JOTI JOURNAL

JUNE 2012 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL JUNE - 2012

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CONSUMER PROTECTION ACT, 1986

FROM THE PEN OF THE EDITOR

Manohar Mamtani,
Director, JOTRI

Esteemed Readers

With this issue, I again have an occasion of sharing my views with you. After a successful, rather historical implementation of the Transfer Guidelines/ Policy of the High Court of Madhya Pradesh, by single transfer order almost all the Judicial Officers have now settled at their respective places of posting with fullsatisfaction much before the commencement of summer vacation to experience the real flavour of relaxation with their family members during this summer vacation. But we should also remember that relaxation is followed by rejuvenation. Therefore, every Judge should rejuvenate and explore new avenues, new thoughts and techniques to streamline challenges for determination of Justice Delivery System and to march towards excellence enhancement in terms of qualitative and timely justice, reduction of pendency and dispensation of justice to the poor and disadvantaged persons. Recently, our Vice President, Hon'ble Shri M.H. Ansari has also expressed that the country's Judicial System should be able to deliver justice to the poor and the disadvantaged.

Hon'ble the Chief Justice of India, Mr. H.S. Kapadia expressed his disconcert over the low pitch at which the High Courts and the Lower Courts are deciding graft cases. His Lordship said "I am of the firm view that cases under the Prevention of Corruption Act in the interest of society need special attention and we must strive hard to achieve the goal of zero pendency." The Judiciary should not lag behind in the quest to create a corruption-free world.

Recently, Hon'ble Mr. Justice A.K. Ganguly, Judge Supreme Court of India in a matter relating to 2G Spectrum Allocation has said that today, corruption in our country not only poses a great deter to the concept of constitutional governance but also threaten the very foundation of Indian Democracy and Rule of Law.... The magnitude of corruption in our public life is incompatible with the concept of Socialist, Secular and Democratic Republic. It cannot be disputed that where corruption begins, all rights end...Corruption devalues Human Rights, chokes development and undermines justice, liberty, equality and fraternity, which are the core values of our Preambular vision.

As we feel, everyone is concerned with speedy trial particularly, cases relating to corruption, which are to be dealt with swiftly, promptly and without any delay. In such cases, the amount involved is not material, but speedy justice is the mandate of the Constitution, being in the interest of the accused as well as that of the society.

As we are aware that like other States, our State also under Madhya Pradesh Vishesh Nyayalayas Adhiniyam, 2011 has constituted 8 Special Courts for speedy trial of certain class of offences related to disproportionate assets and for confiscation of properties involved therein. The cases pending in Special Courts set up under the existing Anti-Corruption Act, shall be transferred to them. The new Act specifies a time limit of one year for trial of these special cases.

Concerned over the pendency of corruption cases, the Chief Justice of India emphasized the need of setting up of Fast Track Courts for expediting such cases so that it acts as a deterrent to corrupting elements. Therefore, we should strengthen ourselves to fight against corruption and should be firm to eradicate this social menace The Apex Court in ***Registrar General, Patna High Court v. Pandey Gajendra Prasad & Ors., (Civil Appeal No. 4553 of 2012,*** decided on 11.05.2012) has stated that Subordinate Judiciary is the kingpin in the hierarchical system of administration of justice. It is the trial judge, who comes in contact with the litigant during the day-to-day proceedings in the court and, therefore, a heavy responsibility lies on him to build a solemn unpolluted atmosphere in the dispensation of justice which is an essential and inevitable feature in a civilized democratic society.

In justice delivery system, better performance of judicial work may be sufficient but contribution to the Institution by way of putting some extra effort is required for supporting the Judicial System to fulfill its mission of realizing the Constitutional vision, as enhancement of judicial excellence will strengthen the public confidence on our Judiciary for which we all have to serve.

Now, let me throw some light on the activities of the Institute in the months of May and June. As for the approved scheme of grant-in-aid provided under the recommendations of the XIII Finance Commission, the Institute has conducted Regional Training Programmes on ***Negotiable Instruments Act, 1881*** at Vidisha & Shivpuri and ***Protection of Women from Domestic Violence Act, 2005*** at Guna.

Apart from that, a Revised Action Plan regarding the Schemes of XIII Finance Commission through Registry has also been submitted to the Law & Legislative Affairs Department, Government of M.P., Bhopal for getting approval from the High Level Monitoring Committee.

In this Journal, Part I of the issue consists of Articles and Part II contains the pronouncements of Hon'ble the Apex Court and M.P. High Court. Part III and Part IV consist of notifications and amendments, respectively.

I hope that this issue will help us to enrich our knowledge to do justice in a more effective and efficient manner.

Rest in the next issue.

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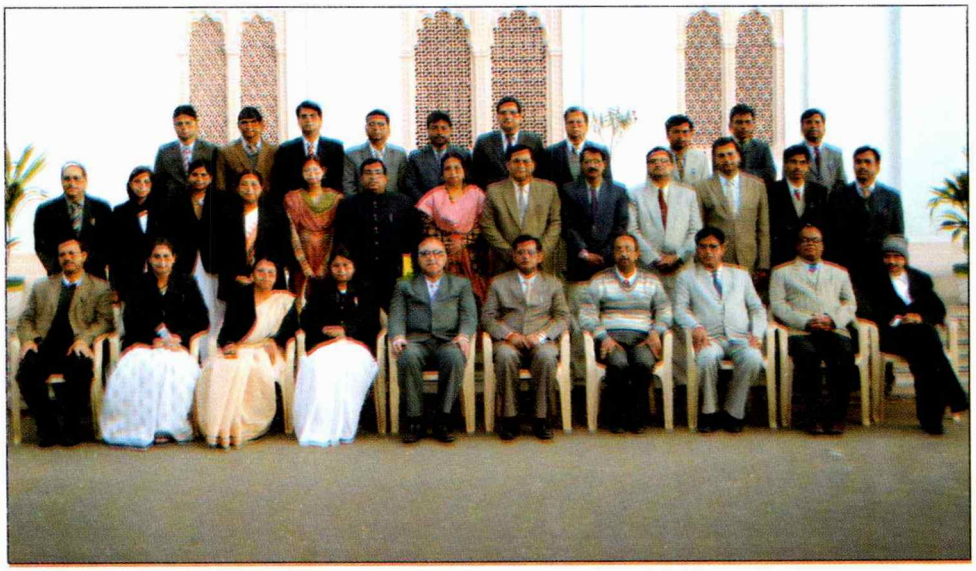
REGIONAL TRAINING PROGRAMME CONDUCTED BY THE INSTITUTE UNDER THE APPROVED SCHEME FOR UTILIZATION OF GRANT-IN-AID RECOMMENDED BY THE XIII FINANCE COMMISSION

Protection of Women from Domestic Violence Act, 2005
District Mandasur (14.01.2012)



Negotiable Instruments Act, 1881
District Ujjain (15.01.2012)

Protection of Women from Domestic Violence Act, 2005
District Sidhi (29.01.2012)

Protection of Women from Domestic Violence Act, 2005
District Morena (18.03.2012)

PART - I

TRIAL OF OFFENCES UNDER WILD LIFE (PROTECTION) ACT, 1972

Ved Prakash
Principal Registrar (Judl.)
High Court of M.P.

Wild Life (Protection) Act, 1972,for short 'the Act', which received Presidential assent on 9.9.1972 and was notified in Central Gazette on 11.9.1972 came into force in Madhya Pradesh on 03.02.1973.

India once upon a time had the distinction of having the richest and the most varied wild life. However, poaching and hunting with a feudalistic attitude resulted in rapid decline of invaluable wealth of India's wild life. This gave rise to a grave concern because it ultimately threatened the ecosystem and richness of the biodiversity, which is a pre-condition for the survival of life as well as human civilization. Considering all these aspects Wild Life (Protection) Act, 1972 was enacted by the Parliament, which provides for the protection of wild animals, birds and plants with a view to ensure ecological and environmental security and stability.

LEGISLATIVE DEVELOPMENTS:

The Act, as enacted, aimed at regulating hunting of wild animals, laying down procedure for declaring areas as sanctuaries and national parks, regulating possession, acquisition, transfer of or trade in wild animals, animal articles, trophies and taxidermy thereof. Since its inception 'the Act' has undergone many legislative changes. In the present form 'the Act' provides for total ban on 'hunting' - an expression defined in Section 2 (16) having a wide import. 'The Act' also stipulates penalties for contravention of its various provisions. To make it more effective, 'the Act' has so far been amended six times, i.e in 1982, 1986, 1991, 1993, 2003 and 2006 with following broad features:

a. Act No. 23 of 1982, which came into force from 22.5.1982, basically provided for translocation of wild animals for scientific management and guidelines regarding licensing for hunting.

b. Act No. 28 of 1986, which came into force on 25.11.1986, provides in respect of prohibition of trade in trophies, animal articles, etc. relating to 'scheduled animals', i.e, animals included in Sch. I and Part II of Sch. II of 'the Act'.

c. Act No. 44 of 1991, which came into force on 2.10.1991, stipulates total ban on hunting of wild animals included in Sch. I to Sch. IV of the Act except VERMIN as defined in Section 2 (34) and detailed in Sch. V of 'the Act'. The only exception carved out is regarding hunting for protection of life, property, education, research, scientific management and captive breeding.

   It also provides for immunization of live stock in buffer areas, i.e. areas around sanctuaries and national parks. Ban on transport of wild life without permission, setting of Central Zoo Authority, prohibition on collection/ exploitation of threatened species of plants (as included in Sch. VI) and prohibition on import/export of imported ivory with an object of protecting

African Elephant are other important features of this amending Act. The Act also made various penalties more rigorous.

d. Act No. 26 of 1993, which came into effect from 4.8.1992, provides for control of Central Zoo Authority over all zoos.

e. Amending Act No.16 of 2003, which came into force from 04.08.2003, provides for effective control over increased poaching and trade of wild life products.

Apart this, it also provides for development of conservation reserves/ community reserves and highlights the ecological and environmental aspects related with wild life protection. It also provides for enhancement of rewards as well as increase in composition fee from Rs. 2000/- to Rs. 25,000/-.

f. Amending Act of 2006 (39 of 2006) makes provision for creation of National Tiger Conservative Authority and Crime Control Bureau for offences relating to Tiger and endangered species.

BRIEF OVERVIEW OF THE ACT:

Originally, 'the Act' had 7 Chapters consisting of 66 Sections and 6 Schedules. By various Amending Acts Chapter III-A, Chapter IV-A, IV-B, IV-C, Chapter V-A and Chapter VI-A were added. Presently, 'the Act' has 13 Chapters and six Schedules.

Chapter-I contains definition clause (Section 2). Chapter-II provides in respect of various Authorities under 'the Act'. Chapter-III deals with prohibition on hunting and permission of hunting in certain cases relating to human safety, scientific research, education, etc., that too under the grant of permit. Chapter-III-A provides for protection of specified plants as defined in Section 2(27) and detailed in Schedule VI of 'the Act'. Chapter-IV consisting of Sections 18 to 38 provides in respect of protected areas, meaning thereby sanctuaries defined in Section 2(26), National Parks defined in Section 2(21), Conservation reserve defined in Section 36-A and Community reserve defined in Section 36(c). Chapter IV-A accords statutory recognition to Central Zoo Authority which has power to control various zoos. Chapter IV-B provides for constitution of Natural Tiger Conservation Authority and functioning thereof. Chapter IV-C envisages creation of Wildlife Crime Control Bureau to deal with matters relating to crime concerning tiger and other endangered species. Chapter-V consisting of Sections 39 to 49 provides in respect of trade/commerce in wild animals, animal articles and trophies. Chapter-V-A imposes prohibition on trade and commerce in respect of trophies and animal articles of scheduled animals i.e, animals included in Schedule I and Part II of Schedule II. Chapter-VI, which is rather most important, being related with investigation and trial of various offences under 'the Act' consists of Sections 50 to 58 including Section 51-A, which was added by the Amendment Act of 2003, and provides for certain rigorous conditions regarding grant of bail in offences relating to hunting inside national park/sanctuary or altering boundary marks or an offence regarding scheduled animals if such person is previously convicted under 'the Act'. Chapter-VI-A deals with forfeiture of property derived from illegal hunting and trade while Chapter-VII consisting of Section 59 to 66 including Section 60-A and 60-B deals with miscellaneous aspects pertaining to reward, etc.

NATURE OF OFFENCES:

Various offences provided under 'the Act' may be categorized as under on the basis of sentence prescribed for them:

Sl. No.	Offence	Section	Penalty	Nature of Offence	Mode of Trial Warrant Trial/
1.	Contravention of any provision of the Act or Rules or Order except Ch. V-A & S.38-J	51 (1)	Impri. Up to 3 yrs. or Fine Up to Rs. 25,000/- or both	Non-bailable & Cognizable	Cognizance by court on the basis of complaint
2.	Subsequent offence of the	Proviso (2) of S. 51(1)	Impri. Up to 7 Yrs. & Fine Min. Impri. 3 Years & Fine Rs.25,000/-	Non-bailable & Cognizable	Warrant Trial/ cognizance by court on the basis of complaint
3	Offence regarding animal specified in Sch. I or Part II of Sch. II or offence re. meat, trophy, uncured trophy, article of such animal or hunting in sanctuary /national park or altering boundaries of Sanctuary/ national park	Proviso (1) of S. 51(1)	Impri. Up to 7 Yrs. & Fine Min. Impri. 3 Years & Fine Rs.10,000/-	Non-bailable & Cognizable	Warrant Trial/ cognizance by court on the basis of complaint
4.	Contravention of any provision of Ch.V-A	S.51(1-A)	Impri.–Up to 7 Yrs. &Fine Min. Impri. 3 Years & Fine Rs.10,000/-	Non-bailable & Cognizable	Warrant Trial/ cognizance by court on the basis of complaint
5.	Teasing, molesting, injuring, feeding, disturbing any animal of zoo (u/s.38 –J)	S. 51(1-B)	Impri. – Up to 6 Months or fine Up to Rs.2000/- or both	Bailable & Non-Cognizable	Summons Trial/ cognizance by court on the basis of complaint
6.	Subsequent offence of the above	Proviso to S.51(1-B)	Impri. Up to 1 Yr. or fine Up to Rs.5,000/-	Bailable & Non-Cognizable	Summons Trial/ cognizance by court on the basis of complaint
7.	Wrongful seizure, etc.	S.53	Impri. Up to 6 Months or fine up to Rs.500/- or both	Bailable & Non-Cognizable	Summons Trial/ cognizance by court on the basis of complaint

INVESTIGATION:

Investigation, which involves collection of material to establish the commission of an offence, is the foundation on which depends the ultimate success or failure of the case. Regarding investigation part, we can examine the legal position from the following angles:

i. Officers empowered to investigate;

ii. powers regarding entry, search and seizure;

iii. powers regarding arrest, detention and remand;

iv. powers regarding interrogation of persons and production of documents;

v. power to receive and record evidence (Section 50 (8) (d).

EMPOWERED OFFICERS:

Section 50 of 'the Act' empowers following officers to make entry into any premises, land vehicle, vessel, including power to stop any vehicle or vessel in order to conduct search or inquiry on having reasonable grounds for believing that any person has committed any offence under 'the Act':

a. Director of Wild Life Preservation

b. Any officer authorized by the Director (W.L.P.)

c. Chief Wild Life Warden

d. Any officer authorized by the Chief Wild Life Warden (W.L.P.)

e. Any Forest Officer- Section 2 (12 A)

f. Any Police Officer not below the rank of Sub-Inspector

SEARCH AND SEIZURE:

Aforesaid Officers u/s 50 of 'the Act' on having reasonable grounds for believing commission of an offence under 'the Act' by a person may seize from him:

i. Captive animal

ii. Wild animal

iii. Meat

iv. Uncured trophy

v. Specified plant

vi. Part or derivative of the above

vii. Animal Article

viii. Trophy

ix. Trap tools, vehicle, vessel, weapon - used in commission of such offence

ARREST, DETENTION AND REMAND:

Section 50(1)(c)of 'the Act' authorizes specified officers to arrest a person suspected of being involved in commission of an offence under 'the Act' without warrant and to detain him. It is noteworthy that the aforesaid provision also leaves a discretion with the aforesaid officers not to arrest if they are satisfied that such person will appear and answer any charge.

The empowered officer also has the power to stop and detain any person to verify about any license or permit required under 'the Act' and on his failure to do so and further failure to furnish his name and address to arrest such person without warrant.

In order to carry out the investigation, an officer not below the rank of Assistant Director of Wild Life or Assistant Conservator of Forests authorized by the State Government in this behalf may for purpose of investigation-

i. issue a search warrant, enforce the attendance of witnesses;

ii. compel the discovery and production of documents and material objects.

RECEIVING AND RECORDING EVIDENCE BY FOREST OFFICERS:

The officers of the specified category (Assistant Director/Assistant Conservator of Forests and officers of above rank) may receive and record evidence under Section 50(8)(d). Sub-section 9 of Section 50 provides that such evidence is admissible in any subsequent trial before a Magistrate provided it has been taken in the presence of the accused. Regarding identical provisions contained in Section 71(d) and Section 72 (2) of Madhya Bharat Forest Act, it was authoritatively laid down by our own High Court in ***Sajjan Singh v. State, 1960 JLJ S.N. 108*** as under:

"The statement made before a Forest Officer under clause (d) of section 72 of the Forest Act is admissible in any subsequent trial before a Magistrate, provided it has been taken in the presence of the accused person. Under section 72(2) of the Act the statements recorded before the Forest Officer by themselves become a substantive piece of evidence when the conditions laid down in section 72(2) are fulfilled. In the present case the statements before the Forest Officer were taken in the presence of the accused and he had cross-examined them. The statements could be relied upon in the trial."

From the above it is abundantly clear that if the statement of a person has been recorded in the presence of the accused and the accused has been given the opportunity to cross-examine him, in the event of the witness turning hostile the statement recorded by the competent Forest Officer can be used as substantive piece of evidence. Here it is noteworthy that this provision is seldom used by the Forest Officers and Courts and if used with care and caution may prove very helpful in establishing the guilt of the accused.

COGNIZANCE BY COURT:

The provisions of Section 55 of 'the Act' do clearly indicate that cognizance by a Court in respect of offences coming under 'the Act' can be taken only on a complaint made by any of the following officers -

a. Director of Wild Life Preservation.

b. Any officer authorized by the Central Government

c. Member Secretary Central Zoo Authority (for offences under Section VI-A

d. Chief Wild Life Warden

e. Any officer authorized by the State Government (vide notification dated 31.7.1974 the M.P. State Government has authorized Wild Life Warden u/s 55. It is further noteworthy that the M.P. State Government vide Notification dated 22.01.2002 has, apart from some other Officers, appointed all Range Officers as Wild Life Warden in their respective Jurisdiction.

f. Officer in-charge of the Zoo (for offences u/s 38-J).

g. Vide Notification dated 20.10.1976 issued by the M.P. Government Station House Officers have also been empowered to file complaint under Section 55 of 'the Act'.

Apart from the above, reference to Rule 55 of M.P. Wild Life (Protection) Rules, 1974 is also apposite whereunder following officers have been authorized to file complaint u/S. 55 of 'the Act'

- Chief Wild Life Warden
- Wild Life Warden
- Forest Range Officer

A peculiar provision in the shape of Section 55 (c) of 'the Act' authorizes any person to make a complaint to the Court in respect of an offence under 'the Act' provided such person has given notice of not less than 60 days in the manner prescribed about the alleged offence and his intention to make a complaint to the Central Government or the State Government or the officer authorized, meaning thereby the Court can take cognizance of any offence against an accused person on the complaint of a person who has given notice to the Central/ State Government in the aforesaid manner.

From the aforesaid provisions, it is clear that the Court can take cognizance of an offence under 'the Act' only on the basis of complaint. In ***State of Bihar v. Murad Ali Khan, AIR 1989 SC 1,*** which was a case relating to killing of an elephant, police registered the case u/s 429 IPC. A complaint was also filed by the competent Forest Officer. It was argued that as police has registered a case for cognizable offence, therefore, Section 210 Cr.P.C. of the Cr.P.C. will apply and the Magistrate may not proceed with the complaint till the investigation is over.

This argument was rejected by the apex Court and it was held that where the law provides a single mode of taking cognizance, then cognizance cannot be taken by any other mode and that Section 210 will not create any obstacle against taking cognizance. It was also observed in this case that the ingredients of offence under Section 429 IPC and offence under Section 9(1) read with Section 51 of Wild Life (Protection) Act are not substantially the same.

PRESUMPTIONS:

Section 57 of 'the Act' provides that in a prosecution for an offence under 'the Act', if it is established that a person was found in possession, custody or control of any captive animal, animal article, meat, trophy, uncured trophy, specified plant or part or derivative thereof then it shall be presumed, until the contrary is proved by the accused, that such accused person was in unlawful possession, custody or control of such animal, plant or article or part or derivative thereof. This provision must receive due attention of the Courts, particularly in the background of definitions of meat, trophy and uncured trophy, provided in Sections 2 (20), 2(31) and 2(32), respectively of 'the Act' which are of the widest amplitude and include within their fold even the blood, bone, sinew, eggs, shell, carapace, fat and flesh with or without skin, raw or cooked.

COMPOSITION:

Section 54 of 'the Act' empowers Director of Wild Life Preservation, Asst. Director Wild Life Preservation, Chief Wild Life Warden and all officers of the rank of Deputy Conservator of Forests and above to compound the offences and to accept from any person against whom a reasonable suspicion exists that he has committed an offence under 'the Act' payment of sum of money not exceeding Rs. 25,000/-. However, it is noteworthy that an offence, which is punishable with a minimum period of imprisonment (see table supra) shall not be compounded. The effect of composition as provided in Section 54 (2) is that the suspected person, if in custody, shall stand discharge and no further proceedings in respect of the offence shall be taken against such person. Again, the officer compounding the offence may cancel any license or permit granted under 'the Act'.

Here, it is apposite to state that Section 54 of 'the Act', prior to its amendment by Act 16 of 2003, provided in clause 1 (b) that the empowered Officer on composition of the offence may release any property which has been seized and is liable to be forfeited (other than Government property) on payment of value thereof. After amendment by Act 16 of 2003, this provision conferring power on the empowered officer to release the property on payment of the value thereof has been deleted, thus, giving rise to the issue, whether under the amended provisions, the empowered officer has the authority to release the property on payment of value thereof or to forfeit the same?

This issue came to be considered by the apex court in ***Principal Chief Conservator of Forest & another Vs. J.K. Johnson & Others, 2011(10) SCC 794.*** Repelling the argument that Clause 15 of the statement of object and reasons of the amending Act No.16 of 2003 has the effect of conferring power on the empowered officer to forfeit such property, the apex court held that specified officer empowered u/s 54 (1) of 'the Act' has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person who is suspected to have committed offence against 'the Act'. The apex court made it clear that the property seized u/s 50 (1) (c) and Section 50 (3-A) of 'the Act' has to be dealt with by the competent Magistrate according to law. Thus, it is amply clear that even in the cases where composition has been allowed, the seized property (other than the Government property) shall have to be disposed of by the competent Magistrate u/s 50 (4) of 'the Act'.

DISPOSAL OF SEIZED ANIMAL, ANIMAL ARTICLE OR OTHER PROPERTY:

The power to seize a captive animal, wild animal, animal article, trophy, uncured trophy, specified plant or part or derivative thereof, in respect of which a offence appears to have been committed and trap, tool, vehicle, vessel, which has been used for committing such an offence flows from Section 50 of 'the Act'.

Section 39 (1) (d) provides that vehicle, vessel, trap or tool so seized shall be the property of the Government. The provisions contained in Sections 39 (1) (d) and 50 of 'the Act' have generated a lot of controversy about the mode of disposal of the seized vehicle, vessel, trap, tool. But if we examine the provisions of Section 50 a little carefully then following position emerges:-

1. A captive or wild animal that has been seized under section 50 (1) (c) may be given under Section 50 (3-A) on supurdagi by an officer not inferior to the rank of Asst. Director of Wild Life Preservation or Asst. Conservator of Forest to any person on execution by him of a bond for the production of such animal as and when required before the Magistrate having jurisdiction to try the offence.
2. Meat, uncured trophy, specified plant or part of derivative thereof, has to be disposed of by the Assistant Director of Wild Life Preservation or any Officer of gazetted rank authorized by him, in this behalf or the Chief Wild Life Warden, in such manner as may be prescribed. [See-Section 50 (6)]. As per existing rules, such items are to be disposed of by putting them to fire and not by way of auction.
3. The remaining articles, i.e. animal articles, trophy, trap, tool, vehicle, vessel or weapon must forthwith be taken before the Magistrate u/s 50 (4) to be dealt with according to law under intimation to the Chief Wild Life Warden or the officer authorized by the same in this regard.

From the aforesaid, it is clear that the items seized under Section 50 (1) (c) of 'the Act' have to be dealt according to the aforesaid 3 modes. As far as the

final disposal of things which have been produced before the Magistrate u/s 50 (4) of 'the Act' is concerned the same have to be dealt with as per Section 39 of 'the Act', meaning thereby, if it is found that the seized animal article, trophy, trap, tool, vehicle, vessel or weapon is one in respect of which an offence has been committed under the Act, then it will become the property of the Government.

To put it precisely, it can be said that to render such property the property of the Government under S. 39 (1) (d), it must be proved before the competent Court that it has been used for committing an offence under 'the Act'. Therefore, there is nothing to indicate that seizure simplicitor of the property will make it the property of the Government. This position of law has been made amply clear by the Full Bench decision of our own High Court in ***Madhukar Rao v. State of Madhya Pradesh and others, 2001 JLJ 304*** wherein it has also been held that such property may be given by the Magistrate on supurdagi. This view has been approved by the apex Court in ***State of Madhya Pradesh & Ors. v. Madhukar Rao,2008(14)SCC 624=2008 (1) MPJR 189 SC.***.

However, a note of caution is there emerging from the pronouncement of the apex Court in ***State of Karnataka v. K. Krishnan, AIR 2000 SC 2729*** wherein dealing with Karnataka Forest Act, it has been ordained that generally, any forest produce, tools, vehicle used in the commission of forest offence which are liable to forfeiture should not be released. The liberal approach in the matter would perpetuate the commission of the more offences with respect to the forest and its produce which, if not protected, is surely to affect the mother earth and the atmosphere surrounding it. The apex Court observed that the courts cannot shut their eyes and ignore their obligations indicated in 'the Act' enacted for the purpose of protecting and safeguarding both the forests and their produce. The Court further held that when any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence. This mandate of law can be equally applied in respect of tools, vehicles etc. seized under Wild Life (Protection) Act.

CONFESSION:

Sections 25 and 26 of the Evidence Act declare in unequivocal terms that confession made before a police officer or in police custody is in-admissible in evidence. As explained in ***Ramesh Chandra Mehta Vs. State of West Bengal AIR 1970 SC 940*** (Five Judge Bench), the test for determining whether an officer is to be deemed a 'Police Officer' is whether he is invested with all the powers of a Police Officer qua investigation of an offence, including the power to submit a report under Section 173, Cr.P.C. Relying upon this dicta, it has been held in ***Forest Range Officer v. Abu Bakar, 1989 Cr.L.J.2083 (K.T. Thomas, J).***, that a forest officer, though invested with some of the powers of a police officer, cannot be called a 'Police Officer' and a confessional statement made to him will not be hit by Section 25 of the Evidence Act.

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आपराधिक विचारणों में चिकित्सा विशेषज्ञ का साक्ष्यिक मूल्य

न्यायिक अधिकारी गण,
जिला नीमच

भारतीय साक्ष्य अधिनियम, 1872 में, अन्य व्यक्तियों की राय कब सुसंगत होगी इस संबंध में धारा 45 से 51 के अंतर्गत उपबंध किये गये हैं। धारा 45 विशेषज्ञों की राय को सुसंगत बनाती है। धारा 46 में विशेषज्ञों की राय का समर्थन करने वाले या उनसे असंगत ऐसे तथ्यों को जो अन्यथा सुसंगत नहीं हैं, को सुसंगत माना गया है जबकि धारा 51 किसी जीवित व्यक्ति की सुसंगत राय के आधारों की सुसंगति के विषय में उपबंध करती है।

धारा 45 का उल्लेख प्रासंगिक है, जो इस प्रकार है–

> **धारा 45. विशेषज्ञों की राय–** जबकि न्यायालय को विदेशी विधि की या विज्ञान की या कला की किसी बात पर या हस्तलेख या अंगुली–चिन्हों की अनन्यता के बारे में राय बनानी हो, तो तब उस पर ऐसी विदेशी विधि, विज्ञान या कला में या हस्तलेख या अंगुली – चिन्हों की अनन्यता विषयक प्रश्नों में, विशेष कुशल व्यक्तियों की रायें सुसंगत तथ्य है। ऐसे व्यक्ति विशेषज्ञ कहलाते हैं।

उक्त धारा विशेषज्ञों की परिभाषा प्रस्तुत करती है। विशेषज्ञ वह है जिसे विदेशी विधि, विज्ञान, कला, हस्तलेख या अंगुली–चिन्हों के संबंध में विशेष जानकारी हो, जिसने इन में से किसी क्षेत्र में दक्षता या अनुभव अर्जित किया है। इन विषयों पर विशेष कौशल का तात्पर्य योग्यता के औपचारिक प्रमाण पत्रों की अनिवार्यता से नहीं है। विशेषज्ञों की साक्ष्य की सुसंगतता के संदर्भ में धारा 46 के प्रावधान भी महत्वपूर्ण हैं, जो इस बात को इंगित करती है कि एक विशेषज्ञ के कथन की दूसरी साक्ष्य द्वारा पुष्टि की जा सकती है या खंडन किया जा सकता है। धारा इस प्रकार है –

> **धारा 46. विशेषज्ञों की रायों से संबंधित तथ्य–** वे तथ्य, जो अन्यथा सुसंगत नहीं है, सुसंगत होते हैं यदि वे विशेषज्ञों की रायों का समर्थन करते हों या उनसे असंगत हों जबकि ऐसी रायें सुसंगत हों।

विशेषज्ञ की राय अत्यंत महत्वपूर्ण है तथा इससे किसी तथ्य को साबित किया जा सकता है तथापि न्यायालय विशेषज्ञ की राय को संपुष्ट किए जाने की अपेक्षा कर सकता है। विशेषज्ञ की राय न्यायालय पर बाध्यकारी नहीं है। चिकित्सा क्षेत्र विज्ञान का क्षेत्र है। अतः चिकित्सा विज्ञान में विशेष कुशल व्यक्तियों की साक्ष्य इस प्रावधान के अंतर्गत सुसंगत होगी। एक फिजिशियन या शल्य चिकित्सक की राय एक व्यक्ति की शारीरिक दशा, रोग की प्रकृति, चोटों की प्रकृति, तथा उस हथियार की प्रकृति को दर्शित कर सकेगी जिससे वह चोट कारित की गई है। चिकित्सकीय साक्ष्य संपुष्टिकारक साक्ष्य की श्रेणी में आती है।

प्रावधानों से ही स्पष्ट है कि चिकित्सा विशेषज्ञ की साक्ष्य सुसंगत है, निश्चायक नहीं। ऐसी कोई अखंडनीय उपधारणा नहीं है कि चिकित्सक की साक्ष्य सदैव एक सच्चे साक्षी की साक्ष्य है। चिकित्सक की साक्ष्य भी अन्य साक्षियों की साक्ष्य की तरह ही विचार में ली जायेगी। जैसा कि माननीय सुप्रीम कोर्ट ने न्यायदृष्टांत ***मयूर पानाभाई शाह विरुद्ध स्टेट आफ गुजरात, ए.आई.आर. 1983 एस.सी. 66*** में अभिनिर्धारित किया है।

माननीय सुप्रीम कोर्ट ने न्यायदृष्टांत ***रमेश चंद्र अग्रवाल विरुद्ध रीजेन्सी हास्पिटल लि., (2009) 9 एस.सी.सी. 709 = 2009 ए.आई.आर. एस.सी.डब्लू 7308*** में यह मत व्यक्त किया है कि जहां चिकित्सा संबंधी प्रश्न के साथ विज्ञान का प्रश्न सम्मिलत है वहां विशेषज्ञ की केन्द्रीय भूमिका पर विवाद नहीं किया जा सकता है।

प्रत्यक्षदर्शी साक्षी की साक्ष्य एवं चिकित्सकीय साक्ष्य में अंतर्विरोध होने पर संपूर्ण साक्ष्य को अस्वीकृत नहीं किया जा सकता है। आपराधिक विचारणों में प्रायः मौखिक साक्ष्य एवं चिकित्सकीय साक्ष्य में अंतरविरोध की परिस्थितियां पाई जाती हैं, ऐसी स्थिति में साक्ष्य का मूल्यांकन उचित रूप से किया जाना एक दुरूह कार्य हो जाता है। माननीय सुप्रीम कोर्ट के न्यायदृष्टांत ***थमनकुमार विरुद्ध स्टेट ऑफ यूनियन टेरिटोरी ऑफ चंडीगढ़, (2003) 6 एस.सी.सी. 380*** में अभिनिर्धारित किया गया है कि मौखिक साक्ष्य एवं चिकित्सकीय साक्ष्य में संघर्ष की स्थिति के कई आयाम और प्रकार हो सकते हैं। प्रथम मामला ऐसा हो सकता है कि विनिर्दिष्ट प्रकृति के हथियार से कारित की जाने वाली चोट का पूर्णतः अभाव हो। द्वितीय श्रेणी ऐसी हो सकती है कि आहत पर इस प्रकार की चोट पाई जाये जो हमले वाले आयुध से आना संभाव्य हो परंतु चोट का आकार एवं आयाम आयुध के आकार और आयाम से सटीक मेल नहीं खाता हो। तृतीय श्रेणी ऐसी हो सकती है जहां पर आहत पर ऐसी चोट पाई जाये जो कि सामान्यतः हमले वाले आयुध से कारित होती हो परंतु प्रत्यक्षदर्शी साक्षियों द्वारा अभिसाक्ष्य में वर्णानुसार शरीर के विनिर्दिष्ट स्थान पर नहीं पाई गई हो। उक्त तीनों स्थितियों के संबंध में यह अभिनिर्धारित किया गया है कि उक्त अंतरविरोध की स्थिति में समान प्रकृति का अनुमान नहीं निकाला जा सकता है। प्रथम श्रेणी के मामले में वैधानिक रूप से यह कहा जा सकता है कि विनिर्दिष्ट प्रकृति के आयुध से हमला किये जाने की मौखिक साक्ष्य विश्वसनीय नहीं है। परंतु द्वितीय एवं तृतीय श्रेणी के मामले में उक्त अनुमान सीधे नहीं निकाला जा सकता है। उक्त श्रेणियों के मामले में हमले का तरीका एवं प्रकार, आहत की स्थिति, उसका प्रतिरोध, साक्षियों द्वारा घटना को देखने का अवसर, आदि अन्य कई कारण मौखिक साक्ष्य की विश्वसनीयता की परख करने में विचार में लिये जाते हैं।

माननीय म.प्र. उच्च न्यायालय के न्यायदृष्टांत ***भवनराजसिंह वि. म.प्र. राज्य, 2009 (1) एम. पी.एच.टी. 370 (डी.बी.)*** में माननीय म.प्र. उच्च न्यायालय ने उक्त ***थमनकुमार*** (पूर्वोक्त) का अवलंब लेते हुए यह अभिनिर्धारित किया है कि सभी प्रत्यक्षदर्शी साक्षियों ने अपीलार्थी/अभियुक्त द्वारा फरसा के भोथरे भाग के उपयोग किये जाने का कथन कहीं नहीं दिया है, पूर्णतः कटे घाव का अभाव है।

