Court, Omerga as noted above wherein offences committed by the accused were also inquired and dealt with. There is ample material in the complaint that the transportation of narcotic substance started from Omerga, Maharashtra and was being allegedly to be taken to Chennai and intercepted at Hyderabad. The complaint, which has been brought on the record gives the detailed facts including the journey and the interception of appellants at Hyderabad. The combined complaint having been filed on 06.07.2018, i.e., well within 180 days, the High Court did not commit any error in cancelling the default bail granted to the appellants on 12.07.2018.

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171. CRIMINAL PROCEDURE CODE, 1973 – Sections 195(1)(b)(i), 195(1)(b)(ii) and 340
INDIAN PENAL CODE, 1860 – Section 193
PREVENTION OF CORRUPTION ACT, 1988 – Sections 13(1)(d), 13(1)(e) and 13(2)

(i) Whether bar u/s 195(1)(b)(i) CrPC applies to offence of giving false evidence committed during the stage of investigation prior to production of such evidence before trial court? Held, no – Such offence is not committed in or in relation to any proceeding in any Court – However, investigation agency must lodge complaint or register case u/s 193 IPC prior to commencement of proceedings before trial court.

(ii) Whether "stage of a judicial proceeding" under Explanation 2 to Section 193 IPC is synonymous with "proceeding in any Court" u/s 195(1)(b)(i) CrPC? Held, no – Purpose of explanation is to ensure that a person who fabricates false evidence during investigation or inquiry does not escape penalty.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 195(1)(ख)(i), 195(1)(ख)(ii) एवं 340

भारतीय दण्ड संहिता, 1860 – धारा 193

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 13(1)(घ), 13(1)(ङ) एवं 13(2)

(i) क्या धारा 195(1)(ख)(i) द.प्र.सं. की बाधा विचारण न्यायालय के समक्ष ऐसे साक्ष्य प्रस्तुत करने के पूर्व अनुसंधान के दौरान किए गए मिथ्या साक्ष्य देने के अपराध पर लागू होती है? अवधारित, नहीं – ऐसा अपराध किसी भी न्यायालय में या किसी कार्यवाही के संबंध में नहीं किया गया है – तथापि, अनुसंधान

एजेंसी को विचारण न्यायालय के समक्ष कार्यवाही प्रारंभ होने के पूर्व धारा 193 भा.द.सं. के संबंध में परिवाद अथवा प्रकरण पंजीबद्ध कराना होगा।

(ii) क्या भा.द.सं. की धारा 193 के स्पष्टीकरण 2 में ''न्यायिक कार्यवाही के चरण'' धारा 195(1)(ख)(i) द.प्र.सं. के ''किसी भी न्यायालय में कार्यवाही'' का पर्याय है? अभिनिर्धारित, नहीं – स्पष्टीकरण का उद्देश्य यह सुनिश्चित करना है कि कोई व्यक्ति जो अनुसंधान अथवा जांच के दौरान मिथ्या साक्ष्य गढ़ता है, वह दण्ड से बच नहीं जाए।

Bhima Razu Prasad v. State Rep. by Deputy Superintendent of Police, CBI/SPE/ACU-II

Judgment dated 12.03.2021 passed by the Supreme Court in Criminal Appeal No. 305 of 2021, reported in AIR 2021 SC 2090

Relevant extracts from the judgment:

The provision is intended to bar the right to initiate prosecution only where the offence committed has a reasonably close nexus with the court proceedings, such that the Court can independently determine the need for an inquiry into the offence with reference to its own records. Therefore, the offence must be such that directly impacts administration of justice by the Court. This would certainly be the case if the document was in the custody of the Court at the time of commission of offence. However, the bar u/s 195(1)(b)(ii) cannot be read as operating even in cases where the offence against administration of justice was committed in respect of a document

1) outside of the Court,

2) by a person who was not yet party to the Court proceedings, and,

3) at a time long before the production of the document before the Court.

The same would not have a “reasonably close nexus” with the court proceedings.

Though these observations in ***Sachida Nand Singh v. State of Bihar, AIR 1998 SC 1121*** were made in the context of section 195(1)(b)(ii), we find that they have useful application in interpreting section 195(1)(b)(i) as well. The prohibition contained in section 195(1)(b)(i) should not be extended to provide protection to a person who has been Accused of tendering false evidence during the investigative stage prior to becoming a party to the court proceedings and producing such evidence before the Court.

The view taken in ***Sachida Nand Singh*** (supra) was subsequently affirmed by the Constitution Bench in ***Iqbal Singh Marwah v. Meenakshi Marwah, AIR 2005 SC 2119***.

This brings us to the phrase “in relation to any proceeding in any Court”, which appears in section 195(1)(b)(i), CrPC but is absent in section 195(1)(b)(ii). It may be argued that this phrase makes the scope of section 195(1)(b)(i) wider

than Section 195(1)(b)(ii). The words "in relation to" u/s 195(1)(b)(i) appear to encompass situations wherein false evidence has been fabricated prior to being produced before a Court of law, for the purpose of being used in proceedings before the Court. Therefore, it may not be possible to apply the ratio of ***Iqbal Singh Marwah*** (supra) by way of analogy to section 195(1)(b)(i) in every case.

However, where a person fabricates false evidence for the purpose of misleading the investigating officer, this may not have any direct nexus with the subsequent court proceedings. There is an indirect nexus inasmuch as if the investigating agency does not suspect any wrongdoing, and the Court commits the case for trial, the evidence will be produced for the Court's perusal and impact the judicial decision-making process. However, it may be equally possible that even if the fabricated evidence appears sufficiently convincing, the investigating agency may drop proceedings against the Accused and divert its time and resources elsewhere. Therefore, the offence may never reach the stage of court proceedings. Further, if it subsequently comes to light that the evidence was falsely adduced, it will be the investigating agency which will suffer loss of face and be forced to conduct a fresh investigation. Hence, though the offence is one which affects the administration of justice, it is the investigating agency, and not the Court, which is the aggrieved party in such circumstance.

In case the bar u/s 195(1)(b)(i) is applied to offences committed during the course of investigation, the Court may think it fit to wait till the completion of trial to evaluate whether a complaint should be made or not. Subsequently, the Court may be of the opinion that in the larger scheme of things the alleged fabrication of evidence during investigation has not had any material impact on the trial, and decline to initiate prosecution for the same. The investigation agency cannot be compelled to take a chance and wait for the trial court to form its opinion in each and every case. This may give the offender u/s 193, IPC sufficient time to fabricate more falsehoods to hide the original crime. Further, irrespective of the potential impact that such false evidence may have on the opinion formed by the trial court, the investigating agency has a separate right to proceed against the Accused for attempting to obstruct fair and transparent probe into a criminal offence. Thus, we are of the view that it would be impracticable to insist upon lodging of written complaint by the Court u/s 195(1)(b)(i), CrPC in such a situation.

x x x

The purpose of Explanation 2 to Section 193, IPC is evidently to ensure that a person who fabricates false evidence before an investigating or inquiring authority prior to the trial of the case does not escape penalty. This encompasses all nature of proceedings, whether civil or criminal. However, whether the commission of such offence would require the complaint of a Court u/s 195(1)(b)(i) would depend upon the authority before whom such false evidence is given. For example, if a person gives false evidence in an inquiry before the Magistrate u/s 200, CrPC, that would undoubtedly be an offence committed

before a Court u/s 195(1)(b)(i), CrPC. However, this would not be the case where false evidence is led before an investigating officer prior to the Court having taken cognizance of the offence or the case being committed for trial.

In the present case, pursuant to recovering the seized currency from the Appellant's house on 24.01.2001, the Respondent initiated investigation u/s 13(2) read with Section 13(1)(e), PC Act against him. Accused Nos. 2 and 3, at the behest of the Appellant, wrote letter dated 04.02.2002 to the Superintendent of Police, CBI stating that the seized currency was held by the Appellant as part of an escrow arrangement amongst the parties. Hence, they sought that the money should be paid back to Accused No 2. They additionally produced a false sale deed dated 24.01.2001 and certain books of account in support of their claim. There was no involvement of the Trial Court at this stage in as much as the letter dated 4.02.2002 and the sale deed were obviously intended to convince the investigation agency that the Appellant had not accumulated disproportionate financial assets. Had the Respondent accepted the veracity of the contents of this letter, they would not only have dropped the investigation against Appellant/Accused No. 1 but also wrongfully returned the seized currency under the mistaken impression that it was the property of Accused No. 2. The Accused No. 2 would have then facilitated the return of the Appellant's ill-gotten gains back to his custody. The authorities would be none the wiser and the loss of Rs. 80 lakhs from the exchequer would have flown under the radar.

Therefore, in the present case, it is not the Trial Court but the Respondent authority/agency which has been directly impacted due to fabrication of evidence by the Appellants/Accused. The Appellants' intention was not to mislead the Trial Court, at least not at the first instance. Rather, their goal was to ensure that the Appellant/Accused No.1 was cleared of wrongdoing at the stage of investigation itself. It was after being charged u/s 193, Indian Penal Code, that the Appellants/Accused reiterated the fictitious escrow arrangement story before the Trial Court so as to prove their innocence. Hence it cannot be said that the offence u/ss 120B read with 193, IPC was committed by the Appellants "in relation to" a proceeding in a court u/s 195(1)(b)(i), CrPC.

The questions of law formulated in paragraph 6 are answered as follows:

Section 195(1)(b)(i), CrPC will not bar prosecution by the investigating agency for offence punishable u/s 193, IPC, which is committed during the stage of investigation. This is provided that the investigating agency has lodged complaint or registered the case u/s 193, IPC prior to commencement of proceedings and production of such evidence before the trial court. In such circumstance, the same would not be considered an offence committed in, or in relation to, any proceeding in any Court for the purpose of Section 195(1)(b)(i), CrPC.

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*172. **CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 239 and 397**
Revision petition – Maintainability of – Whether a revision lies against order of framing charge or refusal to discharge? Held, yes – Such an order is neither interlocutory nor final in nature and therefore, is not affected by bar u/s 397(2) CrPC.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 227, 239 एवं 397

पुनरीक्षण याचिका – पोषणीयता – क्या आरोप विरचित करने अथवा आरोपमुक्त करने से इंकार करने के आदेश के विरुद्ध पुनरीक्षण पोषणीय है? अभिनिर्धारित, हाँ – ऐसे आदेश की प्रकृति न तो अंतर्वर्ती है और न ही अंतिम, इसलिए धारा 397(2) द.प्र.सं. की बाधा से प्रभावित नहीं होगा।

Sanjay Kumar Rai v. State of Uttar Pradesh and anr.
Judgment dated 07.05.2021 passed by the Supreme Court in Criminal Appeal No. 472 of 2021, reported in AIR 2021 SC 2351 (Three Judge Bench)

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*173. **CRIMINAL PROCEDURE CODE, 1973 – Section 311**
INDIAN PENAL CODE, 1860 – Sections 302 and 498-A
Power to summon material witness – Exercise of – Deceased died of unnatural death – Medical officer who conducted first post-mortem turned hostile – Material on record revealed that second post-mortem on deceased's body was also conducted – At the fag end of trial, application filed by Public Prosecutor to summon the medical officer who conducted second post-mortem along with relevant records – Held, application deserves to be allowed to uphold the truth.

दण्ड प्रक्रिया संहिता, 1973 – धारा 311

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 498–क

महत्वपूर्ण साक्षी को आहूत करने की शक्ति का प्रयोग – मृतक की अप्राकृतिक मृत्यु हुई – पहला शव परीक्षण करने वाले चिकित्साधिकारी पक्षद्रोही हो गए – अभिलेख से प्रकट हुआ कि मृतक के शरीर का दोबारा शव परीक्षण किया गया था – विचारण के अंतिम चरण पर, लोक अभियोजक द्वारा दूसरा शव परीक्षण करने वाले चिकित्साधिकारी को सुसंगत अभिलेख के साथ आहूत करने संबंधी आवेदन प्रस्तुत किया गया – अभिनिर्धारित, सत्य प्रकट करने के लिए आवेदन स्वीकार योग्य है।

V.N. Patil v. K. Niranjan Kumar and ors.
Judgment dated 04.03.2021 passed by the Supreme Court in Criminal Appeal No. 267 of 2021, reported in (2021) 3 SCC 661

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*174. **CRIMINAL PROCEDURE CODE, 1973 – Section 357**

Compensation; release of – Whether compensation ordered u/s 357 CrPC be released during pendency of appeal? Held, no – Such release would lead to multiplicity of proceedings.

दण्ड प्रक्रिया संहिता, 1973 – धारा 357

प्रतिकर का भुगतान – क्या अपील के लंबित रहने के दौरान धारा 357 द.प्र.सं. के अधीन आदेशित प्रतिकर के भुगतान का आदेश दिया जा सकता है? अभिनिर्धारित, नहीं – इस तरह के भुगतान से कार्यवाहियों की बहुलता होगी।

Dalbir Singh v. State (NCT of Delhi) and anr.

Order dated 28.08.2020 passed by the Supreme Court in Criminal Appeal No. 550 of 2020, reported in (2020) 8 SCC 125

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175. **CRIMINAL PROCEDURE CODE, 1973 – Sections 362, 437(5), 439, 439(1)(b), 439(2) and 482**

(i) **Alteration in conditions of bail order – Power of Magistrate – Since legislature has not expressly given power to Magistrate to change or alter the conditions of bail order, such power cannot be exercised by Magistrate impliedly u/s 437(5) and 439(2) of CrPC**

(ii) **Modification of conditions in bail order – Power of Sessions Court – Section 439(1)(b) of CrPC is enabling provision which gives express power to High Court and Court of Sessions, to modify or alter the conditions imposed by Magistrate while grating bail – However, High Court and Sessions Court cannot modify or alter the conditions of bail order passed by it by a subsequent order.**

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 362, 437(5), 439, 439(1)(ख), 439(2) एवं 482

(i) जमानत आदेश की शर्तों में परिवर्तन – मजिस्ट्रेट की शक्ति – चूंकि विधायिका द्वारा अभिव्यक्त रूप से मजिस्ट्रेट को जमानत आदेश की शर्तों को उपांतरित या परिवर्तित करने की शक्ति प्रदत्त नहीं की गई है, ऐसी शक्ति दण्ड प्रक्रिया संहिता की धारा 437(5) एवं 439(2) के अंतर्गत विवक्षित रूप से प्रयुक्त नहीं की जा सकती।

(ii) जमानत आदेश की शर्तों में परिवर्तन – सत्र न्यायालय की शक्ति – दण्ड प्रक्रिया संहिता की धारा 439(1) समर्थकारी प्रावधान है जो उच्च न्यायालय एवं सत्र न्यायालय को अभिव्यक्त शक्ति देता है कि वह मजिस्ट्रेट द्वारा जमानत प्रदान किए जाते समय अधिरोपित शर्तों को संशोधित या परिवर्तित कर सके – यद्यपि, उच्च न्यायालय एवं सत्र न्यायालय द्वारा स्वयं के द्वारा पारित जमानत आदेश की शर्तों को पश्चात्वर्ती स्तर पर संशोधित या परिवर्तित नहीं किया जा सकता है।

Aniruddh Khehuriya v. State of M.P.

Order dated 24.11.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 43474 of 2020, reported in ILR (2020) MP 2880

Relevant extracts from the order:

Considering the provisions of section 362, 439 (1) (b), 437(5) and 439(2) and also the judgment passed by the High Court of Karnataka in matter of ***Brijesh Singh and etc. v. State of Karnataka and etc., 2002 CriLJ 1362***, I am of considered opinion that Section 439(1)(b) of Cr.P.C. is enabling provision which gives express power to High Court and Court of Session to modify or alter the conditions imposed by Magistrate while grating bail. High Court and Sessions Court cannot modify or alter the conditions of bail order passed by it by a subsequent order. The High Court of Karnataka has held that since Sections 437(5) and 439(2) of Cr.P.C. give power to concerned Court, if it considers necessary, to direct a person who is released on bail to be arrested and commit him to custody, therefore, there is implied power to the concerned Court to modify or alter the conditions imposed in the bail order. I do not agree with the law laid down by the Single Bench of Karnataka High Court in matter of Brijesh Singh (supra). Legislature has expressly and directly provided power to change the condition of bail order passed by a Magistrate to the Court of Sessions and High Court. If legislature intended that Magistrate can also alter or change the condition of the bail order passed by it than such power could have been provided to the Magistrate. Since legislature has not expressly given power to Magistrate to change or alter the conditions of bail order, such power cannot be exercised by Magistrate impliedly under Section 437(5) and 439(2) of Cr.P.C.

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176. CRIMINAL PROCEDURE CODE, 1973 – Section 406

Transfer – The prosecution agency i.e. the State may file transfer petition in criminal case because it has a vital interest in criminal administration.

दण्ड प्रक्रिया संहिता, 1973 – धारा 406

अंतरण – अभियोजन अधिकरण अर्थात् राज्य द्वारा भी दाण्डिक प्रकरण के अंतरण की याचिका प्रस्तुत की जा सकती है क्योंकि दाण्डिक प्रशासन में राज्य का महत्वपूर्ण हित होता है।

State of Uttar Pradesh v. Jail Superintendent (Ropar) and ors.

