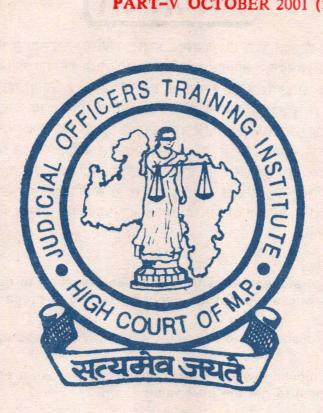
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### JUDICIAL OFFICER'S TRAINING INSTITUTE

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# जिज्ञासा

संस्थानिक प्रतिवेदन से ज्ञात होगा कि जबलपुर, इन्दौर, ग्वालियर एवं भोपाल में पायलेट प्रोजेक्ट का कार्य प्रारम्भ हुआ है। इन्हीं स्थानों पर सेमिनार आयोजित किए थे तथा हम वहां गए थे। दि. 29 जुलाई को जबलपुर में, दि. 11 अगस्त को इन्दौर में, 25 अगस्त को ग्वालियर में एवं 2 सितंबर को भोपाल में ये आयोजिन हुए। सभी को अग्रिम रूप से सूचना थी व ये भी निवेदन था (निदेशक निर्देश क्या देगा) कि वे अग्रिम रूप से इस संस्था को अपनी समस्याएँ सूचित कर दें ताकि उन प्रश्नों पर विस्तृत रूप से अध्ययन करके उसका निदान किया जा सके। लेकिन किसी ने भी ऐसा नहीं किया। इन्दौर तहसील के एक व्यवहार न्यायाधीश का एक प्रश्न व उससे सम्बन्धित पूरक प्रश्नों का पर्चा जरूर मुझे इन्दौर में दिखाया गया। उस पर उत्तर भी दिए गए। सौभाग्य से उस पर मैंने एक लेख लिखा है। वह लेख धारा 10 व्य.प्र.स. से सम्बन्धित है इसी अंक में प्रकाशित हो रहा है। जिस व्यवहार न्यायाधीश ने ये प्रश्नावली दी थी वह व्यवहार न्यायाधीश सेमिनार में नहीं आ सके क्योंकि स्वास्थ्य खराब होना कहा गया।

सेमिनार (Seminar) शब्द के अर्थ देखें।

- (1) A small group of students at a University, etc. meeting to discuss or study a particular topic with a teacher. Students are asked to prepare material in advance.
- (2) Any meeting for discussion or training : a one-day business management seminar.
- (3) A seminar is a meeting where a group of poeple discuss a problem or topic. It is to help (Judges) to get the best value.......
- (4) सेमिनार शब्द का हिन्दी अनुवाद अध्ययन- गोष्ठी है।

कुछ स्थानों पर तो किसी को कोई समस्या ही नहीं रही होगी क्योंकि कोई भी न्यायाधीश प्रश्न पूछने के लिए तत्पर ही नहीं था। उसी स्थान पर एक सज्जन मेरा ही साक्षात्कार ले रहे हो ऐसा अनुभव किया क्योंकि वे जो प्रश्न पूछ रहे थे उस सम्बन्ध में उस विषय वस्तु के विषय में उनकी कोई पृष्ठ भूमि नहीं थी। मुझे कहना पड़ा कि मैं आपका व आप मेरा साक्षात्कार लेने यहां नहीं बैठे हैं।

वास्तव में हम भ्रम से पीड़ित व्यक्ति होते हैं। भ्रम इस बात का कि कोई समस्या नहीं है तथा जब आएगी तो (अंदाज से) हल कर लेंगे। स्वामी विवेकानंद का कथन समीचीन है कि अपने मार्ग पर चलने वाले व्यक्ति को यदि कोई कठिनाई नहीं है तो निश्चित समझें कि हम सही मार्ग पर नहीं चल रहे हैं।

प्रश्नों का न पूछना खंटकने वाली बात नहीं है। समस्या न हो तो न पूछना भी सही है लेकिन जब हम न्यायाधीश के रूप में कार्य करते रहे हैं तो क्या कार्य करने में कभी कोई समस्या आई ही नहीं या आई हो तो उसे हल किए बिना ही प्रकरण का निराकरण कर दिया गया?

यथार्थ ये है कि न्यायधर्म के सम्बन्ध में हमने हमारा आचरण निर्धारित करना होगा। निर्धारण कर भी ले तो उस आचरण के आधार से लक्ष्य की ओर अग्रसर होना कठिन है क्योंकि उसके लिए प्रयत्न करना होगा। प्रयत्न करने के लिए विषय के प्रति जिज्ञासा उत्पन्न होना होगी। जिज्ञासा तो तब उत्पन्न होगी जब हम अपने विषय में खो जाएँ।

खो जाना कठिन है। दिशाहीन जंगल में आप खो जाने की इच्छा से चलना प्रारम्भ भी कर दो तब भी आप खो नहीं पाओगे। जंगल के प्रत्येक तत्व व विविधताओं के साथ तादत्म्य स्थापित करना होगा तभी आप स्वयं को खो पाओगे। आशय, ज्ञान एवं लक्ष्य से कृत्य करना आवश्यक है तभी हम खो पाएंगे।

यदि हम भटक जाने को ही खो जाना या विषय में डूब जाना मान रहे हैं तो निश्चित ही हम अपने आचरण–धर्म–न्यायदान का पालन नहीं कर रहे होंगे।

न्यायदान की आकांक्षा हमारी क्यों नहीं होना चाहिए जब कि न्यायालय में आने वाला व्यक्ति न्याय प्राप्त होगा ऐसी आकांक्षा से आता है।

आकांक्षा यदि है तो उसकी परिणिती भी होना चाहिए। आकांक्षा का बीज कल्पना की धरती पर पौधा नहीं बनेगा। बीज के लिए धरती चाहिए। जिज्ञासा धरती होगी। सतत चिंतन से नए आयाम खुलेंगे तो नई नई समस्याओं से साक्षात्कार होगा ताकि जो लक्ष्य प्राप्त होगा वह गुणवत्ता लिए हुए होगा।

ढोल का ढांचा खोखला होता है लेकिन चमड़े की ढाल चढ़ते ही वह वास्तव में ढोल हो जाता है। सार्थक आवाज उसी पर निकलती है खोखले ढांचे पर नहीं।

जिज्ञासा का सतत रूप से हमारे मन मस्तिष्क को आंदोलित करना सत्य की परख करने के लिए पारस का काम करेगा।

पारस के साथ सौ टंच सोना घिसने पर सोना बिन बोले बोलता है। सत्य की यही चमक बोलेगी।

यह चमक अहंकार एवं अज्ञानता को मिटा देगी। अहंकार व अज्ञानता मिटते ही व्यक्ति संस्कारी हो जाएगा। जो व्यक्ति संस्कारी होगा वह कर्म के प्रति प्रतिबद्ध होगा एवं प्रतिबद्ध व्यक्ति लक्ष्य प्राप्त कर लेता है जिसे हम सफल व्यक्ति कहते हैं। आकांक्षा एवं जिज्ञासा का मिलन अपेक्षित है।

पुरूषोत्तम विष्णु नामजोशी

दूसरा पहलू

# उमंग भरा मौसम - प्रेरणा का स्रोत

प्रकृति ने अपनी सारी धूल उदासी आलस को वर्षा के शीतल जल से स्वच्छ कर लिया है। छोटे दिन लंबी रातों वाला मौसम शुरू हो गया है। नया ताजा मौसम है जितना काम इस सुंदर मौसम में कर सकते हैं उतना कम है। चारों तरफ उत्साह उमंग है। हमारे आसपास का वातावरण मौसम के अनुसार बदलता है। इसका असर हमारे दैनिक जीवन, रहन सहन सोचने समझने की शक्ति पर भी पड़ता है।

सोने जैसे दिन और चाँदी जैसी सुहानी रातें हैं। न सर्दी है न गरमी है समशीतोष्ण संतुलित मौसम है। अच्छे मौसम के कारण हमारा भी तन, मन उत्साह से भरा है। यही वह समय है जिसका हम जितना उपयोग अपने कार्य की गति बढ़ाने के लिये कर सकते हैं हमें करना है।

शरदऋतु का सुहाना मौसम है। अच्छी ताजी सब्जियां फलों फूलों का यह मुस्त मौसम है। सूर्य की तपन,

विता से मिलता है, अपने बब्से से अपनों के अपनेपन से मिलता है। ने जलाते ही नहीं एक मुखद स्पष से तुन्हें दुलारती भी हूँ। यह वही दुलार है कि अपने माँ से अपने बन्दमा की शीतलता तन मन को एक एक मुखद स्पश्च दे रही है। यह कह रही है कि को में सिफं तुम्हें अपनी

मि मड़ की ई किएक निर्दार मि मेड प्रांध ई किकि एक निर्कार कम्जानभाष्ट्रमध कप्र निक्र प्रकार भड़ । ई ही रहते हैं। समय समय पर अपने खभावानुसार हमे पार दुलार फटकार कर जब जैसी आवश्यकता हो हमे इप्रत कि फिप्रअप के प्राव्धीय प्राप्त आप प्राप्त कि अप प्राप्त कि प्राप्त कि

अनुशासन का पालन करके अपनी दिनचयों को एक लयबद्धता के साथ जी सकते हैं।

लिया ? यद पुरानी यादे, कुछ बुढ़ापे की बीमारियां बस। मा एक में भारत से आपसे अख्य जीवन की रहें हैं। हमारा क्या बिगड़ा और आपसे से किम नम नेपार भि अनुशासनहीन जीवन जीन में आनंद आ रहा है। मानौ हम अपने बड़ों को बताना चाहते हो कि लीजिये हम आज हमने इसी अनुशासन हीनता के कारण कई बार डॉट खाई है बुरा नहीं लगा है लेकिन आज भी हमें अपने का पालन किये बिना हम कोई भी कार्य सरलता से सफलता से नहीं कर सकते। बुजुगी की माता पिता की हमारे बड़े बुजुगों ने हमें बरापन से ही यह कहा है कि जीवन में अनुशासन का बहुत महत्व है। अनुशासन

एक आदश अनुशासन पूर्ण जीवन शैली, जो जीवन के प्रति एक स्वरथ दृष्टिकोण दे उसे अपना ही सकते हैं। अपने लिये या अपने पूर्वजो, माता पिता के लिये न सही लेकिन अपने बच्चों के भविष्य का मुखद बनाने के लिये करना है। आज हम जैसा जीवन जीयेंगे हमारे बच्चे उसको ही आदर्श मानेंगे उसे ही अनुशासन मानेंगे। हम आशीविद से मिला है और इसे ही हमें अपने बच्चों को अपने कि कि कि कि अहा व आदर त्याग से वापस ह मर्र ागफ़ क किंग्रेप प्रीर किम काम नेपर मेंड इए हैं ईप्र कि नकि मि कि मड़ रूपर किथाए प्रेम

सुद्दे । वि । से अप हे में अप यह में में है । में अप नया अर्थ नया रंग देंग अभी बस इतना है। मुझे भी क नर्गात किन्छ इन्ड्र नेपर मंड में पल के इपुष्ट कुए कुछ निर्ध किर्फ एक किर्म निर्ध होन स्पी भी फल मिलेगे तो उसे मीसम की अधिकता तीव्रता के अनुसार सहन करने की शक्ति यह धरती हमें देगी और ज्ञायन्य भिक्त । पर्याप किमी ज्ञाय नम नेपक्ष आप अपने आप अपने जाय नेपि किमी है। एकि भिक्ष । पर्याप अपना है। परिवास एकलयता से एक के बाद एक आकर अपना कार्य इमानदारी से करके गुजर जाते हैं बस वैसे ही एकलयता को नियमित करना है। जैसे पल छिन दिन सप्ताह साल गुजर रहे है जैसे वर्षो, ठड, गमी दिन रात सुबह शाम नहीं है। हमें इसके लिये कोई बहुत बड़ा त्याग या काम नहीं करना है बस मीसम के अनुरूप अपनी दिनययो उक आइ ड्रेक मिंह के मिंह निवास के मिंह को मार्थ में अनुशासन पूर्ण जीवन जी के कि कि को है। संकलता पाने के विवास धरती माता का ऋण चुकाना है। यह ऋण मुक्ति हम अपनी अच्छी अनुशासन वाली दिनचयो अपने कर्तव्यों का जिक्र ाजाम हिंब भवम प्रीह कि जिस मित्र कि । मेरे हिंद हिंम प्राध्य हिंच है भा प्राध्य कि है भा प्राध्य कि मिर् नाता कर पेट कार कर जो नहीं पाया वह हम सब यू ही आसानी से पा गरे हैं इसलिये आज हम अपने माता ऐसा बधन हीन जीवन बड़ा मीठा लगता है। हमें लगता है हमारे माता पिता ने मितव्ययिता से, अपने सुखों का र्जित हैं उनाह । इब में नित निवास प्रम ने जान ने जान में बहा ने निवास में बहा आनंद है और

# सी. मजु नामजोशी

। इंछि नाष्ट्रने नेगर अनुशासन की माइन प्रि की है। नाइन प्र प्राप्त कि नेशाष्ट्र भ कुछे है।

# न्यायधीश – शब्द एवं भाव को जीवन में उतारना है

जबलपुर, इन्दौर, ग्वालियर एवं भोपाल में पायलेट प्रोजेक्ट आयोजन 15 जुलाई से प्रारम्भ हो गया है। उक्त जिलों में पदस्थ न्यायिक बंधु उक्त आयोजन को सफल बनाने हेतु कटिबद्ध हैं ऐसा अनुभव हुआ। इन आयोजनों में संस्था का भी सक्रिय सहयोग होना चाहिए ऐसी हमारी इच्छा थी। उच्च न्यायालय द्वारा संस्था का प्रस्ताव स्वीकार होने के पश्चात इन जिलों में मैं तथा अतिरिक्त निदेशक सौ. नामजोशी न्यायिक बंधुओं के साथ सेमीनार के माध्यम से मिले। निरीक्षण न्यायाधीश श्री शंकरलाल गुप्ता, श्री एस.के. शर्मा क्रमशः जबलपुर एवं ग्वालियर आयोजन में सिमलित हुए तो निरीक्षण न्यायाधीश श्री एस.एस. द्विवेदी इन्दौर एवं भोपाल आयोजन में सिमलित हुए। इन्दौर में जिला न्यायाधीश श्री नारायणसिंह आजाद, ग्वालियर में जिला न्यायाधीश सुश्री शीला खन्ना, जबलपुर में श्री ए.के. सक्सेना एवं भोपाल में श्री सुशील पांडे जी के नेतृत्व में ये सेमिनार आयोजित हुए।

सभी स्थानों पर विभिन्न विषयों पर प्रश्नोत्तर होते रहे। प्रक्रिया विधि पर विशेष रूप से जोर रहा। ये आयोजन अवकाश के दिन रखे गए थे व औसत रूप से 11 से 4 बजे तक कार्यक्रम हुआ जब कि जबलपुर में तो शाम साढ़े पांच बजे तक कार्यक्रम चलता रहा समय कम पड़ा। जबलपुर में प्रश्नोत्तर काल मुखरित रूप से चला। प्रश्न पूछने वालों ने भी जमकर प्रश्न पूछे तो हम सब ने उन प्रश्नों के समाधान कारक उत्तर देने का प्रयत्न किया। प्रश्न पूछने वाले न्यायाधीश बंधु भी अपने प्रश्नों की पृष्ठभूमि बताते थे, उनके विचार भी प्रदर्शित करते थे व हम सबसे और अधिक जानने की इच्छा रखते थे। इन्दौर में एवं ग्वालियर के आयोजन में बाहर गांव से आए न्यायिक बंधु भी सम्मिलित हो गए थे जो अपने अपने अन्य काम से आए थे। यह सक्रियता संस्था के लिए उत्साहवर्धक है।

जिला न्यायाधीश श्री सुशील पांडे के कथनों से ज्ञात हुआ कि उन्होंने उन्हें मिलने वाला वेतन का 25% पायलेट प्रोजेक्ट भत्ता न लेने का निर्धार किया है क्यों कि उनके मतानुसार उनके न्यायालय में उन्होंने सामान्य स्थिति में ही दो साल से अधिक पुराने प्रकरण निराकृत कर दिए हैं और उनके पास अब इतने अधिक पुराने स्थिति के प्रकरण नहीं हैं कि जिसके लिए विशेष भत्ता प्राप्त करने का औचित्य हो। उनकी निष्ठा व दक्षता, क्षमता एवं त्याग के लिए साधुवाद।

इसी साधु शब्द पर उन्होंने एक लघुकथा मेरे निवेदन पर प्रशिक्षण सत्र में सुनाई थी। बड़ी मार्मिक है सटीक है व कर्तव्य भावना को जागृत करने वाली है।

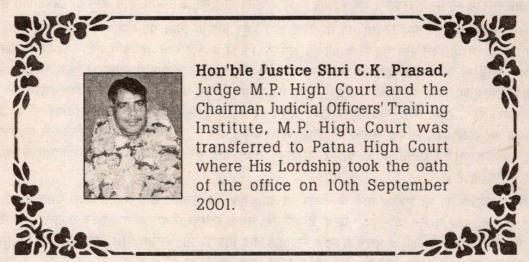
राजा के दरबार में बहुरूपिया था। रोज अलग अलग रूपों में आता था लेकिन उसे पहचान लिया जाता रहा। राजा ने कहा कि तुम ऐसा रूप धारण करो कि पहचाने नहीं जा सको तो 1000 सिक्के दिए जाएंगे। तत्पश्चात राजा के दरबार में बहुरूपिये का आना ही बंद हो गया। कुछ महिनों पश्चात राजा को उसके मंत्री ने सूचना दी कि शहर में एक पहुंचा हुआ साधु आया है। एकदम त्याग की मूर्ति है किसी से कुछ नहीं लेता। शहर के धनाढ़यों से भी कुछ नहीं लेता व बड़ा ही धर्मकर्म का पालन करता है। राजा दर्शन करने गया। सोना—चांदी, जड़ जवाहरातों के थाल लेकर राजा पहुंचा। राजा ने उससे आशीर्वाद लिया। उक्त सामान भेंट किया तो साधु ने नहीं लिया। दूसरे दिन बहुरूपिया दरबार में पहुंचा व राजा से एक हजार सिक्के मांगने लगा व वास्तविकता बताई। राजा ने कहा कि मूर्ख तेरे को तो मैं थाल के थाल भेंट करने आया था जो तुमने लौटा दिए व एक हजार सिक्के मांगने आ गया। बहुरूपिये ने कहा कि महाराज बहुरूपिये के रूप में ही सही लेकिन

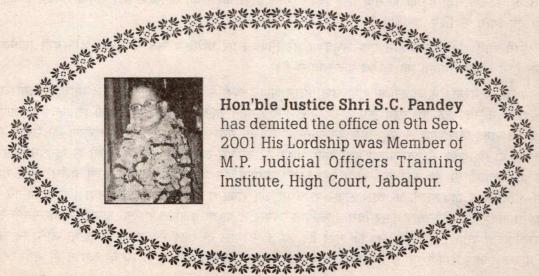
मैंने रूप साधु का धारण किया था और साधु के प्रति जो श्रद्धा भाव सर्वसाधारण जन का है वह टूट जाता यदि मैं आपके थाल स्वीकार करता। मैं तो अपना पुरस्कार भर मांगने आया हूँ कि आप मेरे रूप को नहीं पहचान पाए। मित्रों मैं इस लघुकथा से बहुत प्रभावित हुआ हूँ। कथा का भावार्थ बोधगम्य व अनुकरणीय भी है।

ग्वालियर यात्रा के समय एक वरिष्ठ अधिवक्ता से भी चर्चा हुई। न्यायाधीशों के प्रति उनकी प्रतिक्रिया सुनने योग्य है। वे ये अनुभव कर रहे थे कि आज कल न्यायाधीश ज्यूडिशियस कम हैं एक्जीक्यूटिव ज्यादा हो गए हैं। भोपाल की तुलना में ग्वालियर की कथा अति लघु कथा थी लेकिन वस्तुस्थिति के दृष्टिकोण से देखा जावे तो दोनों ही कथाएं हमारे लिए मार्गदर्शन प्रद होगी यह निश्चित है ऐसा विश्वास है।

### FERVENT FARE WELL

THREE CHEERS FOR LORDS; HIP, HIP, HURRAY! HIP, HIP, HURRAY!