अतः प्रत्यक्षदर्शी साक्षीगण को मेडिकल साक्ष्य पर अधिमान्यता नहीं दी जा सकती है। प्रत्यक्षदर्शी साक्षियों की साक्ष्य को विश्वसनीय नहीं कहा जा सकता है।

मौखिक साक्ष्य एवं चिकित्सकीय साक्ष्य में भिन्नता की स्थिति में, जहां चिकित्सकीय साक्ष्य, मौखिक साक्ष्य की समस्त संभावनाओं को निरस्त करने वाली है वहां मौखिक साक्ष्य अविश्वसनीय मानी जा सकती है। जैसा कि माननीय उच्चतम न्यायालय ने ***अब्दुल सईद विरुद्ध म.प्र. राज्य, (2010) 10 एस.सी.सी. 259*** में प्रतिपादित किया है।

माननीय उच्चतम न्यायालय के न्यायदृष्टांत ***मुकुल महतो विरुद्ध स्टेट आफ झारखण्ड, ए. आई. आर. 2009 एस.सी. 335*** में प्रत्यक्षदर्शी साक्षी की साक्ष्य एवं चिकित्सकीय साक्ष्य में अंतर्विरोध होने की स्थिति में अवधारित किया है कि कुल्हाड़ी जैसी वस्तु से फटा घाव आना संभव है क्योंकि ग्रामीणों द्वारा इसका लकड़ी, वृक्ष आदि काटने में प्रयोग किये जाने से यह चाकू की तरह धारदार नहीं रहती है। ***स्टेट ऑफ मध्यप्रदेश विरुद्ध सुघर सिंह, ए.आई.आर. 2009 एस.सी. 586*** में मृतक की चोटों का परीक्षण करने वाले चिकित्सक ने दो कटे घाव की चोटें पाईं थी जबकि पोस्टमार्टम करने वाले चिकित्सक ने चोटों की प्रकृति पर भिन्न मत दिया क्योंकि चोटों की ड्रेसिंग की गयी थी, माननीय उच्चतम न्यायालय ने साक्ष्य में कोई अंतर्विरोध न होना मानते हुए उच्च न्यायालय के दोषमुक्ति के निष्कर्ष को अपास्त किया है। इस संबंध में ***साहेबराव मोहन बेराड विरुद्ध स्टेट ऑफ महाराष्ट्र, (2011) 4 एस.सी.सी. 249*** भी अवलोकनीय है।

न्यायदृष्टांत ***छोटन्ने विरुद्ध स्टेट ऑफ उत्तर प्रदेश, ए.आई.आर. 2009 एस.सी. 2013*** के अनुसार जहां पर प्रत्यक्षदर्शी साक्षीगण विश्वसनीय पाये जाते हैं, वहां पर वैकल्पिक संभाव्यताओं की ओर संकेत करने वाली चिकित्सा विशेषज्ञ की राय निश्चायक रूप में स्वीकार नहीं की जा सकती है। न्यायदृष्टांत ***रंगनाथ शाम राव धास विरुद्ध स्टेट ऑफ महाराष्ट्र, (2009) 4 एस.सी.सी. 33*** में अभिनिर्धारित किया गया है कि सामान्यतः चिकित्सकीय साक्ष्य का मूल्य केवल संपुष्टीकारक है जो केवल यह साबित करती है कि चोट कथित तरीके से आयी है, इससे अधिक नहीं। न्यायदृष्टांत ***कपिलदेव मंडल विरूद्ध स्टेट ऑफ बिहार, ए.आई.आर. 2008 एस.सी. 533*** में अभिनिर्धारित किया गया है कि मौखिक साक्ष्य और चिकित्सकीय साक्ष्य में भिन्नता होने पर मौखिक साक्ष्य को अधिमान दिया जायेगा, परंतु यदि पूर्णतः भिन्नता है, तब चिकित्सकीय साक्ष्य की महत्ता बढ़ जाती है।

न्यायदृष्टांत ***मंगा विरूद्ध स्टेट ऑफ हरियाणा, (1979) 4 एस.सी.सी. 349, स्टेट ऑफ यू.पी.विरूद्ध कृष्णगोपाल, (1988) 4 एस.सी.सी. 302 एवं रामानंद यादव विरूद्ध प्रभूनाथ झा, (2003) 12 एस.सी.सी. 606*** का उल्लेख करते हुए ***कपिलदेव*** (पूर्वोक्त) में माननीय सुप्रीमकोर्ट ने यह कहा है कि मौखिक साक्ष्य और चिकित्सकीय साक्ष्य की भिन्नता के मूल्यांकन के संबंध में उक्त न्यायालय के कई विनिश्चियों से यह सुस्थापित हो चुका है कि प्रत्यक्षदर्शी साक्षी की साक्ष्य अधिमान पायेगी क्योंकि मूलतः चिकित्सकीय साक्ष्य मत के रुप में होती है। उक्त संबंध में अभिनिर्धारित किया गया है कि, जहां पर न्यायालय प्रत्यक्षदर्शी साक्षियों द्वारा दी गई साक्ष्य में असंगति पाये जो

चिकित्सकीय विशेषज्ञ से पूर्णतः असंगतिपूर्ण हो तब न्यायालय द्वारा साक्ष्य का मूल्यांकन भिन्न तरीके से किया जायेगा। उक्त स्थिति को अभियोजन मामले की अत्यधिक मूलभूत कमी माना है, जब तक कि उक्त असंगति को युक्तियुक्त ढंग से स्पष्ट नहीं किया जाय। इसी बिन्दु पर न्यायदृष्टांत ***मोहिन्दरसिंह विरूद्ध दी स्टेट ए.आई.आर. 1953 एस.सी. 415 एवं मनीराम विरूद्ध स्टेट ऑफ यू.पी., 1994 स्पलीमेन्ट्री (2) एस.सी.सी. 289*** का उल्लेख भी किया गया है।

कपिलदेव (पूर्वोक्त) के मामले में माननीय सुप्रीमकोर्ट ने अभिनिर्धारित किया है कि इस मामले में चिकित्सकीय साक्ष्य के अनुसार मृतक के शरीर में आग्नेय अस्त्र की कोई चोट नहीं थी जबकि प्रत्यक्षदर्शी साक्षियों का कथन है कि अभियुक्त/अपीलार्थीगण आग्नेय आयुध से लैस थे और आग्नेय आयुध से चोट कारित की गई थी, उक्त परिस्थिति में चिकित्सकीय साक्ष्य महत्वपूर्ण हो जाती है, और न्यायालय इसे मौखिक कथन पर अधिमान देगा और इसका उपयोग प्रत्यक्षदर्शी साक्षियों की अभिसाक्ष्य का खंडन करने में किया जा सकता है क्योंकि यह मामले के मूल तक जाता है, जिसका प्रभाव निश्चायक रूप से प्रत्यक्षदर्शी साक्षियों के कथन सत्य होने का खंडन करना है। जब चिकित्सकीय साक्ष्य विनिर्दिष्ट रूप से प्रत्यक्षदर्शी साक्षियों के कथन में कही गई चोट को खारिज करती है, तब न्यायालय यह विपरीत अनुमान निकाल सकता है कि, न्यायालय में प्रस्तुत किया गया अभियोजन का पक्ष विश्सनीय नहीं है।

न्यायदृष्टांत ***स्टेट ऑफ म.प्र. विरूद्ध धारकोले उर्फ गोविंदसिंह, ए.आई.आर. 2005 एस. सी. 44*** में अभिनिर्धारित किया गया है कि यह त्रुटिपूर्ण होगा कि, चिकित्सकीय साक्षी के परिकल्पनात्मक उत्तरों को प्रत्यक्षदर्शी साक्षी के कथन पर अधिमान दिया जाये। जहां पर प्रत्यक्षदर्शी साक्षी विश्वसनीय पाये जाते हैं, वहां पर वैकल्पिक संभाव्यताओं को दर्शाने वाली चिकित्सकीय राय निश्चायक रूप में स्वीकार नहीं की जायेगी।

न्यायदृष्टांत ***साहेब राव मोहन बेरड़ विरूद्ध स्टेट ऑफ महाराष्ट्र, (2011) 4 एस.सी.सी. 249*** में माननीय सुप्रीमकोर्ट के पूर्व विनिश्चय ***माफाभाई नागर भाई रावल विरूद्ध स्टेट ऑफ गुजरात, (1992) 4 एस.सी.सी. 69*** को उद्धृत करते हुए अभिनिर्धारित किया गया है कि केवल वह चिकित्सक जिसने मृतक की परीक्षा करके पोस्टमार्टम किया है, चोटों की प्रकृति और मृत्यु का कारण बताने के लिए सक्षम साक्षी होगा। जब तक कि कोई अंतरनिहित त्रुटि नहीं हो, तब तक न्यायालय चिकित्सक की राय को प्रतिस्थापित नहीं कर सकता है।

माननीय सुप्रीमकोर्ट ने न्यायदृष्टांत ***अनंत चिन्तामन लागू विरूद्ध दी स्टेट ऑफ बाम्बे, ए. आई.आर. 1960 एस.सी. 500*** में विष द्वारा हत्या के मामले में विचार किया, जिसमें चिकित्सकीय साक्ष्य नकारात्मक थी। यह अभिनिर्धारित किया गया कि परिस्थितिजन्य साक्ष्य द्वारा दोषिता साबित होने पर दोषी ठहराया जा सकता है।

न्यायदृष्टांत ***रणछोड़सिंह विरूद्ध म.प्र. राज्य, 1984 एम.पी. एल.जे. 294*** में माननीय म. प्र. उच्च न्यायालय की खण्ड पीठ ने अभिनिर्धारित किया है कि चिकित्सकीय साक्षी तथ्य का साक्षी है,

यदि उसका कथन मौखिक साक्ष्य के कथन का खंडन करता है तब अभियोजन का मामला संदिग्ध हो जाता है। उक्त मामले में माननीय उच्च न्यायालय ने यह पाया कि, यह तथ्य अविवादित है कि बंदूक से फायरिंग हुई और गनशॉट घाव होने से मृतक की मृत्यु हुई। उक्त तथ्य के समर्थन में मौखिक साक्ष्य भी है। परंतु चिकित्सकीय साक्ष्य की मौखिक साक्ष्य के साथ तुलना करने पर कठिनाई उत्पन्न होती है। चिकित्सकीय साक्ष्य स्पष्ट संकेत करती है कि अभियोजन द्वारा कथित रूप से वर्णित स्थिति से गनशॉट फायर नहीं हो सकता है, यदि उक्त स्थिति से गन फायर होता है, तब चोटों की प्रकृति भिन्न होगी। उक्त स्थिति में अभियोजन कथानक में परिवर्धन करके कतिपय तथ्यों को समाविष्ट किया गया है। अभियोजन के मामले को युक्तियुक्त संदेह के परे प्रमाणित नहीं पाया है। इस मामले से भी उक्त परिस्थिति में चिकित्सकीय साक्ष्य की महत्ता परिलक्षित होती है।

माननीय सुप्रीमकोर्ट ने न्यायदृष्टांत ***पंजाब सिंह विरूद्ध स्टेट ऑफ हरियाणा, ए.आई.आर. 1984 एस.सी. 1233*** में यह अभिनिर्धारित किया है कि चिकित्सकीय साक्ष्य विशिष्ट प्रकार के आयुध द्वारा हमला किये जाने संबंधी प्रत्यक्ष साक्ष्य पर अभिभावी नहीं हो सकती है, जबकि प्रत्यक्ष साक्ष्य संतोषजनक एवं विश्वसनीय हो।

उक्त ***पंजाब सिंह***, के मामले में अभियोजन साक्षियों ने अभिसाक्ष्य दी कि पंजाबसिंह ने मृतक पर गड़ासा का प्रहार किया था। यह तर्क किया गया कि चिकित्सकीय साक्ष्य, प्रत्यक्ष साक्ष्य से असंगत है। माननीय सुप्रीमकोर्ट ने दो कारणों से उक्त बात को नहीं माना। यह अभिनिर्धारित किया कि यदि प्रत्यक्ष साक्ष्य संतोषपूर्ण और विश्वसनीय हो तो इसे परिकल्पनात्मक चिकित्सकीय साक्ष्य के आधार पर खारिज नहीं किया जा सकता है, और उक्त मामले के तथ्यों के आधार पर यह कहा कि यदि चिकित्सकीय साक्ष्य उचित रूप से पढ़ी जाये तो यह केवल दो वैकल्पिक संभाव्यताओं को दर्शाती है और कोई असंगति नहीं है।

न्याय दृष्टांत ***बाजवा विरूद्ध स्टेट ऑफ यू.पी., ए.आई.आर. 1973 एस.सी. 1204*** में अभिनिर्धारित किया गया है कि हत्या के मामले में केवल यह तथ्य कि प्रत्यक्षदर्शी साक्षी की अभिसाक्ष्य चिकित्सकीय साक्ष्य से असंगत है, स्वतः पूर्ववर्ती को अविश्वसनीय नहीं बनायेगी। उक्त मामले में माननीय सुप्रीमकोर्ट ने कहा कि, प्रत्यक्षदर्शी साक्ष्य का पूर्ण एवं सही मूल्यांकन नहीं किया गया, जिसे डॉक्टर की असंतोषजनक अभिसाक्ष्य के आधार पर अविश्वास किया गया है जो कि उचित न्यायिक मूल्यांकन करने पर अभियोजन साक्षियों द्वारा वर्णित मृतक को गोली मारने के तरीके का खंडन नहीं करती है। इस न्यायदृष्टांत से यह परिलक्षित होता है कि यदि प्रत्यक्षदर्शी साक्षी की साक्ष्य विश्वसनीय है तब केवल चिकित्सकीय साक्ष्य से असंगति मात्र पूर्ववर्ती को अविश्वसनीय नहीं बना देती है। इसके साथ ही सावधानी से चिकित्सकीय साक्ष्य का मूल्यांकन भी करना चाहिए। क्योंकि प्रायः तुच्छ असंगति को छोड़कर कोई महत्वपूर्ण असंगति नहीं होती है।

न्यायदृष्टांत ***मंगा*** (पूर्वोक्त) जो मूक एवं बधिर तेरह वर्षीय बालिका के साथ बलात्संग का मामला था तथा बालिका का मूक एवं बधिर होने से अभियोजन द्वारा न्यायालय में परीक्षण नहीं कराया गया

था व प्रत्यक्षदर्शी साक्षी ने अभियोजन का समर्थन किया, में यह तर्क किया गया कि, घटना दिनांक को बलात्संग नहीं हुआ है, क्योंकि महिला चिकित्सक ने दो दिन पूर्व संभोग होना पाया है। उक्त मामले में महिला चिकित्सक का कथन था कि यदि ताजा बलात्संग हुआ है तब रक्त स्त्राव होना चाहिए और व्यथित की चोटों की अवधि बारह से अठ्ठाईस घंटे की बताई। परंतु उक्त चिकित्सक की साक्ष्य स्पष्ट रूप से घटना समय पर बलात्संग होने को निरस्त नहीं करती है। अगला तर्क किया गया कि, चिकित्सक ने हाईमन फटा पाया परंतु उसने सूजन या लालिमा चारों ओर पाने का कथन नहीं दिया है जबकि यदि ताजा बलात्संग हो तो सामान्यतः यह पाये जाते हैं। माननीय सुप्रीमकोर्ट ने उक्त परिस्थिति को अभियोजन के मामले को निरस्त करने हेतु पर्याप्त नहीं माना, क्योंकि बलात्संग में यह पर्याप्त है कि हाईमन फटा था और हाईमन के चारों और चोट थी। माननीय सुप्रीमकोर्ट ने यह भी वर्णित किया है कि किसी चिकित्सकीय विशेषज्ञ के लिये बलात्संग कारित किये जाने की सटीक समयावधि बताना कठिन है। जबकि उक्त मामले में प्रत्यक्षदर्शी साक्षी की अभिसाक्ष्य घटना की तारीख एवं समय बताती है। इस कारण चिकित्सकीय साक्ष्य का अवलंब प्रत्यक्षदर्शी साक्षी की अभिसाक्ष्य को असत्य ठहराने के लिये कठिनतापूर्वक ही लिया जा सकता है, क्योंकि चिकित्सकीय साक्ष्य, अनुमान और कतिपय गणनाओं, जैसे विभिन्न कारकों से निर्देशित होती है। उक्त मामले में माननीय सुप्रीमकोर्ट ने यह अभिनिर्धारित किया है कि इस कारण वे महिला चिकित्सक के कथन के आधार पर प्रत्यक्षदर्शी साक्षी के साक्ष्य को निरस्त करने में असमर्थ हैं।

आयु निर्धारण के संबंध में न्यायदृष्टांत ***बिष्णुदयाल विरूद्ध दी स्टेट ऑफ बिहार, ए.आई.आर 1981 एस.सी. 39*** महत्वपूर्ण है। उक्त मामले में अभियोक्त्री, उसके पिता, एवं चिकित्सकीय साक्षी ने घटना के समय अभियोक्त्री की आयु तेरह–चौदह वर्ष होने का कथन दिया है। चिकित्सकीय साक्षी की राय अभियोक्त्री के अट्ठाईस दांत, प्रत्येक जबड़े में चौदह दांत, स्मूथ प्यूबिक हेयर एवं एक्सीलरी हेयर जैसे शारीरिक लक्षणों पर आधारित थी। चिकित्सक की राय के अनुसार चौदह वर्ष की आयु प्रारंभ होने पर उक्त बाल आते हैं। उक्त न्यायदृष्टांत, अभियोक्त्री, उसके पिता की मौखिक प्रत्यक्ष साक्ष्य का चिकित्सकीय साक्ष्य से सटीक समानता को दर्शाता है।

निष्कर्ष

उपरोक्त विवेचन के उपरांत यह निष्कर्ष प्राप्त होता है कि आपराधिक विचारणों में चिकित्सा विशेषज्ञ की राय सुसंगत तथ्य है। यद्यपि विशेषज्ञ की राय न्यायालय पर बाध्यकारी नहीं है, तथापि क्षेत्र विशेष का विशेषज्ञ होने के नाते उसकी अभिसाक्ष्य का मूल्य होता है, जिसे आपराधिक विचारणों में कतिपय निष्कर्षो में पहुंचने पर पर्याप्त सहायता मिलती है और न्याय का कार्य सुगम होता है।

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मध्यप्रदेश स्थान नियंत्रण अधिनियम, 1961 के संदर्भ में सी. पी. सी. के आदेश 41 नियम 5 (1) के अंतर्गत अपील न्यायालय की शक्तियों का विस्तार

न्यायिक अधिकारी गण,
जिला सिवनी एवं शहडोल

आदेश 41 नियम 5 सिविल प्रक्रिया संहिता, 1908 (संक्षेप में–सी.पी.सी.) अपीलीय न्यायालय को विचारण न्यायालय द्वारा पारित डिक्रियों एवं आदेशों के निष्पादन को स्थगित करने की शक्ति प्रदान करता है। आदेश 41 नियम 5 सी.पी.सी. के उपबंध निम्नानुसार हैं:–

> **5. अपील न्यायालय द्वारा रोका जाना**– (1) अपील का प्रभाव जिस डिक्री या आदेश की अपील की गई है, जिसके अधीन की कार्यवाहियों को रोकना नहीं होगा, किन्तु यदि न्यायालय आदेश दे तो कार्यवाहियॉ रोकी जा सकेंगी। केवल इस कारण से कि डिक्री से अपील की गई है, डिक्री का निष्पादन स्थगित नहीं हो जाएगा, किन्तु अपील न्यायालय ऐसी डिक्री के निष्पादन के रोके जाने के लिए आदेश पर्याप्त हेतुक से दे सकेगा।
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> **स्पष्टीकरण** – डिक्री के निष्पादन को रोकने के लिए अपील न्यायालय का आदेश प्रथम बार के न्यायालय को ऐसे आदेश की संसूचना की तारीख से प्रभावी होगा, किन्तु निष्पादन को रोकने के लिए आदेश की या उसके प्रतिकूल किसी आदेश की, अपील न्यायालय से प्राप्ति होने तक प्रथम बार का न्यायालय अपीलार्थी की उसकी वैयक्तिक जानकारी पर आधारित ऐसे शपथ पत्र पर कार्यवाही करेगा जिसमें यह कथित हो कि डिक्री के निष्पादन को रोकने के लिए अपील न्यायालय द्वारा आदेश दे दिया गया है।
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> **(2) जिस न्यायालय ने डिक्री पारित की थी उसके द्वारा रोका जाना** – जहां किसी अपीलनीय डिक्री के निष्पादन के रोके जाने के लिए आवेदन उस समय के अवसान से पूर्व जो उसकी अपील करने के लिए अनुज्ञात है, किया जाता है वहां डिक्री पारित करने वाला न्यायालय निष्पादन के रोके जाने के लिए आदेश पर्याप्त हेतुक दर्शित किए जाने पर दे सकेगा।
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> (3) निष्पादन रोके जाने के लिए कोई भी आदेश उपनियम (1) या उपनियम (2) के अधीन तब तक नहीं किया जाएगा जब तक कि उसे देने वाले न्यायालय का यह समाधान नहीं हो जाता कि–

(क) यदि वह आदेश न किया गया तो परिणाम यह हो सकता है कि निष्पादन के रोके जाने का आवेदन करने वाले पक्षकार को सारवान् हानि हो,

(ख) आवेदन अयुक्तियुक्त विलम्ब के बिना किया गया है, तथा

(ग) आवेदक ने ऐसी डिक्री या आदेश के सम्यक् रूप से पालन के लिए जो अन्त में उसके लिए आबद्धकर हो, प्रतिभूति दे दी है।

(4) उपनियम (3) के उपबन्धों के अधीन रहते हुए, न्यायालय आवेदन की सुनवाई लम्बित रहने तक निष्पादन के रोके जाने के लिए एक पक्षीय आदेश कर सकेगा।

(5) पूर्वगामी उपनियमों में अंतर्विष्ट किसी बात के होते हुए भी, वहां अपीलार्थी नियम 1 के उपनियम (3) में विनिर्दिष्ट निक्षेप करने में या प्रतिभूति देने में असफल रहता है वहां न्यायालय डिक्री का निष्पादन रोकने वाला आदेश नहीं करेगा।

आदेश 41 नियम 5 के उपनियम (1) के उपबंध के अवलोकन से यह स्पष्ट होता है कि केवल इस कारण से कि विचारण न्यायालय की डिक्री के विरूद्ध अपील की गई है डिक्री का निष्पादन नहीं रोका जाएगा, किन्तु अपील न्यायालय "पर्याप्त हेतुक" होने पर निष्पादन रोक सकता है। स्पष्टीकरण से यह दर्शित होता है कि डिक्री के निष्पादन को रोकने के लिए अपील न्यायालय का आदेश विचारण न्यायालय को ऐसे आदेश की जानकारी की तारीख से प्रभावी होगा। तथापि निष्पादन को रोकने के लिए अपीलार्थी उसकी वैयक्तिक जानकारी के आधार पर शपथ पत्र पर यह कह सकता है कि डिक्री के निष्पादन को रोकने के लिए अपील न्यायालय द्वारा आदेश दे दिया गया है, तब ऐसी स्थिति में भी विचारण न्यायालय डिक्री के निष्पादन को रोकने के लिए समुचित कदम उठा सकता है। अर्थात् विचारण न्यायालय की डिक्री के निष्पादन को रोकने के लिए पर्याप्त हेतुक होना चाहिए और अपील न्यायालय द्वारा डिक्री के निष्पादन को रोकने के लिए दिये गये आदेश की सूचना विचारण न्यायालय को होना चाहिए। इन्हीं परिस्थितियों में, उपनियम (4) के अनुसार, निष्पादन को रोकने के आवेदन के लंबित रहते निष्पादन को रोकने हेतु एक पक्षीय आदेश दिया जा सकता है।

उपनियम (3) के अनुसार निष्पादन रोके जाने के लिए कोई भी आदेश देते समय न्यायालय का यह समाधान होना जरुरी है कि यदि निष्पादन रोके जाने का आदेश नहीं दिया गया तो निष्पादन को रोकने हेतु आवेदन करने वाले पक्षकार को सारवान हानि होगी। साथ ही यह भी कि आवेदन अयुक्तियुक्त विलंब के बिना किया गया हो। आवेदक को ऐसी डिक्री या आदेश जो अपील के निराकरण पश्चात्, यानि अपील में असफल होने की दशा में यदि उसके लिए बंधनकारी हो, तब उसके सम्यक् रूप से पालन के लिए प्रतिभूति देने का आदेश दिया जाना भी आवश्यक होगा। जबकि

उपनियम (5) के अनुसार, अपीलार्थी द्वारा नियम 1 के उपनियम (3) में बताये अनुसार निक्षेप करने में या प्रतिभूति देने में असफल रहता है वहां न्यायालय डिक्री का निष्पादन रोकने वाले आदेश नहीं करेगा।

उक्त विधिक उपबंध के निर्वचन से यह प्रकट होता है कि, अपील न्यायालय की डिक्री के निष्पादन को रोकने की शक्ति स्वतंत्र एवं निर्बाध नहीं है वरन् पद "पर्याप्त हेतुक" से सीमित एवं नियंत्रित है। अब प्रश्न यह उठता है कि पर्याप्त हेतुक क्या हो सकता है? सामान्य हेतुक पर्याप्त हेतुक नहीं माना जा सकता है। वस्तुतः आज्ञप्ति का धारण करना किसी व्यक्ति के पक्ष में स्वयं में एक विधिक प्रास्थिति को निर्मित करता है और किसी व्यक्ति को किसी विधिक प्रास्थिति के फलस्वरूप प्राप्त अधिकारों से पर्याप्त हेतुक के बिना वंचित रखा जाना न्यायोचित नहीं माना जा सकता है।

आदेश 41 नियम 5 (1) के अंतर्गत विहित पर्याप्त हेतुक तथा आदेश–41 नियम 5 (3) में उपबंधित परिस्थितियों की संतुष्टि हो जाने पर उचित निबंधन या शर्त अधिरोपित करते हुए डिक्री का निष्पादन रोका जा सकता है। इस सम्बन्ध में अपील न्यायालय के समक्ष स्थगन की प्रार्थना विनिर्दिष्टतः की जानी चाहिये। यह अपील न्यायालय का विवेकाधिकार है कि वह डिक्री का निष्पादन रोकना स्वीकार करे या न करें। पर्याप्त कारण होने पर आवेदक के पक्ष में निष्पादन रोकने का आदेश दिया जा सकता है। डिक्री से संबंधित संपत्ति के कब्जे में रहने वाले पक्षकर को अपील की लंबित रहने के दौरान बेकब्जा करना साधारणतया निष्पादन रोकने के लिये आवेदन करने वाले पक्षकार को सारवान् हानि होना समझा जाना चाहिये।

न्यायदृष्टांत ***आत्माराम प्रापर्टीज (प्रा.) लि. विरूद्ध फेडेरल मोटर्स (प्राय.) लि0, (2005) 1 एस.सी.सी. 705*** में माननीय उच्चतम न्यायालय द्वारा आदेश 41 नियम 5 सी.पी.सी. के प्रावधानों के अंतर्गत निष्पादन रोकने हेतु मार्गदर्शक सिद्धान्त प्रतिपादित किये गये हैं और स्पष्ट किया गया कि डिक्री या आदेश के निष्पादन की कार्यवाही को रोके जाने के लिये निवेदन किया जाना आवश्यक है, तभी अपील न्यायालय द्वारा निष्पादन कार्यवाही को रोका जा सकता है अथवा रोकने से इंकार किया जा सकता है। रोक का आदेश उसी दशा में किया जा सकता है, जब अपीलार्थी के पक्ष में निष्पादन कार्यवाही को रोके जाने के लिये पर्याप्त कारण हो, जिससे अपील न्यायालय निष्पादन कार्यवाही को रोकने के लिये प्रवृत्त हो सके। अनुभव में यह पाया गया है कि डिक्री या आदेश पारित करने के समय की यथास्थिति अपील की सुनवाई तक कायम रखी जानी चाहिये और यदि यह पाया जाता है कि अपीलार्थी अपील के सफल होने पर वह उसे प्राप्त होने वाले फल से वंचित हो सकता है तो इस स्थिति में बेदखली की डिक्री के निष्पादन की कार्यवाही को उक्त प्रावधान के अंतर्गत स्टे किया जाना चाहिए।

न्यायदृष्टांत ***सरदार वीरेन्द्रसिंह (श्रीमंत) विरूद्ध मनोहर, 2006 (2) वि.भ. 54*** से यह मार्गदर्शन प्राप्त होता है कि अभिधारी की बेदखली के विरूद्ध रोक के समय अपील न्यायालय को भू–स्वामी के हित की रक्षा करनी चाहिये और युक्तियुक्त प्रतिकर, अधिरोपित करना चाहिए यह आवश्यक नहीं है कि केवल भाड़े की रकम अधिरोपित की जाये।

न्यायदृष्टांत ***मूलराज विरूद्ध मूर्ति रघुनाथजी महाराज, ए.आई.आर. 1967 एस.सी. 1386*** में माननीय उच्चतम् न्यायालय ने अभिनिर्धारित किया है आवेदक उसके वैयक्तिक जानकारी के आधार पर ऐसे शपथपत्र पर कार्यवाही कर सकेगा जिसमें यह कथित हो कि डिक्री के निष्पादन को रोकने के लिए अपील न्यायालय द्वारा आदेश दे दिया गया है। अर्थात् विचारण न्यायालय की डिक्री के निष्पादन को रोकने के लिए पर्याप्त हेतुक होना चाहिए और उसकी सूचना विचारण न्यायालय को होना चाहिए। माननीय उच्चतम् न्यायालय ने यह भी अभिनिर्धारित किया है कि अपीलीय न्यायालय के स्टे आदेश पारित होने एवं इसका विचारण न्यायालय के ज्ञान में लाये जाने के बीच की अवधि में यदि विचारण न्यायालय द्वारा डिक्री के निष्पादन की दिशा में कोई कार्यवाही कर दी गयी है तब यदि ऐसा करने की प्रार्थना की जाय और ऐसा करना न्याय हित में आवश्यक लगता है तब विचारण न्यायालय को ऐसी बीच की अवधि में की गयी कार्यवाही को अपास्त करने की शक्ति होगी।

न्यायदृष्टांत ***बी. जॉनसन विरूद्ध सी.एस. नायडू, ए.आई.आर. 1986 एम.पी. 72 (अन्य बिन्दु पर कुंजुलाल विरूद्ध परसराम, ए.आई.आर. 2000 एम.पी. 235*** द्वारा अतिष्ठित) में यह अभिनिर्धारित किया गया है कि म.प्र. स्थान नियंत्रण अधिनियम की धारा 23 एफ के अंतर्गत बेदखली के आदेश के निष्पादन को रोकने के लिए भाड़ा नियंत्रक प्राधिकारी द्वारा या उच्च न्यायालय द्वारा पारित स्टे आदेश, उक्त आदेश दिनांक से 6 माह की अवधि बीतने पर स्वमेव समाप्त हो जाता है, हालांकि समुचित मामलों में एक नवीन आदेश जारी किया जा सकता है जो उसी समयावधि के लिए प्रभाव में रहेगा क्योंकि प्रथम आदेश के समाप्त होने के बाद नवीन आदेश जारी किये जाने के विरूद्ध कोई प्रतिबंध नहीं हैं।

बाबूलाल पोखरमल सुनार विरूद्ध संत कुमार, ए.आई.आर 2007 (एन.ओ.सी.) 318 में जहां निष्कासन की डिक्री के विरुद्ध द्वितीय अपील में डिक्री का निष्कासन रोका गया किन्तु अपील न्यायालय द्वारा डिक्रीदार–मकान मालिक के पक्ष में अंतर्वती लाभ या क्षतिपूर्ति का कोई आदेश नहीं किया गया था, वहां यह प्रतिपादित किया गया है कि निष्कासन की डिक्री के विरुद्ध अपील की लंबित अवधि के दौरान डिक्रीदार–मकान मालिक के पक्ष में अंतर्वती लाभ या क्षतिपूर्ति का आदेश अंतर्निहित शक्तियों के प्रयोग में किया जा सकता है। विवादित दुकान शहर के मुख्य भाग में स्थित होने के तथ्य को देखते हुए किराएदार को निर्देशित किया गया कि वह अन्तःकालीन लाभ/प्रतिकर का भुगतान भू–स्वामी को करें।

न्यायदृष्टांत ***प्रदीप कुमार विरूद्ध हजारीलाल, ए.आई.आर. 2008 एस.सी. 1689*** में माननीय उच्चतम न्यायालय द्वारा आदेश 41 नियम 5 सी.पी.सी. के प्रावधान के अंतर्गत, बेदखली की डिक्री के निष्पादन की कार्यवाही को रोके जाने पर, मूल्यांकनकर्ता द्वारा 92,000/– रूपये वार्षिक रेंट निर्धारित किये गये आवास के लिए 4,000/– रूपये मासिक मध्यवर्ती लाभ के रूप में दिलाने का आदेश, विशेषकर यह पाते हुए कि अपीलार्थी द्वारा प्रकरण के विचारण में विलम्बकारी प्रयास किया गया है, उचित ठहराया है।

न्यायदृष्टांत ***राजाराम प्रसाद गुप्ता विरूद्ध रामचन्द्र, (2008) 10 एस.सी.सी. 796*** में जहां कि प्रस्तुत वाद में विचारण न्यायालय द्वारा स्वत्व की उदघोषणा एवं कब्जा की वापसी हेतु डिक्री प्रदान की गई थी, जिसमें उच्च न्यायालय ने विचारण न्यायालय द्वारा निष्पादन कार्यवाही को रोके जाने के निष्कर्ष को अस्वीकार कर दिया था, माननीय उच्चतम न्यायालय द्वारा यह निर्धारित किया गया कि जब विवादित आवासीय परिसर में निर्णीतऋणी निवास कर रहा हो, तब निष्कासन की कार्यवाही को विशेष परिस्थितियों में नियमानुसार रोका जाना चाहिए तथा यह भी प्रतिपादित किया कि डिक्री के निष्पादन के रोक की दशा में अंतःवर्ती लाभ निर्धारित किया जा सकता है और आज्ञप्तिधारी को उक्त रकम न्यायालय से प्राप्त करने हेतु अनुमति दी जा सकती है।

न्यायादृष्टांत ***काशीमठ विरूद्ध श्रीमद सुधीन्द्र तीर्थ स्वामी, ए.आई.आर. 2010 एस.सी. 296*** में प्रतिपादित विधिक सिद्धान्त से यह प्रकट होता है कि आवेदक द्वारा यदि प्रथम दृष्टया मामला निर्मित नहीं किया गया तो ऐसी स्थिति में अपील की लंबित अवधि के दौरान डिक्री के निष्पादन की कार्यवाही को रोकने से इंकार किया जा सकता है।

न्यायदृष्टांत ***आन्ध्रप्रदेश राज्य विरूद्ध मेहमूद हसन खांन, ए.आई.आर. 1983 आंध्रप्रदेश 277*** में माननीय उच्च न्यायालय द्वारा यह सिद्धांत प्रतिपादित किया गया है कि आदेश 41 नियम 5 (5) सी.पी.सी. के अंतर्गत पैसों की आज्ञप्ति के निष्पादन को रोकने के लिये आवेदन पत्र प्रस्तुत करने पर उसके विचार के पूर्व आज्ञप्ति राशि अथवा जमानत राशि देना आवश्यक नहीं है, किन्तु न्यायदृष्टांत ***हिमांचल रोड ट्रान्सपोर्ट कारपोरेशन विरूद्ध सुशीला देवी, ए.आई.आर. 1986 हिमांचल प्रदेश 78*** में यह सिद्धांत प्रतिपादित किया गया है कि न्यायालय द्वारा पैसा जमा करने अथवा जमानत देने में छूट नहीं दी जा सकती है भले ही न्यायोचित आधार क्यों न हो, लेकिन न्यायदृष्टांत ***मे. मालवा स्ट्रिप्स प्रा.लि. विरूद्ध मे. ज्योति लि., ए.आई.आर. 2009 एस.सी. 1581*** में माननीय उच्चतम न्यायालय ने अवधारित किया है कि, धन की डिक्री के निष्पादन को रोके जाने के मामलों में डिक्री धन अथवा प्रतिभूति जमा किये बिना निष्पादन को रोके जाने का आदेश आपवादिक मामला दर्शाये बिना नहीं दिया जा सकता है। इस तरह से, जहां निष्कासन की डिक्री के साथ अवशेष किराया की डिक्री भी पारित की गयी है वहां किराया विषयक डिक्री का निष्पादन रोकने से पूर्व किराया जमा कराया जाना चाहिए।

अतः आदेश 41 नियम 5 (1) सी.पी.सी. के उक्त प्रावधानों तथा माननीय उच्चतम् न्यायालय एवं विभिन्न माननीय उच्च न्यायालयों के न्यायदृष्टांतों में प्रतिपादित सिद्धांत के प्रकाश में यह स्पष्ट है कि अपील न्यायालय का क्षेत्र वैवेकीय एवं व्यापक स्वरूप का है और यह प्रकरण के तथ्य और परिस्थितियों के अनुरूप पर्याप्त हेतुक प्रकट होने पर तथा आदेश 41 नियम 5 (3) के अंतर्गत दी गई परिस्थितियों से संतुष्ट होने के पश्चात् अपील न्यायालय द्वारा निष्कासन की डिक्री के विरूद्ध अपील प्रस्तुत किये जाने पर सामान्यतः अपील के निराकरण तक डिक्री का निष्पादन रोका जाना अपेक्षित होता है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

*147. ACCOMMODATION CONTROL ACT, 1961(M.P.) – Sections 12 (1) (a), 12 (3) and 13

Protection to tenant – Civil suit for eviction on the ground of arrears of rent was dismissed after extending the benefit of protection under Section 12(3) – Tenant again committed default in payment of rent – Second Civil suit filed for eviction on the ground of arrears of rent – Held, benefit of protection under Section 12(3) of the Act can be extended only for once – Decree on the ground of arrears of rent was rightly granted by Trial Court.