Judgment dated 26.03.2021 passed by the Supreme Court in Writ Petition (Criminal) No. 409 of 2020, reported in AIR 2021 SC 1678

Relevant extracts from the judgment:

A crime against an individual is to be considered as a crime against a State and public, at large. In the criminal administration system, State is the prosecuting agency, working for and on behalf of the people of the State. It is to be noticed

that "party interested" has not been defined under the Code of Criminal Procedure, 1973. The words "party interested" are of a wide import and, therefore, have to be interpreted by giving a wider meaning. The words such as "aggrieved party", "party to the proceedings" and "party interested" are used in various Statutes. If the words used are to the effect "party to the proceedings" or "party to a case", it can be given a restricted meaning. In such cases, the intention of the legislature is clear to give restricted meaning. But, at the same time, the words used as "party interested", which are not defined under the Code of Criminal Procedure, have to be given a wider meaning. As a prosecuting agency in the Criminal Administration, the State can be said to be a party interested within the meaning of Section 406(2) of the Code of Criminal Procedure, 1973. It is a well settled principle of law that the Statute must be interpreted to advance the cause of the Statute and not to defeat the same. The petitioner-State, being a prosecuting agency in the Criminal Administration, is vitally interested in such administration, as such, we are of the view that the State is considered as a "party interested" within the meaning of sub-section (2) of Section 406 of the Code.

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177. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Bail – Outbreak of COVID-19 – Directions of Supreme Court to release under-trial prisoners to prevent overcrowding of prisons – Applicability of – Held, such directions were issued to release prisoners of minor offences and not those charged with murder.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 437 एवं 439

जमानत – कोविड–19 का प्रकोप – जेलों में भीड़भाड़ को रोकने के लिए विचाराधीन बंदियों को रिहा करने के सर्वोच्च न्यायालय के निर्देश की प्रयोज्यता – अभिनिर्धारित, ऐसे निर्देश छोटे अपराधों के बंदियों को रिहा करने के लिए जारी किए गए थे ना कि हत्या करने के आरोपित बंदिओं को।

State of Kerala v. Mahesh

Judgment dated 19.03.2021 passed by the Supreme Court in Criminal Appeal No. 343 of 2021, reported in AIR 2021 SC 2071

Relevant extracts from the judgment:

There can be no doubt that the outbreak of the novel COVID-19 pandemic and its spread has been a matter of serious public concern. The virus being highly infectious, precautions to prevent spread of infection to the extent possible are imperative. In ***Suo Motu Writ Petition (Civil) No. 1 of 2020 In Re: Contagion of Covid 19 Virus In Prisons***, this Court expressed concern over the possibility of spread of COVID-19 amongst prisoners lodged in overcrowded correctional homes and accordingly issued directions from time to time, directing the authorities concerned to inter alia take steps as directed by this Court, to minimize the risk of spread of COVID amongst the inmates of correctional homes. This Court also directed that a High Powered Committee be constituted by the States

and Union Territories to consider release of some prisoners on interim bail or parole during the Pandemic, to prevent overcrowding of prisons.

It appears that the High Court has completely mis-appreciated the object, scope and ambit of the directions issued by this Court from time to time in In Re: Contagion of Covid 19 Virus In Prisons. This Court did not direct release of all under-trial prisoners, irrespective of the severity of the offence. After hearing the learned Attorney General of India, Mr. Venugopal, the *Amicus Curiae* appointed by this Court, Mr. Dushyant Dave and other Learned Counsel, the States and Union Territories were directed to constitute a High Powered Committee to determine which class of prisoners could be released on parole or interim bail for such period as might be thought appropriate. By way of example, this Court directed the States/ Union Territories to consider release of prisoners convicted of minor offences with prescribed punishment of seven years or less. The orders of this Court are not to be construed as any direction, or even observation, requiring release of under-trial prisoners charged with murder, and that too, even before investigation is completed and the chargesheet is filed. The Respondent Accused, it is reiterated, is charged with murder in the presence of an eye witness, and the impugned order granting bail was filed even before the chargesheet was filed. The Chargesheet appears to have been filed on 01.01.2021. Moreover the Respondent Accused had been absconding after the incident.

For the reasons discussed above the Appeal is allowed and the impugned order of the High Court is set aside. The Respondent Accused shall be taken into custody.

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178. CRIMINAL PROCEDURE CODE, 1973 – Section 439

Bail – Parity – While deciding the bail application on the basis of parity, the role of the accussed in offence is most important aspect.

दण्ड प्रक्रिया संहिता, 1973– धारा 439

जमानत – समानता – समानता के सिद्धांत के आधार पर जमानत आवेदन का निराकरण करते समय अपराध में अभियुक्त की भूमिका सबसे महत्वपूर्ण पहलू होता है।

Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana Makwana (Koli) & anr.

Judgment dated 20.04.2021 passed by the Supreme Court in Criminal Appeal No. 422 of 2021, reported in AIR 2021 SC 2011

Relevant extracts from the judgment:

Parity while granting bail must focus upon role of the accused. Merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether a case for the grant of bail on the basis of parity has been established. In deciding the aspect of parity, the role attached to the accused, their position in relation to the incident and to the victims is of utmost importance.

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179. CRIMINAL PROCEDURE CODE, 1973 – Section 439
N.D.P.S. ACT, 1985 – Section 37
UNLAWFUL ACTIVITIES PREVENTION ACT, 1967 – Section 43-D
CONSTITUTION OF INDIA – Article 21
Bail application – Parameters applicable while considering – Effect of statutory restrictions – Whether statutory restrictions like Section 43-D of UAPA and Section 37 of NDPS Act oust the ability of courts to grant bail? Held, no – Constitutional courts can grant bail on grounds of violation of Part III of the Constitution i.e. right to speedy trial – Instantly, accused was in jail for more than five years and 276 witnesses left to be examined – Thirteen co-accused convicted but none of them was sentenced to more than eight years' rigorous imprisonment – Held, in such premises order granting bail was justified.

दण्ड प्रक्रिया संहिता, 1973 – धारा 439
मादक द्रव्य एवं मनःप्रभावी पदार्थ अधिनियम, 1985 – धारा 37
विधिविरूद्ध क्रियाकलाप निवारण अधिनियम, 1967 – धारा 43–घ
भारत का संविधान – अनुच्छेद 21
जमानत आवेदन – विचार करते समय लागू मानदण्ड – वैधानिक प्रतिबंधों का प्रभाव – क्या यूएपीए की धारा 43–घ और एनडीपीएस अधिनियम की धारा 37 जैसे वैधानिक प्रतिबंध न्यायालयों की जमानत देने की अधिकारिता को बाधित करते हैं? अभिनिर्धारित, नहीं – संविधान के भाग III अर्थात शीघ्र विचारण के अधिकार का उल्लंघन होने के आधार पर संवैधानिक न्यायालय जमानत दे सकती हैं – हस्तगत मामले में आरोपी पांच वर्ष से अधिक समय से जेल में था और 276 साक्षियों का परीक्षण शेष था – तेरह सह–अभियुक्त दोषसिद्ध ठहराए गए परन्तु उनमें से किसी को भी आठ वर्ष से अधिक अवधि के कठोर कारावास का दण्ड नहीं दिया गया था – अभिनिर्धारित, ऐसी परिस्थितियों में जमानत देने का आदेश उचित था।

Union of India v. K.A. Najeeb
Judgment dated 01.02.2021 passed by the Supreme Court in Criminal Appeal No. 98 of 2021, reported in (2021) 3 SCC 713 (Three Judge Bench)

Relevant extracts from the judgment:

Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 which too have somewhat rigorous conditions for grant of bail, this Court in ***Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252, Babba v. State of Maharashtra, (2005) 11 SCC 569*** and ***Umarmia v. State of Gujarat, (2017) 2 SCC 731*** enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality

of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

Not only has the respondent been in jail for much more than five years, but there are 276 witnesses left to be examined. Charges have been framed only on 27-11-2020. Still further, two opportunities were given to the appellant NIA who has shown no inclination to screen its endless list of witnesses. It also deserves mention that of the thirteen co-accused who have been convicted, none have been given a sentence of more than eight years' rigorous imprisonment. It can, therefore, be legitimately expected that if found guilty, the respondent too would receive a sentence within the same ballpark. Given that two-third of such incarceration is already complete, it appears that the respondent has already paid heavily for his acts of fleeing from justice.

It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

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180. CRIMINAL PROCEDURE CODE, 1973 – Section 457
N.D.P.S. ACT, 1985 – Sections 8, 20 and 25
Interim custody of vehicle – Vehicle seized under the NDPS Act may be released by the Trial Court in interim custody as the Act does not restrict the power of Trial Court in such matters.

दण्ड प्रक्रिया संहिता, 1973 – धारा 457
स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 – धाराएं 8, 20 एवं 25
वाहन की अंतरिम अभिरक्षा – स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम के अंतर्गत जप्तशुदा वाहन विचारण न्यायालय द्वारा अंतरिम अभिरक्षा में प्रदान किया जा सकता है क्योंकि यह अधिनियम ऐसे मामलों में विचारण न्यायालय की शक्तियां प्रतिबंधित नहीं करता है।

Ajay Pratap Verma v. The State of Madhya Pradesh
Judgment dated 09.03.2021 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 43959 of 2020, reported in 2021 (1) ANJ (MP) 274

Relevant extracts from the judgment:

On perusal of the provisions of Section 60 (3) and Section 63 of the NDPS Act, it is clear that the conveyance seized under the NDPS Act shall be liable to confiscation only when the owner of the conveyance who was given an opportunity by the Court could not prove that the conveyance was used without his knowledge or connivance. The Court will have to decide whether a vehicle seized under the NDPS Act is liable to confiscation only on conclusion of the trial.

There is no provision in the NDPS Act to restrict the power of the trial Court to release the vehicle in interim custody. It has been held by this Court in the case of ***Pandurang Kadam v. State of M.P., 2005 (2) ANJ (MP) 351***, that notwithstanding the fact that the vehicle is liable to be confiscated under Section 60 of the NDPS Act, it may be released in interim custody in appropriate cases. Thus, interim custody should not be denied to the owner of the vehicle, simply because it is liable to be confiscated under Section 60 of the NDPS Act.

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181. EVIDENCE ACT, 1872 – Sections 3 and 118
INDIAN PENAL CODE, 1860 – Section 376
SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3(2)(v)
APPRECIATION OF EVIDENCE:

(i) Sexual offences against women and girls with disability – Guidelines issued to make out criminal justice system more disabled-friendly.

(ii) Sexual assault – Veracity of the testimony of disabled witness – Held, testimony of a disabled witness cannot be considered weak or inferior – Court needs to be attentive to the fact that such witness may give evidence in different form – Instantly, prosecutrix was blind, her primary mode of identification of persons around her is sound of their voice – Held, her testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

साक्ष्य अधिनियम, 1872 – धाराएं 3 एवं 118
भारतीय दण्ड संहिता, 1860 – धारा 376
अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 – धारा 3(2)(v)
साक्ष्य का मूल्यांकनः

(i) दिव्यांग महिलाओं और बालिकाओं के साथ लैंगिक अपराध – आपराधिक न्याय प्रणाली को दिव्यांगों के लिए और अधिक अनुकूल बनाने के लिए दिशानिर्देश जारी किए गए।

(ii) लैंगिक हमला – दिव्यांग साक्षी की साक्ष्य की सत्यता – अभिनिर्धारित, एक दिव्यांग साक्षी की साक्ष्य को कमजोर या निम्न नहीं माना जा सकता है – न्यायालय को इस तथ्य पर ध्यान देना चाहिए कि ऐसा साक्षी अलग स्वरूप में साक्ष्य दे सकता है – हस्तगत मामले में अभियोक्त्री नेत्रहीन थी, अपने आस–पास के व्यक्तियों की पहचान का उसका प्राथमिक तरीका उनकी आवाज थी – अवधारित, उसकी साक्ष्य एक ऐसी अभियोक्त्री के समान महत्व की है जो अभियुक्त को देखकर पहचानने में सक्षम होती।

Patan Jamal Vali v. State of Andhra Pradesh

Judgment dated 27.04.2021 passed by the Supreme Court in Criminal Appeal No. 452 of 2021, reported in AIR 2021 SC 2190

Relevant extracts from the judgment:

While changes in the law on the books mark a significant step forward, much work still needs to be done in order to ensure that their fruits are realized by those for whose benefit they were brought. In this regard, we set out below some guidelines to make our criminal justice system more disabled-friendly.

> (i) The National Judicial Academy and State Judicial Academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/ survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B. program that cover these topics and the intersectional nature of violence more generally;
>
> (ii) Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, in order to facilitate easy access and coordination;

(iii) The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;

(iv) Police officers should be provided sensitization, on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and

(v) Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.

x x x

We are of the view that the testimony of a prosecutrix with a disability, or of a disabled witness for that matter, cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-à-vis their able-bodied counterparts. As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness. In the case at hand, for instance, PW2's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, is by the sound of their voice. And so PW2's testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

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***182. EVIDENCE ACT, 1872 – Section 8**

CRIMINAL PRACTICE:

Absconding – Mere abscondance of an accused is not an incriminating evidence against such accused but it may assume importance when considered along with other circumstances.

साक्ष्य अधिनियम, 1872 – धारा 8

आपराधिक विचारणः

फरारी – किसी अभियुक्त की फरारी मात्र उस अभियुक्त के विरूद्ध अभियोगकारी साक्ष्य नहीं है किंतु अन्य परिस्थितियों के साथ विचार किये जाने पर यह महत्व ग्रहण कर सकती है।

State of M.P. v. Ramant Singh

Judgment dated 30.04.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Appeal No. 584 of 2008, reported in 2021 (1) ANJ (MP) 356 (DB)

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183. EVIDENCE ACT, 1872 – Section 32

Dying declaration – Recording of dying declaration by the executive Magistrate is not necessary in every case – It depends upon the circumstances of each case.

साक्ष्य अधिनियम, 1872 – धारा 32

मृत्युकालीन कथन – प्रत्येक प्रकरण में कार्यपालक मजिस्ट्रेट द्वारा ही मृत्युकालीन कथन अभिलिखित किया जाना आवश्यक नहीं होता है – ऐसा अभिलेखन प्रत्येक प्रकरण की परिस्थिति पर निर्भर होता है।

Bheem alias Prakash v. State of Madhya Pradesh

Judgment dated 18.03.2021 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 2208 of 2010, reported in 2021 (1) ANJ (MP) 300 (DB)

Relevant extracts from the judgment:

Learned counsel for the appellant contended that in this case there is no dying declaration recorded by the Executive Magistrate. In our opinion, it is not necessary in every case as it depends upon the circumstance of each case. Sometimes, doctors are of the opinion that the patient may not survive for such length of time. They are important witness to observe about the physical and mental condition of the patient in the right perspective.

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184. EVIDENCE ACT, 1872 – Section 32

APPRECIATION OF EVIDENCE:

Dying declaration; evidentiary value of – Statement recorded by police officer in presence of doctor projected as dying declaration – Deceased suffered 80% burn injuries – Written permission of doctor was not taken before recording dying declaration – Doctor admitted that deceased was administered painkillers – Dying declaration was not recorded in question-answer format – Deceased was an illiterate old person whereas narration of events in dying

declaration were so accurate that a normal person cannot be expected to depose with such precision – There were material contradictions in statements of doctor on one hand and police officer who recorded the dying declaration on the other, in respect of nature of burn injuries suffered by deceased – No complaint was lodged by deceased's son and daughter-in-law with police who were alleged eye witnesses which raises doubt on the conduct of parties – Deceased died after almost 30 hours of recording of dying declaration, thus, there was sufficient time to call Magistrate to record the declaration – All prosecution witnesses including son and daughter-in-law of deceased turned hostile – Held, conviction on sole basis of dying declaration is not maintainable.