# गुणात्मक एवं संख्यात्मक संतुलन

जागते रहो। भय बाहर वालों से कम है घरवालों से ज्यादा। खेत बाहर वाले नहीं बागड़ ही खा जाएगी ऐसा भी अनुभव होने दो। रखवाली करना है तो बाहर—अंदर, अंदर—बाहर का अन्तर मत करना। भय समान रूप से है। तर्क किया जावे तो वह अंदर से ज्यादा ही होगा।

सुबह 9 बजे का समय था। खाना खाने बैठ गया था। प्रयत्न रहता है कि मैं मेरी अपनी मातृतुल्य संस्था में 9.15 या 9.20 तक अवश्य पहुंच जाऊं। समयपूर्व पहुंचना पाबंदी नहीं है परन्तु अंतः चेतना कहती है कि जहां पाबंदी नहीं है वहां स्वप्रेरणा से किया कार्य उत्साह वर्धक होता है।

उसी वक्त फोन आया। नमस्कार किया व अपना परिचय भी दिया। ऐसा ही करता हूँ। वार्तालाप हॅलो से नहीं अपने नाम से करता हूँ। मैं फोन करूं और दूसरी छोर से रमेश गर्ग शब्द सुनते ही अच्छा लगता है। बाकी औपचारिकताओं की आवश्यकता नहीं रहती है। समय एवं टेलीफोन चार्जेस की बचत होती है।

सुबह फोन आया न्यायाधीश ने प्रश्न पूछा। उत्तर दिया। खाना खाया, रवाना हुआ एवं संस्था में पहुंच गया। बैठा लेकिन मन ही बैठ गया।

> मन ने कहा मन को तू ही गया बैठ तो होगा कैसे कर दे झंकृत हिला दे उसे कर आंदोलित न हो पराजित।

फिर क्या था, लिए कलम कागज और उतार दी विचारों की अभिव्यक्ति कोरे कागज पर कि न कहना पड़े मुझे कि कोरा कागज कोरा ही रह गया। इसीलिए आपको भी बता रहा हूँ। बिल्ली का दूध पीना, आंखों का बंद होना उसे यह आभास दिलाता है कि दुनिया उससे बेखबर है। नहीं बेखबर तो वह है जो दुनिया को बेखबर मानता है। हमारी भी यही स्थिति है। प्रकरण था घोषणा एवं स्थायी निषेधाज्ञा हेतु। प्रकरण की सुनवाई के अंतराल में कहा जाता है कि, प्रतिवादी ने अधिपत्य जबरन लेकर निर्माण कार्य कर लिया तो अधिपत्य की सहायता चाही व दावा संशोधन हेतु आवेदन पत्र दिया। संशोधन हो गया प्रकरण में साक्ष्य हो गई तर्क हो गए निर्णय के लिए प्रकरण आया। सुज्ञ न्यायाधीश को निर्णय के समय लगा कि दावे में अधिपत्य की सहायता मांगने पश्चात वादी ने अधिपत्य के लिए व न्यायालय की अधिकारिता के लिए दावे का मूल्यांकन नहीं किया है एवं कोर्ट फीस नहीं दी है क्या किया जावे। उसे चिंता पड़ गई निर्णय नहीं दे पाएंगे तो डिस्पोजल के चार पांच यूनिट्स चले जाएंगे। एक से सलाह ली उसने कहा कि मूल्यांकन एवं कोर्ट फीस के विषय को टच ही न करो एवं फैसला दे दो, दूसरे से सलाह ली तो उसने कहा फैसला तो दे दो उसमें लिख दो कि वादी अमुक—अमुक कोर्ट फीस देगा तब डिक्री का निष्पादन हो सकेगा। एक ने कहा कि जिस सहायता के लिए कोर्ट फीस दी है उसी सीमा तक निर्णय देना बाकी वाद खारिज कर देना। पिक्चर में संभव है कि ऊपर वाला जान के भी अन्जान बना रहे लेकिन यहां संभव नहीं होगा ऊपर वाले

को। आंखें मीचना स्वयं को धोखा देना भी होगा। ऐसा करने का बुरा प्रभाव हम अधिवक्ताओं पर भी छोड़ते हैं। हमारी योग्यता का वे मूल्यांकन करते हैं व भविष्य में हमें दबाते भी हैं। यूनिट्स का भय किसी सीमा तक वास्तविक होता है, यह सम्भव है। लेकिन उस न्यायाधीश को सोचना था जिसने संशोधन आवेदन पत्र स्वीकार कर अधिपत्य की सहायता मांगने का आधार स्वीकार किया। उस समय उसे देखना था कि इस अतिरिक्त सहायता के लिए दावे का मूल्यांकन किया है या नहीं। नहीं किया है तो करवाया जाता। लेकिन साक्ष्य भी हो गई तर्क भी हो गए। वकीलों व न्यायाधीश को उस समय भी कुछ नहीं महसूस हुआ। निर्णय के वक्त समस्याओं ने घर लिया।

प्रथम बात तो ये कि अधिपत्य की जहां सहायता मांगी जाती है वहां भी दावे का मूल्यांकन एवं कोर्ट फीस विषयक चिंतन दावा चेक करते वक्त अच्छे से कर लें। यदि वाद प्रश्न के आधार पर निर्णय होना है तो वाद प्रश्न भी बनाया जाना जरूरी है ताकि पक्षकारों को साक्ष्य के लिए अवसर मिल सके व तर्क हो सके।

वर्तमान समस्या का निदान तो संभवतः यह होगा कि प्रथमतः प्रकरण को पुनः प्रारम्भ करना चाहिए एवं यह आदेश देना चाहिए कि उभय पक्षों के अभिकथन देखते हुए एक वाद प्रश्न यह बनाना उचित प्रतीत होता है कि क्या वादी ने वाद का उचित मूल्यांकन कर उचित कोर्ट फीस दी है? उभय पक्षों के तर्क सुनकर यदि आवश्यक हो तो वाद प्रश्न बनाया जावे एवं पक्षकार गणों को साक्ष्य हेतु उचित अवसर दिया जावे। यदि प्रकरण न्यायालय की आर्थिक क्षेत्राधिकार से बाहर जा रहा तो आदेश 7 नियम 10 एवं आदेश 7 नियम 10 ए व्य.प्र.स. या धारा 15 (3) सिविल कोर्ट एक्ट के प्रावधानों के अंतर्गत जैसी भी स्थिति हो कार्यवाही करना चाहिए।

त्वरित संदर्भ हेतु धारा 15(3) सिविल कोर्ट एक्ट को यहां प्रस्तुत किया जा रहा है -

(3) Whenever it appears to any Court, as is referred to in sub-section (2) that institution of suit, appeal or proceeding, pending before it, was not in conformity with the order of distribution of business made under sub-section (1), it shall submit the record of such suit, appeal or proceeding, as the case may be, to the District Judge for appropriate order, and the District Judge in relation thereto may pass order either transferring the concerned record to proper Court as per order of distribution of business or otherwise to any other Court of competent jurisdiction.

पायलेट जिलों में या अन्य न्यायालयों में भी एक साथ एक से अधिक एव्हिडन्स काउंटर न खोलना। न्यायिक भावनाओं को आघात पहुंचाता है। न्यायिक विश्वास पर चोट पहुंचाती है। Very Good हो या Out Standing हो या Good हो अन्य बातें समान एवं सामान्य हो तो पदोन्नित हो जाती है ऐसा सुना है अतः शाब्दिक रूप से यूनिट्स Out standing या Very Good होने से बेहतर ये है कि वे Good ही हों। परिमाण वाचक विशेषण से गुणवाचक विशेषण ज्यादा उपयोगी होगा। न्याय करने की भावनाओं को पोषित किया जा सकेगा व ज्ञान वर्धन भी हो सकेगा।

यह आवश्यक नहीं है कि अधिक संख्या में यूनिट्स देने वाला न्यायाधीश अधिक गुणवत्ता युक्त निर्णय भी लिखता हो। गुणात्मक व मात्रात्मक तत्वों में भेद करना होगा। निर्धारित मात्रा में गुणात्मक निर्णय देना निश्चित ही एक अच्छा गुण होगा।

# किरु कानार रिम

# श्रीमती मंजूषा पी नामजोशी

अतिरिक्त निदेशक

परेशानी ही मुख्य विचारण बिन्दु है।

(1) धारा 301(2) द.प्र.सं. :- किसी मामले में कोई प्राइवेट व्यक्ति किसी न्यायालय में किसी व्यक्ति को अभियोजित करने के लिये किसी प्लीडर को अनुदेश देता है तो मामले का भारसाधक अभियोजक या सहायक लोक अभियोजक के निर्देश के अधीन कार्य करेगा और न्यायालय की अनुज्ञा से उस मामले में साक्ष्य की समाप्ति पर लिखित रूप से तर्क पेश कर सकेगा। यहां यह न्याय उदाहरण देंखे :-

1997 क्रि.लां.ज. 3117 (दिल्ली) श्री पी.वी.नरसिंह राव वि. राज्य :- यहां सी.बी.आई. के द्वारा राज्य के द्वारा याचिका कर्ता के विरुद्ध कार्यवाही प्रारंभ की गई। इस कार्यवाही में मध्यक्षेप करने की अनुज्ञा प्रदान करने के लिये प्रायवेट पक्षकार द्वारा आवेदन पत्र प्रस्तुत किया गया वहां इस प्रकार के आवेदन पत्र को पोषनीय नहीं माना गया।

यह कि धारा 301 द.प्र.सं. के अंतर्गत लोक अभियोजन आदि शासन की ओर से प्रकरण को चलाते हैं। धारा 302 दं.प्र.सं. के अंतर्गत लोक अभियोजक से भिन्न व्यक्ति को न्यायालय की अनुमित लेना पड़ती है, लेकिन उसका विस्तार भी नगण्य है। क्योंकि ऐसा भिन्न व्यक्ति सिक्रय रूप से प्रकरण में भाग नहीं ले सकता। ऐसे निजी व्यक्ति को (अधिवक्ता) यदि पारिश्रमिक देना ही तो उसकी व्यवस्था भी आहत व्यक्ति को करनी पड़ती है। इस प्रकार वास्तविक प्रतिनिधित्व जहां आहत व्यक्ति का होना चाहिये वह नहीं के बराबर होता है।

यह सर्व विदित है कि सभी क्षेत्रों में दक्षता, क्षमता और योग्यता का तीव्र गति से पतन हो रहा है तब आहत व्यक्ति के अपने प्रकरण में ही सक्रिय रूप से भाग लेने से वंचित हो जाने के कारण प्रभावशाली प्रतिनिधित्व नहीं हो पाता।

- (2) धारा 357 द.प्र.सं. प्रतिकर देने का आदेश :- इसमें फरियादी या पीड़ित व्यक्ति को चोटे आने या नुकसानी होने पर प्रतिकर देने का प्रावधान है जो विस्तृत रूप से दिया है इसका उपयोग उदारता से किया जाना चाहिये।
- (3) धारा 377 द.प्र.सं. :- राज्य सरकार द्वारा दंडादेश के विरुद्ध अपील :— राज्य सरकार उच्च न्यायालय से भिन्न (उपधारा 2 के सिवाय) किसी न्यायालय द्वारा किए गये विचारण में दोषसिद्धी के किसी मामले में लोक अभियोजक को दंडादेश की अपर्याप्तता के आधार पर उसके विरुद्ध उच्च न्यायालय में अपील पेश करने का निर्देश दे सकती है। फरियादी प्रार्थी को इस प्रकार दंडादेश की अपर्याप्तता के आधार पर कोई अपील करने का या आपत्ति करने का अधिकार नहीं है।
- (4) धारा 378 दं.प्र.सं. :- दोष मुक्ति की दशा में अपील करने के विस्तृत प्रावधान है लेकिन फरियादी पीड़ित व्यक्ति को केवल प्रायवेट परिवाद करने पर एवं उच्च न्यायालय से विशेष अनुमित मिलने पर ही अपील करने का अधिकार है। ऐसा अपील का अधिकार फरियादी को पुलिस रिपोर्ट पर से कायम किये अपराध के संबंध में नहीं है।
- (5) धारा 401 (1) दं.प्र.सं. :- उच्च न्यायालय की पुनरीक्षण की शक्तियां :— यहां फरियादी उच्च न्यायालय या सत्र न्यायालय में पुनरीक्षण कर सकता है। लेकिन उच्च न्यायालय व सत्र न्यायालय की अधिकारित इस संबंध में बहुत सीमित है।
- (6) धारा 235(2) दं.प्र.सं.-248(2):- दं.प्र.सं. के तहत अभियुक्त को दोषसिद्ध किया जाता है तो (धारा 360 दं.प्र.सं. का लाभ देने के सिवाय) दंड के प्रश्न पर अभियुक्त को सुनने का अधिकार है एवं सुनने के बाद ही विधि अनुसार दंडादेश देगा। इस प्रकार की सुनवाई का फरियादी के लिये कोई प्रावधान नहीं है।
- (7) धारा 248(2) दं.प्र.सं. :- विचारण की समाप्ति पर मजिस्ट्रेट इस निष्कर्ष पर पहुंचता है कि अभियुक्त

दोषी है किन्तु वह धारा 325 या धारा 360 दं.प्र.सं. के अनुसार कोई कार्यवाही नहीं करता है वहीं वह दंड के प्रश्न पर अभियुक्त को सुनने के पश्चात विधि के अनुसार उसके बारे में दंडादेश दे सकता है। ऐसा सुनवाई का प्रावधान फरियादी प्रार्थी के लिये नहीं है।

इस प्रकार यह स्पष्ट होता है कि फरियादी प्रार्थी को अपराधिक न्यायिक प्रणाली में भाग लेने के लिये पर्याप्त प्रावधान नहीं है। पीड़ित व्यक्ति कौन है इसका सुन्दर वर्णन इस प्रकार किया गया है।

The victim has an inadequate degree of participation in the criminal justice system. At the international level rights of victim has been enlisted in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (G.A. res. 40/34, anne. 40 U.N. Gaor Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985) The Declaration provides victims of crime and abuse of power the right to be a party to the criminal proceedings against the accused. "Victims" have been defined as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within States, including those laws prescribing criminal abuse of power.

Under the Declaration a person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The Declaration provides that the term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

इस प्रकार उपरोक्त विचार से यह निष्कर्ष निकाल सकते हैं कि किसी जुल्म के शिकार पीड़ित व्यक्ति को क्या अधिकार होना चाहिये? इसे संक्षेप में इस प्रकार कह सकते हैं।

- (1) पीड़ित व्यक्ति के साथ सदभावना पूर्ण व्यवहार होना चाहिये। उसकी प्रतिष्ठा का ध्यान रखना चाहिये। न्यायिक प्रक्रिया में उन्हें भी सुने जाना चाहिये और उन्हें शीघ्र न्याय मिलना चाहिये।
- (2) न्यायिक व प्रशासनिक संस्था की सहायता से पीड़ित को प्रभावी (दिखावटी नहीं) मदद मिलना चाहिये जो कम खर्चीली व न्याय दान में सहायक हो।
- (3) किसी अपराधी या अन्य व्यक्ति द्वारा यदि पीड़ित पक्ष को या उसके परिवार को या उसके आश्रितों को किसी प्रकार का नुकसान, चाहे वह व्यक्ति या सम्पत्ति का हो, उसकी नुकसानी या सम्पत्ति का कब्जा वापस करना चाहिये अथवा आर्थिक नुकसानी दिलाना चाहिये। अर्थात पीड़ित को इस प्रकार नुकसान की भरपाई मिलना चाहिये कि उसकी पुरानी प्रतिष्ठा या सम्पत्ति उसे वापस मिल सके।

यदि अभियुक्त से या अन्य आधारों पर पर्याप्त नुकसानी नहीं दिलाई जा सकती तो इसके लिये राज्य सरकार को उचित व्यवस्था और आर्थिक सहायता करना चाहिये।

- (1) पीड़ित आहत का इस प्रकार शारीरिक गंभीर चोट या उसको स्वास्थ्य या मानसिक अक्षमता गंभीर रूप से घटित अपराध से हुई हो उसे आर्थिक या डाक्टरी सहायता दी जाना चाहिये।
- (2) पीड़ित आहत के परिवार या उस पर आश्रित व्यक्ति की मृत्यु हुई हो या वह इस प्रकार मानसिक या शारीरिक रूप से अपंग अपराध के कारण हुआ हो उसे आर्थिक या डाक्टरी इलाज के लिये सहायता दी जाना चाहिये।

- (3) पीड़ित आहतों की सहायता के लिये यदि कोई सामाजिक संस्था, अस्पताल उपलब्ध हो तो उसकी जानकारी उन्हें देना चाहिये जिससे वह सहायता पा सके।
- (4) इस प्रकार आहत व्यक्ति का सक्रिय रूप से प्रतिनिधित्व होने के लिये जरूरी है कि उसे भी प्रकरण की सुनवाई के समय व्यक्तिगत रूप से उपस्थिति हेतु सूचना दी जावे तथा विधिक सहायता उसे भी मिले। जब जब वह (पीड़ित) प्रकरण में भाग ले उसे नियमानुसार गवाह भत्ते के बराबर धनराशि प्राप्त हो।
- (5) पीड़ित व्यक्ति या आश्रित व्यक्ति को अपकृत्य सम्बन्धि सांपत्तिक वाद प्रस्तुत करने हेतु न्याय शुल्क की पूर्ण छूट होना चाहिए। वर्तमान में ऐसा न होने से सर्वसाधारण व्यक्ति विधि के इस उपचार से वंचित ही रह जाता है।

इस प्रकार मानव अधिकारों के तहत तथा अन्य भारतीय संस्थाएं जो इस प्रकार पीड़ित की मदद के लिये कार्यरत हैं उन्हें चाहिये कि इस प्रकार अपराधों के शिकार व्यक्तियों की मदद के लिये आर्थिक व स्वास्थ्य संबंधी व मनोवैज्ञानिक रूप से सहायता करें जिससे कि अपराध पीड़ित व्यक्ति या उसका परिवार उपेक्षित न हो एवं प्राकृतिक न्याय सिद्धांतों के अनुसार उन्हें भी पर्याप्त सहायता व लाभ मिले।

आभार - हेन्डबुक ऑन ह्यूमन राईट्स फॉर ज्यूडिशियल ऑफिसर्स के सौजन्य से।

### LIFE PLAN

### THE CONCEPT OF 'PRACTICAL REASONABLENESS'

Finnis classifies under ten headings the essential features of 'practical reasonableness (which Features also as a 'Human good') These headings encapulate principles which seem to be in spirit of the classical natural law.

- (1) If the individual is to distinguish morally right actions from wrong actions, he must have a rational life plan a harmonious set of orientations, purposes and commitments.
- (2) He must pay equal regard to each of the basic human goods.
- (3) He must not leave out of account the necessity for others to participate in these goods.
- (4) He must not attribute to any project the overriding significance of a basic human good.
- (5) He must pursue his general commitments with creativity and must not abandon them lightly.
- (6) He must not waste his opportunities by acting inefficiently.
- (7) He must not choose directly against any human good.
- (8) He must faster the common good of his community.
- (9) He must not act contrary to his conscience.
- (10) He must not choose 'apparent goods' which he knows to be merely the simulations of real goods.

Courtesy - L.B. Curzon on Jurisprudence and publishers 'Cavendis Publishing Limited.'

### MY HUMBLE VIEW!

# POWER TO RE-ARREST A PERSON, ORDERED TO BE RELEASED BY A SUPERIOR COURT, DEBATED

(REFERENCE S. 389 CR.P.C.)