Protection – Protection of Section 12(3) is available only when the provisions of Section 13(1) of the Act are complied with – In case of three consecutive defaults, the protection is automatically removed and the proceedings can be initiated under Section 13(6) or under Section 12(1)(a) of Act.

Shri Pratap Raghav Ji Bhagwan v. Smt. Krishna & Ors.

Judgment dated 16.12.2011 passed by the High Court of M.P. in S.A. No. 1669 of 2007, reported in ILR (2012) M.P. 507

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*148. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b)
EVIDENCE ACT, 1872 – Sections 101 and 102

Burden of proof as to sub-tenancy – The initial burden is on the landlord to prove the sub-tenancy as it is a secret arrangement between tenant and sub-tenant and burden then shifts to the tenant to disprove that the suit accommodation is not sub-let.

Purushottamdas and another v. Laxmilal

Judgment dated 09.07.2011 passed by the High Court of M.P. in S.A. No. 490 of 2008, reported in 2012 (1) MPLJ 544

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149. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 and 36
CONTRACT ACT, 1872 – Sections 59 and 60

(a) Award of the arbitrator is tantamount to a decree as per the language of Section 36 of the Act of 1996.

(b) Judgment debtor/respondent deposited sum during the pendency of the proceeding under Section 34 of the Act – It was accepted by the appellant on protest – He is entitled to appropriate deposit towards interest which was due and payable till that date on principal amount

Leela Hotels Ltd. v. Housing & Urban Development Corporation Ltd.

Judgment dated 15.11.2011 passed by the Supreme Court in Civil Appeal No. 9763 of 2011, reported in AIR 2012 SC 903

Held:

The philosophy behind the principle set out in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu & Ors. v. Raja Parthasarathy Appa Rao Bahadur Zamindar Garu, AIR 1922 PC 233* and as reiterated in *Rai Bahadur Seth Nemichand v. Seth Radha Kishen, AIR 1922 SC 26* and also in *M/s I.C.D.S. Ltd. v. Smithaben H. Patel & Ors., AIR 1999 SC 1036* and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of Section 59 of the Indian Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard. That is not so in the instant case and, accordingly, the creditor cannot be denied its dues on a unilateral stipulation that the amount of ₹ 89.78 crores was being deposited as against the principal sum due in terms of the Award. Since the said amount was accepted by the Appellant on protest, it would be entitled to appropriate the same against the interest which was due and payable till that date on the principal amount, as has been asserted by it.

Regarding the question as to whether the Award of the learned Arbitrator tantamount to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an Award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the Court. The said language leaves no room for doubt as to the manner in which the Award of the learned Arbitrator was to be accepted.

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150. CIVIL PROCEDURE CODE, 1908 – Section 11

Whether wrong decision or judgment which is contrary to law operates as res judicata? Held, Yes – Until the decision or judgment is not set aside in appeal, it is binding upon the parties as res judicata.

Ditya (Deleted) Through L.Rs. Richhu and others v. Kidi and Others

Judgment dated 25.11.2011 passed by the High Court of M.P. in S.A. No. 21 of 1999, reported in 2012 (2) MPLJ 86

Held :

Learned counsel for the appellants vehemently submitted that the judgment passed in the former suit was wrong and was in complete derogation to section 2(2) of the Hindu Succession Act. Several contentions have been put forth by learned counsel for the appellants in this regard, but, those contentions cannot

be accepted for the simple reason that even if the judgment passed in the former suit was erroneous or wrong it cannot be a ground to file a fresh suit or res judicata would not apply. In this context, the decision of Supreme Court in ***State of West Bengal v. Hemant Kumar Bhattacharjee and others, AIR 1966 SC 1061*** has been rightly placed reliance by learned senior counsel for the respondents. I may further add that undisputedly the learned Court which decided the former suit was competent and having jurisdiction to decide the same. The Court may have wisdom to decide rightly or wrongly and even contrary to law, but, the said erroneous judgment or even a judgment which is contrary to the law can always be challenged in appeal before the superior Court. However, a fresh suit cannot be filed. A landmark decision in this regard of Single Bench of this Court in the case of ***State of M.P. v. Mulamchand, 1973 MPLJ 832 = 1973 JLJ 489,*** may be taken note of which governs the field of this case and the submissions placed reliance by learned counsel for the appellants. According to me, even a wrong decision or the judgment which is contrary to the law is binding upon the party unless and until it is set aside in the appeal or the other remedy provided under the law.

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151. CIVIL PROCEDURE CODE, 1908 – Sections 36 & 37 and Order 39 Rule 2-A

"Court granting an injunction" as used in Rule 2-A of Order 39, meaning of – The phrase can only be understood to mean that court which is trying the suit in which, injunction is granted and which has jurisdiction to grant an injunction – Hence, trial court has jurisdiction to punish disobedience of order of temporary injunction, even if the order was granted by an appellate court. (*Allanoor v. Ramgopal, 1987 MPWN 237* held *per incurium*)

Smt. Sadhana Tripathi v. Banarasidevi

Judgment dated 08.02.2012 passed by the High Court of M.P in Civil Revision No. 16 of 2012, reported in 2012 (2) MPHT 328

Held:

A bare perusal of the application under Order 7 Rule 11 read with Section 151 of the Code would reveal that objection to jurisdiction was based on the fact that the injunction order, said to have been disobeyed, was passed by the appellate Court and it was overruled by learned Civil Judge for the reason that "the Court granting injunction" means the Court, which was hearing the suit or the Court to which it has been transferred for trial.

While placing implicit reliance on the decision of a Single Bench of this Court in ***Allanoor v. Ramgopal, 1987 MPWN 237,*** learned Counsel for the petitioners has contended that the impugned order deserves to be set aside as one without jurisdiction because the alleged breach of injunction granted in appeal was punishable by the Appellate Court only. However, in that case, the earlier decision

to the contrary as rendered in ***Balu v. Nandram, 1969 MPLJ Note 30,*** though concerning the provision of Order 39 Rule 2 (3) of the un-amended Code, does not find reference. The provision of Order 39 Rule 2 (3) (supra), was omitted and a new Rule, i.e., Order 39 Rule 2-A was inserted by Act 104 of 1976 w.e.f. 01.02.1977 in accordance with the suggestion given by Macpherson, J., while speaking for the Bench for Patna High Court in ***Jang Bahadur Singh v. Chhabila Koiri, AIR 1936 Patna 23,*** but, fact of the matter is that the power to punish disobedience of injunction continued to remain with the Court ordering injunction.

Both the provisions are substantially similar and, therefore, as explained by the Full Bench of this Court in ***Jabalpur Bus Operators Association v. State of M.P., 2003 (1) MPLJ 513,*** the earlier decision given by a Bench of equal strength in ***Balu's case*** (supra), interpreting the expression "Court granting injunction" still holds the field as the binding precedent.

Moreover, the only decision viz., ***Shashank v. Naraindas, AIR 1973 MP 303,*** distinguished in ***Allanoor's case*** (supra), also relates to interpretation of the words "Court granting an injunction". Explaining the effect of Sections 36, 37 and 150 of the CPC in ***Shashank's case*** (supra), the then Chief Justice, even without making reference to the view taken in ***Balu's case*** (supra). Virtually re-affirmed the same after considering judgments of the various High Courts on the question as to whether the Court to which the suit is transferred is competent to entertain an application under Order 39, Rule 2 (3). It was observed: –

> "Words "Court granting an injunction" can only be understood to mean the Court which is trying the suit in which the injunction is granted and which has the jurisdiction to grant an injunction."

To sum up, the decision in the case of Allanoor (supra), was rendered not only by failing to take note of an earlier decision on the point but also in ignorance of relevant analogous statutory provisions as contained in Sections 36 and 37 of the CPC. It is, therefore, required to be ignored as ***per incurium***. Further, in view of well settled position of law on the point, the decision need not be referred to a Division Bench.

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152. CIVIL PROCEDURE CODE, 1908 – Section 148, Order 21 Rules 84, 85 and 86

Whether time to deposit remaining 75% of purchase money can be extended under Section 148 in execution of decree? Held, No, as Rules 84 and 85 of Order 21 CPC leave no discretion of power to court to extend time statutorily fixed by the rules, Section 148 has no role as to extension of time.

Alok Badal v. State of Bank of Indore and others

Judgment dated 07.03.2012 passed by the High Court of M.P in Civil Revision No. 80 of 2012, reported in 2012 (2) MPHT 303

Held:

The legal consequences of default of payment of purchase money have been enumerated in Rule 86 of Order XXI of the Code. Accordingly, after defraying expenses of the auction sale, the property has to be-re-sold. The provisions of Rules 84 and 85 of Order XXI are mandatory and upon non-compliance with these provisions, there is no sale at all (***Manilal Mohanlal Shah and Others v. Sardar Sayed Ahmed Sayed Mahmad and Another, AIR 1954 SC 349*** referred to). As explained further, even the inherent powers of the Court cannot be invoked to circumvent these mandatory provisions of the Code.

As an obvious corollary, contention that the time to deposit the remaining 75% of the purchase money could be extended under Section 148 of the Code as the application for extension of time moved before expiry of the prescribed period of 15 days is apparently misconceived as Rules 84 and 85 leave no discretion of power to Court to extend time statutorily fixed by these Rules or to condone any delay in depositing the purchase money.

Moreover, a fact that the decree holder has pleaded no objection to the prayer for extension of time to deposit the remaining amount of purchase money also does not assume any significance.

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153. Civil Procedure Code, 1908 – Order 3 Rule 4 and Section 9
Advocate witness – 'O' was counsel once upon a time for petitioner but he is not counsel in the present case – Since he was scribe of the will, therefore, his name was shown in the list of witnesses by petitioner – His name was delisted by the order of trial court on the ground that he was Advocate of petitioner and hence, he cannot be allowed to examine as witness – Held, "O" cannot be delisted from the list of witnesses as he was not appearing in the same case as an Advocate of petitioner – Order of trial court set aside. (*Jhanak v. Santosh, ILR 2008 MP 310* distinguished)

Ishwarlal v. Gendalal and Others
Judgment dated 22.07.2011 passed by the High Court of M.P. in W.P. No. 2482 of 2011, reported in 2012 (1) MPLJ 688

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154. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17
Amendment of pleadings – Important factors which are required to be borne in mind while dealing with an application for amendment illustrated.

Pushpa Arora v. Anita Arora and others
Judgment dated 22.02.2012, passed by the High Court of M.P. in W.P. No. 21249 of 2011, reported in 2012 (1) MPLJ 710

Held :

The amended provisions of the Code of Civil Procedure have been considered by the Supreme Court in ***Salem Advocate Bar Association, T.N. v. Union of India, (2005) 6 SCC 344.*** The Supreme Court in ***Chander Kanta Bansal v. Rajinder Singh Anand, (2008) 5 SCC 117*** has held that the delayed amendment which appears to be an afterthought should not be allowed. However, in deserving cases the Court can allow even a belated application for amendment, if other side can be compensated in terms of the cost. In ***Usha Devi v. Rijwan Ahamad and Others, (2008) 3 SCC 717,*** it has been held that merits of amendment is not the relevant criteria while deciding the application for amendment. In ***Rajkumar Gurawara (Dead through LRs. v. S.K. Sarwagi and Company Pvt. Ltd. and Another, (2008) 14 SCC 364*** it has been held that just and proper amendment can be introduced at any stage for the purpose of determining the real controversy involved in the suit. In ***South Konkan Distilleries and Another v. Prabhakar Gajanan Naik and Others, (2008) 14 SCC 632*** it has been held that if the application for amendment is within limitation or there is an arguable case with regard to the question of limitation, the same should be allowed. However, time barred amendment should not be allowed. In ***Rajkumar Gurawara (supra)*** the Supreme Court while drawing distinction between the pre trial and post trial amendment has further held that greater degree of prejudice is caused by amendments which are sought after commencement of the trial. It has further been held that prejudice likely to be caused depends upon the procedural stage at which the amendment is sought. It has been reiterated that it is a settled law that the grant of application for amendment shall be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; and (iii) when allowing amendment application defeats the law of limitation. The basic principles with regard to dealing with the application for amendment have been stated by the Supreme Court in ***Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84.*** In view of the well settled position dealing with the prayer for amendment of the pleadings the following important factors are required to be borne in mind by the Court dealing the application for amendment: –

(i) Whether the amendment is necessary for proper and complete adjudication of the controversy involved in the suit.

(ii) Whether the application has been made bona fide or with mala fide intention to protract the proceedings.

(iii) Whether the proposed amendment, if allowed, would cause any prejudice to either side which cannot be compensated in terms of money.

(iv) Whether by the proposed amendment a party is setting up a new case or cause of action which changes the nature and character of the case.

(v) The application for amendment should not be rejected merely on the ground that delay alone, if the other side can be compensated in terms of cost.

(vi) The amendment which is barred by limitation should not be allowed.

(vii) In case of post trial amendment, the Court has to come to the conclusion that in spite of due diligence party could not have raised the matter before the commencement of the trial.

I may hasten to add here that the aforesaid factors are only illustrative and not exhaustive. The trial Court while passing the impugned order has failed to take into account the basic principles which are to be kept in mind while deciding the application for amendment.

For the aforementioned reasons, the impugned order cannot be sustained in the eye of law. The same is hereby quashed. The trial Court is directed to decide the application preferred by the petitioner afresh by a speaking order by taking into account the well settled legal principles governing grant of amendment.

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155. CIVIL PROCEDURE CODE, 1908 – Order 9 Rules 7 & 13 and Order 18 Rules 2, 4, 5, 13 & 15

(i) Expression "from the stage at which his predecessor left it" occurring in Rule 15 of Order 18 CPC, meaning thereof – It is wide and comprehensive enough to take in its fold all situations and stages of the suit.

(ii) *Ex parte* **proceeding – Opportunity of hearing – Court ordered the suit to proceed ex parte against the defendants – Heard the arguments of the plaintiff and closed the suit for pronouncement of the judgment – Presiding Officer who heard the arguments was transferred and the new Presiding Officer who assumed the charge pronounced the judgment – In these facts, the defendant cannot be permitted to raise any grievance that the successor Judge who delivered the judgment has not given an opportunity of hearing.**

(iii) Recording of evidence – Examination-in-chief on affidavit – Purpose and objective is speedy trial of the case and to save precious time of the Court – Legal position reiterated.

Rasiklal Manikchand Dhariwal and another v. M.S.S. Food Products

Judgment dated 25.11.2011 passed by the Supreme Court in Civil Appeal No. 10112 of 2011, reported in (2012) 2 SCC 196

Held:

In terms of the order of the High Court and subsequent order of this Court, the suit was required to be disposed of by the trial court expeditiously and the trial court endeavoured to proceed accordingly, but the defendants continued to make application after application stalling the effort of the trial court in that direction. Suffice it to state here that on 28.02.2005, the trial court closed the defendants' right to cross-examine the plaintiff's witnesses. The matter was then fixed for 17.03.2005. On that date, nobody appeared on behalf of the defendants and the matter was directed to proceed ex parte. The plaintiff closed the evidence and the trial court heard the arguments of the plaintiff and reserved the judgment and fixed the matter for 28.03.2005 for pronouncement of judgment. It appears that later on the Advocate for the defendants appeared on that date and signed the order sheet.

After the arguments were heard on 17.03.2005 and although the matter was fixed for pronouncement of judgment on 28.03.2005, on behalf of the defendants, an application was made on 21.03.2005for setting aside the ex parte order. The defendants continued to make applications even thereafter. The judgment was not pronounced on 28.03.2005 or immediately thereafter.

Then, it so happened that the Presiding Officer who heard the arguments got transferred and the new Presiding Officer assumed charge on 28.08.2006. Even thereafter the defendants kept on making application after application. The trial court heard arguments on those applications and all these applications were dismissed. The trial court pronounced the judgment on 07.03.2005 whereby plaintiff's suit was decreed.

Order 18 Rule 15 provides for the contingency where the Judge before whom the hearing of the suit has begun is prevented by death, transfer or other cause from concluding the trial of a suit. This provision enables the successor Judge to proceed from the stage at which his predecessor left the suit. The provision contained in Order 18 Rule 15 of the Code is a special provision. The idea behind this provision is to obviate re-recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught.

This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Order 18 Rule 15 of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it.

A decision of the Lahore High Court, in the case of ***Harji Mal v. Devi Ditta Mal, AIR 1924 (Lah) 107*** deserves to be noticed by us. In that case, in the second appeal before the High Court, one of the contentions advanced by the appellants was that the Senior Sub Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him and, therefore, the judgment was a nullity and the matter needed to be remanded to the trial court. The facts in that case were these : the Sub-Judge who heard the case fixed the 10th of November, for arguments. On that date, an adjournment was sought by the counsel who appeared. The Sub-Judge did not allow adjournment but directed them to file written arguments, if they wished to do so. The written arguments were submitted. While the matter was reserved for the judgment, the Sub-Judge decided to inspect the spot but he could not carry out inspection as he was transferred. The successor Judge took over and he inspected the spot and delivered the judgment. While dealing with the argument, as noticed above, the Division Bench of the Lahore High Court referred to Order 18 Rule 2 of the Code and noted that the said provision gave an option to the parties to argue their case when their evidence was conducted and it was for them to decide whether they would avail of this privilege. The High Court held that it was for a party to argue the case if they wished to do so and as they did not do so, the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity.

We are in agreement with the view of the Lahore High Court in ***Harjimal case*** (supra) that Order 18 Rule 2 of the Code gives an option to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege and if they do not, they do so at their peril. Insofar as the case in hand is concerned, the right of the defendants to cross-examine plaintiff was closed on 28.02.2005. The matter was then fixed for 17.03.2005 for the remaining evidence of the plaintiff. On that day, none appeared for the defendants although the matter was called out twice. In that situation, the Judge ordered the suit to proceed ex parte against the defendants; heard the arguments of the plaintiff and closed the suit for pronouncement of judgment on 28.03.2005. In these facts, the defendants, having lost their privilege of cross-examining the plaintiff's witnesses and of advancing oral arguments,

now cannot be permitted to raise any grievance that the successor Judge who delivered the judgment has not given them an opportunity of oral arguments.

The expressions "state his case", "produce his evidence" and "address the court generally on the whole case" occurring in Order 18 Rule 2, sub-rule (1) and sub-rule (2) have different meaning and connotation. By use of the expression "state his case", the party before production of his evidence is accorded an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. The general outline by a party before letting in evidence is intended to help the court in understanding the evidence likely to be followed by a party in support of his case. After case is stated by a party, the evidence is produced by him to prove his case. After evidence has been produced by all the parties, a right is given to the parties to make oral arguments and also submit written submissions, if they so desire. The hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments. The scheme of the Code, as embodied, in Order 18 Rule 2, particularly, sub-rules (1), (2), (3) and (3A) and Order 18 Rule 15 enables the successor Judge to deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it.

In light of the legal position and the factual matrix of the case, we are unable to accept the contention of the learned senior counsel for the appellants that the trial court violated the fundamental principle of law, i.e. "one who hears must decide the case".

Once the hearing of the suit is concluded; and the suit is closed for judgment, Order 9 Rule 7 of the Code has no application at all. The very language of Order 9 Rule 7 makes this clear. This provision pre-supposes the suit having been adjourned for hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". On 17.03.2005, the trial court in the present case did four things, namely, (i) closed the evidence of the plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed ex parte as defendants failed to appear on that date; (iii) heard the arguments of the Advocate for the plaintiff; and (iv) kept the matter for pronouncement of judgment on 28.03.2005. In view of the above, Order 9 Rule 7 of the Code has no application at all and it is for this reason that the application made by the defendants under this provision was rejected by the trial court.

Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order 9 Rule 7 of the Code and thereby entitling them to address the court on the merits of the case.

The purpose and objective of Order 18 Rule 4 of the Code is speedy trial of the case and to save precious time of the court as the examination-in-chief of a witness is now mandated to be made on affidavit with a copy thereof to be supplied to the opposite party. The provision makes it clear that cross-examination and reexamination of witness shall be taken either by the court or by Commissioner appointed by it. Proviso appended to sub-rule (1) of Order 18 Rule 4 further clarifies that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with the affidavit shall be subject to the order of the court. In a case in which appeal is allowed, Order 18 Rule 5 provides that the evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on a typewriter or recorded mechanically in the presence of the Judge if the Judge so directs for reasons to be recorded in writing.

The above provisions, namely, Order XVIII Rule 4 and Order 18 Rule 5 of the Code came up for consideration before this Court in the case of ***Ameer Trading Corpn. Ltd. v. Sharpoorji Data Processing Ltd., (2004) 1 SCC 702.*** Before we refer to this judgment, it is appropriate that the judgment of the Bombay High Court in ***F.D.C. Limited v. Federation of Medical Representatives Assn. India AIR 2003 Bom 371*** is noted.

Now, we consider the decision of this Court in ***Ameer Trading Corpn. Ltd.*** (supra) The interpretation of Order 18 Rule 4 and Rule 5 of the Code fell for consideration in that case.

It cannot be said that in ***Ameer Trading Corpn. Ltd.*** (supra) it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already.

In our view, there is no requirement in Order 18 Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence.

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***156. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13**

Setting aside ex-parte decree – Written statement was filed by defendant beyond the period of 90 days – Rent was deposited within time and defence was struck off – Adjournment was taken for cross examination of plaintiff – Thereafter, the defendant was proceeded *ex-parte* and decree was passed – Application for setting aside *ex-parte* decree was filed after 30 days – No application for condonation of delay was filed – Only reason assigned in the application was that it took time to obtain certified copy of decree – Provisions of Section 12 of Limitation Act does not apply to proceedings under Order 9 Rule 13 – Conduct of respondent in original suit in adopting the delaying tactics does not entitle him for condonation of delay – Order of appellate Court setting aside *ex-parte* decree set aside.

Shri Jagat Guru Shankrachariya Swami v. Siddhu Engineering Works

Judgment dated 18.11.2011 passed by the High Court of M.P. in C.R. No. 350 of 2009, reported in ILR (2012) M.P. 562

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157. CIVIL PROCEDURE CODE, 1908 – Order 11 Rule 12 and Order 38 Rule 5

Whether discovery of document under Order 11 Rule 12 can be allowed for facilitating adjudication of application under Order 38 Rule 5 for attachment before judgment of property of the defendant? – Held, No.

M/s Bhatia Distributors and Others v. Bosch Limited and Another

Judgment dated 03.10.2011 passed by the High Court of M.P. in Writ Petition No. 4519 of 2011, reported in 2012 (2) MPHT 107

Held:

The respondents have filed an application under Order 38 Rule 5 of the Code of Civil Procedure. Thereafter, the respondents filed an application under Order 11 Rule 12 of the Code of Civil Procedure by which the respondents sought the details of the property held by the petitioner. The Trial Court though by the impugned order held that the burden is on the person who moves the application under Order 38 Rule 5 of the Code of Civil Procedure to furnish the particulars, yet the respondent/ plaintiff is not expected to know the details of the property of the petitioners/ defendants.

Learned Counsel for the petitioner submitted that the order passed by the Trial Court suffers from the error apparent on the face of the record. On the other hand, learned Counsel for the respondents submitted that the order has been passed by the Trial Court in exercise of power under Section 151 of the CPC and the plaintiff is not expected to know the details of the properties which are held by the defendants.

I have considered the submissions made on both sides. The condition precedent for invocation of power under Order 11 Rule 12 of the CPC, is that the production of the document should be relevant to any matter in question. The burden to prove the essential ingredients under Order 38 Rule 5 of the CPC is on the person who seeks the relief from the Court. For the purposes of facilitating adjudication of the application filed by the respondents under Order 38 Rule 5 of the CPC, the powers under Order 11 Rule 12 of the CPC at the instance of the respondents/ plaintiff cannot be exercised by the Trial Court.

For the aforementioned reasons, the order passed by the Trial Court cannot be sustained in the eye of law. The same is hereby quashed.

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158. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18 and Order 23 Rule 3

Compromise in partition suit – Nature and scope of decree.

(i) Where in a partition suit a compromise petition filed by the parties showing that they had admitted their respective share in property had already been allotted and they were in separate and exclusive possession thereof and there was no clause regarding any future course of action in the compromise petition, then decree drawn up incorporating the compromise is a final decree and executable accordingly.

Distinction between *preliminary* and *final* decree in partition suit, reiterated.

(ii) A final decree becomes enforceable from the date of passing of decree and not when decree is engrossed on the stamp paper – Hence, execution application of such decree should be filed within the prescribed period of limitation under Article 136 of Limitation Act, 1963, i.e. 12 years from the date of decree.

Bimal Kumar and another v. Shakuntala Debi and others

Judgment dated 27.02.2012 passed by the Supreme Court in Civil Appeal No. 2524 of 2012, reported in (2012) 3 SCC 548

Held:

(i) In *Rachakonda Venkat Rao v. R. Satya Bai, AIR 2003 SC 3322* it has been stated that the compromise application does not contain any clause regarding the future course of action which gives a clear indication that nothing was left for the future on the question of partition of the joint family properties. The curtain had been finally drawn.

In *Muzzaffar Husain v. Sharafat Husain, AIR 1933 Oudh 562,* it has been held as follows:

> "...We think the decree passed by the civil Court should be treated as a final order for effecting a partition. It is true that the decree was passed on the basis of a compromise

filed by the parties, but the fact remains that it was passed in a partition suit, and had the effect of allotting a specific portion of the property to the plaintiff as his share in the property. The conclusion at which we have arrived is supported by a decision of the Madras High Court in ***Thiruvengadathamiah v. Mungiah, ILR (1912) 35 Mad. 26***"

In ***Raghubir Sahu v. Ajodhya Sahu, AIR 1945 Pat 482,*** the Division Bench of Patna High Court had ruled thus:-

> "In the present case, the decree was passed on compromise. It was admitted that by the compromise, the properties allotted to the share of each party were clearly specified and schedules of properties allotted to each were appended to the compromise petition. Therefore, no further inquiry was at all necessary. In such circumstances, the decree did not merely declare the rights of the several parties interested in the properties but also allotted the properties according to the respective shares of each party. Therefore, it was not a preliminary decree but it was the final decree in the suit."

In ***Renu Devi v. Mahendra Singh, AIR 2003 SC 1608,*** the effect of a compromise decree and allotment of shares in pursuance of the said decree was dealt with. The two-Judge Bench referred to the decisions in ***Raghubir Sahu v. Ajodhya Sahu*** (supra) and ***Muzaffar Husain*** (supra) and opined that the law had been correctly stated in the said authorities.

In the said case, after referring to CPC by Mulla, this Court, while drawing a distinction between the preliminary and the final decree, has stated that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is the final decree. Thus, fundamentally, the distinction between preliminary and final decree is that: a preliminary decree merely declares the rights and shares of the parties and leaves room for some - further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

Applying the principles laid down in the aforesaid authorities, it is graphically clear that in the case at hand, the parties entered into a compromise and clearly admitted that they were in separate and exclusive possession of the properties and the same had already been allotted to them. It was also admitted that they were in possession of their respective shares and, therefore, no final decree or execution was required to be filed. It is demonstrable that the compromise application does not contain any clause regarding the future course of action. The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined. They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds. Their rights had attained finality and no further enquiry from any spectrum - was required to be carried out. The whole thing had been embodied in the decree passed on the foundation of compromise.

In the present case, as the factual matrix would reveal, a decree came to be passed on the bedrock of a compromise in entirety from all angles leaving nothing to be done in the future. The curtains were really drawn and the Court gave the stamp of approval to the same. Thus, the inescapable conclusion is that the compromise decree dated 03.04.1964 was a final decree.

(ii) On perusal of Art. 136 of the Limitation Act, 1963, it is quite vivid that an application for execution of a decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed within a period of twelve years.

In ***Chiranji Lal v. Hari Das, (2005) 10 SCC 746*** the question arose whether a final decree becomes enforceable only when it is engrossed on the stamp paper. The three- Judge Bench dealing with the controversy has opined that Article 136 of the Limitation Act presupposes two conditions for the execution of the decree; firstly, the judgment has to be converted into a decree and secondly, the decree should be enforceable. The submission that the period of limitation begins to run from the date when the decree becomes enforceable, i.e., when the decree is engrossed on the stamp paper, is unacceptable.

The Bench, while elaborating the said facet, proceeded to lay down as under (***Chiranji Lal*** (supra):

> "24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In ***Yeshwant Deorao v. Walchand Ramchand, AIR 1951 SC 16*** it was said that the payment of court fee on the amount found due was entirely in the power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As abovenoted, there is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court - passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper."

In this case, it has been held that the decree was a final decree and therefore, it is immediately executable.

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***159. CONSTITUTION OF INDIA – Articles 13, 14 and 21**
ARMS ACT, 1959 – Section 27(3)
Constitutional validity of Section 27 (3) of Arms Act – The mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution – Section 27 (3) of the Arms Act, 1957 is enacted in clear contravention of Article 13 of Part III of our Constitution and is repugnant to Articles 14 and 21 and is void – Therefore, the Apex Court held that Section 27 (3) of the Arms Act, 1959, which provided mandatory death penalty on conviction is against the fundamental tenets of our constitutional law as developed by this Court. This Court declares that Section 27 (3) of the Arms Act, 1959 is ultra vires the Constitution and is declared void.

State of Punjab v. Dalbir Singh
Judgment dated 01.02.2012 passed by the Supreme Court in Criminal Appeal No. 117 of 2006, reported in (2012) 3 SCC 346

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***160. CONSTITUTION OF INDIA – Articles 14, 15, 16, 341 and 342**

(i) Status of offspring of inter-caste or tribal/non-tribal marriage – After analyzing the earlier decisions of *Valasamma Paul v. Cochin University, (1996) 3 SCC 545, Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244, Punit Rai v. Dinesh Choudhary, (2003) 8 SCC 204 and Anjan Kumar v. Union of India, (2006) 3 SCC 257,* legal position explained.

(ii) In an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case – The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case – In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father – This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste – But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe – By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which

his/her mother belonged – Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

Rameshbhai Dabhai Naika v. State of Gujarat and others
Judgment dated 18.01.2012 passed by the Supreme Court in Civil Appeal No. 654 of 2012, reported in (2012) 3 SCC 400

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161. CONSTITUTION OF INDIA – Article 19(1) (a) & (g)
Freedom of Speech and to assembly – Bundh/Strike – There may be a voluntary call to support (Bundh/Strike) but if it has an element of force it would not fall under Article 19(1) (a) & (g).
Bundh/Strike – State directed to take steps to prevent the coercion or the force applied by callers.
Bundh/Strike – Compensation – State is free to quantify the damage and call upon the callers to compensate in case it finds that public property has been damaged – Individuals also at liberty to recover compensation in accordance with law.

Nagrik Upbhokta Margdarshan Manch v. State of M.P. & Anr.
Judgment dated 16.01.2012 passed by the High Court of M.P. in W.P. No. 3597 of 2004, reported in ILR (2012) M.P. 446

Held :

The issue as to whether there can be a fundamental right in a political party to call for Bundh by force, intimidation or coercion is no more res integra and has been held to be not a fundamental right of a political party.

In *Communist Party of India (M) v. Bharat Kumar, AIR 1998 SC 184,* while approving Full Bench decision of the High Court it was held by the Supreme Court

> "3..... There cannot be any doubt that the fundamental right of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people. It is on the basis of this distinction that the High Court has rightly concluded that there cannot be any right to call or enforce a 'Bandh' which interferes with the exercise of the fundamental freedoms of other citizens, in addition to causing national loss in many ways. We may also add that the reasoning given by the High Court, particularly those in paragraphs 12, 13 & 17 for the ultimate conclusion and directions in paragraph 18 is correct with which we are in agreement."