साक्ष्य अधिनियम, 1872 – धारा 32

साक्ष्य का मूल्यांकनः

मृत्युकालिक कथन का साक्ष्यिक मूल्य – पुलिस अधिकारी द्वारा चिकित्सक की उपस्थिति में लेखबद्ध बयान मृत्युकालिक कथन के रूप में पेश किया गया – मृतका 80% जल गई थी – मृत्युकालिक कथन लेख करने के पूर्व चिकित्सक की लिखित अनुमति नहीं ली गई थी – चिकित्सक ने स्वीकार किया कि मृतका को दर्द निवारक दवाएं दी गई थीं – मृत्युकालिक कथन प्रश्न–उत्तर प्रारूप में लेख नहीं था – मृतका एक निरक्षर वृद्ध थी, जबकि मृत्युकालिक कथन में घटनाओं का वर्णन इतना सटीक था कि एक सामान्य व्यक्ति से भी इतनी सटीकता के साथ बयान देने की अपेक्षा नहीं की जा सकती है – एक ओर चिकित्सक और दूसरी ओर मृत्युकालिक कथन लेख करने वाले पुलिस अधिकारी के बयानों में मृतका को जलने से आई चोटों की प्रकृति के संबंध में तात्विक विरोधाभास थे – मृतका के पुत्र और पुत्रवधू जो कथित चक्षुदर्शी साक्षी थे, द्वारा पुलिस में कोई शिकायत दर्ज नहीं कराना साक्षियों के आचरण पर संदेह उत्पन्न करता है – मृतका की मृत्यु उसके मृत्युकालिक कथन लेख करने के लगभग 30 घंटे उपरांत हुई थी, इस प्रकार बयान दर्ज करने हेतु मजिस्ट्रेट को बुलाने के लिए पर्याप्त समय था – मृतका के पुत्र और पुत्रवधू सहित सभी अभियोजन साक्षी पक्षद्रोही हो गए – अवधारित, मृत्युकालिक कथन के एकमात्र आधार पर दोषसिद्धि उचित नहीं है।

Jayamma and anr. v. State of Karnataka

Judgment dated 07.05.2021 passed by the Supreme Court in Criminal Appeal No. 758 of 2010, reported in AIR 2021 SC 2399 (Three Judge Bench)

Relevant extracts from the judgment:

Having meditated over the issue to the extent it is possible, and on a minute examination of the original document Ex. P-5 (without understanding its contents as it is in Kannada language except that the endorsement of the doctor is in

English) read with its true translation placed on record, we do not find it totally safe to convict the Appellants on the basis of the said document along with its corroboration by PW-11 and PW-16. We say so for several reasons as summarised hereinafter:

Firstly, the narration of events in the dying declaration is so accurate, that even a witness in the normal state of mind, cannot be expected to depose with such precision. Although it is stated that deceased was questioned by the Police officer, the purported dying declaration is not in a questions and answers format. The direct or indirect dominance of the Police Officer appears to have influenced the answers only in one direction.

Secondly, the injured victim was an illiterate old person and it appears beyond human probabilities that she would have been able to narrate the minutes of the incident with such a high degree of accuracy.

Thirdly, there is sufficient evidence on record that the victim had been administered highly sedative painkillers. Owing to 80% burn injuries suffered by the victim on all vital parts of the body, it can be legitimately inferred that she was reeling in pain and was in great agony and the possibility of her being in a state of delusion and hallucination cannot be completely ruled out. We say so at the cost of repetition that the doctor (PW-16) made the endorsement that the victim was in a fit state of mind to make the statement 'after' the statement was recorded and not 'before' thereto being the normal practice. It further appears to us that faculties of the injured had been drastically impaired and instead of making statement in an informative form she had apparently endorsed what the Police Officer (PW-11) intended to. True it is that the Police Officer (PW-11) had no axe to grind or a motive to implicate the Appellants, but his over-enthusiasm to solve a criminal case within no time seems to have swayed the Police Officer (PW-11) so much that he appears to have not asked the doctor to make an endorsement of fitness of the victim before recording the statement. He also did not deem it appropriate to call a Judicial or Executive Magistrate to record such statement, for the reasons best known to himself.

Fourthly, there is a serious contradiction between the statement of Dr. A. Thippeswamy (PW-16) on one hand and the police officer K.V. Mallikarjunappa (PW-11) on the other, in respect of the nature of burn injuries suffered on different body parts of the victim. While the doctor acknowledges that burn injuries included the hands of the victim, the police officer claims that her hands were safe and she could put her thumb impression. We have seen the thumb impression very scrupulously and the same appears to be absolutely natural. If that is so, the medical officer, whose statement should carry more weightage in respect of the nature and gravity of injuries, stands belied.

Fifthly, and most importantly the police officer K.V. Mallikarjunappa (PW-11) candidly admits that he did not seek an endorsement from the doctor as to whether the injured was in a fit state of mind to make a statement, before he proceeded to record the statement. Both the police officer as well as the doctor

have tried to cover up this serious lacuna by referring to the purported oral endorsement of the doctor. It appears that the police officer was in full command of the situation and with a view to fill up the legal lacuna, he later on secured the endorsement from the doctor (PW-16) on the available space of the paper, which is ex-facie unusual and not in line with settled legal procedure.

Sixthly, the alleged motive for the homicidal death is highly doubtful. There is not an iota of evidence, and the prosecution has made no effort to verify the truth in the statement that the Appellants poured kerosene and lit the victim on fire only because her son had assaulted the husband of Appellant No. 1 and the Accused were insisting on payment of Rs. 4,000/- which was spent on the treatment of the said assault-victim. Not much can be said when the deceased's own son and daughter-in-law have denied this incident and rather claimed that their mother/mother-in-law committed suicide.

The Seventh reason to dissuade us from harping upon Ex. P-5 is the conduct of the parties, i.e., a natural recourse expected to happen. Had it been a case of homicidal death, and the victim's son (PW-2) and her daughter-in-law (PW-5) had witnessed the occurrence, then in all probabilities, they would have, while making arrangement to take the injured to hospital, definitely attempted to lodge a complaint to the police. Contrarily, the evidence of the doctor and the police officer suggest that while the son, daughter-in-law and neighbour of the deceased were present in the hospital, none approached the police to report such a ghastly crime. It is difficult to accept that the son and daughter-in-law of the deceased were won over by the Accused persons within hours of the occurrence. This unusual conduct and behaviour lends support to the parallel version that the victim might have committed suicide.

The Eighth reason which makes us reluctant to accept the contents of purported dying declaration (Ex. P-5), is the fact that victim, Jayamma was brought to the Civil Hospital at 12.30 a.m. on 22.09.1998. She succumbed to her burn injuries after almost 30 hours later at 5:30 am on 23.09.1998. It is neither the case of prosecution nor has it been so stated by PW-11 or PW-16 that soon after recording her statement (Ex. P-5) she became unconscious or went into coma. The prosecution, therefore, had sufficient time to call a Judicial/Executive Magistrate to record the dying declaration. It is common knowledge that such Officers are judicially trained to record dying declarations after complying with all the mandatory pre-requisites, including certification or endorsement from the Medical Officer that the victim was in a fit state of mind to make a statement. We hasten to add that the law does not compulsorily require the presence of a Judicial or Executive Magistrate to record a dying declaration or that a dying declaration cannot be relied upon as the solitary piece of evidence unless recorded by a Judicial or Executive Magistrate. It is only as a Rule of prudence, and if so permitted by the facts and circumstances, the dying declaration may preferably be recorded by a Judicial or Executive Magistrate so as to muster additional strength to the prosecution case.

The Additional Session Judge, Chitradurga in his judgment dated 30.11.2001 formulated point No. 1 as to whether the prosecution was able to prove beyond all reasonable doubt that the Accused persons with an intention to kill Jayamma went to her house and picked up a quarrel in connection with a previous dispute and then doused her with kerosene and set her ablaze. The Additional Sessions Judge extensively examined the entire evidence and after reaching to the conclusion that all the witnesses of the motive or the occurrence have resiled and declared hostile, he was left with the residuary question to decide as to whether the death was suicidal or homicidal. He, thereafter, considered the dying declaration (Ex. P-5) threadbare and critically analysed the statements of the police officer (PW-11) and the doctor (PW-16). The factors like (i) interpolation in the dying declaration Ex. P-5, (ii) contradiction in the statements of PW-11 and PW-16 regarding injuries on the palm, (iii) the victim with 80% injuries was apparently not in a situation to talk or give statement, (iv) PW-2, son of the deceased himself has stated that his mother committed suicide as she could not bear that her another son had been sent to jail, (v) there being no corroborative evidence to the statement Ex. P-5, and (vi) there is no other evidence led by the prosecution to connect the Appellants with the crime except the statement Ex. P-5, he held it unsafe to convict the Appellants on the solitary basis of the dying declaration (Ex. P-5).

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185. EVIDENCE ACT, 1872 – Section 32

APPRECIATION OF EVIDENCE:

Dying declaration; use of FIR as – Reliability of – Deceased lodged FIR himself explaining the incident at 11:10 p.m. – He was then sent to Community Health Center where he was examined at 12:40 a.m. and later succumbed to injuries at 01:00 a.m. – Medical officer explained that deceased was alive when he conducted MLC, however, his blood pressure was not detected – It cannot be said that deceased was not in a position to record FIR two hours earlier – There was sufficient corroborative evidence on record – FIR rightly relied upon as dying declaration.

साक्ष्य अधिनियम, 1872 – धारा 32

साक्ष्य का मूल्यांकनः

मृत्युकालिक कथन के रूप में प्रथम सूचना रिपोर्ट का उपयोग – विश्वसनीयता – मृतक ने रात्रि 11:10 बजे घटना का वर्णन करते हुए स्वयं प्रथम सूचना रिपोर्ट लेख कराई – फिर उसे सामुदायिक स्वास्थ्य केन्द्र भेजा गया जहां 12:40 बजे उसकी एमएलसी की गई और बाद में रात्रि 01:00 बजे चोटों के कारण उसकी मृत्यु हो गई – चिकित्साधिकारी ने प्रकट किया कि जब उन्होंने एमएलसी की थी तो मृतक जीवित था, यद्यपि उसका रक्तचाप दर्ज नहीं हुआ था – यह नहीं कहा जा सकता है कि मृतक दो घंटे पूर्व प्रथम सूचना रिपोर्ट लेख कराने की स्थिति में नहीं था – अभिलेख पर

पर्याप्त पुष्टिकारक साक्ष्य थी – प्रथम सूचना रिपोर्ट उचित ही मृत्युकालिक कथन के रूप में स्वीकार की गई।

Devilal and ors. v. State of Madhya Pradesh

Judgment dated 25.02.2021 passed by the Supreme Court in Criminal Appeal No. 989 of 2007, reported in AIR 2021 SC 2479 (Three Judge Bench)

Relevant extracts from the judgment:

The instant crime arose out of F.I.R. No. 212 of 1998 registered at 11.10 p.m. on 19.07.1998 with Police Station Manasa, District Neemach, Madhya Pradesh. The reporting made by one Ganeshram was to the following effect:

I am resident of village Khera Kushalpura. On 14.7.98, there had been quarrel between Devilal son of Jetram Gurjar and me in village Khera Kusalpura. Today, in the evening I was coming from Binabas after doing my work and going by walk to my house. At about 8 p.m., while going towards my house on public road when I had reached in front of the house of Devilal Gurjar then after seeking me Devilal armed with Kulhari, his son Gokul armed with Talwar and Amritlal armed with lathi had come there. Devilal had abused me and called me as Chamar and stated that Chamars have advanced too much. He told me that he shall finish me. He had attacked me from sharp side of Kulhari with intention to kill me. The first blow hit me on the bone (calf) of right leg. Gokul had given second sword blow on my bone (calf) of left leg. My both legs were cut and I fell down there itself. Then Amritram had given lathi blow on my right fist and left hand and my right fist was fractured. These persons had again called me Chamar and told me that if I shall fight with them again. They had kicked me on my face below both eyes and there is swelling. Then I shouted for help. My mother Gattu Bai, wife Sajan Bai and sister-in-law Saman Bai had run from home and reached there, they protected me. When Saman Bai was protecting me then Devilal had given blow on her left elbow. Later, my mother, wife and sister-in-law lifted me and taken me to home. Kanhaiyalal had brought tractor from Barbua. ...Satyanarain, my sister-in-law Saman Bai have put me in the tractor and brought me to police station. I am lodging report, I have heard the report, it is correct. Action may be taken. My hand is fractured and I cannot sign. I have put my thumb impression.

The aforesaid FIR was recorded by PW8-Shankar Rao, who, then took Ganeshram along with Tehsildar to Community Health Centre, Manasa, where PW9-Dr. Kailash Chandra Kothari examined injured Ganeshram. It was found that the general condition of the injured was not good; that he was unable to speak; and that his blood pressure could not be recorded. The injuries found on the person of Ganeshram were recorded in report Exhibit P/23 and Ganeshram was referred to Surgical Specialist, District Hospital, Mandasaur vide Reference Form Exhibit P/25 at about 12.45 a.m. on 20.07.1998. However, while PW9-Dr. Kothari was completing the formalities, Ganeshram expired at 1.00 a.m.. PW9-Dr. Kothari, therefore, recorded the information of death in Exhibit P/26 under his signature.

The testimony of PW9-Dr. Kothari, shows that Ganeshram was alive when the initial examination was undertaken by PW9-Dr. Kothari. According to the witness, when he examined Ganeshram, the blood pressure could not be detected. However, that by itself does not mean that Ganeshram was not in a physical condition to make any reporting to the police two hours earlier. Paragraph 24 of the deposition of PW9-Dr Kothari shows that if the symptoms stated therein were present, it could possibly be said that the concerned person would not be in a position to speak. First of all, such assertion is purely an opinion of an expert. Secondly, nothing is available on record to show that Ganeshram had shown these symptoms either soon after the incident or when his statement was recorded by PW8 Shankar Rao. No questions were put to PW1-Sajan Bai, PW2 Saman Bai and PW8-Shankar Rao in that behalf. We, therefore, reject the submission advanced on this score and find that the FIR was rightly relied upon by the courts below as dying declaration on part of Ganeshram.

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186. EVIDENCE ACT, 1872 – Sections 92 and 95

Exclusion of oral evidence by documentary evidence – Applicability of proviso to section 92 and section 95 – Proviso cannot be applied to nullify the main section – Where document is straight forward and presents no difficulty in construing it, the proviso does not apply to prove a fact to show in what manner language of document is related to existing facts – Instantly, contract mandated continuation of existing business in the name of "Karandikar Brothers" by paying royalty of ₹ 90 per month – Held, document was license for continuing existing business and no extrinsic parole evidence may be allowed to show that it was lease/license of shop.

साक्ष्य अधिनियम, 1872 – धाराएं 92 एवं 95

दस्तावेजी साक्ष्य द्वारा मौखिक साक्ष्य का अपवर्जन – धारा 92 के परंतुक व धारा 95 की प्रयोज्यता – मुख्य धारा को अकृत करने के लिए परंतुक लागू नहीं किया जा सकता है – जहां दस्तावेज स्पष्ट हो और इसे समझने में कोई कठिनाई नहीं हो, वहां परंतुक किसी तथ्य को साबित करने के लिए लागू नहीं होगा कि दस्तावेज की भाषा मौजूदा तथ्यों से किस तरह संबंधित है – हस्तगत मामले में, अनुबंध ''करंदीकर ब्रदर्स'' के नाम से मौजूदा व्यवसाय को जारी रखने के लिए ₹ 90 प्रति माह की रॉयल्टी का भुगतान करने से संबंधित था – अवधारित, दस्तावेज मौजूदा व्यवसाय को जारी रखने के लिए लाइसेंस था और किसी बाह्य मौखिक साक्ष्य की यह प्रमाणित करने के लिए अनुमति नहीं दी जा सकती है कि यह दुकान का पट्टा/लाइसेंस था।

Mangala Waman Karandikar (Dead) Through LRs. v. Prakash Damodar Ranade

Judgment dated 07.05.2021 passed by the Supreme Court in Civil Appeal No. 10827 of 2010, reported in AIR 2021 SC 2272 (Three Judge Bench)

Relevant extracts from the judgment:

It is manifest from Sections 92 and 95 that it is only in cases where the terms of the document leave the question in doubt, then resort could be had to the proviso. But when a document is a straightforward one and presents no difficulty in construing it, the proviso does not apply. In this regard, we may state that section 95 only builds on the proviso 6 of section 92.

If the contrary view is adopted as correct it would render section 92 of the Evidence Act, otiose and also enlarge the ambit of proviso 6 beyond the main Section itself. Such interpretation, provided by the High Court violates basic tenants of legal interpretation.

In line with the law laid down, it is clear that the contract mandated continuation of the business in the name of 'Karandikar Brothers' by paying royalties of Rs. 90 per month. Once the parties have accepted the recitals and the contract, the respondent could not have adduced contrary extrinsic parole evidence, unless he portrayed ambiguity in the language. It may not be out of context to note that the extension of the contract was on same conditions.

On consideration of the matter, the High Court erred in appreciating the ambit of section 95, which led to consideration of evidence which only indicates breach rather than ambiguity in the language of contract. The evidence also points that the license was created for continuation of existing business, rather than license/lease of shop premises. If the meaning provided by the High Court is accepted, then it would amount to Courts substituting the bargain by the parties. The counsel for respondent has emphasized much on the receipt of payment, which mentions the term 'rent received'. However, in line with the clear unambiguous language of the contract, such evidence cannot be considered in the eyes of law.

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187. FAMILY COURTS ACT, 1984 – Section 7(1) Explanation (g)
Jurisdiction – Custody of child – The procedure prescribed by law must be followed by the Family Court while conducting any inquiry – There must be fairness and transparency in inquiry and mandatory procedural requirements should not be overlooked.