-P.V. NAMJOSHI

While granting bail under Section 389 Cr.P.C. (Suspension of sentence pending the appeal; release of the appellant on bail), the Superior Court generally directs the CJM or other competent Judicial Magistrate that the accused be released on furnishing bail bonds and the Appellate Court further directs the appellant to appear before such Magistrate as and when he orders him to appear. Generally there is no direction by the Superior Court to the Magistrate regarding the action to be taken by the Magistrate in circumstances where the accused fails to appear on a particular date. Therefore, the practice is few Judicial Magistrates issue a warrant of arrest and rearrest the concerning appellant. Few Judicial Magistrates instead of arresting the accused intimate the Superior Court that the accused has failed to appear on a particular date and seek direction from the Superior Court as to what should be done.

Reference can be made to *State of M.P. Vs. Chintamani and others*, 1989 Cr.L.J. 163 in which scope of Section 437-38-39 Cr.P.C. r/w/s/ 389 Cr.P.C. has been explained.

Following extract from paragraph 6 of the said judgment is reproduced for ready reference:-

"Once a person has been held guilty of having committed an offence, he cannot claim suspension of sentence pending his appeal and consequent release on bail as a matter of right. THE POWER TO ENLARGE ON BAIL AFTER CONVICTION, THOUGH DISCRETIONARY IS NOT SO WIDE AS IS UNDER CHAPTER RELATING TO BAILS BEFORE CONVICTION. By passing an order under S. 389 Cr.P.C. the sentence is not set aside, but is merely suspended i.e. kept in abeyance and the appellant remains a convict for all practical purposes. The indulgence is shown because the appellate court feels that the guilt is required to be rejudged and pending such adjudication if the appellant has served out the sentence or a substantial part of it, in the event of his ultimate acquittal, the suffering may become irreversible. That is why the suspension of the sentence it to be accompanied by reasons to be recorded by the Court in writing. Such suspension of sentence is intended to last ordinarily until the adjudication of appeal on merits. In other words, it is an interim order, temporary in nature as opposed to such order with which a finality is attached. In the very nature of the jurisdiction conferred by S. 389 Cr.P.C. it is inherent that the order may be recalled at any time provided that there may be reasons for doing so and in a judicial manner. The power to create includes the power to destroy and also the power to alter what is created unless the law vesting the power is accompanied by a limitation to the contrary either express or necessarily to be implied looking to the purpose and scope of the power conferred."

In K.M. Nanavati's case, AIR 1960 Bom 501 (512) (FB), (A.I.R. 1961 SC. 112) it is said that an order which suspends sentence cannot be said to be an order for bail.

Thus the scope of Section 389 Cr.P.C. is not larger in comparison to sections 437-38-39 Cr.P.C.

Let us see the provisions of Section 89 Cr.P.C. covered under Chapter 6 of "processes to compel appearance" and sub heading (d) "other rules regarding processes."

Section 89 Cr.P.C. runs as under :-

### "89. ARREST ON BREACH OF BOND FOR APPEARANCE :-

When any person who is bound by any bond taken under this Code to appear before a court, does not appear, the offecer presiding in such Court may issue a warrant directing that such person be arrested and produced before him."

A bare reading of this section will make it clear that the Court by whom the arrested person is bound over who does not appear in terms of the bond, the officer presiding in such Court may issue a warrant asking that such person be arrested and produced before him. The words used in this section are "under this Code". We have to interpret these words also. An expression "proceedings under this Code" also appears under Section 293 Cr.P.C. The expression "proceedings under this code" is not tantamount to judicial proceedings. Thus the words "in the course of any proceeding under this Code" include all the proceedings under the Code and are not confined to a proceeding initiating prosecution. Please refer to Public Prosecutor Vs. Pamarti, AIR 1967 AP 286 (288). Thus it is immaterial that the Magistrate who bounds over the accused has jurisdiction to try the case or not. The Magistrate gets jurisdiction u/s 89 of the Code to arrest him if he fails to appear in terms of the bond. The scope of the words "Bond taken under this Code" cannot be narrowed or illeberalised. Therefore, bond means bond taken under this Code. Generally, the order from the Superior Court is directed to the accused to appear before the Magistrate on a particular date fixed by him. Thus the accused is duty bound to appear before him. If he fails to appear on a particular date the concerning Magistrate or Court has jurisdiction to issue a warrant of arrest and under that warrant he can be detained also. It is submitted that it is not sufficient merely to intimate the concerned Superior Court and not to take any action against the accused. The spirit and purpose behind granting bail under section 389 Cr.P.C. is explained in Chintamani's case referred to above. Since the Superior Court has directed the accused to appear (from time to time) before a Magistrate the Magistrate is duty bound to rearrest the accused who fails to comply with the order of the Superior Court and detain him till fresh order from the Superior Court for release of the accused is passed.

**REGRANTING OF BALL:** Such type of bail order relates to Section 389 Cr.P.C. and not under Sections 437 to 439. Presently the prevelent law in M.P. is if the bail has been granted by the Superior Court and the accused commits breach of bail bond, then the accused may be sent to jail though the bail order of the superior Court is alive. This is

how the law is explained in *Veer Singh Vs. State* M.Cr.C.P. No. 6160/96 published in 1997 Joti Journal, December part at page 41.

Bail order granted under section 389 Cr.P.C. is not on the same footing as is granted u/Ss. 437-38-39 of the Code. Reference can be made to *Veer Singh Vs. State*, M.Cr.P.C. No. 6160/96 published in 1997 JOTI page 41 Dec. Part. The same is reproduced for ready reference:

### STAR FIRMAMENT

### **CANCELLATION OF BAIL - WHO CAN?**

M.C.R.C. NO. 6160/96 VEER SINGH Vs. STATE

(Not yet published in any of the magazine)

Following is the extract from the Order of the Hon'ble Justice Shri Dipak Misra, M.P. High Court, Jabalpur:

It is to be borne in mind that an accused is not entitled to control the proceeding at his own sweet-will. He cannot prolong the trial at his whim and fancy. Caprice has no role to play in a criminal trial. If an accused is permitted to raise a plea that inspite of his nonappearance from time to time, the trial Judge or the trial Magistrate is bound to enlarge him on bail because threre has been no cancellation of the original bail order granted by a superior court, that would be against the mandate of law and nugatory of the provisions enumerated under sections 436(2), 437(5), 439(2), 446 and 446 A of Cr.P.C. read as a harmonious whole. Sometimes a doubt arises whether the court of Session while granting bail to an accused would include a condition that is the accused fails to attend in the trial court he shall have no right to claim bail on the basis of his earlier bail order as the bail order would stand automatically cancelled and the Magistrate would be at liberty to consider the bail-application a fresh. As analysed and stated earlier, once the accused does not appear in a court and is produced in custody court, or surrenders voluntarily being aware of issue of such warrant, all other provisions of the chapter XXXIII will come into play and the Magistrate can refuse to release the accused and he would have no right in law to contend that he is entitled to be enlarged on bail, as the order by which he was enlarged has not been cancelled. In view of this, even if there is no condition at the time of grant of bail, as a consequence of non-appearance of the accused before the learned trial Judge or trying Magistrate, the said court would have complete liberty to deal with him in accordance with law. If the said Court is satisfied that there are cogent and sufficient reasons for non-appearance of the accused he may exonerate and release him on fresh bail bonds with the same conditions or more onerous conditions with regard to the surety and the sum. He is also at liberty, depending upon the facts and circumstances of the case, to refuse him to enlarge him on bail. The said order would be subject to challenge before the superior court.

#### Cases referred:

1. AIR 1978 SC 527, Babu Singh Vs. State,

- 2. AIR 1978 SC 961, State Vs. Sanjay Gandhi.
- 3. AIR 1958 SC 376, Talab Hazi Vs. Madhukar.
- 4. AIR 1967 SC 1639, Ratanial Vs. Asst. Collector.
- 5. 1986 Cr.L.J. !235, Johani Wilson Vs. State of Rajasthan.

Please refer to Article "Cancellation of Bail-who can", a debate published in Vol. III Part IV 1997 August Part.

Thus in pending cases before the Court, a Magistrate may exercise jurisdiction to grant or refuse to grant bail and even if bail was granted by a superior court and accused jumps the bail, the trial Court has jurisdiction not only to forfeit the bail bonds or to cancel and grant the fresh order of bail.

But in a case where accused has been released on bail u/s 389 Cr.P.C. the position would be different because a case is not pending before the Magistrate/Court who has bound over the accused. Therefore, that Magistrate/Court may not cancel the suspention order but has right to proceed u/Ss. 446 and 446A to forfeit the amount under the bail bond and may proceed to recover the amount under it. However, it is submitted that the Magistrate/Court is duty bound to release the accused on the strength of the bail order which is still alive and intimate the concerned court mentioning the circumstances which resulted to take such action. It may be for the Superior Court who passed the bail order to cancel or not to cancel the same. The Magistrate is empowered to demand a fresh security in accordance with the directions of the original order. It may be noted that order of bail u/s 389 is just suspention of sentence and on committing breach of the order Magistrate may take action U/Ss 89, 446 and 446A but is bound to release him again on bail bonds on the strength of the original order of the Superior Court as refusing to do so would vartually amount to cancelling the Suspention Order (and not cancelling the bail order) which was passed by the Superior Court. The Magistrate has no jurisdiction to cancell such suspention order.

#### To summarise it:

- (a) Magistrate has power to arrest the accused, u/s 89 of the Code;
- (b) he is under obligation to intimate the circumstances which lead him to take action u/s 89 of the Code;
- (c) he has power (rather duty bound) to release the accused on the strength of the bail order of the superior court which has not been cancelled by the said Court; provided the order is under Chapter XXXVII of the code of Cr.P.C. (i.e. Ss. 436-37-38) but not obliged to release the convicted accused whose sentence is suspended U/s. 389 of the code and allowed to remain on bail under that provision as per Chintamani's case.
- (d) he has jurisdiction to proceed u/s 446 and 446A of the Code.

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### THE EXTENT OF POWER TO REVERSE OR MODIFY DECREE

(Law under sections 99 & 99A CPC)
AND REMAND OF A CASE

-P.V. NAMJOSHI

Sections 99 and 99A CPC run as under :-

SECTION 99:- No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction - No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

Provided that nothing in this section shall apply to non-joinder of a necessary party.

SECTION 99A: - No order under section 47 to be reversed or modified unless decision of the case is prejudicially affect - Without prejudice to the generality of the provisions of section 99, no order under section 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.

The statement of objects and reasons to amend Sections 99 and inserting 99A was very simple. Section 99 which before amendment of 1976 interalia saved irregularity in respect of mis-joinder of partes or causes of action did not apply to non-joinder. The Section is being amended to cover this omission. A proviso is however, added to indicate that the non-joinder of a necessary party will not be saved by this section. The statement of objects and reasons to insert Section 99-A was to provided that no order under Section 47 CPC shall be reversed or substantially varied nor shall any case relating to such order be remanded in appeal on account of any error, defect or irregularity in any proceedings relating to such order unless such error, defect or irregularity has prejudicially affected the decision of the case. At the end of the Article we shall discuss the meanings of the words relating to "irregularity", "merits", "prejudice", "error" and "defect".

### **CROSS REFERENCES:-**

The term "mis-joinder of parties" is explained in O. 1 R. 1. Mis-joinder of defendants in O. 1 R. 3, Mis-joinder and non-joinder of parties in O. 1 R. 9. In O. 1 R.13 Mis-joinder of plaintiffs and causes of action, in O. 2 R. 3 mis-joinder of defendants and causes of action, in O. 2 Rr. 3, 4 and 5 objections to misjoinder, in O. 2 R. 7 irregularity affecting the jurisdiction and in Sections 21 and S. 105 relates orders from which appeal do not lie and its scope, in Section 107 powers of the Appellate Court.

#### SCOPE AND APPLICABILITY OF SECTION 99:-

Section 99 of CPC proceeds upon a sound principle and is calculated to promote justice. This section indicates that the section to be adopted in hearing of appeals.

Generally a decree shall not be reversed or varied merely because there has been any error, defect or irregularity in any proceedings in the suit but where the error, defect or irregularity is of such importance as to affect the merits of the case (i.e. production of wrong decision) or jurisdiction, it becomes material irregularity, justifying the interference of the court. A decision which is correct on the merits and is within jurisdiction of the Court, should not be upset merely for technical and immaterial defects. This is how said in AIR 1954 SC 340 (342). Again in 1988 MPLJ 211 (217) it is said that when a case has

been tried on merits it cannot be reversed purely on technical grounds unless it is resulted in the failure of justice. Non-compliance of every rule or procedure does not ipso facto destroy the validity of the whole proceedings particularly when no objection was taken in the trial court besides waiver of the objection. The law that an error, defect or irregularity cannot be raised as a ground of appeal only refers to error, defect or irregularities to procedure nor the Rule of Law or conditions which affect the substantive rights of the parties. The section is based on the principle that the Rules and Procedures are made to subserve the ends of justice and not to defeat them.

Lord Penzance said that :

"Procedure is but the machinery of law after all- the channel and means whereby law is administed and justice reached. It strangely departs from its proper office where in place of facilitating, it is permitted to obstruct and even to extinguish the legal rights and is made to govern where it ought to subserve."

So far as jurisdictional error is concerned whether it is jurisdictional defect or procedural irregularity or irregularity in either case correction by an appellate court is open, it is generally, shall be in the later cases only where the defect complained of has failure of justice. In AIR 1975 MP 30 (31) it is said that the term "Jurisdiction" in this section is used in the sense of pecuniary or local jurisdiction or jurisdiction relating to the subject matter. It does not mean the legal authority of a Court to do certain things. Thus a decree passed by Court in a suit beyond its pecuniary jurisdiction is not attracted by Section 99.

Jurisdiction of the Appellate Court is not barred by the conditions included in Section 99 of the Code, when the decree challenged on the face of it is beyond the jurisdiction of the Court though no objection is raised on the point of jurisdiction before the trial Court.

Thus a mere irregularity which does not affect the merits of the case or the jurisdiction of the Court is no ground for reversing or varying a decision in appeal. This is what said in AIR 1961 MP 109, 1972 MPLJ 160 and AIR 1976 SC 2169 (2172). This principle equality applies to misc. cases also. Though section refers in terms to decrees yet it is illustrative of a general principle which should be applied to interlocutory orders also as stated in AIR 1964 Mysore 147. However, the Nagpur High Court in AIR 1935 Nag 33 and AIR 1945 Nag 97 (DB) appears to differs on this subject.

The Commentaries on Section 99 by standard books have given instances of error, defect or irregularity not affecting under this section and instances of error, defect or irregularity affecting merits of the cases. A long list of such cases may be persued from the standard books. There are analogous provisions of law under Section 167 of Evidence Act and Section 11 of the Suits Valuation Act.

#### NON DECIDING APPLICATION :-

The first appellate court failed to decide an application u/o 41.R.27. It was held that non disposal of an application is an irregularity which does not vitiate decision. *Mohini vs. Variety General Stores 1989 M.P.W.N.* (1) 167.

To conclude this subject, it can be safely said that in view of Section 99 CPC, unless manifest injustice is shown, the judgement and decree of the trial Court cannot be interfered with merely for one of territorial jurisdiction or other jurisdictional error or other errors described in the section.

### SCOPE AND APPLICATION OF SECTION 99A:-

The amendment of the definition of the term decree in Section 2 (2) by the Amend-

ment Act necessitated the insertion of this section. After the Amendment Act of 1976, orders under Section 47 are not applicable as decrees. Consequently Section 99 providing decrees from being reversed or substantially varied in appeals on account of any error, defect or irregularity, not affecting the merits of the case or jurisdiction of the cases would have no application. It was therefore, found necessary to have a new Section restricting the powers of the Court interfering with the decisions of the Court under Section 47. This is how said in AIR 1985 AP 42. The word "appeal" has been employed and retained in section 99 while it is excluded in Section 99A due to which Section 99A expressly talks about an order under section 47 only and not at all in decree.

Section 99A applies to proceedings other than appeals, that is revisions just because Section 99A has been placed immediately after Section 99 it would not mean that an appeal under Section 47 would be maintainable as is said in AIR 1987 Patna 83. Under this section an order passed under Section 47 cannot be reversed or modified unless the decision of the case is prejudicially affected. This section does not confer a right of appeal but as seen above restricts the power of the Courts to interfere with orders under Section 47 (3).

#### STAGE AT WHICH OBJECTION IS TO BE TAKEN :-

Objections are to be taken at the earliest possible opportunity, otherwise it will be taken as waived.

### NON-COMPLIANCE WITH ORDER 1 R. 3-B AS INSERTED IN M.P. :-

The non-compliance with the provisions containing in O. 1. R. 3-B, CPC does not create jurisdictional incompetence in the Court hearing the suit or appeal solely on account of non-compliance therewith. The defect as to non-compliance with the provisions contained in Order 1, rule 3-B, CPC can be rectified by joining the State as party to the proceedings and noticing it at that very stage at which the defect is detected or pointed out to the Court. The party on whom lay the primary duty of impleading the State as party to the case having defaulted in doing so, cannot plead the defect at subsequent stage of the proceedings to its own advantage so as to get rid of a decree against it, otherwise well merited. Brijraj Singh Vs. Bitto Devi, 1994 MPLJ 192 (DB): 1993 JLJ 467. Mohan Lal Vs. Ram Lal, 1989 (2) MPWN 22 and Alfoo Vs. Lateef, M.A. No. 90/88 decided on 20-2-1991 overruled.

We as Judges should keep in mind the realities of life and before remanding a case, we must understand their powers to dispose of the case on merits. For that Sections 99, 99A and O. 41 Rr. 23 and 23A will be most helpful. One should try to avoid remanding of case on flimsy grounds. That adversely affects on the merits of the Judges.

### **MEANING OF THE WORDS:-**

ERROR: - Error of Judgement Vs. Usurpation of Power: Former is reversible by an Appellate Court within a certain fixed time & is therefore, only voidable, the latter is an absolute nullity. Mohd. Gulam Vs. Anantha Rao, 1984 AP 150 (155).

Error of law by the subordinate court in deciding whether a document was pro note u/s 2 (22) Stamp Act or not was not concerned with the jurisdiction of the subordinate court & therefore none of the three clauses of S. 115 CPC were attracted to the case. Shah Prabhudas Vs. Shah Bhogilal, 1968 Guj 236 (DB), Kailash Vs. Bhairon 1983 Raj 27-28.

**DEFECT:** A fault or lack that spoils a person or thing (case) and covers any omissions, irregularities in reaching to the conclusion in a case.

IRREGULARITY: - An order is irregular if the procedure followed violates the principles of natural justice & fair play. Keshav Rao Vs. Raju, 1957 AP 55.

Irregularity is not synonymous with 'illegality' in its common acceptance, signifies that which is contrary to the principles of law as distinguished from rules of procedure. The word 'illegality' is synonymous with 'unlawfully'. An 'irregularity' is a want of Adherence to some prescribed rule of mode of proceeding, & consists in omitting to do something that is necessary for the due & orderly conducting of a suit, or doing it in an unreasonable time or improper manner". 'Illegality', on the other hand, is properly predictable of radical defects only, & signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. K. Anbazhagan Vs. Secretary, TN Legislative Assembly, 1988 Mad 275-312.

PREJUDICE: Damage to one's legal right. Prejudice is the spider of mind & womb of injustice. *Mohd Vs. Nemichand, AIR 1986 MP 155.* No-prejudice does not save the principles of natural justice. *SL Kapoor Vs. Jagmohan 1981 SC 136-145.* Without prejudice imports an understanding that if the negotiations fail, nothing that has passed between the parties shall be taken advantage of thereafter.

**MERITS:- (Pros and Cons):-** A fact, an action or a quality that is good or deserves praise or reward. Considering a case on its particular nature or features, regardless of general circumstances or one's personal feelings.

**ILLEGALITY:** S.43, IPC. Everything which is an offence or which is prohibited by law or which furnishes ground for a civil action.