In paragraphs 12, 13 & 17 of ***Bharat Kumar K. Palicha and Another v. State of Kerala and Others, AIR 1997 Kerala 291*** the Full Bench of Kerala High Court observed:

> "12. It is true that there is no legislative definition of the expression 'bundh' and such a definition could not be tested in the crucible of constitutionality. But does the absence of a definition deprive the citizen of a right to approach this Court to seek relief against the bundh if he is able to establish before the Court that his fundamental rights are curtailed or destroyed by the calling of and the holding of a bundh? When Article 19(1) of the Constitution guarantees to a citizen the fundamental rights referred to therein and when Article 21 confers a right on any person – not necessarily a citizen – not to be deprived of his life or personal liberty except according to procedure established by law, would it be proper for the Court to throw up its hands in despair on the ground that in the absence of any law curtailing such rights, it cannot test the constitutionality of the action? We think not. When property understood, the calling of a bundh entails the restriction of the free movement of the citizen and his right to carry on his avocation and if the Legislature does not make any law either prohibiting it or curtailing it or regulating it; we think that it is the duty of the Court to step in to protect the rights of the citizen so as to ensure that the freedoms available to him are not curtailed by any person or any political organization. The way in this respect to the Courts has been shown by the Supreme Court in ***Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.***
>
> 13. It is argued on behalf of the respondents that a bundh could be peaceful or violent and even if the Court were to act, it could act only to curtail violent bundhs and not peaceful bundhs. It is contended that the Court cannot presume or generalize that the calling of a bundh always entails actual violence or the threat of violence in not participating in or acquiescing in the bundh. The decision in ***Kameshwar Prasad v. State of Bihar, AIR 1962 SC 116*** is referred to in that context. This theoretical aspect expounded by counsel for the respondents does not appeal to us especially since as understood in our country and certainly in our State, the calling for a bundh is clearly different from a call for a general strike or a hartal. We have already noticed that a call for a bundh holds out a

warning to the citizen that if he were to go out for his work or to open his shop, he would be prevented and his attempt to take his vehicle on to the road will also be dealt with. It is true that theoretically it is for the State to control any possible violence or to ensure that a bundh is not accompanied by violence. But at present the reluctance and sometimes the political subservience of the law enforcing agencies and the absence of political will exhibited by those in power at the relevant time, has really led to a situation where there is no effective attempt made by the law-enforcing agencies either to prevent violence or to ensure that those citizens who do not want to participate in the bundh are given the opportunity to exercse their right to work, their right to trade or their right to study. We cannot also ignore the increasing frequency in the calling, holding and enforcing of the bundhs in the State and the destruction of public and private property. In the face of this reality, we think that when we consider the impact of a bundh on the freedom of a citizen, we are not merely theorizing but are only taking note of what happens around us when a bundh is called and a citizen attempts either to defy it or seeks to ignore it. We are not in a position to agree with counsel for the respondents that there are no sufficient allegations either in O.P. 7551 of 1994 or in O.P. 12469 of 1995 which would enable us to come to such a conclusion. In fact, the uncontroverted allegations in O.P. 12469 of 1995 are specific and are also supported by some newspaper clippings which though could not be relied on as primary material, could be taken note of as supporting material for the allegations in the Original Petition.

17. No political party or organization can claim that it is entitled to paralyse the industry and commerce in the entire State or Nation and is entitled to prevent the citizens not in sympathy with its view point, from exercising their fundamental rights or from performing their duties for their own benefit or for the benefit of the State or the Nation. Such a claim would be unreasonable and could not be accepted as a legitimate exercise of a fundamental right by a political party or those comprising it. The claim for relief by the petitioners in these Original Petitions will have to be considered in this background."

However, before parting with the matter we observe that, since bundh/ hartal/ strike involves an element of force which ha been declared to be not a fundamental right, it is directed that in future the State of Madhya Pradesh and

its functionaries in case where there is a bundh/ hartal/ strike to take steps to prevent the coercion or the force applied by respective callers. The respondent/ State of Madhya Pradesh would also be at liberty in case it finds that public property/ private property has been damaged in furtherance of such calls, to quantify the damage and call upon the callers to compensate the same. Individuals whose properties get damaged during such bundh or call are also at liberty to recover damages in accordance with law.

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162. CONSTITUTION OF INDIA – Article 22 (1)
CRIMINAL PROCEDURE CODE, 1973 – Sections 303 and 304
An accused has a fundamental right to take service of a lawyer of his choice – It is a mandate given not only by the Constitution and the Code of Criminal Procedure, but also by International Covenants and Human Rights Declarations – If an accused, too poor to afford a lawyer has to go through trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just.

Mohd. Hussain alias Julfikar Ali v. State (Govt. of NCT), Delhi
Judgment dated 11.01.2012 passed by the Supreme Court in Criminal Appeal No. 1091 of 2006, reported in AIR 2012 SC 750

Held:

The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go thorough the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time looses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

In the case in hand the accused is a Pakistani and seems illiterate. He asked for engagement of a counsel to defend him at State expenditure which was provided but unfortunately for him the counsel so appointed remained absent and a large number of witnesses have been examined in the absence of the counsel. Those witnesses have not been cross-examined and many of them have been relied upon for holding the appellant guilty. The learned Judge in seisin of the trial forgot that he has an overriding duty to maintain public confidence in the administration of justice, often referred to a duty to vindicate and uphold the majesty of law. He failed to realize that for an effective instrument in dispensing justice he must cease to be a spectator and a recording machine but a participant in the trial evincing intelligence and active interest so as to elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community itself. Fundamental principles based on reason and reflection in no uncertain term recognize that the appellant haled into court in our adversary system of criminal justice and ultimately convicted and sentenced without a fair trial. There are high authorities of this Court which take this view and I do not deem it expedient to multiply and burden this judgment with those authorities as the same have been referred in the judgment of my learned Brother Dattu, J. except to refer to a judgment of this Court in the case of ***Hussainara Khatoon & Others v. Home Secy., State of Bihar, (1980) 1 SCC 98,*** in which it has been held as follows:

> "6. .....Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him....."

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***163. CONSTITUTION OF INDIA – Article 28(1)**

Religious instruction – Geeta Sar – Religious instruction has a restricted meaning and conveys that teachings of customs, ways of worship, practice and rituals cannot be allowed in educational institutions – Gita is a book on Indian Philosophy and not a book on Indian religion – Petition dismissed.

Catholic Bishop's Council v. State of M.P. & Ors.

Judgment dated 27.01.2012 passed by the High Court of M.P. in W.P. No. 11503 of 2011, reported in ILR (2012) M.P. 725 (DB)

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164. CONSTITUTION OF INDIA – Article 226
CRIMINAL PROCEDURE CODE, 1973 – Sections 82, 84, 164 and 157
INDIAN PENAL CODE, 1860 – Section 302
Honour killing on account of inter caste marriage – Guidelines/ direction issued for fair investigation.

Ram Sahai Verma v. State of M.P. and Others

Judgment dated 09.01.2012 passed by the High Court of M.P. in Writ Petition No. 7410 of 2011, reported in 2012 (2) MPHT 37 (DB)

Held:

In the case of ***Arumugam Servai v. State of Tamil Nadu, AIR 2011 SC 1859,*** the Hon'ble Apex Court held as under: –

> "16. We have in recent years heard of 'Khap Panchayats' (Known as katta panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfered with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in ***Lata Singh v. State of U.P. & Anr., AIR 2006 SC 2522,*** there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to Kangaroo Courts, which are wholly illegal.
>
> 17. Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/ SPs of the district as well as other officials concerned, and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection."

Considering the above broad features of the case, we are of the view that the incident as came out from the document and the media, is not the simple crime of the area, but it is a direct atrocity on the innocent woman who had the love with another caste of the society and was victimized by her husband and other relatives on her husband side and on instigation by the mob present on the spot, she was mercilessly killed. In this particular incident, the mob of the village is involved at public place in broad-day light incident. This is the general trend of the area that some effective culprits abscond from arrest and those absconded accused try to pressurize the material witnesses by any hook or crook and try to win over the eye and material witnesses. Sometimes the absconded accused try to approach the senior officers to effect independent investigation, otherwise. This trend should be curbed by adopting all measures of independent and fair measure in investigation. Sometimes, a vigilant eye by the superior police officers on investigation may be helpful for fair investigation for criminal justice.

For fair investigation of heinous crimes such as atrocities on woman, child and weaker sections of the society and mob violence, more vigilance of fair and independence is required by the Investigators and to prevent hostility, measures such as videography of recording the statements of material witnesses or the statements recorded under Section 164, Cr.P.C. may be taken during investigation. Another step is to arrest the absconded accused under Sections 82 to 84, Cr.P.C. may be adopted so that the threat on the material witnesses can be meted out. During trial, adequate security, if required, may be provided to the material witnesses. A vigilant eye by the Senior Police Officers on independent investigation and trial is necessary for fair and speedy trial of the case.

By this order, we feel it necessary to issue following guidelines/ directions for the investigation to Senior Police Officers posted in the State of Madhya Pradesh: –

> "(1) In cases of woman and child atrocities, the First Information Report be lodged without any delay ensuring compliance of provisions under Section 157 (2) of the Code of Criminal Procedure, 1973, which is mandatory for fair investigation;
>
> (2) In cases of woman and child atrocities, mob violence and other cases of brutal nature in the area, special measures for fair and independent investigation may be adopted;
>
> (3) In all criminal cases of brutality, the Investigating Officers and Supervising Police Authorities shall take all measures including compliance of provisions contemplated under Sections 82 to 84 of Cr.P.C. to arrest all the accused involved in the crime;

(4) All the articles/weapons of crime be kept in a sealed condition in safe custody and sent for scientific examination without any delay on the part of investigation and Senior Police Officer will assist the State Forensic Science Laboratory to examine the articles/weapons without undue delay and the reports from the Experts must be filed alongwith the charge-sheet. They shall also take all measures to produce the properties of crime before the Criminal Court alongwith charge-sheet.

(5) For fair and speedy trial before the Courts, the Investigating Officers and the Senior Police Officers of the District and of the area shall be in constant touch with prosecuting agencies and shall avoid all delays in recording the statements of material witnesses and Investigating Officers during trial. The concerned police officers on the request of the witnesses, on advice of the prosecution agencies and on directions of the Criminal Court shall provide protection against the pressure or threat of the accused or persons acting for accused.

(6) The Senior Police Officers shall keep vigil over the investigation of the crime in their area and issue necessary directions to the Investigating Officers and also watch that their directions are complied with effectively in time."

It is directed that the directions mentioned above shall be complied with in the present case as well as in the cases of woman and child atrocities, mob violence vis-a-vis other cases of brutal nature in the area in future.

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165. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (d) (i) 'Consumer', definition of – National Seeds Corporation Ltd., a Government Company selling substandard and defective seeds causing loss to farmers – Provisions of the Consumer Protection Act are available to the farmers as they are covered by the definition "consumer".

National Seeds Corporation Limited v. M. Madhusudhan Reddy and another

Judgment dated 16.01.2012 passed by the Supreme Court in Civil Appeal No. 7543 of 2004, reported in (2012) 2 SCC 506

Held:

The scope and reach of the Consumer Act has been considered in *large number of judgments, **LDA v. M.K. Gupta, (1994) 1 SCC 243, Fair Air Engineers (P) Ltd. v. N. K. Modi, (1996) 6 SCC 385, Skypay Couriers Limited v. Tata Chemicals Limited, (2000) 5 SCC 294, State of Karnataka v. Vishwabharathi House Building***

Coop. Society, (2003) 2 SCC 412, CCI Chambers Coop. Hsg. Society Limited v. Development Credit Bank Ltd., (2003) 7 SCC 233, Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha, (2004) 1 SCC 305, H.N. Shankara Shastry v. Director of Agriculture Karnataka, (2004) 6 SCC 230 and *Trans Mediterranean Airways v. Universal Exports, (2011) 10 SCC 316.* However, we do not consider it necessary to discuss all the judgments and it will be sufficient to notice some passages from the judgment in *M. Lalitha* (supra).

In *M. Lalitha* (supra) case, the two-Judge Bench noticed the background, the objects and reasons, and the purpose for which the Consumer Act was enacted, referred to the judgments in *LDA v. M. K. Gupta* (supra), *Fair Air Engineers Private Limited v. N. K. Modi* (supra) and proceeded to observe as under:

> "10. The preamble of the Act declares that it is an Act to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and matters connected therewith. In Section 3 of the Act in clear and unambiguous terms it is stated that the provisions of the 1986 Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
>
> 11. From the Statement of Objects and Reasons and the scheme of the 1986 Act, it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for that purpose to provide for better redressal, mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers. To serve the purpose of the Act, various quasijudicial forums are set up at the district, State and national level with wide range of powers vested in them. These quasi-judicial forums, observing the principles of natural justice, are empowered to give relief of a specific nature and to award, wherever appropriate, compensation to the consumers and to impose penalties for non-compliance with their orders."

It can thus be said that in the context of farmers/growers and other consumer of seeds, the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished. However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication

that the provisions of the Consumer Act are not available to the farmers who are otherwise covered by the wide definition of consumer under Section 2(d) of the Consumer Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Act should be so interpreted.

The definition of consumer contained in Section 2(d) of the Consumer Act is very wide. Sub-clause (i) of the definition takes within its fold any person who buys any goods for a consideration paid or promised or partly paid and partly promised, or under any system of deferred payment. It also includes any person who uses the goods though he may not be buyer thereof provided that such use is with the approval of the buyer. The last part of the definition contained in Section 2(d)(i) excludes a person who obtains the goods for resale or for any commercial purpose. By virtue of the explanation which was added w.e.f. 18.6.1993 by the Consumer Protection (Amendment) Act 50 of 1993, it was clarified that the expression commercial purpose used in sub-clause (i) does not include use by a consumer of goods bought and used by him for the purpose of earning his livelihood by means of self-employment.

Since the farmers/growers purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of Section 2(d)(i) of the Consumer Act and there is no reason to deny them the remedies which are available to other consumers of goods and services.

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166. CONTRACT ACT, 1872 – Sections 23 and 28
CIVIL PROCEDURE CODE, 1908 – Section 20
Exclusion or conferring of jurisdiction by mutual agreement – The parties cannot contract against the statutory provisions – The parties to an agreement cannot confer jurisdiction on a Court which has no jurisdiction to entertain a suit – Similarly, a mutual agreement intended to restrict or extinguish the right of a party from enforcing right by legal proceedings would be void – However, where two Courts have the jurisdiction to try a suit, parties can exclude the jurisdiction of one Court or Tribunals to the other by mutual agreement.

A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited

Judgment dated 17.01.2012 passed by the Supreme Court in SLP (C) No. 10184 of 2008, reported in (2012) 2 SCC 315

Held:

The question involved in this Special Leave Petition has several dimensions, including the question as to whether the parties to an agreement can contract in violation of Sections 23 and 28 of the Indian Contract Act, 1872. Obviously, the parties cannot contract against the statutory provisions. A connected question

would arise as to whether the parties to an agreement can confer jurisdiction on a Court which has no territorial or pecuniary jurisdiction to entertain a matter? The answer to the second question is also in the negative.

However, in this case a slightly different question arises, namely, as to whether if two Courts have jurisdiction to try a suit, can the parties to an agreement mutually agree to exclude the jurisdiction of one Court in preference to the other and as to whether the same would amount to violation of the provisions of Sections 23 and 28 of the Indian Contract Act? The said question has been answered in the affirmative by the Trial Court and has been upheld by the High Court.

The question which has been raised in this Special Leave Petition is not new and has been considered by this Court earlier in several decisions. We are, therefore, required to consider as to whether the cause of action for the Suit filed by the Respondent in Vijayawada arose within the jurisdiction of the Court of the Principal Senior Civil Judge at Vijayawada, exclusively, or whether such cause of action arose both in Vijayawada and also in Calcutta?

As has been mentioned hereinbefore on behalf of the Petitioner, it had been urged that the entire cause of action for the Suit had arisen within the jurisdiction of the Calcutta Courts and the Courts at Vijayawada had no jurisdiction whatsoever to entertain a suit pertaining to the Understanding and Agreement arrived at between the parties. However, it was contended on behalf of the Respondent that its Registered Office was situate at Vijayawada, the Invoices for the goods were raised at Vijayawada, the goods were dispatched from Vijayawada and the money was payable to the Plaintiff or its nominee at Vijayawada, by way of Demand Drafts and, accordingly, the Courts at Vijayawada had jurisdiction to entertain the Suit.

It has often been stated by this Court that cause of action comprises a bundle of facts which are relevant for the determination of the *lis* between the parties. In the instant case, since the invoices for the goods in question were raised at Vijayawada, the goods were dispatched from Vijayawada and the money was payable to the Respondent or its nominee at Vijayawada, in our view, the same comprised part of the bundle of facts giving rise to the cause of action for the Suit. At the same time, since the Petitioner/ Defendant in the Suit had its place of business at Calcutta and the Agreement for supply of the goods was entered into at Calcutta and the goods were to be delivered at Calcutta, a part of the cause of action also arose within the jurisdiction of the Courts at Calcutta for the purposes of the suit. Accordingly, both the Courts within the jurisdiction of Calcutta and Vijayawada had jurisdiction under Section 20 of the Code of Civil Procedure to try the Suit, as part of the cause of action of the Suit had arisen within the jurisdiction of both the said Courts.

This leads us to the next question as to whether, if two Courts have jurisdiction to entertain a Suit, whether the parties may by mutual agreement exclude the jurisdiction of one of the Courts, having regard to the provisions of

Sections 23 and 28 of the Indian Contract Act, 1872. Section 23 of the aforesaid Act indicates what considerations and objects are lawful and what are not, including the considerations or objects of an agreement, if forbidden by law.

Basically, what Section 28 read with Section 23 does, is to make it very clear that if any mutual agreement is intended to restrict or extinguish the right of a party from enforcing his/her right under or in respect of a contract, by the usual legal proceedings in the ordinary Tribunals, such an agreement would to that extent be void. In other words, parties cannot contract against a statute.

One of the earlier cases in which this question had arisen, was the case of ***A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, AIR 1989 SC 1239***. In the said case, the cause of action for the suit had arisen both within the jurisdiction of the Civil Court at Salem in Andhra Pradesh and in the Civil Court of Kaira in the State of Gujarat. The question arose as to whether since by mutual agreement the jurisdiction had been confined only to the Courts within Kaira jurisdiction, the suit filed at Salem was at all maintainable? This Court, ***inter alia***, held that

> ".... there could be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void, being against public policy."

However, such a result would ensue if it is shown that the jurisdiction to which the parties had agreed to submit had nothing to do with the contract. If, on the other hand, it is found that the jurisdiction agreed would also be a proper jurisdiction in the matter of the contract, it could not be said that it ousted the jurisdiction of the Court.

After considering the facts involved in the said case and the submissions made on behalf of the parties, this Court observed as follows:

> "..... Thus it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act and cannot also be understood as parties contracting against the statute."

A similar view was taken by this Court in ***Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153,*** wherein the Hon'ble Judges while referring to the decision of this Court in ***A.B.C. Laminart Pvt. Ltd. case*** (supra), ***inter alia***, held that where two Courts have jurisdiction consequent upon the cause of action or a part thereof arising therein, if the parties agree in clear and unambiguous terms to exclude the jurisdiction of the other, the said decision could not offend the provisions of Section 23 of the Contract Act. In such a case, the suit would lie in the Court to be agreed upon by the parties.

This Court has consistently taken the same view in several subsequent cases. We may refer to one such decision of this Court in ***Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., AIR 2004 SC 2432,*** where part of the cause of action arose at both Delhi and Bombay. This Court held that the mutual agreement to exclude the jurisdiction of the Delhi Courts to entertain the suit was not opposed to public policy and was valid.

As indicated herein earlier, in this case also the cause of action for the Original Suit No.519 of 1991, filed by the Respondent before the Principal Senior Civil Judge, Vijayawada, arose partly within the jurisdiction of the Calcutta Courts and the Courts at Vijayawada.

Having regard to the provisions referred to hereinabove, though the Courts at Vijayawada would also have jurisdiction, along with the Courts at Calcutta, to entertain and try a suit relating to and arising out of the Agreement dated 23rd December, 1988, and the Mutual Understanding dated 15th May, 1989, such jurisdiction of the Courts at Vijayawada would stand ousted by virtue of the exclusion clause in the Agreement.

Special Leave Petition has, therefore, to be allowed. The decree passed by the Principal Senior Civil Judge, Vijayawada in O.S. No.519 of 1991, and the impugned judgment of the High Court dated 18th January, 2007, are set aside. The Trial Court at Vijayawada is directed to return the plaint of the Original Suit No.519 of 1991 to the Plaintiff to present the same before the appropriate Court in Calcutta having jurisdiction to try the suit.

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167. CONTRACT ACT, 1872 – Section 27

Injunction related to the use of trademark – Section 27 of the Act not attracted.

Suresh Dhanuka v. Sunita Mohapatra

Judgment dated 02.12.2011 passed by the Supreme Court in Civil Appeal No. 10434 of 2011, reported in AIR 2012 SC 892 (3-Judge Bench)

Held:

Coming to the question, as to whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872, or not, we are inclined to accept learned Senior Advocate for the appellant's submissions that the injunction sought for by the Appellant was not to restrain the Respondent from carrying on trade or business, but from using the Trade Mark which was the subject matter of dispute. Accordingly, the provisions of Section 27 of the Indian Contract Act, 1872, would not be attracted to the facts in this case.

It is obvious that what is declared to be void by virtue of Section 27 is any Agreement to restrain any person from exercising his right to carry on a profession or trade or business and any restraint thereupon by an Agreement would be void.

As will be seen from the materials on record, the Appellant did not ask for any injunction against the Respondent from carrying on any trade or business, but he objected to the use by the Respondent of the Trade Mark, in which he had acquired a 50% interest, while selling her products.

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168. CRIMINAL PROCEDURE CODE, 1973 – Section 24

Public prosecutor – Study and nature of office in context of its role in criminal justice system reiterated.

Centre for Public Interest Litigation and others v. Union of India and others

Judgment dated 11.04.2011 passed by the Supreme Court in Civil Appeal No. 10660 of 2010, reported in (2012) 3 SCC 117

Held:

A Public Prosecutor cannot be equated with a person who is holding an office under the State. He cannot be treated as a government employee. It may be that he should be a lawyer on the government panel. However, the independence of the Public Prosecutor from any governmental control is the hallmark of this high office.

Reference in this connection may be made to the decision of this Court in the case of ***Shrilekha Vidyarthi v. State of U.P., AIR 1991 SC 537***, wherein the following observations have been made:

> "14. .... The function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of acting only in the interest of administration of justice. In the case of public prosecutors, this additional public element flowing from statutory provisions in Cr.P.C, undoubtedly, invest the public prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

The role of a public prosecutor in a criminal justice system has been very aptly put in the following words: [Christmas Humphreys: 1955 Criminal Law Review (pp. 740-41)]

> "The Prosecutor has a duty to the State, to the accused and to the court. The Prosecutor is at all times a minister of justice, though seldom so described. It is ***not*** the duty of the prosecuting counsel to secure a conviction, nor should any

prosecutor even feel pride or satisfaction in the mere fact of success."

A public prosecutor is really a minister of justice and his job is none other than assisting the State in the administration of justice and in fact he is not a representative of any party. (See ***Babu v. State of Kerala, 1984 CriLJ 499***) The same has also been expressed in ***R. v. Banks, (1916) 2 K.B. 621,*** wherein it has been said that the Public Prosecutor:

> "throughout a case ought not to struggle for the verdict against the prisoner but... ought to bear themselves rather in the character of minister of justice assisting the administration of justice."

This Court has also expressed the same opinion in ***Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1,*** where this Court held that public prosecutor must observe a wider set of duties than to merely ensure that the accused is punished. His job is to ensure fair play in all proceedings. (Paras 185-88) In the Constitution Bench decision of this Court in ***Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288,*** this Court held that a Public Prosecutor is not a representative of any ordinary party to a controversy but of the sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.

Therefore, there is a public element in such an appointment.

In the appointment of Public Prosecutor, the principle of master-servant does not apply. Such an appointment is not an appointment to a civil post. [See ***State of U.P. v. Johri Mal, (2004) 4 SCC 714***]

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169. CRIMINAL PROCEDURE CODE, 1973 – Sections 36, 154(3), 156(3) and 190

Private complaint – Direction as to investigation – If a person has grievance that his F.I.R. is not registered by Police, his first remedy is to approach Superintendent of Police under Section 154(3) or other police officers referred in Section 36 – Even after of on account of this his grievance still persists, he can approach Magistrate under Section 156(3).

Sanjay Rana v. Mahesh Garg and another

Judgment dated 12.07.2011 passed by the High Court of M.P. in M.Cri.C. No. 3634 of 2011, reported in 2012 (1) MPLJ 633 (DB)

Held :

If a person has a grievance that his FIR has not been registered by police his first remedy is to approach the Superintendent of Police under Section 154(3), Criminal Procedure Code or other police officer referred to in section 36 Criminal Procedure Code. If despite approaching the Superintendent of Police or the officer referred to in section 36, his grievance still persists, then he can approach

a Magistrate under section 156(3), Criminal Procedure Code. Moreover, he has a further remedy of filing a criminal complaint under section 200, Criminal Procedure Code.

In the case in hand, the respondent No. 1 complainant filed an FIR on 12.01.2011 and on 18.01.2011 filed a complaint before the Magistrate under section 156(3) of Code on the pretext that his FIR has not been registered by the police station, which was rejected on 24.01.2011. He filed another complaint before the Magistrate on 27.01.2011 and during pendency of his second complaint, he challenged the order of rejection dated 24.01.2011 by filing a petition under section 482 of the Code before the High Court, which was dismissed by the Division Bench on 07.02.2011. Thereafter, his second complaint under section 156 (3) of Code filed before the Magistrate on 27.01.2011 was also rejected by the trial Court on 03.03.2011. He was not satisfied with that and filed another complaint on 03.03.2011 before the Magistrate under section 156(3) of the Code, without considering the fact that his earlier two complaints under section 156(3) of Code were rejected and when third complaint was fixed for 14.03.2011, the learned trial Court directed for case diary and report and thereafter, report was filed on 01.04.2011 and the earlier FIR dated 12.01.2011 was also investigated by the concerned police officer and submitted his report on 22.02.2011, stating therein that no case is made out against the petitioner. The learned trial Court at the instance of the learned counsel for the respondent No. 1 fixed for 11.04.2011 and directed that pending complaint under section 156(3) of the case may be considered along with the complaint lodged by the petitioner under section 190 of the Code.

Therefore, in view of the facts and circumstances of this case, as discussed hereinabove, we hold that the police machinery promptly acted upon and submitted the report before the Superintendent of Police on 22.02.2011 and had also taken a prompt action in compliance to order dated 14.03.2011 and after investigation submitted its report on 01.04.2011.

For the reasons stated, therefore, we do find this is an exceptional case with a valid ground to entertain the petition in the facts and circumstances stated by the petitioner. It is noteworthy that in this case, the police acted from the day one and issued notice to the complainant and other witnesses and gave a report to the Superintendent of Police on 22.02.2011 that no offence was committed and copy of the said report was filed before the trial Court.

Thus, in view of the above facts and circumstances, we are of the view that the learned Court below acted without applying its mind and committed a bona fide mistake in clubbing the matter and passing the order dated 11.04.2011.

In view of aforesaid and the law laid down by the Apex Court in the case of ***Maksud Saiyed v. State of Gujarat and Ors., (2008) 5 SCC 668*** the impugned order passed by the Special Judge is contrary to the law and consequently, application filed under section 482 of Criminal Procedure Code is allowed.

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170. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Maintenance – Decree of divorce passed against wife on the ground that she is living an adulterous life – Wife is not entitled for maintenance allowance.

Raj Kumar Dubey @ Raju v. Smt. Rekha Dubey @ Gothal Bai

Judgment dated 24.01.2012 passed by the High Court of M.P. in Cri. Rev. No. 859 of 2006, reported in ILR (2012) M.P. 794

Held :

In the instant case, the respondent/ wife is a divorcee and the decree of divorce is passed on the ground that she is living an adulterous life. However, the aforesaid decree was passed ex-parte, but the respondent's application under Order 9 Rule 13 of CPC is also dismissed vide order dated 31.07.2007 in M.J.C. 03/04, hence the aforesaid decree has become final.

Hon'ble Apex Court in the case of ***Rohtash Singh v. Smt. Ramendri and Others AIR 2000 SC 952*** in para 6 has held as under:

> "(6) Under Section 125(4) Cr.P.C. a wife is not entitled to any Maintenance Allowance from her husband if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by sub-section (4) of section 125 Cr.P.C. presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first circumstances on account of which a wife is not entitled to claim Maintenance Allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim Maintenance Allowance under Section 125 of the Code of Criminal Procedure."

In the case in hand, the responden's marriage life between the parties do not subsist. The decree of divorce is granted on the ground that wife is living in adultery therefore, in view of Section 125(4), she is not entitled for maintenance allowance.

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*171. **CRIMINAL PROCEDURE CODE, 1973 – Sections 156, 157 & 173 (8)**
CONSTITUTION OF INDIA – Articles 14 and 21
Impartial investigation – Every citizen of this country has a right to get his/her complaint properly investigated – The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others – This is a question of equal protection of laws and is covered by the guarantee provided under Article 14 of the Constitution – The issue is akin to ensuring an equal access to justice – A fair and proper investigation is always conducive to the ends of justice and for establishing the rule of law and maintaining proper balance in law and order – These are very vital issues in a democratic set up which must be taken care of by the courts.

Azija Begum v. State of Maharashtra and another
Judgment dated 11.04.2011 passed by the Supreme Court in Criminal Appeal No. 126 of 2012, reported in (2012) 3 SCC 126

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172. **CRIMINAL PROCEDURE CODE, 1973 – Sections 169, 173, 190 and 200**
Closure report under Section 169 CrPC – Court directing submission of chargesheet – Validity of – Held, the Magistrate or Special Judge cannot straightway direct submission of chargesheet by the police in case he refuses to accept closure/final report of the police/ investigating agency – Independent courses open to the Magistrate/ Special Judge, enumerated – Legal position reiterated.

Vasanti Dubey v. State of Madhya Pradesh
Judgment dated 17.01.2012 passed by the Supreme Court in Criminal Appeal No. 166 of 2012, reported in (2012) 2 SCC 731

Held:

In the backdrop of the facts and circumstances of the case to be related hereinafter, the question inter alia which falls for determination by this Court is whether the Magistrate/Special Judge could straightway direct for submission of charge-sheet in case he refused to accept final report/closure report of the police/investigating agency and thereafter direct the police to submit charge-sheet in case he was of the opinion that the case was not fit to be closed and it required to be proceeded further. The question which also requires consideration is whether the Special Judge could refuse to accept closure report and direct reinvestigation of the case for the second time in order to proceed further although he was confronted with the legal impediment indicating lack of sanction for prosecution in the matter.

It is undoubtedly true that even after the police report indicates that no case is made out against the accused, the magistrate can ignore the same and can take cognizance on applying his mind independently to the case. But in that situation, he has two options (i) he may not agree with the police report and

direct an enquiry u/s. 202 and after such enquiry take action under Section 203. He is also entitled to take cognizance u/s. 190 Cr.P.C. at once if he disagrees with the adverse police report but even in this circumstance, he cannot straightway direct submission of the charge-sheet by the police.

In the light of the aforesaid legal position, when we examined the merit of the instant matter, we noticed that the order dated 18.05.2004 passed earlier by the Special Judge straightway directing the police to submit charge-sheet was quashed by the learned single Judge of the High Court and liberty was left open to him either to take cognizance under Section 190(1)(c) of the Cr.P.C. or direct the Lokayukta Police for further investigation. In spite of this order, the Special Judge did not pass an order taking cognizance which he could have done under Section 190(1)(c) of the Cr.P.C.

However, the special Judge chose to direct office of the Lokayukta to enter into further investigation which after further investigation assigned reasons given out hereinbefore, stating that in view of the statement of the complainant that he had complained at the instance of a rival of the accused as also the fact that entire payment had already been made by the complainant prior to the lodgement of complaint, no case was made out against the complainant. In spite of this, if the Special Judge considered it legal and appropriate to proceed in the matter, he could have taken cognizance upon the complaint and could have proceeded further as per the provision under Section 200 of the Cr.P.C. by examining the complainant and if there were sufficient ground for proceeding, he could have issued process for attendance of the accused. However, such process could not have been issued, unless the magistrate found that the evidence led before him was contradictory or completely untrustworthy. Conversely, if he found from such evidence that sufficient ground was not there for proceeding i.e. no prima facie case against the accused was made out, he had to dismiss the complaint, since the complaint did not disclose the commission of any offence. But instead of taking any step either by issuing the process or dismissing the complaint at once, he could have taken immediate step as a third alternative to make an enquiry into the truth or falsehood of the complaint or for an investigation to be made by the police for ascertaining whether there was any prima facie evidence so as to justify the issue of process.

In short, on receipt of a complaint, the magistrate is not bound to take cognizance but he can without taking cognizance direct investigation by the police under Section 156(3) of Cr.P.C. Once, however, he takes cognizance he must examine the complainant and his witnesses under Section 200. Thereafter, if he requires police investigation or judicial enquiry, he must proceed under Section 202. But in any case he cannot direct the Police to straightaway file charge-sheet which needs to be highlighted as this point is often missed by the Magistrates in spite of a series of decisions of this Court including the case of ***Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 and Ram Naresh Prasad v. State of Jharkhand, (2009) 11 SCC 299*** referred to hereinbefore.

When the facts of the instant matter is further tested on the anvil of the aforesaid legal position, we find that the Special Judge instead of following the procedure enumerated in the Cr.P.C. appeared to insist on rejecting the closure report given by the Special Police Establishment, Lokayukta Office and in the process consistently committed error of law and jurisdiction not only once, but twice. On the first occasion when the order of the Special Judge was quashed and set aside by the High Court granting liberty to the Special Judge either to take cognizance under Section 190(1)(c) or order for further investigation as he had committed an error of jurisdiction by directing the police to straightway submit the charge-sheet against the accused-petitioner, the Special Judge did not consider it appropriate to take cognizance but ordered for further investigation by Lokayukta Police and when the matter was reinvestigated by the Special Police Establishment of the Lokayukta Office, the Special Judge in spite of the finding of the investigating agency holding that no further material to proceed in the matter was found, refused to accept the closure report and this time it further realized that it could not proceed in the matter as there was no sanction for prosecution, which the Special Judge obviously noticed since he was not in a position to take cognizance directly under Sections 7, 13(1)(d) of the Prevention of Corruption Act in absence of sanction which was a statutory requirement. In spite of this, he refused to accept closure report but recorded a direction to obtain sanction for prosecution of the appellant and thereafter ordered for reinvestigation of the complaint for the second time creating a peculiar and anomalous situation which is not in consonance with the provision of the Code of Criminal Procedure enumerated under the Chapter relating to conditions requisite for initiation of proceedings.

It may be worthwhile to highlight at this stage that the enquiry under Section 200 Cr.P.C. cannot be given a go- bye if the Magistrate refuses to accept the closure report submitted by the investigating agency as this enquiry is legally vital to protect the affected party from a frivolous complaint and a vexatious prosecution in complaint cases. The relevance, legal efficacy and vitality of the enquiry enumerated under Section 200 Cr.P.C., therefore, cannot be undermined, ignored or underplayed as noncompliance of enquiry under Section 200 Cr.P.C. is of vital importance and necessity as it is at this stage of the enquiry that the conflict between the finding arrived at by the investigating agency and enquiry by the Magistrate can prima facie justify the filing of the complaint and also offer a plank and a stage where the justification of the order of cognizance will come to the fore. This process of enquiry under Section 200 Cr.P.C. is surely not a decorative piece of legislation but is of great relevance and value to the complainant as well as the accused.

It is no doubt possible to contend that at the stage of taking cognizance or refusing to take cognizance, only prima facie case has to be seen by the Court. But the argument would be fit for rejection since it is nothing but mixing up two different and distinct nature of cases as the principle and procedure applied in a case based on Police report which is registered on the basis of First Information

Report cannot be allowed to follow the procedure in a complaint case. A case based on a complaint cannot be allowed to be dealt with and proceeded as if it were a case based on police report.

While in a case based on Police report, the Court while taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate under Section 200 Cr.P.C. if he takes cognizance of the complaint. In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under Section 200 Cr.P.C. But, he cannot exercise the fourth option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case.

