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संपादकीय

हमारा लक्ष्य

मित्रो! नवीन सत्र 23 जून से प्रारंभ हो रहा है । स्थानान्तरण एवं नई पदस्थापनाओं पश्चात पर्याप्त समय व्यतीत हो चुका होगा व न्यायिक अधिकारी व्यवस्थित रूप से स्थापित भी हो चुके होंगे। कई स्थानों पर नए सहयोगी होंगे तो कुछ एक स्वयं को नए स्थान पर पायेंगे। समय के साथ हर कोई नये परिवेश में घुलमिल जाएगा। कुछ समय तक अटपटा जरूर लगेगा लेकिन समय के साथ वही स्थान अपना सा लगेगा। पुरानी स्मृतियां धीरे–धीरे विलुप्त होती जायेंगी। क्षणिक असुविधाएं, कष्ट एवं विपरीत स्थितियां आप को वरण न करें अपितु उनके साथ धैर्य से सामना करें।

नई पदोन्नतियां भी हुई हैं। नया कार्यभार कुछ असुविधा भी उत्पन्न कर सकता है। अपील या रिवीजन न्यायालय से प्रकरण निराकृत होकर आने के पश्चात विचारण न्यायालयों के पीठासीन अधिकारियों से अपेक्षित परंपरा शेष नहीं रही है कि उन निर्णयों व आदेशों को ठीक से पढ़ें या समझें। हर बात को हर चीज को आसानी से तथा हल्के फुल्के ढंग से तथा सतही रूप से लेने की जो प्रवृत्ति विकसित हुई है उसका विपरीत परिणाम सामने आने लगा है। जिन न्यायिक अधिकारी बंधुओं ने वरिष्ठ न्यायालयों के निर्णयों, आदेशों को पढ़ा है उन्हें पदोन्नति पश्चात अपील न्यायालय में कार्य करने में सामान्य रूप से कठिनाई अनुभव नहीं होगी। लेकिन जिनकी विधि अध्ययन के प्रति अल्पज्ञ, सतही आभासी रूचि है उनके लिये कार्य कष्टप्रद रहेगा। सतत् अध्ययन के पहलू को उपेक्षित कर लक्ष्य की ओर कोई भी सफलतापूर्वक अग्रसर नहीं हुआ है। एक वरिष्ठ आदरणीय न्यायिक अधिकारी के साथ विधि पुस्तकों पर से बात हो रही थी तो उन्होंने कहा कि आजकल पुस्तकों की नहीं अपितु ऋतु चक्र के अनुसार कूलर अथवा हीटर की मांग ज्यादा है। उनकी बात अत्यन्त सशक्त थी व हम लोगों के वैचारिक धरातल को अनावृत कर देती है।

यह अनुभव किया गया कि व्यवहार प्रक्रिया संहिता में मध्यप्रदेश संशोधन जो सन् 1960 के लगभग किए गए हैं, से अधिकांश न्यायिक अधिकारी अनभिज्ञ हैं एवं सुविज्ञता नहीं है। यही स्थिति उच्च न्यायालय द्वारा निर्मित विभिन्न अधिनियमों के अंतर्गत निर्मित प्रक्रिया सम्बन्धी नियमों के विषय में भी कही जा सकती है। ये ऐसे नियम है जों उच्च न्यायिक सेवा से सम्बन्धित न्यायिक अधिकारियों के लिये अत्यन्त उपयोगी हैं। उक्त सभी सामग्री संस्था की पत्रिका में सम्मिलित की जा रही है।

व्यवहार न्यायाधीश वर्ग–2 के अधिकारियों के चयन की प्रक्रिया समाप्त हो चुकी है व निकट भविष्य में वे भी न्यायिक परिवार में सम्मिलित होंगे। उन्हें उचित प्रशिक्षण व मार्गदर्शन हम आपको ही देना है। स्वाभाविक है कि जो व्यक्ति नवागतों का मार्ग प्रशस्त करेगा वह स्वयं भी अनुभवी हो। वास्तव में वरिष्ठ न्यायिक अधिकारियों को यह अवसर एवं समय आत्म शोधन व आत्म चिंतन का होगा कि उन्होंने अभी तक क्या एवं किस प्रकार से कार्य किया है। स्वयं परीक्षण का यह समय सकारात्मक कार्यों की ओर परिवर्तित कर दिया जायेगा तो निश्चित ही हम आपको यह अवसर पूर्वाभिनय का सुअवसर होगा व नयी शक्ति उत्पन्न

करेगा तथा पुनश्चर्या हेतु स्फूर्तिदायक भी होगा।

"सत्यं तपो जपोज्ञान सर्वा विद्याः कला अपि।
नरस्य निष्फलाः सन्ति यस्य शील न विद्यते।

जहां शील नहीं है वहां तप, सत्य, जप, ज्ञान, विद्या, कला सब व्यर्थ है। शील का व्यापक अर्थ यदि लिया जावे तो कहा जा सकता है कि ध्यान रूप में अपने अंतःकरण से परिचय होना। न्यायदान के आशय, लक्ष्य, उद्देश्य व आधार को अंतःकरण से पहचानने का दुर्गम, दुश्कर अगम्य कार्य हमारा लक्ष्य हो।

अंग्रेजी शब्द है Austerity उसका अर्थ है मिताहार, संयम, तप, तपस्या, सादगी व आडम्बरहीनता। समझने में अर्थ कितना आसान है लेकिन व्यवहार में उतारना नितांत असंभव। लेकिन क्यों न हमारा यही एकमेव लक्ष्य हो।

आने वाली व्यवहार न्यायाधीश वर्ग–2 की, पीढ़ी का हार्दिक स्वागत है। वे तपोनिष्ठ, तपस्वी बनें। उनका जीवन गरिमामयी हो।

(पुरुषोत्तम विष्णु नामजोशी)

JUDGES' PRAYER

MAY GOD GIVE ME
GRACE TO HEAR PATIENTLY,
TO CONSIDER DELIGENTLY
AND
TO DECIDE JUSTLY,
MAY GOD GRANT ME
DUE SENSE OF HUMILITY IN ORDER
THAT I MAY NOT BE MISLED
BY ANY VANITY OR EGOISM
MAY GOD HELP ME
TO ADMINISTER PROPER JUSTICE
WITHOUT FEAR OR FAVOUR OF ANYBODY.

Courtesy : J.O.T.I., Nagpur (Maharashtra)

लोक न्यायालयों का संचालन

दिनांक 29–6–1997 को एक बैठक माननीय मुख्य न्यायाधिपति महोदय श्रीमान ए. के माथुर एवं माननीय न्यायाधिपति महोदय श्रीमान डी. पी. एस. चौहान के सानिध्य में संपन्न हुई। श्रीमान माथुर महोदय "विधिक सेवा प्राधिकरण (संशोधन)" अधिनियम 1994 (दी लीगल सर्विसेस अमेंडमेंट एक्ट 1994) के अंतर्गत मुख्य संरक्षक होकर श्रीमान चौहान महोदय कार्यकारी अध्यक्ष हैं।

श्रीमान माथुर महोदय ने अपने विद्वतापूर्ण एवं ओजस्वी विचारों को प्रस्तुत करते हुए विचार व्यक्त किये तथा कहा कि लोक न्यायालय (अदालत) मुख्यतः गरीब पीड़ित व्यक्तियों को शीघ्र न्यायदान के लिये संचालित किए जाना है तथा उक्त अधिनियम का मुख्य आशय भी यही है। अपने विचारों को प्रस्तुत करते हुए उन्होंने यह भी कहा कि स्थापना सम्बन्धी व्यय को कम से कम किए जाने की नितांत आवश्यकता है। हर कोई अपने स्तर पर ऐसा करने के लिए सक्षम है तथा कटिबद्ध होना ही चाहिये। आडंबर रहित सादगीपूर्ण रूप से तथा बिना किसी औपचारिकताओं के नैमित्तिक क्रिया कलापों के रूप में ही ऐसा कार्य होना चाहिये। समारोह पूर्वक आयोजनों को नितांत अनावश्यक प्रतिपादित किया। अपने विचारों को गति देते हुए यह भी कहा कि लोक न्यायालयों में अधिक प्रकरणों के निराकरण को दर्शाने के आशय से नियमित न्यायालयों में राजीनामों के आधार से निराकृत होने वाले प्रकरणों को स्थगित कर उन्हें लोक नयायालयों में भेजने की प्रवृत्ति को अनुचित बताते हुए कहा कि इसके कई विपरीत परिणाम होंगे व लोग न्याय से वंचित हो सकते हैं। दुर्घटना एवं विवाहों से संबंधित प्रकरणों में ऐसे आयोजनों का प्रभावी रूप से लाभ लेने का कहकर ये भी कहा कि ऐसे विषयों से संबंधित प्रकरणों का निराकरण भी लोक अदालतों के माध्यम से होते रहना चाहिये। लोक न्यायालयों के संचालन का सम्पूर्ण भार अब चूँकि न्यायपालिका को ही वहन करना है इसलिए अब किसी दूसरे पक्ष को दोषारोपित नहीं किया जा सकता ऐसा भी अभिमत उन्होंने अभिव्यक्त किया। एक अन्य महत्वपूर्ण अभिव्यक्ति जो उन्होंने की वो यह कि लोक न्यायलयों के संचालन के लिए किसी प्रकार का प्रदर्शन न करें न समारोह आयोजित करें न भाषण संभाषण का दौर भी हो तथा किसी भी अन्य व्यक्ति या संस्था के माध्यम से किसी भी प्रकार की आर्थिक सहायता, अल्पाहार, स्वल्पाहार आदि के लिए भी न ली जावे।

जो न्यायिक अधिकारी सफलतापूर्वक लोक न्यायालयों का संचालन कर अधिकाधिक प्रकरण निराकृत करेंगे उनके संबंध में गोपनीय चरित्रावली में सकारात्मक टिप्पणी को अंकित करने का प्रस्ताव भी विचाराधीन होने की घोषणा करते हुए माननीय माथुर महोदय ने उक्त आयोजन में अपने

विचारों को विराम दिया तथा अपेक्षा की कि न्यायिक अधिकारी कर्तव्य भावना व अपनत्व भाव से कार्य करेंगे।

तत्पश्चात् माननीय चौहान महोदय ने अपने विचारों की प्रस्तुति करते हुए लोक न्यायालयों को सर्वसामान्य जन की ओर अधिक निकट लाने की अपेक्षा न्यायायिक अधिकारियों से की तथा आमंत्रितों से एक महत्वपूर्ण एवं एकदम नए तथा मौलिक विचार की ओर ध्यान आकृष्ट करते हुए अपने अपने सुझाव आमंत्रित किए हैं। उनका यह विचार था कि बीमारी के उपचार से उसका रोधात्मक तथा निरोधात्मक कार्य सक्रिय रूप से होना चाहिये। इस विचार को प्रस्तुत करते हुए उनका विचार था कि इस विषय पर सुझाव आना चाहिये कि विवादों को न्यायालयों में आने से पूर्व (प्री लिटिगेशन) ही उनको निराकृत कैसे किया जा सकता है ताकि प्रकरणों की संख्या में वृद्धि न हो व सर्वसामान्य व्यक्ति आपसी कलह विवादों से मुक्त होकर सुखमय जीवन व्यतीत कर सकें। माननीय न्यायाधिपति चौहान महोदय के निर्देशन में उपस्थित न्यायिक अधिकारियों ने कार्य संचालन में आने वाली व्यवहारिक कठिनाईयों का हल भी सहज भाव से ज्ञात किया। आयोजनों के अधिक प्रचार प्रसार के लिए (मीडिया) समाचार पत्रों को तथा टी. वी. एवं रेडियों केन्द्रों को प्रेसनोट के माध्यम से सूचित करने के लिए भी कहा जिससे कि सर्वसामान्य व्यक्ति इन आयोजनों में सक्रिय भागीदार बन सके। अपने विचारों को उक्त आयोजन के लिए विराम देते हुए अपेक्षा की कि न्यायिक अधिकारी न्यायाधीश के उच्च पद की गरिमा का सम्मान करते हुए नियमित न्यायालयों में अपनी वेशभूषा निर्धारित मानदंडों के अनुरूप ही धारण करते रहेंगे क्योंकि यह न केवल नैतिक दायित्व है अपितु कर्त्तव्य का अंग भी है।

प्रेस विज्ञप्ति के लिए जो प्रारूप जिला न्यायाधीश, जबलपुर ने तैयार किया है उसे उचित मानते हुए आवश्यक परिर्वतनों के साथ ही सभी को स्वीकार करना चाहिए ऐसी अपेक्षा भी उन्होंने की।

कार्यक्रम में पदेन सदस्य रजिस्ट्रार जनरल मध्य प्रदेश उच्च न्यायालय श्री सी. एस. गुप्ता, म. प्र. विधिक सहायता सचिव श्री निर्मल कुमार जैन, विजिलेन्स रजिस्ट्रार श्री नारायण लाल श्रीवास्तव, एडीशनल रजिस्ट्रार (जिला प्रशासन) श्री बी. के. दुबे के अतिरिक्त जबलपुर संभाग से पधारे जिला न्यायाधीश सर्वश्री एन. जी. करमबेलकर (जबलपुर) एस. ए. नकवी (छिन्दवाड़ा) आर. एन. सक्सेना (सिवनी) एन. पी. मिश्रा (मंडला) आर. जी. अग्रवाल (बालाघाट) सुश्री शीला खन्ना (नरसिंहपुर) उपस्थित थे। मुख्य न्यायिक दंडाधिकारी सर्वश्री राजेन्द्र कुमार सिंह गौतम (जबलपुर) अजीत सिंह (छिन्दवाड़ा) जी. एल. सोनवानी (सिवनी) मोहम्मद युसूफ मंसूरी (मंडला) जगपतिराव (बालाघाट) मोहम्मद फहीम अनवर (नरसिंहपुर) उपस्थित थे।

LAW AND FACT

P. V. Namjoshi

Generally questions which arise for consideration and determination in a Court of Law are of two kinds, viz. Question of Law and Question of Fact. Generally a question of law means a question which the law itself has authoritatively answered and question of fact means everything that is not law. Salmond says that, "the law is the theory of things as received and acted upon within the courts of justice and this theory may or may not confer to the reality of things outside". The term law has several aspects to be viewed from the point of view of logical reason, commands etc. The practical aspect of question of law and question of fact relates to Section 96 (4) of the CPC which says that no appeal shall lie, EXCEPT ON A QUESTION OF LAW, from a decree in any suit of the nature cognisable by court of small causes when amount of VALUE OF THE ORIGINAL SUIT does not exceed Rs. 3,000/-. It means that no appeal shall lie on question of fact but except on question of law. However, we as judicial officers have to deal with civil appeals under S. 96 of the CPC. Therefore our subject is limited only to question of fact and question of law relating to section 96 (4) CPC. Order 14 of the CPC also says that the courts have to frame issues relating to question of law and question of facts. The term fact has been defined under the Evidence Act which says that, "FACT" means and includes -

1) anything, state of things, or relation of things, capable of being perceived by the senses;

2) any mental condition of which any person is conscious.

again the term "facts in issue"has been defined in the Evidence Act. The expression **"facts in issue"** means and includes any fact from which, either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation:-

Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any court records an issue of fact, to be asserted or denied in the answer to such issue, is a fact in issue.