ILLEGAL Vs. UNLAWFUL: The word 'unlawful' has nowhere been defined in the IPC. The broad difference is that whatever is illegal is unlawful but not vice versa. In other words, everything that is unlawful is not necessarily illegal. An act may be unlawful from two points of view, viz., 1. unenforceable by law, 2. punishable by law. Thus an act which is not punishable, though unenforceable, is unlawful, & an act which is punishable is illegal as well as unlawful. (Please refer to section 23 Contract Act)

ILLEGAL Vs. VOID:- An order is illegal when it is passed by a court having jurisdiction to pass it but when it is passed against or without the provisions of any law; it is void when it is passed by a court having no jurisdiction to pass it irrespective of the fact whether it is passed as provided by a law. In the former case, a court should not have passed it; but in the latter case, a court could not have passed. Official Trustee Vs. Schindra, 1969 SC 823 (831).

### ILLEGALITY OR WITH MATERIAL IRREGULARITY IN CL. C. OF S. 115 CPC :-

Does not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure & not to errors of either law or fact after the formalities which the law prescirbed have been complied with. Chanchi Dass Vs. Sajjan Singh 1983 PH 442: Keshavdev Vs. Radha Kissen, 1953 SC 23.

Illegally means errors relating to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribed have been complied with. Erroneous construction placed upon a statute by the trial Court does not amount to exercising jurisdiction and would not furnish a ground for intereference under section 115. Ratilal Nazar Vs. Ranchchodbhai 1966 SC 439. Please also refer to ML Sethi Vs. R.P. Kapur, 1972 SC 2379.

# न्यायालयों द्धारा समय बढ़ाया जाना : अधिकार एवं परिधि

(धारा 148 व्य.प्र.सं.)

पुरुषोत्तम विष्णु नामजोशी

व्यवहार प्रक्रिया संहिता (व्य.प्र.स.) की धारा 148 इस प्रकार है-

148. समय का बढ़ाया जाना -

जहां न्यायालय ने इस संहिता द्वारा विहित या अनुज्ञात कोई कार्य करने के लिए कोई अवधि नियत या अनुदत्त की है वहाँ न्यायालय ऐसी अवधि को स्व-विवेकानुसार समय समय पर बढ़ा सकेगा, यद्यपि पहले नियत या अनुदत्त अवधि का अवसान हो चुका हो।

अंग्रेजी अनुवाद इस प्रकार है -

### 148- Enlargement of time -

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

धारा 149 व्य.प्र.सं. के अंतर्गत न्यायालयों को यह अधिकार दिया है कि जहां निर्धारित कोर्ट फी —कम संदाय की हो वहां उसे पूर्ण करने हेतु समय दिया जा सकता है। यहां इस विषय के संदर्भ में विस्तार से चर्चा की आवश्यकता नहीं है। केवल इतना बताया जाना पर्याप्त है कि यदि न्यायालय ने कोर्ट फी संदाय करने हेतु समय दिया हो एवं अंतिम बार यह भी निर्देश दिया हो कि 'यदि अगली तिथि को या उसके पूर्व कोर्ट फी संदाय नहीं की गई तो और अवसर नहीं दिया जावेगा व प्रकरण निरस्त मान लिया जाएगा या और समय नहीं दिया जाएगा' (Rejection of the plaint under order 7-R-11 CPC) तब भी यहां केवल एक बात मुख्य रूप से ध्यान रखनी है कि ऐसा लिखने का अर्थ यह नहीं है कि न्यायालय का यह आदेश अभंगुर—अनुल्लंघनीय, अविमोचनी, अलंघ्य, दुरितक्रम अथवा दुरुतर (Insuperable, inviolable, imperative, inextricable, Inviocable, absolute अथवा peremptory) प्रकृति का है। ऐसी आदेशिका लिखने के बाद भी न्यायालय न्यायोचित आधार पर समय दे सकता है। यही सिद्धांत धारा 148 व्य.प्र.स. के लिए लागू होगा यह बात विशेष रूप से ध्यान रखना होगी। आ.8 नि. 10, आ.6 नि. 5, आ. 6 नि. 17 या अन्य किसी भी आदेश के लिए लागू होगी। अपवाद का विश्लेषण आगे किया जाएगा।

आ. 21 नि. 85. क्रयधन के पूरे संदाय के लिये समय - क्रयधन की संदेय पूरी रकम को क्रेता इसके पूर्व कि संपत्ति के विक्रय से पन्द्रहवें दिन न्यायालय बंद हो, न्यायालय में जमा करेगा।

परन्तु न्यायालय में ऐसे जमा की जाने वाली रकम की गणना करने में क्रेता किसी भी ऐसे मुजरा का फायदा उठा सकेगा जिसका वह नियम 72 के अधीन हकदार हो।

इस प्रावधान में म. प्र. संशोधन स्पष्टीकरण के रूप में भी जोड़ा गया है जो इस प्रकार है-

स्पष्टीकरण - जहाँ कोई राशि एक बजे के बाद निविदान (Tender) की जाए परन्तु न्यायालय में भुगतान अगले दिन 11 से 1 बजे के बीच किया जावे, तो यह माना जाएगा कि भुगतान जिस दिन निविदान किया था, उस दिन किया गया है।

चूंकि विधि द्वारा कालाविध निर्धारित है, तथा 1 बजे बाद न्यायालय में भुगतान (पेमेंट) नियमों के अनुसार (व्यवहार न्यायालय नियम एवं आदेश) रकम एक बजे तक स्वीकार की जाती है अतः यदि अंतिम दिन पंद्रहवें दिन रकम एक बजे बाद जमा करना चाहता है तो न्यायालय का यह कर्तव्य है इस तथ्य को प्रकरण में अंकित कर दूसरे दिन वह रकम न्यायालय में विधिवत जमा हो सके इस लिए दूसरे दिन 1 बजे तक रकम जमा करने की अनुमित अिधनियम के तहत् न्यायालय को देने का अधिकार है। धारा 148 व्य.प्र.स., के अनुसार समय नहीं बढ़ाया जा सकता है। कृपया एक दृष्टांत और देखें। यथा जोगधन्य वि. बाबूराम ए.आई.आर. 1983 सु.को. 57। इसका एक और उदाहरण आ. 21, नि. 89–90 (2) का भी हो सकता है जो 30 दिन की अविध को दर्शाता है। लेकिन हिसाब तय करने के बाद की कितनी रकम कम जमा हुई है व पूरी जमा कराने के लिए समय देने का अधिकार न्यायालय को दिया है।

इसी प्रकार ए. पेधन्ना चेट्टियार वि. मूलचंद 1973 जे.एल.जे. 292 में इस संबंध में बहुत सुंदर शब्दों में वर्णन किया है वह इस प्रकार है—"Where the law has given a particular term of limitation, the parties cannot change it unless the law it self expressly enables them to do so. But the starting point of limitation is not a point of Law. समय मिले तो उक्त दृष्टांत जरूर पढें।

इसी दृष्टिकोण को ध्यान रखते एक और उदाहरण आ. 6 नि. 18 व्य.प्र.स. का दिया जा सकता है। प्रावधान इस प्रकार है—

आ. 6 नि. 18. आदेश के पश्चात संशोधन करने में असफल रहना-यदि कोई पक्षकार, जिसने संशोधन करने की इजाजत के लिए आदेश प्राप्त कर लिया है, उस आदेश द्वारा उस प्रयोजन के लिए पिरसीमित समय के भीतर या यदि उसके द्वारा कोई समय पिरसीमित नहीं किया गया है तो, आदेश की तारीख से चौदह दिन के भीतर तदनुसार संशोधन नहीं करता है, तो जब तक कि न्यायालय द्वारा समय बढ़ा न दिया जाए, उसे यथास्थिति, यथापूर्वोक्त पिरसीमित समय के या ऐसे चौदह दिन के अवसान के पश्चात् संशोधन करने के लिए अनुज्ञात नहीं किया जाएगा।

अंग्रेजी अनुवाद इस प्रकार है-

0.6. R. 18. Failure to amend after order-If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

उपरोक्त प्रावधान में 14 दिन का समय विधि द्वारा निर्धारित है लेकिन उसके साथ विकल्प भी है। ऐसा विकल्प आदेश 21 नि. 85 या आदेश 21 नि. 89 एवं नि. 90(2) में नहीं है। आ. 6 नि. 18 व्य.प्र.स. में न्यायालय को अधिकार है वह 14 दिन से कम या अधिक समय निर्धारित करे। यदि समय निर्धारित नहीं किया है तो प्रावधान के अनुसार आदेश दिनांक से 14 दिन उपधारित होगा एवं 14 दिन बाद भी समय बढ़ाने का अधिकार न्यायालय को है।

इस प्रकार धारा 148 का मूल तत्व ज्ञान करना हो तो आ. 6. नि. 18 व्य.प्र.स. एवं आ. 21 नि. 85 व्य.प्र.स. में उल्लेखित समय विषयक शब्दावली की तुलना से हो जाएगा। प्रारम्भ में यह बताया गया है कि जहां न्यायालय ने स्वयं ही किसी आदेशिका में लिखा हो कि अमुक समय में ऐसा न करने पर कार्यवाही अपने आप समाप्त हो जाएगी तब भी न्यायालय यदि समय बढ़ाता है तो कार्यवाही समाप्त नहीं होगी अपितु न्यायालय को समय बढ़ाने का अधिकार है। ध्यान रहे बुटासिंह विरुद्ध राज्य 1962 जे.एल.जे. 268 का न्याय दृष्टांत — उल्टा दिया गया है यह बात बुद्धलाल वि. छोटेलाल 1976 जे.एल.जे. 797 (पूर्ण पीठ) से ज्ञात होगी।

1976 जे.एल.जे. 797 में तैयार किए गए शीर्ष टीप जे.एल.जे. प्रकाशन ग्वालियर के आभार व्यक्त करते हुए प्रस्तुत कर रहा हूँ जिससे विधि सिद्धांत स्पष्ट हो जाएगा। शीर्ष टीप बहुत अच्छे ढंग से तैयार की गई है।

Civil P.C. 1908-Ss. 148 & 149-Power of the Court to extend time. Three stages when application for extending time can be made-application for extention of time given after the time fixed but before disposal of the case-court has jurisdiction to extend time.

When the Court fixes time and directs payment of costs or to perform any other act, but there is no compliance within time, the defaulting party may apply for extension of time at one of the following stages: (1) Before the time fixed has expired. (2) After the time fixed has expired but before the Court has passed an order disposing of the proceeding finally so far as that Court is concerned. (3) After such order (finally disposing of the proceeding) has been passed.

In the first case, it is undoubted law that the Court has jurisdiction to extend the time initially granted by it. Sections 148 and 149 are abundantly clear and apply in terms.

The third case also presents no difficulty whatever. When the Court has finally disposed of the proceedings before it and it becomes functus officio, no application for extension of time can be entertained by it, unless the order disposing of the proceedings is set aside and the proceedings are reopened by taking recourse to an appropriate remedy prescribed by the Code for reopening the proceedings.

There is considerable debate and controversy as regards the second case, i.e. where the time fixed by the Court has expired but the Court has not yet passed a formal order finally disposing of the suit or proceeding.

The language of section 148 CPC is wide enough to vest the Court with undoubted jurisdiction to enlarge the time, from time to time, and this jurisdiction extends even to a case where the period fixed has already expired.

Even if in the initial order the Court may have said that if costs are not paid before a certain date fixed for it, the suit shall stand dismissed, the Court does not lose seisin of the case after the expiry of such period notwithstanding a default. Such directions are in terrorem so that dilatory litigants put themselves in order. The Court does not cease to have jurisdiciton on the happening of the default. There are no words in section 148 to confine it to cases in which extension is sought before the period fixed by the Court expires. The Court does not cease to have jurisdiction until it makes an order finally disposing of the proceeding before it. 1962 JLJ 268 overruled. ILR 48 Cal. 902 relied on. AIR 1950 Cal. 564, dissented from.

पूर्ण पीठ के उपरोक्त न्यायदृष्टांत में मुद्दा क्रमांक दो को जिस प्रकार से बताया है उसे सर्वोच्च न्यायालय ने सुन्दरसिंह वि. केन्द्रीय सरकार और अन्य, 1987 मिनसा. नोट 42 में स्पष्ट करते हुए कहा कि जहाँ कोई कार्य करने के लिए समय निश्चित किया गया और निर्देश दिया गया कि निर्धारित समय में कार्य न होने पर आदेश निरस्त माना जावेगा वहां भी आदेश यद्यपि अनुल्लंघनीय प्रकार का है किन्तु न्यायालय समस्त परिस्थितियों को ध्यान में रखते हुए और समय बढ़ा सकता है और इस प्रकार समय बढ़ाया जाना पूर्व के आदेश का पूनर्विलोकन करना नहीं माना जा सकता।

कमालुद्दीन वि. छोटेलाल 1986 जे.एल.जे. 494 में भी यही विचार व्यक्त किया है और कहा है कि Even if the initial order of the Court may have said that if the Costs are not paid before a certain date fixed for it, the suit shall stand dismissed, the Court does not lose seisin of the case after the expiry of such period notwithstanding the default. It is substanctive justice which should be administered and not the procedural justice. मनरामन वि. लक्ष्मीबाई 1981 (भाग 2) म.प्र. वि.नो. 99, अम्बिका प्रसाद वि. राज्य 1981 (भाग 2) म.प्र.वि.नो. 150 में कहा है कि व्यवहार प्रक्रिया संहिता के प्रावधान दांडिक प्रकृति के नहीं है। ए. महंत रामदास वि. गंगादास, ए.आई.आर. 1961 सु.को. 882 का दृष्टांत इसी बात को विश्लेषणात्मक रूप से बताता है।

शर्त केवल यह हो सकती है कि संबंधित अउल्लंघनीय आदेश वाद, अपील या आवेदन से संबंधित तात्विक विषय का नहीं हो जिसके बारे में कि न्यायालय द्वारा निर्णय या अंतिम आदेश दिया हो जैसा कि सशर्त आज्ञप्ति हो। न्यायालय ने प्रकरण पर अपनी अधिकारिता यदि खो दी है (फंक्शस ऑफिसियो) नहीं खोना चाहिये। धारा 148—149 के लिए आवश्यकता पड़ने पर धारा 151 व्य.प्र.स. की सहायता ली जा सकती है यह बात भी उपर उल्लेखित दृष्टांत महंत रामदास वि. गंगादास, ए.आई.आर. 1961 सु.को. 882(883) में बताई है। यदि कोई आदेश न्यायालय के निर्णय —डिक्री में पारित किया है तो उसे वही न्यायालय फेरफार करके नहीं बदल सकेगा क्योंकि एक बार डिक्री पारित हो चुकने के बाद तुच्छ अपवादों को छोड़ (जैसे धारा 152 व्य.प्र.स.) परिवर्तन, परिवर्धन अथवा संशोधित करने की अधिकारिता समाप्त हो जाती है। लेकिन इस एक अन्य दृष्टिकोण से भी देखना होगा। जब्बार अली वि. अदर 1960 ए.आई.आर. आसाम 126 में डिक्री पारित करते समय यह आदेशित किया गया था कि अतिरिक्त कोर्ट फी एक निर्धारित तिथि तक देने पर डिक्री का निष्पादन हो सकेगा अन्यथा दावा खारिज माना जावेगा उक्त प्रकरण में कोर्ट फी देने को समय दिया गया।

एक महत्वपूर्ण उदाहरण देकर इस लेख को विराम दिया जा रहा है।

विनिर्दिष्ट सहायता अधिनियम के अंतर्गत जो डिक्री विनिर्दिष्ट सहायता हेतु पारित होती है वह यद्यपि प्रारंभिक डिक्री के रूप में तैयार नहीं हाती है फिर भी वास्तविक अर्थों में प्रारंभिक डिक्री ही होती है क्योंकि पक्षकारों को उक्त डिक्री के पश्चात कुछ न कुछ करना होता है। इस संबंध में दो दृष्टांत प्रस्तुत हो रहे हैं।

EXTENSION OF TIME FOR PAYMENT UNDER DECREE: - A decree fixing the time for payment is a self operating decree and time cannot be extended by the Court. Therefore, if the party required to pay fails to do so the suit shall stand dismissed. *Bhujangrao Vs. Sheshrao (1974) AIR Bom 104.* 

The Patna High Court has held that the Court which passed the decree can give extension of time even where the decree has merged in the decree of the High Court and even after the expiry of time given by the decree. But under S. 28 (1) of the Specific Relief Act this power is discretionary and will not be exercised on flimsy grounds. Further the extension of time for payment is not modification of the decree (S. 148 of the Code of Civil Procedure applied). It is submitted that this is a correct view of S. 148 Civil Procedure Code. Bisan Prasad Misra Vs. Kamala kant Jha (1972) AIR Patna 322: Mohanth Ram Vs, Ganga Das (1961) AIR SC 882: (1961) 3 SCR 763 relied on.

This is the extract of the Commentary from Pollock & Mulla on Indian Contract and Specific Relief Act, 1986 Edition at page 1047.

विस्तृत अध्ययन हेतु व्यवहार प्रक्रिया संहिता लेखक, मुल्ला, सरकार, ठक्कर या अन्य का अध्ययन उपयोगी हो सकता है।

# विस्फोटक पदार्थ अधिनियम, 1908 विरूद्ध विस्फोटक अधिनियम 1884 तुलनात्मक टीप

## पुरूषोत्तम विष्णु नामजोशी

मित्रों ने पूछा कि विस्फोटक पदार्थ अधिनियम (Explosive Substance Act) एवं विस्फोटक अधिनियम (Explosive Act) में क्या अंतर है। कौन से प्रकरण में वि.प.अ. के अंतर्गत एवं किस प्रकरण में वि.अ. के अंतर्गत आरोप लगाए जाना चाहिये। सतही रूप से देखा जावे तो ऐसा लगता है कि वास्तव में कोई अंतर नहीं है एवं यह भी बात मुंह से स्वाभाविक रूप से निकल आती है कि एक ही विषय पद दो—दो अधिनियम बनाने की आवश्यकता क्यों पड़ी। मैंने अपनी ओर से सीमित प्रयत्न किया कि तुलनात्मक अध्ययन हेतु कोई पुस्तक उपलब्ध हो जावे लेकिन प्रयत्न फलीभूत नहीं हो पाए अतः अपनी ही कल्पना से इस विषय पर तुलनात्मक अध्ययन के बजाय तुलनात्मक टीप मात्र प्रस्तुत कर रहा हूँ। बुद्धिमान पाठकगण से आग्रह है कि वे इसे और अधिक विस्तार देंगे व समीक्षात्मक चिंतन भी करेंगे। यह लेख केवल प्रारम्भिक विचारों के बाद अप्रवीण (Amateur) चिंतन मात्र है ऐसा मेरा मत है। कृपया सुविज्ञ पाठक इस बात को ध्यान रखेंगे।

तुलनात्मक चिंतन के लिए आवश्यक है कि हम उक्त अधिनियमों का आधार देखें। ऐसा आधार अधिनियमों के प्रस्तावना व परिभाषाओं से ज्ञात होगा। वो इस प्रकार है—

### वि. प. अ. की प्रस्तावना-

विस्फोटक पदार्थों से सम्बन्धित विधि को और संशोधित करना आवश्यक है; अतः एतद् द्वारा निम्नलिखित रूप में यह अधिनियम किया जाता है :-

### वि. अ. की प्रस्तावना -

यह अधिनियम विस्फोटकों के विनिर्माण, कब्जे, प्रयोग, विक्रम परिवहन, आयात और निर्यात को विनियमित करने हेतु बनाया है।

उद्देश्य है विस्फोटकों के विनिर्माण, कब्जे, प्रयोग, विक्रय, परिवहन और आयात को विनियमित करना..... उक्त कथन को समझने के लिए एक एक परिभाषा भी देखना उचित होगा।