As already stated, this position can be clearly deduced from the catena of decisions including those referred to hereinbefore but needs to be reinstated as time and again this magisterial error reaches up to this Court for rectification by judicial intervention.

The instant matter is one such example and is one step ahead wherein the Special Judge was confronted with yet another legal impediment of lack of sanction for prosecution giving rise to a peculiar situation when he noticed and recorded that he could not proceed in the matter under the Prevention of Corruption Act without sanction for prosecution, but in spite of this he directed to obtain sanction, ordered for reinvestigation and consequently refused to accept closure report.

Since the Special Judge in the instant matter refused to accept the closure report dated 18.05.2004 without any enquiry or reason why he refused to accept it which was submitted by the Special Police Establishment, Lokayukta Office, Jabalpur after reinvestigation for which reasons had been assigned and there was also lack of sanction for prosecution against the appellant which was necessary for launching prosecution under the Prevention of Corruption Act, we deem it just and appropriate to hold that the Special Judge clearly committed error of jurisdiction by directing reinvestigation of the matter practically for the third time in spite of his noticing that sanction for prosecution was also lacking, apart from the fact that the Special Police Establishment, Lokayukta Office, after reinvestigation had given its report why the matter was not fit to be proceeded with.

We are therefore of the considered view that the Special Judge in the wake of all these legal flaws as also the fact that the Special Judge under the circumstance was not competent to proceed in the matter without sanction for prosecution, could not have ordered for reinvestigation of the case for the third time by refusing to accept closure report dated 18.05.2004. This amounts to sheer abuse of the process of law resulting into vexatious proceeding and harassment of the appellant for more than 10 years without discussing any

reason why he disagreed with the report of the Lokayukta and consequently the closure report which would have emerged if the Special Judge had carefully proceeded in accordance with the procedure enumerated for initiation of proceeding under the Code of Criminal Procedure.

In view of the aforesaid discussion based on the existing facts and circumstances, we deem it just and appropriate to set aside the impugned order passed by the Special Judge refusing to accept the closure report dated 18.05.2004 and consequently the judgment and order of the High Court by which the order of the Special Judge was upheld, also stands quashed and set aside.

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173. CRIMINAL PROCEDURE CODE, 1973 – Sections 178 (d), 179, 181 (4) and 182

Territorial Jurisdiction of Indian Courts

(i) Offence when committed within India by reason of "anything which has been done" in India or by reason "of a consequence which has ensued" in India can be tried in India even against foreigners stationed in different foreign countries but their acts/omissions connected with transaction/cause of action arising in India.

(ii) Culpability is relatable even to the place at which consideration is required to be returned or accounted for.

(iii) For offence of which cheating is a component if the alleged act of deception is shown to have been committed through communications/letters/messages, the Court within whose jurisdiction the said communications/letters/messages were sent (or were received) would be competent to inquire into and try the same.

(iv) Where an offence consists of several acts carried out under different jurisdictions, a Court having jurisdiction where any one of such acts was committed will be competent to try the same.

Lee Kun Hee, President, Samsung Corporation, South Korea and others v. Sate of Uttar Pradesh and others

Judgment dated 31.01.2012 passed by the Supreme Court in Criminal Appeal No. 304 of 2012, reported in (2012) 3 SCC 132

Held:

The offences in this case, have been framed under Sections 403 (dishonest misappropriation), 405 (criminal breach of trust), 420 (cheating) and 423 (dishonest/fraudulent execution of an instrument containing a false statement relating to consideration) of the Indian Penal Code. The denial of liability by the accused under the agreement dated 01.12.2001 is allegedly the basis of the criminal complaint lodged by JCE Consultancy. The place where the agreement was executed, as well as, the places where different constituents of the agreement were carried out, are material factors to determine the relevant

court(s) which would/could have jurisdiction in the matter. The place where the consequence of the criminal action (alleged in the complaint) ensues, may also be relevant for the said purpose. And finally, place(s) of receipt and dispatch of communications exchanged by the rival parties, revealing deception as an ingredient of cheating alleged by the complainant, can also be relevant to identify the court(s) having jurisdiction in the matter. The aforesaid relevance becomes apparent from Sections 179, 181 and 182 of the Code of Criminal Procedure.

The aforesaid examination has to be based on certain salient facts, which we may first recapitulate. The complaint alleges the execution of a contract dated 01.12.2001, wherein consideration in the form of goods/product produced in India, by the seller (JCE Consultancy) stationed in India, were to be supplied to the buyer (Sky Impex Ltd.), in Dubai. The reciprocal consideration in the agreement was in the form of a monetary payback, by the eventual recipient of goods (Samsung, Dubai), to the seller in India (JCE Consultancy). The complaint narrates a circuitous passage of the goods from the seller (JCE Consultancy) to the eventual buyer (Samsung, Dubai), as also, the return consideration from the said buyer (Samsung, Dubai) to the seller. Both the aforesaid transactions, according to the complainant, passed through an intermediary - Sky Impex Limited.

The agreement, according to the complainant, also contemplates commission for the intermediary (Sky Impex Ltd.). There is definiteness in the complainant's allegations of the transfer of goods from India, as also, the receipt of monetary consideration in India. The complainant has supported his allegations on the basis of documents, wherein each document connects the passing of goods from the seller, and of the reciprocal monetary consideration from the eventual buyer (Samsung, Dubai) to the seller (JCE Consultancy) through a fine unbroken chain of events.

The foundation of the complaint has been laid on the basis of the agreement dated 01.12.2001, whereby the complainant wishes to establish the corresponding obligations of the rival parties. Through the delivery receipt dated 28.1.2002, the complainant desires to demonstrate communication of the goods by the seller, as also, their receipt by the buyer. Based on the execution of the bill of exchange on 01.02.2002 by, the authorized signatory of Samsung, Dubai, and the endorsement of the bill of exchange on 01.02.2002 itself by Sky Impex Limited, in favour of the complainant JCE Consultancy as reciprocal consideration; exactly in the manner contemplated under the agreement dated 01.12.2001; the complainant desires to establish the liability of Samsung, Dubai, under the agreement dated 01.12.2001.

On the question of jurisdiction, two phrases of Section 179 Cr.P.C. need to be noticed: firstly, "anything which has been done", with reference to the offence. And secondly, "consequence which has ensued", also with reference to the offence. Both the aforesaid phrases substantially enlarge and magnify the scope of jurisdiction contemplated under Section 179 aforesaid, so as to extend the same over areas contemplated by the two phrases.

In so far as the present controversy is concerned, the offence(s) alleged in the complaint emerge from the fact, that even though the complainant faithfully performed its obligations under the agreement/contract dated 01.12.2001, the accused dishonestly/fraudulently/falsely denied/avoided the reciprocal obligation(s) which they were obliged to perform thereunder. In our view, the words "anything which has been done", for the present controversy, would extend to anything which has been done in furtherance of the execution of the agreement dated 01.12.2001. The facts constituting the performance of obligations by the complainant, actually constitute the foundational basis for the criminal accusation levelled against the accused (in refusing to honour the corresponding obligation). The instant foundational basis for establishing the commission of the offence, in our view, would fall within the ambit of the words "anything which has been done" used in the aforesaid provision. In the absence of the instant affirmation of the factual position, in the present controversy, the culpability of the accused cannot be established. In the complaint it is asserted, that the contracted goods/ product were/was supplied by JCE Consultancy from Ghaziabad in India. The factum of having supplied the goods/product to Samsung, Dubai through Sky Impex Limited, is sought to be established not only through a delivery receipt dated 28.01.2002 (issued by the intermediary buyer - Sky Impex Limited), but also, on the basis of the bill of exchange executed on 01.02.2002 by Samsung, Dubai (the ultimate beneficiary), constituting the payment for the goods/product purchased. The factum of supply of goods from Ghaziabad (in India) to Dubai (in the United Arab Emirates), as an essential component of the offence(s) allegedly committed by the accused, in our view, is relatable to the words "anything which has been done" used in Section 179 aforesaid. This factual position, in our view, is sufficient to vest jurisdiction under Section 179 of the Code of Criminal Procedure, with a competent Court at Ghaziabad.

Besides the aforesaid, under Section 179 of the Code of Criminal Procedure, even the place(s) wherein the consequence (of the criminal act) "ensues", would be relevant to determine the court of competent jurisdiction. Therefore, even the courts within whose local jurisdiction, the repercussion/ effect of the criminal act occurs, would have jurisdiction in the matter. The reciprocal consideration, flowing out of the agreement dated 01.12.2001, is comprised of a monetary payback. The aforesaid monetary payback was allegedly transmitted by the recipient of goods (Samsung, Dubai) to the intermediary buyer (Sky Impex Limited), by way of a bill of exchange valued at US$ 14,32,745, on 01.2.2002. The aforesaid bill of exchange was then endorsed by Sky Impex Limited, to the complainant- JCE Consultancy. JCE Consultancy maintains, that it holds the said bill of exchange at Ghaziabad in India. The execution of the bill of exchange (by Samsung, Dubai) and its endorsement (by Sky Impex Limited) is in consonance with the terms and conditions of the agreement dated 01.12.2001. Upon alleged denial of payment to JCE Consultancy (under the bill of exchange dated 01.02.2002), a legal notice dated 20.12.2004 came to be issued demanding payment. In its response dated

21.12.2004, Samsung, Dubai, allegedly dishonestly/fraudulently/falsely denied liability/responsibility. Since the complainant is allegedly holding the bill of exchange dated 01.02.2001 at Ghaziabad in India, the consequence emerging out of the said denial of encashment of the bill of exchange, in our view, would be deemed to "ensue" at Ghaziabad in India. In the instant view of the matter, the competent Court at Ghaziabad in India, in our view, would have jurisdiction in the matter under Section 179 of the Code of Criminal Procedure.

Insofar as Section 181 of the Code of Criminal Procedure is concerned, while inviting our attention to the same, learned counsel for the complainant-JCE Consultancy, in order to emphasize the issue of jurisdiction, brought to our notice sub-section (4) thereof. A perusal of the aforesaid provision leaves no room for any doubt, that in offences of the nature as are subject matter of consideration in the present controversy, the court within whose local jurisdiction, the whole or a part of the consideration "...were required to be returned or accounted for..." would have jurisdiction in the matter.

In the present case, a bill of exchange dated 1.2.2002 was issued on behalf of Samsung, Dubai, to Sky Impex Limited; Sky Impex Limited, in terms of the agreement dated 1.12.2001, endorsed the aforesaid bill of exchange in favour of the complainant-JCE Consultancy; JCE Consultancy claims to be holding the aforesaid bill of exchange at Ghaziabad in India. Being holder of the bill of exchange dated 1.2.2002, JCE Consultancy demanded the right of payment thereunder, which is being denied by the accused. Since the bill of exchange issued by Samsung, Dubai, dated 01.02.2002 for US$ 14,32,745 was received, and is allegedly being held by JCE Consultancy at Ghaizabad in India; the aforesaid bill of exchange, according to the complainant, has to be honoured/ realized at the place where it is held (i.e. at Ghaziabad, in India). In the instant alleged factual background of the matter, we are of the view, that the competent court at Ghaziabad in India, would have jurisdiction to hold the trial of the complaint under Section 181(4) of the Code of Criminal Procedure.

Lastly, a. perusal of Section 182 reveals that the said provision can be invoked to determine jurisdiction in respect of a number of offences which include cheating as a component. When acts of fraud/dishonesty/deception, relatable to the offence(s), contemplated under Section 182 aforementioned, emerge from communications/messages/letters etc., the place(s) from where the communications/messages/letters etc. were sent, as also, the places at which the same were received, would be relevant to determine the court of competent jurisdiction.

The allegations contained in the complaint reveal, that the complainant-JCE Consultancy, addressed a legal notice dated 20.12.2004 to Samsung, Dubai, calling upon Samsung, Dubai, to honour its reciprocal commitment of the monetary payback contemplated under the agreement dated 01.12.2001. In its response dated 21.12.2004, Samsung, Dubai, denied liability, by asserting that Samsung, Dubai, had no commitment/responsibility towards JCE Consultancy,

under the bill of exchange dated 01.02.2002. The aforesaid denial according to the complainant, constitutes the basis of the criminal complaint filed against the accused. The place at which the said response on behalf of Samsung, Dubai, was received, in our view, would be relevant to determine the Court of competent jurisdiction, under Section 182 of the Criminal Procedure Code. Even if the response was received by the counsel for JCE Consultancy in a place other than Ghaziabad (though in India), still the competent court at Ghaziabad in India, in our view, would be vested with jurisdiction, as under Section 178 (d) of the Code of Criminal Procedure, in cases where an offence consists of several acts carried out under different jurisdictions, a court having jurisdiction where any one of such acts was committed, will be competent to try the same. In view of the aforesaid deliberations, it is not legitimate for the appellants to contend, that the actions attributed by JCE Consultancy to the accused, have no connectivity to territorial jurisdiction in India.

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174. CRIMINAL PROCEDURE CODE, 1973 – Section 190 (1) (b)

Order of taking cognizance – Interference by superior Courts – The correctness of the order of taking cognizance of the offence by Magistrate, unless it is perverse or based on no material should be sparingly interfered by the Superior Court – If an order is well reasoned, speaking and showing proper application of mind, there is no question of interference by the Superior Court.

Dr. Mrs. Nupur Talwar v. C.B.I., Delhi & Anr.

Judgment dated 06.01.2012 passed by the Supreme Court in Criminal Appeal No. 68 of 2012, reported in AIR 2012 SC 847

Held:

The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, anyone reading the order of the Magistrate taking cognizance, will come to the conclusion that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a Criminal Revision under Sections 397 and 401 of the code (not under Section 482) at the instance of Dr. Mrs. Nupur Talwar would also show that there has been a proper application of mind and a detailed speaking order has been passed.

In the above state of affairs, now the question is what is the jurisdiction and specially the duty of this Court in such a situation under Article 136?

We feel constrained to observe that at this stage, this Court should exercise utmost restrain and caution before interfering with 'an order of taking cognizance by the Magistrate, otherwise the holding of a trial will be stalled. The superior Courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice.

Reference in this connection may be made to a three Judge Bench decision of this Court in the case of *M/s. India Carat Private Ltd. v. State of Karnataka & Anr., AIR 1989 SC 885.* Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we would rather quote the observation: as under:-

> "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1) (b) and direct the issue of process to the accused..."

These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.

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***175. CRIMINAL PROCEDURE CODE, 1973 – Sections 204(1)(b), 209 and 319**

(i) After committal of a case u/s 209 of Cr.P.C. the concerned Magistrate is not empowered to issue process to other persons u/s 204 (1) (b) of Cr.P.C. – Such persons can be arrayed as accused persons by the Sessions Court u/s 319 of Cr.P.C. only after collecting evidence for which it is not necessary to collect the entire evidence.

(ii) Such persons may also be arrayed as accused person only when a reference is made either by the Magistrate while passing an order of commitment or by the Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet.

(Note: Earlier decisions of *Ranjit Singh v. State of Punjab, (1998) 7 SCC 149 and Kishori Singh v. State of Bihar, (2004) 13 SCC 11* referred)

Jile Singh v. State of Uttar Pradesh and another
Judgment dated 12.01.2012 passed by the Supreme Court in Criminal Appeal No. 121 of 2012, reported in (2012) 3 SCC 383

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176. CRIMINAL PROCEDURE CODE, 1973 – Sections 240 and 401
Can a Revisional Court appraise the evidence in revision? Held, No – It is the Trial Court which has to decide if evidence on record is sufficient to make out a prima facie case against the accused so as to frame charge against him.

Ashish Chadha v. Smt. Asha Kumari & Anr.
Judgment dated 02.12.2011 passed by the Supreme Court in Criminal Appeal No. 893 of 2005, reported in AIR 2012 SC 431

Held:

The High Court has in its revisional jurisdiction appraised the evidence which it could not have done. It is the trial court which has to decide whether evidence on record is sufficient to make out a prima facie case against the accused so as to frame charge against him. Pertinently, even the trial court cannot conduct roving and fishing inquiry into the evidence. It has only to consider whether evidence collected by the prosecution discloses prima facie case against the accused or not. In this connection, it would be useful to refer to the observations of this court in *Munna Devi v. State of Rajasthan & Anr., (2001) 9 SCC 631.*

> "We find substance in the submission made on behalf of the appellant. The revision power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

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177. CRIMINAL PROCEDURE CODE, 1973 – Section 321
Withdrawal of case – Trial Court permitted to withdraw one of the counter criminal case – Held, permitting withdrawal of one case would be compelling one party to face trial and giving benefit to the other party – Hence, withdrawal cannot be said to be in public interest – Order permitting withdrawal set aside.

Brijpal Singh v. Pramod Kumar and Another

Judgment dated 16.12.2011 passed by the High Court of M.P. in Misc. Cri. Case No. 4798 of 2010, reported in 2012 (2) MPHT 88

Held:

It is undisputed on record that criminal case pending against the petitioner as criminal case No. 1259/2004 and criminal case pending against the respondent No. 2 as criminal case No. 604/2004 had arisen out of the same incident that took place on 21.9.2004. In these circumstances, both cases were cross cases.

It is well established principle of law that in the trial of cross cases, it is imperative on the part of the trial Court to reach to the conclusion that out of two parties who was the aggressor in the incident and thereafter dispose of the cases on merit. Since, Courts below have failed to consider the aforesaid matter of fact and allowed the application under Section 321 of Cr.P.C. by A.D.P.O. for withdrawal from prosecution. It is also pertinent to note that co-ordinate Bench of this Court in ***Ramnaresh Tyagi and Another v. Arjun Mohan Singh and Others, 2008 (4) MPHT 109 = 2008 (3) MPLJ 96,*** was of the view that by compelling one of the two parties to face trial and giving benefit to the other party while withdrawing the cases pending against him, cannot be said to be in public interest.

In these circumstances, I am of the view that if the order passed by the Courts below shall remain continued then it will amount to harassment to the petitioner and will further amount to abuse of process of law. Thus, the present petition is allowed and the order passed by the Courts below in criminal case No. 604/2004, ***State of Madhya Pradesh v. Pramod Kumar,*** is hereby set aside. It is directed to the trial Court to restore the criminal case No. 604/2004 to its original number and proceed further in accordance with law. It is further directed to Chief Judicial Magistrate, Beohari that if criminal case No. 1259/2004 is not pending in the Court of Additional Chief Judicial Magistrate, Beohari then this case be immediately transferred to the Court of Additional Chief Judicial Magistrate, Beohari for analogous trial of both cross cases in the light of observation made in this order.

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***178. CRIMINAL PROCEDURE CODE, 1973 – Section 357 (3)**

Compensation to the victims

It is an important provision but Courts seldom invoke it – It empowers the Court to award compensation to victims while passing judgment of conviction – This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system – It is a constructive approach to crimes – The Courts should exercise this power liberally so as to meet the ends of justice in a better way – The compensation must be reasonable – Reasonable period for payment of compensation, if necessary by installments, may also be given – The Court may enforce the order by imposing sentence in

default. (Note: The cases of *Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551, Manish Jalan v. State of Karnataka, (2008) 8 SCC 225 and Rachhpal Singh v. State of Punjab, (2002) 6 SCC 462* referred)

Roy Fernandes v. State of Goa and others

Judgment dated 01.02.2012 passed by the Supreme Court in Criminal Appeal No. 1108 of 2002, reported in (2012) 3 SCC 221

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***179. CRIMINAL PROCEDURE CODE, 1973 – Section 391**

Scope of taking additional evidence at appellate stage

The provision u/s 391 Cr.P.C. is not limited to recall of a witness for further cross-examination with reference to his previous statement – The Appellate Court may feel the necessity to take additional evidence for any number of reasons to arrive at just decision in the case – The law casts a duty upon the court to arrive at truth by all lawful means. As a matter of fact, if some later statement, has come to be made in some legal ways, it may be admissible on its own – It is only such statement or development which is otherwise not within the legal framework that would need the exercise of the Court's jurisdiction to bring it before it as part of the legal record with the aid of Section 391 Cr.P.C.

Sudevanand v. State through Central Bureau of Investigation

Judgment dated 19.01.2012 passed by the Supreme Court in Criminal Appeal No. 174 of 2012, reported in (2012) 3 SCC 387

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180. CRIMINAL PROCEDURE CODE, 1973 – Sections 397, 401, 407 and 408

Maintainability of revision – Application filed under Section 408 for transfer of case rejected – No revision lies against the order – Applicant has remedy of filing application under Section 407 of Cr.P.C. for transfer – Revision dismissed.

Anita Sharma (Smt.) v. State of M.P. & Anr.

Judgment dated 29.11.2011, passed by the High Court of M.P. in Cr.Rev. No. 883 of 2011, reported in ILR (2012) M.P. 608

Held :

Considering the provisions of Section 407(2) of Cr.P.C., it is clear that after dismissal of application under Section 408 of Cr.P.C., an application under Section 407 of Cr.P.C. shall lie. Therefore, revision against the order dated 28.09.2011 passed on the application under Section 408 of Cr.P.C. is impliedly barred. Therefore, this Criminal Revision filed by the petitioner under Section 397/401 of Cr.P.C. is dismissed as not maintainable. The petitioner is at liberty to move an application under Section 407 of Cr.P.C. before the High Court.

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181. CRIMINAL PROCEDURE CODE, 1973 – Section 397(2)
Criminal Revision of Bail Order – A bail Order is interlocutory order, hence no revision lies against it.

Pawan v. Harbhajan Singh and Another

Judgment dated 01.11.2011 passed by the High Court of M.P. in Misc. Cri. Case No. 8259 of 2011, reported in 2012 (1) MPHT 487

Held:

In the case of ***Ram Naresh Singh v. State of M.P., 1995 Cri.LJ 2523,*** it has been held that order granting bail is interlocutory order. Hence, no revision lies in view of S. 397 (2) of the Cr.PC. It was held by the Revisional Court in the impugned order that the revision was not maintainable.

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182. CRIMINAL PROCEDURE CODE, 1973 – Section 438
Application for anticipatory bail directly to High Court – Whether maintainable? – Application under Section 438 should have been filed at the first instance before the Sessions Court and thereafter, in case, necessity arises, the applicants should approach the High Court – Application disposed off with liberty to approach Sessions Court.

Priya Agrawal @ Shubhlata Agrawal (Smt.) v. State of M.P.

Judgment dated 09.01.2012 passed by the High Court of M.P. in M.Cri.C. No. 14504 of 2011, reported in ILR (2012) M.P. 803

Held :

I have gone through the decisions of Andhra Pradesh High Court in ***Y. Chendrasekhara Rao and Others v. Y.V. Kamala Kumari and Others 1993 Cri.L.J. 3508*** and Kerala High Court in and ***Balan v. State of Kerala, 2004 Cri.L.J. 3427,*** in which it has been held that the application file under section 438 of Cr.P.C. cannot be returned to the applicant because he did not move at the first instant to the Sessions Court, if such application is returned, it is illegal and violative of Article 21 of the Constitution of India, in the aforesaid judgments passed by this Court in ***Daini @ Raju v. State of M.P., 1989 JLJ 323,*** has not been referred and considered, though so many judgments of other High Courts have been considered.

I have also gone through the decisions of this Court in ***Daini @ Raju (supra) and Smt. Manisha Neema v. State of M.P., 2003 (2) MPHT 303*** and the decision of Apex Court in ***Gurcharan Singh and Others v. State (Delhi Administration), AIR 1978 SC 179.*** The view of this Court has been consistent since 1989 till today that though the High Court has concurrent jurisdiction with the Court of Sessions under section 438 of Cr.P.C. yet the applicant should approach the Sessions Court at the first instance, which would examine the facts and pass the suitable order and may be in that case petitioner was not required to apply before this Court.

The applicants pleaded their apprehension that they are not safe to go to Sagar but the aforesaid apprehension has no basis. It may be possible that

husband and in-laws of applicant No. 1 are big businessman of Sagar and they are influential persons, but it cannot be said that they own the government and the Police Department. It is also not necessary to personally appear before the Sessions Court to pursue the application under section 438 of Cr.P.C.

In view of the aforesaid decisions of Apex Court and this Court, I am of the view that the application under section 438 of Cr.P.C. should have been filed by the applicants at the first instance before the Sessions Court at Sagar and thereafter, in case necessity arises, the applicants are free to approach this Court.

Thus, this application is disposed of with liberty to the applicants to file application under section 438 of Cr.P.C. before the Sessions Court concerned and if such application is filed, the concerned Sessions Court expected to decide the same expeditiously as far as possible within one week from the date of filing of the aforesaid application. However, it is made clear that this Court has not expressed any view on the merits of the case and the Sessions Court is free to decide the matter on its own.

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183. CRIMINAL PROCEDURE CODE, 1973 – Section 439

Grant of bail on repeat application – After rejection of bail by High Court, the subordinate Court should not oblige to entertain and grant bail as it affects judicial discipline.

Successive bail applications – Duty of Public Prosecutor – When bail application is filed, liberty to object or controvert the facts is available to the prosecutor – It is his duty to bring to the knowledge of the Court that the bail application filed by the accused person has been rejected by the High Court and cannot be entertained by the Subordinate Court.

Cancellation of bail – Bail obtained by accused persons from Trial Court after suppressing material fact and submitting false affidavit with regard to rejection of their bail applications by High Court – Such hoodwinking cannot be permitted – Bail granted by the Trial Court is cancelled.

Satish Lodhi v. State of M.P.

Judgment dated 08.08.2011, passed by the High Court of M.P. in M.Cr.C. No. 2214 of 2011, reported in ILR (2012) M.P. 632

Held :

The Apex Court in the case of ***Smt. Bimla Devi v. State of Bihar and Others, 1994 Cri. L.J 638,*** has observed that after rejection of the bail petition by the High Court, the Magistrate cannot grant the bail as it affects the principle of judicial discipline and observed as under: –

"2. In view of the fact that the Judicial Magistrate at a later stage has himself cancelled the bail, it is not necessary for us to pass any order with regard to the petitioner's prayer for cancellation of bail but the disturbing feature of the case is that though two successive applications of the accused for grant of bail were rejected by the High Court yet the learned Magistrate granted provisional bail. The course adopted by the learned Magistrate is not only contrary to settled principles of judicial discipline and propriety but also contrary to the statutory provisions. See in this connection ***Shahzad Hasan Khan v. Ishhaq Hasan Khan & another, AIR 1987 SC 1613 : (1987 Cri.L.J. 1872)***. The manner in which the learned Magistrate dealt with the case can give rise to the apprehensions which were expressed by the complainant in her complaint, which was treated by this Court as a writ petition and is being dealt with as such. In the course that we are adopting, we would not like to comment upon the manner in which the learned Magistrate dealt with the case any more at this stage. We in the facts and circumstances stated above, direct that a copy of this order be sent to the Chief Justice of the Patna High Court for taking such action on the administrative side as may be deemed fit by him."

In view of the law laid down in the aforesaid judgments, it is apparent that the subsequent bail petition filed before the High Court is required to be placed before the same Judge before whom the earlier bail petition was filed. After rejection of bail by the High Court, the subordinate Court should not oblige to entertain and grant the bail, if it is so, it affects the judicial discipline. The subsequent bail petitions must mention all the earlier attempts made either before the subordinate court or before the High Court and their fate. The relevant orders ought to be produced before the Court considering the subsequent bail petitions. The bail petition is expected to incorporate a statement of all facts and circumstances considered relevant by the applicant is support of his prayer to apprise the correct facts. Setting forth such averments, may likely to give an opportunity to the opposite party to controvert it. In support of the said pleadings, the affidavit or the documents are also advised. The grant of bail in a non-bailable offence is a discretion which can be exercised judiciously based upon the methodized by analogy, disciplined by system and subordinated to the primordial necessity.

On going through the complete record of the Sessions Trial, the role of the prosecutor who appeared before the Trial Court is also not very fair. If any bail petition is filed, a liberty to object or controvert the facts is available to the prosecutor, however it is his duty to bring into the knowledge of the Court that the bail petition filed by the accused person has been rejected by the High Court and it cannot be entertained by the subordinate court. Neither the fact of rejection of the bail by the

High Court has been brought into the knowledge nor such objection has been raised by him. The officer assisting the prosecutor in trial is equally responsible for not disclosing such facts, however, the Home Department and Law Department are required to look into the matter how much effectively their officers are working and assisting the court and if so advised, action may be taken for fair administration of justice and to curb such tendency in future.

It is apparent that the bail petitions of accused persons, namely, Dr. Jyotsana Pare, Anil Kumar Gupta and Satish Babu Lodhi have been allowed by the Trial Court is amounting to abuse of process of the Court. The said orders are also based upon non-furnishing the relevant orders, supply of incorrect information on the affidavit. Such hoodwinking cannot be permitted on the insistence of the accused persons and by their advocates, therefore the bail granted by the Trial Court to these accused persons vide orders dated 28.02.2011, 11.05.2011 and 18.05.2011 is hereby cancelled. The accused persons are present in the Court, however the Registrar is directed to take them into police custody for their production before the Trial Court. On production the Trial Court shall send them to jail after preparing the jail warrants. It is made clear here that the said cancellation would not continue by way of stigma if they renew the prayer after incarceration of further three months and the applicants may be at liberty to file a fresh petition before this Court which may be considered without drawing any adverse inference against them.

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184. CRIMINAL PROCEDURE CODE, 1973 – Section 439(2)
Cancellation of bail – Bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial.

Shaheed Khan v. Jaleel Khan
Judgment dated 11.01.2012 passed by the High Court of M.P. in M.Cri.C. No. 9004 of 2011, reported in ILR (2012) M.P. 809

Held :

It is well established principle of law that different considerations have to be weighed while dealing with the applications for cancellation of bail and for grant of bail respectively. In ***Dolatram and Others v. State of Haryana, (1995) 1 SCC 349,*** the Apex Court observed that the bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial Similar is view taken by the Apex Court in ***Ramcharan v. State of M.P., (2004) 13 SCC 617.***

In the instant case, in my opinion, the Court below rightly granted bail to the respondents on the basis of parity with Hafeez Khan and Mohd. Yunus. The

applicant only alleged against the respondents that they abused him and threatened him, however, no crime was registered against the respondents on the basis of aforesaid complaint of the applicant. Thus, it cannot be said that there is any supervening circumstances, in which bail granted to the respondents should be cancelled.

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***185. EASEMENT ACT, 1882 – Section 7**

Restriction on easement – Plaintiffs are taking water from the well of the first defendant for the last 43 years from the date of filing of the suit – However, they have not acquired any easementary right – Owner is having all right to collect and dispose within his own limits of all water under the land and on its surface which does not pass in defined channel – Water in a well is beneath the surface and no defined channels are beneath the surface – However, plaintiffs are entitled for decree of injunction to the extent that till defendant obtain necessary order under the law, he shall not obstruct the plaintiffs from taking water from his well.

Mangilal & Ors. v. Mangilal & Anr.

Judgment dated 12.10.2011 passed by the High Court of M.P. in S.A. No. 235 of 1996, reported in ILR (2012) M.P. S.N. 26

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186. EVIDENCE ACT, 1872 – Section 3

Appreciation of an interested/relative witness

As a rule of prudence and not as a rule of law, the evidence of an interested witness should be scrutinized with a little care – After making the above approach, if the Court is satisfied that the evidence of an interested/relative witness has a ring of truth, then such evidence can be relied upon without corroboration even if other eye witness turns hostile.

Jaisy @ Jayaseelan v. State, Rep. By Inspector of Police

Judgment dated 23.11.2011 passed by the Supreme Court in Criminal Appeal No. 1389 of 2007, reported in AIR 2012 SC 478

Held:

It is true that PWs-2, 3 and 4 who were examined as eyewitnesses have turned hostile. But having carefully perused the evidence of PW-1, we feel that it can be safely relied upon so far as prosecution case against the appellant is concerned. It is true that being the brother of the deceased, PW-1 is an interested witness. However, on that ground his evidence cannot be discarded. As stated by this Court in *Sarwan Singh & Ors. v. State of Punjab (1976) 4 SCC 369 and Sucha Singh & Anr. v. State of Punjab (2003) 7 SCC 643,* it is not the law that the evidence of an interested witness should be equated with that of a tainted witness or that of an approver so as to require corroboration as a matter of necessity.

The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of the interested witness has a ring of truth such evidence could be relied upon even without corroboration.

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187. EVIDENCE ACT, 1872 – Section 120
POWERS OF ATTORNEY ACT, 1882 – Section – 1A
CIVIL PROCEDURE CODE, 1908 – Order 3 Rule 1
Competent witness – Husband is a competent witness for his wife – He can also be permitted to exhibit the documents and there is no need to execute the power of attorney – Husband of the petitioner permitted to depose and exhibit the documents which have been produced by them.

Rajni Tiwari (Smt.) v. Smt. Bhagyawati Bai
Judgment dated 02.02.2012 passed by the High Court of M.P. in W.P. No. 14278 of 2010, reported in ILR (2012) M.P. 730

Held :

From perusal of Section 120 of the Indian Evidence Act, 1872, it is apparent that in all civil proceedings, the parties to the suit and the husband or wife of any party to the suit, shall be competent witnesses.

From perusal of Section 1A of the Powers of Attorney Act, 1882 it is apparent that power of attorney is required to act for an in the name of the person executing it.

If all the provisions referred to above are read conjointly, it is apparent that there is no prohibition in law to the effect that a competent witness cannot be permitted to exhibit the document. Under Section 120 of the Indian Evidence Act, 1872 the husband of a party to the suit is competent witness therefore he is entitled to depose about the facts about which either he or his wife has the knowledge. The husband of the petitioner being the competent witness for the wife can also be permitted to exhibit the document and there is no need to execute the power of attorney. However, the question of proof of a document is altogether different from the question of exhibiting a document.

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***188. FINANCIAL CODE (M.P.) – Rule 84**
Date of Birth – Correction – Date of birth recorded in the service record at the time of entry in service is final and conclusive except in the case of a clerical error, which may be corrected at a later stage – Petitioner approached the authorities for correction of his date of birth after putting 24 years of service on the strength of the certificates issued after his entry in service – Not permissible in view of Rule 84 – Petition dismissed.

Surijbal Soni v. State of M.P. & Ors.
Judgment dated 07.02.2012 passed by the High Court of M.P. in W.P. No. 7373 of 2009, reported in ILR (2012) M.P. S.N. 37

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189. HINDU SUCCESSION ACT, 1956 – Sections 6 and 14
Whether property acquired by a daughter by way of gift from her father can be treated to be an ancestral property of her husband's family? Held, No.

Indrakali (Smt.) & Ors. v. Ravi Bhan Prasad & Anr.
Judgment dated 15.09.2011 passed by the High Court of M.P. in S.A. No. 495 of 1994, reported in ILR (2012) M.P. 471

Held :

The plaintiff's own case is that the suit property was owned by father of Suryabhan's wife who gifted it to his daughter (wife of Suryabhan). Said Suryabhan died in the year 1946 and his wife also lateron died and both of them died issueless. Since the property in dispute was of father of Suryabhan's wife and it was gifted to her, the same would become her *stridhan* in view of Article 126 of the Mulla's Hindu Law (21st edition). Hence for all practical purpose, it is hereby held that suit property was the *stridhan* of Suryabhan's wife and if that would be the position it cannot be said to be the ancestral property of plaintiff and defendant because the ancestral property means all property inherited by male Hindu from his father, father's father or father's father's father (see Article 221 of Mulla's Hindu Law). The property inherited from collaterals and property inherited from female would be excluded from the ancestral property. In this context Article 221 (3) of ***Mulla's Hindu Law*** is quite clear, which reads thus:

> **221 (3)** Property inherited from collaterals – property inherited from females – Excluding the case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property, is property inherited by a person from his father, father's father, father's, father's father Property inherited by a person from any other relation is his separate property, and his male issues do not take any interest in it by birth. Thus, property inherited by a person from collaterals, such as a brother, uncle etc. or property inherited by him from a female, eg. His mother, is his separate property.