कुटुम्ब न्यायालय अधिनियम, 1984 – धारा 7(1) स्पष्टीकरण (छ)
क्षेत्राधिकार – बालक की अभिरक्षा – कुटुम्ब न्यायालय को जांच करते समय विधि द्वारा विहित प्रक्रिया का अवश्यमेव पालन करना चाहिए – ऐसी जांच में निष्पक्षता और पारदर्शिता होना आवश्यक है तथा अनिवार्य प्रक्रियात्मक आवश्यकताओं को अनदेखा नहीं करना चाहिए।

Aman Lohia v. Kiran Lohia
Judgment dated 17.03.2021 passed by the Supreme Court in Transferred Case (Civil) No. 25 of 2021, reported in AIR 2021 SC 1748

Relevant extracts from the judgment:

The Family Court is obliged to inquire into the matter as per the procedure prescribed by law. It does not have plenary powers to do away with the mandatory procedural requirements in particular, which guarantee fairness and transparency in the process to be followed and for adjudication of claims of both sides. The nature of inquiry before the Family Court is, indeed, adjudicatory. It is obliged to resolve the rival claims of the parties and while doing so, it must adhere to the norms prescribed by the statute in that regard and also the foundational principle of fairness of procedure and natural justice.

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188. HINDU MARRIAGE ACT, 1955 – Section 13(1)

(i) Ground of divorce – Mental cruelty – Determination of – Held, result of mental cruelty must be such that it is not possible to continue with the matrimonial relationship – The degree of tolerance will vary from couple to couple – Factors such as level of education, status of parties and background to be considered while determining sufficiency of alleged cruelty.

(ii) Ground of divorce – Mental cruelty – Wife made several defamatory complaints against husband to his superior officers – Resultantly, his career progression affected – Wife also made complaints to other authorities and posted defamatory material on other platform which harmed the reputation of husband – Parties were highly educated, wife a faculty in Govt. PG College with PhD degree and husband, an army officer with M.Tech. degree – Held, husband cannot be expected to continue with the matrimonial relationship and it is definite case of cruelty inflicted by wife against husband.

हिन्दू विवाह अधिनियम, 1955 – धारा 13(1)

(i) विवाह–विच्छेद का आधार – मानसिक क्रूरता – निर्धारण – अभिनिर्धारित, मानसिक क्रूरता का परिणाम ऐसा होना चाहिए कि वैवाहिक संबंध जारी रखना संभव न हो – सहिष्णुता का स्तर युगल–युगल में भिन्न होगा – शिक्षा के स्तर, पक्षकारों की सामाजिक स्थिति और पृष्ठभूमि जैसे कारक कथित क्रूरता की पर्याप्तता का निर्धारण करते समय विचार में लिये जाने चाहिए।

(ii) विवाह–विच्छेद का आधार – मानसिक क्रूरता – पत्नी ने पति के विरुद्ध उसके वरिष्ठ अधिकारियों को कई अपमानजनक शिकायतें कीं – परिणामस्वरूप, उसके करियर की प्रगति प्रभावित हुई – पत्नी ने अन्य अधिकारियों को भी शिकायत की और अन्य मंच पर अपमानजनक सामग्री पोस्ट की जिससे पति की प्रतिष्ठा को नुकसान हुआ – पक्षकार उच्च शिक्षित थे, पत्नी पीएचडी डिग्री के साथ शासकीय पीजी कॉलेज में संकाय सदस्य थी और पति एम.टेक डिग्री के साथ सेना में

अधिकारी था – अभिनिर्धारित, पति से वैवाहिक संबंध जारी रखने की उम्मीद नहीं की जा सकती है और यह पति के साथ पत्नी द्वारा की गई क्रूरता का स्पष्ट मामला है।

Joydeep Majumdar v. Bharti Jaiswal Majumdar
Judgment dated 26.02.2021 passed by the Supreme Court in Civil Appeal No. 3786 of 2020, reported in (2021) 3 SCC 742 (Three Judge Bench)

Relevant extracts from the judgment:

For considering dissolution of marriage at the instance of a spouse who allege mental cruelty, the result of such mental cruelty must be such that it is not possible to continue with the matrimonial relationship. In other words, the wronged party cannot be expected to condone such conduct and continue to live with his/her spouse. The degree of tolerance will vary from one couple to another and the Court will have to bear in mind the background, the level of education and also the status of the parties, in order to determine whether the cruelty alleged is sufficient to justify dissolution of marriage, at the instance of the wronged party. In ***Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511***, this Court gave illustrative cases where inference of mental cruelty could be drawn even while emphasising that no uniform standard can be laid down and each case will have to be decided on its own facts.

The materials in the present case reveal that the respondent had made several defamatory complaints to the appellant's superiors in the Army for which, a court of inquiry was held by the Army authorities against the appellant. Primarily for those, the appellant's career progress got affected. The respondent was also making complaints to other authorities, such as, the State Commission for Women and has posted defamatory materials on other platforms. The net outcome of above is that the appellant's career and reputation had suffered.

When the appellant has suffered adverse consequences in his life and career on account of the allegations made by the respondent, the legal consequences must follow and those cannot be prevented only because, no court has determined that the allegations were false. The High Court, however, felt that without any definite finding on the credibility of the wife's allegation, the wronged spouse would be disentitled to relief. This is not found to be the correct way to deal with the issue.

Proceeding with the above understanding, the question which requires to be answered here is whether the conduct of the respondent would fall within the realm of mental cruelty. Here the allegations are levelled by a highly educated spouse and they do have the propensity to irreparably damage the character and reputation of the appellant. When the reputation of the spouse is sullied amongst his colleagues, his superiors and the society at large, it would be difficult to expect condonation of such conduct by the affected party.

The explanation of the wife that she made those complaints in order to protect the matrimonial ties would not in our view, justify the persistent effort made by her to undermine the dignity and reputation of the appellant. In circumstances like this, the wronged party cannot be expected to continue with the matrimonial relationship and there is enough justification for him to seek separation.

Therefore, we are of the considered opinion that the High Court was in error in describing the broken relationship as normal wear and tear of middle class married life. It is a definite case of cruelty inflicted by the respondent against the appellant and as such enough justification is found to set aside the impugned judgment of the High Court and to restore the order passed by the Family Court. The appellant is accordingly held entitled to dissolution of his marriage and consequently the respondent's application for restitution of conjugal rights stands dismissed.

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

Waiver of period – The statutory period mentioned in the section 13-B(2) may be waived by the Court after its satisfaction in case of mutual consent.

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

अवधि की छूट – न्यायालय द्वारा आपसी सहमति के प्रकरण में अपनी संतुष्टि के पश्चात् धारा 13–ख(2) में उल्लेखित वैधानिक अवधि में छूट दी जा सकती है।

Swati Singh Parmar v. Vinay Pratap Singh

Judgment dated 24.03.2021 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 960 of 2021, reported in 2021 (1) ANJ (MP) 313

Relevant extracts from the judgment:

Where the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B (2), it can do so after considering the following [***Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746***]:

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

(ii) All efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

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

(iv) The waiting period will only prolong their agony.

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190. HINDU SUCCESSION ACT, 1956 – Section 8
COMPANIES ACT, 2013 – Sections 241 and 242

(i) Dispute as to succession of shares of company – Jurisdiction of Civil Court or NCLT – Held, question of right, title and interest is essentially adjudication of civil rights between the parties – Civil Court has the jurisdiction to entertain such disputes.

(ii) Succession – Disowning of son by father or family – Effect of – Held, mere disowning of son does not deprive a son any right in property to which he is otherwise entitled to under law.

हिन्दू उत्तराधिकार अधिनियम, 1956 – धारा 8
कम्पनी अधिनियम, 2013 – धाराएं 241 एवं 242

(i) कंपनी के शेयरों के उत्तराधिकार का विवाद – सिविल न्यायालय अथवा एनसीएलटी का क्षेत्राधिकार – अधिकार, स्वत्व और हित का प्रश्न वस्तुतः पक्षकारों के मध्य के सिविल अधिकारों का निर्णयन है – ऐसे विवाद पर विचार करने की अधिकारिता सिविल न्यायालय को है।

(ii) उत्तराधिकार – पिता या परिवार द्वारा पुत्र का त्याग करने का प्रभाव – अवधारित, मात्र पुत्र का त्याग करने से पुत्र को उस संपत्ति के किसी भी अधिकार से वंचित नहीं किया जा सकता है जिसका वह अन्यथा विधि अनुसार अधिकारी है।

Aruna Oswal v. Pankaj Oswal and ors.

Judgment dated 06.07.2020 passed by the Supreme Court in Civil Appeal No. 9340 of 2019, reported in (2020) 8 SCC 79

Relevant extracts from the judgment:

It is admitted by respondent 1 that he was not involved in day-to-day affairs of the company and had shifted to Australia to set up his independent business w.e.f. 2001. His grievance is that the family had not recognised him as holder of the one-fourth shares. They were registered in the ownership of his mother Mrs. Aruna Oswal; that also he had submitted to be an act of oppression. He acquired 0.03% share capital after filing of the civil suit, otherwise he was not having any shareholding in M/s Oswal Agro Mills Ltd.

In ***Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, (2005) 11 SCC 314***, it was held that the dispute as to inheritance of shares is eminently a civil dispute and cannot be said to be a dispute as regards oppression and/or mismanagement so as to attract the Company Court's jurisdiction under Sections 397 and 398. Adjudication of the question of ownership of shares is not contemplated under Section 397.

In view of the aforesaid decision in ***Sangramsinh*** (supra), we are of the opinion that the basis of the petition is the claim by way of inheritance of 1/4th shareholding so as to constitute 10% of the holding, which right cannot be decided in proceedings under Sections 241/242 of the Act. Thus, filing of the

petition under Sections 241 and 242 seeking waiver is a misconceived exercise, firstly, respondent 1 has to firmly establish his right of inheritance before a civil court to the extent of the shares he is claiming; more so, in view of the nomination made as per the provisions contained in Section 71 of the Companies Act, 2013.

The question of right, title, and interest is essentially adjudication of civil rights between the parties, as to the effect of the nomination decision in a civil suit is going to govern the parties' rights. It would not be appropriate to entertain these parallel proceedings and give waiver as claimed under Section 244 before the civil suit's decision.

x x x

Merely disowning a son by late father or by the family, is not going to deprive him of any right in the property to which he may be otherwise entitled in accordance with the law. The pertinent question needs to be tried in a civil suit and adjudicated finally, it cannot be decided by NCLT in proceedings in question.

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191. INDIAN PENAL CODE, 1860 – Sections 34, 201, 302, 342, 364 and 365 EVIDENCE ACT, 1872 – Section 6

Murder – Abduction – There should be no interference in conviction when it was proved beyond reasonable doubt that deceased was last seen with the accused and in the course of investigation, ransom letter was also discovered at the instance of accused and dead body of deceased was also found in the room of accused.

भारतीय दण्ड संहिता, 1860 – धाराएं 34, 201, 302, 342, 364 एवं 365 साक्ष्य अधिनियम, 1872 – धारा 6

हत्या – अपहरण – जब युक्तियुक्त संदेह से परे यह साबित कर दिया गया हो कि मृतक अंतिम बार अभियुक्त के साथ देखा गया था और अनुसंधान के दौरान मुक्ति धन (फिरौती) संबंधी पत्र भी अभियुक्त से प्राप्त जानकारी पर प्राप्त किया गया था और मृतक का शरीर भी अभियुक्त के ही कमरे में पाया गया तब ऐसी परिस्थितियों में की गई दोषसिद्धि में कोई हस्तक्षेप नहीं किया जाना चाहिए।

Sachin Vishnu Prasad Namdeo v. State of Madhya Pradesh

Judgment dated 09.03.2021 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 1407 of 2014, reported in 2021 CriLJ 2129 (DB)

Relevant extracts from the judgment:

The facts that the appellant was last seen in the company of the deceased and that the letter of ransom was recovered on his instance, were rightly found proved by the trial Court. This leaves no scope for interference in the finding of guilt recorded by the trial Court.

Recovery of a letter written to demand money to release the abductee is more than enough to establish the motive and clean antecedent cannot be a ground for acquittal. Therefore, both these grounds taken by the appellant are also not helpful for him.

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192. INDIAN PENAL CODE, 1860 – Sections 107 and 306

Abetment of suicide – When the abetted follows such course of action which was intended or desired by the abettor, then only conviction of the accused can be held for abetment of the offence but this must be proved beyond reasonable doubt by the prosecution.

भारतीय दण्ड संहिता, 1860 – धाराएं 107 एवं 306

आत्महत्या का दुष्प्रेरण – जब दुष्प्रेरित ऐसी कार्यवाही का अनुसरण करता है जो कि दुष्प्रेरक द्वारा आशयित अथवा प्रभावित थी, केवल तभी अभियुक्त की दोषसिद्धि अपराध के दुष्प्रेरण हेतु की जा सकती है परन्तु अभियोजन द्वारा इसे युक्तियुक्त संदेह से परे अवश्य साबित किया जाना चाहिए।

Shivcharan v. State of Madhya Pradesh

Judgment dated 20.01.2021 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 8469 of 2019, reported in 2021 CriLJ 1772

Relevant extracts from the judgment:

As regards the offence of abetment of suicide punishable u/s 306 IPC, it is imperative that it must satisfy the ingredients of Section 107 of IPC. The ingredients of abetment are given in Section 107 IPC. Abetment can be effected by three means:

(a) By instigation

(b) By illegal act or omission pursuant to a conspiracy, and

(c) By participation.

The offence of abetment falls in the category of "Inchoate Offences". In criminal jurisprudence, inchoate offences are a species which are also known as "incomplete" or "incipient offences". Those guilty of the same fall under Principals in the Second degree (present at the scene of occurrence and "assisting" or "instigating" the principal offender) or Third degree (as in a conspirator or instigator - not present at the scene of occurrence) and may be guilty even where the principal offence intended has not attained fruition. In such offences, what remains inchoate or incomplete is the principal offence intended. However, the abettor may still be liable for punishment as the offence of abetment is complete against the abettor. Besides the offence of abetment, the other offence is "attempt" which also falls under this category of offences.

Instigation is the actus reus by the abettor on the abetted, where the abettor intends/desires or has sufficient knowledge, that the abetted would follow a particular course of action, in the manner desired or intended by the abettor. It is only in such a circumstance, proved beyond reasonable doubt by evidence, that the accused can be held guilty of having abetted the offence.

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193. INDIAN PENAL CODE, 1860 – Sections 120-B and 302
EVIDENCE ACT, 1872 – Sections 3, 8, 10 and 106
APPRECIATION OF EVIDENCE:

Murder – Circumstantial evidence – Application of motive, last seen theory, criminal conspiracy and burden of proof; explained – Deceased was newly wedded bride and was returning to her parental home as pillion rider on the scooter with her brother-in-law accused-S – Allegedly, on the way she was ambushed and taken to a sugarcane field by two armed miscreants and shot from close range and looted – Accused-S then drove the scooter to deceased's parental home, informed her father about the incident and returned to his home and informed his brother and father, who are co-accused persons – FIR was lodged by father of deceased against accused persons alleging maltreatment of deceased – Prosecution relied upon motive, last seen, criminal conspiracy and burden of proving facts within knowledge – Held, accused-husband was unhappy with deceased wife for her looks does not provide strong enough motive to conspire to kill her – Accused-S never fled and on being confronted with armed miscreants, chose to not to be valiant and drove down to inform deceased's father; this is a plausible human conduct – Evidence on record does not establish any agreement between accused persons, therefore, conspiracy cannot be inferred – In absence of any acceptable evidence against accused, burden cannot be shifted on accused with aid of Section 106 – Several components are missing in the chain of circumstantial evidence; accused persons held, are entitled to acquittal.

भारतीय दण्ड संहिता, 1860 – धारा 120–ख एवं 302

साक्ष्य अधिनियम, 1872 – धारा 3, 8, 10 एवं 106

साक्ष्य का मूल्यांकनः

हत्या – परिस्थितिजन्य साक्ष्य – हेतुक, अंतिम बार साथ देखा जाना, आपराधिक षड़यंत्र एवं सबूत के भार के सिद्धांत की प्रयोज्यता समझाई गई – मृतका नवविवाहित वधु थी और अपने देवर अभियुक्त–एस के साथ स्कूटर से अपने पैतृक घर लौट रही थी – कथित रूप से रास्ते में दो हथियारबंद बदमाशों द्वारा उसे एक गन्ने के खेत में ले जाया गया और नजदीक से गोली मारकर लूट कारित की – अभियुक्त–एस

मृतका के माता–पिता के घर स्कूटर ले गया, उसके पिता को घटना की सूचना दी और अपने घर लौटकर अपने भाई और पिता को सूचित किया, जो सह–अभियुक्त हैं – मृतका के पिता द्वारा प्रथम सूचना रिपोर्ट दर्ज कराई गई और अभियुक्तगण द्वारा मृतका के साथ दुर्व्यवहार का आक्षेप लगाया – अभियोजन ने हेतुक, अंतिम बार साथ देखा जाना, आपराधिक षड़यंत्र और ज्ञान के भीतर के तथ्यों को साबित करने के भार पर निर्भरता दर्शायी – अवधारित, अभियुक्त–पति की मृतका पत्नी की सुंदरता से अप्रसन्नता उसे मारने का षडयंत्र रचने के लिए पर्याप्त प्रबल हेतुक उत्पन्न नहीं करती है – अभियुक्त–एस कभी नहीं भागा और सशस्त्र बदमाशों से सामना होने पर उसने कोई बहादुरी नहीं दिखाने का चुनाव किया और मृतक के पिता को सूचित करने के लिए चला गया, यह एक संभाव्य मानव आचरण है – अभिलेख पर आई साक्ष्य अभियुक्तगण के मध्य किसी सहमति को स्थापित नहीं करती है, इसलिए, षड़यंत्र का अनुमान नहीं लगाया जा सकता है – अभियुक्त के विरुद्ध किसी भी स्वीकार्य साक्ष्य के अभाव में धारा 106 की सहायता से अभियुक्त पर सबूत का भार स्थानांतरित नहीं किया जा सकता है – परिस्थितिजन्य साक्ष्य की श्रृंखला में कई घटक अनुपस्थित हैं, अतः अभियुक्तगण दोषमुक्ति के पात्र हैं।

Surendra Kumar and anr. v. State of U.P.