Thus the duty of the court is to ascertain the issues in dispute between the parties and to determine those issues. The court first decides the facts in issues as are permitted by the evidence aduced by the parties and then the court declares the rules or proposition of law, which in the light of finding of the facts of the issues to be decided.

The term question of law is generally used in 3 different senses though they are related to each other. In the first place it relates to a Rule of Law in the second place it relates to what the law is and lastly it deals with question of law for the determination of the Judge in the sense that all questions which are to be answered by the Judge are named questions of law even for any particular instance say that they may be questions of fact. Let us deal with each and every term.

A) The Rule of Law:-

It means a question the answer to which is already prescribed by some rule of law. It means that the answer to the question is determinable by some prescribed rule of principle of law. It is binding on the courts. Therefore the court has to answer a question in the manner in which it has been laid down in the principle of law. It is a question in which the discretion of the Judge is ruled out. The minimum amount of punishement that may be awarded for a crime under Section 397 or 398 is prescribed in the law and therefore it is to be answered in accordance with the Rule of Law. There is no discretion of the Court to award lesser punishment than the prescribed. Once the law prescribes minimum punishment the court has no jurisdiction to award lesser punishment and therefore this is a question of law. The answer of which is already given by the particular provision of the law. Thus punishment for murder has been prescribed by law under Sectoin 302 of I.P.C. Therefore the question as to what punishment should be awarded to an accused is pure question of law.

B) What the law is:-

Question of law in this sense arises not out of the existence of the law but out of its uncertainity. For example if a quesstion arises is interpretation and meaning to an ambiguous statutory provision the question is one of the law. It is a question as to what the law is. It is not a question of law in the first sense but the question of fact. The court has to first decide what the facts of the case are? In this respect it is a matter for arguments and discussion by the Advocates and then determination by the Courts. Once the question has been judicially determined the authoritative answer to it becomes a judicial precedent which is the law for all other cases in which the same statutory provision comes in question and then it becomes a question of law in the first sense.

C) Evaluation:-

The third category is that all questions which are to be answered by the Courts that they may relate to the question of fact. For example whether a certain prosecution was malicious or not is to be answered by the facts and circumstances of the case and to consider whether there are reasonable and sufficient grounds to hold that it is malicious. Since such a question is answered by the Court therefore it is a question of law. The answer to a question of opinion may be a matter of assessment or evaluation which can neither be proved by evidence nor determined by law,since the law may not provide criteria for assessment. Many of the questions which the Court decided, "on the facts" and which are not governed by fixed legal rules are questions of opinion in this second sense. Whether the defendant drove without due care, whether the accused reacted to the deceased's provocation as would a reasonable man, whether a flat has been so substantially altered as to suffer a change of identity - ALL THESE ARE STRICTLY NEITHER QUESTIONS OF LAW NOR OF FACT; they are matters for evaluation. Questions of opinion are transformed into question of law. The trial by Jury is now replaced and is now by Judge followed. In trial by Jury the judge used to sum up the general law to Jury leaving the Jury

to decide the matters on facts. Now the Judge himself decides the case apply the law to the facts and decide the case. In many areas judicial discretion had been freed from the fetters or clutches of the law. The courts now have wide discretion. Question of pure facts are also transformed into question of law. On occassions the law supplies pre-determined and authoritative answers. The law presumes some facts and say that the fact must be deemed to be such and such whether it be so in truth or not. A set of circumstances giving raise to certain conclusion may due to either intentionally framed rules of law or previous decisions by Judge or legal error be deemed to constitute a different fact. Under section 55 of Transfer of Property Act the seller is duty bound to disclose any defect etc. to the buyer. Law presumes fraud in circumstances without such intention being proved. "May presume", "shall presume", "conclusive proof" are the terms under S. 4 of the Evidence Act. Section 114 of the Evidence Act presumes some facts. Few examples are likewise:-

"May Presume":-Ss. 86, 87, 88, 90, 113A, 114, 118.

"Shall Presume":- Ss. 79, 80, 81, 83, 85, 89, 105, 111A.

"Conclusive Proof":- Ss. 41, 112, 113.

Question of fact :-

As stated above in general term question of fact means all questions which are not questions of law. In its another sense convey yet another meaning. They are matters of fact as opposed to the matter of opinion. The truth can be asertained by evidence or otherwise. In case for such damages for breach of contract the damages, the future damages, profits are not itself unascertainable and these are matters of opinion. But profits arising our of similar transaction during the same period may be proved by evidence and that will be a question of fact. Question of law are those questions which the Judge has to decide according to the fixed legal norms or where there is a principle then it is to be applied accordingly. Where the question of discretion is there then Judge has to exercise his moral judgment according to the equity, justice and good conscious. It means not according to the private opinion, according to the law and not humour, it cannot be arbitrary vague or fancyful but a legal and well reasoned. Such power is not a discriminatory power. It is also a matter of years of discretion i.e. an age when one is able to judge between what is right and what is wrong. Lord Denning says it is an art which requires long study and experience before that a man can attend to the cognizance of it. A Judge has to find out what is reasonable , right equitable in the circumstances of a given case. In such case any rule of law is not directly applicalbe. Salmond says that, "natural or moral justice to a very large extent transmited into legal justice; JUS NATURABLE becomes JUS POSITIVUM". The justice which courts of justice are appointed to administer becomes for the most part such justice as is recognised and approved by the law, and not such justice as commends itself to the courts themselves. This sphere of judicial discretion is merely such portion of the sphere of right as has not been thus enchroached upon the sphere of law

Mixed Question of Law and Fact:-

There are matters which involve mixed question of law and fact. For example the question is whether a partnership exist or not. The facts in issue would be what is the agreement between the parties and where such agreement is sufficient to constitute legal relationship of partnership. Thus the first question is relating to the question of fact and second relates to question of law. The punishment to be awarded to the offender is generally a mixed question of law and discretion. The law prescribes punishment i.e. imprisonment or fine or both. The judge cannot give any other form of punishment. In such case the discretion of the court is limited to the quantum of punishment to be imposed on the accused. On the trial of a person accused of theft, the question whether the act alleged to have been done by him amounts to criminal offence of theft is a question of law, is a question to be answered by the application of the rule which determines the scope and nature of the offence of the theft and distinguish it from other offence. The question is whether the accused did the act which he said to have done is a question of fact. What offence do such act constitute is a question of law and how much and what punishment should be awarded is a question of discretion. In a case for rescission of contract the question whether a promise was made and accepted for consideration would be one of fact; whether this gave raise to a contract is a question of law and whether the facts alleged on ground of which rescission is sought is a question of fact and whether these facts constitute a legal ground for rescission again is a question of law and whether rescission should be allowed is a queston of discretion. The child of under 7 years of age has not sufficient mental capacity to commit a crime is a presumption under Section 82 of the IPC which says that "nothing is an offence which is done by a child under 7 years of age". In this case the court has to decide whether the age of a child is below 7 years or not. This is a question of fact to be decided by the court so as to entitle to protection on the ground of incapacity to commit a crime.

Let us see few examples from the case law. An important case law is ***1983 M. P. Weekly Note 13 Bharose vs. Komalchand.*** The facts of the case are a suit was of the nature cognisable by the court of Small Causes as the value did not exceed Rs. 3,000/-. The defendant had admitted his thumb impression on the promissory note but contended that the said impression was obtained by the plaintiffs by misrepresentation that the document was relating to his services as a chowkidar. In these circumstances the High Court held that the burden was on the defendant applicant to establish the misrepresentation which he failed to establish. Question relating to misrepresentation, section 16 of Contract Act relating to fiduciary relations and Section 111 of the Evidence act relating to active confidence. In ***1996(11) SCC Page 480(b) Brij Kishore vs. Ram Singh*** it is held that "since it is a question of appreciation of evidence it is question of fact".

Where the suit for recovery of arrears cognisable by Small Causes Court is for valuation of less than Rs. 3,000/- and the question of limitation was involved the order cannot be challenged in appeal as the question of limitation is not a pure question of law but a mixed question of law and fact. (1986) 2 Orissa LR 164 (167).

Where in a suit filed before the Small Cause Court the question was whether nationalised banks, obliged to charge interest of specified rate in accordance with the circulars and directives periodically issued by the Reserve Bank under the provisions of Banking Regulation Act can be taken out of the category of cases whether the presumption regarding excessive nature of interest under the Usurious Loans Act can be raised, an appeal would lie against decision in the suit as the question involved was a question of law. ***AIR 1982 Mad.*** 296 (300, 301). (Now S. 21 A has been inserted by Banking Law Amendent Act specifying that provision relating to Usurious Loans Act are not applicable).

No definite scale or yardstick can be provided to make an easy distinction between question of law and questions of fact in cases falling under S. 14 (1) of the Limitation Act. Application of the sub-section may sometimes involve questions of law. But generally its application; depends on factual position alone. A decision has to be taken in each case whether it involved a question of law or not. Such a decision is sine qua non where S. 96 (4) comes into play. ***(1988) 1 Ker. LJ 475; (1988) 1 Ker. LT 929.***

The provisions of this section are not applicable to the appeals filed prior to the commencement of the 1976 Amendment Act. AIR1981 Ker. 225 (257)

For detail studies kindly go through commentary under Section 96 and Section 100 of the CPC from a standard book. This Article is based on Salmon on Jurisprudence, Paton on Jurisprudence and Jurisprudence; students edition by Two Vakils.

'What is the argument on the other side?

Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both'.

Denning LJ in Packer V. Packer (1954) P 15 at 22

विनिर्दिष्ट सहायता अधिनियम 1963
धारा 5 एवं धारा 6

पु. वि. नामजोशी

विनिर्दिष्ट सहायता अधिनियम 1963 लागू होने के पूर्व विनिर्दिष्ट सहायता अधिनियम 1877 लागू था।

पुराने अधिनियम की धारा 8 तथा पुराने ही अधिनियम की धारा 9 (1) जो अब क्रमशः धारा 5 और 6 नये अधिनियम के अंतर्गत दर्शाई गई है, पर विचार कर रहे हैं।

प्रावधानों का लागू होना

अचल सम्पत्ति के सम्बन्ध में धारा 5 और धारा 6 यह दर्शाती है कि कोई भी व्यक्ति अचल सम्पत्ति का आधिपत्य प्राप्ति हेतु विर्निदिष्ट रूप से सहायता के लिये व्यवहार प्रक्रिया संहिता के अंतर्गत कार्यवाही कर सकता है। नये अधिनियम की धारा 6 विभिन्न स्थितियों को बताती है। जब कोई व्यक्ति जिसका आधिपत्य किसी अन्य व्यक्ति ने बिना विधि प्रक्रिया के हटा दिया है तो वह व्यक्ति आधिपत्य प्राप्त करने के लिये धारा 6 एवं नये अधिनियम की धारा 8 के अन्तगत सहायता प्राप्त कर सकता है।

धारा 5 एवं धारा 6 के सम्बन्ध में अंतर

धारा 5 विस्तार लिये हुये है तथा धारा 6 सीमित अधिकारों से सम्बन्धित प्रावधान है। धारा 5 के अन्तर्गत यह विस्तार है कि अचल सम्पत्ति के संबंध में विर्निदिष्ट सहायता प्राप्त करने का अधिकार उक्त व्यक्ति को है जिसके स्वत्व और अधिकार है लेकिन धारा 6 के अंतर्गत अपने स्वत्व और अधिकारों को सिद्ध करने की आवश्यकता नहीं रहती है। तब केवल आधिपत्य होने की स्थिति में वह व्यक्ति वापस आधिपत्य प्राप्त कर सकेगा यदि उसे विधि प्रक्रिया से नहीं हटाया गया है। धारा 5 और 6 परस्पर विरोधी नहीं हैं अपितु धारा 5 सामान्य अधिकार व्यक्ति को प्रदान करती है तथा धारा 6 के अंतर्गत उस प्रक्रिया को बताया गया है जिसके अंतर्गत आधिपत्य प्राप्त करने का अधिकार मिल जाता है लेकिन धारा 6 के अंतर्गत दावा बिना स्वत्व घोषणा के होता है जबकि धारा 5 के अंतर्गत दावे में स्वत्व और अधिकार सिद्ध करना होता है।

धारा 6 का विवेचन

धारा 6 यह दर्शाती है कि जहाँ पर कोई व्यक्ति बिना किसी वैध प्रक्रिया के अचल सम्पत्ति से हटा दिया गया है तब वह निष्कासन की तारीख से 6 माह के अंदर आधिपत्य प्राप्त करने हेतु दावा प्रस्तुत कर सकता है और तब उसे यह दर्शाने की आवश्यकता नहीं है कि वह विवादित अचल सम्पत्ति पर किस प्रकार से आधिपत्य में था उसे केवल यह बताना मात्र पर्याप्त है कि वह उक्त सम्पत्ति पर दावा तारीख से 6 माह पूर्व तक आधिपत्य में था और उस अवधि के अंदर उसे प्रतिवादी ने बिना किसी वैध अधिकार के एवं वैध प्रक्रिया के अर्थात जबरदस्ती बिना औचित्य के हटा दिया है। यह महत्वहीन है कि उस व्यक्ति के कोई स्वत्व या स्वामित्व उस सम्पत्ति पर था या नहीं अर्थात यह कहा जा सकता है कि आधिपत्यधारी व्यक्ति भी सम्पत्ति का आधिपत्य प्राप्त कर सकता है यदि उसका आधिपत्य उसके सहमति के बिना 6 माह के अवधि में हटा दिया गया था।

ऐसा दावा उस व्यक्ति को निम्नलिखित दो कारणों से प्रस्तुत करने का अधिकार नहीं होगा :–

(1) यदि दावा अचन सम्पत्ति से निष्कासन से 6 माह पश्चात प्रस्तुत किया हो।

(2) यदि ऐसा निष्कासन शासन द्वारा दिया गया है तो शासन के विरुद्ध दावा प्रस्तुत करने का अधिकार नहीं है।

दावे की प्रकृत्ति

ऐसा दावा धारा 6 के अंतर्गत केवल आधिपत्य प्राप्ति हेतु ही संस्थित किया जा सकता है ऐसे दावों में उक्त सम्पत्ति पर अवैध रूप से यदि कोई भवन निर्माण किया गया है तो उसे हटाने के लिये लगने वाले खर्च जमीन को समतल करने के लिये खर्च अथवा क्षतिपूर्ति जो अंतरिम प्रकार की होती है (मीन प्राफिट) की मांग नहीं की जा सकती है। इस प्रकार का दावा मात्र आधिपत्य प्राप्ति का होता है उसमें अन्य कोई सहायता नहीं दी जाती है। यदि भूमि पर कोई झोपड़ी या अन्य निर्माण कार्य हुआ है तो उसके हटाने हेतु व्यय के लिये कोई आदेश न्यायालय नहीं दे सकता। (ए.आई.आर. 1927 रंगुन 142, ए.आय.आर. 1940 कलकत्ता 464)

लेकिन ए.आय.आर. 1987 बाम्बे 273–275 में कहा है कि अंतरिम लाभ तथा क्षतिपूर्ति की सहायता भी मांगी जा सकती है।