By analyzing the aforesaid provisions of Hindu Law it emerges that the property of Suryabhan's wife which was given to her by her father was her stridhan and it cannot be said to be an ancestral property and if that would be the position, I am of the view that the said property cannot be blended with the ancestral property. In this regard Article 225 and particularly Sub-Article (2a) of ***Mulla's Hindu Law*** 21st Edition may be seen and I would like to quote Article 225 (1) and (2a) as under: –

225. Property thrown into common stock. – (1) Property which was originally the separate or self acquired property of a member (coparcener) of a joint family may, by operation of the doctrine of blending, become joint family property, if it, has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established. It will neither be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son, or from the mere failure of a member to keep separate accounts of his earnings. So also acts of generosity or kindness should not be construed as admissions of legal obligation. A permissive use of separately acquired property by coparceners cannot raise a presumption that the property belongs to the joint family unless the acquirer throws such property into common stock. Separate property thrown into the common stock is subject to all the incidents of joint family property.

(2) xxx xxx

(2a) The basis of the doctrine is the existence of coparcenary and coparcenary property, as well as the existence of the separate property of a coparcener. The doctrine cannot be applied to the case of a Hindu female, who has acquired immovable property from her father, for she is not a coparcener.

A Hindu female cannot be a coparcener and the doctrine of blending cannot apply to her. This was re-affirmed by the Supreme Court.

Thus, since a Hindu female cannot be a coparcener and the doctrine of blending of her own property cannot apply to her, therefore, the property in dispute could not be blended with the ancestral property, the same could not be partitioned. In this context the decision of Supreme Court ***Mallesappa Bandeppa Desai and Another v. Desai Mullappa alias Mallesappa and Another, AIR 1961 SC 1268,*** para 11 may be taken into consideration wherein it has been held that doctrine of co-parcenery cannot be invoked to a female as her stridhan and similar view has been again taken by the Supreme Court in ***Smt. Pushpa Devi v. The Commissioner of Income-tax, New Delhi, AIR 1977 SC 2230,*** wherein, the Apex Court placed reliance upon its earlier decision of ***Mallesappa Bandeppa Desai*** (supra). Hence because the suit property was the stridhan of Suryabhan's wife, the same could not be blended with the ancestral property and could not be partitioned which took place in the year 1964 between the plaintiff and defendant.

The substantial question of law is thus answered that the property acquired by Suryabhan's wife who was the daughter of Ramsanehi cannot be treated to be an ancestral property of plaintiff and defendant since it was given to her by her father by way of gift and was her stridhan.

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190. HIRE PURCHASE ACT, 1972 – Section 21
CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (g)
Can a Finance Company, in the garb of hire purchase agreement, take over possession of vehicle with use of force from purchaser and sell it? Held, No – Till such time as the ownership is not transferred to the purchaser, it will not entitle the seller on the strength of the agreement to take back the possession of the vehicle by use of force – It is against the guidelines of RBI and principles laid down by the Supreme Court – The recovery process of loan has to be in accordance with law.

Citicorp, Maruti Finance Ltd. v. S. Vijaylaxmi
Judgment dated 14.11.2011 passed by the Supreme Court in Civil Appeal No. 9711 of 2011, reported in AIR 2012 SC 509 (3-Judge)

Held:

The question is whether the fora below were right in holding that the vehicles had been illegally and/or wrongfully recovered by use of force from the loanees. The aforesaid question has since been settled by several decisions of this Court and in particular in the decision rendered ***ICICI Bank Ltd. v. Prakash Kaur, AIR 2007 SC 1349.*** It is, not, therefore, necessary to go into the said question all over again and reiterate the earlier view taken that even in case of mortgaged goods subject to Hire-Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicles by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the Appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down.

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191. INDIAN PENAL CODE, 1860 – Section 120-B
Criminal conspiracy, what is? The gist of the offence of conspiracy is the agreement between two or more persons to do or cause to do an illegal act or a legal act by illegal means – There must be meeting of minds resulting in an ultimate decision taken by the conspirator regarding commission of the crime.

Sherimon v. State of Kerala

Judgment dated 14.11.2011 passed by the Supreme Court in Criminal Appeal No. 1221 of 2005, reported in AIR 2012 SC 493

Held:

It is undoubtedly true that PW-4 had not repaid the entire loan to City Auto Finance. He was in arrears. However, in our opinion, on the basis of the evidence on record to which we have made a reference hereinabove, it was wrong on the part of the trial court and the High Court to come to the conclusion that the appellant was a party to the alleged criminal conspiracy entered into by the appellant and A1 to A3 to repossess the said auto rickshaw irrespective of the consequences and, pursuant thereto, on 31.3.1999, A1 to A3 murdered the driver of the said auto rickshaw and repossessed it. It was wrong to come to the conclusion that the evidence referred to hereinabove indicates the existence of a strong motive on the part of the City Auto Finance to repossess the said auto rickshaw at any cost. When it is not the case of the prosecution that the appellant was present when the murder took place and when no overt act is attributed to him by any witness, to hold him responsible for offence under Section 324 IPC with the aid of 120B is clearly improper and illegal. The gist of the offence of conspiracy is the agreement between two and more persons to do or cause to be done an illegal act or a legal act by illegal means. There must be meeting of minds resulting in an ultimate decision taken by the conspirators regarding commission of the crime. In this case, no such evidence has come on record. PW-5 Biju, the employee of City Auto Finance at Moovattupuzha was the only witness examined by the prosecution to prove the alleged meeting between the appellant and the other accused. He has turned hostile. Therefore, there is nothing on record to establish meeting of minds between the appellant and the other accused. Assuming that the appellant had produced certain documents pertaining to the said auto rickshaw, it cannot be concluded on the basis thereof that he had entered into conspiracy with A1 to A3 to repossess the said auto rickshaw because the loan amount was not repaid and in pursuance thereto A1 to A3 murdered the driver of the said auto rickshaw. The evidence on record is totally inadequate to come to such a conclusion. It is, therefore, not possible to sustain the impugned judgment.

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192. INDIAN PENAL CODE, 1860 – Sections 141, 143, 148, 323 and 325 r/w/s 149 Vicarious liability – The provision under Section 149 of the Code is in two parts – The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly – The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly "knew that the same is likely to be committed in prosecution of the common

object of the assembly" – The scope of the vicarious liability with the aid of this provision, explained.

Roy Fernandes v. State of Goa and others

Judgment dated 01.02.2012 passed by the Supreme Court in Criminal Appeal No. 1108 of 2002, reported in (2012) 3 SCC 221

Held:

A plain reading of S.149 of I.P.C. would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly 'knew that the same is likely to be committed in prosecution of the common object of the assembly'.

In the case of ***Khem Karan v. State of U.P., (1974) 4 SCC 603,*** where this court observed:

> "the fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if - as in this case the court has taken care to find - there are other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number".

To the same effect is the decision of this Court in ***Dharam Pal v. State of U.P., (1975) 2 SCC 596*** where this Court observed:

> "10. ..... If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding based on good evidence and sound reasoning that the participants were five or more in number."

Acquittal of three of the five accused persons comprising the unlawful assembly does not in the light of the settled legal position make any material difference. So long as there were four other persons with the appellant who had the common object of committing an offence the assembly would be unlawful in nature acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them notwithstanding.

Further, so far as the first part of Section 149 IPC is concerned, there would not be any problem as this part deals with the offence which is committed in prosecution of the common object of the unlawful assembly whereas to what extent a member of unlawful assembly can be liable for the act of every member in the context of second part of Section 149 IPC depends upon the circumstance in which the incident has been taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot.

In ***Lalji v. State of U.P., (1989) 1 SCC 437,*** this Court observed that common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

The Court elaborated the above proposition in ***Dharam Pal*** (supra) as:

> "11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggi to reach near the field of Daryao in the early hours of June 7, 1967, shows pre-planning. Some of the assailants had sharp- edged weapons. They were obviously lying in wait for the buggi to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a pre concert was necessary. Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34 IPC also to this case. The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See: ***Yeshwant v. State of Maharashtra, (1972) 3 SCC 639*** and ***Sukh Ram v. State of U.P.), (1974) 3 SCC 656***. The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated."

In *Chikkarange Gowda v. State of Mysore, AIR 1956 SC 731,* this Court observed that it is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149 Indian Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149 Indian Penal Code was not justified in law.

In *Gajanand v. State of U.P., AIR 1954 SC 695,* this Court approved the following passage from the decision of the Patna High Court in ***Ram Charan Rai v. Emperor, AIR 1946 Pat 242:***

> "Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

This Court then reiterated the legal position as under [***Gajanand case*** (supra)]:

> "9.....The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

In *Mizaji v. State of U.P., AIR 1959 SC 572* this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified.

This Court analysed Section 149 in the following words(*Mizaji case* (supra):

> "6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

In *Shambhu Nath Singh v. State of Bihar, AIR 1960 SC 725,* this Court held that:

> "6. ... 'members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object...'."

As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court in ***Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381*** and ***Bishna v. State of West Bengal, (2005) 12 SCC 657*** similarly explain and reiterate the legal position on the subject.

The commission of the offence of murder of Felix Felicio Monteiro was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141 of the IPC.

Even when commission of murder was not the common object of the accused persons, they certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proves that point.

The appellant was totally unarmed for even according to the prosecution witnesses he had pushed, slapped and boxed those on the spot using his bare hands. The second and equally notable circumstance is that neither the cycle chain nor the belt allegedly carried by two other members of the unlawful assembly was put to use by them.

The non-use of the same is a relevant circumstance. It is common ground that no injuries were caused by use of those weapons on the person of the deceased or any one of them was carrying a knife. The prosecution case, therefore, boils down to the appellant and his four companions arriving at the spot, one of them giving a knife blow to the deceased in his thigh which cut his femoral artery and caused death.

There is no evidence to show that the appellant knew that in prosecution of the common object of preventing the putting up of the fence around the chapel the members of the assembly or any one of them was likely to commit the murder of the deceased. There is indeed no evidence to even show that the appellant knew that Anthony D'Souza was carrying a knife with him, which he could use. The evidence on the contrary is that after stabbing the deceased Anthony D'Souza had put the knife back in the cover from where he had drawn it. The conduct of the members of the assembly especially the appellant also

does not suggest that they intended to go beyond preventing the laying of the fence, leave alone committing a heinous offence of murder of a person who had fallen to the ground with a simple blow and who was being escorted away from the spot by his companions. We have, therefore, no hesitation in holding that the Courts below fell in error in convicting the appellant for murder with the aid of Section 149 of the IPC.

Having said that, we have no manner of doubt that the conviction of the appellant for offences punishable under Sections 143, 148, 323 and 325 read with Section 149 of the IPC is perfectly justified.

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193. INDIAN PENAL CODE, 1860 – Sections 299, 300, 304 Part I and Part II, 304-A, 337 and 338

(i) Whether the charge under Sections 304 Part II and 337 and 338 IPC co-exist in respect of a single rash or negligent act, as they are mutually destructive? Held, No – Rash or negligent driving on a public road with the knowledge of a dangerous character and the likely affect of the act resulting in death may fall in the category of culpable homicide not amounting to murder.

(ii) Voluntary act – Connotation of – An act does not become an involuntary act simply because its consequences were unforeseen –The case of negligence or of rashness or dangerous driving do not eliminate the possibility of the act being voluntary.

(iii) Form of charge under Section 304 Part II IPC – Ingredients of – Effect of omission – The omission of the words like "in drunken condition" in the charge is not material and such omission has not at all resulted in prejudice to the accused where he was fully aware of the prosecution evidence which consisted of drunken condition of the accused.

(iv) Incriminating evidence – Apprising of – Effect of omission to specifically draw attention of the accused to incriminating/ inculpatory materials brought in by the prosecution – May not by itself render the trial void and bad in law if accused was afforded an opportunity to explain what he wanted to say and such omission has not caused prejudice to him resulting in failure of justice.

(v) Determination of sentence – No strait-jacket formula for sentencing an accused on proof of crime – What sentence would not meet ends of justice depends on the facts and circumstance of each case and the Court must keep in mind the gravity of the crime, nature of the crime, nature of the offence and all attending circumstances as well as social interest and consciousness of the society.

Alister Anthony Pareira v. State of Maharashtra

Judgment dated 12.01.2012 passed by the Supreme Court in Criminal Appeal No. 1318 of 2007, reported in (2012) 2 SCC 648

Held:

Insofar as Section 304A IPC is concerned, it deals with death caused by doing any rash or negligent act where such death is caused neither intentionally nor with the knowledge that the act of the offender is likely to cause death. The applicability of Section 304A IPC is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder. An essential element to attract Section 304A IPC is death caused due to rash or negligent act. The three things which are required to be proved for an offence under Section 304A are :

(1) death of human being;

(2) the accused caused the death and

(3) the death was caused by the doing of a rash or negligent act, though it did not amount to culpable homicide of either description.

Like Section 304A, Sections 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act. The scheme of Sections 279, 304A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life.

The question is whether indictment of an accused under Section 304 Part II and Section 338 IPC can co-exist in a case of single rash or negligent act. We think it can. We do not think that two charges are mutually destructive. If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused then not only that the punishment is for the act but also for the resulting homicide and a case may fall within Section 299 or Section 300 depending upon the mental state of the accused viz., as to whether the act was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.

Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law - in view of the provisions

of the IPC - the cases which fall within last clause of Section 299 but not within clause 'fourthly' of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II IPC. Section 304A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description.

A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II IPC. There is no incongruity, if simultaneous with the offence under Section 304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to any person is tried for the offence under Section 338 IPC.

In view of the above, in our opinion there is no impediment in law for an offender being charged for the offence under Section 304 Part II IPC and also under Sections 337 and 338 IPC. The two charges under Section 304 Part II IPC and Section 338 IPC can legally co-exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.

By charging the appellant for the offence under Section 304 Part II IPC and Section 338 IPC - which is legally permissible - no prejudice has been caused to him. The appellant was made fully aware of the charges against him and there is no failure of justice. We are, therefore, unable to accept the submission of Senior Advocate for the appellant that by charging the appellant for the offences under Section 304 Part II IPC and Section 338 IPC for a rash or negligent act resulting in injuries to eight persons and at the same time committed with the knowledge resulting in death of seven persons, the appellant has been asked to face legally impermissible course.

In ***Prabhakaran v. State of Kerala, (2007) 14 SCC 269,*** this Court was concerned with the appeal filed by a convict who was found guilty of the offence punishable u/s. 304 Part II IPC. In that case, the bus driven by the convict ran over a boy aged 10 years. The prosecution case was that bus was being driven by the appellant therein at the enormous speed and although the passengers had cautioned the driver to stop as they had seen children crossing the road in a queue, the driver ran over the student on his head. It was alleged that the driver had real intention to cause death of persons to whom harm may be caused on the bus hitting them. He was charged with offence punishable u/s. 302 IPC. The Trial Court found that no intention had been proved in the case but at the same time the accused acted with the knowledge that it was likely to cause death, and, therefore, convicted the accused of culpable homicide not amounting to murder punishable under Section 304 Part II IPC and sentenced him to undergo

rigorous imprisonment for five years and pay a fine of ₹ 15,000 with a default sentence of imprisonment for three years. The High Court dismissed the appeal and the matter reached this Court.

While observing that Section 304A speaks of causing death by negligence and applies to rash and negligent acts and does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death and that Section 304A only applies to cases in which without any such intention or knowledge death is caused by a rash and negligent act, on the factual scenario of the case, it was held in ***Prabhakaran case*** (supra) that the appropriate conviction would be under Section 304A IPC and not S. 304 Part II ***IPC. Prabhakaran*** (supra) does not say in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act of the driver, the conviction can be maintained for the offence u/s. 304 Part II IPC even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused. ***Prabhakaran*** (supra) turned on its own facts.

Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, S. 304 Part II IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under Section 302 IPC.

In light of the legal position, if the charge under Section 304 Part II IPC framed against the appellant is seen, it would be clear that the ingredients of Section 304 Part II IPC are implicit in that charge. The omission of the words 'in drunken condition' in the charge is not very material and, in any case, such omission has not at all resulted in prejudice to the appellant as he was fully aware of the prosecution evidence which consisted of drunken condition of the appellant at the time of incident.

The accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice.

Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

There is a presumption that a man knows the natural and likely consequences of his acts. Moreover, an act does not become involuntary act simply because its consequences were unforeseen. The cases of negligence or of rashness or dangerous driving do not eliminate the act being voluntary. In the present case, the essential ingredients of Section 304 Part II IPC have been successfully established by the prosecution against the appellant.

The facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused under Section 304 Part II IPC undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime. Seven precious human lives were lost by the act of the accused. For an offence like this which has been proved against the appellant, sentence of three years awarded by the High Court is too meagre and not adequate but since no appeal has been preferred by the State, we refrain from considering the matter for enhancement. By letting the appellant away on the sentence already undergone i.e. two months in a case like this, in our view, would be travesty of justice and highly unjust, unfair, improper and disproportionate to the gravity of crime. It is true that the appellant has paid compensation of ₹ 8,50,000 but no amount of compensation could relieve the family of victims from the constant agony. As a matter of fact, High Court had been quite considerate and lenient in awarding to the appellant sentence of three years for an offence under Section 304 Part II IPC where seven persons were killed.

We are satisfied that the facts and circumstances of the case do not justify benefit of probation to the appellant for good conduct or for any reduction of sentence.

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194. INDIAN PENAL CODE, 1860 – Section 302

CRIMINAL TRIAL:

Death caused by administration of poison – Case based on circumstantial evidence – Principles which are necessary to prove in order to hold conviction in a case of murder by poisoning, discussed.

Shanmughan v. State of Kerala

Judgment dated 19.01.2012 passed by the Supreme Court in Criminal Appeal No. 1157 of 2007, reported in (2012) 2 SCC 788

Held:

The only dispute is who administered the poison, and whether it was a case of suicidal poisoning or homicidal poisoning. The injuries which have been found on the deceased by PW 7 are very vital to answer this question. It is the case of the prosecution that the victim died of cyanide poison which is a highly corrosive poison and is obtained by distilling potassium cyanide or potassium ferrocyanide with dilute sulphuric acid. [See: ***Modi, a textbook of Medical Jurisprudence and Toxicology 24th Edition Year 2011 Page 260, Chapter 12, Section 2***]. As a result of administering such corrosive poison, there is bound to be local and chemical action of corroding and destroying all tissues which come in contact with it. [See: *Modi's* (supra) ***pages 33-37, Chapter 2, Section 2***].

The post mortem examination in cases of death by administering such corrosive poison, would show that the mouth, lips, skin and mucous membrane are corroded in patches and in acute cases, the same may be charred. [See: *Modi's* (supra) ***pages 33-37, Chapter 2, Section 2***).

In this case, we find from the injuries discussed above that there is presence of lacerated wounds on the lips, contusions in the ear and abrasions in the chest. These injuries clearly show that some force was used while administering the poison. Without any force these injuries could not be there in a case of suicidal poison. Apart from the appellant no one was there in bed room to apply force on the victim. That apart the evidence of PW 7 also shows that all the injuries were fresh injuries and cannot be sustained by fall on a hard substance. PW 7 also deposed that the injuries could be because of forcible administration of poison. Thus the prosecution has rightly proved that it is a case of murder and there is no reason for our interference.

On the next point urged by the learned counsel that as the prosecution has failed to prove that the appellant had the possession of poison, the prosecution's case will be vitiated, we are not accepting the aforesaid proposition. However, in support of the aforesaid submission, learned counsel for the appellant relied upon a three Judge Bench decision of this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116*** and the learned counsel relied upon paragraph 165 at page 188 of the judgment where Justice Fazal Ali, J. formulated certain propositions to indicate that in a case relating to murder by poison, four important circumstances can justify a conviction and His Lordship laid down the following principles:

"1. there is a clear motive for an accused to administer poison to the deceased,

2. that the deceased died of poison said to have been administered,

3. that the accused had the poison in his possession,

4. that he had an opportunity to administer the poison to the deceased"

We have gone through the said judgment carefully. We find that in the said case, the learned Judges gave the accused the benefit of doubt in view of the last seen theory.

Here the facts are much more loaded against the appellant. In this case, the appellant and the deceased were admittedly sleeping together at the night of occurrence inside a bed room and no third person was there and administration of poison took place inside the bed room. However, it appears that on those principles which have been formulated by Justice Fazal Ali, some doubts were expressed both by Justice Varadarajan and Justice Mukharji, JJ (as His Lordship then was) in paragraphs 199 and 204 of the Judgment. However, the learned Judges agreed with the conclusions reached by Justice Fazal Ali.

Another three Judge Bench of this Court in a matter relating to murder by poisoning gave a unanimous verdict formulating different principles. In the case of ***Anant Chintaman Lagu v. The State of Bombay, AIR 1960 SC 500,*** Justice Hidayatullah (as His Lordship then was) elaborated these principles succinctly in paragraph 58 of the judgment. His Lordship referred to three principles which are necessary to prove in order to return a conviction in a case of murder by poisoning. Those principles are as follows:

a. That death took place by poisoning.

b. That the accused had the poison in his possession and .

c. That the accused had an opportunity to administer the poison to the deceased.

At page 520 of the case, in paragraph 59, the Learned Judge clarified those principles by saying that

> "three propositions must be kept in mind always, the sufficiency of the evidence direct or circumstantial, to establish murder by poisoning will depend on the facts of each case". His Lordship further clarified by saying "If circumstantial evidence, in the absence of direct proof of the three elements, is so decisive that the Court can unhesitatingly hold that the death was a result of administration of poison and that the poison must have been administered by the accused persons, then the conviction can be rested on it".

In the instant case, there was no third person in the bed room and there are clear injuries on the deceased, which cannot be self inflicted. Therefore, poison could only be administered by the accused - appellant.

Reference in this connection can also be made to other judgments of this Court where this Court has taken a view which is consistent with the view taken by the unanimous three Judge Bench of this Court in ***Anant Chintaman Lagu*** (supra).

In ***Bhupinder Singh v. State of Punjab, (1988) 3 SCC 513,*** this question has been fully answered by this Court in paragraph 25 which reads thus:

> "We do not consider that there should be acquittal or the failure of the prosecution to prove the possession of poison with the accused. Murder by poison is invariably committed under the cover and cloak of secrecy. Nobody will administer poison to another in the presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the investigating officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. In such cases, it would be impossible for the prosecution to prove possession of poison with the accused. The prosecution may, however, establish other circumstances consistent only with the hypothesis of the guilt of the accused. The court then would not be justified in acquitting the accused on the ground that the prosecution has failed to prove possession of the poison with the accused".

Similarly, in a subsequent decision of this Court in the case of ***Nirmala Devi v. State of J&K, (1994) 1 SCC 394,*** this Court again affirmed the aforesaid principles in paragraph 7 by holding as follows:

> ".....Yet another submission of the learned Counsel is that the prosecution has not established as to how the appellant came into possession of arsenic poison. We are of the view that this by itself does not affect the prosecution case when the other evidence is clinching".

Therefore, taking all these facts and also the concurrent findings of the two courts, we are not inclined to interfere in this appeal. The appeal is accordingly dismissed. The appellant is to serve out the remaining sentence.

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195. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12

Bail – Denial of – Bail to a juvenile cannot be denied unless his case falls within any of the exceptions engrafted in Section 12 of the Act.

Narayan Sharma v. State of M.P.

Judgment dated 07.02.2012 passed by the High Court of M.P. in Cri. Rev. No. 52 of 2012, reported in ILR (2012) M.P. 796

Held :

What is discernible from Section 12 of Juvenile Justice (Care & Protection of Children) Act, 2000 governing bail to a juvenile is that a juvenile in conflict with law should normally be granted bail unless his case falls within one of the exceptions engrafted thereunder and those exceptions are that there appears to be reasonable grounds for believing that his release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would otherwise defeat the ends of justice. Unless the aforesaid rider is satisfied, bail to a juvenile should not be refused. It is significant to note that the gravity of the offence or its seriousness alone, divorced from the above exceptional reasons, has not been taken as a rider by the legislature to deny bail to a juvenile in conflict with law. It is only when there is danger to his moral, physical or psychological qualities or likelihood of his attaching himself with criminals or that his release may otherwise defeat the ends of justice, the Board or the Court may not exercise discretion in his favour and enlarge him on bail. For such a determination, no hard and fast rule of inflexible nature can be laid down as it depends on the facts and circumstances peculiar to each case.

In the opinion of this Court, the Juvenile Justice Board may be justified in denying bail to a juvenile involved in a heinous crime only if there is material before it to form a prima facie opinion on the aspects carved out as exception to rule of bail in section 12 of the Act itself. There must be some mechanism with the Juvenile Justice Board to gather material and form an opinion as to whether the juvenile need to be denied bail by bringing his case under the exceptions to bail engrafted in section 12. the opinion to be formed by the Board, by no means, can be subjective and has to be objective. Either the prosecution should place some prima facie material before the Board or the Court to show that release of a juvenile on bail may expose him to moral, physical or psychological danger or the Board may obtain a report from the Probation Officer attached to the Board regarding antecedents and circumstances attended to the juvenile, both pre and post crime and it is only thereafter the Board or the Court should crystallise its opinion regarding release or non-release of the juvenile on bail, though involved in a heinous crime. A reference to the statutory provisions governing bail to a juvenile contained in section 12 would show that there is a mandate of law that the juvenile has to be released on bail, except only in those cases where the case falls in one or the other exception engrafted by the legislature in section 12 itself.

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196. LIMITATION ACT, 1963 – Section 5

Where question of personal liberty is involved, the Court must show greater indulgence and flexibility in applying law of limitation. The Court should be very reluctant to shut out consideration of the case on merits on ground of limitation or other similar technicalities where question of personal liberty is involved – Delay of 15 months in filing revision condoned.

Abdul Ghafoor & Anr. v. State of Bihar

Judgment dated 16.09.2011 passed by the Supreme Court in Criminal Appeal No. 1812 of 2011, reported in AIR 2012 SC 640

Held:

The law of limitation is indeed an important law on the statute book. It is in furtherance of the sound public policy to put a quietus to disputes or grievances of which resolution and redressal are not sought within the prescribed time. The law of limitation is intended to allow things to finally settle down after a reasonable time and not to let everyone live in a state of uncertainty. It does not permit any one to raise claims that are very old and stale and does not allow anyone to approach the higher tiers of the judicial system for correction of the lower court's orders or for redressal of grievances at ones own sweet will. The law of limitation indeed must get due respect and observance by all courts. We must, however, add that in cases of conviction and imposition of sentence of imprisonment, the court must show far greater indulgence and flexibility in applying the law of limitation than in any other kind of case. A sentence of imprisonment relates to a person's right to personal liberty which is one of the most important rights available to an individual and, therefore, the court should be very reluctant to shut out a consideration of the case on merits on grounds of limitation or any other similar technicality.

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197. LIMITATION ACT, 1963 – Articles 64 and 65

Adverse possession – In the larger public interest, law of adverse possession should be abolished or atleast amended by making suitable changes in law.

State of Haryana v. Mukesh Kumar and ors.

Judgment dated 30.09.2011 passed by the Supreme Court in Petition for Special Leave to Appeal (Civil) No. 28034 of 2011, reported in AIR 2012 SC 559

Held:

We inherited this law of adverse possession from the British. The Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in the larger public interest. The Government instrumentalities-including the police-in the instant case have

attempted to possess land adversely. This, in our opinion, a testament to the absurdity of the law and a black mark upon the justice system's legitimacy. The Government should protect the property of a citizen - not steal it. And yet, as the law currently stands, they may do just that. If this law is to be retained, according to the wisdom of the Parliament, then at least the law must require those who adversely possess land to compensate title owners according to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property. While it may be indefensible to require all adverse possessors - some of whom may be poor - to pay market rates for the land they possess, perhaps some lesser amount would be realistic in most of the cases. The Parliament may either fix a set range of rates or to leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case.

The Parliament must seriously consider at least to abolish "bad faith" adverse possession, i.e., adverse possession achieved through intentional trespassing. Actually believing it to be their own could receive title through adverse possession sends a wrong signal to the society at large. Such a change would ensure that only those who had established attachments to the land through honest means would be entitled to legal relief.

In case, the Parliament decides to retain the law of adverse possession, the Parliament might simply require adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12. Such an extension would help to ensure that successful claimants have lived on the land for generations, and are therefore less likely to be individually culpable for the trespass (although their forebears might). A longer statutory period would also decrease the frequency of adverse possession suits and ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotective owners lose title.

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***198. MADHYASTHAM ADHIKARAN ADHINIYAM, 1983 (M.P.)**
ARBITRATION AND CONCILIATION ACT, 1996

Jurisdiction in case of works contract

Disputes pertaining to or arising out of works contract with State of M.P. or its instrumentality will have to be mandatorily referred to M.P. State Arbitration Tribunal irrespective of arbitration agreement as per the provisions of M.P. Madhyastham Adhikaran Adhiniyam, 1983 and not under Arbitration and Conciliation Act, 1996 – Earlier decision in *Va Tech Escher Wyass Flovel Ltd. v. M.P. SEB, (2011) 13 SCC 261* held per incuriam.

Madhya Pradesh Rural Road Development Authority and another v. L.G. Chaudhary Engineers and Contractors

Judgment dated 24.01.2012 passed by the Supreme Court in Civil Appeal No. 974 of 2012, reported in (2012) 3 SCC 495

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199. MOTOR VEHICLES ACT, 1988 – Sections 140 and 163-A

(a) As per Sections 140 (3) and 140 (4), there can be no doubt that compensation claimed under Section 140 is governed by the principle of "no fault" liability.

(b) Sections 163-A (2) and 140 (3), are *pari materia* to each other – Unlike Section 140 (4), no similar provision is made in Section 163-A Act – Compensation claimed under Section 163-A is governed by the principle of "fault" liability.

(c) Under Section 163-A, it is for the insurer to prove that accident had taken place due to negligence of the deceased and he was not the third party.

National Insurance Company Ltd. v. Sinitha & Ors.

Judgment dated 23.11.2011 passed by the Supreme Court in Special Leave Petition (C) No. 6513 of 2007, reported in AIR 2012 SC 797

Held:

For determination of the issue under consideration, namely, whether Section 163A of the Act is governed by the "fault" or the "no-fault" liability principle, it is first relevant for us to examine Section 140 of the Act, so as to determine whether it has any bearing on the interpretation of Section 163A of the Act.

A perusal of sub-section (3) of S.140 reveals, that the burden of "pleading and establishing", whether or not "wrongful act", "neglect" or "default" was committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. In other words the onus of proof of "wrongful act", "neglect" or "default" is not on the claimant. The matter however does not end with this. A perusal of sub-section (4) of Section 140 of the Act further reveals, that the claim of compensation under Section 140 of the Act cannot be defeated because of any of the "fault" grounds ("wrongful act", "neglect" or "default"). This additional negative bar, precluding the defence from defeating a claim for reasons of a "fault", is of extreme significance, for the consideration of the issue in hand. It is apparent, that both sides are precluded in a claim raised under Section 140 of the Act from entering into the arena of "fault" ("wrongful act" or "neglect" or "default"). There can be no doubt, therefore, that the compensation claimed under Section 140 is governed by the "no- fault" liability principle.

In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163A of the Act.

A perusal of Section 163(A) reveals that sub-section (2) thereof is in *pari materia* with sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also under Section 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of sub-section (4) of Section 140 in Section 163A of the Act. Whereas, under sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163A of the Act. The additional negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through sub-section (4) thereof), having not been embodied in Section 163A of the Act, has to have a bearing on the interpretation of Section 163A of the Act. In our considered view the legislature designedly included the negative clause through sub- section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163A of the Act. The legislature must have refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section 140, and the absence of a similar provision in Section 163A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defence to defeat a claim for compensation raised under Section 163A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

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200. MOTOR VEHICLES ACT, 1988 – Section 142

Under all circumstances, it is not necessary that the Tribunal has to blindly accept disability certificate produced by the victim – It has discretion to either accept totally or partially or reject it, but that can be done only after assigning cogent and acceptable reasons.

D. Sampath v. United India Insurance Co. Ltd. & Anr.

Judgment dated 13.09.2011 passed by the Supreme Court in Civil Appeal No. 7824 of 2011, reported in AIR 2012 SC 544

Held:

The High Court, while assessing the compensation payable to the claimant, has arrived at the loss of earning capacity in a sum of ₹ 8,16,000 and, thereafter, though the Doctor has assessed 75% disability, has taken into account 50% disabilfty while calculating the loss of income without any rhyme or reason. In our view, this is a mistake committed by the High Court. It is no doubt true that, while making assessment, there is an element of guess work, but that guess work again must have reasonable nexus to the available material/evidence and the quantification made. In the instant case, the claimant had not only examined himself to sustain the claim made in the petition but also Dr. J.R.R. Thiagarajan, PW-3, who has stated that the claimant has suffered 75% disability, by referring to the Disability Certificate issued by a competent Doctor who had treated the claimant. Though the Doctor is cross- examined at length by learned Advocate for the Insurance Company, nothing adverse to the interest of the claimant is elicited. Therefore, the Tribunal has rightly accepted the evidence of the Doctor-PW-3. However, the High Court has taken 50% disability into account while calculating the loss of income. This, in our view, is the mistake committed by the High Court. We hastened to add that we are not saying that under all circumstances, the Court has to blindly accept the Disability Certificate produced by the claimant. The Court has the discretion to accept either totally or partially or reject the Certificate so produced and marked in the trial but, that, can be done only by assigning cogent and acceptable reasons. In this view of the matter, we take the disability suffered by the claimant at 75% and calculate the loss of income of the claimant keeping in view the loss of earning capacity of the claimant assessed by the High Court. Accordingly, we arrive at the loss of earning capacity of the claimant at ₹ 6,12,000.

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***201. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168**

Determination of compensation in a case of death of owner of three buses-cum-agricultural lands and also driver of one of the buses – Income of deceased out of agricultural lands would still continue to accrue to his family – Likewise, income derived out of three buses would also still accrue to family of deceased – The only difference would be that during his life time, the deceased was managing the

three buses and was driving one of these buses, but now, the claimants may have to engage some competent person to manage the asset, which in turn, would require some payment to be made to such a manager and also one driver is to be engaged for one bus which the deceased himself used to drive – Therefore, loss of income (dependency) can be assessed only on the basis of payment to be made for one driver of a bus and a manager engaged for these three buses.

As in this case, accident had taken place a decade ago (21.12.2002) the Apex Court assessed salary of Manager for these buses as ₹ 10,000 per month and for a driver of a bus as ₹ 3,900 per month. Therefore, total monthly loss calculated as ₹ 13,900 and by adopting 16 as multiplier, ₹ 26,68,800 awarded for loss of dependency unfaltering compensation awarded under other heads.