Judgment dated 20.04.2021 passed by the Supreme Court in Criminal Appeal No. 449 of 2021, reported in AIR 2021 SC 2342 (Three Judge Bench)

Relevant extracts from the judgment:

The appellants are brothers and are residents of Mahal Village in Meerut District. The appellant No. 2 Ramveer was married on 13.5.1993 to Kamla Rani, whose parental home was in the neighboring village of Phlawada. On 8.8.1993 Kamla Rani, after spending some days with her parents was returning back on the scooter driven by her brother in law Surendra Kumar (appellant No. 1). Some minutes after they started the journey, two armed miscreants on the road between Phlawada and Bathnor ambushed the scooter near the forested area and took Kamla Rani to the roadside sugarcane field of Quasim Ali and shot her from close range and robbed her of the gold and silver ornaments worn on her person. Surendra Kumar then rode the scooter to village Phlawada to inform Baldev, the father of Kamla Rani about the incident. The scooter was left behind with Kamla Rani's father and Surendra then returned to his own village and informed his brother and other family members in the matrimonial home of the deceased, at Village Mahal. Both brothers accompanied by their father, thereafter rushed to the police station. Around the same time, Dhan Singh (PW-1) and Karamveer (PW-2), who were near the site of incident, after hearing the sound of firing went towards the field and they noticed two miscreants (not appellants), removing ornaments from the body of Kamla Rani. The PW1 and PW2 accosted the looters but showing arms, both looters fled from the scene.

The FIR of the incident (which took place around 4.45 pm) was filed at 5.30 pm by Baldev Singh (father of the deceased Kamla Rani) at the Phlawada Police Station. Meanwhile, the appellants and their father Om Prakash also reached the Police Station. Since, maltreatment of the deceased in the matrimonial home was alleged in the FIR, the Appellants were detained in the police lock up and four days later, the police formally arrested all three, on charge of conspiracy and murder. In course of investigation, the police also arrested Rajveer and Shiv Kumar alias Pappu, suspecting them to be the two unknown robbers seen by PW1 and PW2, in the act of removing ornaments from the person of the deceased Kamla Rani.

In any case, even Ramveer's dissatisfaction with his wife may not provide an acceptable and strong enough motive for the husband to conspire and kill Kamla Rani. This is pertinent since no role whatsoever is attributed to the husband by the evidence on record. Ramveer may or may not be having a cordial relation with the deceased but it can't be said with certainty that killing her was the only option available to him to avoid the company of the deceased.

We may now examine the role and conduct of the appellant No. 1 Surendra Kumar who was escorting the deceased from her parental home on his scooter and is the last person seen in the company of the deceased. The Court below however has relied upon Section 106 of the Indian Evidence Act to connect him with the crime. This according to us was the incorrect approach inasmuch as the burden to prove the guilt is always on the prosecution and cannot be shifted to the accused by virtue of Section 106 of the Evidence Act.

The next issue to be considered is whether there was any suspicious conduct of the appellant Surendra Kumar after the incident. Soon after the scooter was ambushed and Kamla Rani was shot dead, the appellant Surendra Kumar straight away rode the scooter to Phlawada village to inform Baldev, the father of the deceased. The post occurrence meeting between the deceased's father Baldev and Surendra, can be gathered from the fact that in the FIR lodged within half an hour of the incident, Baldev had specifically mentioned about absence of injuries on Surendra. The question is whether failure of the brother-in-law to confront the armed attackers and not suffer any injury thereby, can be a circumstance to implicate him. The reaction of witnesses who see violent crime can vary from person to person and to expect a frightened witness to react in a particular manner would be wholly irrational. Equally dangerous would be the approach of the Courts to reach certain conclusion based on their understanding of how a person should react and to draw an adverse inference when the reaction is different from what the Court expected.

Another key link in the chain of circumstances to connect Surendra with the murder was the fact that he was the last person to be seen alive with Kamla Rani and his alleged unnatural conduct after the incident. On being confronted with the armed miscreants, Surendra perhaps was too intimidated to offer any

fight or resistance. The accused did not try to do anything valiant at the place of occurrence and instead straight away drove down to inform the deceased's father, at his village. With this information, Baldev managed to lodge the FIR. The police seized the scooter the next day from Baldev's residence. The scooter was a dowry gift and following the death of the newly married Kamla Rani, Surendra might have considered it appropriate to entrust the scooter to the deceased's father. The FIR and the scooter seizure memo (Exbt. Ka-2) clearly show that Surendra did not run away as it has been assumed by the courts below. Confronted by the armed robbers, Surendra may not have counter attacked to invite injury upon himself but this by itself can't be construed as suspicious conduct. Yet his post incident conduct was found to be suspicious enough by the courts below, to link him with the murder. In the present case, no criminal act is attributed to Surendra and conspiracy between him and the two armed miscreants is not shown. Therefore to link the appellant with the murder is nothing more than a matter of surmises and conjectures.

Similarly for the husband Ramveer, there is no direct evidence to establish his role in the incident. As his conviction is entirely based on a conspiracy theory, it is essential to determine whether there was an agreement between the parties for doing an unlawful act and it must emerge clearly from evidence that there was meeting of mind towards a common goal between Ramveer and his brother and also between Ramveer and the two armed robbers. The case evidence on record does not however establish any such agreement between Ramveer and the other accused. Conspiracy is a matter of inference and inference must be based on solid evidence. In case of any doubt the benefit must inevitably go to the Accused. The 2nd appellant's conviction simply because of his dislike for the deceased, even if accepted to be correct, would not in our opinion be justified in the absence of any evidence either direct or of conspiracy, to link him with the crime.

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194. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Sections 3 and 8
APPRECIATION OF EVIDENCE :

(i) Related witness – Credibility – Being related to the deceased does not necessarily mean that they will falsely implicate innocent persons – The testimony of the related witness, if found to be truthful, can be the basis of conviction.

(ii) Enmity – If the witnesses are otherwise trustworthy, past enmity by itself will not discredit any testimony – In fact the history of bad blood gives a clear motive.

भारतीय दण्ड संहिता, 1860 – धारा 302
साक्ष्य अधिनियम, 1872 – धाराएं 3 एवं 8
साक्ष्य का मूल्यांकनः

(i) संबंधी साक्षी – विश्वसनीयता – मृतक से संबंधी होने का अर्थ आवश्यक रूप से यह नहीं है कि वे निर्दोष व्यक्तियों को मिथ्या आलिप्त करेंगे – संबंधी साक्षी की साक्ष्य यदि सत्यता से युक्त पाई जाती है, तो दोषसिद्धि का आधार हो सकती है।

(ii) रंजिश – यदि साक्षीगण अन्यथा विश्वसनीय हों, तो पूर्व रंजिश अपने आप में उनकी साक्ष्य को अविश्वसनीय नहीं करती है – वास्तव में पूर्व आपसी रंजिश का इतिहास एक स्पष्ट हेतुक देता है।

Karulal and ors. v. State of M.P.

Judgment dated 09.10.2020 passed by the Supreme Court in Criminal Appeal No. 316 of 2011, reported in ILR (2020) MP 2524 (SC) (Three Judge Bench)

Relevant extracts from the judgment:

The testimony of the related witness, if found to be truthful, can be the basis of conviction and we have every reason to believe that PW3 and PW12 were immediately present at the spot and identified the accused with various deadly weapons in their hands.

If the witnesses are otherwise trustworthy, past enmity by itself will not discredit any testimony. In fact the history of bad blood gives a clear motive for the crime. Therefore this aspect does not in our assessment, aid the defence in the present matter.

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195. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3
APPRECIATION OF EVIDENCE:

(i) Contradiction; when not material – Prosecution version states that there was head injury – Injured eye-witnesses deposed that there was no head injury – Post mortem report indicates injury on lower back side of the head – Deceased was assaulted with axe when moving on motorcycle – Held, it cannot be expected that deceased has to be hit on centre of the head – Contradiction is not material.

(ii) Non-seizure of vehicle and gold chain of one victim – Effect – Held, where testimony of key witnesses is found consistent, natural and trustworthy, omission of seizure is no ground to discredit them.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धारा 3

साक्ष्य का मूल्यांकनः

(i) विरोधाभास कब महत्वपूर्ण नहीं – अभियोजन कथानुसार सिर में चोट थी – आहत चक्षुदर्शी साक्षियों ने कथन दिया कि सिर में कोई चोट नहीं थी – शव परीक्षण प्रतिवेदन सिर के निचले हिस्से में चोट का संकेत देती है – मोटरसाइकिल पर चलते समय मृतक पर कुल्हाड़ी से हमला किया गया था – अवधारित, यह अपेक्षा नहीं की जा सकती है कि मृतक के सिर के केंद्र पर प्रहार किया गया हो – विरोधाभास महत्वपूर्ण नहीं है।

(ii) वाहन और एक पीड़ित के सोने की चेन की जप्ती का अभाव – प्रभाव – अवधारित, जहां प्रमुख साक्षियों की साक्ष्य सुसंगत, प्राकृतिक और विश्वसनीय पाई गई हो, जप्ती का अभाव उन्हें अस्वीकार करने का कोई आधार नहीं होगा।

Kalabhai Hamirbhai Kachhot v. State of Gujarat

Judgment dated 28.04.2021 passed by the Supreme Court in Criminal Appeal No. 216 of 2015, reported in AIR 2021 SC 2327

Relevant extracts from the judgment:

The submission of the learned Counsels, that there was no head injury, as deposed by PWs-18 and 19 on the deceased and also as per the postmortem report, as such the deposition of PWs-18 and 19 is to be discarded, cannot be accepted for the reason that the postmortem report indicates injury on the lower back side of the head. An attempt was made to assault the deceased with an axe. We cannot expect that it has to be hit on the centre of the head. It has fallen on the lower back side of the head, same is evident from the postmortem report. At this stage, it is to be noted, that the attack was made on the deceased and injured, when they were moving on motor cycle. As such, it cannot be said that merely because there is no injury on the centre of the head, the testimony of PWs-18 and 19 is to be discarded. The doctor who has conducted the post mortem, has also clearly stated in his deposition that all injuries which were noticed on the deceased were ante mortem.

x x x

The omissions like not seizing the motorcycle and also not seizing the gold chain of one of the victims, by itself, is no ground to discredit the testimony of key witnesses who were examined on behalf of the prosecution, whose say is consistent, natural and trustworthy.

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196. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Sections 3, 8 and 134
APPRECIATION OF EVIDENCE:

(i) Murder trial – Motive; absence of – Effect – Where there is direct evidence in the form of trustworthy and reliable eye-witnesses, absence of motive is insignificant.

(ii) Non-examination of independent witnesses – Effect of – Held, where eye-witnesses have fully supported the case of

prosecution and are found to be trustworthy and reliable, non-examination of independent witnesses is not fatal to the case of prosecution.

(iii) Correction in deposition sheet – In cross-examination the words "not true" were struck off and overwritten as "it is true" – Effect and appreciation – Held, entire paragraph is to be read and not a truncated statement – Instantly, suggestion was given to eye-witness that he was not present in the village and reached there after receiving the information – Correction in deposition sheet suggests that he admitted it to be true – Supreme Court rejected the contention that witness accepted that suggestion in the light of contents of the entire paragraph.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धाराएं 3, 8 एवं 134

साक्ष्य का मूल्यांकनः

(i) हत्या का मामला – हेतुक के अभाव का प्रभाव – जहां दृढ़ और विश्वसनीय चक्षुदर्शी साक्षियों के रूप में प्रत्यक्ष प्रमाण हों, वहां हेतुक का अभाव महत्वहीन होता है।

(ii) स्वतंत्र साक्षियों का परीक्षण न कराना – प्रभाव – अवधारित, जहां चक्षुदर्शी साक्षियों ने अभियोजन के मामले का पूरा समर्थन किया हो और वे दृढ़ एवं विश्वसनीय पाए गए हों, वहां स्वतंत्र साक्षियों का परीक्षण न कराना अभियोजन के मामले के लिए घातक नहीं है।

(iii) बयान शीट में सुधार – प्रतिपरीक्षण में ''गलत है'' शब्दों को काट कर ''सही है'' के रूप में अधिलेखित किया गया – प्रभाव और मूल्यांकन – अवधारित, पूरा पैराग्राफ पढ़ा जाना चाहिए न कि एक छोटा वाक्य – हस्तगत मामले में, चक्षुदर्शी साक्षी को सुझाव दिया गया कि वह गांव में नहीं था और सूचना मिलने के बाद वहां पहुंचा – बयान शीट में यह सुधार किया गया कि साक्षी ने इसे सही माना था – सर्वोच्च न्यायालय ने पूरे पैराग्राफ की अंतर्वस्तु के आलोक में इस तर्क को खारिज कर दिया कि साक्षी ने उक्त सुझाव स्वीकार किया था।

Guru Dutt Pathak v. State of Uttar Pradesh

Judgment dated 06.05.2021 passed by the Supreme Court in Criminal Appeal No. 502 of 2015, reported in AIR 2021 SC 2257

Relevant extracts from the judgment:

So far as the submission on behalf of the accused that no motive has been established and proved is concerned, the High Court has elaborately dealt with the same. The High Court has rightly observed that when there is a direct evidence in the form of eyewitnesses and the eyewitnesses are trustworthy and reliable, absence of motive is insignificant.

One another ground given by the learned trial Court while acquitting the accused was that no independent witness has been examined. The High Court has rightly observed that where there are clinching evidence of eye-witnesses, mere non-examination of some of the witnesses/independent witnesses and/or in absence of examination of any independent witnesses would not be fatal to the case of the prosecution.

In the case of ***Manjit Singh v. State of Punjab, (2019) 8 SCC 529***, it is observed and held by this Court that reliable evidence of injured eyewitnesses cannot be discarded merely for reason that no independent witness was examined.

In the recent decision in the case of ***Surinder Kumar v. State of Punjab, (2020) 2 SCC 563***, it is observed and held by this Court that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that Accused was falsely implicated.

In the case of ***Rizwan Khan v. State of Chhattisgarh, (2020) 9 SCC 627***, after referring to the decision of this Court in the case of ***State of H.P. v. Pardeep Kumar, (2018) 13 SCC 808***, it is observed and held by this Court that the examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case.

Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when, as observed by the High Court, the prosecution witnesses have fully supported the case of the prosecution, more particularly PW2 & PW4 and they are found to be trustworthy and reliable, non-examination of the independent witnesses is not fatal to the case of the prosecution. Nothing is on record that those two persons, namely, Shiv Shankar and Bhagwati Prasad as mentioned in the FIR reached the spot were mentioned as witnesses in the chargesheet. In any case, PW2 & PW4 have fully supported the case of the prosecution and therefore non-examination of the aforesaid two persons shall not be fatal to the case of the prosecution.

We have carefully gone through the depositions of PW2 & PW4 who can be said to be the star witnesses and they are the eyewitnesses to the incident. From the deposition of PW2 (Hindi version, para 9), learned Counsel appearing on behalf of the Appellant has vehemently submitted that the said witness has specifically admitted that at the night of the incident, he was at 291, Malviya Nagar and after receiving the information he reached at the spot. However, there is an overwriting in para 9 and the words “not true” have been struck off by pen and what is overwriting is “it is true”. Who made this overwriting is difficult to say at this stage? Even the aforesaid was not even pointed out and/or submitted before the learned trial Court or even before the High Court. However, if we read the entire para 9 as a whole, it is very difficult to accept that he admitted that he was not present in the village in the morning and therefore his presence can be doubted.

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197. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3
Murder – Motive – No importance should be given to *factum* of motive when prosecution is able to prove beyond reasonable doubt the charge of murder against the accused by clear and material evidence.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धारा 3

हत्या – हेतुक – जब अभियुक्त के विरूद्ध हत्या के आरोप को अभियोजन स्पष्ट और तात्विक साक्ष्य द्वारा युक्तियुक्त संदेह से परे साबित करने में सक्षम हो तब हेतुक को कोई महत्व नहीं दिया जाना चाहिए।

Rahul v. State of Haryana
Judgment dated 03.03.2021 passed by the Supreme Court in Criminal Appeal No. 262 of 2021, reported in 2021 CriLJ 2100

Relevant extracts from the judgment:

If we closely scrutinize the oral evidence on record coupled with the documentary evidence, we are of the considered view that there is a complete chain of evidence which would lead to irresistible conclusion that the appellant accused has committed the offence and none else. Even the recoveries are sufficiently proved with the cogent evidence.