संदर्भ इंडियन कॉन्ट्रक्ट एन्ड स्पेसिफिक रिलिफ एक्ट– लेखक–पोलक मुल्ला सन् 1994 पृष्ठ 1224

मध्य प्रदेश भू–राजस्व संहिता के अंतर्गत अधिकार

इस संबंध में दो दृष्टांत बताये जा सकते हैं प्रथम दृष्टांत **ए.आई.आर. 1967 एम.पी 14.1. 1964 जे. एल.जे. 707 नाथ विरुद्ध दिलबन्दे हुसैन** तथा **1971 जे.एल.जे. 827 कृष्णकुमार दास विरुद्ध बलराम दास** दोनों ही दृष्टांत एक दूसरे के विपरीत नहीं हैं। दृष्टांतों का सार यह है कि धारा 250 भू राजस्व संहिता सहपठित धारा 257 (दस) के अंतर्गत प्रावधानों का पालन किया जाना जरूरी है। केवल भूमि से जबरदस्ती बिना वैध प्रकिया के हटाये जाने पर उक्त प्रावधान लागू होंगे। लेकिन धारा 2 (के) भूराजस्व संहिता के अंतर्गत भू राजस्व संहिता की सीमा तक के लिये मात्र यह घोषित किया गया है कि भूमि पर स्थित मकान भी भूमि माना जावेगा लेकिन यदि मुख्य उद्देश्य निवास कार्य के लिये उक्त संपत्ति का उपयोग होता है तो दावा धारा 6 के अंतर्गत चल सकता है। एक अन्य दृष्टांत इस संबंध में यह भी बताया जा सकता है कि एक व्यक्ति ने अपंजीकृत विक्रय पत्र द्वारा भूमि स्वामी से संपत्ति क्रय की और उस व्यक्ति को उसी भूमि स्वामी ने क्रेता को भूमि से अवैध रूप से निष्कासित कर दिया तो यह पाया कि वह व्यक्ति जिसने संपत्ति क्रय की थी वह चूँकि भूमि स्वामी नहीं बना था इसलिये संपत्ति के आधिपत्य उक्त धारा के अंतर्गत रखने का अधिकारी था। दृष्टांत इस प्रकार बताये जा सकते हैं। **1970 जे.एल.जे. 122 दरखशाह विरुद्ध रख्खू,** 1968 जे.एल.जे. 405 सर्वोच्च न्यायालय एवं 1970 जे.एल.जे. टीप क्रमांक 53.

प्रमाण

धारा 6 के अंतर्गत संस्थित दावे में केवल यह प्रमाण देना मात्र पर्याप्त है कि वह व्यक्ति जिसने दावा किया था वह दावा तारीख से ठीक 6 माह पूर्व सम्पत्ति के आधिपत्य मे था ऐसा प्रमाण मात्र धारा 6 के अंतर्गत दावे के लिये पर्याप्त है। इस प्रकार के प्रकरणों में मुख्य मुद्दा केवल इस आशय का होगा कि दावा तारीख

से 6 माह पूर्व के अंदर वादी विवादित संपत्ति पर आधिपत्य में था या नहीं। इस बात की जांच नहीं होना है कि वादी उक्त संपत्ति का स्वामी है या नहीं। यदि स्वामित्व के संबंध में कोई आधार वादी ऐसे दावे में प्रारंभ में ही उपस्थित करता है तो वह दावा धारा 6 विनिर्दिष्ट सहायता अधिनियम के अंतर्गत नहीं होगा अपितु ऐसा दावा गुण दोष के आधार पर सिद्ध करना होगा और यह दावा धारा 6 के विस्तार से बाहर हो जावेगा। प्रतिवादी को अपने स्वत्व और स्वामित्व भी सिद्ध करना होगा। ऐसा दावा धारा 5 के अंतर्गत होगा।

यदि किसी व्यक्ति ने धारा 6 विनिर्दिष्ट सहायता अधिनियम के अंतर्गत दावा प्रस्तुत किया है एवं उसी दावे में वह ऐसी सहायता चाहते हुए संशोधन प्रस्तुत करना चाहता है कि स्वत्व स्वामित्व के आधार से उसे आधिपत्य दिया जावे तो ऐसा सशोधन स्वीकार किया जा सकता है दावे की प्रकृति नहीं बदलेगी लेकिन तब वादी को अपने स्वत्व और स्वामित्व सिद्ध करना होगा।

यदि धारा 6 के अंतर्गत दावा पारित हो गया है तब भी प्रतिवादी यदि अन्यथा यह सिद्ध करने में सफल हो कि वह वास्तविक रूप से उक्त संपत्ति का स्वामी है और आधिपत्य रखने का अधिकारी है तब वादी द्वारा जयपात्र के निष्पादित किये जाने वाले प्रवर्तन को रोकने हेतु सिविल वाद प्रतिवादी संस्थित कर सकता है और अपने स्वत्व की घोष्णा करने के लिए स्वतंत्र है और उस स्थिति में विचारण न्यायालय धारा 6 के अंतर्गत पारित निर्णय के आधार से आधिपत्य देने संबंधी कार्यवाही को स्थगित करने के लिये सक्षम है। इस संबंध में ***ए. आइ. आर. 1972 इलाहाबाद 418 चुन्नी विरुद्ध सुलाहार तथा ए.आईआर. 1984 गुजरात पृष्ठ 66 मो. हुसैन सुलेमान विरुद्ध बटक भाई तथा 1983 वीकली नोट 242 रुग्गा विरुद्ध मोती के दृष्टांत देखने योग्य हैं।***

नायर सर्विस सोसाइटी विरुद्ध के. सी. अलेक्जेन्डर ए.आई.आर. 1968 सुप्रीम कोर्ट 1165 तथा ***लल्लू यशवंतसिंह विरुद्ध राव जगदीश सिंह ए.आई.आर. 1968*** सुप्रीम कोर्ट के अनुसार धारा 6 के अंतर्गत स्वत्व का प्रश्न उपस्थित नहीं होता है निर्णय के लिये केवल यह विवाद मात्र शेष रहता है कि क्या दावा तारीख से 6 माह पूर्व वादी विवादित भूमि पर आधिपत्य में था। यदि धारा 6 के अंतर्गत दावा लगाया हो या ना भी लगाया हो तब भी स्वत्व के आधार से सहायता मांगने के लिये पृथक से दावा संस्थित किया जा सकता है एवं धारा 6 के अंतर्गत दावा लगाया हो तो उसे स्वत्व के आधार से संशोधित भी किया जा सकता है। इस प्रकार विस्तार की सीमा है।

धारा 6 के अंतर्गत वह व्यक्ति आधिपत्य के लिये दावा प्रस्तुत नहीं कर सकता जिसने किसी को कब्जे से हटा दिया हो और स्वयं कब्जे में आकर और किसी ने उसे भी कब्जे से हटा दिया हो। अर्थात जिस व्यक्ति का फलोटिंग आधिपत्य हो तथा स्थापित (सेटल्ड) आधिपत्य ना हो तो उस व्यक्ति को धारा 6 का लाभ नहीं मिलेगा।

दावा कौन ला सकेगा

ऐसा व्यक्ति जिसके पास विवादित सम्पत्ति का न्यायिक (ज्युडिशियल) आधिपत्य रहा था वह दावा प्रस्तुत कर सकता है। लेकिन अतिक्रामक जिसे आधिपत्य से हटाया गया हो धारा 6 के अंतर्गत दावा प्रस्तुत नहीं कर सकता है। उसी प्रकार वह लड़का जो यह कहता हो कि अपने पिता अथवा चाचा का प्रतिनिधित्व कर रहा था उसे दावा लगाने का अधिकार नहीं है। नौकर अथवा डेप्युटि अथवा अपाएन्टी जो

कि सेवक के रूप मे है किसी अन्य से अधिकृत प्रतिनिधित्व के रूप में स्वय दावा लगाने के लिये सक्षम नहीं है।

मकान मालिक और किरायेदार तब दावा लगा सकते है जब किरायेदार को किसी तृतीय व्यक्ति ने निष्कासित किया हो। तृतीय व्यक्ति ऐसे दावे में स्वत्व के आधार से अपने अधिकारों की स्थापना ऐसे प्रकरण में नहीं कर सकता।

संयुक्त आधिपत्यधारी व्यक्ति में से किसी एक को आधिपत्य से हटाया गया हो तो वह व्यक्ति भी दावा करके आधिपत्य प्राप्त कर सकता है। आधिपत्य से हटाये गये व्यक्ति के उत्तराधिकारी दावा करने के लिये सक्षम है क्योंकि आधिपत्य से सम्बन्धित सत्व (पजेसरी टाइटल) अनुवांशिक (हेरीटेबल) होता है।

यदि मकान मालिक ने किरायेदार को जबरदस्ती आधिपत्य से हटा दिया है तो किरायेदार भी धारा 6 के अंतर्गत दावा संस्थित करने के लिये सक्षम है। एक नौकर अथवा सेवक अथवा सहायक जो आधिपत्यधारी की ओर से देखरेख करता है अर्थात कामदार है वह धारा 6 के अंतर्गत अचल सम्पत्ति के आधिपत्य करने के लिये दावा प्रस्तुत करने के लिये सक्षम नहीं है क्योंकि ऐसे सेवक या सहायक का आधिपत्य उक्त संपत्ति पर आधिपत्यधारी के रूप में नहीं है अपितु आक्युपायर अर्थात धारक के रूप में मात्र है और तब उसे केवल यह अधिकार है कि वह चल सम्पत्तियों के संबंध में मात्र दावा लगा सकता है लेकिन अचल संपत्ति के लिये आधिपत्यधारी ही दावा लगाने में सक्षम है। आक्युपायर अर्थात अधिभोगी आधिपत्यधारी नहीं है वह तो सेवक के रूप में कामदार मात्र है।

रेसजुडिकेटा

धारा 6 के प्रकरणों में दिये जाने वाले निर्णय रेसजुडिकेटा के आधार पर बाधित नहीं होते हैं इस संबंध में ***रामनाथ विरुद्ध मालती बाई 1981 भाग 1 म. प्र. वीकली नोट 70*** का दृष्टांत देखने योग्य है।

चूँकि धारा 6 के अंतर्गत संक्षिप्त कार्यवाही के द्वारा प्रकरण का निराकरण किया जाता है तथा स्वत्व स्वामित्व के विषय में किसी भी प्रकार का कोई चिंतन उसमें नहीं होता है इसलिये रेसजुडिकेटा का प्रश्न ऐसे प्रकरणों में लागू नहीं होता है।

राज्य शासन के प्रतिनिधि

धारा 6 के अंतर्गत राज्य शासन को मुक्त किया गया है और उसके विरुद्ध दावा प्रस्तुत नहीं किया जा सकता है इसका अर्थ यह नहीं है कि राज्य शासन उसके प्रतिनिधियों को किसी न्यायिक आधिपत्य से हटाने से कोई अधिकार प्राप्त हुआ है। ***ए.आई.आर. 1979 सुप्रीम कोर्ट 1628 रामन्ना विरुद्ध दि इंडस्ट्रियल एअरपोर्ट,*** ए.आई.आर. 1982 म.प्र. पेज 1 (एम पी.आई एक्सट्रेक्शन प्रा. लि. विरुद्ध म. प्र राज्य) तथा ***ए.आई.आर. 1980 देहली 83 डी.बी. जगजीत फिल्म प्रा. लि. विरुद्ध देहली डेवलेपमेन्ट अथारिटी*** के दृष्टांत के अनुसार तथ्यात्मक बाते भारतीय संविधान के अनुच्छेद 226 के अनुसार उच्च न्यायालय में उपस्थित नहीं की जा सकती हैं और इसके लिये विनिर्दिष्ट सहायता अधिनियम के अंतर्गत ही कार्यवाही अपेक्षित होती है।

मर्यादाकाल

धारा 6 विनिर्दिष्ट सहायता अधिनियम के अंतर्गत मर्यादाकाल की अवधि अनिर्धारित कर देने से मर्यादा अधिनियम की धारा 29 (2) के अनुसार मर्यादाकाल के लिये मर्यादा अधिनियम के प्रावधान इस सीमा तक लागू नहीं होंगे। इस संबंध में ***ए.आई.आर. 1974 गुजरात 106 बाई धाई विरुद्ध अमोलक भाई*** का दृष्टांत स्पष्ट है।

अपील अथवा रिवीजन

ए.आई.आर. 1974 इलाहाबाद 1969 जमालुद्दीन विरुद्ध असीमुल्ला तथा ***ए.आई. आर. 1947 नागपुर 53 झकराली विरुद्ध इसरार हुसैन*** के दृष्टांत के आधार से यह कहा जा सकता है कि धारा 6 के अंतर्गत पारित आदेश के आधार से अपील नहीं होगी।

रिवीजन

धारा 115 व्यवहार प्रकिया संहिता के अंतर्गत विचारण न्यायालय के पत्र अंतर्गत पारित आदेश के विरुद्ध रिवीजन होगी। और रिवीजन का अधिकार भी अत्यन्त मर्यादित है जैसा कि ए.***आई.आर. 1993 उड़ीसा 92 पदारथ विरुद्ध सीबा साहू*** के दृष्टांत में दर्शाया गया है ***ए.आई.आर 1968 देहली 36 मेसर्स इंडस्ट्रियल माइनिंग विरुद्ध एन. एल. कमोडिया*** के दृष्टांत में उच्च न्यायालय ने कहा कि चूँकि घोषणा और निषेधाज्ञा की सहायता के द्वारा नियमित वाद प्रस्तुत करके प्रतिवादी अपने स्वत्व स्थापित कर सकता है इसलिये रिवीजन अस्वीकार की जाती है। इस संबंध में ए.आई आर. 1953 आसाम 158 अब्दुल बारी का प्रकरण तथा ए.आई.आर. 1984 पेज 171 श्रीमति शोभा बाटी का प्रकरण स्पष्ट है जिसमें कहा गया है कि अपवादात्मक रूप से मात्र विशेष परिस्थितियों में ही रिवीजन सुनवाई के लिये ग्राह्य हो सकती है। अपील न होने का कारण यह दर्शाया गया है कि धारा 6 के अंतर्गत संस्थित दावा वास्तव में प्रवर्तन जैसी कार्यवाही होती है इसलिये धारा 6 के अंतर्गत पारित और डिक्री के विरुद्ध अपील नहीं होगी। ***कन्हाईलाल विरुद्ध जितेन्द्रनाथ (1918) 45 कलकत्ता 519*** का दृष्टांत एवं ***1977 एम. पी. एल. जे. नोट 40 पारसनाथ वि. रज्जन बाई*** के दृष्टांत बताए जा सकते हैं।

धारा 145 दंड प्रकिया संहिता का प्रभाव

यदि धारा 145 दंड प्रकिया संहिता के अंतर्गत दांडिक न्यायालय (कार्यपालक दंडाधिकारी) ने यह मानते हुये कि कार्यवाही दिनांक से 2 माह पूर्व के अंदर हीरालाल का आधिपत्य था और हीरालाल को आधिपत्य दे दिया है तब भी रामलाल यदि कार्यवाही दिनांक से 6 माह पूर्व आधिपत्य में रहा हो तब भी धारा 6 के अंतर्गत दावा संस्थित करने के लिये सक्षम है 1929 ए.आई.आर. रंगून पेज 31, ए.आई.आर. 1939 इलाहाबाद 208 एवं 1971 इलाहाबाद विकाली रिपोर्ट पेज 562 के दृष्टांत स्पष्ट है। (1997) 2 एस. सी. सी 279 बिहारी लाल विरुद्ध भूरी देवी के दृष्टांत स्पष्ट हैं।

कोर्ट फीस

कोर्ट फीस अधिनियम म. प्र. संशोधन परिशिष्ट 1 अनुच्छेद 2 के अनुसार धारा 6 विनिर्दिष्ट सहायता अधिनियम के अंतर्गत सामान्यतः किसी दावे के लिये जो कोर्ट फीस लगती है उस कोर्ट फीस की आधी कोर्ट फीस देय होती है।

HINDU MARRIAGE & AGE

V. K. Shrivastava
D. J., Durg

A particular Matrimonial relationship, having statutory status between a man and a woman is commonly called Marriage, which is the origin of a family. Since ancient days certain conditions are continuing for marriage and after fulfilment of those conditions only a marriage tie is given recognition in society. Before coming into force of the Hindu Marriage Act 1956 a Hindu marriage could be solemnized in accordance with the customary rites or under Special Marriage Act 1954.