New India Assurance Company Limited v. Yogesh Devi and others

Judgment dated 10.02.2012 passed by the Supreme Court in Civil Appeal No. 1987 of 2012, reported in (2012) 3 SCC 613

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202. MOTOR VEHICLES ACT, 1988 – Section 168

Mode of payment of compensation in motor accident claims – Guidelines issued by the Apex Court in *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176* were to safeguard the interests of the claimants particularly, minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds – Tribunals to pass appropriate orders after examining each case on its own merits and should not take a rigid stand while considering an application seeking release of the money – Change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

A.V Padma and others v. R. Venugopal and others

Judgment dated 27.01.2012 passed by the Supreme Court in Civil Appeal No. 1095 of 2012, reported in (2012) 3 SCC 378

Held:

In *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176,* this Court issued certain guidelines in order to –

> "safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation".

Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of

any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit.

The expression used in guideline No. (iv) issued by this Court in ***Susamma Thomas*** (supra) is that in the case of literate persons also *the Tribunal may* resort to the procedure indicated in guideline (i), whereas in the guideline (i), (ii), (iii) and (v), the expression used is that *the Tribunal should*. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money.

The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the

genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him.

The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

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203. MOTOR VEHICLES ACT, 1988 – Section 168

Loss of future earnings, how to judge? It has to be judged with reference to the nature of the work being performed by the victim – There is a basic premise and once that is grasped, it clearly follows that the same injury or loss may affect different persons in different ways i.e. loss of one leg to a cycle rickshaw puller is different from that of a desk worker in an office.

Mohan Soni v. Ram Avtar Tomar & Ors.

Judgment dated 10.01.2012 passed by the Supreme Court in Civil Appeal No. 237 of 2012, reported in AIR 2012 SC 782

Held:

The Tribunal and the High Court were in error in pegging down the disability of the appellant to 50% with reference to Schedule 1 of the Workmen's Compensation Act, 1923. In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability. This is the basic premise and once that is grasped, it clearly follows that the same injury or loss may affect two different persons in different ways. Take the case of a marginal farmer who does his cultivation work himself and ploughs his land with his own two hands; or the puller of a cycle-rickshaw, one of the main means of transport in hundreds of small towns all over the country. The loss of one of the legs either to the marginal farmer or the cycle-rickshaw-puller would be the end of the road insofar as their earning capacity is concerned. But in case of a person engaged in some kind of desk work in an office, the loss of a leg may not have the same effect. The loss of a leg (or for that matter the loss of any limb) to

anyone is bound to have very traumatic effect on one's personal, family or social life but the loss of one of the legs to a person working in the office would not interfere with his work/earning capacity in the same degree as in the case of a marginal farmer or a cycle-rickshaw-puller.

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204. MUSLIM LAW

EVIDENCE ACT, 1872 – Section 14

Alienation of undivided property – There is no prohibition not to alienate any specific item of undivided share – Normally, any specific item should not be alienated as it may cause anomaly to the other co-owners – However, the alienation cannot be said to be illegal or not recognized by law if a co-owner alienates any specific property without the consent of co-owners – However, the co-owners may sue for partial partition of the property so alienated.

Interpretation of pleadings – Mufssal Pleadings – Parties are villagers – Suit was filed at Tahsil place – Some latitude should be given in case of mufssal pleadings and they should not be construed strictly. Presumption – If a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavorable to him.

Akbar Khan & Ors. v. Faridabai & Ors.

Judgment dated 22.11.2011 passed by the High Court of M.P. in S.A. No. 15 of 1999, reported in ILR (2012) M.P. 737

Held :

Under the Mahomedan Law normally any specific item of the undivided property should not be alienated by a Mahomedan because it may create anomaly to the other co-owners, but if a co-owner alienates any specific property without the consent of the other co-owners, the alienation cannot be said to be illegal or not recognised by the law, but the other co-owners may sue for a partial partition of the property so alienated or sold.

Under the Mahomedan Law a co-sharer (co-owner) is authorised to sell his undivided share and in this regard Articles 42 and 49 of the Principles of Mahomendan Law by Mulla 19th Edition may be seen. Since there is no prohibition under the Mahomedan Law not to alienate the undivided share or even a specific share prior to the partition, the sale-deed executed by Shabir Khan in favour of plaintiff cannot be said to be bad in law particularly when it was never challenged by any of the defendants by filing counter-claim.

The parties are residents of Village Malhargarh, which comes in Tahsil Narayangarh of District Mandsaur. The suit was filed in the Trial Court at Tahsil Narayangarh. Bearing this proposition on many occasions some latitude should be given in the case of mufssal pleadings and they should not be construed strictly. In this regard, decision of Supreme Court in ***Badat and Co., Bombay v.***

East India Trading Co., AIR 1964 SC 538 at page 545 may be seen. This principle has already been laid down and was taken note of by the Division Bench of this Court back (more than seven decades ago) in *Arjunsa Raghusa and others v. Mohanlal Harakchand, AIR 1937 Nagpur 345 at page 350.*

Section 114, Illustration (h) of the Evidence Act speaks that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavourable to him. Thus, if the answer to the question put to Akbar Khan (DW-1) whether partition has taken place would have been given by him, it would have been unfavourable to him and therefore, he kept silent on this point and did not give any answer to this question. Hence, it can be inferred that the partition took place between the brothers and by not answering the material question in this regard defendant Akbar Khan is suppressing the reality that partition has already taken place. If his silence in answering the question is read in context to para 3 of his cross-examination, where he has admitted that all the brothers are cultivating the separate land in juxtaposition to each other, no other inference can be drawn except that partition had taken place between the brothers earlier.

Learned First Appellate Court by taking note of the demeanour of defendant Akbar Khan has categorically held that deliberately the defendant did not answer the material question pin pointing and going to the root of the matter and thus had come to the conclusion that there was a partition in the family in which the suit property fell in the share of Shabir Khan who sold lateron vide sale-deed dated 07.06.1986 (Ex.P/1) to the plaintiff and therefore learned First Appellate Court has rightly arrived at a pure finding of fact that there was a partition in the family of plaintiff in which the suit property fell in the share of plaintiffs husband Shabir Khan.

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205. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
EVIDENCE ACT, 1872 – Section 45
Hand writing expert, opinion of – Application for adducing opinion of handwriting expert was rejected by trial court – Held, since the blank cheque was issued according to the accused, an opportunity to adduce the opinion of handwriting expert must be given to him in the principles of natural justice.

Abhishek v. Ramesh

Judgment dated 10.12.2011 passed by the High Court of M.P. in Misc. Cri. Case No. 8627 of 2011, reported in 2012 (2) MPHT 19

Held:

It is the admitted fact that the accused has been given blank and signed cheque and never disputed the loan amount of ₹ 20,000 which is the outstanding amount to be paid by him to the complainant. Counsel further relied on *Mrs. Kalyani Baskar v. Mrs. M.S. Sampoornam, 2007 (1) DCR 168,* whereby the Apex

Court has categorically considered the scope of powers of Magistrate for seeking expert opinion after evidence of prosecution was rejected and the Apex Court had directed that fair trial includes fair and proper opportunities allowed by law to prove the innocence of accused and adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial.

On considering the above submissions, I find that no fault can be found in the stay granted earlier by this Court. In fact, the accused is expected to adduce evidence in rebuttal to discharge the burden. Hence, considering the facts and circumstances of the case since the blank cheque was issued according to the accused an opportunity must be given to him in the principles of natural justice.

In this light, I find that the dispute pertains to only protraction of the trial and hence, the application is allowed and the impugned order is hereby set aside. It is directed that the accused applicant shall be given an opportunity to adduce the opinion of the handwriting expert at his own expense without wasting ay further time.

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206. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 145
Affidavit – Offence under Section 138 of the Act – Complainant submitted affidavit in support of his complaint which contained entire factual position – Held, proper compliance of Section 200 Cr.P.C. in light of the provision of Section 145 of the Act – Registration of complaint on basis of affidavit is legal – Petition dismissed.

Dinesh Vaishnav (Bairagi) v. Kishor Kumar Gupta
Judgment dated 06.01.2012, passed by the High Court of M.P. in M.Cr.C. No. 2234 of 2011, reported in ILR (2012) M.P. 654

Held :

The Hon'ble Apex Court in the case of ***Mandvi Co-operative Bank Limited v. Nimesh B. Thakore, [2010 (2) MPHT 397 (SC)],*** held that the evidence given on affidavit is in the nature of examination-in-chief, so accused can only cross examine the person concerned as to facts stated in the affidavit. It is also held that the evidence given on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case if affidavit of the complainant contains statement, which is not admissible in evidence, then it is always open to the accused to point out the same to the Court and the Court would surely deal with such objection. In the light of the ratio laid down by the Hon'ble Apex Court in the matter Mandvi Co-operative Bank Limited (supra), the observations made by this Court in the case of ***Banshilal v. Abdul Munnar, 2010 (1) MPHT 40***, are not applicable in the present case. Submission of the evidence by the complainant and his witnesses with the help of their affidavits is a sufficient compliance of the provisions of section 200 and 202 of the Code, 1973.

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207. PREVENTION OF CORRUPTION ACT, 1988 – Sections 19 (1) and 22
CRIMINAL PROCEDURE CODE, 1973 – Sections 190 and 197
CVC SANCTION FOR PROSECUTION GUIDELINES, 2005

(i) Access to justice is hallmark of Indian constitutional scheme – Private citizen's right to file complaint against public servant and to obtain sanction for prosecuting public servant flows from rule of law – Therefore, freedom of a private citizen to proceed against a corrupt public servant cannot be restricted.

(ii) Sanction not necessary when accused ceased to be a public servant in one capacity but continues to be so in other capacity – Similarly, sanction is not required if alleged corrupt act relates to office which has since been demitted by the public servant.

(iii) Decision to grant or refuse sanction is not a quasi-judicial function but an administrative one – CVC Sanction for Prosecution Guidelines, 2005 correctly sums up law on the subject and must strictly be followed by the authorities concerned – Sanctioning authority is to decide whether material collected against public servant is *prima facie* sufficient to proceed against him for the offence alleged – In this process opportunity of hearing is not required to be given to the affected person.
Time limit of three months for grant of sanction for prosecution upon sanction application by private citizen must be strictly adhered to, however, additional one month time may be allowed – Finally, such private citizen must be informed of the decision on sanction application so as to enable it to avail appropriate remedy, if not satisfied with decision.

(iv) Concept as evolved through interpretative process warrants that there must be definite time frame for taking decision for prosecution.

(v) Meaning of 'cognizance', its general scope of consideration by the Courts and also in comparison to special provisions of Section 19 of the Prevention of Corruption Act, 1988 explained.

Subramanian Swamy v. Manmohan Singh and another

Judgment dated 31.01.2012 passed by the Supreme Court in Civil Appeal No. 1193 of 2012, reported in (2012) 3 SCC 64

Held:

Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision.

Therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.

Time and again this Court has expressed its dismay and shock at the ever growing tentacles of corruption in our society but even then situations have not improved much.

The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law.

There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (CrPC) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Similarly, the Special Judge can take cognizance on the basis of such private complaint. Therefore, the argument of the learned Attorney General that the appellant cannot file a complaint for prosecuting respondent No. 2 merits rejection. A similar argument was negatived by the Constitution Bench in ***A.R. Antulay v. R.S. Nayak, (1984) 2 SCC 500.***

It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. The scheme of the Code of Criminal Procedure envisages two parallel and independent agencies for taking criminal offences to court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. While Section 190 of the Code of Criminal Procedure permits anyone to approach the Magistrate with a complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint. But where an eligibility criterion for a complainant is contemplated specific provisions have been made such as to be found in Sections 195 to 199 of the CrPC. These specific provisions clearly indicate that in the absence of any such statutory provision, a locus standi of a complainant is a concept foreign to criminal jurisprudence. In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision.

This general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force is not merely an offence committed relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait- jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. To hold that such an exception exists that a private complaint for offences of corruption committed by public servant is not maintainable, the court would require an unambiguous statutory provision and a tangled web of argument for drawing a far fetched implication, cannot be a substitute for an express statutory provision.

The Constitution Bench then considered whether the Special Judge can take cognizance only on the basis of a police report and answered the same in negative.

Once Section 5-A is out of the way in the matter of taking cognizance of offences committed by public servants by a Special Judge, the power of the Special Judge to take cognizance of such offences conferred by Section 8(1) with only one limitation, in any one of the known methods of taking cognizance of offences by courts of original jurisdiction remains undented. One such statutorily recognised well-known method of taking cognizance of offences by a court competent to take cognizance is upon receiving a complaint of facts which constitutes the offence. And Section 8(1) says that the Special Judge has the power to take cognizance of offences enumerated in Section 6(1)(a) and (b) and the only mode of taking cognizance excluded by the provision is upon commitment. It therefore, follows that the Special Judge can take cognizance of offences committed by public servants upon receiving a complaint of facts constituting such offences.

(ii) The question whether sanction for prosecution of respondent No. 2 for the offences allegedly committed by him under the 1988 Act is required even after he resigned from the Council of Ministers, though he continues to be a Member of Parliament, need not detain us because the same has already been answered by the Constitution Bench in ***R.S. Nayak*** (supra).

Same view has been taken in ***Balakrishnan Ravi Menon v. Union of India, (2007) 1 SCC 45*** and it was observed that Clauses (a) and (b) of sub-section (1) specifically provide that in case of a person who is employed and is not removable from his office by the Central Government or the State Government, as the

case may be, sanction to prosecute is required to be obtained either from the Central Government or the State Government. The emphasis is on the words "who is employed" in connection with the affairs of the Union or the State Government. If he is not employed then Section 19 nowhere provides for obtaining such sanction. Further, under sub-section (2), the question of obtaining sanction is relatable to the time of holding the office when the offence was alleged to have been committed. In case where the person is not holding the said office as he might have retired, superannuated, be discharged or dismissed then the question of removing would not arise.

The same view was reiterated in ***Parkash Singh Badal v. State of Punjab, (2007) 1 SCC 1*** and the argument that even though some of the accused persons had ceased to be Ministers, they continued to be the Members of the Legislative Assembly and one of them was a Member of Parliament and as such cognizance could not be taken against them without prior sanction, was rejected.

(iii) Grant or refusal of sanction is not a quasi judicial function and the person for whose prosecution the sanction is sought is not required to be heard by the Competent Authority before it takes a decision in the matter. What is required to be seen by the Competent Authority is whether the facts placed before it which, in a given case, may include the material collected by the complainant or the investigating agency prima facie disclose commission of an offence by a public servant. If the Competent Authority is satisfied that the material placed before it is sufficient for prosecution of the public servant, then it is required to grant sanction. If the satisfaction of the Competent Authority is otherwise, then it can refuse sanction. In either case, the decision taken on the complaint made by a citizen is required to be communicated to him and if he feels aggrieved by such decision, then he can avail appropriate legal remedy.

After examining various facets of the matter in detail, the three Judge Bench in its final order in ***Vineet Narain v. Union of India, (1998) 1 SCC 226*** observed:

> "These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinising the conduct of every holder of a public office. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.

> The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to underdeveloped countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant. Increasing corruption has led to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not unknown in other countries: ***R. v. Secy. of State for Foreign and Commonwealth Affairs, ex p World Development Movwment Ltd., (1995) 1 All ER 611***."

In paragraph 58 of the judgment in ***Vineet Narain, (1998) 1 SCC 226,*** the Court gave several directions in relation to the CBI, the CVC and the Enforcement Directorate. In para 58 (I)(15), the Court gave the following direction:

> "Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office."

The CVC, after taking note of the judgment of the Punjab and Haryana High Court in ***Jagjit Singh v. State of Punjab (1996) CriLJ 2962 (P&H), State of Bihar v. P.P. Sharma, 1992 Supp. (1) SCC 222, Supt. of Police (CBI) v. Deepak Chowdhary, (1995) 6 SCC 225,*** framed guidelines which were circulated vide office order No. 31/5/05 dated 12.5.2005. The relevant clauses of the guidelines are extracted below:

> "2(i) Grant of sanction is an administrative act. The purpose is to protect the public servant from harassment by frivolous or vexatious prosecution and not to shield the corrupt. The question of giving opportunity to the public servant at that stage does not arise. The sanctioning authority has only to see whether the facts would prima-facie constitutes the offence.
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> (ii) The competent authority cannot embark upon an inquiry to judge the truth of the allegations on the basis of representation which may be filed by the accused person before the Sanctioning Authority, by asking the I.O. to offer his comments or to further investigate the matter in the light of representation made by the accused person or by otherwise holding a parallel investigation/enquiry by calling for the record/report of his department.

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(vii) However, if in any case, the Sanctioning Authority after consideration of the entire material placed before it, entertains any doubt on any point the competent authority may specify the doubt with sufficient particulars and may request the Authority who has sought sanction to clear the doubt. But that would be only to clear the doubt in order that the authority may apply its mind proper, and not for the purpose of considering the representations of the accused which may be filed while the matter is pending sanction.

(viii) If the Sanctioning Authority seeks the comments of the IO while the matter is pending before it for sanction, it will almost be impossible for the Sanctioning Authority to adhere to the time limit allowed by the Supreme Court in *Vineet Narain, (1998) 1 SCC 226.*"

The aforementioned guidelines are in conformity with the law laid down by this Court that while considering the issue regarding grant or refusal of sanction, the only thing which the Competent Authority is required to see is whether the material placed by the complainant or the investigating agency prima facie discloses commission of an offence. The Competent Authority cannot undertake a detailed inquiry to decide whether or not the allegations made against the public servant are true.

(iv) If we look at Section 19 of the P.C. Act which bars a Court from taking cognizance of cases of corruption against a public servant under Sections 7, 10, 11, 13 and 15 of the Act, unless the Central or the State Government, as the case may be, has accorded sanction, virtually imposes fetters on private citizens and also on prosecutors from approaching Court against corrupt public servants. These protections are not available to other citizens. Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption.

Therefore, in every case where an application is made to an appropriate authority for grant of prosecution in connection with an offence under P.C. Act it is the bounden duty of such authority to apply its mind urgently to the situation and decide the issue without being influenced by any extraneous consideration. In doing so, the authority must make a conscious effort to ensure the rule of law and cause of justice is advanced. In considering the question of granting or refusing such sanction, the authority is answerable to law and law alone.

Therefore, the requirement to take the decision with a reasonable dispatch is of the essence in such a situation. Delay in granting sanction proposal thwarts a very valid social purpose, namely, the purpose of a speedy trial with the requirement to bring the culprit to book. Therefore, in this case the right of the sanctioning authority, while either sanctioning or refusing to grant sanction, is coupled with a duty.

The sanctioning authority must bear in mind that what is at stake is the public confidence in the maintenance of rule of law which is fundamental in the administration of justice. Delay in granting such sanction has spoilt many valid prosecution and is adversely viewed in public mind that in the name of considering a prayer for sanction, a protection is given to a corrupt public official as a *quid pro quo* for services rendered by the public official in the past or may be in the future and the sanctioning authority and the corrupt officials were or are partners in the same misdeeds. the general demoralizing effect of such a popular perception is profound and pernicious.

By causing delay in considering the request for sanction, the sanctioning authority stultifies judicial scrutiny and determination of the allegations against corrupt official and thus the legitimacy of the judicial institutions is eroded. It, thus, deprives a citizen of his legitimate and fundamental right to get justice by setting the criminal law in motion and thereby frustrates his right to access judicial remedy which is a constitutionally protected right. In this connection, if we look at Section 19 of the P.C. Act, we find that no time limit is mentioned therein. This has virtually armed the sanctioning authority with unbridled power which has often resulted in protecting the guilty and perpetuating criminality and injustice in society.

The Parliament should consider the Constitutional imperative of Article 14 enshrining the rule of law wherein 'due process of law' has been read into by introducing a time limit in Section 19 of the P.C. Act 1988 for its working in a reasonable manner. The Parliament may, consider the following guidelines:

(a) All proposals for sanction placed before any Sanctioning Authority, empowered to grant sanction for the prosecution of a public servant under section 19 of the P.C. Act must be decided within a period of three months of the receipt of the proposal by the concerned authority.

(b) Where consultation is required with the Attorney General or the Solicitor General or the Advocate General of the State, as the case may be, and the same is not possible within the three months mentioned in clause (a) above, an extension of one month period may be allowed, but the request for consultation is to be sent in writing within the three months mentioned in (a) above. A copy of the said request will be sent to the prosecuting agency or the private complainant to intimate them about the extension of the time limit.

(c) At the end of the extended period of time limit, if no decision is taken, sanction will be deemed to have been granted to the proposal for prosecution, and the prosecuting agency or the private complainant will proceed to file the chargesheet/ complaint in the court to commence prosecution within 15 days of the expiry of the aforementioned time limit.

(v) Though, the term 'cognizance' has not been defined either in the 1988 Act or the CrPC, the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially". In ***R.R. Chari v. State of U.P., AIR 1957 SC 207*** the three Judge Bench approved the following observations made by the Calcutta High Court in ***Supt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee, AIR 1950 Cal 437:***

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

In ***State of W.B. v. Mohd. Khalid, (1995) 1 SCC 684,*** the Court referred to Section 190 of the CrPC and observed:

"In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a

Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

In *State of Karnataka v. Pastor P. Raju, (2006) 6 SCC 728,* this Court referred to the provisions of Chapter XIV and Sections 190 and 196 (1-A) of the CrPC and observed:

"There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 CrPC. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) CrPC and no illegality of any kind would be committed."

The Court then referred to some of the precedents including the judgment in Mohd. Khalid's case and observed:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

In *K. Kalimuthu v. State, (2005) 4 SCC 512* the only question considered by this Court was whether in the absence of requisite sanction under Section 197 CrPC, the Special Judge for CBI cases, Chennai did not have the jurisdiction to take cognizance of the alleged offences. The High Court had taken the view that Section 197 was not applicable to the appellant's case. Affirming the view taken by the High Court, this Court observed:

"The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are

concerned, the effect of Section 197, dealing with the question of prejudice has also to be noted."

In *State v. Raj Kumar Jain, (1998) 6 SCC 551* also it was observed that CBI was not required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173 (2) Cr.P.C.

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208. SPECIFIC RELIEF ACT, 1963 – Section 16 (c)
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

(i) Suit for specific performance of contract – Absence of necessary averments – Effect of – In the absence of the averment that plaintiff is always ready and willing to perform his part of contract, the decree of specific performance cannot be granted.

(ii) Amendment of pleading after commencement of trial – Effect of proviso to Rule 17 of Order 6 CPC – Duly diligent efforts are required for a party seeking amendment of pleading after commencement of trial – A party requesting relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with.

(iii) Amendment of pleading – Typographical error – Meaning of – It is a mistake made in the printed/typed material during a printing/ typing process – It includes error due to mechanical failure or slips of hand or finger but usually excludes error of ignorance – Omission of mandatory requirement running into 3-4 sentences cannot be typographical error.

J. Samuel and others v. Gattu Mahesh and others
Judgment dated 16.01.2012 passed by the Supreme Court in Civil Appeal No. 561 of 2012, reported in (2012) 2 SCC 300

Held:

In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

It is clear that in a suit for specific performance of a contract, unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the above said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the Court.

As stated earlier, in the present case, the amendment application itself was filed only on 24.09.2010 after the arguments were completed and the matter was posted for judgment on 04.10.2010. On proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the Court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, proviso restricts that power once the trial has commenced. Unless the Court satisfies itself that there is a reasonable cause for allowing the amendment normally the court has to reject such a request.

An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff has also led in evidence, nothing precluded the court from entertaining the said application with which we are unable to accept in the light of Section 16(c) of the Specific Relief Act as well as proviso to Order VI Rule 17. The only reason stated so in the form of an affidavit is omission by "type mistake". Admittedly, it is not an omission to mention a word or an arithmetical number. The omission is with reference to specific plea which is mandated in terms of Section 16(c) of the Specific Relief Act.

The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

> "...no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of duediligence, the party could not have raised the matter before the commencement of trial."

Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term

"due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip.

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209. SPECIFIC RELIEF ACT, 1963 – Section 34
CRIMINAL PROCEDURE CODE, 1973 – Sections 145 and 146
Possession of Receiver – Permanent Injunction – Possession of property taken from plaintiff and given to Supurdgidar under Section 145 of the Code – It shall be deemed that plaintiff was in possession of suit property because Supurdgidar holds possession for the person who is actually entitled to obtain the possession – Plaintiff not required to seek the relief of possession.

Gangabai v. Devi Singh & Anr.
Judgment dated 11.10.2011 passed by the High Court of M.P. in S.A. No. 368 of 1998, reported in ILR (2012) M.P. 490

Held :

On going through the admission of the defendant, this Court finds that before filing of the suit, the suit property was being possessed by plaintiff for last several years and the defendant tried to take possession of the suit property which culminated into the proceedings under Section 145, Criminal Procedure Code. The land in dispute was attached and its possession was taken from the plaintiff and was given to the supurdgidar. What ultimately happened ins 145, Criminal Procedure Code proceedings there is no order on record. But looking to the admission of the defendant that suit property was being possessed by

plaintiff for last several years before filing of the suit, and further admitting that in the proceedings under section 145, Criminal Procedure Code the possession of the suit property was taken from the plaintiff and was given to the supurdgidar, according to me in the eye of law it shall be deemed that the plaintiff was in possession of the suit property because a supurdgidar holds the possession for the person who is actually entitled to obtain the possession and, therefore, the plaintiff was not required to seek the relief of possession. In this context I may profitably place reliance on the decision of Supreme Court in ***Deo Kuer and another v. Sheo Prasad Singh and others, 1966 AIR SC 359*** wherein it has been categorically held by the Apex Court that if the defendant is not in possession of property and is not able to deliver possession as for example when the property is attached by a criminal Court, in the proceedings u/s 145, Criminal Procedure Code, it was not necessary for plaintiff to ask for relief of possession in a suit for declaration. By placing reliance on this decision for all practical purpose it is hereby held that plaintiff was possessing the suit property though it was in the supurdagi of e supurdgidar who was only a ***custodia legis*** and was holding the possession of the suit property for the plaintiff.

Unless and until, the actual possession of the land in dispute had taken away from the agency of the Court and the defendant is placed in actual possession of the same by the agency of the Court, he cannot resist the right of plaintiff to retain the possession of the suit property. The order of attachment under section 146, Criminal Procedure Code is always subject to the decision of the civil Court. In the instant case, the possession of plaintiff has been found by the First Appellate Court and, therefore, rightly a decree of injunction has been granted in his favour.

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210. STAMP ACT, 1899 – Sections 33 and 35

Impounding of insufficiently stamped instrument – When an insufficiently stamped instrument is tendered in the Court, the Court is duty bound to impound the same – Court has the power to admit the document in question on payment of duty with which the instrument is chargeable or amount required to make up the deficiency together with penalty – When the instrument is impounded but has not been admitted in evidence, on payment of penalty and duty, the Court has to send the document to the Collector and the Collector is required to deal with the document in the manner prescribed under Section 40.

Bhagwati Prasad v. Smt. Mathura Devi

Judgment dated 30.01.2012 passed by the High Court of M.P. in W.P. No. 14816 of 2011, reported in ILR (2012) M.P. 726

Held :

Section 33 of the Act provides that when an insufficient stamped document is filed in the Court, the Court is duty bound to impound the same. Section 35 of

the Act provides that no instrument chargeable with duty shall be admitted in evidence for any purpose unless such instrument is duly stamped. Clause (a) of the proviso to Section 35 provides that such an instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion. Section 38 prescribes the procedure after impounding a document. Section 38(1) provides that when the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admit such instrument in evidence upon payment of a penalty as provided by Section 35, or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf. Sub-section (2) of Section 38 provides that in every other case, the person so impounding an instrument shall send it in original to the Collector. Section 40 of the Act deals with power of the Collector to stamp the instrument which have been impounded. Section 40 (1)(b) provides that if the Collector is of the opinion that instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.

Thus, the scheme of the Act is abundantly clear. Where the instrument is chargeable to duty is tendered in the Court, the Court is duty bound to impound the same, if it is of the opinion that the document is not duly stamped. The Court under Section 35 of the Act has the power to admit the document in question on payment of duty with which the instrument is chargeable or amount required to make up such deficiency together with penalty, limits of which are prescribed in the section. There is no other course open to the Court, once it is found that instrument tendered in evidence is not duly stamped. However, if the instrument has been impounded under section 33 of the Act, but has not been admitted in evidence, on payment of penalty and duty the Court has to send the document to the Collector under section 38(2) of the Act and the Collector is required to deal with the document in the manner prescribed under section 40 of the Act.

The Full Bench of this Court in ***Nathuram Arjun v. Siyasharan Harprasad, AIR 1970 AIR 1970 MP 79*** has held that the instrument can be send to the Collector under section 38(2) of the Act only when it is impounded under section 33 of the Act, but has not been admitted in evidence on payment of penalty and or duty with the aid of section 35 of the Act.

The Supreme Court in ***Petiti Subba Rao v. Anumala S. Narendra, (2002) 10 SCC 427,*** has held that where the party fails to pay the penalty suggested by the Court the document impounded has to be sent to the Collector for the purpose of taking further steps in respect of document as provided in section 40 of the Act.

In the backdrop of aforesaid legal position if the impugned order is seen, the document is yet to be tendered in evidence. If the petitioners tender the document in evidence, the trial Court shall deal with the document in the light of the aforesaid well settled legal position and in view of the law laid down by Supreme Court in Petiti Subba Rao's case as well as by the Full Bench of this Court in ***Nathuram Arjun's*** case.

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211. TRANSFER OF PROPERTY ACT, 1881 – Section 52

Doctrine of lis pendens – Applicability of – Since the sale was executed at a time when the second appeal was not filed but which came to be filed afterwards within the period of limitation, such a sale, unlike the period of limitation for second appeal is over, will have to be held as covered under Section 52 of the Transfer of Property Act.

Jagan Singh (dead) through LRs. v. Dhanwanti and another
Judgment dated 19.01.2012 passed by the Supreme Court in Civil Appeal No. 2467 of 2005, reported in (2012) 2 SCC 628

Held:

The broad principle underlying section 52 of the T.P. Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in ***Krishanaji Pandharinath v. Anusayabai, AIR 1959 Bom 475.*** In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15.07.1952 under order IX, Rule 2, of Code of Civil Procedure 1908, for non-payment of process fee. The husband sold the house immediately on 17.07.1952. The respondent applied for restoration on 29.07.1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:-

> ".....In section 52 of the Transfer of Property Act, as it stood before it was amended by Act XX of 1929, the expression "active prosecution of any suit or proceeding" was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis' continues so long as a final decree or order has not been obtained and complete

satisfaction there of has not been rendered. At page 228 in Sir Dinshah Mulla's "Transfer of Property Act", 4th Edition, after referring to several authorities, the law is stated thus:

> "Even after the dismissal of a suit a purchaser is subject to 'lis pendens', if an appeal is afterwards filed."

If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order IX Rule 2, of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue.

It is relevant to note that even when Section 52 of T.P. Act was not so amended, a division bench of Allahabad High Court had following to say in ***Moti Chand v. British India Corporation, AIR 1932 Allahabad 210***

> The provision of law which has been relied upon by the appellants is contained in S.52, T.P. Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate Court are merely continuation of those in the suit: (see the case of ***Gobind Chunder Roy v. Guru Chur Kurmokar ILR (1988) 15 Cal. 194.***)

If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath (supra) to cover the present situation under the principle of lis-pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis-pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 26TH DECEMBER, 2011 OF MINISTRY OF WOMEN AND CHILD DEVELOPMENT REGARDING AMENDMENT IN THE JUVENILE JUSTICE (CARE & PROTECTION OF CHILDERN) RULES, 2007

[Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 27.12.2011 page 2]

G.S.R. 903 (E) – In exercise of the powers conferred by the proviso to sub-section (1) of Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000), the Central Government, hereby makes the following rules to amend the Juvenile Justice (Care and Protection of Children) Rules, 2007, namely : –

1. **Short title and commencement.** – (1) These rules may be called the Juvenile Justice (Care and Protection of Children) Amendment Rules, 2011.

   (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the principal rules), in rule 45, for clause (p), the following clause shall be substituted, namely :–

   "(p) refer such children who are addicted to alcohol or other drugs which lead to behavioural changes in a person, to an Integrated Rehabilitation Center for Addicts or similar centers maintained by the State Government for mentally ill persons (including the persons addicted to any narcotic drug or psychotropic substance) for the period required for in-patient treatment of such juvenile or child."

3. In rule 46 of the principal rules, for sub-rule (10), the following sub-rule shall be substituted, namely: –

   "(10) No Juvenile or child shall be administered medication for psychiatric problems without a psychological evaluation and diagnosis by a trained medical health professional."

4. In rule 61 of the principal rules, –

   (a) In sub-rule (1), for the words "mental health problems requiring prolonged medical treatment, or is found addicted to a narcotic drug or psychotropic substance", the words "psychiatric problems requiring prolonged medical treatment, or is found addicted to alcohol or other drugs which lead to behavioural changes in a person" shall be substituted;

   (b) in sub-rule (2), for the words "mental health" the words "psychiatric", shall be substituted;

   (c) sub-rule (3) shall be omitted;

   (d) in sub-rule (4), the words "and infection" shall be omitted.

NOTIFICATION DATED 21ST JUNE, 2011 OF MINISTRY OF FINANCE (DEPARTMENT OF REVENUE) REGARDING AMENDMENT IN THE NOTIFICATION NO. S.O. 1055 (E) DATED 19.10.2001 IN RESPECT OF NDPS ACT

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1192, dated 21st June, 2011.

No. S.O. 1430(E), dated June 21, 2011. – In exercise of the powers conferred by clauses (vii-a) and (xxiii-a) of Section 2 of **the Narcotic Drugs and Psychotropic Substances Act, 1985** (61 of 1985), the Central Government hereby makes the following amendment to the notification of the Government of India, Ministry of Finance, Department of Revenue, published in the Gazette of India, Extraordinary, part II, Section 3, sub-section (ii), vide number S.O. 1055(E), dated the 19th October, 2001, namely -

In the said notification, in the Table, after Serial Number 238 and the entries relating thereto, the following serial numbers and the entries shall be inserted, namely -

Sl. No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name)	Other non-proprietary name	Chemical Name	Small Quantity (in-gm)	Commercial Quantity (in gm/kg)
1	2	3	4	5	6
"238-A	Dilhydroetorhine		7, 8 - dihydro - 7a [l-(R)-hydroxy-l-methylbuty l]-6, 14-endoethanotetrahydrooripavine	0.01	0.5 gm
238-B	Oripavine			2	100 gm
238-C	Remifentanil		1-(2-methoxy carbonylethyl)-4-(phenylpropionylamino) piperidine-4-carboxylic acid methyl ester	0.004	0.2 gm
238-D	Amineptine		(7-[10, 11-dihydro-5H-dibenzo [a, d] cycloepten-5-yl] amino] heptanoc acid	20	1 kg
238-E	Ketamine		2-(2-chlorphenyl) 2- methylamino) Cyclohexanone	19	500 gm.".

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE HIGH COURT OF MADHYA PRADESH (CONDITIONS OF PRACTICE) RULES, 2012

Memo No. C-15 dated 4/14 May, 2012. – In exercise of the powers conferred by Section 34 (1) of the **Advocates Act, 1961 (Act No. 25 of 1961),** the High Court of Madhya Pradesh hereby makes following Rules laying down the conditions subject to which an advocate shall be permitted to practice in the High Court and the Courts subordinate thereto.

ANNEXURE - A

Preamble

1. **Nomenclature.** – These rules shall be called "The High Court of Madhya Pradesh (Conditions of Practice) Rules, 2012".

2. **Commencement.** – "These Rules shall come into force on the date on which they are published in the Official Gazette.