The material evidence on record produced by the prosecution has been further corroborated by call details of mobile phones of Ramesh, Ashok Kumar and Jitender and such call details have been proved by the statement of PW-14. Further, it is also well settled that if other evidence on record clearly establishes that the deceased was murdered by the appellant by using firearm, the factum of motive loses its importance.

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198. INDIAN PENAL CODE, 1860 – Section 324
CRIMINAL PROCEDURE CODE, 1973 – Section 320

(i) Weapon of offence "likely to cause death" – Whether wooden *lathi* and (police) baton can never fall under the category of such weapon? Held, no – It depends on the manner of use of the wooden *lathi* and baton.

(ii) Compounding of offence – Grant of leave by Court – Guiding factors for Court to grant or refuse the leave; explained – Held, nature of offence, its effect on society and abuse of public office are the relevant considerations for the Court – Instantly, police officers brutally beaten the deceased with *lathi* and baton causing his death in police station – Held, these offences cause a sense of fear in entire society, thus, leave to compound refused.

भारतीय दण्ड संहिता, 1860 – धारा 324

दण्ड प्रक्रिया संहिता, 1973 – धारा 320

(i) आक्रामक आयुध जिससे ''मृत्यु कारित होना संभाव्य हो'' – क्या लकड़ी की लाठी और पुलिस का डंडा कभी भी ऐसे हथियार की श्रेणी में नहीं आ सकते हैं? अभिनिर्धारित, नहीं – यह लकड़ी की लाठी और डंडे के उपयोग के तरीके पर निर्भर करता है।

(ii) अपराध का शमन – न्यायालय द्वारा अनुमति दिया जाना – न्यायालय द्वारा अनुमति देने अथवा न देने के लिए मार्गदर्शक कारक समझाए गए – अभिनिर्धारित, अपराध की प्रकृति, समाज पर इसका प्रभाव और लोक पद का दुरुपयोग न्यायालय के लिए प्रासंगिक कारक हैं – हस्तगत मामले में पुलिस अधिकारियों ने मृतक को लाठी और डंडों से बेरहमी से पीटा, जिससे पुलिस थाने में उसकी मृत्यु हो गई – अभिनिर्धारित, ऐसे अपराध पूरे समाज में भय की भावना उत्पन्न करते हैं, अतः शमन की अनुमति अस्वीकार की गई।

Pravat Chandra Mohanty v. State of Odisha and anr.

Judgment dated 11.02.2021 passed by the Supreme Court in Criminal Appeal No. 125 of 2021, reported in (2021) 3 SCC 529

Relevant extracts from the judgment:

Emphasis of the learned counsel for the appellants is that only *lathi* and wooden baton were alleged to have been used as weapons of offence, use of which weapons cannot be said to be likely to cause death. MO-IV was a bamboo *lathi* and MO-VII was a wooden baton. Section 324 IPC uses the examination of "weapon of offence". The submission cannot be accepted that use of wooden *lathi* and baton are weapons which are not likely to cause death. Wooden *lathi* and baton are the weapons which are usually possessed by the police and the submission cannot be accepted that the injuries cannot be caused by wooden lathi and baton which may cause death. It depends on the manner of use of the wooden *lathi* and baton.

x x x

The grant of leave as contemplated by sub-section (5) of Section 320 is not automatic nor it has to be mechanical on receipt of request by the appellant which may be agreed by the victim. The statutory requirement makes it a clear duty of the court to look into the nature of the offence and the evidence and to satisfy itself whether permission should be or should not be granted. The administration of criminal justice requires prosecution of all offenders by the State.

The question arises as to while granting leave of the court for composition of offence, what is the guiding factor for the court to grant or refuse the leave for composition of offence. The nature of offence, and its effect on society are relevant considerations while granting leave by the court of compounding the

offence. The offences which affect the public in general and create fear in the public in general are serious offences, nature of which offence may be relevant consideration for the court to grant or refuse the leave. When we look into the conclusion recorded by the trial court and the High Court after marshalling the evidence on record, it is established that both the accused have mercilessly beaten the deceased in the premises of the police station. Eleven injuries were caused on the body of the deceased by the accused. As per the evidence of PW 1, which has been believed by the courts below, the victim was beaten mercilessly so that he passed stool, urine and started bleeding.

Present is a case where the offence was committed by the in-charge of Police Station Purighat, as well as the Senior Inspector, posted at the same police station. The police of a State is protector of law and order. The people look forward to the police to protect their life and property. People go to the police station with the hope that their person and property will be protected by the police and injustice and offence committed on them shall be redressed and the guilty be punished. When the protector of people and society himself instead of protecting the people adopts brutality and inhumanly beats the person who comes to the police station, it is a matter of great public concern. The beating of a person in the police station is the concern for all and causes a sense of fear in the entire society.

We, thus, are of the considered opinion that present is a case where this Court is not to grant leave for compounding the offences under Section 324 IPC as prayed for by the counsel for the appellants. The present is a case where the accused who were police officers, one of them being in charge of station and other Senior Inspector have themselves brutally beaten the deceased, who died the same night. Their offences cannot be compounded by the Court in exercise of Section 320(2) read with sub-section (5). We, thus, reject the prayer of the appellants to compound the offence.

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***199. LAND ACQUISITION ACT, 1894 – Section 18**

Land acquisition – Determination of compensation – Method of cumulative annual increase; applicability of – It is one of the methods of determining market value, but valuation based on sale deed is normally the safest method.

भू–अर्जन अधिनियम, 1894 – धारा 18

भूमि अधिग्रहण – प्रतिकर का निर्धारण – संचयी वार्षिक वृद्धि की पद्धति की प्रयोज्यता – यह बाजार मूल्य निर्धारित करने की एक पद्धति है, परन्तु विक्रय विलेख के आधार पर मूल्यांकन सामान्य रूप से सबसे सुरक्षित पद्धति है।

Ved and anr. v. State of Haryana and anr.

Judgment dated 08.04.2021 passed by the Supreme Court in Civil Appeal No. 1158 of 2021, reported in AIR 2021 SC 2056

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*200. **LAND REVENUE CODE, 1959 (M.P.) – Section 110**

Mutation – Any registered sale deed cannot be set aside by revenue authority on the ground of balance to be paid – Only competent Civil Court can decide the legality of such registered document.

भू राजस्व संहिता, 1959 (म.प्र.) – धारा 110

नामान्तरण – कोई रजिस्टर्ड विक्रय पत्र प्रतिफल भुगतान बकाया होने के आधार पर राजस्व अधिकारी द्वारा अपास्त नहीं किया जा सकता, ऐसे रजिस्टर्ड दस्तावेज की वैधता का निर्धारण मात्र सक्षम अधिकारिता वाले सिविल न्यायालय द्वारा ही किया जा सकता है।

Ramdev Baba Developers and Builders Pvt. Ltd., Vardha v. Asad Khan

Order dated 13.03.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Petition No. 937 of 2019, reported in AIR 2021 (NOC) 462 (M.P.)

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201. **MOTOR VEHICLES ACT, 1988 – Sections 2(30) and 147(1)**

Motor Insurance – Owner – When any motor vehicle is under possession of a person or corporation under a valid agreement then such person or corporation is called the owner of the vehicle – In such case without impleading the registered owner, the Tribunal can pass award against the insurance company of such vehicle.

मोटर यान अधिनियम, 1988 – धाराएं 2(30) एवं 147(1)

वाहन का बीमा – स्वामी – जब कोई मोटर यान एक वैधानिक अनुबंध के अंतर्गत किसी व्यक्ति या निगम के आधिपत्य में होता है, तब ऐसे व्यक्ति या निगम को उस वाहन का स्वामी कहा जाता है – ऐसे मामले में वाहन के रजिस्टर्ड स्वामी को पक्षकार बनाये बिना अधिकरण द्वारा ऐसे वाहन की बीमा कंपनी के विरूद्ध अवार्ड पारित किया जा सकता है।

Maya and ors. v. Kok Singh and ors.

Judgment dated 14.05.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 1510 of 2009, reported in 2021 ACJ 1187

Relevant extracts from the judgment:

After hearing arguments advanced by learned counsel for the parties and perusing the record, certain facts are crystal clear that Insurance Policy Exhibit D/5-C which is a certificate cum policy schedule bearing number LM-A-06 083195 makes a mention of name and address of the insured. It is also mentioned Smt. Preeti Gupta wife 9 M.A. Nos. 1510/2009, 1595/2009, 1516/2009, 1512/2009, 1513/2009 & CR Nos.141/2009 & 142/2009 of Shri P.N Gupta under agreement with M.D. DVM, MPRTC, Gwalior (M.P.). Therefore, when this policy is read with the provisions

contained under Section 2 (30) of the Motor Vehicles Act, defining "owner", it is crystal clear that even Insurance Company had accepted MPRTC to be the insured and vehicle which was insured being run by MPRTC under agreement as is apparent form the policy which was valid from 25.01.2007 to mid night on 24.01.2008 (Exhibit D/5-C). Even otherwise, as per the definition of "owner", even a person in possession of the vehicle under that agreement is a owner, and therefore, non-impleadment of Smt. Preeti Gupta registered owner is not fatal to the case of claimants, as Road Transport Corporation of the State was impleaded as a party. There is no definition of 'registered owner' under the Motor Vehicles Act and it only defines an "owner". Therefore, the objection in regard to non-impleadment of registered owner deserves to be and is hereby rejected.

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202. MOTOR VEHICLES ACT, 1988 – Sections 147, 185, 203 and 204
EVIDENCE ACT, 1872 – Sections 101, 102 and 106

(i) Drink and drive – Exclusion of liability of insurance company – Whether presence of alcohol in excess of 30 mg per 100 ml of blood is indispensable requirement to enable the insurance company to invoke exclusion clause? Held, no – Alcohol-blood level is not the only way to prove that a person was under the influence of alcohol.

(ii) Drink and drive – Burden of proof in claim case – Driver was smelling of alcohol in MLC – What was the nature and quantity of alcohol consumed and place where it was consumed are facts within the special knowledge of driver – It would be disproportionately difficult for the insurance company to prove these facts.

मोटरयान अधिनियम, 1988 – धाराएं 147, 185, 203 एवं 204
साक्ष्य अधिनियम, 1872 – धाराएं 101, 102 एवं 106

(i) मदिरा पीकर वाहन चलाना – बीमा कंपनी के दायित्व का अपवर्जन – क्या प्रति 100 मिलीलीटर रक्त में 30 मिलीग्राम से अधिक अल्कोहल की उपस्थिति बीमा कंपनी द्वारा अपवर्जन खण्ड लागू करने के लिए अनिवार्य आवश्यकता है? अभिनिर्धारित, नहीं – मदिरा–रक्त स्तर यह साबित करने का एकमात्र तरीका नहीं है कि कोई व्यक्ति मदिरा के प्रभाव में था।

(ii) मदिरा पीकर वाहन चलाना – दुर्घटना दावा के मामले में सबूत का भार – एमएलसी के समय चालक से मदिरा की गंध आ रही थी – मदिरा की प्रकृति और मात्रा क्या थी और वह स्थान जहां इसका सेवन किया गया था, वाहन चालक के विशेष ज्ञान के तथ्य हैं – बीमा कंपनी के लिए इन तथ्यों को साबित करना अनुपातहीन रूप से कठिन होगा।

IFFCO Tokio General Insurance Company Ltd. v. Pearl Beverages Ltd.

Judgment dated 12.04.2021 passed by the Supreme Court in Civil Appeal No. 1526 of 2021, reported in AIR 2021 SC 2277 (Three Judge Bench)

Relevant extracts from the judgment:

In regard to a claim involved in this case, we are of the view that there is nothing in law which would otherwise disentitle the appellant from setting up the case that the exclusion Clause would disentitle the respondent from succeeding. As to whether it is a case of driving of the vehicle under the influence of the alcohol is different matter, altogether. The requirement of Section 185 is in the context of a criminal offence. While it may be true that if there is a conviction u/s 185, it would, undoubtedly, fortify the insurer in successfully invoking Exclusion Clause 2(c), is the reverse also true? We expatiate. If prosecution has not filed a case u/s 185, that would not mean that a competent forum in an action alleging deficiency of service, under the Consumer Protection Act, is disabled from finding that the vehicle was being driven by the person under the influence of the alcohol. The presence of alcohol in excess of 30 mg per 100 ml. of blood is not an indispensable requirement to enable an insurer to successfully invoke the clause. What is required to be proved is driving by a person under the influence of the alcohol. Drunken driving, a criminal offence, u/s 185 along with its objective criteria of the alcohol-blood level, is not the only way to prove that the person was under the influence of alcohol. If the Breath Analyser or any other test is not performed for any reason, the insurer cannot be barred from proving his case otherwise.

x x x

Coming to the question again on burden of proof, insofar as the appellant-insurer seeks to establish exclusion of liability is concerned, the burden of proof is upon it, subject to what we hold.

In the context of question relating to burden of proof, in the case of this nature, we cannot but notice section 106 of the Evidence Act. Section 106 of the Evidence Act speaks of the burden of proving facts which are in the special knowledge of the person. Section 106 of the Evidence Act reads as follows:

106. Burden of proving facts specially within knowledge – When any fact is specially is within knowledge of any person the burden of proving that fact is upon him.

This section enshrines the principle which conduces to establishing facts when those facts are especially within the knowledge of a party. There can be no doubt this is a salutary provision which applies to both civil and criminal matters also.

The respondent set up the case that the driver had not consumed any alcohol. In the very next sentence, it is pleaded that further assuming that he had consumed alcohol, as he was not intoxicated the exclusion Clause is not attracted. When it came to affidavit evidence, however, the driver has not deposed that he had not consumed intoxicating liquor. He has only stated that he was neither under the influence of intoxicating liquor or drugs at the time of the accident. In view of the evidence that pointed to the driver smelling of alcohol and the absence of any evidence by even the driver that he has not consumed alcohol and as even found by the National Commission, it would appear to be clear that the car was driven by the driver after having consumed alcohol. In such a case as to what was the nature of the alcohol and what was the quantity of alcohol consumed, and where he had consumed, it would certainly be facts within the special knowledge of the person who has consumed the alcohol. The driver has not, for instance also, once we proceed on the basis that he has consumed alcohol, indicated when he has consumed the alcohol. It would be "disproportionately difficult" as laid down by this Court for the insurer in the facts to have been proved as to whether the driver has consumed liquor on an empty stomach or he had food and then consumed alcohol or what was the quantity and quality of the drink (alcohol content) which would have been circumstances relevant to consider as to whether he drove the vehicle under the influence of alcohol.

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***203. MOTOR VEHICLES ACT, 1988 – Section 166**

Determination of Compensation – Income of deceased – Deduction – Income of deceased means 'gross income minus statutory deductions' – So the Tribunal can deduct tax from the salary of the deceased and after this deduction, rest of the amount should be treated as income of the deceased.

मोटरयान अधिनियम, 1988 – धारा 166

प्रतिकर का निर्धारण – मृतक की आय – कटौती – मृतक की आय से तात्पर्य है ''वैधानिक कटौतियों को छोड़कर सकल आय'' – अतः अधिकरण द्वारा मृतक के वेतन में से कर की कटौती की जा सकती है और ऐसी कटौती के पश्चात बची हुई राशि को मृतक की आय माना जाना चाहिए।

Jasoda and ors. v. Mahesh and ors.

Judgment dated 05.03.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Appeal No. 4241 of 2010, reported in 2021 ACJ 1256

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***204. MOTOR VEHICLES ACT, 1988 – Section 166**

Motor accident – Determination of compensation – Death claim – Whether self-employed deceased is entitled to future prospects? Held, yes – In case deceased is self-employed and below the age of 40, 40% addition would be made to their income as future prospects.

[*National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680* followed.]

मोटरयान अधिनियम, 1988 – धारा 166

मोटरयान दुर्घटना – प्रतिकर का निर्धारण – मृत्यु दावा – क्या स्वनियोजित मृतक भी भविष्य की संभावना प्राप्त करने का अधिकारी है? अभिनिर्धारित, हाँ – जहां मृतक स्वनियोजित हो एवं 40 वर्ष से कम आयु का हो, वहां उसकी आय में 40 प्रतिशत की वृद्धि भविष्य की संभावना के रूप में की जाएगी।

[*नेशनल इंश्योरेंस कं. लिमि. वि. प्रणय सेठी, (2017) 16 एससीसी 680* अनुसरित।]

Rahul Sharma and anr. v. National Insurance Company Ltd. and ors.

Judgment dated 07.05.2021 passed by the Supreme Court in Civil Appeal No. 1769 of 2021, reported in AIR 2021 SC 2255 (Three Judge Bench)

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205. MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Section 401
CIVIL PROCEDURE CODE, 1908 – Section 80
LAND REVENUE CODE, 1959 (M.P.) – Section 117

(i) Determination of title – Burden of proof – Plaintiff in possession since long time, various permissions granted in favour of him by the State Authorities – The plaintiffs having established a high degree of probability in their favour, the onus had shifted on the defendants to prove the contrary, which they failed to discharge.