After coming into force of the Hindu Marriage Act 1956 a Hindu Marriage may be solemnized in accordance with the provisions contained there in or in accordance with the provisions of the special Marriage Act 1954.

Hindu Marriage Act 1956, Section 5(iii) as amended by Act 2 of 1978 has laid down that a marriage between any two hindus may be solemnized if the bridegroom has completed the age of twenty one years and the bride is of the age of eighteen years at the time of marriage.

Most important feature of this condition is that the violation of this condition does not make the marriage void although the violation is punishable under section 18 of the Act.

Under Special Marriage Act 1954 as per section 4(c) a marriage between any two person may be solemnized if at the time of marriage the male has completed the age of twenty one years and the female has completed the age of Eighteen years. As per section 24 (I) (i) it is clear that if condition specified above is violated then the marriage shall be null and viod.

When under both these enactments, age restrictions are the same, then it is necessary to avoid the ambiguity that the marriage solemnized under Hindu Marriage Act in violation to age restrictions must be declared null and viod.

Under Article 14 and 15 (1) of our Indian Constitution man and woman are treated at par but under above provisions different age has been fixed for woman and man for entering into married life on the ground that woman attains maturity earlier than male.

Minimum age for bride and bridegroom has been fixed to save the children and immature boys and girls but ignoring the fact that still in our society a man of sixty can marry a girl of teen age.

I am of the view that different scale age for man and woman as prevalent now should be abolished and minimum age for both be kept alike and some age difference should be fixed for those who are interested in marrying in their old age so that woman, who are compelled, oppressed or forced under influence of money, power or threat to marry old persons.

RULES UNDER SECTION 14 AND 21 OF THE HINDU MARRIAGE ACT, 1955

(ACT. NO. XXV OF 1955)

High Court of Madhya Pradesh, Jabalpur - In exercise of the powers conferred by sections 14 and 21 of the Hindu Marriage Act, 1955 (Act XXV of 1955) the High Court is pleased to make the following rules to regulate proceedings under the said Act.

RULES

1. Every petition under the Hindu Marriage Act (Act XXV of 1955) hereafter called the "Act" shall be accompanied by a certified copy of extract form the Hindu Marriage Register maintained under section 8 of the Act or from the Register of Marriages maintained under any other Act where the marriage has been registered under some other Act and where a certified copy of extract can be granted to the petitioner.

2. **CONTENTS OF PETITIONS -** Every petition shall state.

   (1) The name of the Court in which the petition is presented.

   (2) The name of the parties, their ages, description and places of residence,

   (3) The place and date of marriage :

   (4) The principal addresses at which the parties to the marriage reside or last resided together, within the jurisdiction of the court.

   (5) Whether there is any living issue of the marriage, and if so, the names and dates of birth or ages of such issues.

   (6) Whether there have been in any Court in India previous proceedings with reference to the marriage by or on behalf of either of the parties, and if so, the particulars and the results of such proceedings,

   (7) Details of the facts specified in section 20 (1) of the Act so far as they are known to the petitioner. In particular the details shall include.

   (a) If the petition is for restitution of conjugal rights, the date when and the circumstances in which the respondent withdrew form the society of the petitioner.

   (b) If the petition is for judicial separation

   (i) The date and place of the desertion, cruelty, or sexual intercourse which is made the ground for relief and in case of sexual intercourse, the names and address of the person or persons with whom the respondent had sexual intercourse.

   (ii) The period of leprosy, venereal disease or unsoundness of mind which is made the grounds of relief :

   (c) If the petition is for a decree of nullity on the grounds of contravention of clause (i) of section 5 of the Act, the name and address of the spouse.

(d) If the petition is for a decree of nullity on the grounds specified in clause (c) of section 12 of the Act, the date and particulars of the force or fraud as the case may be, by which the consent was obtained and the date on which the force ceased to operate or the fraud was discovered.

(e) If the petition is for divorce on the grounds of -

(i) Conversion, unsoundness of mind, leprosy, veneral disease renunciation of the world or another marriage, the date and place of the act or disease.

(ii) Adultery, rape or sodomy, the date and place of the act or acts and the name and address of the person or persons with whom these acts were committed by the respondent.

(iii) Presumption of death, the last place of co-habitation of the parties, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of and the steps which have been taken to trace the respondent.

(8) The property mentioned in section 27 of the Act, if any relief is claimed in respect thereof :

(9) Relief or reliefs :

3. **APPLICATION FOR LEAVE UNDER SECTION 14 OF THE ACT. -** Where any party to the marriage desires to present a petition for divorce within three years of such marriage, he or she shall apply by an application for leave of the Court-

(1) The application shall be accompanied by the petition intended to be filed.

(2) The application shall be supported by an affidavit made by the applicant and shall state the following particulars :-

(a) the ground on which the application is made.

(b) particulars of the hardship or deprivity alleged.

(c) Whether there has been any previous application for this purpose, if so its details.

(d) Whether there are living any children of the marriage, and if so, their names and dates of birth or ages, and where and with whom they are residing.

(e) Whether any, and if so, what attempts at reconciliation have been made.

(f) Any other circumstance which may assist the court to determine the question whether there is reasonable probability of a reconciliation between the parties.

(3) Notice of the application along with the copy of the application and of the petition shall be served on the respondent.

(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order.

4. **APPLICATION OF ALIMONY AND MAINTENANCE -** Every application for alimony and maintenance shall be supported by an affidavit made by the applicant and shall state the average monthly incomes of the petitioner and the respondent, the source of these incomes, particulars of other movable and immovable property owned by them, the number of dependents on the petitioner and the respondent, and the names and ages of such dependents.

5. **NOTICE :-**The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition, The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in court within a period specified by the Court along with a copy for the use of the petitioner.

6. **SERVICE OF PETITION -** Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of the Civil Procedure Code.

7. **TAXATION OF COSTS -** Unless otherwise directed by the court, The costs of the petition under the Act shall be costs as taxed in a suit.

8. **TAXATION OF CERTIFIED COPY OF THE DECREE -** The Court shall send a certified copy of every decree of nullity or divorce to the Registrar incharge of the Hindu Marriage Register maintained under the Act or the officer in charge of the Marriage Register maintained under any other Act containing an entry about the marriage annulled or dissolved by the decree.

9. **APPEALS -** Appeal to the High Court from the decree and order of the District Court shall be governed by the Rules of the High court as far as may be applicable.

RULES UNDER
THE INDIAN DIVORCE ACT, 1869
(ACT IV OF 1869)

PART 1 - RULES MADE UNDER SECTION 17-A

1. These rules may be called the Indian Divorce (Domiciled Parties) Intervention Proceeding Rules, 1928

2. In these rules, unless there is anything repugnant in the subject or context-

   '**Act**' means the Indian Divorce Act 1869 (IV of 1869)

   '**Officer**' means an officer appointed under section 17-A of the Act to exercise the like right of showing cause that a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in English by the King's Proctor,

   '**Pleader**' Means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of a High-Court, and

   '**Proceeding**' means a suit or proceeding under the Act.

3 (i) If any person during the progress of a proceeding or before the decree nisi is made absolute gives information to the officer on any matter

material to the due decision of the case, the officer may take such steps as he considers necessary or expedient.

(ii) If in consequence of any such information or otherwise the officer suspects that any parties to the petition are or have been in collusion for the purpose of obtaining decree contrary to the justice of the case he may after obtaining the leave of the Court, intervene and produce evidence to prove the alleged collusion.

4 (i) When the officer desires to show cause against making absolute a decree nisi, he shall enter an appearance in the proceeding in which such decree nisi has been pronounced and shall, within a time to be fixed by the Court, file his plea setting forth the grounds upon which he desires to show cause as aforesaid and a certified copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his pleader. On entering an appearance the officer shall be made a party to the proceeding and shall be entitled to appear in person or by pleader.

(ii) Where such plea alleges the petitioner's adultery with any named person, a certified copy of the plea shall be served upon each such person omitting such part thereof as contains an allegation in which the person to be served is not named.

(iii) All subsequent pleading and proceeding in respect of such plea shall be filed and carried on in the same manner in respect of an original petition under the Act, except as hereinafter provided.

(iv) If the charges contained in the plea of the officer are not denied or if no answer to the plea of the officer is filed within the time allowed or if an answer is filed and withdrawn or not proceeded with, the officer may apply forthwith for recession of the decree nisi and dismissal of the petition.

5. Where the officer intervenes and shows cause against a decree nisi in any proceedings for divorce, the Court may make such order as to the payment by other parties to the proceeding of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(Government of India, Home Department, Notification No. F-928-27-1. Judicial, dated the 28th July, 1928 may be referred.)

Note - *The Legal remembrancer. Central Provinces and Berar is the officer appointed under Section 17-A to exercise, within the jurisdiction of the High Court of judicature at Nagpur, the like right of showing cause why a decree for dissolution of marriage should not be made absolute or should not be confirmed. As the case may be as is exercisable in England by the King's Proctor.*

(Government of India, Home Department, Notification No. F., 928-27-1 Judicial, dated the 28th July, 1928 as amended by Notification No. F. 34-36 Judicial, dated the 31st March, 1936 may be referred.)

PART 2 - RULES UNDER SECTION 62

1. All petitions under sections 10, 18, 27, 32 or 34 and all applications under Section 23 of the Indian Divorce Act (IV of 1869), hereinafter called 'the Act' shall be accompanied by a certified copy of the certificate of marriage if no such a certificate is available to the petitioner or applicant and if no such certificate is available by an affidavit setting forth that such certificate is not available. All such petitions or application shall also be accompanied by the registered address of the applicant or petitioner under Order VII, rule 19, Civil Procedure Code.

2. (a) The body of such petition or application shall, in addition to any particulars required by law to be included, contain the particulars stated below :-

   (i) whether the petitioner or applicant professes the Christian religion.

   (ii) the place and date of the marriage and the name, status and domicile of the wife before the marriage.

   (iii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and the places of residence of the parties at the time of the institution of the suit.

   (iv) the principal permanent addresses where parties have cohabited including the address where they last resided together in India;

   (v) whether there is living issue of the marriage, and if so the names and dates of birth or ages of such issues;

   (vi) whether they have been in the Divorce Division of the High Court of Justice in England or in the Court of Sessions in Scotland or in any Court in India if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage and the result of such proceedings;

   (vii) the matrimonial offences charged, set out in separate paragraphs, with times and places of their alleged commission.

   (viii) the claim for damages, if any;

   (ix) the grounds on which the petitioner claims that the District Court, in which the petition is presented, has jurisdiction to determine the petition.

   and, if the petition is one presented by a husband for dissolution of marriage and the alleged adulterer is not made a co-respondent, the grounds on which the petitioner seeks to be excused from making such adulterer a co-respondent.

   (b) The petition shall conclude with a prayer setting out particulars of the relief claimed including the amount of any claim for damages and any order for the custody of children which is sought, and shall be signed by the petitioner.

Provided that where the petitioner is, by reason of absence or for other good cause unable to sign the petition, it may be signed by any person duly authorised by him or her to sign the same or to sue on his or her behalf.

3. The statement contained in every petition shall be verified by the petitioner or some other competent person in the manner required by the Code of Civil Procedure for the verification of plaints.

4. Where in an answer to a petition for dissolution of marriage presented by a husband, the wife alleges the adultery of the husband with a named person a certified copy of the pleading shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

5. Every petition or notice required to be served under the Act or under these rules shall be served either within or without British India in the manner prescribed for service of summons in the Civil Procedure Code, provided that service shall, as far as possible be made by delivery of the petition or notice to the person to be served.

6. A respondent, co-respondent, or woman to whom leave to intervene has been given under rule 4 may file in Court an answer to the petition.

7. (i) Any answer which contains matters other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent, co-respondent or intervener, as the case may be, in the manner required by these rules for the verification of petitions, and when the respondent is husband or wife of the petitioner, the answer shall contain a declaration that there is not any collusion or connivance between the parties.

   (ii) Where the answer of a husband alleges adultery and prays relief a certified copy thereof shall be served upon the alleged adulterer. When in such case no relief in claimed, the alleged adulterer shall not be made a co-respondent but a certified copy of the answer shall be served upon him together with a notice as under rule 4 that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

8. The provisions of Order VIII, rules 11-13 shall apply to respondents, co-respondents and interveners as though they were opposite parties in a proceedings.

9. (i) If it appears to the court that proceedings for the dissolution of the marriage has been instituted in England or Scotland before the date on which the petition was filed in India. the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in England or Scotland, have terminated or until the Court shall otherwise direct.

(ii) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provision of the Act, with the trial of the suit.

10. Every judgment granting a decree for dissolution of marriage, nullity of marriage, of judicial separation shall record clear findings as to the facts which give the Court jurisdiction to pass the decree, and the court for this purpose should take care to see that sufficient and proper evidence is adduced in the course of the proceedings to enable it to record such findings.

11. When the District Judge makes a decree for dissolution of marriage or of nullity of marriage, a copy thereof shall, if the respondent, co-respondent or intervener filed a registered address, be served within a month form the date of the decree at such address in the manner prescribed and the parties shall be informed by notice at their registered address that the case for confirmation of the decree will come up in the High Court on the first Friday which is a working day after the completion of six clear months from the date of the decree and that no further notice of the date of hearing in the High Court will be given. The period of six months shall not include the day on which the decree was made. The parties shall at the same time be warranted that a re-marriage before six months from the date on which decree is made absolute by the High Court is prohibited by Section 57 of the Act and that such re-marriage is liable under Section 19 to be declared a nullity.

12. The District Judge shall then submit the proceedings to the High Court for order under Section 17 or 20, as the case may be.

13. Cases for confirmation of a decree received from District Judge under section 17 and 20 of the Indian Divorce Act shall be put to the Court on the First Friday which is working day after the completion of six clear months form the date of the decree of the District Judge and the court may either deal with the matter forthwith or adjourn the matter.

14. Any person applying under the paragraph of section 17 of the Act to the High Court to remove the suit form the Court of A District Judge may file an application for the purpose supported by an affidavit setting forth the grounds on which the applicant relies. A certified copy of the application and affidavit shall be served on all parties to the suit who may, within a time to be fixed by the High Court, file affidavits in reply and the High Court shall then make such further orders in the matter as it deems fit.