3. **Definitions.**– In these rules unless there is anything repugnant in the subject or context -

   (1) "Advocate" shall include a partnership or a firm of advocates.

   (2) Other words and phrases shall respectively carry the same meaning as assigned to them under the Advocates Act, 1961 the Code of Civil Procedure, 1908 or the High Court of Madhya Pradesh Rules, 2008.

4. **Vakalatnama or Memorandum of Appearance.**– Save as otherwise provided for in any law for the time being in force, no advocate shall be entitled to appear, act or plead for any person in any Court in a -

   (1) Civil case, unless the advocate files an appointment in writing in either Form I-A or I-B appended to these Rules, called Vakalatnama, signed by such person, his recognized agent or by some other person, duly authorized by or under a power of attorney to make such appointment and signed by the advocate, signifying acceptance thereof, except with the leave of the Court granted on an application made for the purpose along with a memorandum or appearance, or

   (2) Criminal case, unless, the advocate files a Vakalatnama or memorandum of appearance in the form prescribed by the High Court (Form No. 2 of the Appendix to the High Court of Madhya Pradesh Rules, 2008) :

Provided that notwithstanding anything in clause (1) above, an advocate appointed for representing the Central Government or the Government of Madhya Pradesh may appear, act and plead on the strength of a memorandum of appearance in form no 2 of the High Court of Madhya Pradesh Rules, 2008, signed by himself :

Provided that where an advocate has already filed a Vakalatnama in a case and a party or the advocate engages another advocate to appear in that case merely for the purposes of pleading it shall be sufficient for such advocate to file a memorandum of appearance. However, such advocate may make a prayer of adjournment even without filing a memorandum of appearance:

Provided further that an advocate can act, appear and plead on behalf of a party in all such matters, as are mentioned in clause (3) of Rule 4 of Order III of the Code of Civil Procedure, 1908, (Madhya Pradesh amendment dated 18.10.1968) provided that he had filed vakalatnama for such party in the proceeding out of which such matter has arisen. However, in such a case, he shall file a memo of appearance in Form No. 1 of the Appendix to the High Court of Madhya Pradesh Rules, 2008, expressing that he had filed vakalatnama at any stage of the case :

Provided further that nothing herein contained shall apply to an advocate who has been requested by the court to assist the court as amicus curiae in any case or proceeding :

Provided further that where an advocate has been appointed by the High Court Legal Services Committee or District Legal Services Authority to defend an accused person in a criminal case and the accused desires to replace him with an advocate of his own choice, he shall file a vakalatnama duly executed in favour of such advocate or a memorandum of appearance in lieu of Vakalatnama, if so permitted by the Court.

Explanation. – (1) A separate appointment or a memorandum of appearance shall be filed in each of the several connected proceedings, notwithstanding that the same advocate is retained for the party in all the connected proceedings.

(2) In this rule terms "Civil Case and Criminal Case" for the purpose of the High Court, shall respectively have the same meaning as has been assigned to them in Rule 4 (2) and (3) of the High Court of Madhya Pradesh Rules, 2008.

5. Outside Advocate not to Appear without a Local Advocate. – An Advocate who is not ordinarily practicing in a particular Court shall not appear, act or plead in such Court unless he filed a Vakalatnama or a memo of appearance as the case may be, along with a local advocate.

6. Joint Vakalatnama or Memorandum of Appearance.– Where in a case, a party is represented by more than one advocate; they may file a joint vakalatnama or memo of appearance, as the case may be.

7. Address of Advocate on Vakalatnama shall be the Address for the Purpose of Service. – The address, furnished by an advocate at the time of acceptance of his appointment in accordance with Rule 5 (3) of Chapter VIII of the High Court of Madhya Pradesh Rules, 2008, shall be the address for service within the meaning of Rule 5 of order III of the Code of Civil Procedure, 1908.

8. Extent of VAkalatnama and Memorandum of Appearance in Civil Cases.- (1) The vakalatnama of an advocate in civil cases, unless otherwise restricted, shall be deemed to be in force to the extent provided in that behalf by clause (3) of Rule 4 of Order III of the Code of Civil Procedure, 1908, (Madhya Pradesh amendment dated 18.10.1968).

(2) In civil cases, the memorandum of appearance of an advocate shall be deemed to be in force -

(a) under Rule 8 of Chapter VIII of the High Court of Madhya Pradesh Rules, 2008, read with clause (3) of Rule 4 of Order III of the Code of Civil Procedure, 1908, (Madhya Pradesh amendment dated 18.10.1968); till the proceeding in which it is filed, is over and

(b) under Order III Rule 4(5) of the Code of Civil Procedure, 1908, till the event for which the advocate was authorized, is over.

(3) Without prejudice to the generality of the foregoing sub-rule (1) and (2) above, a Vakalatnama filed in a writ petition from which a writ appeal lies, shall continue in force till conclusion of proceedings of the writ appeal unless the Vakalatnama is replaced by a fresh Vakalatnama in favour of another advocate.

9. Extent of Vakalatnama in Criminal Cases. – The Vakalatnama of an advocate, in Criminal Cases, unless otherwise restricted, shall be deemed to be in force in following proceedings as well-

(1) every inquiry, trial or proceeding before a criminal Court whether instituted on a police report or otherwise;

(2) an application for bail or reduction, enhancement of amount or cancellation of bail in the case in the same Court where such Vakalatnama or memorandum of appearance was filed;

(3) an application for transfer of the case from one Court to another;

(4) an application for leave to appeal against an order of acquittal in case;

(5) an appeal or petition for revision against any order or sentence passed in a case;

(6) A reference arising out of a case;

(7) An application to correct a clerical or arithmetical error in judgment or final order;

(8) An application for making concurrent, the sentences awarded in the case or in an appeal, reference or revision arising out of the case;

(9) an application relating to or incidental to or arising in or out of any appeal, reference or revision arising in or out of the case;

(10) an application or act for obtaining copies of documents or for the return of articles or documents produced or filed in the case or in any of the proceedings;

(11) an application or act for withdrawal, refund or payment;

(12) an application for the custody of or return, restitution or restoration of the property forfeited or confiscated in the case or an appeal, reference or revision arising from the case as per the final order;

(13) an application for expunging remarks or observations on the record of or made in the judgment in the case or any appeal, reference, revision or review arising out of the case; and

(14) an application or proceeding for sanctioning prosecution under Chapter XIV of the Code of Criminal Procedure, 1973, or any appeal or revision arising from and out of any order passed in such an application or proceeding :

Provided that where the venue of the case or the proceedings is shifted from one Court to another (subordinate or otherwise) except by way of transfer within the same sessions division, the advocate filing the Vakalatnama referred to in sub-rules (1) and (2) above in the former court shall not be bound to appear, act or plead in the later court unless he files or has already filed a memorandum signed by him in the later court that he has instructions from his client to appear, act and plead in that Court.

10. Cessation of Vakalatnama or Memo of Appearance. – The Vakalatnama or memo of appearance, as the case may be, of an advocate, unless otherwise restricted, shall be deemed to be in force until –

(1) determined with the leave of the Court, on an application signed by the party, or the advocate, as the case may be, and filed in Court or

(2) the party or the advocate dies or

(3) the advocate is suspended or disbarred or

(4) all proceedings in that civil or criminal case have ended so far as regards the party.

11. Advocates not to Appear, Act or Plead in Certain Circumstances.– (1) An advocate who has, at any time, advised in connection with subject matter of a case, civil or criminal; or has drawn pleadings, or acted for a party shall not act, appear or plead for the opposite party, in that case :

Provided that on receiving such information, the concerned advocate may withdraw from the case, failing which, on proof of such conduct, the Court may not allow the advocate to appear in the case.

(2) An advocate who is not supposed to appear before a Judge for any reason, shall not -

(a) file a Vakalatnama or memorandum of appearance or

(b) appear, act or plead with or without a Vakalatnama,

- in a case in which an advocate is already appearing for the party and

(i) which is known to be likely to be listed,

(ii) hearing therein is about to commence or

(iii) has already commenced before such Judge.

12. Frivolous, vexatious or motivated application or prayer for refusal/ transfer. – No advocate shall make a frivolous, vexatious or motivated application or prayer for -

(1) recusalmade to a bench on judicial side or

(2) transfer of a case or a class of cases from a bench, to the Chief Justice on administrative side.

13. Acceptance of Appointment by a Firm or a Partnership of Advocates.- (1) The acceptance of a Vakalatnama or memo of appearance, as the case may be, on behalf of a firm or partnership of advocates shall be indicated by a partner affixing his own signature and specifying that it is in his capacity as a partner of that firm or partnership of advocates.

(2) No such firm or partnership shall be entitled to appear, act or plead in any Court unless at least one of the partners thereof is entitled to appear; act or plead in such Court in conformity with Rule 5 above.

(3) The Vakalatnama of a firm shall not be filed in any court unless accompanied by a separate sheet certified by the partner of the firm who has filed the Vakalatnama and containing the names and such other particulars as are required in a Vakalatnama in respect of all partners of the firm.

(4) In every case where a partner of a firm of advocates signs any document or writing on behalf of the firm he shall do so in the name of the partnership and shall authenticate the same by affixing his own signatures as partner.

(5) Neither the firm of advocates nor any partner thereof shall advise a party or appear, act or plead on behalf of a party in any matter or proceeding where the opposite party is represented by any other partner of the firm or by the firm itself.

14. Advocate not to file Vakalatnama or Memorandum of Appearance in a Case in which an Advocate is already on Record. – (1) No advocate shall be permitted to file a Vakalatnama or memorandum of appearance in any proceeding in which another advocate is already on record of the case for the same party save with the consent of the former advocate already on record of the case or with the leave of the Court unless the former advocate has ceased to practice or has by reason of infirmity of mind or body or otherwise become unable to continue to act.

(2) The former advocate on record of the case may signify his consent for allowing the latter advocate to file a vakalatnama or memorandum of appearance for the same party, in the margin of the vakalatnama or memorandum of appearance.

(3) Where the former advocate refuses or neglects to accord such consent, the party or, the latter advocate may file an application, for leave of the Court concerned, to replace the former advocate and to take the vakalatnama or memorandum of appearance, as the case may be, on record.

(4) Such an application, where filed, shall be placed before the Court concerned, which may, in its discretion, allow or reject the same.

15. Disbarred or Suspended Advocate not to Act as a Recognized Agent.– No advocate who has been disbarred or suspended or whose name has been struck off the role of advocates, shall be permitted to act, as a recognized agent of any Party within the meaning of Order III of the Code of Civil Procedure, 1908.

16. Advocate Guilty of Criminal Contempt of Court not to Appear, Act or Plead in a Court. – (1) No advocate who has been found guilty of criminal contempt of the High Court of Madhya Pradesh or of any Court subordinate thereto shall appear, act, or plead in the High Court and any Court of the District where the contempt was committed -

(a) if the contempt is of a nature which is capable of being purged, unless he has purged himself of contempt,

(b) if the contempt is of a nature which is not capable of being purged, for a period of 6 months from the date on which he is convicted of the contempt.

(2) An order, holding that an advocate -

(a) is guilty of contempt of Court; or

(b) has purged himself of the contempt;

shall be placed before the Chief Justice for its circulation amongst the Judges of the State and the State Bar Council.

17. Repeal and Saving. – (1) On coming into force of these Rules, the Rules framed by the High Court of Madhya Pradesh under Section 34 (1) of the Advocates Act, 1961, and published in M.P. Rajpatra, Pt. 4 (ga), dated 23rd August, 1968, p. 69 by Nofn. No. 1546-III-I-S-57 Ch. 18 dated 28th February, 1967; shall stand repealed.

(2) Notwithstanding that these Rules have come into force and repeal under sub-rule (1) has taken effect –

(a) anything duly done or suffered; or

(b) any right, obligation or liability; accrued, imposed or incurred; or any proceedings taken or to be taken, in respect of such right, obligation or liability; under the repealed rules, before such enforcement, shall not be affected.

18. Removal of Difficulties.– If any difficulty arises in giving effect to the provisions of these Rules, the Chief Justice may, by notification, make such provisions, as may appear necessary and expedient for removing such difficulty.

APPENDIX 1 - A
FORMAT OF VAKALATNAMA

[Rule 4 (1) of the Rules framed under the Advocates Act, 1961]

In the Court of_____

Case/Proceedings No. _____

_____ Plaintiff/Appellant/Claimant/Petitioner/Applicant

Versus

_____ Defendant/Respondent/Non-applicant

I/We the *Plaintiff/Appellant/Claimant/Petitioner/Appellant or Defendant/ Respondent/Non-applicant named below do hereby appoint, engage and authorize advocate (s) named below to appear, act and plead in aforesaid case/ proceedings, which shall include applications for restoration, setting, aside of ex-parte orders, corrections, modifications, review and recall of orders passed in these proceedings, in this court or in any other Court in which the same may be tried/heard/proceeded with and also in the appellate, revisional or executing Court in respect of proceedings arising from this case/proceedings, as per agreed terms and conditions and authorize him/them to sign and file pleadings, appeals, cross objections, petitions, applications, affidavits or other documents as may be deemed necessary or proper for the prosecution/defence of the said case in all its stages and also agree to ratify and confirm acts done by him/them as if done by me/us :

In witness whereof I/we do hereunto set my/our hand to these presents, the contents of which have been duly understood by me/us, this _____ day of _____ 201 _____

Particulars (in block letters) of each Party Executing Vakalatnama

Name & Father's/ Husband's Name	Registered Address	E-Mail Address (if any)	Telephone Number (if any)	Status in the Case	Full Signature/ **Thumb Impression
(1)					
(2)					
(3)					

THEMADHYAPRADESHVISHESHNYAYALAYA ADHINIYAM,2011

[Received the assent of the Governor on 7th February, 2012 and was published in the Madhya Pradesh Gazette, Extra-ordinary, dated 10th February, 2012.]

An Act to provide for the constitution of Special Courts for the speedy trial of certain class of offences and for confiscation of the properties involved and for the matters connected therewith and incidental thereto.

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

CHAPTER-I
PRELIMINARY

1. **Short title, extent, and commencement.-** (1) This Act may be called **the Madhya Pradesh Vishesh Nyayalaya Adhiniyam, 2011.**

   (2) It shall extend to the whole of the State of Madhya Pradesh.

   (3) It shall come into force on such date as the State Government may, by notification, appoint.

2. **Definitions.-** (1) In this Act, unless the context otherwise requires,-

   (a) "Act" means the Prevention of Corruption Act, 1988 (49 of 1988);

   (b) "authorised officer" means any Serving Officer belonging to Higher Judicial Service and who is or has been Sessions Judge/Additional Sessions Judge, for the purpose of Section 14;

   (c) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974);

   (d) "declaration" in relation to an offence, means a declaration made under Section 5 in respect of such offence;

   (e) "offence" means an offence of criminal misconduct which attracts application of Section 13(1)(e) of the Act either independently or in combination with any other provision of the Act or any of the provision of Indian Penal Code, 1860 (45 of 1860);

   (f) "Special Court" means a Special Court established under Section 3;

   (2) The words and expressions used herein and not defined but defined in the Code or the Act shall have the meanings respectively assigned to them in the Code or the Act.

CHAPTER-II
ESTABLISHMENTOFSPECIALCOURTS

3. Establishment of Special Courts.- (1) The State Government shall, for the purpose of speedy trial of offence, by notification, establish as many courts as considered adequate to be called Special Courts.

(2) A Special Court shall be presided over by a Judge to be nominated by the State Government with the concurrence of the High Court.

(3) No person shall be qualified for nomination as a Judge of a Special Court unless he is a member of Higher Judicial Service and is or has been a Sessions Judge/ Additional Sessions Judge in the State.

4. Cognizance of cases by Special Courts. – A Special Court shall take cognizance of and try such cases as are instituted before it or transferred to it under Section 10.

5. Declaration of cases to be dealt with under this Act. – (1) Where the State Government, on the basis of prima-facie evidence, have reasons to believe that appropriate grounds exist about the commission of an offence alleged to have been committed by a person, who has held or is holding public office and is or has been public servant within the meaning of Section 2(c) of the Act in the State of Madhya Pradesh, the State Government shall make a declaration to that effect in every case in which it is of the aforesaid belief.

(2) Such declaration shall not be called in question in any Court.

6. Effect of declaration. – (1) On such declaration being made, notwithstanding anything in the Code or any other law for the time being in force, any prosecution in respect of the offence shall be instituted only in a Special Court.

(2) Where any declaration made under Section 5 relates to an offence in respect of which a prosecution has already been instituted and the proceedings in relation thereto are pending in a Court other than Special Court under this Act, such proceedings shall, notwithstanding anything contained in any other law for the time being in force, stand transferred to Special Court for trial of the offence in accordance with this Act.

7. Jurisdiction of Special Court as to trial of offences. – A Special Court shall have jurisdiction to any person alleged to have committed the offence in respect of which a declaration has been made under Section 5, either as principal, conspirator or abettor and all of them can be jointly tried therewith at one trial in accordance with the Code.

8. Procedure and powers of Special Courts. – (1) A Special Court shall, in the trial of such cases, follow the procedure prescribed by the Code for the trial of warrant cases before a Magistrate.

(2) Save as expressly provided in this Act, the provisions of the Code and of the Act shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Special Court and for the purpose of the said provisions, the persons conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(3) A Special Court may pass, upon any person convicted by it, any sentence authorized by law for the punishment of the offence of which such person is convicted.

9. Appeal against orders of Special Courts.– (1) Notwithstanding anything in the Code, an appeal shall lie from any judgment and sentence of a Special Court to the High Court both on facts and law.

(2) Except as aforesaid, no appeal or revision shall lie in any court from any judgment, sentence or order of a Special Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment and sentence of a Special Court:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied for reasons to be recorded in writing that the appellant had sufficient cause for not preferring the appeal within the period.

10. Transfer of cases.– Notwithstanding the order provisions of this Act, it would be open to the High Court to transfer cases from one Special Court to another.

11. Special Court not bound to adjourn a trial. – (1) A Special Court shall not adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interest of justice and for reasons to be recorded in writing.

(2) The Special Court shall endeavour to dispose of the trial of the case within a period of one year from the date of its institution or transfer.

12. Presiding Judge may act on evidence recorded by his predecessor. – A Judge of a Special Court may act on the evidence recorded by his predecessor or predecessors or partly recorded by his predecessor or predecessors and party recorded by himself.

CHAPTER-III
CONFISCATIONOFPROPERTY

13. Confiscation of property.– (1) Where the State Government, on the basis of prima facie evidence, have reasons to believe that any person, who has held or is holding public office and is or has been a public servant has committed the offence, the State Government may, whether or not the Special Court has taken cognizance of the offence, authorize the Public prosecutor for making an application to the Authorized officer for confiscation under this Act of the money and other property, which the State Government believe the said person to have procured by means of the offence.

(2) An application under sub-section(1)-

(a) shall be accompanied by one or more affidavits, stating the grounds on which the belief, that the said person has committed the offence, is founded and the amount of money and estimated value of other property believed to have been procured by means of the offence; and

(b) shall also contain any information available as to the location for the time being of any such money and other property, and shall, if necessary, give other particulars considered relevant to the context.

14. Notice for confiscation. – (1) Upon receipt of an application made under Section 13, the Authorized Officer shall serve a notice upon the person in respect of whom the application is made (hereafter referred to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days to indicate the source of his income, earnings or assets, out of which or by means of which he has acquired such money or property, the evidence on which he relies and other relevant information and particulars, and to show cause as to why all or any of such money or property or both, should not be declared to have been acquired by means of the offence and be confiscated to the State Government.

(2) Where a notice under sub-section (1) to any person specified any money or property or both as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

(3) Notwithstanding anything contained in sub-section (1), the evidence, information and particulars brought on record before the Authorized Officer, by the person affected or the State Government shall be open to the rebutted in the trial before the Special Court provided that such rebuttal shall be confined to the trial for determination and adjudication of guilt of the offender by the Special Court under this Act.

15. Confiscation of property in certain cases. – (1) The Authorized Officer may, after considering the explanation, if any, to the show cause notice issued under Section 14 and the materials available before it, and after giving to the person affected (and in case where the person affected holds any money or property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any other money or properties in question have been acquired illegally.

(2) Where the Authorized Officer specifies that some of the money or property or both referred to in the show cause notice are acquired by means of the offence, but is not able to identify specifically such money or property, then it shall be lawful for the Authorized Officer to specify the money or property or both which to the best of his judgment, have been acquired by means of the offence and record a finding accordingly under sub-section (1).

(3) Where the Authorized Officer records a finding under this section to the effect that any money or property or both have been acquired by means of the offence, he shall declare that such money or property or both shall, subject to the provisions of this Act, stand confiscated to the State Government free from all encumbrances:

Provided that if the market price of the property confiscated is deposited with the Authorized Officer, the property shall not be confiscated.

(4) Where any share in a Company stands confiscated to the State Government under this Act, then, the Company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the Articles of Association of the Company, forthwith register the State Government as the transferee of such share.

(5) Every proceeding for confiscation of money or property or both under this Chapter shall be disposed of within a period of six months from the date of service of the notice under sub section (1) of Section 15.

(6) The order for confiscation passed under this section shall, subject to the order passed in appeal, if any, under section 17 be final and shall not be called in question in any Court of law.

16. Transfer to be null and void. – Where, after the issue of a notice under Section 14 any money or property or both referred to in the said notice are transferred by any mode whatsoever such transfer shall, for the purposes of the proceedings under this Act be void and if such money or property or both are subsequently confiscated to the State Government under Section 15, then the transfer of such money or property or both shall be deemed to be null and void.

17. Appeal. – (1) Any person aggrieved by any order of the Authorized Officer under this Chapter may appeal to the High Court within thirty days from the date on which the order appealed against was passed.

(2) Upon any appeal preferred under this section, the High Court may, after giving such parties, as it thinks proper, and opportunity of being heard, pass such order as it think fit.

(3) An appeal preferred under sub-section (1) shall be disposed preferably within a period of six months from the date it is preferred and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal.

18. Power to take possession. – (1) Where any money or property or both have been confiscated to the State Government under this Act, the concerned Authorized Officer shall order the person affected, as well as any other person, who may be in possession of the money or property or both to surrender or deliver possession thereof to the concerned Authorized Officer or to any person duly authorized by him in this behalf, within thirty days of the service of the order:

Provided that the Authorized Officer, on an application made in that behalf and being satisfied that the person affected is residing in the property in question, may instead of dispossessing him immediately from the same, permit such person to occupy it for a limited period to be specified on payment of market rent to the State Government and thereafter, such person shall deliver the vacant possession of the property.

(2) If any person refuses or fails to comply with an order made under sub-section (1), the Authorized Officer may take possession of the property and may, for that purpose, use such force as may be necessary.

(3) Notwithstanding anything contained in sub-section (2), the Authorized Officer may, for the purpose of taking possession of any money or property or both referred to in sub-section (1), requisition the service of any Police Officer to assist and it shall be the bounded duty of such officer to comply with such requisition.

19. Refund of confiscated money or property. – Where an order of confiscation made under Section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected and in case it is not possible for any reason to return the property, such person shall be paid the price thereof including the money so confiscated with the interest at the rate of five percent per annum thereon calculated from the date of confiscation.

CHAPTER-IV
MISCELLANEOUS

20. Notice or order not be invalid for error in description.– No notice issued or served, no declaration made and no order passed, under this Act shall be deemed to be invalid by reason of any error in the description of the property or person mentioned therein, if such property or person is identifiable from the description so mentioned.

21. Act to be in addition to any other law. – The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him.

22. Bar to other proceedings. – Save as provided in sections 9 and 17 and notwithstanding anything contained in any other law, no suit or other legal proceedings shall be maintainable in any Court in respect of any money or property or both ordered to be considered under Section 15.

23. Protection of action taken in good faith. – No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

24. Power to make rules. – (1) The State Government may, by notification, make such rules, if any, as it may deem necessary for carrying out the purposes of this Act.

(2) Every rule made under sub-section (1) shall be laid before the State Legislative Assembly.

25. Overriding effect. – Notwithstanding anything in the Act for any other law for the time being in force, the provisions of this Act shall prevail in case of any inconsistency.

26. Power to remove difficulties. – If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order, not inconstant with the provisions of this Act, remove the difficulty :

Provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act.

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THE MADHYA PRADESH VISHESH NYAYALAYA NIYAM, 2012

[Published in the Madhya Pradesh Gazette, Extraordinary, Part I, dated 22nd February, 2012.]

No. F.-2-8-2011-I-10. – In exercise of the powers conferred by Section 24 of the Madhya Pradesh Vishesh Nyayalaya Adhiniyam, 2011 (No. 8 of 2012), the State Government, hereby, makes the following rules, namely:-

1. Short title, extent and commencement. – (1) These rules may be called **the Madhya Pradesh Vishesh Nyayalaya Niyam, 2012**.

(2) They shall extend to the whole of Madhya Pradesh.

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

2. Definitions.- (1) In these rules, unless the context otherwise requires.-

(a) "Act" means the Madhya Pradesh Vishes Nyayalaya Adhiniyam, 2011 (No. 8 of 2012);

(b) "authorised officer" means an officer appointed in accordance with the provisions of this Act;

(c) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974);

(d) "Form" means Forms appended to these rules;

(e) "High Court" means the High Court of Madhya Pradesh;

(f) "Indian Penal Code" means the Indian penal Code, 1860 (45 of 1860);

(g) "public servant" means a public servant as defined in clause (c) of section 2 of the Prevention of Corruption Act, 1988 (No. 49 of 1988) or under section 21 of the Indian Penal Code, 1860 (No. 45 of 1860) or personnel of the State Government or any organization specified in clause (b) of section 2 of the prevention of Corruption Act, 1988, serving in connection with the affairs of the State Government and it includes Group-A service of the Central Government serving in connection with the affairs of the State Government;

(h) "section" means a section of the Act;

(i) "Special Court" means a Special Court established under section 3 of the Act; and

(j) "State Government" means the Government of Madhya Pradesh.

(2) Words and expressions used herein but not defined shall have the same meaning as respectively assigned to them in the Code or the Act.

3. Procedure for nomination of Presiding Judge.- (1) The State Government shall nominate serving officer belonging to the Madhya Pradesh Higher Judicial Service in consultation with the High Court of Madhya Pradesh to be the Presiding Judge of the Special Court.

(2) The jurisdiction of a Special Court under the Act shall be such as may be decided by the State Government in consultation with the High Court.

(3) The Special Court shall have its sittings at such place or places as may be decided by the State Government in consultation with the High Court.

(4) The Presiding Judge shall be assigned by such officers and staff as may be decided by the State Government in consultation with the High Court.

4. The tenure of office of the Presiding Judge. – The term of Presiding Judge shall ordinarily be three years but he may continue in office till the nomination and joining of another Presiding Judge.

5. Cognizance of offences and trial by the Special Court. – The Special Court shall take cognizance only of such offences and try those cases which are instituted before it under sub-section (1) of Section 6 or transferred to it under sub-section (2) thereof or Section 10.

6. Declaration. – (1) The declaration to be made by the Principal Secretary/ Secretary of General Administration Department under sub-section (1) of Section 5 shall be in Form I.

(2) The declaration shall be published in the official Gazette and communicated to -

(i) the Special Court;

(ii) the concerned Court of the Special Judge under the Prevention of Corruption Act, 1988 (No. 49 of 1988) from which the pending proceedings stand transferred;

(iii) the investigating agency or agencies:

(iv) the person affected:

(v) General Administration Department, Government of Madhya Pradesh: and

(vi) any other authority as may be considered expedient by the State Government.

(7) Appointment of Special Public Prosecutors and their fees – (1) One or more Special Public Prosecutors may be appointed by the State Government to institute and conduct cases in the Special Court, The tenure of Special Public Prosecutors shall ordinarily be of there years.

(2) The State Government may appoint one or more Additional or Assistant Public Prosecutors on the recommendation of the Special Public Prosecutor to assist the Special Public Prosecutor.

(3) The Special Public Prosecutor and Additional or Assistant Public Prosecutor shall be paid such fees and allowances at such rates as may be decided by the State Government from time to time.

(8) Authorized Officer – (1) The State Government, in consultation with the High Court, shall nominate officer belonging to the cadre of the Madhya Pradesh Higher Judicial Service who is or has been a sessions Judge or Additional Sessions Judge to act as the authorized officer for the purposes of the Act.

(2) The office of the authorized officer shall function at such place or places as the State Government may notify in consultation with the High Court.

(3) The authorized officer shall be assisted by such staff as may be decided by the State Government.

(4) The State Government may appoint one or more Special Public Prosecutors on such terms and conditions, as may be prescribed, to make applications to the authorized officer and conduct cases before the said officer for confiscation of the money and other property under the Act. The tenure of Special Public Prosecutor shall ordinarily be of three years.

(9) Authorised Officer to be public servant. – The authorized officer shall be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860.(No. 45 of 1860) and any proceeding before him shall be deemed to be a judicial proceeding for the purpose of Section 228 of the Code.

(10) Authorised officer to follow summary procedure. – (1) On receipt of application under Section 13 read with Section 14 of the Act, the authorized officer shall immediately issue notice to the person affected.

(2) If the person affected responds to the notice and appears before the authorized officer either in person or through his legal representative, he shall be furnished with the copy of the application filed under Section 13 alongwith all the enclosures. The authorized officer shall allow 30 days time to file his statement in defence. If for good and valid reasons, to the satisfaction of the authorized officer, the person affected does not file his statement of defence, he may allow a further period of 15 days within which he shall have to file his statement of defence.

(3) If the person affected does not file his statement of defence within the prescribed period of 30 days or within extended period of 15 days, it shall be presumed that he has no defence to put forward and then the authorized officer shall be free to adjudicate the proceeding instituted before him.

(4) If the person affected submits his statement in defence, a copy of the same shall be made available to the Special Public Prosecutor conducting the proceeding before the authorized officer who shall have the opportunity to reply to the same.

(5) The Special Public Prosecutor shall have to reply within a maximum period of 15 days from service of statement of defence upon him.

(6) If the Special Public Prosecutor fails to submit his reply within 15 days, the authorized officer may for good or valid reasons allow a further period of 15

days for filing the reply, failing which the authorized officer shall proceed to adjudicate the proceedings as if the prosecution has no reply to submit.

(7) If the person affected proposes to contest the valuation of the property, the authorised officer may take assistance of such State Government agency or Central Government agency or any other officer or person technically qualified, as he may deem fit and proper.

(8) The authorized officer, after consideration of the application, statement of defence, reply of Special Public Prosecutor and report of experts, if any, shall adjudicate the proceeding and pronounce final verdict within a maximum period of 6 months from the date of the service of notice.

(9) The authorized officer, after final adjudication, may proceed to confiscate the property in accordance with Section 15 of the Act.

(10) The market price of the property confiscated is deposited with the authorized officer under the proviso to sub-section (3) of Section 15 of the Act, the same shall be deposited in a fixed deposit in any nationalized bank.

(11) If the authorized officer pass an order to confiscate the money and property of the person affected, then the money shall be impounded and property shall be handed over to the District Magistrate of the District wherein the property is situated, and the District Magistrate may, as far as practicable, utilize the property in pubic interest under the directions of State Government, till the final decision of the case, and if the person affected is convicted of the offence by the trial court, the confiscated money and property shall be in possession of the State Government.

11. Particulars of the application made before the authorized officer and Form of notice. - (1) The application to be filed under Section 13 before the authorized officer shall, inter alia, contain the following particulars, namely:-

(a) name of the person affected;

(b) official designation and detailed addresses of the person affected;

(c) the particulars of the known source of income of the person affected;

(d) particulars of assets that are maintained by the person affected and their estimated value;

(e) how much of these assets are disproportionate to the known sources of income;

(f) manner of confiscation prayed for;

(g) name and detailed address of the persons whose affidavits are furnished in support of the case; and

(h) location of the money or property with appropriate value.

(2) The notice of confiscation to be issued under section 14 shall be in Form II.

(3) The applications filed before the authorized officer shall contain the particulars as specified in Form III.

(12). Application of Code of Criminal Procedure, 1973 – The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, in so far as they are not inconsistent with the provisions of the Act, apply to the proceeding before the Special Court and the authorized officer.

(13). Application of Indian Evidence Act, 1872 – The provisions of the Indian Evidence Act, 1872 (1 of 1872) shall apply to the proceedings before the Special Court and the authorized officer.

(14). Assistance of Police required by the Special Court and the authorized officer- The State Government shall make available the assistance of the Police Officers as may be required by the Special Court and the authorised officer in implementing and executing the orders passed by them.

(15). Maintenance of Registers by the Authorised Officer. – (1) The following Registers may be maintained in the officer of the authorized officer, namely:-

(a) Register of confiscation cases prescribed in Form III.

(b) Receipt register.

(c) Dispatch register.

(d) Accounts register

(2) The authorised officer may also maintain such other Registers an may be considered necessary in the conduct of business of his office.

FORM I

(see rule 6)

DECLARATION

WHEREAS, It was alleged that Shri..... (name and address) while holding .....Office (indicate name of public office) in the State of Madhya Pradesh has committed an offence under clause (e) of sub-section (1) of Section 13 of the Prevention of Corruption Act, 1988 and that the matter was investigated in Crime No. .....of .....

AND, WHEREAS, on scrutiny of relevant materials available on record, the State Government is of the opinion that there is a prima facie case of Commission of the offence by the .....(name of the accused) who has accumulate properties disproportionate to his known sources of income by resorting to corrupt means;

AND, WHEREAS, it is felt necessary and expedient by the Government that the said offender should be tried by the Special Court established under sub-section (1) of Section 3 of the Madhya Pradesh Vishesh Nyayalaya Adhiniyam, 2011.

NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of Section 5 of Madhya Pradesh Vishesh Nyayalaya Adhiniyam, 2011 the State Government do hereby declare that the said offence shall be dealt with under the Madhya Pradesh Vishesh Nyayalaya Adhiniyam, 2011.

Place:.....

Date:..... By order and in the name of the Governor of Madhya Pradesh,

Principal Secretary/Secretary,
Government of Madhya Pradesh,
General Administration Department.

FORM II
[see rule 11 (2)]
NOTICE OF CONFISCATION

To

Name.....

Designation.....

Address.....

.....

WHEREAS, an application has been filed against you by the Special Public Prosecutor being authorized by the State Government (copy of application to be attached) that your assets are disproportionate to your known source of income; you are hereby called upon to report by ..... as to your sources of income, earning of assets, out of which or by means of which you have acquired such money/property the evidence on which you intended to rely upon and submit relevant informations and particulars and show cause as to why all or any of such money/property should not be declared to have been acquired by means of offence and confiscated to State Government.

Place:.....

Date:..... (Authorised Officer with seal)

FORM III

[see rule 11 (3)]

PARTICULARS OF APPLICATION UNDER SECTION 13 (1)

1.	Date of filing application	:.....
2.	Serial No. of application	:.....
3.	Name of the person affected	:.....
4.	Address of the person affected	:.....
5.	Particulars of known sources of income	:.....
6.	Particulars of accumulation of assets and estimated value thereof	:.....
7.	Particulars of money and properties disproportionate to the known source of income	:.....
8.	Names of witnesses examined on behalf of State Government.	:.....
9.	Particulars of documents relied on behalf of the State Government.	:.....
10.	Any other relevant information	:.....
11.	Prayer	:.....

Place:.....

Date:.....

Signature.....

Name of applicant.....

Address.....

.....

By order and in the name of the
Governor of Madhya Pradesh,

Ajay Sharma, Deputy Secretary