- वि. प. अ. के अंतर्गत विस्फोटक पदार्थ की परिभाषा धारा 2 में दी है वह इस प्रकार है-
- 2. "विस्फोटक पदार्थ" की परिभाषा- इस अधिनियम में "विस्फोटक पदार्थ" पद के अंतर्गत विस्फोटक पदार्थ बनाने के लिए कोई सामग्री, किसी विस्फोटक पदार्थ में या उससे विस्फोटक कारित करने या कारित करने में प्रयुक्त या प्रयुक्त किये जाने के लिए आशायित या अनुकूलित या कारित करने में सहायता के लिए अनुकूलित कोई साधित्र, मशीन, उपकरण या सामग्री भी तथा ऐसे किसी साधित्र, मशीन या उपकरण का कोई भाग भी समझा जाएगा।
- वि. अ. की धारा 2 ध (2 डी) में जो परिभाषा विस्फोटक की दी है वह इस प्रकार है-
- धारा 2 डी (ध) : "विस्फोटक" से अभिप्रेत है बारूद, नाइट्रो-ग्लिसरीन, नाइट्रोग्लिकोल, गनकाटन, डाइनाइट्रो-टोल्यून, ट्राई-नाइट्रो-टोल्यून, पिकरिक एसिड, डाइ-नाइट्रो-फिलॉन, ट्राइ-नाइट्रो रिसार्सिनाल (स्टाइफिनिक एसिड), साइक्लो ट्राइ-मेथिलिन, ट्राइ-नाइट्रामाइन, पेन्टा एरिथ्रिटॉलट्रेट्रानाइट्रेट, टेट्रिल,

नाइट्रो—ग्वानिडीन, लेड, एजाइड, लेट स्टाइफाइनेट, पारे या अन्य धातु का फिल्मनेट, डाइएजोडाइनाइट्रोफिनाल, रंगीन आतिश या अन्य पदार्थ चाहे वह एक रसायन सिम्मश्रण या पदार्थों का मिश्रण हो, चाहे वह ठोस या तरल या गैसीय हो, जिसका प्रयोग या विनिर्माण विस्फोट द्वारा व्यावहारिक प्रभाव उत्पन्न करना या आतिशबाजी करना हो; और कुहरा—संकेत, आतिशबाजी, पलीते, राकेट, आघात टोपियाँ, विस्फोट प्रेरक, कारतूस, सभी प्रकार के गोला—बारूद और इस खण्ड में यथा—परिभाषित विस्फोटक का प्रत्येक अनुकूलन या निर्मित इसके अंतर्गत हैं:

विस्फोट शब्द विशेषण (एडजेक्टिव) है जब कि पदार्थ संज्ञा (नाउन) है। जब संज्ञा है तो ही उसका विशेषण (विशेषता होगी) संज्ञा यदि पदार्थ है तो उसकी विशेषता दर्शाई जा रही है। अर्थात पदार्थ यदि विस्फोटक है तो वह उस पदार्थ की विशेषता है। यदि आपके पास ऐसे साधन व पदार्थ जिनको विभिन्न प्रकार से जोड़—बाकी—गुणा भाग आदि से विस्फोटक तैयार किया जा सकता है तो वह विस्फोटक पदार्थ है उनमें अपने विशेष गुण हैं तथा इन पदार्थ साधनों से निर्मित वस्तु विस्फोटक पदार्थ कही जाएगी। इसीलिए वि. प. अधिनियम में उन समस्त वस्तुओं एवं साधनों का वर्णन है जिन्हें विस्फोटक पदार्थ कहा जाता है।

यदि अपने पासं मावा, शक्कर आदि है, कढ़ाही, चूल्हा आदि है तो मिठाई के पदार्थ है व उससे तैयार वस्तु मिठाई (जैसे पेड़ा) है। यदि आप विस्फोटक या विस्फोटक पदार्थ का साशय जानते हुए विस्फोट करते हैं तो विस्फोटक अधिनियम के अंतर्गत कृत्य होगा एवं आपके पास विधिवत अनुज्ञप्ति ऐसे विस्फोटक निर्माण हेतु है तथा दुर्घटना आदि के कारण विस्फोट होता है तो उसकी जांच वि. प. अधि. के अंतर्गत धारा 8–9–9 ए के अंतर्गत होगी एवं धारा 9बी, 9सी, आदि के अंतर्गत सजा होगी। यही बात बिना आज्ञप्ति के विस्फोटक धारण करने, निर्माण, परिवहन, आयात निर्यात आदि के संबंध में भी कही जा सकती है।

अब वि.प.अ. की एवं वि.अ. की कुछ धाराएं तुलनात्मक सारिणी के रूप में प्रस्तुत की जा रही हैं-

धारा	वि.प.अ.	धारा	वि. अ.
3.	जीवन एवं सम्पत्ति को जोखिम में डालने वाला विस्फोटक कारित करने के लिए दण्ड	6बी	अनुज्ञप्ति का अनुक्त किया जाना
4.	विस्फोट कारित करने के प्रयत्न के लिए या जीवन या संपत्ति को जोखिम में डालने के आशय से विस्फोटक बनाने या रखने के लिए	8—9एर्ब	ो दुर्घटना की जांच एवं सूचना का दिया जाना
5.	दण्ड संदिग्ध परिस्थितियों में विस्फोटक पदार्थ बनाने	9बी	कतिपय अपराधों के लिए दण्ड
7.	या अपने पास रखने के लिए दंड अपराधों के विचारण पर निबन्ध (स्वीकृति पश्चात विचारण)	17	विस्फोटक की परिभाषा का अन्य विस्फोटक पदार्थों तक विस्तार

उपरोक्त दोनों परिभाषाएं पढ़ने से यह ज्ञात होगा कि विस्फोटक साधन हैं एवं विस्फोटक पदार्थ साध्य है अर्थात साधनों द्वारा साध्य अर्थात विस्फोटक पदार्थ पूर्णतः बनाया जाना है।

वि.अ. में कुछ और धाराएं हैं जो विस्फोटक बनाने हेतु अनुज्ञप्ति, विस्फोटक विनिर्मित करने हेतु आवश्यक सामग्री के विषयक अनुज्ञप्ति, निरीक्षण, विस्फोटक की परिभाषा का विस्तार करने की शक्ति आदि से सम्बन्धित है। विस्फोटक पदार्थ के कारण दुर्घटना हो जाने पर सूचना देना या जांच करने विषयक प्रावधान धारा 8 एवं 9ए में है। इस प्रकार विस्फोटक अधिनियम विस्फोट बनाने हेतु सामग्री का वर्णन करता है व उसके अधिपत्य हेतु अनुज्ञप्ति व उल्लंघन के विषय में है।

इसके विपरीत विस्फोटक अधिनियम के अंतर्गत किसी के पास साधन हो, तैयार सामान हो व अनुज्ञप्ति न हो तो अधिनियम में वर्णित धारा 4 एवं 5 के अनुसार विस्फोट किया जाता है तो अपराध की परिभाषा में आएगा। अर्थात ये धाराएँ वि. अ. की धाराओं से अधिक विस्तार योग्य है। वो ऐसे की विस्फोटक अथवा विस्फोटक पदार्थ किसी ने बिना अनुज्ञप्ति के धारण किया भी है तो अपराध है एवं ऐसा विस्फोटक अथवा विस्फोटक पदार्थ वि. अधि. में धारा 4 व 5 में वर्णित अपराधिक कृत्यानुसार कृत्या करता है तो वि.अधि. क अंतर्गत दंडनीय है।

यह सही है कि यदि विस्फोट नहीं होता है तो वि. अ. के अंतर्गत अपराध दंडनीय है व विस्फोट होता है तो दोनों ही अपराधों के अंतर्गत आरोप लगाया जा सकता है, व सिद्ध दोष (Guilty) पाए जाने पर दोषसिद्ध (Convict) भी किया जा सकता है लेकिन दंडादेश (Sentence) मात्र एक ही दिया जा सकेगा। ठीक वैसे ही जैसे धारा 279–337 भा.द.वि. के अनुरूप। चिंतन का मूल आधार धारा 71 भा.द.वि. होगी। ध्यान रखना वि.प.अ. के अंतर्गत प्रकरण में धारा 7 के अंतर्गत सक्षम प्राधिकारी की स्वीकृति पश्चात ही आरोप पत्र पर विचार हो सकता है। रामचंदर सिंह वि. स्टेट 1961(2) क्रि.लॉ.ज. पृष्ठ 391 (पटना) पर बहुत सुंदर प्रस्तुती इस विषय पर है कुछ अंश ज्यों के त्यों प्रस्तुत कर रहा हूँ। तािक शब्दों के आधार से उनका प्रभाव (Impact) पूर्ण एवं प्रभावी रूप से हो सके। निर्णय के चरण 19 में दृष्टांत कहता है कि;

Explosive Substance within the meaning of S. 2 explosive substance Act would include also any explosive ready for explosion. If it includes a part, it would surely include the whole.

Finished product ready for explosion would came within the mischief of definition in S. 2 of the Explosive Substance Act and S. 4 of the Explosive Act.

चरण 20 में आगे यह भी कहा है कि "The penal section in both the Acts is S. 5 and under Rule 81 of the Explosive Rules, 1940, a licence is necessary for possession of explosives or explosive substances and failure to obtain such a licence would bring the offender under the mischief of S. 5 of either of the two Act.

मोहम्मद उस्मान मोहम्मद हुसैन मनियार वि. स्टेट ऑफ महाराष्ट्र ए.आई.आर. 1981 सु. को 1062 (1065)=1981 क्रि.लॉ.ज. पृष्ठ 588 में कहा है कि

'Explosive Substance' has a broader and more comprehensive meaning than the term 'Explosive'. 'Explosive Substance' includes 'explosive' The term explosive has not defined in the Act (i.e. in Explosive Substances Act) उक्त दृष्टांत वि.प.अ. पर आधारित है। उक्त दृष्टांत के कुछ अंश इस प्रकार हैं –

In order to bring home the offence under Section 5 the prosecution has to prove (i) that the substance in question is explosive substance; (ii) that the accused makes or knowingly has in his possession or under his control any explosive substance; and (iii) that he does so under such circumstances as to give rise to a reasonable suspicion that he is not doing so for a lawful object. (Para 10)

The burden of proof of these ingredients is on the prosecution. The moment the prosecution has discharged that burden, it shifts to the accused to show that he was making or possessing the explosive substance for a lawful object, if he takes that plea. (Para 10)

उक्त न्यायदृष्टांत में चरण 15 में उल्लेखित अन्य दृष्टांत (1939) 2 All ER. 641 एवं (1957) All ER. 665 का संदर्भ देते उद्धरण भी प्रस्तुत किया है उसे भी देख लेना उचित होगा।

एक अन्य दृष्टांत महबूब उरमान भाई वि. गुजरात राज्य 1973 क्रि.लॉ.ज. पृष्ठ 80 को भी देखें। उसमें प्रश्न यह था कि क्या धारा 4(ख) के अंतर्गत दोषी अभियुक्त को धारा 5 के अंतर्गत भी अपराधी स्थिर किया जा सकता है उसका उत्तर इस प्रकार दिया गया था।

अधिनियम की धारा 4 (ख) और 5 के अंतर्गत अपराध के तत्व देखने पर और दोनों ही धारों द्वारा उपबंधित अधिकतम कारावास की अविध से यह पाया जाता है कि धारा 5 के अंतर्गत अपराध अधिनियम की धारा 4 (ख) के तहत अपराध की तुलना में कम है। अधिनियम की धारा 4 (ख) के तहत अपराधी व्यक्ति निश्चित रूप से अधिनियम की धारा 5 के अंतर्गत दोषी होगा। अतः धारा 4 (ख) के अंतर्गत अभियुक्त व्यक्ति धारा 5 में भी दोषी ठहराया जायेगा।

उपरोक्त तथ्यों को देखने से ज्ञात होगा कि विस्फोटक पदार्थ अधिनियम (वि.प.अ.) का विस्तार अपराधिक प्रकरणों के सम्बन्ध में विशालता लिए है जिसके अंतर्गत 'विस्फोटक' या विस्फोटक पदार्थ के अवैध आधिपत्य उसका अपराधिक कृत्य के रूप में उपयोग आदि धारा 4 एवं 5 के अंतर्गत दंडनीय है जबिक विस्फोटक अधिनियम के अंतर्गत मुख्यतः विस्फोटक के अनाधिकार रूप से अधिपत्य के सम्बन्ध में एवं अन्य कितपय कृत्यों के सम्बन्ध में धारा 9बी एवं 9सी के अंतर्गत दंडनीय है। ध्यान रहे कि विस्फोटक अधिनियम के अंतर्गत प्रकरण चलाने हेतु पुलिस को वैसी अनुमित नहीं लेना पड़ती जैसी धारा 7 विस्फोटक पदार्थ अधिनियम के अंतर्गत।

## प्रकरण की सुनवाई कौन करेगा-

प्रशिक्षण काल में एक अतिरिक्त जिला न्यायाधीश ने इस विषय पर समस्या पूछी थी व दृष्टांत भी बताया था। मूल आधार धारा 326–409–394–306–366 भा.द.वि. जैसे अपराधों को बनाया जा सकता है। जैसे धारा 326–394–409 जैसे अपराधों के लिए आजीवन कारावास या 10 वर्ष की सजा है लेकिन दं.प्र.सं. के परिशिष्ट 1 भाग की सारिणी के स्तम्भ 6 में .सुनवाई का अधिकार मजिस्ट्रेट को दिया है। विपरीत इसके धारा 306–366 में 10–10 वर्ष की सजा का प्रावधान है लेकिन सुनवाई का अधिकार सत्र न्यायालय को दिया है। द.प्र.स. के परिशिष्ट 1 का दूसरा भाग भा.द.वि. में वर्णित अपराधों से भिन्न अपराधों के विषय में अधिकार है। 7 वर्ष से अधिक या मृत्युदंड या आजीवन कारावास की सजा से दंडित अपराधों का विचारण केवल सत्र न्यायालय ही कर सकता है। यही बात प्रकारांतर से एम.सी.आर.सी.क. 814/2001 बलवन्त वि. स्टेट निर्णय दि. 05.3.2001 म.प्र. उच्च न्यायालय, जबलपुर पीठ में बताई है। (देखें ज्योति एप्रिल 2001 पृष्ठ 145)। डी.एस. बाली वि. एन.एस. अहलवत, 1981 क्रि.ए. लॉ. ज., एन,ओ,सी, क्र. 149 (पंजाब–हरियाणा) में कहा है कि वि.प्र.अ. की धारा 5 के अंतर्गत अपराध हेतु दण्ड स्वरूप 7 से अधिक वर्षों का कारावास हो सकता है। अधिनियम में कोई विशेष न्यायालय का उल्लेख नहीं किया गया है कि कौन सा न्यायालय अपराध का परिक्षण करेगा। धारा 26(ख) और अनुसूची 1 भाग 2 दं.प्र.स. के अंतर्गत अपराध का श्रवण सत्र न्यायालय द्वारा ही किया जा सकेगा।

### समापन

उपरोक्त विवरण के आधार से यह बताया जा सकता है कि विस्फोटक एवं विस्फोटक पदार्थ का धारण (जैसे मावा, शक्कर, इलायची, केशर अथवा उससे बनी मिठाई) अपने आप में अपराध है जो दोनों ही अधिनियमों के अंतर्गत समान रूप से सम्मिलित हो सकता है तथा धारा 4 व 5 वि.प्र.अ. के कृत्य भी समान रूप से विस्तारित होंगे दोनों ही अधिनियमों के लिए। इस प्रकार अपराधिक कृत्य के सम्बन्ध में दण्ड के जो प्रावधानों दोनों अधिनियमों में हैं उस दृष्टिकोण से एवं 'विस्फोटक' एवं 'विस्फोटक पदार्थ' की परिभाषा के दृष्टि से वे परस्पर व्यापी, परस्पर छादित (Over laping) है। यदि विस्फोटक पदार्थ अधिनियम की धारा 7 के अंतर्गत सक्षम प्राधिकारी की प्रकरण चलाने विषयक स्वीकृति है तो दोनों ही अधिनियमों के अंतर्गत अन्यथा विस्फोटक

अधिनियम के अंतर्गत प्रकरण चलाया जा सकेगा। ऐसा करने के पूर्व निवेदन यह रहेगा कि धारा 9बी, 9सी, धारा 5 विस्फोटक अधिनियम एवं धारा 5 के अंतर्गत विस्फोटक नियमों को अवश्य देख लें।

ये लेखक के रूप में मेरे अपने विचार हैं। समीक्षा, विश्लेषण, समालोचन व नये चिंतन हेतु एवं अपने स्वयं के सृजनात्मक विचारों हेतु अभिधारणा (आधार) के रूप में उपयुक्त सिद्ध हो। कितना उचित होगा कि इन दोनों अधिनियमों को मिलाकर युक्तियुक्त रूप से एक नया अधिनियम बनाया जावे।

बेहतर है जान लो

# पूर्व तैय्यारी

पद, अधिकार, सत्ता कुछ को मिलती है। प्राप्त करने वाले व न प्राप्त करने वालों में योग्यता अयोग्यता का आधार होना चाहिए। लेकिन ऐसा हो या न भी हो। फिर भी जब हम उस पद अधिकार सत्ता के हकदार बनकर पद ग्रहण करते हैं तब तो हमारा कर्त्तव्य बनता ही है कि हम उस पद के हकदारी का औचित्य सिद्ध करें।

स्वतंत्र प्रभार के रूप में जिला न्यायाधीश का पद मिलता है तो व्यवहार न्यायाधीश वर्ग 1 से अतिरिक्त जिला न्यायाधीश बनते हैं। आदेश प्राप्त होने तक हमें उसकी प्रतीक्षा रहती है। ग्रेडेशन लिस्ट का अविरत अध्ययन होता रहता है, कल्पनाओं में ही हम उसमें से हमारे उपर वालों की अयोग्यता, उनके पदोन्नित की न्यूनतम संभावनाओं की भी कपोल कल्पना करते हैं। मुख्यालय स्थित रिजस्ट्री के अधिकारियों से बार—बार टेलीफोन लगाकर कमेटी, फुल कोर्ट मीटिंग की चर्चा करते रहते हैं। ये सब बातें उचित हैं या अनुचित हैं इस बात का यहां निर्धारण नहीं करना है। विचार ये करना है कि हम यह सब क्यों करते हैं। यह इसलिए करते हैं कि हमारा कौतुहल आकांक्षा, इच्छा होती है। ऊंचे पद की चाहत की तीव्रता से प्रतीक्षा होती है, परिवार समाज में बढ़ती प्रतिष्टा की इच्छा होती है। ये सब अस्वाभाविक नहीं है। लेकिन ये सब इसी सीमा तक सिमट जाता है जो महत्वपूर्ण है उसे हम स्पर्श ही नहीं कर पाते।

पूर्व में भी पत्रिका के माध्यम से बताया था कि प्रशिक्षण शिविरों में आने वाले अतिरिक्त जिला न्यायाधीश जो यहां आने के तीन चार माह पूर्व पदोन्नत हुए थे तथा प्रशिक्षण शिविरों में आने के लगभग एक माह पूर्व अग्रिम रूप से सूचित भी किया था कि अमुक—अमुक प्रावधानों को अवश्य पढ़कर आना फिर भी यहां जब वे आये तो कुछ एक कुछ भी पढ़कर नहीं आये थे। उनसे चर्चा होने पर ये भी ज्ञात हुआ कि पदोन्नति के पूर्व या उसके पश्चात अतिरिक्त जिला न्यायाधीश के रूप में पदोन्नत होने पर भी तथा प्रशिक्षण के लिए आने तक भी नहीं पढ़ा था फिर भी उस पद का कार्य करते थे। तत्पश्चात क्या पढ़ा होगा ये वे ही बता पायेंगे।

जिला न्यायाधीश के अधीन कार्य करने वाले न्यायाधीश समवेत रूप से एक ही बात कहते रहते हैं कि जिला न्यायाधीश तो अपने बुद्धि से प्रशासनिक कार्य भी नहीं करता वो तो आफिस नोटशीट पर चिड़िया (हस्ताक्षर) बना देता है। संभव है यही बात सही है ऐसा मान लें। लेकिन क्रमानुसार जब एक—एक को स्वतंत्र प्रभार में जिला न्यायाधीश के रूप में पदास्थापित किया जाता है तो वो क्या करते हैं। जो न्यायाधीश जिले में प्रभारी अधिकारी होते हैं वे क्या करते हैं? हम जिस पद पर कार्य करते हैं उससे वरिष्ठ के पद का कार्य आसान है ऐसा मूल्यांकन करके हम अपने पद के कार्य के प्रति हमारी अयोग्तया एवं अक्षमताओं की ओर उपेक्षा से देखते हैं व आंखें बन्द तो नहीं कर लेते हैं? लेकिन दूसरे भांपते भी हैं ध्यान रहे मौसम की भविष्यवाणी है। कृषक को मौसम की पूर्व सूचना लाभदायी एवं उपयोगी होती है। कृषक उसी हिसाब से तैयारी करता है।

# वाद का रोक दिया जाना

(धारा 10 व्य.प्र.स.)