15. Any person other than the officer appointed under Section 17-A of the Act wishing to show cause against making absolute a decree nisi made under Section 16 of the Act shall enter an appearance in the suit in which such decree nisi has been pronounced and at the same time file affidavit setting forth the facts upon which he relies.

16. Certified copies of such affidavits shall be served upon the party in whose favour the decree nisi has been made at his registered address or upon his advocate authorised to receive service.

17. The party in the suit in whose favour the decree *nisi* has been pronounced may, within a time to be fixed by the court file affidavits in answer and the person showing cause against the decree nisi being made absolute may, within a further time to be so fixed, file affidavits in reply.

18. A decree *nisi* made under section 16 shall not be made absolute till after the expiration of six clear months form the date of the decree *nisi*. The period of six months shall not include the day on which the decree was made.

RULES UNDER SECTION 41 OF THE SPECIAL MARRIAGE ACT, 1954

(ACT NO. XLIII OF 1954)

Nagpur, the 11th September 1956 No. 8266 - In exercise of the powers conferred by section 41 of the special Marriage Act, 1954 (No. 43 of 1954) and all other powers hereunder enabling the High Court of Judicature at Nagpur has, made the following rules which are published for general information.

RULES

1. **Short title and commencement** -

   (a) These rules may be called the special Marriage Rules. 1956

   (b) They shall come into force from the date of their publication in the Madhya Pradesh Gazette.

2. **Definition** - In these rules unless there is anything repugnant to the subject or context.

   "Act" means the special Marriage Act, 1954, (No. XLIII of 1954)

3. **Application of other Act and Rules** - The provisions of the Indian Divorce Act, 1869 as regards forms and procedure in so far as such forms and procedure may be applicable *mutatis mutandis* and the rules made there-under with necessary changes and adaptation and the general rules of Court relating to registration contents and presentation or filing of plaints and written statements, in so far as they are not inconsistent with the Act or with these rules shall apply to all proceedings under the Act.

4 **Registration of petitions** - All original petition under Chapter V, VI or VII of the Act shall be registered as suits of Class III in the register of Civil Suits.

5 **Contents of petitions** - A petition under Chapter V or Chapter VI of the Act shall, in addition to any particulars required by law, state :-

   (i) the place and date of marriage

   (ii) the name, status and domicile of the wife before the marriage.

   (iii) the status of the husband and his domicile at the time of the marriage and at the time, the petition is presented and his occupation and the place or places of residence of the parties at the time of the institution of the suit,

(iv) the principal permanent addresses where the parties have cohabited including the address where they last resided together.

(v) where there is living issue of the marriage and if so the names and date of birth or ages of such issues.

(vi) whether there have been any, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, the place of such proceedings and result of such proceedings;

(vii) the grounds on which the petitioner claims that the court to which the petition is presented has jurisdiction to entertain the petition.

6. A petition for restitution of conjugal rights shall, in addition to the particulars mentioned in rule 5, state -

(i) The date from which the respondent has withdraw from the society of the petitioner.

(ii) The age of the respondent.

(iii) the person or persons with whom the respondent residing at the time of the institution of the suit.

(iv) the attempts, if any, made before suit by the petitioner for resumption of normal relations.

7. A petition for judicial separation or divorce shall, in addition to the particular mentioned in rule 5 state-

(i) the specific grounds on which judicial separation or divorce is claimed.

(ii) the claim for damages, if any.

(iii) the absence of collusion between the petitioner and the other party to the marriage.

8. A petition for divorce by mutual consent shall in addition to the particulars mentioned in rule 5, state-

(i) the place or places and period or periods during which the parties have lived together.

(ii) the period during which the parties have been living separately.

(iii) the reason for not being able to live together.

9. A petition for declaration of nullity of a marriage shall, in addition to the particulars mentioned in rules 5 and 7, as far as applicable, state the facts which make the marriage null and void.

10. A petition for the annulment of a marriage shall, in addition to the particulars mentioned in rules 5 and 7 as far as applicable, state the grounds or ground on which annulment of the marriage is sought.

11 **Impleading of co-respondent** - Petition for Judicial separation or divorce on the grounds of adultery shall implead the alleged adulterer as a co-respondent, unless any of the following reasons is given for not so impleading-

(a) that the respondent is leading the life of a prostitute and that the petitioner knows of no person with whom the adultery has been committed.

(b) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it.

(c) that the alleged adulterer is dead.

12. **Intervener** -

(a) Any person, not already a party to the proceedings may, by an application supported by an affidavit seek the permission of the Court to intervene and show cause why a decree for divorce, declaration of nullity of marriage or annulment of marriage should not be passed.

(b) It the Court allows such an application, the intervener shall be made a party to the proceedings and shall, if the intervention is not bonafide, be liable for costs.

13. **Damages** - The Court may award to the petitioner such damages against a co-respondent who has been found guilty of adultery as the court deems proper.

14. **Limitation** - The provisions of section 5 of the Indian Limitation Act, 1908 shall apply to applications and appeals under the Act.

●

NOTABLE EXCERPTS

Oliver Wendell Holmes Jr. :-

"This is a court of law, young man, not a court of Justice."

The underlying sarcasm in the barb of Holmes generates and fuels the impulse of law courts to endavour to become courts of justice.

In the words of Addison:

"To be perfectly just is an attribute of the divine nature; to be so to the utmost of our abilities is the glory of man."

It is this spirit which motivates the judiciary to strive to realise its full potential and convert it into kinetic energy.

By Hon'ble the Chief Justice of India

SHRI J. S. VERMA

AMENDMENTS OF RULES IN C. P. C. BY M. P. HIGH COURT

(Notification No. 5283-A, Published in M.P. Rajpatra. dated 16-6-1960 Part 4 (Ga)- In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908 (V of 1908). and in supersession of all previous amendments in the Code which are now in force in any part of Madhya Pradesh. the High Court of Madhya Pradesh. Jabalpur is pleased to make, with the previous approval of the State Government, the following amendments to the rules in the First Schedule to the Code of Civil Procedure-

Amendments

ORDER III

(1) *Substitute* the following for clsuse (a) of rule (2) :-

Person holding on behalf of such parties either (i) a general power-of-attorney. or (ii) in the case of proceedings in the High Court of Madhya Pradesh, an advocate of that High Cout and in the case of proceedings in any district, any Advocate. or a Pleader to whom a sanad for that district has been issued, holding the requisite special power-of- attorney from parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done. authorising them or him to make and do such appearance, applications and acts of behalf of such parties.

(2) Rule 5- *Substitute* 'on a pleader who has been appointed to act for any party' for 'on the pleader of any party.'

ORDER IV

(3) Rule 1. *Substitute* the following for sub-rule (1) :-

'(1) Every suit shall be instituted for presenting to the Court or such officer as it appoints in this behalf a plaint. together with as many true copies on plain paper as there are defendants for service with the summons upon each defendant. unless the Court for good cause shown. allows time for filing such copies.'

(4) Rule 1. *Insert* the following as sub-rule (2) renumbering the existing sub-rule (2) as sub-rule (3) :-

'The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed. and in the case of all other proceedings when the process is applied for.'

ORDER V

(5) Rule 15.- *Substitute* 'when the defendant is absent or cannot be personally served' for 'Where in any suit the defendant cannot be found.'

(6) Rule 17. *Add* at the end of the rule the following proviso :-

'Provided that where a special service has been issued and the defendant refused to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore'

(7) Rule 25.- *Substitute* 'may' for 'shall'

(8) New Rule 25-A-*Add* the following as rule 25-A:-

'25-A, Service where defendant resides in India but outside Madhya Pradesh.- Where the defendant resides in India but out side the limits of Madhya Pradesh. The Court may. in addition to any other mode of service. Send the summons by registered post to the defendant at the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be prima facie proof of service.

(9) Rule 26- *Insert* 'In additon to or in substitution of the method permitted by rule 25' between the words 'may' and 'be sent'.

ORDER VII

(10) Rule 9.- *Substitute* the following for the existing rule :-

'9 (1)The plaintiff shall endorse on the plaint or annex thererto a list of the documents (if any) which he has produced along with it.

(2)The Chief Ministerial officer of the Court shall sign such lists and the copies of the plaint presented under rule 1 of Order IV. if on examination, he finds them to be correct.'

(11). New Rules 19 to 23- *Add* the following as rules 19 to 23 :-

19 Registered address. Every plaint or original petition shall be accompanied by a memorandum giving an address at which service of process may be made of the plaintiff or the petitioner. The address shall be within the local limits of the Civil district in which the plaint or original petition is filed. or, if an address within such Civil district cannot conveniently be given, within the local limits of the Civil district in which the party ordinarily resides.

This address shall be called the 'registered address' and it shall hold good throughout interlocutory proceedings and appeals and also for a Further period of two years from the date of final decision and for all purposes including those of execution.

20. Registered address by a party subsequently added as plaintiff or petitioner :- Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. Consequences of non-filing of registered address-

(1) If the plaintiff or the petitioner fails to file a registered address as required by rule 19 or 20, he shall be liable, at the discretion of the court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court suo motu or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the court shall set aside the dismissal or the rejection upon such terms as to costs or othrewise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22. Affixing of process and its validity.- Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

23. Change of registered address :- A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendments of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform'

ORDER VIII

(12) New rules 11 to 13.- *Add* the following as rules 11 to 13-

11. Registered address:- Every defendant in a sult or opposite- party in any proceedings, shall on the first day of his appearance in court file a memorandum giving an address for service on him of any subsequent process. The address shall be within the local limits of the Civil District in which the suit or petition if filed or, If an address witin the limits of such Civil District in which the party ordinarily resides.

This address shall be called the 'registered address' and it shall hold good throughout intcrlocutory procecdings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

12. Consequence of non-Filing of registered address:- (1) if the defendant or the opposite-party fails to file a registered address as required by rule 11 he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

An order under this rule may be passed by the Court suo motu or on the application of any party.

(2) Where the Court has struck out the defendant under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing, appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be. may apply to the Court by which the decree or order was

passed for an order to set aside the decree or order : and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address. the court shall make an order setting aside the decree or order as against him upon such terms as to costs or othrewise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposlte parties.

13. Rules 20.22 and 23 of Order VII. shall apply so far as may be to addresses for service filed under rule 11

ORDER IX

(13) Rule 13.- (a) *Renumber* the existing rule as sub-rule (1)

(b) *Substitute* 'there was sufficient cause of his failure to appear' for 'he was prevented by any sufficient cause from appearing' occurring in the sub-rule (1) so renumbered.

(c) *Add* the following as additional proviso and explanation to sub-rule (1):-

Provided also that no such decree shall be set aslde merely on the ground of irregularity in service of summons. if the Court is satisfied that the defendant knew. or but for his willful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiffs claim.

Explanation.- Where a summons has been served under 'Order V. rule 15. on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit. it shall not be deemed to have been duly served within the meaning of this sub-rule.

(d) *Add* the following as sub-rule (2) :-

"(2) The provisions of section 5 of the Indian Limitation Act. 1908. shall apply to applications under sub-rule (1)"

ORDER XIII

(14) Rule 7. *Add* the following as sub-rule (3)-

"(3) Every document produced in evidence which is not written in the Court language or in English. Shall be accompanied by a correct translation into English and every document which is written in Court language but in a script other than Devanagri shall be accompanied by a correct transliteration into Devanagri script. If the document is admitted in evidence. the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document."

(15) Rule 9.- *Insert* the following as sub-rule (2) renumbering the existing sub-rule (2) sub-rule (3):-

"(2) Where the document has been produced by a person who is not a party to suit the Court may order and at the request of the person applying for the return of the document shall order the party. at whose instance the document was produced to pay the cost of preparing a certifying copy."

ORDER XVI

(16) Rule 2.- *Add* the following as an exception to sub-rule (1):-

'*Exception.*- When applying for a summons for any of its own officers. Government and State Railway administrations will be exempt from the operation of sub-rule (1).'

(17) Rule 3.- *Substitute* the following for the existing rule :-

"3 (1) The sum so paid into Court Shall. Except in case of a Government servant or State Railway employee. be tendered to the person summoned, at the time of serving the summons if it can be served personally.

(2) Where a party other than Government in a suit requests the Court to summon a Government servant or a Railway employee as a witness or to produce official documents. the party shall deposit with the Court a sum. which in the opinion of the Court. will be sufficient to defray the travelling and other allowances of the Government servant or the Railway employee. as the case may be. as for a journey on tour and out of the sum so deposited. the court shall pay the Government servant or the Railway employee concerned. the amount of travelling and other allowances admissible to him as for a journey on tour."

(18) Rule 4:- *Insert* the following between the words ' summoned' and 'as appears' and sub-rule (1):-

"Or, when such person is a Government servent or a State Railway employee to be paid into Court."

ORDER XVII

(18 A) *Add* the following proviso to Rule 3 -

"Provided that in a case where there is default under this rule as well as default of appearance under Rule 2, the Court will proceed under Rule 2" - M.P. Gaz. 27-8-96, Pt. IV (Ga), P. 650.

ORDER XVIII

(19) Rule 2.- *Add* the following as sub-rule (4):-

(4) 'Nortwithstanding anything contained in this rule, the Court may order that the production of evidence of the address to the Court may be in any order which it may deem fit.'

(20) for the existing rule 5 of Order XVIII *substitute* the following:-

"in case in which an appeal is allowed, the evidence of each witness shall be taken down in writing. in the language of the Court or, in English. by or in the presence and under the personal direction and superintendence of the Judge not ordinarily in the form of question and answer, but in that of a narrative and. when completed. shall be read over in the presence of the Judge and of the witness, and the Judge shall. if necessary, correct the same and shall sign it."

ORDER XX

(21) Rule 11.- *Substitute* "and after notice to the decree-holder" for "and with the consent of the decree-holder" occurring in sub-rule (2).

(22) For the existing rule "20" of Order XX, *Substitute* the following :-

"20. Certified copies of Judgment and decree shall be furnished to the parties on application, and at their expense.

Applications for copies may be presented in person of by an agent or a pleader or sent by post to the head copyist of the office at the place where the record from which the copies are applied for will eventually be deposited for safe custody. When copies from a record in the temporary custody of a Court at a station where there is no record-room are required. applications may be presented in person or by an agent or pleader to the senlor judge at that station.

Provided that the judge shall neither comply with applications received by post nor send copies by post."

ORDER XXI

(23) Rule 1. *Substitute-*

(a) "Decree order" for "decree", wherever it occurs in the rule. and the marginal note.

(b) "by deposit in, or by postal money-order to", for the word "into" occurring in clause (a) of sub-rule (1) :

(c) "shall be given by the judgment-debtor to the decree-holder either through Court or direct by registered post." for "shall be given to the decree-holder" occurring sub-rule (2).

(24) Rule 11. *Add* the following proviso to sub-rule (2) :-

"Provided that. when the applicant files with his application a certified copy of the decree the particulars specified in clause (b), (c) and (h) need not be given in the application."