(ii) *Khasra* Entries – Evidentiary value – On the strength of *Khasra* entries of certain years, State cannot claim title over the disputed land as it is well settled that an entry in the revenue records is not a document of title.

(iii) Non-issuance of notice u/s 401 – Effect – Objection as to non-issuance of notice u/s 401 of the M.P. Municipal Corporation Act, lost significance in the wake of the Corporation having been issued notice u/s 80 of the CPC – Moreso, when the defendants chose to remain reticent not only at the initial stage but even after framing of issues.

नगरपालिक निगम अधिनियम, 1956 (म.प्र.) – धारा 401

सिविल प्रक्रिया संहिता, 1908 – धारा 80

भू–राजस्व संहिता, 1959 (म.प्र.) – धारा 117

(i) स्वत्व का निर्धारण – सबूत का भार – वादी लंबे समय से आधिपत्य में है, राज्य प्राधिकारियों द्वारा वादीगण के पक्ष में विभिन्न अनुमतियाँ प्रदत्त की गईं – वादीगण द्वारा अपने पक्ष में उच्च श्रेणी की संभाव्यता स्थापित की गई है, प्रतिकूलतः प्रमाणित करने का उत्तरदायित्व प्रतिवादीगण पर अंतरित होता है जिसे पूर्ण करने में वे असफल रहे।

(ii) खसरा प्रविष्टियाँ – साक्ष्यिक मूल्य – कुछ वर्षों की खसरा प्रविष्टियों के बल पर राज्य विवादित भूमि पर स्वत्व का दावा नहीं कर सकता, जैसा कि यह सुस्थापित है कि राजस्व अभिलेखों में की गई प्रविष्टि स्वत्व का दस्तावेज नहीं है।

(iii) धारा 401 के अंतर्गत सूचना–पत्र जारी न करना – प्रभाव – मध्यप्रदेश नगरपालिक निगम अधिनियम की धारा 401 के अंतर्गत सूचना–पत्र जारी न किए जाने की आपत्ति अपना महत्व उस समय खो देती है जबकि निगम को सिविल प्रक्रिया संहिता की धारा 80 के अंतर्गत सूचना पत्र जारी किया गया और वह भी, तब जबकि प्रतिवादीगण ने न केवल प्रारंभिक स्तर से अपितु वाद प्रश्न विरचित किए जाने के उपरांत भी मौन रहना स्वीकार किया।

State of M.P. and anr. v. Smt. Betibai (Dead) Through Her LRs. and anr.

Judgment dated 08.10.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in First Appeal No. 155 of 2001, reported in ILR (2020) MP 2826

Relevant extracts from the judgment:

The learned trial Court, after appreciating the evidence on record found that the defendants could not prove that the Army under the control of the then Maharaja Scindia had not granted the disputed land as reward to Machal Singh, Lal Singh and Bhagwan Singh for their services in Armed forces. They were also bestowed with War Medal, Burma Star, Defence Medal and Scindia Medal. The erstwhile Gwalior State later having merged in the Union of India, the orders passed by Ruler thereof could only have been cancelled by the Government of India and none else. However, there was nothing on record to show that the said document (Ex.P/1) was ever cancelled by any order of the Government. The plaintiffs having established a high degree of probability in their favour, the onus had shifted on the defendants to prove the contrary, which they failed to discharge (***RVE Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P, (2003) 8 SCC 752***, referred to). Moreover, on the strength of Khasra entries of certain years, the State cannot claim title over the disputed land as it is well settled that an entry in the revenue records is not a document of title. Revenue Authorities cannot decide a question of title (***Faqruddin (Dead) through LRs. v. Tajuddin (Dead) through LRs., (2008) 8 SCC 12***, referred to). In this regard, the Apex Court in the case of ***Suraj Bhan v. Financal Commr, (2007) 6 SCC 186*** has held as under:

"It is well settled that an entry in Revenue Records does not confer title on a person whose name appears in Record of Rights. It is settled law that entries in the Revenue Records or Jamabandi have only 'fiscal purpose' i.e. payment of land-revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court (vide ***Jattu Ram v. Hakam Singh and ors., AIR 1994 SC 1653***)"

That apart, this Court is in complete agreement with the reasoning assigned by the learned trial Court that objection as to non issuance of notice under section 401 of the M.P. Municipal Corporation Act lost significance in the wake of the Corporation having been issued notice under section 80 of the CPC, moreso when the defendants chose to remain reticent not only at the initial stage but even after framing of issues. The trial Court rightly held that the purpose of notice is to bring the dispute to the fore of parties, which had already been done; the Corporation having been made party in pursuance of order dated 4/2/1997 of this Court passed in LPA No. 52/1997.

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206. N.D.P.S. ACT, 1985 – Sections 15 and 42

Conviction – Appeal – There should be acquittal in case of total non-compliance of section 42 because total non-compliance of section 42 is impermissible.

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 – धाराएं 15 एवं 42

दोषसिद्धि – अपील – धारा 42 के सम्पूर्ण अननुपालन के प्रकरण में दोषमुक्ति होना चाहिए क्योंकि धारा 42 का सम्पूर्ण अननुपालन अनुज्ञेय नहीं है।

Boota Singh and ors. v. State of Haryana

Judgment dated 16.04.2021 passed by the Supreme Court of India in Criminal Appeal No. 421 of 2021, reported in 2021 (1) ANJ (SC) 387

Relevant extracts from the judgment:

It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act.

The decision of this Court in ***Karnail Singh v. State of Haryana, (2009) 8 SCC 539*** as followed in ***State of Rajasthan v. Jagraj Singh alias Hansa, (2016)11 SCC 687*** is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in ***Karnail Singh*** (supra) but in no case, total non-compliance of Section 42 can be accepted.

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*207. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
CRIMINAL PROCEDURE CODE, 1973 – Section 389
Suspension of Sentence – The Appellate Court can take appropriate decision in the case of non-compliance of the condition of suspension of sentence and the suspension order may be vacated in such circumstances.

परक्राम्य लिखत अधिनियम, 1881 – धारा 138

दण्ड प्रक्रिया संहिता, 1973 – धारा 389

दण्डादेश का स्थगन – दण्डादेश स्थगन की शर्तों का पालन नहीं होने की स्थिति में अपील न्यायालय उचित निर्णय ले सकता है और ऐसी परिस्थितियों में स्थगन आदेश रद्द किया जा सकता है।

Surinder Singh Deswal v. Virender Gandhi and anr.
Judgment dated 08.01.2020 passed by the Supreme Court of India in Criminal Appeal No. 1936 of 2019, reported in 2021 (1) ANJ (SC) 411

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208. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
CRIMINAL PROCEDURE CODE, 1973 – Sections 258 and 322

(i) **Dishonour of cheque – If any Magistrate presumes on the basis of evidence during inquiry or trial that he has no jurisdiction to try the case then in such a situation proceeding of the case must be stayed and case must be submitted with a brief report to Chief Judicial Magistrate u/s 322 CrPC.**

(ii) **Dishonour of cheque – Proceeding cannot be stopped in a case of Section 138 NI Act u/s 258 CrPC – Court of Magistrate has no power to review or recall order of issuance of process.**

परक्राम्य लिखत अधिनियम, 1881 – धारा 138

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 258 एवं 322

(i) चेक अनादरण – यदि कोई मजिस्ट्रेट जांच या विचारण के समय साक्ष्य के आधार पर यह उपधारणा करता है कि उसे विचारण का क्षेत्राधिकार नहीं है तो ऐसी स्थिति में वह दण्ड प्रक्रिया संहिता की धारा 322 के अंतर्गत कार्यवाही को अनिवार्य रूप से स्थगित करते हुए संक्षिप्त प्रतिवेदन के साथ प्रकरण मुख्य न्यायिक मजिस्ट्रेट को प्रेषित करेगा।

(ii) चेक अनादरण – धारा 138 परक्राम्य लिखत अधिनियम के प्रकरण की कार्यवाही धारा 258 दण्ड प्रक्रिया संहिता के अंतर्गत नहीं रोकी जा सकती। मजिस्ट्रेट न्यायालय को आदेशिका जारी करने के आदेश का पुनर्विलोकन करने या ऐसे आदेश को वापस बुलाने की शक्ति नहीं है।

In Re: Expeditious Trial of Cases Under Section 138 of N.I. Act, 1881

Judgment dated 16.04.2021 passed by the Supreme Court in Suo Motu Writ Petition (Criminal) No. 2 of 2020, reported in AIR 2021 SC 1957 (Five Judge Bench)

Relevant extracts from the judgment:

The upshot of the discussion leads us to the following conclusions:

(1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

(2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

(3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

(4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

(5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

(6) Judgments of this Court in ***Adalat Prasad v. Rooplal Jindal, AIR 2004 SC 4674*** and ***Subramanium Sethuraman v. State of Maharashtra, AIR 2004 SC 4711*** have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

(7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in ***Meters and Instruments Private Limited and anr.v. Kanchan Mehta, 2017 (4) Crimes 1 (SC)*** do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

(8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints u/s 138 of the Act shall also be considered by the Committee.

Committee headed by Hon'ble Mr. Justice R.C. Chavan, former Judge of the Bombay High Court as Chairman to consider various suggestions made by the learned Amici Curiae.

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209. PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Section 27
CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Offence of pre-natal sex determination and female foeticide – Bail; entitlement for – Held, gravity of offence and its impact on society along with strong *prima facie* case disentitle accused to be released on bail – No leniency should be granted in such cases.

गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का निषेध) अधिनियम, 1994 – धारा 27

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 437 एवं 439

प्रसव पूर्व लिंग निर्धारण और कन्या भ्रूण हत्या के अपराध – जमानत की पात्रता – अभिनिर्धारित, अपराध की गंभीरता और समाज पर इसके प्रभाव के साथ–साथ ठोस प्रथम दृष्टया मामला अभियुक्त को जमानत पर रिहा करने का पात्र नहीं बनाते हैं – ऐसे मामलों में कोई उदारता नहीं की जानी चाहिए।

Rekha Sengar v. State of Madhya Pradesh
Judgment dated 21.01.2021 passed by the Supreme Court in Special Leave Petition (Criminal) No. 380 of 2021, reported in (2021) 3 SCC 729 (Three Judge Bench)

Relevant extracts from the judgment:

The charge-sheet prima facie demonstrates the presence of a case against the petitioner. A sting operation was conducted upon the order of the Collector, by the member of the PC & PNDT Advisory Committee, Gwalior; the Nodal Officer, PC & PNDT; and lady police officers. The team used the services of an anonymous pregnant woman, who approached the petitioner seeking sex determination of the foetus and sex-selective abortion. The petitioner accepted Rs 7000 for the same whereupon the team searched her residence. From the residence, an ultrasound machine with no registration or licence, adopter and gel used in sex determination, and other medical instruments used during abortion and sex determination were seized. This constitutes sufficient evidence to hold that there is a prima facie case against the petitioner.

In the present case, contrary to the prevailing practice, the investigative team has seized the sonography machine and made out a strong prima facie case against the petitioner. Therefore, we find it imperative that no leniency should be granted at this stage as the same may reinforce the notion that the PC & PNDT Act is only a paper tiger and that clinics and laboratories can carry out sex determination and foeticide with impunity. A strict approach has to be adopted if we are to eliminate the scourge of female foeticide and iniquity towards girl children from our society. Though it certainly remains open to the petitioner to disprove the merits of these allegations at the stage of trial.

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210. PREVENTION OF CORRUPTION ACT, 1988 – Section 12

Bribe giver – FIR – When any complainant pays the bribe money to any public servant for any favourable order and the public servant after accepting bribe money, neither passes order in favour of complainant nor returns the bribe money then in such cases, an offence must be registered against such complainant/bribe giver also by the police under section 12 of the Act – However, such a bribe giver must be distinguished from a person from whom a bribe is demanded and where such person without paying the bribe seeks to trap the person demanding the bribe and approaches the police or the Lokayukta.

भ्रष्टाचार निवारण अधिनियम, 1988 – धारा 12

रिश्वत देने वाला – प्रथम सूचना रिपोर्ट – जब कोई शिकायतकर्ता किसी लोक सेवक से अपने पक्ष में आदेश पारित करने के लिये रिश्वत राशि लोकसेवक को प्रदान करता है और ऐसा लोक सेवक रिश्वत राशि लेने के पश्चात ना तो उसके पक्ष में आदेश पारित करता है और ना ही रिश्वत राशि वापिस करता है तब ऐसे प्रकरणों में पुलिस द्वारा रिश्वत देने वाले शिकायतकर्ता के विरूद्ध भी भ्रष्टाचार निवारण अधिनियम की धारा 12 के अंतर्गत अपराध पंजीबद्ध किया जाना चाहिए – किंतु इस प्रकार की रिश्वत देने वाले व्यक्ति को उस व्यक्ति से अलग समझना चाहिए जिससे रिश्वत की मांग की जाती है और जो रिश्वत दिये बिना रिश्वत मांगने वाले व्यक्ति को पकड़वाने के लिये पुलिस या लोकायुक्त के पास जाता है।

Surajmal & ors v. State of M.P.

Order dated 15.12.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 52490 of 2019, reported in ILR (2021) MP 135

Relevant extracts from the order:

It is cautioned that a bribe giver must be distinguished from a person from whom a bribe is demanded and where such person, without paying the bribe, seeks to trap the person demanding the bribe and approaches the police or the Lok Ayukta, to set a trap for the bribe taker. Such a person is not a bribe giver, but a genuine victim of a dishonest public servant or his agent and needs to be

protected. He is to be distinguished from the person who pays the bribe money and approaches the police later, being aggrieved by the non-return of the bribe money as the work for which it was paid was not done.

In every case where the Complainant alleges the payment of bribe money by him to a public servant or his agent in order to influence the decision of such public servant in favour of the Complainant and where, the Complainant is aggrieved by the non-performance on the part of the public servant and is further aggrieved by the non-return of the bribe money by the public servant or his agent, the police shall register an offence under section 12 of the PC Act against such Complainant/Bribe Giver and proceed against him in accordance with law.

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211. PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)(e)
Preliminary Enquiry – Permissibility – In cases relating to acquiring disproportionate assets to known sources of income, before registering F.I.R., enquiry is not only permissible but also desirable to ascertain the commission of cognizable offence.

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

प्रारंभिक जाँच – अनुज्ञेयता – आय के ज्ञात स्त्रोतों से अनुपातहीन संपत्ति अर्जन के प्रकरणों में प्रथम सूचना प्रतिवेदन लेखबद्ध किये जाने के पूर्व संज्ञेय अपराध का किया जाना सुनिश्चित करने के लिये प्राथमिक जांच न केवल अनुज्ञेय बल्कि आवश्यक भी होती है।

Charansingh v. State of Maharashtra and ors.
Judgment dated 24.03.2021 passed by the Supreme Court in Criminal Appeal No. 363 of 2021, reported in AIR 2021 SC 1620

Relevant extracts from the judgment:

An enquiry at pre-FIR stage is held to be permissible and not only permissible but desirable, more particularly in cases where the allegations are of misconduct of corrupt practice acquiring the assets/properties disproportionate to his known sources of income. After the enquiry/enquiry at pre-registration of FIR stage/preliminary enquiry, if, on the basis of the material collected during such enquiry, it is found that the complaint is vexatious and/or there is no substance at all in the complaint, the FIR shall not be lodged.

However, if the material discloses *prima facie* a commission of the offence alleged, the FIR will be lodged and the criminal proceedings will be put in motion and the further investigation will be carried out in terms of the Code of Criminal Procedure. Therefore, such a preliminary enquiry would be permissible only to ascertain whether cognizable offence is disclosed or not and only thereafter FIR would be registered.

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212. PREVENTION OF MONEY LAUNDERING ACT, 2002 – Sections 2(v), 2(w), 17 and 17(1A)

CRIMINAL PROCEDURE CODE, 1973 – Section 102

Freezing of Bank account – Legality – When the power is available under the special enactment, the question of resorting to the power under the general law does not arise – There is no material placed before the Court to indicate compliance of Section 17 of PMLA – In that view, the freezing or the continuation thereof is without due compliance of the legal requirement and, therefore, not sustainable.

धन–शोधन निवारण अधिनियम, 2002 – धाराएं 2(फ), 2(ब), 17 एवं 17(1क)

दण्ड प्रक्रिया संहिता, 1973 – धारा 102

बैंक खाते पर रोक – वैधता – जहाँ विशेष अधिनियम के तहत् शक्ति उपलब्ध हो तब सामान्य अधिनियम के अंतर्गत शक्तियों के प्रयोग का प्रश्न ही नहीं उठता – न्यायालय के समक्ष ऐसी कोई विषयवस्तु नहीं रखी गई जो धारा 17 पी.एम.एल.ए. अधिनियम के अनुपालन को दर्शित करता हो – इस दृष्टि से विधिक आवश्यकता के अनुपालन के बिना खाते पर रोक लगाना अथवा जारी रखना उचित नहीं है और इसे स्थिर नहीं रखा जा सकता।

OPTO Circuit India Ltd. v. Axis Bank and ors.