-पुरूषोत्तम विष्णु नामजोशी

धारा 10 व्य.प्र.स. के प्रावधान इस प्रकार है :

व्य.प्र.स. धारा 10 वाद का रोक दिया जाना :- कोई न्यायालय ऐसे किसी भी वाद के विचारण में जिसमें विवाद्य—विषय उसी के अधीन मुकदमा करने वाले किन्हीं पक्षकारों के बीच के, या ऐसे पक्षकारों के बीच के जिनसे व्युत्पन्न अधिकार के अधीन वे या उनमें से कोई दावा करते हैं, किसी पूर्वतन संस्थित वाद में भी प्रत्यक्षतः और सारतः विवाद्य है, आगे कार्यवाही नहीं करेगा जहाँ ऐसा वाद उसी न्यायालय में या भारत में के किसी अन्य ऐसे न्यायालय में, जो दावा किया गया अनुतोष देने की अधिकारिता रखता है या भारत की सीमाओं के परे वाले किसी ऐसे न्यायालय में जो केन्द्रीय सरकार द्वारा स्थापित किया गया है या चालू रखा गया है और वैसी ही अधिकारिता रखता है, या उच्चतम न्यायालय के समक्ष लिम्बत है।

स्पष्टीकरण :- विदेशी न्यायालय में किसी वाद का लंबित होना उसी वाद हेतुक पर आधारित किसी वाद का विचारण करने से भारत में के न्यायालयों को प्रवारित नहीं करती।

उक्त धारा पर न्यायालयीन कार्य की दृष्टि से विचार किया जा रहा है। सिद्धांतिक, संक्षिप्त एवं व्यवहारिक चिंतन मात्र प्रस्तुत किया जा रहा है जो दैनंदिन कार्य में न्यायालयों में उपयोगी हो।

### प्रावधान का उद्देश्य :

एक ही विषय पर दो व्यक्तियों के बीच परस्पर विवाद हो तथा वे पृथक पृथक दावे समवर्ती न्यायालयों में प्रस्तुत करें तो सहज संभव है कि विभिन्न न्यायालय अलग अलग विचार करके भिन्न भिन्न निर्णय दे जिस कारण अनावश्यक रूप से उलझने निर्मित होगी। न्याय का प्रमुख उद्देश्य ही विवादों को एवं प्रकरणों की भरमार को कम करना है। यह धारा रेसज्यूडिकेटा का मूलाधार है। न्यायदृष्टांत के रूप में अन्नामलाई वि. थौर्नहील ए.आई.आर. 1931 पी.सी. 263 एवं इंडियन बैंक वि. महाराष्ट्र स्टेट कोऑपरेटिव मार्केटिंग फेडरेशन मर्यादित ए.आई.आर. 1998 सु. को 1952(1954) के दृष्टांत अध्ययन योग्य होंगे।

### प्रावधान आदेशात्मक हैं ?

जी हां ये प्रावधान आदेशात्मक (मॅन्डेटोरी) है। अर्थात यदि धारा 10 में वर्णित आवश्यक तत्व (जो ठीक ऊपर बताये हुए हैं) प्रकरण में उपस्थित हैं, एवं प्रकरण के पक्षकार ने इस विषय में आवेदन पत्र प्रस्तुत किया है तथा न्यायालय का समाधान हो जावे कि पश्चातवर्ती प्रकरण की स्थिति भी उल्लेखित शर्तों को (तत्वों की) पूर्णता करती हो तो न्यायालय को यह अनिवार्य है कि प्रकरण की कार्यवाही स्थिगत कर दें। न्यायालय यदि धारा 10 के अंतर्गत कार्यवाही करता है तो पक्षकारों पर कोई शर्त लगाने का अधिकार उसे नहीं है लेकिन ऐसी ही कार्यवाही धारा 151 व्य.प्र.स. के अधिकारों का प्रयोग करते लगाई जाती है तो न्यायालय शर्तें लगा सकता है। देखें ए.सी. नाहा रॉय वि. नेशनल कोल डेव्हलपमेंट कार्पोरेशन 1972 जे.एल.जे. 831 (डी.बी.) एवं रतनसिंह वि. मुसद्दीलाल ए.आई.आर. 1972 इलाहाबाद 473।

### मापदंड क्या हो ?

दो प्रकरणों में से दूसरा प्रकरण स्टे करना है ये तो सामान्य सिद्धांत है लेकिन इसका यह अर्थ नहीं है

कि हमने लकीर के फकीर बनना है। न्यायालय को धारा 151 के अंतर्गत भी समान रूप से अधिकार है तथा दूसरा दावा स्टे न करते प्रथम दावे की कार्यवाही को चालू रखने में रोक लगाई जा सकती है। धारा 151 व्य. प्र.स. के अधिकार धारा 10 के अतिरिक्त है। मनोहरलाल वि. सेठ हीरालाल ए.आई.आर. 1962 सर्वोच्च न्यायालय 527 में यही बात बताई गई है। शेट्टी वि. गिरधारी ए.आई.आर. 1982 सु.को. 83, ऊपर उल्लेखित दृष्टांत इंडियन बैंक भी इसी बात को विस्तार करके बताते हैं। न्यायालय का यह कर्तव्य है कि कोई भी प्रकरण स्टे करने के पूर्व यह देखे कि पक्षकारों को क्या सुविधाजनक होगा, आदेश का पालन एवं लागू करना निर्णय का दूसरे प्रकरण पर क्या प्रभाव होगा यह भी विचार करना होगा। सबसे महत्वपूर्ण बात है निर्णय का दूसरे प्रकरण पर क्या प्रभाव। इसका सूत्रबद्ध उत्तर है रेस ज्यूडिकेटा (पूर्व न्याय)। देखें शॉ वैलेस वि. भोलानाथ ए.आई.आर. 1975 कलकत्ता 41।

रेस ज्यूडिकेय का प्रभाव देखने के लिये यह आवश्यक नहीं है कि दावे की विषय वस्तु एवं दावे का कारण समान हो। जब तक एक दावे के निर्णय का प्रभाव दूसरे दावे पर पूर्व न्याय के रूप में नहीं पड़ेगा तब तक हम यह नहीं कह सकते कि प्रकरणों में विवादित विषय वस्तु प्रत्यक्षतः एवं सारवान रूप से समान है। देखें अन्नामलई वि. थोमहील ए.आई.आर. 1931 पी.सी. 263 रामितवारी वि. भोलीदेवी ए.आई.आर. 1994 पटना 76 मुन्नीलाल वि. सर्वजीत, ए.आई.आर. 1984 राजस्थान 22, रिधका वि. कोनेस ए.आई.आर. 1993 मद्रास 90.

जहां पर दावे को कारण किसी पृथक आधार पर हो तब धारा 10 के सिद्धांत लागू नहीं होंगे क्योंकि जहां दावे को कारण ही भिन्न हैं वहां धारा 10 का मूलाधार ही अस्तित्व में नहीं रहेगा।

एक उदाहरण यहां बताया जा सकता है। रामलाल ने हीरालाल के विरुद्ध एक वाद स्थायी निषेधाज्ञा हेतू प्रस्तुत किया कि वादी विवादित भूमि का स्वामी होकर अधिपत्यधारी है तथा प्रतिवादी को वादी के हितों के विरूद्ध कोई भी कार्यवाही करने से व अधिपत्य लेने से रोका जावे। प्रतिवादी हीरालाल ने वादी रामलाल के विरुद्ध बाद में दूसरा दावा यह लगाया कि वह (हीरालाल) विवादित भूमिका स्वामी है व उसे वादी (रामलाल) से अधिपत्य दिलाया जावे तथा भविष्य में उसके (हीरालाल) के अधिकारों में हस्तक्षेप न करे। ऐसे प्रकरणों में ऐसा नहीं होगा कि दूसरा दावा स्टे हो जाएगा क्योंकि प्रथम दावे में होने वाला निर्णय रेस ज्युडिकेय नहीं होगा क्योंकि विषय वस्तु भिन्न है। दूसरे प्रकरण में प्रतिवादी ने अधिपत्य की मांग की है एवं स्वयं को मालिक होना भी सिद्ध करना चाहता है। इस प्रकार के प्रकरणों में प्रथम दावा स्टे करना न्यायोचित होगा क्योंकि द्वितीय दावे में विषय वस्तु जिस बावत निर्णय दिया जाना है उसका विस्तार पूर्णता लिए हुए है एवं प्रथम वाद की विषय वस्तु भी दूसरे दावे में समाहित है। अतः कौन सा दावा स्टे किया जाना है इसके लिए आधार ये है कि किस दावे का विस्तार (काम्परहेन्सिव) कितना है व क्या एक दावे की सुनवाई में दूसरे दावे की सुनवाई भी पूर्णतः हो जाएगी। जिस दावे के विषय में ऐसा सकारात्मक उत्तर मिल जाएगा वही दावा चलेगा व दूसरा दावा (चाहे वह पहले ही संस्थित क्यों न किया गया हो स्टे होना चाहिये) ऐसी कार्यवाही धारा 10 के बजाय धारा 151 व्य.प्र. स. के अंतर्गत होती है। अन्य कारणों से स्टे करने की कार्यवाही भी धारा 151 व्य.प्र.स. के अंतर्गत की जा सकती है। जैसे टी.एन.सिव्हिल सप्लाईज वर्कस वि. टी.एन.सिविल सप्लाईज कारपोरेशन (2001) 4 एस.सी.सी. 469 में बताया कि 'Writ petition filed by a party admittedly having locus standi was disputed. In such circumstances, adjournment of hearing in the writ appeal till the decision of the writ petition was proper.

### समवर्ती न्यायालय

धारा 10 के सिद्धांत लागू होने के लिए यह आवश्यक है कि न्यायालय जो दोनों प्रकरणों की सुनवाई कर रहा हो (चाहे वह एक ही न्यायालय हो या दो पृथक न्यायालय हो) समवर्ती होना चाहिये। अर्थात दोनों ही न्यायालय या एक न्यायालय दोनों ही प्रकरण सुनने के लिए सक्षम हो। अर्थात दोनों ही दावों में मांगी गई सहायता वो/वे न्यायालय दे सकते हैं। लेकिन यह बात ध्यान देने योग्य हैं कि इसका यह अर्थ नहीं है कि भौतिक क्षेत्राधिकार वाला वो/वे न्यायालय होना ही चाहिये। देखें ए.आई.आर. 1982 कलकत्ता 41 मिर्ता लिना (प्रायवेट) लिमिटेड वि. फिन्ले मिल्स एवं ए.आई.आर. 1972 मैसुर 112 चन्नाभासप्पा वि. किशनचंद सुब्रह्मणयम वि. नरसिंह ए.आई.आर. 1972 एम.पी. 186

## 'दावा' शब्द का निर्वचन

# दावा (सूट) का विस्तार

यह स्थापित सिद्धांत है कि दावा शब्द के अंतर्गत अपील भी सम्मिलित है। जैसा कि हरिशचंद्र वि. त्रिलोकी सिंह ए.आई.आर. 1957 सु.को. 444 तथा अन्नामलाई का उपर उल्लेखित दृष्टांत देखें। ध्यान रहे कि अपील की सुनवाई लंबित दावे की सुनवाई करना नहीं माना जा सकता। जैसा कि मुन्नालाल के प्रकरण ए.आई.आर. 1984 राजस्थान पृष्ठ 22 में कहा है। अतः द्वितीय अपील के लंबित रहते यह माना जाएगा कि पूर्वगामी दावा लंबित था अतः द्वितीय अपील में पश्चातवर्ती दावा स्टे करने हेतू आदेश पारित नहीं किया जा सकता। देखें, अंबिका वि. संविता ए.आई.आर. 1990 उड़ीसा 127। प्रवर्तन कार्यवाही धारा 10 के अधीन सम्मिलित नहीं होगी चाहे वह कार्यवाही धारा 47 व्य.प्र.स. के अंतर्गत भी क्यों न हो। कुछ उच्च न्यायालय मत भिन्नता रखते हैं। कुछ एक कहते हैं कि मध्यस्तता के प्रकरणों में ये प्रावधान लागू होते हैं। कुछ एक का कहना है कि धारा 33 आर्बिट्रेशन एक्ट (पुराना) के अंतर्गत यदि आवेदन पत्र लंबित हो तब भी दूसरी कार्यवाही जो धारा 20 के अंतर्गत हो चालू रह सकती है। क्योंकि पश्चातवर्ती कार्यवाही ज्यादा विस्तार लिये (काम्परहेन्सिव) होगी। धारा 83 संपत्ति अंतरण अधिनियम की कार्यवाही पर ये प्रावधान लागू नहीं होंगे। वैवाहिक सम्बन्धों की पुनः स्थापना के लिए पति ने यदि कार्यवाही की हो व पत्नी ने उसी कार्यवाही में भरण पोषण की मांग की हो तब पत्नी द्वारा पूर्व में संस्थित धारा 18 हिन्दू एडॉप्शन एण्ड मेन्टेनन्स एक्ट की कार्यवाही स्थगित नहीं की जा सकती। जहां पत्नी ने परिवार न्यायालय में बालक का अधिपत्य (कस्टडी) प्राप्त करने के लिए कार्यवाही की हो तब पति द्वारा उच्च न्यायालय में उसे बालक का संरक्षक नियुक्त करने व अधिपत्य प्राप्त करने हेतु की गई कार्यवाही स्थिगित करना चाहिये ऐसा राधिका वि. कोनेल पारेख ए.आई.आर. 1993 मदास 90(100) एवं सिम्हाचलम वि. पोपम्मा ए.आई.आर. 1973 ए.पी. 31 में कहा गया है। संक्षिप्त (समरी) सुनवाई के प्रकरणों में प्रावधानों को लागू करने के विषय में सर्वोच्च न्यायालय ने इंडियन बैंक (1998) 5 सू.को.के. 69=ए.आई. आर. 1998 स्.को. 1952 में कुछ मापदंड दिए हैं व कहा है कि समरी-केसेस (आ. 37 व्य.प्र.स.) में दावा लगाते ही वह दावा शब्द के विशिष्ट अर्थ में दावा नहीं हो जाता क्योंकि उसमें प्रथमतः प्रतिरक्षा हेतु न्यायालय से प्रतिवादी अनुमती मांगता है तथा वह न्यायालय स्वीकार या अस्वीकार करता है, यदि अनुमती दी जाती है तो प्रतिवादी को कुछ शर्तें पूर्ण करना होती है तब जाकर वास्तव में दावे की कार्यवाही प्रारम्भ होती है। ध्यान रखना दो विभिन्न अधिनियमों के अंतर्गत दो पृथक दावे किए जा सकते हो तथा उक्त अधिनियमों में इस विषयक कोई शर्तें हो तो उन शर्तों का पालन किए जाने पश्चात दावे प्रस्तुत हुए हो तो किसी एक में भी पक्षकार को

अधिकार से वंचित नहीं किया जा सकता; दोनों दावे चल सकेंगे। ऊपर उल्लेखित सिम्हाचलम के दृष्टांत से भी यह बात ज्ञात होगी। यह बात भी स्पष्ट है कि धारा 141 व्य.प्र.स. दावों की कार्यवाही समान रूप से आवेदन पत्रों पर लागू होने का निर्देश देती है अतः धारा 10 व्य.प्र.स. प्रोबेट प्रशासन पत्र संरक्षणता विषयक कार्यवाही में लागू होगी।

# क्या दावे के प्रस्तुतीकरण पर रोक है ?

निश्चित रूप से उत्तर दिया जा सकता है कि ऐसी बात नहीं है। धारा 10 पक्षकारों को अधिकार देता है प्रयोग करना न करना उनकी इच्छा पर है। अतः इस अधिकार का प्रयोग पक्षकार न भी करे एवं न्यायालय को सूचित न करे कि समानांतर प्रकरण चल रहे हैं व न्यायालय तब निर्णय दे दे तो वे निर्णय स्वयमेव शून्य या अवैध नहीं है व प्रभावशील होंगे। यह प्रावधान पक्षकारों के लिए एक सुविधा मात्र देता है यथार्थ या तात्विक अधिकार प्रदान नहीं करता न प्रकरण के गुण दोष पर विपरीत प्रभाव डालने हेतु प्रावधान को सक्षम किया गया है। यह बात भी ऊपर उल्लेखित इंडियन बैंक के न्यायदृष्टांत में बताई गई है। यह दृष्टांत अन्य बातों पर भी विचार करता है, यथा समय विवेचन किया जाएगा। यहां यह भी ध्यान रखने योग्य है कि दूसरा दावा प्रस्तुतीकरण में कोई रोक इस प्रावधान के अंतर्गत नहीं है रोक गुणदोष पर सुनवाई (ट्रायल) के विषय में है। यदि दूसरे के सुनवाई में भी यह स्थिति ज्ञात हो जाती है तब भी अगली सुनवाई रोकी जाएगी। ऊपर बताए दृष्टांतों के अतिरिक्त ए.आई.आर. 1937 नागपुर 132 गंगाप्रसाद वि. महिला बनापत्ती, शांतिस्वरूप वि. अब्दुल रहमान ए.आई.आर. 1965 एम.पी.एल. एवं ए.आई.आर. 1984 उड़ीसा 209 गुरू प्रसाद वि. बृजकुमार एवं ए.आई.आर. 1984 राजस्थान 22 मुन्नीलाल वि. सरजीत देखें।

### आवश्यक तत्व :-

धारा 10 के प्रावधान लागू होने के लिये यह आवश्यक है कि दो दावे हो, विषय वस्तु समान हो, पक्षकार वे ही हो (अथवा ऐसे पक्षकारों के बीच के जिनसे व्युत्पन्न अधिकारों के अधीन हो) एक दावा पूर्व से लंबित हो जो भारत के समवर्ती (कांकरन्ट ज्यूरिसडिक्शन) न्यायालय में हो, सहायता समान हो एवं पक्षकारों की, पहचान स्थिति — हैसियत अवस्थिति, कोटि (कॅरेक्टर—स्टेटस पोजिशन) भी समान हो। (अर्थात रामलाल रामलाल होना एक बात होगी एवं रामलाल यदि भागीदारी के किसी फर्म भागीदार के रूप में हो तो उसकी हैसियत भिन्न हो जाएगी। रामलाल का व्यक्तिगत कार्य एवं पदीय रूप से किया कार्य भिन्न होगा) देखें श्रीवल्लभ वि. लक्ष्मण ए.आई.आर. 1947 नागपुर 39।

### अपराधिक प्रकरणों में कार्यवाही का रोका जाना -

यह विषय अपने आप में पृथक से लेख लिखने योग्य है। यहां संक्षिप्त में कुछ दृष्टांतों सहित व्याख्या करना पर्याप्त है। यदि वादी ने एक दावा रूपये वसूल करने हेतु प्रस्तुत किया हो व उसी रकम सम्बन्धी प्रतिवादी द्वारा दिए चेक का डिसऑनर होने से अपराधिक कार्यवाही प्रारम्भ की हो तो कोई भी कार्यवाही स्टे नहीं होती है भूषण टिन वर्क विरूद्ध पंजाब एण्ड सिंध बैंक (1992)। पी एण्ड एच 529, साईं उद्योग वि. सेंट्रल बैंक ए.आई.आर. 1998 एम.पी. 191, स्टेट ऑफ राजस्थान वि. कल्याण (1996) 3 एस.सी.सी. 87 तथा ब्रिटिश इंडियन कॉर्पोरेशन वि. राष्ट्र को कॅरिअर्स (1996)4 एस.सी.सी. 748। महत्व ये है कि अपराधिक कार्यवाही एवं सांपत्तिक कार्यवाही में एक दूसरे पर क्या प्रभाव (बिअरिंग) है यह देखा जाना है।