(25) Rule 16.- *Insert* "or to any Court to which it has been sent for execution" after the words "which passed it"

(26) Rule 17.- *Substitute* "the Court may allow the defect to be remedied then and there. or may fix time within which it should be remedied and. in case the decree-holder fails to remedy the defect within such time. the Court may reject the application", for "the Court may reject within a time to be fixed by it" occurring in sub-rule (1)

(27) Rule 18.- *Substitute* the following for the existing rule :-

"18.- (1) Where decree-holders apply to a court for execution of cross decrees in separate suits between the same parties for the payment of two sums of money passed and capable of execution at the same time by such Court, then-

(a) if two sums are equal, satisfaction shall be entered upon both decrees:

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum. and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum :

Provided that-

(i) each party fills the same character in both suits:

(ii) the sums due under the decrees are definite

(2) This rule shall be deemed to apply where either applicant is an assignee of one of decree as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself.

provided that-

(i) where the decrees were passed between the same parties. each party fills the same character in each suit.

(ii) where the decrees were not passed between the same parties the decree-holder in one of the suits is the judgment-debtor in the other suit and fills the same character in both suits: and

(iii) the sums due under the decrees are definite.

(3) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more such persons.'

(28) Rule 22.- *Add* the following proviso to sub-rule (2):-

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule. unless the judgment-debtor has sustainded injury by reason of such omission."

(29) Rule 24.- *Substitute* "returned to the Court" for the word "executed" occurring at the end of sub-rule (3).

(30) Rule 26.- *Substitute* "shall. unless good cause to the contrary is shown" for the word "may" occurring in sub-rule (3).

(31) Rule 31.- *Substitute* three months or such further time as the Court may. in any special case. for good cause shown. direct' the words 'six months' wherever they occur in sub-rule (2) and (3).

(32) Rule 32-

(a) in sub-rule (3)-

(i) *Substitute* 'three months' for 'one year'

(ii) *Insert* and the Court may also, for good cause shown. extend the time for the attachment remaining in force for a period not exceeding one year' after the word "application" : and

(b) in sub-rule (4) *Substitute* "three months, or such further time as may have been fixed by the Court under sub-rule (3)" for "one year".

(33) Rule 39.- (a) *Delete* the full stop at the end of sub-rule (1) and add the following

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house."

(b) *Substitute* the following as sub-rules (4) and (5) in place of the corresponding existing sub-rules :-

"(4) Such sum (if any) as the judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court -house to the civil prison, and from the civil prison on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) of such portion of the current month as remains unexpired, shall be paid to the proper officer of the court before the judgment-debtor is committed to the civil prison and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the costs of the conveyance if any of the judgment-debtor shall be deemed to be costs in the suit."

(34) Rule 40.- *Add* the following sub-rule (6), (7) and (8):-

"(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-rule (2) of the proviso to sub-rule (3) above. the Court may direct the decree-holder to deposit such amount as having regard to the specified or probable length of detention. will provide-

(a) for the subsistence to the judgment-debtor at the rate to which he is entitled under the scales fixed under section 57.

(b) for the payment to the office of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix.

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time; and

(ii) that the Court may form time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-rule (6) shall be deemed to be costs in the suit.

Provided that the judgment-debtor shall not be detained in the civil prison of arrested on account of any sum so disbursed.

(35) Rule 43.- *Substitute* the following for the existing rule 43:-

"**43. Attachment of movable property other than agricultural produce in possessing of judgment-order.-** (1) Where the property to be attached is movable property, other than agricultural produce. in the possession of the judgment-debtor, the attachment shall be made by actual seizure. and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible of the due custody thereof:

Provided that. when the property seized is subject to the speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value the attaching officer may sell it at once: and

Provided also that when the property attached consists of livestock,agricultural implement or other articles which cannot be conveniently removed, and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or any person claiming to be interested in such property. leave it in the village or at the place where it has been attached-

(a) in the charge of the judgment-debtor. or of the station pound-keeper. if any, or

(b) in the charge of the decree-holder, or the person claiming to be interested in such property or of such respectable person as will undertake to keep such property, on his entering into a bond with one of more sureties in an amount not less than the value of the property, that he will take proper care of such property and produce it when called for.

(3) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left. and if possible. of the parties to the suit and of at least one respectable person in attestation of the correctness of the list If the property attached includes both live stock and other articles, a separate list of the live-stock shall similarly be prepared and attested.'

(36) New Rule 43-a.- Insert the following as rule 43-a:-

43-A. Attachment of live stock.- (1) When an application is made for the attachment of live-stock the court may demand. in advance in cash at rates to be fixed half yearly. or oftener. if necessary. by the courts with the sanction of the district judge. the amount requisite for the maintenance of the live-stock from the probable time of attachment to the probable time of sale. or may at its discretion. make successive demands for portions of such period. The rates shall include cost of feeding. tending and conveyance and all other charges requisite for the maintenace and custody of the live-stock.

(2) If the live stock be entrusted to any person other than the judgment-debtor, the amount paid by the decree-holder for the maintenance of the cattle or a part thereof,may, at the discretion of the Court. be paid to the custodian of the live-stock for their maintenance. The produce, such as milk. eggs. etc., if any. may either be sold as promptly as possible for the benefit of the judgment-debtor, or may, at the discretion of the Court, be set off against the cost of maintenance of the live-stock,'

(37) Rule 53.- *Substitute-*

(a) "to such other Court and to any other Court to which the decree has been transferred for execution" for the word "to such other Court" occurring in clause (b) of sub-rule (1) and the sub-rule (4): and

(b) the following as sub-clause (ii) of clause (b) of sub-rule (1) in place of the existing sub-clause :-

"(ii) the holder of the decree sought to be executed or his judgment-debtor with the consent of the said decree holder expressed in writing or with the permission of the attaching Court applies to the Court receivng such notice to execute the attached decree."

(38) Rule 54.- in sub-rule (2). delete the full stop at the end of sub-rule (2) and add the following:-

'and also where the property is situated within cantonment limits, in the office of the local Cantonment Board and Military Estates Officer concerned.'

(39) Rule 54.- *Add* the following as sub-rule (3):-

"(3) The order shall take effect as against pruchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made."

(40) Rule 57.- *Substitute* the following for the existing rule:-

"57. Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application. the Court shall direct whether the attachment shall continue or cease, if the Court omits to make any such direction. the attachment shall be deemed to have ceased to exitst."

(41) Rule 58.- *Delete* the full stop at the end of sub-rule (2) and add the following :-

'Or, where the property to be sold is immovable property. the Court may. in its discreation. direct that the sale be held but shall not become absolute until the claim or objection is decided.'

(42) Rule 65.- *Add* the following :-

'Such officer or person shall be competent to declare the highest bidder as purchaser at the sale provided that where the sale is made in. or within the precincts of the Court-house. no such declaration shall be made without the leave of the Court.'

(43) Rule 66.- *Substitute* a comma for the full stop at the end of clause (e)of sub-rule (2). and add the following :-

"including the decree-holders estimate of the approximate market price."

(44) Rule 69.- *Substitute* 'thirty days' for 'seven days' in sub-rule (2).

(45) Rule 75.- *Insert* 'or where it appears to the Court that the crop can be sold to greater advantage in an upripe state' afther the words 'being stored' occurring in sub-rule (2).

(46) Rule 85.- *Add* the following explanation :-

"**Explanation.-** When an amount is tendered on any day after 1 p.m. but paid into Court on the next working day between 11 a.m and 1 p.m. the payment shall be deemed to have been made of the on which the tender is made "

(47) Rule 89.- *Substitute* 'any person claiming any interest in the property sold at the time of the sale or at the time of the petition. or acting for or in the interest of such person for any person either owning such property or holding an interest therein by virtue of a title acquired before such sale' occurring in sub-rule (1).

(48) Rule.9- *Add* the following as additional proviso to sub-rule (1) :-

'Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been,but was not put forward the applicant before the commencement of the sale.'

(49) Rule 92.- *Insert* the words "subject to the provisions of rule 58 (2)" after the word "make" occurring in sub-rule (1).

(50) Rule 94.- *Insert* a comma "the amount of the purchase money" between the words "sold" and "and".

(51) Rule 98.- (a) *Insert* "or on his behalf" after the word "instigation" wherever it occurs.

(b) *Substitute* a comma for the full stop at the end of the rule and add the following :-

"and may order the person or persons who it holds responsible for such resistance or obstruction to pay jointly of severally. in addition to costs. reasonable compensation to the decree-holder or the pruchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

(52) Rule 99.- *Substitute* '(other than the persons mentioned in rule 95 or 98) for '(other than the judgment-debtor).'

ORDER XXV

(53) Rule 1.- *Insert* 'or that any plaintiff is being financed by a person not a party to the suit' at the end of the proviso to rule 1 (1).

(54) New Rule 3.- *Add* the following as rule 3 :-

"3. Power to implead and demand security from a third person financing litigation,-(1) Where any plaintiff has. for the purpose of being financed in suit. transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit. the Court may order such person to be made a plaintiff to the suit if he consents and may either of its own motion or on the application of any defendant order such person. within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed. the Court may make an order dismissing the suit so far as his right to, or interest in. the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in the property in suit.

(2) If such person declines to be made a plaintiff. the Court may implead him as a defendant and may order him. within a time to be fixed by it. to give security

for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed. the court may make an order declaring that he shall be debarred from claiming any right to, or interest in the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rule (2) and (3) of rule 3 shall apply mutatis mutandis. to such application.

ORDER XXXII

(56) Rule 3.- *Substitute* the following for the existing rule :-

'3. Guardian for the suit to be appointed by Court for minor defendant.- (1) Where the defendant is a minor. the court. on being satisfied of the fact of his minority. shall appoint a proper person to be guardian for the suit of such minor.

(2) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree.'

(56) Rule 4. *Substitute* the following for the existing rule :-

'4. Who may act as next friend or guardian for the suit.- (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not. in the case of a next friend. a defendant, or in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers for reasons to be recorded, that is for the minor's welfare that another person be permitted to act in either capacity.

4-A. Procedure for appointment of guardian for the suit.- (1) No person except the guardian appointed or declared by competent authority. shall without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the Fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed

guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or where there is no such guardian. the person in whose care the minor is. and after hearing any objection that may be urged on a day to be specified in the notice. The court may. in any case. if it thinks fit. issue notice to the minor also.

(5) Where on or before the specified day such proposed guardian fails to appear and express his consent to act as guardian for the suit, of where he is considered unfit or disqualified under sub-rule (3), the Court may in the absence of any other person fit and willing to act. appoint any of its ministerial officers. or a legal practitioner. to be guardian for the suit. if a legal practitioner is appointed guardian for the suit, the Court shall pass an order stating whether he is to conduct the case himself or engage another legal practitioner for the purpose.

(6) In any case in which there is a minor defendant, the Court may direct a sufficient sum shall be deposlted in Court by the plaintiff from which sum the expenses of the minor defendant in the suit including the expense of a legal practitioner appoinrted guardian for the suit shall be paid. The costs so incurred by the plaintiff shall be adjusted in accordance with the final order passed in the suit in respect of cost.'

ORDER XLI

(57) Rule 14.- *Add* the following as sub-rule (3) :-

"(3) The appellate court may in its discretion dispense with notice to any respondent against whom the suit was heard exparte."

(58) New Rule 15-A.- *Insert* the following as rule 15-A:-

"15-A. Failure to take necessary steps after admission of an appeal in the High Court.- Where. after admission of an appeal in the High Court. the Rules of the High Court require the appellant to take any steps in the prosecution of appeal before a fixed date, and where, after due service of a notice intimating the steps to the High Court. the Rules of the High Court require the appellant fails to take such steps within the prescribed time. the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit."

(59) Rule 19.- *Substitute* "sub-rule (2) or rule 15-A, or rule 17" for "sub-rule (2). or rule 17".

(60) Rule 21.- *Renumber* the existing rule as sub-rule (1) and Add the following as sub-rule (2) :-

"(2) The provisions of section 5 of the Indian Limitation Act,1908, shall apply to application under sub-rule (1)".

(61) Below rule 27.- After sub-rule (1) (a) Insert the following as clause (b) and renumber the existing clause (b) as (c) :-

"(b) the party seeking to adduce additional evidence, satisfies the Appellate Court that such evidence. notwith standing the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal. was passed or made: or"

ORDER XLV

(62) Rule 3.- *Substitute* the following for the existing sub-rule (2):-

"(2) Upon receipt of such petition the Court, after sending for the record. and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day. may dismiss the petition."

(b) *Add* the following as sub-rule (3) :-

" (3) Unless the Court dismisses the petition under sub-rule (2), it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

(63) New Rule 7-A.- *Insert* the following as rule 7-A :-

"**7-A**. No such security as is mentioned in rule 7 (1), clause (a) shall be required from the Union of India or, where the State Government has undertaken the defence of the suit. from any public officer sued in respect of an act alleged to be done by him in his official capacity."

ORDER XLVIII

(64) Rule 1 (2).- *Substitute* the following for the words 'The Court-fee' occurring in sub-rule (2) :-

'Except as provided in Order IV. rule (2). the Court-fee."

APPENDIX E

(65) Form No. 38.- *Insert* "for Rs....." between "the purchaser" and "at a sale".

APPENDIX H

Miscellaneous

(66) Form No. 11.- *Substitute* the following for the existing form :-

"No. 11.

Notice to minor defendant and guardian

[Order 32, rule 4-A (Title)]

To,

Minor defendant,

Legally appointed/Actual guardian.

Proposed guardian.

Whereas an application has been presented on the part of the plaintiff on behalf of the minor defendant for the appointment of you.....as guardian of the Suit of the minor defendant .....(you the said minor[1]) you:.....his legally appointed/Actual guardian and you .....the proposed guardian for the suit are hereby required to take notice that unless you. the proposed guardian, appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to your appointment. or unless an application is made to this Court for the appointment of some other

1. The portion in brackets should be scored out if notice is to issue to the minor defendant.

person to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as a guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

Given under my hand and the seal of the Court this.....day of .....19....

Judge

[Published in M.P. Gaz., D. 16-6-1960, Pt IV(Ga)]

THE CODE OF CIVIL PROCEDURE (MADHYAPRADESH AMENDMENT) ACT, 1984

(M.P. ACT NO. 29 OF 1984

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THE CODE OF CIVIL PROCEDURE (MADHYA PRADESH AMENDMENT) ACT, 1984

(M.P. Act No. 29 of 1984)

[Received the assent of the President on the 31st July. 1984; Assent first published in the "M.P. Gazette" (Extraordinary) dated the 14th August 1984.]

AN ACT FURTHER TO AMEND THE CODE OF CIVIL PROCEDURE, 1908, IN ITS APPLICATION TO THE STATE OF MADHYA PRADESH.

Be it enacted by the Madhya Pradesh Legislature in the Thirty fifth year of the Republic of India as follows.

1. Short title.- This Act may be called the Code of Civil Procedure (Madhya Pradesh Amendment) Act. 1984.

2. Amendment of Central Act V of 1908 in its application.- to the State of Madhya Pardesh.- The Code of Civil Procedure.1908 (V of 1908) (hereinafter referred to as the principal Act) in its Application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Section 80.- Section 80 of the Principal Act.-

(i) In sub-section (1) for the words, brackets and figures 'sub-section (2)', the words, brackets and figures 'sub-section (2) or sub-section(4)' shall be substituted:

(ii) After sub-section (3). the following sub-section shall be inserted. manely.:-

"(4) Where in a suit or proceeding referred to in rule 3-B of Order I, the State is joined as a defendant or non-applicant or where the court orders joinder of the State as defendant or non Applicant in exercise of powers under sub-rule (2) of rule 10 of Order I such suit or proceeding shall not be dismlssed by reason of ommission of the plaintiff or application to issue notice under sub-section (1)".