Judgment dated 03.02.2021 passed by the Supreme Court in Criminal Appeal No. 102 of 2021, reported in 2021 CriLJ 1636

Relevant extracts from the judgment:

The scheme of the PMLA is well intended. While it seeks to achieve the object of preventing money laundering and bring to book the offenders, it also safeguards the rights of the persons who would be proceeded against under the Act by ensuring fairness in procedure. Hence a procedure, including timeline is provided so as to ensure that power is exercised for the purpose to which the officer is vested with such power and the Adjudicating Authority is also kept in the loop. In the instant case, the procedure contemplated under Section 17 of PMLA to which reference is made above has not been followed by the Officer Authorised. Except issuing the impugned communication dated 15.05.2020 to AML Officer to seek freezing, no other procedure contemplated in law is followed. In fact, the impugned communication does not even refer to the belief of the Authorised Officer even if the same was recorded separately. It only states that the Officer is investigating the case and seeks for relevant documents, but in the tabular column abruptly states that the accounts have to be 'debit freezed/ stop operations'. It certainly is not the requirement that the communication addressed to the Bank itself should contain all the details. But what is necessary

is an order in the file recording the belief as provided under Section 17(1) of PMLA before the communication is issued and thereafter the requirement of Section 17(2) of PMLA after the freezing is made is complied. There is no other material placed before the Court to indicate compliance of Section 17 of PMLA, more particularly recording the belief of commission of the act of money laundering and placing it before the Adjudicating Authority or for filing application after securing the freezing of the account to be made. In that view, the freezing or the continuation thereof is without due compliance of the legal requirement and, therefore, not sustainable.

The learned Additional Solicitor General made a subtle attempt to contend that the power of seizure is available under Section 102 of the Code of Criminal Procedure, which has been exercised and as such the freezing of the account would remain valid. We are unable to appreciate and accept such contention for more than one reason. Firstly, as noted, it has been the contention of Respondent No.4 that PMLA is a stand-alone enactment. If that be so and when such enactment contains a provision for seizure which includes freezing, the power available therein is to be exercised and the procedure contemplated therein is to be complied. Secondly, when the power is available under the special enactment, the question of resorting to the power under the general law does not arise. Thirdly, the power under Section 102 CrPC is to the Police Officer during the course of investigation and the scheme of the provision is different from the scheme under PMLA. Further, even sub-section (3) to Section 102 CrPC requires that the Police Officer shall forthwith report the seizure to the Magistrate having jurisdiction, the compliance of which is also not shown if the said provision was in fact invoked. That apart, the impugned communication dated 15.05.2020 does not refer to the power being exercised under the Code of Criminal Procedure.

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213. SPECIFIC RELIEF ACT, 1963 – Section 16(c)

Specific Performance – Delay – Delay cannot be a sole ground for dismissing a suit for specific performance.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 16(ग)

विनिर्दिष्ट अनुपालन – विलंब – विनिर्दिष्ट अनुपालन का कोई दावा विलंब के एकमात्र आधार पर निरस्त नहीं किया जा सकता।

A. R. Madana Gopal Etc. v. M/s Ramnath Publications Pvt. Ltd. and anr.

Judgment dated 09.04.2021 passed by the Supreme Court in Civil Appeal No. 3523 of 2010, reported in AIR 2021 SC 1886

Relevant extracts from the judgment:

A suit for specific performance cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where an immovable property is to be sold within a certain period, time being of the essence, and it is not found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. Once a suit for specific performance has been filed, any delay as a result of the Court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour even at the appellate stage.

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***214. SPECIFIC RELIEF ACT, 1963 – Section 34**

Will – Declaration – Relief of declaration based on Will should not be granted in favour of such plaintiff who kept mum for 15 years about Will.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 34

वसीयत – घोषणा – किसी वसीयत के संबंध में 15 वर्षों तक चुप रहने वाले वादी के पक्ष में ऐसी वसीयत के आधार पर घोषणा का अनुतोष प्रदान नहीं करना चाहिए।

Jhallu Mann Singh Rathore v. Mani Ram Mangal Singh and ors.

Judgment dated 13.03.2020 passed by the High Court of Madhya Pradesh in Second Appeal No. 1022 of 1996, reported in AIR 2021 (NOC) 477 (M.P.)

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215. SPECIFIC RELIEF ACT, 1963 – Sections 34 and 38

Suit for injunction simpliciter – No declaration of title sought for – Maintainability of – Where defendant admitted peaceful possession of plaintiff, previous suit of defendant for declaration of title and recovery of possession failed, plaintiff not raising any issues as to his title, suit for injunction simpliciter is maintainable.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 34 एवं 38

मात्र निषेधाज्ञा का वाद – स्वत्व घोषणा की वांछा नहीं की गई – वाद की पोषणीयता – जहां प्रतिवादी ने वादी के शांतिपूर्ण आधिपत्य को स्वीकार किया, स्वत्व घोषणा और आधिपत्य वापसी का प्रतिवादी का पूर्व वाद विफल रहा, वादी ने अपने स्वत्व का कोई प्रश्न नहीं उठाया, मात्र निषेधाज्ञा का वाद प्रचलनशील है।

A. Subramanian and anr. v. R. Pannerselvam

Judgment dated 08.02.2021 passed by the Supreme Court in Civil Appeal No. 9472 of 2010, reported in (2021) 3 SCC 675 (Three Judge Bench)

Relevant extracts from the judgment:

In the present case, the possession of the plaintiff was upheld by the High Court on two main reasons. Firstly, the defendant of the suit, Subramanian had earlier filed a suit for recovery of possession and declaration for the same property against Ghani Sahib who was manager of the property which suit was dismissed and recovery of possession having been rejected, the defendant cannot even make a plea to be in possession and secondly, the defendant in his cross-examination himself admitted that the plaintiff after purchase had demolished the construction.

The High Court was also right in its view that it is a common principle of law that even trespasser, who is in established possession of the property could obtain injunction. However, the matter would be different, if the plaintiff himself elaborates in the plaint about title dispute and fails to make a prayer for declaration of title along with injunction relief. The High Court has rightly observed that a bare perusal of the plaint would demonstrate that the plaintiff has not narrated anything about the title dispute obviously because of the fact that in the previous litigation, DW 1 failed to obtain any relief. The High Court has rightly observed that the principle that the plaintiff cannot seek for a bare permanent injunction without seeking a prayer for declaration is not applicable to the facts of the present case.

Coming to the facts in the present case the present suit giving rise to this appeal, was not a suit for declaration of title and possession rather the suit was filed for injunction. As noted above, the High Court has given cogent reasons for holding that the suit filed by the plaintiff for injunction was maintainable without entering into the title of the plaintiff in facts of the present case specially in view of the previous litigation which was initiated at the instance of Defendant 1 where he lost the suit for declaration and recovery of possession of the same property.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

NO. 3 OF 2021

[11th March, 2021]

An Act further to amend the Arbitration and Conciliation Act, 1996.

BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows: –

1. **Short title and commencement.** – (1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2021.

   (2) Save as otherwise provided in this Act, it shall be deemed to have come into force on the 4th day of November, 2020.

2. **Amendment of section 36.** – In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section 36, in sub-section (3), after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from the 23rd day of October, 2015, namely:

   "Provided further that where the Court is satisfied that a prima facie case is made out that,–

   (a) the arbitration agreement or contract which is the basis of the award; or

   (b) the making of the award,

   was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

   Explanation.– For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.".

3. **Substitution of new section for section 43J.** – For section 43J of the principal Act, the following section shall be substituted namely: –

   "**43J**.– Norms for accreditation of arbitrators.– The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.".

4. **Omission of Eighth Schedule. –** The Eighth Schedule to the principal Act shall be omitted.

5. **Repeal and savings. –** (1) The Arbitration and Conciliation (Amendment) Ordinance, 2020 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act.

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

– Abraham Lincoln

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2021

No. 23 of 2021

[7th August, 2021]

An Act to amend the Juvenile Justice (Care and Protection of Children) Act, 2015.

BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:—

1. **Short title and commencement.** – (1) This Act may be called the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021.

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

2. **Amendment of Section 2.** – In section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the principal Act),—

   (i) clause (4) shall be omitted;

   (ii) in clause (14),—

      (a) in sub-clause (ii), after the words "contravention of", the words "the provisions of this Act or" shall be inserted;

      (b) for sub-clause (vi), the following sub-clause shall be substituted, namely:–

      "(vi) who does not have parents and no one is willing to take care of and protect or who is abandoned or surrendered;";

      (c) in sub-clause (ix), for the words "is likely to be", the words "has been or is being or is likely to be" shall be substituted;

   (iii) in clause (17), for the words "Children's Home", the words "child care institution" shall be substituted;

   (iv) in clause (26), for the words "which is the focal point", the words "which shall function under the supervision of the District Magistrate" shall be substituted;

   (v) after clause (26), the following clause shall be inserted, namely:—

   '(26A) "District Magistrate" includes Additional District Magistrate of the District;';

   (vi) in clause (46), the words "the person in-charge of which is willing" shall be omitted;

(vii) for clause (54), the following clause shall be substituted, namely:—

'(54) "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is,—

(a) minimum imprisonment for a term more than three years and not exceeding seven years; or

(b) maximum imprisonment for a term more than seven years but no minimum imprisonment or minimum imprisonment of less than seven years is provided.'.

3. Amendment of Section 3. – In section 3 of the principal Act, for the words "the Board, and", the words "the Board, the Committee, or" shall be substituted.

4. Amendment of Section 4. – In section 4 of the principal Act, in sub-section (7), in clause (iii), for the words "less than", the word "minimum" shall be substituted.

5. Amendment of Section 8. – In section 8 of the principal Act, in sub-section (3), in clause (m), for the words "of such a child to the observation home", the words "that child to an observation home or place of safety, as the case may be," shall be substituted.

6. Amendment of Section 12. – In section 12 of the principal Act, in sub-section (2), after the words "observation home", the words "or a place of safety, as the case may be," shall be inserted.

7. Amendment of Section 16. – In section 16 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) The District Magistrate may, as and when required, in the best interest of a child, call for any information from all the stakeholders including the Board and the Committee.".

8. Amendment of Section 18. – In section 18 of the principal Act, in sub-section (1), after the words "heinous offence,", the words and figures "or a child above the age of sixteen years has committed a heinous offence and the Board has, after preliminary assessment under section 15, disposed of the matter" shall be inserted.

9. Amendment of Section 27. – In section 27 of the principal Act,—

(i) for sub-section (4), the following sub-sections shall be substituted, namely:—

"(4) No person shall be appointed as a member of the Committee unless he has a degree in child psychology or psychiatry or law or social work or sociology or human health or education or human development or special education for differently abled children and has

been actively involved in health, education or welfare activities pertaining to children for seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human health or education or human development or special education for differently abled children.

(4A) No person shall be eligible for selection as a member of the Committee, if he—

(i) has any past record of violation of human rights or child rights,

(ii) has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence,

(iii) has been removed or dismissed from service of the Government of India or State Government or an undertaking or corporation owned or controlled by the Government of India or State Government,

(iv) has ever indulged in child abuse or employment of child labour or immoral act or any other violation of human rights or immoral acts, or

(v) is part of management of a child care institution in a District.";

(ii) in sub-section (7), in clause (iii), for the words "less than", the word "minimum" shall be substituted;

(iii) for sub-section (8),the following sub-section shall be substituted, namely:—

"(8) The Committee shall submit a report to the District Magistrate in such form as may be prescribed and the District Magistrate shall conduct a quarterly review of the functioning of the Committee.";

(iv) for sub-section (10), the following sub-section shall be substituted, namely:—

"(10) The District Magistrate shall be the grievance redressal authority to entertain any grievance arising out of the functioning of the Committee and the affected child or anyone connected with the child, as the case may be, may file a complaint before the District Magistrate who shall take cognizance of the action of the Committee and, after giving the parties an opportunity of being heard, pass appropriate order.".

10. Amendment of section 32. – In section 32 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) The information regarding a child referred to in sub-section (1) shall be uploaded by the Committee or the District Child Protection Unit or the child care institution, as the case may be, on a portal as may be specified by the Central Government in this behalf."

11. Amendment of section 37. – In section 37 of the principal Act, in sub-section (1), the words "submitted by Child Welfare Officer" shall be omitted.

12. Amendment of section 38.- In section 38 of the principal Act, in sub-section (5), after the words "shall inform", the words "the District Magistrate," shall be inserted.

13. Amendment of section 40. – In section 40 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) The Committee shall submit a quarterly report regarding restored, dead and runaway children to the State Government and the District Magistrate in such form as may be prescribed.".

14. Amendment of section 41. – In section 41 of the principal Act,—

(i) in sub-section (1), the words ", within a period of six months from the date of commencement of this Act," shall be omitted;

(ii) in sub-section (2), for the words "shall determine", the words "shall, after considering the recommendations of the District Magistrate, determine" shall be substituted.

15. Amendment of section 54. – In section 54 of the principal Act,—

(i) in sub-section (2), for the words "District Child Protection Units or State Government, as the case may be", the words "District Magistrate" shall be substituted;

(ii) in sub-section (3), for the words "District Child Protection Unit or the State Government", the words "District Magistrate" shall be substituted.

16. Amendment of section 55. – In section 55 of the principal Act, in sub-section (1), after the words "State Government", the words "or District Magistrate" shall be inserted.

17. Amendment of section 56. – In section 56 of the principal Act, in sub-section (5), for the word "Court", the words "District Magistrate" shall be substituted.

18. Amendment of section 58. – In section 58 of the principal Act,—

(i) in sub-section (3), for the words "in the court", the words "before the District Magistrate" shall be substituted;

(ii) in sub-section (4), for the words "court order", the words "order passed by the District Magistrate" shall be substituted.

19. Amendment of section 59. – In section 59 of the principal Act,—

(i) in sub-section (7), for the words "in the court", the words "before the District Magistrate" shall be substituted;

(ii) in sub-section (8), for the words "court order", the words "order passed by the District Magistrate" shall be substituted.

20. Amendment of section 60. – In section 60 of the principal Act, in sub-section (1), for the word "court", the words "District Magistrate" shall be substituted.

21. Amendment of section 61. – In section 61 of the principal Act,—

(i) for the marginal heading, the following marginal heading shall be substituted, namely:—

"Procedure for disposal of adoption proceedings.";

(ii) in sub-section (1), for the word "court", the words "District Magistrate" shall be substituted;

(iii) in sub-section (2), for the word "court", the words "District Magistrate" shall be substituted.

22. Amendment of section 63. – In section 63 of the principal Act, for the word "court", the words "District Magistrate" shall be substituted.

23. Amendment of section 64. – In section 64 of the principal Act, for the words "concerned courts", the words "District Magistrate" shall be substituted.

24. Amendment of section 65. – In section 65 of the principal Act, in sub-section (4), for the word "court", the words "District Magistrate" shall be substituted.

25. Amendment of section 74. – In section 74 of the principal Act, in sub-section (2), for the words "in cases where the case", the words "in the pending case or in the case which" shall be substituted.

26. Substitution of section 86. – For section 86 of the principal Act, the following section shall be substituted, namely:—

"86. Classification of offences and designated court. –

(1) Where an offence under this Act is punishable with imprisonment for a term of more than seven years, then, such offence shall be cognizable and non-bailable.

(2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be non-cognizable and non-bailable.

(3) Where an offence, under this Act is punishable with imprisonment for less than three years or with fine only, then, such offence shall be non-cognizable and bailable.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or the Commission for Protection of Child Rights Act, 2005 or the Protection of Children from Sexual Offences Act, 2012, offences under this Act shall be triable by the Children's Court.".

27. Amendment of section 87. – In section 87 of the principal Act, for the *"Explanation"*, the following *Explanation* shall be substituted, namely:—

'*Explanation.*—For the purposes of this section, the expression "abetment" shall have the same meaning as assigned to it in section 107 of the Indian Penal Code.'.

28. Amendment of section 101. – In section 101 of the principal Act,—

(i) for sub-section (3), the following sub-section shall be substituted, namely:–

"(3) No appeal shall lie from any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years.".

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

"(6) Any person aggrieved by an adoption order passed by the District Magistrate may, within a period of thirty days from the date of such order passed by the District Magistrate, file an appeal before the Divisional Commissioner.

(7) Every appeal filed under sub-section (6), shall be decided as expeditiously as possible and an endeavour shall be made to dispose it within a period of four weeks from the date of filing of the appeal:

Provided that where there is no Divisional Commissioner, the State Government or Union territory Administration, as the case may be, may, by notification, empower an officer equivalent to the rank of the Divisional Commissioner to decide the appeal.".

29. Amendment of section 110. – In section 110 of the principal Act, in sub-section (2),—

(a) after clause (xiv), the following clause shall be inserted, namely:—

"(xiva) the form of report submitted to the District Magistrate under sub-section(8) of section 27;";

(b) after clause (xxii), the following clause shall be inserted, namely:—

"(xxiia) the form of quarterly report regarding restored, dead and runaway children under sub-section (4) of section 40;".

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मध्यप्रदेश उच्च न्यायालय, खण्डपीठ इन्दौर

मध्यप्रदेश उच्च न्यायालय, खण्डपीठ ग्वालियर

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