# किस न्यायालय में आवेदन पत्र प्रस्तुत होगा

सामान्य नियम यही है कि पश्चातवर्ती दावा जिस न्यायालय में प्रस्तुत किया गया है उसी न्यायालय में धारा 10 का आवेदन पत्र प्रस्तुत होना चाहिये। मोहनलाल विरूद्ध सेठ हीरालाल ए.आई.आर. 1962 सु.को. 527 अंबिका वि. सुमित्रा ए.आई.आर. 1990 उड़ीसा 127 के दृष्टांत देखे जा सकते हैं।

## आवेदन कब प्रस्तुत होगा :-

सामान्य रूप से ऐसा आवेदन पत्र बिना विलंब प्रस्तुत किया जा सकता है अथवा उत्तरवाद के साथ भी किया जा सकता है। मुख्य मुद्दा यह है कि न्यायालय के सामने पर्याप्त रेकार्ड उपलब्ध हो जिससे कि न्यायालय किसी निष्कर्ष पर पहुंच सके। अतः ऐसी कोई सीमा बांधी नहीं जा सकती कि कब तक आवेदन पत्र प्रस्तुत होगा।

## दावों का एकत्र करना :-

दावों का सिपंडित या समाहित या एकत्र करना सबसे अच्छी बात है। मुकदमेंबाजी को रोक लग जाती है, समय बचता है व पक्षकारों को न्याय शीघ्र मिलने की किरण दिख सकती है। यदि धारा 10 के सम्बन्ध में न्यायालय प्रारम्भिक स्तर पर ही कार्यवाही करके आदेश दे व ऐसा मानता हो कि द्वितीय दावा स्टे करना चाहिये तथा दोनों ही दावे एक ही न्यायालय में है तो दोनों को ही समाहित करके (कन्सालिडेट) प्रकरणों को आगे चलाया जा सकता है। दो पृथक न्यायालयों में दावे हो तो, जैसी भी स्थिति हो एक ही न्यायालय में अंतरित भी कराए जा सकते हैं। यदि व्यवहारिक रूप से सम्भव नहीं है तो ऐसा न भी किया जावे जैसा कि आनंददीप वि. रणजीत कौर ए.आई.आर. 1992 दिल्ली 87 में बताया गया है।

### समानांतर दावा विदेश में :-

धारा 10 का स्पष्टीकरण स्वयमेव स्पष्ट है। प्रथमतः लंबित दावा विदेश में संस्थित किया हो तथा दूसरा दावा पश्चातवर्ती हो व भारत में प्रस्तुत किया हो तो धारा 10 के प्रावधान लागू करने की आवश्यकता नहीं। लेकिन यदि साम्या के आधार से द्वितीय दावा स्थिगत किया जाना हो तो ऐसा किया जा सकता है। देखें नाथबेंक वि. ए.एम.टी. कंपनी ए.आई.आर. 1960 कलकत्ता 779 तथा व्ही.आर.नाईक वि. बलवन्त ए.आई. आर. बाम्बे 135।

### स्थगन एवं विविध कार्यवाही

द्वितीय/प्रथम प्रकरण स्थिगित करने का यह अर्थ नहीं है कि स्थिगत प्रकरण में आगे कोई कार्यवाही नहीं होगी। यदि त्वरित रूप से किन्हीं आवेदन पत्रों की सुनवाई की जाना हो तो की जा सकेगी व उचित आदेश दिया जा सकेगा। ऊपर उल्लेखित इंडियन बैंक का केस यहां पुनः बताया जा सकता है।

## रेसज्यूडिकेय (धारा 11) एवं रेस सबज्यूडिस (धारा 10) में अंतर :-

- ए. धारा 11 के अंतर्गत एक प्रकरण का अंतिम रूप से निराकरण हो चुका होता है जबकि धारा 10 के अंतर्गत किसी प्रकरण का निराकरण हुआ नहीं होता है।
- बी. धारा 11 के अंतर्गत पूर्व में निर्णित प्रकरण का निर्णय दूसरे पर बंधनकारी होता है जब कि धारा 10 के अंतर्गत रोके गए प्रकरण में चलित प्रकरण का निर्णय अंतिम रूप से निराकृत होने पर बंधनकारी है।

- सी. धारा 11 के अंतर्गत निर्णित प्रकरण का तत्काल प्रभाव पश्चातवर्ती दावे में पड़ेगा जब कि धारा 10 के अंतर्गत कार्यवाही विलंबित कार्यवाही होगी।
- डी. धारा 11 के अंतर्गत एक समय एक ही वाद लंबित होता है जिसमें पूर्व में निराकृत प्रकरण के आधार से पूर्व न्याय के सिद्धांत का लागू करने के विषय में विचार करना है जब कि धारा 10 के अंतर्गत एक ही समय दो वादों का अस्तित्व आवश्यक है।
- इ. धारा 11 के अंतर्गत पश्चातवर्ती दावे की पोषणीयता विचार में लेना है जब कि धारा 10 सपठित धारा 151 के अंतर्गत प्रथम वाद भी स्थगित किया जा सकता है।

इस प्रकार प्रमुख रूप से ये भेद हैं।

#### समापन :-

विषय का समापन कुछ न्याय दृष्टांतों के उद्धरण के साथ करते हैं वे इस प्रकार हैं :-

- 1. कृष्णराव वि. श्रीधर ए.आई.आर. 1947 नागपुर 154=1947 एन.एल.जे. पेज 31 जिसमें कहा है "that the subsequent suit must be stayed till the decision of the appeal in the previous suit, as the decision in the previous suit would be resjudicata in the subsequent suit.
- 2. सेठ भोजराव वि. बाबूलाल 1953 एन.एल.जे. शार्ट नोट 168 में कहा है कि— A suit should be stayed only if the decision in a previously pending litigation would cover all the issues involved in suit to be stayed.
- 3. गणपत वि. रामराव 1954 एन.एल.जे. शार्ट नोट 44 में कहा गया है कि -

Civil Procedure Code, Ss. 10 and 151- Procedure-Second appeal in suit for title pending-Subsequent suit for mesne profit-Suit should proceed but judgment stayed till decision of second appeal.

A second appeal from a suit for title of fields was pending. The defendant in the subsequent suit for mesne profits by the plaintiff in the previous suit applied for stay of the suit pending the decision of the second appeal. The Court refused to stay on the ground that section 10, Civil Procedure Code could not apply.

Held, that the matter did not fall to be governed by section 10; that it would be highly inconvenient to stay the suit and that the Court should have proceeded with the suit but should defer writing judgment till decision of the second appeal.

उपरोक्त लेख में बारबार संदर्भित दृष्टांत अन्नामलई वि. थोर्नहील ए.आई.आर. 1931 पी.सी. 263 एवं इडियन बैंक वि. महाराष्ट्र स्टेट को-आपरेटिव मार्केटिंग फेडरेशन मर्यादित ए.आई.आर. 1998 सु.को. 1952 (1954) मार्गदर्शक दृष्टांत है। उन दृष्टांतों से कई समस्याओं का निदान करने में मार्गदर्शन मिलेगा।

धारा 10 के प्रावधान पढ़ने में सरल है लेकिन वे गहराई लिये हुए हैं जिन्हें विश्लेषणात्मक रूप से देखा जाना होता है।

# डॉक्टरी परीक्षण -व्यक्ति की पहचान एवं विशेषज्ञ की साक्ष्य लिपिबद्ध करना

पुरूषोत्तम विष्णु नामजोशी

न्यायालयों में साक्षी के रूप में डॉक्टर को मेडिकल रिपोर्ट सिद्ध करने हेतु आहूत किया जाता है। वह रिपोर्ट के आधार से आहत व्यक्ति चाहे वह परिवादी पक्ष हो या अभियुक्त पक्ष हो उपहित आदि सिद्ध करता है। साक्ष्य लिपिवद्ध करते समय न्यायालय का यह कर्तव्य है कि वह देखे कि रिपोर्ट विधिवत सिद्ध हुई है या नहीं। रिपोर्ट सिद्ध करने का अर्थ यह नहीं है कि डॉक्टर आकर कहे कि यह रिपोर्ट मैंने लिखी थी जिस पर मेरे हस्ताक्षर हैं आदि। न्यायालय पंच या दर्शक के रूप में भी कार्य नहीं करता है न करना चाहिये। इस सम्बन्ध में न्यायालय का क्या कर्तव्य है यह नियम एवं आदेश (अपराधिक) के नियम 118 में दर्शाया है तथा आप अपनी संतुष्टि न्याय दृष्टांतों के आधार से भी कर सकते हैं।

साक्ष्य लिपिपद्ध करते समय आप सक्रिय होना चाहिये। आहत व्यक्ति की रिपोर्ट यदि सिद्ध हो रही है व उस रोज यदि आहत व्यक्ति न्यायालय में उपस्थित है तो उस व्यक्ति को भी डॉक्टर के सन्मुख प्रस्तुत करना चाहिये। ऐसा इसलिये कि डॉक्टर ने अपनी रिपोर्ट में जो पहचान चिन्ह लिखा है उसकी तुलना (मिलान) व्यक्ति के साथ हो सके। यही बात समान रूप से अभियुक्त के सम्बन्ध में भी लागू होगी। अर्थात यदि डॉक्टर की साक्ष्य के समय अभियुक्त उपस्थित हो तथा जिसका पहचान चिन्ह रिपोर्ट में अंकित है तो डॉक्टर वैसा देखकर बताएगा व न्यायालय तब अपनी साक्ष्य में लिखेगा कि परिवादी/अभियुक्त जो न्यायालय में उपस्थित है उसका पहचान चिन्ह एवं रिपोर्ट में अंकित पहचान चिन्ह की तुलना कर साक्षी कहता है कि इसी व्यक्ति का परीक्षण उसने किया था।

डॉक्टर या किसी भी विशेषज्ञ का परीक्षण करते समय न्यायालय का यह कर्तव्य है कि प्रारम्भ में उससे कुछ औपचारिक प्रश्न पूछे जिससे यह ज्ञात हो सके कि वह एक अनुभवी विशेषज्ञ है व अपनी साक्ष्य उस आधार से दे सकता है। उदाहरण के रूप में यहां बताया जा रहा है। स्मरण रहे कि पिछले पांच सालों में प्रशिक्षण सत्र में प्रत्येक बार यह बताया गया है व समय बचाने की प्रक्रिया भी बताई गई है। किसी डॉक्टर की साक्ष्य में प्रारंभिक बातें जो आ सकती हैं वे इस प्रकार सम्भव है।

"मैंने, एम.बी.बी.एस. की परीक्षा 1975 में उतीर्ण की थी एवं मास्टर ऑफ सर्जरी में (एम.एस.) की परीक्षा सन 1985 में पास की थी। मैं सहायक शल्य चिकित्सक के रूप में 1976 से पदस्थ हूँ तथा वर्तमान में जिला अस्पताल न्यायनगर में पदस्थ हूँ। पिछले पच्चीस वर्षों में मैंने कई मेडिको लीगल केसस (एम.एल. सी.) में परीक्षण किया होकर अपनी रिपोर्ट दी है। मैं अपनी योग्यता एवं अनुभव के आधार से सक्षमतापूर्वक दे सकता हूँ"।

ऐसा लिखकर आगे साक्ष्य जो प्रकरण से संबंधित है प्रारम्भ करना चाहिये। ऐसा क्यों इसका कारण लेख के अंत में कुछ अंश पुस्तकों मे से दिये हैं।

इस प्रकार की औपचारिक प्रश्नावली व उत्तर प्रत्येक विशेषज्ञ चाहे वह आबकारी विभाग का हो या नारकोटिक विभाग का या न्यायालयिक विज्ञान प्रयोगशाला सागर का हो या हस्ताक्षर विशेषज्ञ हो या विस्फोटक विशेषज्ञ हो या अन्य तकनीकी मुद्दे से सम्बन्धित विषय के बावत साक्षी को पूछे जाना चाहिये। यह उचित ही होगा कि यहां पर हम सब का ध्यान अपराधिक नियम एवं आदेश के नियम 198(इ) तथा नियम 199 से 211 तक आकर्षित करे।

यदि कोई आयुध आदि से उपहित पहुंचाई है तथा ऐसा आयुध न्यायालय में पुलिस की ओर से प्रस्तुत किया है तो वह भी डॉक्टर को दिखाया जाना चाहिये व पूछना चाहिये कि क्या उक्त उपहित ऐसे आयुध से आ सकती है। यही बात अन्य विशेषज्ञों के विषय में लागू होगी। साक्ष्य में भी यह लिखा जाना चाहिये कि वस्तु 'ए' चाकू साक्षी को दिखाया गया साक्षी कहता है कि यह उपहित ऐसे चाकू से आ सकती है।

विशेषज्ञ की परीक्षा हो जाने के पश्चात एक प्रमाण पत्र भी देना होता है। उसकी बनी बनाई सील न्यायालय में रहती है उसमें क्या लिखा है यह या तो हम पढ़ते नहीं हैं या सील के अक्षर ऐसे हो जाते हैं कि वह कार्य मात्र औपचारिक कर्मकांड हो जाता है अतः इस सम्बन्ध में ध्यान अपराधिक नियम एवं आदेश 200 की और आकृष्ट किया जाता है।

ध्यान रखना आरोपी का आरोपी कथन (परीक्षण) जो धारा 313 दंडप्रक्रिया संहिता के अंतर्गत लिपिबद्ध होता है उस पर भी प्रमाण पत्र देना होता है उसकी भी रेडीमेड सील मेड टू यूज उपलब्ध होती है उसमें क्या होता है यह जानना हो तो धारा 281(5) दं.प्र.सं. को देख सकते हैं। वैसे तो धारा 281 पूर्ण रूप से पढ़ लें तो ज्यादा उचित है।

Rogers in his book Expert Testimoney, on page 21 states as under:

"The foundation on which expert testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject matter upon which he is permitted to give an opinion as evidence.

Extract from Law of Evidence by woodroffe 1979 edition. page 1285 S. 46.

#### 5. COMPETENCY OF EXPERT

To render the opinion of a witness admissible on the ground that it is the opinion of an expert, the witness must have special skill in the subject concerning which his opinion is sought to be given.-Lawson.

Matter of opinion is entitled to no weight with a Court unless it comes from persons who first gave satisfactory evidence that they are possessed of such skill or experience in such matters as entitles their opinions to pass for scientific truth.
Car V. Northern Liberties, 35 Pat St 324 (AM).

It is the duty of the Judge to decide, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.-(Extract from Article 49 of Stephen's Digest of the Law of Evidence.)-Bristow V. Sequeville, 6 EX 275; Rowley V.L. & N.W. Rly. Co., LR 8 Ex 221; In the Goods of Bonelli, LR 1 PD 69 (Cited under Article 49 of Stephen's Digest Of The Law Of Evidence.) -See also Abdullah V. Mst. Zulekha, AIR 1949 Pesh 11.

In America, before an expert is permitted to give his evidence, a preliminary examination is allowed for ascertaining the qualifications of the expert about to depose. An expert's testimony is not admissible without asking any question as to what claims he has to the character of an expert. The law requires that there should at least be a profession of special qualifications on the part of a person who comes forward to depose to matters lying beyond common knowledge.-Rowley V. L. & N. W.

Rly Co., LR 8 Ex. 221. In such cases, the question is, as Lord Russel put it:-"Is he peritus? Is he skilled? Has he adequate knowledge?"- United States Shipping Board V. The Ship 'St. Albans', 131 IC 771=AIR 1931 PC 189.

No exact test, however, can be laid down by which one can determine with mathematical precision how much skill or experience a witness must possess to quality him to testify as an expert. That question rests with fair discretion of the Court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinions of any value.-Rogers.

But the witness need not in every case be a professional expert. -Per West, J., in Timangavda V. Rangangavda. Regular Appeal No. 24 of 1877: see also the note to Hari Chintaman V. Moro Lakshman, 11 Bom 89, at p. 101. An expert, in order to be competent as an expert witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein. - R.V. Silverlock, 1894, 2 QB 766. It is enough if he has made the subject-matter of enquiry the object of his particular attention or study. Thus, foreign law has frequently been proved by witnesses who, though not professional lawyers, followed some occupation which gave them peculiar means of knowing the law in question. -Halsbury, Vol. XIII, para 661.

Proper preliminary questions relating to the technical qualifications and experience of the witness, before he is permitted to give opinion testimony, are legally necessary, though opposing counsel admits the expert qualification of the wintess. When a witness is offered as an expert, it is a preliminary question in America for the Court to determine whether he has the requisite qualifications. In India, this practice does not obtain; it is enough if in his examination-in-chief the competency of the expert is shown, to render his opinion evidence admissible; and, for this purpose, he should be examined as to his opportunities and means of knowledge. But regular cross-examination may fully go into the question of the competency of the witness, and if it appears that he is not competent as an expert, his evidence will be weakened or entirely destroyed. Rogers, in his 'Expert Testimony', is of the opinion that the effect of successful cross-examination, with reference to the competency of the witness, is to destroy the evidence of the witness and thus prevent material harm to the party against whom he swears, but not to exclude it. This appears to be in consonance with Indian practice.

Extract from Expert Evidence by Rao & Rao 1955 edition pages 9 and 10.

I HOPE I SHALL ALWAYS POSSESS FIRMNESS AND VIRTUE ENOUGH TO MAINTAIN WHAT I CONSIDER THE MOST ENVIABLE OF TITLES, THE CHARACTER OF AN HONEST MAN.

- George Washington

JUDGES, LIKE CAESAR'S WIFE, SHOULD BE ABOVE SUSPICION.