This has been re- amended by the C.P.C. [M.P. Amendment Act 1994 (No. 4 of 1994)]

4. Substitution of S.115.- For Section 115 of the Principal Act.the following section shall be substituted namely :-

115. Revision.- The High Court. in cases arising out of original suits or other proceedings of the value of twenty thousand rupees and above, and the District Judge in any other case may call for the record of any case which has been decided by any court subordinate to such High Court or District Judge, as the case may be. and in which no appeal lies thereto, and if such subordinate court appears.

(a) to have exercised a jurisdiction not vested in it by law : or

(b) to have failed to exercise a jurisdiction so vested : or

(c) to have acted in the exercise of its jursdiction illegally or with material irregularity:

the High Court or the District Judge, as the case may be, make such order in the case as it thinks fit:

Provided that in respect of cases arising out of original suits or other proceedings of any valuation. decided by the District judge the High Court alone shall be competent to make an order under this section :

Provided further that the High Court or the District Judge shall not, under this section, vary or reverse any order including an order deciding an issue made in the course of a suit or other proceedings. except where.-

(i) the order. if so varied or reversed. would finally dispose of the suit or other proceeding or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Explanation.- In this section, the expression "any case which has been decided" includes any order deciding an issue in the course of a suit or other proceeding

5. Amendment of Order I of First Schedule.- In order I of First Schedule to the Principal Act after rule 3-A, the following rule shall be inserted. namely:-

"*3-B. Conditions for entertainment of suits.-* (1) No suit or proceeding for

(a) declaration of title or any right over any agricultural land, with or without any other relief. or

(b) specific performance of any contract for transfer of any agricultural land, with or without any other relief.

shall be entertained by any court, unless the plaintiff or applicant. as the case may be. knowing or having reason to believe that return under section 9 of the Madhya Pradesh Ceiling on Agricultural Holdings Act. 1960 (No. 20 of 1960) in relation to land aforesaid has been or is required to be filed by him or by any other person before competent authority appointed under that Act. has impleaded the State of Madhya Pradesh as one of the defendants or non-applicants. as the case may be, to such suit or proceeding.

(2) No court shall proceed with pending suit or proceeding referred to in sub-rule (1) unless. as soon as may be. the State Government is so impleaded as a defendant or non-applicant.

Explanation.- The expression 'sutil or proceeding' used in this sub-rule shall include appeal, reference or revision, but shall not include any proceeding for or connected with execution of any decree or final order passed in such suit or proceeding."

6. Amendment of Order VI of the First Schedule.- In Order VI of the First Schedule to the Principal Act. after rule 4. the following rule shall be inserted. namely :-

"*4-A. Particulars of pleadings for agricultural land.*- In any suit or proceeding contemplated under rule 3-B of Order I, the Parties, other than the State Government shall plead the particulars of total agricultural land which is owned claimed or held by them in any right and shall further declare whether the subject matter of suit or proceeding is or is not covered by Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (No. 20 of 1960) and whether any proceedngs in relation to such subject matter are to the knowledge of the party pending befor the competent authority."

7. Amendment of Order XIX of the First Schedule.- In order XIX of the First Schedule to the Principal Act. After rule 1, the following rule shall be inserted, namely:-

"*1-A. Proof of fact by affidavit in certain cases.*- Notwithstanding anything to the contrary in rule 1. the court shall. in a suit or proceeding referred to in rule 3-B of Order I and whether or not any proceeding under the M.P. Ceiling on Agricultural Holdings Act. 1960 (No. 20 of 1960) are pending before the competent authority appointed under that Act. call upon the parties of prove any particular fact of facts as it may direct. by affidavit, unless the court looking to the nature and complexity of the suit or proceeding and for reasons to be recorded in writing deems it just and expedient to dispense with the proof of a fact or facts by affidavits."

8. Amendment of Order XXXIX of the First Schedule.- In Order XXXIX of the First Schedule to the Principal Act.

(a) In rule 2, in sub-rule (2) following proviso shall be inserted. namely:-

"Provided that no such injunction shall be granted -

(a) Where no perpetual injunction could be granted in view of the provisions

of Section 38 and Section 41 of the Specific Relief Act. 1963 (No. 47 of 1947) : or

(b) to stay the operation of an order for transfer. suspension, reduction in rank, compulsory retirement. dismissal, removal or otherwise termination of service of. or taking charge from. any person appointed to public service and post in connection with the affairs of the state including any employee of any company or corporation owned or controlled by the State Government : or

(c) to stay. any disciplinary proceeding pending or intended or. the effect of any adverse entry against any person appointed to public service and post in connection with the affairs of the State including any employee of the company owned or controlled by the State Government : or

(d) to restrain any election : or

(e) to restrain any auction intended to be made or, to restrain the effect of any aucton made by the Government : or to stay the proceedings for the recovery of any dues recoverable as land revenue uness adequate security is furnished:

and any order for injunction granted in contravention of these provisions shall be void."

(b) In rule 4-

(i) after the words 'by the court' the words 'for reasons to be recorded, either on its own motion or' shall be inserted:

(ii) at the end. the following proviso shall be inserted. namely :

"Provided also that if at any stage of the suit it appears to the court that the party in whose favour the order of injunction exists is delaying the proceedings or is otherwise abusing the process of court, it shall set aside the order for injunction."

THE CODE OF CIVIL PROCEDURE (MADHYA PRADESH AMENDMENT) ACT, 1994

(NO 4 OF 1994)

Received the assent of the Governor on the 15th March 1994; assent first published in the "Madhya Pradeh Gazette (Extraordinary)" dated the 16th March, 1994.

An Act further to amend the Code of Civil Procedure, 1908 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Forty-Fifth year of Republic of India as follows:-

1. **Short Title -** This Act may be called the Code of Civil Procedure (Madhya Pradesh Amendment) Act, 1994

2. Amendment of Central Act V of 1908 in its application to the state of Civil Procedure, to the state of Madhya Pradesh - The Code of Civil Procedure, 1908 (V of 1908) (here-in-after refferred to as the Principal Act) in its application to the State of Madhya Pradesh be amended in the manner here-in-after provided.

3. Substitution of Section 115 - For Section 115 of the principal Act, the following Section shall be substituted, namely :-

"115 (1), Revision. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears -

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit;

Provided that the Hight Court shall not, under this section vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding, except where -

(a) the order, if it had been made in favour of the party applying for the revision, would have finally disposed of the suit or proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation. - In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

NOTES

For validity of State amendments in Rules under CPC please refer to the following law :-

(a) Section 97 (1) of the Code of Civil Procedure (Amendment) Act 1976 which runs as under :-

"97. Repeal and Saving - (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature of High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

(b) AIR 1986 SC 589 ***Ganpat Vs. IInd Addl. District Judge, Balia.***

(c) (1995) 4 SCC 718 ***Pt. Rushikesh Vs. Salma Begam*** (Art. 254 (2) proviso to Constitution of India and CPC (Amendment) Act 1976 S. 97 (1).

CENTRAL AMENDMENT

SECTION 28 OF THE INDIAN CONTRACT ACT AMENDED

THE INDIAN CONTRACT (AMENDMENT) ACT 1996 (ACT NO. 1 OF 1997) *

(8th January 1997)

An Act further to amend the Indian Contract Act, 1872 be it enacted by Parliament in the Fortyseventh year of the Republic of India as follows:

1. Short Title - This Act may be called the Indian Contract (Amendment) Act, 1996.

2. Amendment of S. 28 - In S. 28 of the Indian Contract Act 1872, for the portion beginning with the words "Every Agreement" and ending with the words "is void to that extent", the following shall be substituted namely :-

"Every agreement :-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his right, is void to that extent."

*Received the assent of the President on 8-1-1997. Act published in Gaz. of India; 8-1-1997, Part II-S. 1, Ext. P. 1 (No. 4).

STATE AMENDMENT

19-B. Definitions of "maintainer" and "champertous agreement" -

(a) "Maintainer" means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognised by law as justifying his interference.

(b) "Champertous agreement" means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

19-C. Power to set aside champertous agreement. - A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose.

Section 19-B and 19-C were added by the Central Provinces & Berar Indian Contract (Amendment) Act. XV of 1938 for local application.

N D. P. S. S.27

NOTIFICATION

Ministry of Finance (Department of Revenue) Notification No. S.O. 527(E) dated the 16th July, 1996 Published in Gazette of India (Extraordinary) Part II Section 3(ii) dated 23-7-96 Pages 10-19.

In exercise of the powers conferred by Explanation (1) to section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of the notifications of the Government of India, in the Ministry of Finance, Department of Revenue numbers S.O. 825 (E) dated the 14th November, 1985 and S.O. 827 (E) dated the 14th November, 1985 except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies the quantity mentioned in Column (3) of the Table below, in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in column (2) of the said Table, as **"small quantity"** for the purpose of clause (b) of that section.

Table

Sl. No.	Name of the narcotic drugs and psychotropic substance	Quantity (In grams)
(1)	(2)	(3)
1.	Opium and preparations containing opium	25
2.	Opium derivative [other than di-acety] morphine (heroin), morphine and those listed below] their salts and preparations containing such opium derivative or their salts.	5
3.	Poppy straw	100
4.	Charas (Cannabis resin)	25
5.	Ganja	100
6.	Coca leaf	100
7.	Coca derivatives (excluding cocaine) and their salts and preparation containing such coca derivatives\or their salts.	2

For further details of list of 218 items please see M.P.L.T. March 1997 Section III Page 57.

Rules U/S 82 of the Arbitration & Conciliation Act, 1996

Notification No. C-966-III-15-28-41 dated the 25th February, 1997.-In exercise of the powers conferred by Section 82 of the Arbitration & Conciliation Act, 1996 (26 of 1996), the High Court of Madhya Pradesh makes the following Rules as to the proceedings before the Courts under the Act, namely :-

1. These rules may be called the **Madhya Pradesh Arbitration Rules, 1997.**
2. They shall come into force from the date of their publication in the "Madhya Pradesh Rajpatra."

3. In these Rules "Act" means the Arbitration and Conciliation Act, 1996. Other expressions not defined herein shall carry the same meaning as they do under Section 2 of the Act.

4. (1) Every application under Section 9, Section 14, Section 17, Section 27, Section 34, Section 39 and Section 43 of the Act shall be made in writing duly signed and verified in the manner prescribed by Order-VI, Rule 14 and 15 of the Code of Civil Procedure, 1908 and if the Court so directs, shall be supported by an affidavit. It shall be divided into paragraphs numbered consecutively and shall contain the name, description and place of residence of the parties. It shall contain statement in concised form-

(a) of the material facts constituting cause of action;

(b) of facts showing that the Court to which the application is presented has jurisdiction;

(c) relief asked for; and,

(d) names and addresses of the persons liable to be affected by the application :

Provided that where a party, by reason of absence or for any other reason, is unable to sign and verify the same, it may be signed and verified by any person duly authorised by him in this behalf and is proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) an application for enforcement of an arbitral award under Section 36 or a foreign award under Section 47 or Section 56 shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the particulars prescribed in sub-rule (2) of Rule 11 of Order 21 of the Code of Civil Procedure, 1908.

5. The Court Fees (in Court fee stamps) on the application\Vakalatnama\Appeal made\preferred to the Court\Court of appeal under the Act shall be payable according to the Schedule below :-

SCHEDULE

A-APPLICATIONS

S.No.	Nature of Application	Amount of Court Fee
(1)	(2)	(3)
1.	Application under Section 9	Rs. 300.00
2.	Application under sub-Section (1) of Section 17	Rs. 50.00
3.	Application under Section 34	Rs. 500.00
4.	Application under Section 14,27,36,39 and 43	Rs. 200.00
5.	Application under Section 47 and 56	Rs.1,000.00
6.	Any other application	Rs. 50.00
7.	Vakalatnama	As prescribed under the Court Fees Act,1870

B-APPEALS

S.No. (1)	Nature of Appeal (2)	Amount of Court Fee (3)
1.	Appeal against an order on an application under Section 9	Rs. 300.00
2.	(a) Appeal against order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16.	Rs. 300.00
3.	Appeal against an order on an application under Section 34	Rs. 500.00
4.	Appeal against an order refusing to refer the parties to arbitration under Sections 45 and 54	Rs. 300.00
5.	Appeal against an order refusing to enforce a foreign award under Section 48 and sub-section (2) of Section 57.	Rs. 500.00

6. Where the application made by the party is not in accordance with the provisions of these rules, the Court may reject the application.

7. Every application shall, if the Court is satisfied that the same is in order, be numbered and registered as an arbitration case and every appeal shall be registered as an arbitration appeal.

8. The Court to which an application is presented shall direct notice thereof to be given to the opposite party and to such other persons as are likely to be affected by the proceedings requiring to show cause within a time to be specified in the notice why the relief sought in the application be not granted. The notice shall be accompanied by a copy of the application and documents filed by the applicant.

9. (1) Save as otherwise expressly provided in the Act or these Rules the following provisions of the Code of Civil Procedure, 1908 (V of 1908) shall apply to the proceedings before a Court in so far as they may be applicable thereto namely :-

(i) Sections 28, 31, 35, 35A, 35B, 107, 133, 135, 148A, 149, 151 and 152, and,

(ii) Order III, V, VI, IX, XIII, XIV, XVI to XIX, XXIV, and XLI.

(2) (a) For the purpose of facilitating the application of the provisions referred to under sub-section (1) the Court may construe them with such alterations, not affecting the substance, as may be necessary or proper to adopt to the matters before it; and

(b) The Court may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if it is satisfied that the interests of the parties shall not thereby be prejudiced.

10. The process fees in relation to the proceedings before the court shall be charged as per chapter XX of the Madhya Pradesh Civil Court Rules, 1961 as if the proceedings were the proceedings in suit.

[Published in M.P. Rajpatra Part IV (Ga) dated 14-3-97 Pages 24-25]

TIT-BITS

1) *A I R 1977 S C 925 =*
(1997) 2 SCC 469 STATE OF ORISSA VS. AGGARWALA :-

Arbitration Act : Interest

The arbitrator has jurisdiction to award interest pendente Lite i.e. for the period during which arbitration proceedings were pending. Arbitrator has jurisdiction to award future interest from the passing of the award but he should award future interest till the date of decree and the date of the payment which ever has earlier. The Court has jurisdiction, if award is filed in the Court, to determine whether interest could be awarded form the date of the decree and what should be the proper rate of interest. It is further held that arbitrator has jurisdiction to award interest in cases which arose after the Interest Act 1978 has become applicable i.e. from 19-8-1981 in regard to cases pertaining the period prior to applicability of the Interest Act. 1978.

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2) *(1997) 2 SCC 279 BIHARILAL VS. BHOORI DEVI*

Suit for possession under Section 6 (2) Specific Relief Act :-

Period of limitation is 6 months under Section 6 of the Act. Proceedings under Section 145 Cr. P. C. were initiated at the instance of the respondent and were pending for long time until the revision was dismissed by the High Court. While dismissing the revision the appellant was permitted to file a suit for possession. Suit filed immediately after issuance of notice ot the Government under Section 80 CPC it was held that the suit was maintainable under Section 6 of the Act. Permission was granted. Once an appellant comes in possession of the property lawfully cannot be unlawfully dispossessed.

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3) *(1997) 2 SCC 611 T. L. MUDDUKRISHANA AND ANOTHER V.S. SMT. LALITHA RAMACHANDRA RAO*

Specific Performance : Limitation.

Limitation Act, 1963. Art. 54 and Section 3. Amendment of plaint seeking specific performance of contract. Where date fixed in the contract for its performance, time begins to run from that date and for that purpose whether or not time was of the essence of the contract would be of no relevance. Agreement for sale of land by respondent to appellant stipulating date of performance as 28-5-1989 Respondent by notice dated 6-11-1989 repudiating the contract. Suit filed by appellant on 21-4-1992 for mandatory injunction directing respondent to comply with the requirements mentioned in the agreement. During pendency of the suit application filed by appellant on 5-11-1992 under Or. 6 R. 17 for amending the plaint and seeking specific performance of the agreement. Held suit for specific performance having been claimed by way of amendment of the plaint after expiry of 3 years from 28-5-1989 stipulated in the agreement, it was barred by limitation provided under Art. 54.

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4) *(1997) 1 SCC ADAVALA SATHAIAH VS. SPECIAL DEPUTY COLLECTOR. GENERAL CLAUSES ACT 1897 AND SECTION 9 LAND ACQUISITION ACT SERVICE OF*

Notice by post : Presumption.

Respondents 2, 3, 5, 6, 11 to 14 and 18 have left their respective places without any instruction as per endorsement made by the Postal authorities. Under these circumstances, notice on them is not necessary. Regarding Respondents 4, 7 to 10, 15 to 17 and 19 to 20, it is stated that neither unserved envelopes nor AD cards have been received back by the Registry. Under these circumstances, they must be deemed to have been served. Even though the petitioners succeed, these respondents cannot get the same benefit because they did not challenge the award. They being proforma respondents, notice on them is not necessary. Please See (1996) 11 SCC 116 ***Union of India vs. Ujagarlal.***

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5) *(1997) 1 SCC 68 M. P. ELECTRICITY BOARDN VS. VIJAY TIMBER COMPANY) SEE ALSO 1997 (1)JLJ 210 AND 1997(1)JLJ 213 BHEL VS. KESHAV DAS*

CPC Sectioin 9 Jurisdiction of the Court :-

The respondent plaintiff filed a suit in Civil Court alleging that he had already started construction on the land in the industrial area. The appellant M.P.E.B. had taken high tension transmission lines. The appellant had no previous approved scheme. The appellant challenged the jurisdiction of the Court. It was held that exclusion of civil court's jurisdiction cannot be readily inferred on the ground of availability of remedy and forum under special Act when the action in question was taken without complying with the provisions of that Act. Suit filed by respondent cannot said to be barred by law. The appellant did not take the consent of the respondent and there was no approved scheme for having high tension lines. In the circumstances it was held that the civil suit is maintainable. Section 12, 19 and 52 of the Indian Electricity Act were referred.

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6) *(1997) 1 SCC 66 NATIONAL INSURANCE COMPANY VS. JIKUBHAI NATHUJI DABHI*

Insurance policy when becomes operative ? :-

The adimtted possession is as under. The policy was renewned and the terms were as under :-

1. Whether the accident had occurred during the operation of the insurance policy in controversy. The admitted postion is that the renewal of the insurance was effected as under :-

"Address : Jal Apartment,... Rd. Vile Parle (N) Bombay 5

It is hereby understood and agreed that the renewal premium of Rs. 1307 only under this Policy having been paid on 25-10-1983 and not within the renewal date viz. 14-10-1983 the Insurance by this Policy is suspended from 14-10-1983 (4 p.m.) to 24-10-1983.

Further, it is declared and agreed that the cover under this policy is reinstated and renewed for a further period of twelve months from 25-10-1983 to 24-10-1984 at a premium of Rs. 1307."

2. The tribunal also had recorded, as a fact, that on 25-10-1983 at 4.00 p.m., the contract of renewal had come into force and it would be operative up to 24-10-1984. The tribunal also recorded, as a fact, that the accident had occurred on 25-10-1983 at 11.14 a.m., that is, before the renewal of the contract. Under thses circumstances, it would be clear that the accident had occurred when the renewal had not taken effect.

3. This Court in ***New India Assurance Co. Ltd. vs. Ram Dayal (1990) 2 SCC (CRI) 432 : (1990) 2 SCR 570*** had held that in the **absence of any specific time mentioned** in that behalf, the contract would be operative from the midnight of the day by operation of provision of the General Clauses Act, 1897. But in view of the special contract mentioned in the Insurance policy namely, it would be operative from 4.00 p.m. on 25-10-1983 and the accident had occurred earlier thereto, the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant-Company.

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7. (1997) 2 SCC 53 K.V.MUTHU VS. ANGAMUTHU AMMAL, LANDLORD AND TENANT : WHETHER FOSTER SON IS MEMBER ?

Foster son can be a member of the family within the meaning of the term 'member of his family' as defined in Section 2 (6-A) of T.N.Rent Control Act. Same is the position in M.P. also as the word used "the context otherwise requires". The definition of a word or phrase is to be construed in the light of the context, scheme and object of the Act instead of ascribing the meaning as literally set out in the definition.

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8) (1997) 1 SCC 272 STATE OF A.P. VS. GANGULA SATYA MURTHY :- RAPE CASE. APPRECIATION OF MEDICAL EVIDENCE, EXTRA JUDICIAL CONFESSION, CIRCUMSTANTIAL EVIDENCE :-

Readers are advised to kindly go through the whole case which is reported in detail.

It is the duty of the court to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of the witness should not be a ground for throwing out allegations of rape. The court should examine broader probabilities of a case and not get swayed away by minor contradictions or insignificant discrepancies in the statement of the witnesses which are not of a fatal nature. ***State of Punjab vs. Gurumith Singh (1996) 2 SCC 384*** was relied on.

Extra judicial confession made by the accused before two witnesses of the locality and it was reduced to writing inside the police station when the accused was produced before the police. It was held that such extra judicial confession

was not hit by Section 26 of the Evidence Act. The contents reduced inside the police station were disclosed by the accused long before they were reduced to writing.

In paragraph 19 of the judgment the Supreme Court held that the custody need not necessarily be post-arrest custody. The word 'custody' used in Section 26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act.

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9) BRAHMADEB VS. RISHIKESH AIR 1997 SC 856-1997 (1) MPL 48
O. 21 R. 97-R. 35 AND R. 105

Decree for possession passed-objection by third person raised.

Objection by third person claiming independently, it is the duty of Court to adjudicate the grievances of third person. Decree holder cannot overlook the resistance and seek issuance from the Court for the issue of warrant on possession under Order 21 Rule 35 by seeking police help.

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10) AIR 1997 ORISSA 67 SATYENDRA SAHU VS. PRATIKANT PANDA :-
CPC SECTION 11 RES-JUDICATA :-

Dispute regarding ownership of ornaments in bank locker. Bank Manager claiming ownership ordered by Consumer Forum that the ornaments should be returned to the Consumer i.e. Bank customer. Civil suit for declaration of ownership that ornaments belongs to him is not barred by res-judicata because the Consumer Forum while deciding deficiency in service concluded that contents of the locker should be made over to locker holder. Therefore, finding as to ownership concluded by Forum is only incidental and not final.

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11) AIR 1997 SC 896 BHARAT RAM VS. RAJASTHAN HIGH COURT :-
QUASHING OF ADVERSE REMARKS :-

The Annual Confidential Report discloses that his acts amounting to grass misconduct, indiscipline, insubordination and dereliction of duty, manipulation, alteration of judicial records, pressurising Advocates for ante-dated applications. This report of the District Judge was endorsed by the Inspecting District Judge and by the Hon'ble Chief Justice of the High Court. The adverse remarks were communicated to the concerning officer, who made representation but that representation was rejected. In meanwhile that judicial officer was promoted as Chief Judicial Magistrate. He filed a writ petition in the Rajasthan High Court for quashing the adverse remarks. The High Court while dismissing the writ petition summaraly stated that, "we have seen the original A.C Rs. of the officers and on going through the case find no ground to interferewith the recording of the A.C. Rs. for the year 1990 in the extraordinary writ jurisdiction. The appellant

challenged the decision before the Supreme Court saying that High Court should not have summarily dismiss the writ petition but should have examined the facts in detail. The Supreme Court held that the appellant had his opportunity to make representation against the report which he did. The appellant is to be judged at the strength of his work and his conduct. The Supreme Court did not find that the assessment of the merit of the applicant can be treated in any way as arbitrary or without any factual basis. According to Supreme Court nothing has been brought on record to justify the Court, an exercise of its writ jurisdiction to intervene and quash the adverse remarks.

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12) 1996 JLJ 436 BENEBAI VS. CHAMPABAI :-

ADVOCATE. NO INSTRUCTIONS :-

It does not appear from the proceedings that the learned Judge had taken all necessary steps to ensure that the counsel had sufficient reason not to appear for the party who engaged him or to plead no instructions. If a Judge in disregard of duties permits a lawyer to withdraw from the case then he is virtually violating the principle of justice. A party who deposes confidence and relies on counsel is entitled to be under the belief that his interest would be looked after properly by the counsel. A Judge ordinarily should not permit a lawyer to plead no instructions unless the lawyer satisfies the judicial conscience of the Court that for the compelling reasons he was posed to plead no instructions.

Withdrawal from cases and pleading no instructions when witnesses are present. This act of an Advocate not only disservice to the client but also professional misconduct. ***Ratiram vs. Laxmi Narayan, 1986 (1) PWN 134.***

Advocate leaves brief in sessions trial. It is the duty of the Advocate to attend trial day to day. If he fails he will be committing breach of the professional duty. ***Lt. Col. S.S. Chowdhary vs. State.***

●

13) (1997) 1 SCC 254 C.S. Venkatasubramaniyan vs. State Bank of India.

Civil Procedure Code Order 3 Rule 4 (2) and Rule 28 of Tamilnadu Legal Practitioners Fees Rule 1973 :-

Rule of the Court for determination of appointment of pleader respondent. Bank lost confidence wanted to change the Advocate. First Advocate demanding fees as a condition for his withdrawal from record and for giving consent to another counsel to appear on behalf of the respondent Bank. Respondent seeking leave of the Court for engaging another counsel. The Advocate is not entitled to demand fees as a pre condition for his consent. The Advocate may be left free to recover the same from the part.

●

14) AIR 1995 M.P. 147 BANARASI DAS VS. RAMAKRISHNA

M.P. MUNICIPAL CORPORATION ACT SECTIONS 73 & 74 READ WITH ORDER 39 RULE 1 CPC :-

Corporation issued receipts for payment as rent. No document of contract executed as provided by Sections 73 and 74 of the Act. Mere issuance of such

receipt does not confer status of tenant to the person. Mere receipt showing payment as rent is not sufficient to confer status of tenant. Public street covers pavement, vestibules, drains, open places infront of the shops assessible to public vest in municipal corporation. This judgment also expresses the word vest and says that the word vest with reference to the Act means vesting of land in municipal corporation even if the corporation is not the owner of street in legal sense. It may vest with corporation. For further reference please see ***AIR 1962 SC 554 and AIR 1996 Kerala 274.***

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15) (1996) 11 SCC 133 BANDLAMUDDIN ATCHUTA RAMAIAH VS. STATE OF A.P.

Cr. P.C. Section 154 read with Section 145, 157 Evidence Act :-

A statement in an F.I.R. can normally be used only to contradict its maker as provided in Section 145 of the Evidence Act or to corroborate the evidence as envisaged in Section 157 of the act. Neither is possible in a criminal trial as long as its maker is an accused in the case unless he offers himself to be examined as a witness.

A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession.

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16) (1996) 11 SCC 148 STATE OF KARNATAKA VS. DIWAKAR BHATT

SECTION 325 I. P. C. AND SECTION 154 CR. P. C. :-

Grevious injuries caused by the accused pushing deceased ambiciny against a hard and rug surface resulting in his death. Evidence of wife of the deceased corroborated by medical evidence and even by the hostile witnesses to some extent. Trial Court convicted the accused but the High Court with the aid of ifs and buts found fault with the prosecution evidence and on the basis of certain conjectures and surmises rejected the evidence of PW 1 for which Supreme Court found no justification in view of the positive statement that she made. The incident took place at about 2.15 p.m. The F.I.R. was lodged at 5.10 p.m. But after the incident the deceased was taken to private clinic where the doctor refused to treat him and directed him to take to medical hospital. Therefore instead of taking deceased to the police station the deceased was taken to the medical hospital. The first and formost consideration of the wife and his son would be to see that the victim is provided with immediate medical aid without any further risk of his life. In such a situation the report was slightly delayed for which there was a Plausible reason. The appeal was allowed. Judgment of the trial court was maintained.

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17. ARMS ACT-

GUDDA VS STATE OF M. P., 1997 (1) JLJ 352

The applicant was prosecuted for the offence under Section 25 (1) (b) of the Arms Act 1959. The trial court and the appellate court convicted the accused. On perusal of the record High Court held as under.

It is evident, form category 5 of schedule 1 and rule 3 of the Arms Rules, 1962 that any sharp edged and deadly weapon, namely sword, Dagger, a knife and other weapon, the blade of these weapons should be longer than 9" or wider than 2" in order to bring them within the purview of the definition of the Arms Act. In the instant case, the prosecution has not been able to bring any notification of the Central Government on the record, issued under Section 4 of the Arms Act, regulating the acquisition, possession and carrying of Arm in the district of Panna. The prosecution has also not led any cogent evidence that the kinfe seized from the possession of the applicant was longer than 9" and 2" in width, in order to bring the same within the purview of the definition of the Arms as provided under the Arms Act.

The accused was acquitted in the criminal revision filed before the High Court.

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18. M.A.C.T -

CHATRA AND OTHERS VS. IMRATLAL AND OTHERS 1997 (1) JLJ 353

Deceased was crushed under tractor wheel. Driver of the offending vehicle having no licence. Therefore principle of res ipsa loquitur, i.e. accident itself speaks applies. No further proof of negligence is required. Negligence means breach of the provisions of statute as well as a breach of duty caused by omission to do something which should have been done or doing something which should not have been done. It was further held that the vehicle being driven by an unlicenced driver therefore insurer was not liable. Reference of case law ***New India Assurance Company Ltd. Vs. Mandar Madhav Tembe (1996) 2 SCC 328 was also made.***

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19. ORDER 33 RULE 1

VANDANA BHARGAVA VS. KAPIL BHARGAVA 1997 (1) JLJ 370

Right of indigent person to sue without payment of court-fees is a personal right that on his death it does not survive to the legal heirs. The legal heirs cannot continue and represent the proceedings wihtout payment of courtfees. However, the legal heirs are able to administer before the courts that they are also indigent persons. The trial court has jurisdiction to pass suitable order permitting them to proceed without payment of court-fees.

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