- Charles Bowen, English Jurist

### बंधपत्र एवं प्रतिभूति – राशि का निर्धारित करना

पुरुषोत्तम विष्णु नामजोशी

### विधिक प्रावधान

धारा 117 दं.प्र.स. के परन्तुक का (ख) भाग नीचे अनुसार है-

धारा 117 परन्तुक (ख) प्रत्येक बन्धपत्र की रकम मामले की परिस्थितियों का सम्यक ध्यान रख कर नियत की जाएगी और अत्याधिक नहीं होगी। (अध्याय 8 परिशांति.....के लिए प्रतिभूति)

धारा 440 दं.प्र.स. की उपधारा (1) कहती है कि "इस अध्याय के अधिन (अध्याय 33—जमानत और बन्धपत्रों के बारे में उपबन्ध) निष्पादित प्रत्येक बन्धपत्र की रकम मामले की परिस्थितियों का सम्यक ध्यान रखकर नियत की जायेगी जो अत्याधिक नहीं होगी"

(2) उच्च न्यायालय या सेशन न्यायालय यह निर्देश दे सकेगा कि पुलिस अधिकारी या मजिस्ट्रेट द्वारा अपेक्षित जमानत घटायी जाये।

अंग्रेजी अनुवाद इस प्रकार है-

**S.117 Proviso (b)**- The amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive (chapter 8 security for......good behaviour)

S. 440 (1) Cr.P.C. - The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive. (ch.33 provisions as to bail and bonds)

- (2) The High Court or Court of session may direct that the bail required by a police officer or Magistrate be reduced.
- म.प्र. नियम एवं आदेश पाठ 15 का नियम यहां देखने योग्य है जो उपरोक्त संदर्भ में ही है।

नियम 377. अभियुक्तों से प्रतिभू मांगने में प्रतिभूति राशि निश्चित करते समय पीठासीन मॅजिस्ट्रेटों को अन्य बातों के साथ अभियुक्त के सामाजिक स्तर को भी ध्यान में रखना चाहिए। प्रतिभू का तात्पर्य अभियुक्त को निरोध में रखे बिना अपेक्षित स्थान एवं समय पर उसकी उपस्थिति निश्चित करना है और राशि इस प्रयोजन को क्रियान्वित करने के लिए निर्धारित करना चाहिए। इस बात का ध्यान रखना चाहिए कि वह अंक (रकम, फिगर) इतना अधिक न हो कि जिसका अर्थ वास्तव में प्रतिभू लेने से इन्कार करना हो।

प्रतिभू न देने की स्थिति में अभियुक्त को निरोध में रखने का निर्देश वाले आदेश के मुखभाग में प्रतिभू राशि तथा आरोपित अपराध सदैव लिखा जाना चाहिए।

धारा 88 दं.प्र.सं. इस प्रकार है-

धारा 88- जब कोई व्यक्ति, जिसकी हाजिरी या गिरफ्तारी के लिए किसी न्यायालय का पीठासीन अधिकारी समन या वारण्ट जारी करने के लिए सशक्त हो, ऐसे न्यायालय में उपस्थित हो तब वह अधिकारी उस व्यक्ति से अपेक्षा कर सकेगा कि वह उस न्यायालय में या किसी अन्य न्यायालय में, जिसको मामला विचारण के लिए अन्तरित किया जाए, अपनी हाजिरी के लिए बन्धपत्र, प्रतिभुओं सहित या रहित, निष्पादित करें।

धारा 441 दं.प्र.स. इस प्रकार है-

- 441. अभियुक्त और प्रतिभुओं का बन्धपत्र- (1) किसी व्यक्ति के जमानत पर छोड़े जाने के या उसके बन्धपत्र पर छोड़े जाने के पूर्व उस व्यक्ति द्वारा, और जब वह जमानत पर छोड़ा जाता है तब एक या अधिक पर्याप्त प्रतिभुओं द्वारा इतनी धनराशि के लिए जितनी, यथास्थिति, पुलिस अधिकारी या न्यायालय पर्याप्त समझे, इस शर्त का बन्धपत्र निष्पादित किया जायेग कि ऐसा व्यक्ति बन्धपत्र में वर्णित समय और स्थान पर हाजिर होगा और जब तक, पुलिस—अधिकारी या न्यायालय द्वारा अन्यथा निदेश नहीं दिया जाता है, इस प्रकार बराबर हाजिर होता रहेगा।
- (2) जहाँ किसी व्यक्ति को जमानत पर छोड़ने के लिए कोई शर्त अधिरोपित की गई हो, वहाँ बन्धपत्र में वह शर्त अन्तर्विष्ट होगी।
- (3) यदि मामले से ऐसा अपेक्षित हो तो बन्धपत्र, जमानत पर छोड़े गये व्यक्ति से अपेक्षा किये जाने पर आरोप का उत्तर देने के लिए उच्च न्यायालय, सेशन न्यायालय या अन्य न्यायालय में हाजिर होने के लिए भी आबद्ध करेगा।
- (4) यह अवधारित करने के प्रयोजन के लिए कि क्या प्रतिभू उपयुक्त या पर्याप्त है अथवा नहीं, न्यायालय शपथपत्रों को, प्रतिभुओं के पर्याप्त या उपयुक्त होने के बारे में अन्तर्विष्ट बातों के सबूत के रूप में, स्वीकार कर सकता है अथवा यदि न्यायालय आवश्यक समझे तो वह ऐसे पर्याप्त या उपयुक्त होने के बारे में, या तो स्वयं जाँच कर सकेगा या अपने अधीनस्थ किसी मजिस्ट्रेट से जाँच करवा सकेगा।

न्यायालय को यह भी अधिकार है कि प्रारम्भ में ली गई प्रतिभूति अपर्याप्त हो तो उसमें वृद्धि करने का भी अधिकार है। यह बात धारा 443 दं.प्र.सं. में बताई गई है जो इस प्रकार है।

443. जब पहले ली गई जमानत अपर्याप्त हो तब पर्याप्त जमानत के लिए आदेश देने की शक्ति- यदि भूल या कपट के कारण या अन्यथा अपर्याप्त प्रतिभू स्वीकार कर लिए गये हो अथवा यदि वे बाद में अपर्याप्त हो जाएँ तो न्यायालय यह निदेश देते हुए गिरफ्तारी का वारण्ट जारी कर सकेगा कि जमानत पर छोड़े गये व्यक्ति को उसके समक्ष लाया जाये और उसे पर्याप्त प्रतिभू देने का आदेश दे सकेगा और उसके ऐसा करने में असफल रहने पर उसे जेल में सुपूर्द कर सकेगा।

उपरोक्त प्रावधान व नियम की पृष्ठभूमि में हमें यह ज्ञात करना है कि प्रतिभूति पत्र एवं बंधपत्र की रकम कितनी होनी चाहिये। यह एक सामान्य सिद्धांत है कि अभियुक्त की उपस्थिति सुनिश्चित करने हेतु बंधपत्र एवं प्रतिभूति पत्र की मांग विधि प्रावधानों के अनुरूप की जाती है।

अपराध की प्रकृति, अभियुक्त की पृष्ठ—भूमि एवं अभियुक्त की सुगमता से उपलब्धि ये मुख्य रूप से ऐसे आधार हैं जिन्हें ध्यान में रखते हुए प्रतिभूति की रकम का खुलासा होना चाहिये। हमारे मन में यह धारणा नहीं होना चाहिये कि अभियुक्त को प्रतिभूति पर छोड़ना है तो हम कुछ एहसान या कृपा कर रहे हैं। यदि ऐसा अनुभव होता है तो निश्चित ही हम सही रूप से आदेश नहीं दे रहे हैं। दूसरी बात यह कि जब न्यायिक विवेक का प्रश्न है तो वह विवेक न्याय्य विचार, सदाशय से एवं सम्यक रूप से विचार कर के प्रयोग होता है।

जहां पर अपराध तुच्छ कोटि के हो तथा जेल एवं अर्थदण्ड सजा अत्याधिक न हो वहां प्रतिभूति की रकम लगभग 500 रु. से अधिक की न भी हो क्योंकि इतना तो अर्थदंड भी नहीं किया जाना है। यद्यपि सही है कि अर्थदंड कितना है यह बात प्रतिभूति आदेश देने के लिए पूर्णतः सुसंगत न भी हो लेकिन विसंगत भी तो नहीं है अथवा असम्बन्धित भी तो नहीं है। स्थानीय निवासी हो तथा अपराध की प्रकृति घृणित (Heinous) प्रकार की न हो तथा अभियुक्त का फरार होना संभाव्य प्रतीत नहीं होता है तो निश्चित ही प्रतिभूति की रकम भी सामान्य हो। यदि अपराध की प्रकृति गंभीर—घृणित कोटि की है एवं विशेष परिस्थितियां दृष्टिगोचर होती हैं, तब प्रतिभूति की रकम किसी सीमा तक ज्यादा भी हो सकती है। लेकिन प्रकरण की परिस्थिति क्या है यह एक तथ्यात्मक पढ़िलू है। अभियुक्त को प्रतिभूति पर न छोड़ने की इच्छा हो तथा न्यायाधीश की दृष्टि में छोड़ा जाना मजबूरी है तब हम प्रतिभूति की रकम बढ़ाचढ़ा कर बता देते हैं ताकि अभियुक्त को ऐसा प्रतिभू न मिल सके व आरोपी को जेल में रहना पड़े। लेकिन यह स्वस्थ मानसिकता का लक्षण नहीं है। ऐसा करने हेतु हम उससे सालव्हन्सी प्रमाण पत्र (शोध क्षमता प्रमाण पत्र) मांगते हैं। स्पष्ट है कि ऐसा प्रमाण पत्र कलेक्टोरेट में बनता है व दो चार दिन का समय भी लगता है। अतः हमने अपनी मानसिकता को निष्कलंक रखने का प्रयत्न करना चाहिये।

अत्याधिक बड़ी रकम का प्रतिभूति पत्र एवं बंधपत्र भरने का आदेश देना, वास्तव में न्यायप्रक्रिया में अनुचित—असामाजिक लोगों के हस्तक्षेप के लिए निमंत्रण देना है। मेरी आँखों देखी बाते हैं वे यहां बता रहा हूँ। इसके पूर्व धारा 444 दं.प्र.सं. को प्रस्तुत कर रहा हूँ।

- 444. प्रतिभुओं का उन्मोचन- (1) जमानत पर छोड़े गये व्यक्ति की हाजिरी और उपस्थिति के लिए प्रतिभुओं में से सब या कोई बन्धपत्र के या तो पूर्णतया या वहाँ तक, जहाँ तक वह आवेदकों से सम्बन्धित है, प्रभावोन्मुक्त किये जाने के लिए किसी समय मजिस्ट्रेट से आवेदन कर सकेंगे।
- (2) ऐसे आवेदन किये जाने पर मजिस्ट्रेट यह निर्देश देते हुए गिरफ्तारी का वारण्ट जारी करेगा कि ऐसे छोड़े गये व्यक्ति को उसके समक्ष लाया जाये।
- (3) वारण्ट के अनुसरण में ऐसे व्यक्ति के हाजिर होने पर या उसके स्वेच्छया अभ्यर्पण करने पर मिजिस्ट्रेट बन्धपत्र के या तो पूर्णतया या, वहाँ तक जहाँ तक कि आवेदकों से सम्बन्धित हो, प्रभावोन्मुक्त किये जाने का निर्देश देगा और ऐसे व्यक्ति से अपेक्षा करेगा कि वह अन्य पर्याप्त प्रतिभू दे और यदि वह ऐसा करने में असफल रहता है तो उसे जेल में सुपुर्द कर सकेगा।

### जमानत की रकम एवं दलाली

जमानत की रकम जितनी अधिक होती है दलालों की बन पड़ती है एवं पक्षकारों के साथ अन्याय होता है। जैसे—एक व्यक्ति के विरुद्ध धारा 302 भा.द.वि. का प्रकरण जबलपुर में चला वह व्यक्ति इन्दौर का था। जमानत का आदेश रु. 20,000 का हुआ। परदेस का आदमी कहां जमानत मिले। जज साहब स्थानीय जमानत हेतु अड़ गए। दलालों की निगाह बड़ी पैनी रहती है। वे अपने शिकार को पहचान लेते हैं। रु. दो हजार की दलाली (दस प्रतिशत) पर जमानत देने का तय होता है। दलाल के पास कृषिभूमि की ऋण पुस्तिकाएँ मकानों के कबाले आदि भरपूर मात्रा में होते हैं। आरोपी जमानत पर छूट जाता है। अगली तिथि जो न्यायालय ने निर्धारित की है उस रोज अभियुक्त दलाल को बायपास (उपेक्षा नजर अंदाज) कर के कोर्ट पेशी के लिए बैठा है। दलाल के पास अपनी डायरी होती है। आरोपी की पेशी उसके पास लिखी है। वो आरोपी के पास जाएगा व आज की दलाली की फीस रु. दो सौ (एक प्रतिशत) मांगेगा। यदि अभियुक्त नहीं देगा तो उपर उल्लेखित प्रावधान 444 का आश्रय दलाल लेगा व एक आवेदन पत्र न्यायालय में लगा देगा कि वह अब प्रतिभू रहना नहीं चाहता है। न्यायालय के पास कोई विकल्प नहीं है। प्रतिभू (दलाल) का आवेदन पत्र स्वीकार करना होगा व आरोपी को निरोध में लेना होगा। उसे तत्काल नई जमानत के लिए कोई प्रतिभू नहीं मिलना है तब उसे जेल जाना पड़ेगा। अतः प्रत्यक्ष—अप्रत्यक्ष रूप से हम आप ऐसे अनुचित कार्यों के भागीदार न हो तो कितना अच्छा होगा।

दलालों को प्रोत्साहन तब भी मिलता है जब न्यायालय स्थानीय जमानत की मांग करें। हर अभियुक्त स्थानीय नहीं होता है। पीठासीन न्यायाधीशों को समय के साथ अनुभव होता जाता है कि किसी अभियुक्त के फरारी के कितने लक्षण हैं। जैसे बन्ता सिंह कानपुर यदि पुलिस पता लिखकर आरोप पत्र व आरोपी प्रस्तुत

करती है तो पुलिस से पूर्ण पता लगवा लेना चाहिए, लिखवा लेना चाहिए। आरोपी से क्रांस क्वश्चन कर के पता लगा लेना चाहिए। तब जाकर प्रतिभूति के लिए आदेश करना चाहिए।

### विषय वस्तु व प्रतिभूति की रकम :-

ट्रक, बस या अन्य वाहनों से दुर्घटना होने पर वाहन को सुपुर्दगी नामे पर देने हेतु हम 8–10 लाख की भी प्रतिभूति मांगते हैं। दुर्घटनाओं की धाराएँ हैं–279–337–338–304ए। वाहन का कोई सम्बन्ध आरोपी के विरूद्ध आरोपित होने वाले अपराध से नहीं होता है। आरोपी का सम्बन्ध स्वयं से व उसके विरूद्ध प्रस्तुत होने वाले अपराधिक धाराओं की प्रकृति सें है। वाहन का कोई सम्बन्ध नहीं है फिर भी 8–10 लाख रूपये की प्रतिभूति मांगी जाती है। सारे प्रकरण के निराकरण तक उस वाहन से कोई लेना देना नहीं है। ये तत्व भी दलालों को प्रोत्साहित करते हैं।

### हमारी सुप्त अवस्था-

हमने जहां जागृत होना चाहिए वहां हम सुप्त अवस्था में होते हैं। जैसे शपथ पत्र पर जहां शपथ आयुक्त के सामने शपथ ग्रहिता की शपथ होती है वहां उसे पहचानने वालों के नाम लिखे जाते हैं। आयुक्त एवं शपथ पत्र में उनके नाम कमल और नवल लिखे है। जिस दिन यह विवाद हो जावे कि शपथ गृहिता कौन था व कमल—नवल की साक्ष्य कराना हो तो उनका पता ही नहीं होगा क्योंकि उनके नाम व हस्ताक्षर के सिवाय अन्यत्र कहीं कोई खुलासा नहीं है। यही बात प्रतिभूति पत्र व व्यक्तिगत बंधपत्र के विषय में होती है। शपथ पत्र पर फोटो लगाना पड़ता है व उस पर एक छोर से दूसरे छोर तक शपथ पत्र गृहिता के हस्ताक्षर करवाना होते हैं। ध्यान रहे उस विषय में हम गंभीर नहीं होते। डॉट पेन से फोटो पर हस्ताक्षर नहीं उभरते हैं स्याही द्वारा उभरते हैं। अतः इसकी उपेक्षा न हों। शपथ पत्र पर या अन्यत्र जहां फोटो लगाना हो फोटो हमेशा दाएँ बाजू में हो न कि बाएँ बाजू में। क्यों कि फाईलिंग करते समय बार बार सूजे से छेद करने में फोटो फट जाता है व फोटो में से चेहरा पहचान योग्य न भी रहे। फोटो पर एक सीरे से दूसरे सीरे तक अंदर बाहर हस्ताक्षर होते हैं। पहचान चिन्ह की ओर विशेष ध्यान दे व अंकित करावें।

### प्रतिभूति एवं संविदा

अपराधिक प्रकरणों में प्रतिभूति एवं संविदा अधिनियम की धारा 74 का एक दूसरे से पूर्ण सम्बन्ध है। प्रतिभूति का अनुबंध प्रतिभू, आरोपी व न्यायालय के बीच होता है। अतः जमानत स्वीकार करते समय प्रतिभूति व बंधपत्र पर यह लिखा करें कि वे स्वीकार किए जाते हैं। ऐसा लिखने से अस्पष्टता, संदिग्धता शेष नहीं रहती है।

### सार संक्षेप

मित्रों ! हम हमारे मन में यह भावना संजोएँ कि प्रतिभूति पर आरोपी को छोड़ना सामान्यतः सकारात्मक प्रवृत्ति होकर न छोड़ना एक विशेष अपवाद हो सकता है। दूसरी बात यह कि न्यायालय कक्ष के बाहर क्या होता है इस सम्बन्ध में भी हमारी चौकसी सतर्क रूप से होती रहे। हमारे आदेश प्रतिभूति के सम्बन्ध में विधि प्रावधान एवं नियम तथा आदेश की भावनाओं को ध्यान में रखकर ही हो। प्रतिभूति की रकम अनुचित रूप से अत्याधिक न हो। ऐसा करने से दलालों की संख्या नगण्य हो जाएगी एवं अभियुक्त—अधिवक्ताओं में विश्वास बढ़ेगा तथा यह कार्य जिसमें विशेषतः अत्याधिक महत्व न होते हुए भी भारी महत्व का मानने की प्रवृत्ति क्षीण होगी व परिणामतः अनुचित रूप से जेलों में भीड़ भी कम हो जाएगी। ध्यान रहे कि दिल्ली उच्च न्यायालय ने किसी एक समय सेकड़ों अभियुक्तगणों को ऐसे ही न्यून रकम की प्रतिभृति पर छोड़ा था।

कृपया विचार करें अपने अपने अनुंभव से, इस विषय को देखें एवं व्यवहारिक धरातल पर लागू करें। न्याय के प्रति सभी सम्बन्धितों की निष्ठा बढेगी। कृपया अपराध नियम एवं आदेश पाठ 15 एवं 35 अवश्य पढ़े।

#### TIT-BITS

### 1. FLASH - STOP PRESS- JUDGMENT

STATE OF M.P. Vs. BHOORAJI AND ORS. JT. 2001 (7) SC. 55 DECIDED ON 24.8.2001 CR.P.C., S. 193, S. 14 S.C., S.T. (P.A.) ACT, 1989 REFER GANGULA ASHOK VS. STATE (JT. 2001(1) SC. 379.

RE-TRIAL NOT NECESSARY EXCEPT IN EXCEPTIONAL CASES.

Criminal Procedure Code, 1973

- a) Sections 465, 193, 209-Irregularities-Effects-Re-trial of case-When permissible-Offences under the SC/ST Act and under IPC Trial completed in 9 years High Court directing re-trial View in Gangula Ashok's case [JT 2000 (1) SC 379] Taking advantage of that view, plea taken that trial was without jurisdiction as cognizance of offences taken by Sessions Judge (Special Court un der the SC/ST Act) without the case being committed by Magistrate -If de novo trial justified. Held that do novo trial should be directed only in extreme exigencies to avert "failure of justice".
- b) Sections 465, 462 Irregularities Scope Errors, omissions or irregularity Legislative mandate. Held that proceedings would not be axed merely on account of error, omission or irregularity unless there is 'failure of justice'.
- c) Section 465 Irregularity "Failure of justice" What is Cognizance by specified sessions court, without being committed to it If such an irregularity which occasioned "failure of justice" Is special sessions court under the SC/ST Act would be incompetent to pass any order, without case being committed to it. Held that the court of sessions would not become a court of incompetent juridiction [AIR 1955 SC 196] and [AIR 1960 SC 576] distinguished.

Courtesy: Shri B. Maheshwari Ad. Reg. (V.L. H.C. JBP) and Publishers. Judgment Today.

2. 1) ADVERSE POSSESSION, 2) LIMITATION ACT, SECTION 27AND ARTICLE 65 2001 (1) M.P.H.T. 97 (DB)

RATAN SINGH Vs. SHALIGRAM

Initially possession was under an agreement to sell and therefore, it was under a compromise. It was held that possession was not adverse. The compromise was made on 19-2-1964. Suit for possession was filed on 4-2-1976, i.e. within 12 years. Parties were litigating and asserting their possession from 1964 in previous suit. Decree was finally passed in 1974. Defendant/respondent's title negatived with respect to disputed land. Conditional injunction also came to an end on deposit of money. Decree attained finality. Therefore, adverse possession was never perfected. A plea without stating the material facts constituted adverse possession was held to be vague. A general plea of limitation and operation over 12 years is not sufficient to raise the plea of adverse possession.

NOTE: - Judicial Officers are requested to go through (2000) 1 SCC 144 JOTI Journal, April part Page 221 Tit Bit No. 57, 2000 (3) M.P.H.T. 18 (SC), i.e. 2000 Joti Journal August 509 Tit Bit No. 71.

3. ARBITRATION ACT, SECTIONS 8 (2), 17 AND 20 : APPOINTMENT OF UMPIRE :- 2000 (3) M.P.L.J. 637

CHANDMAL Vs. JHAMAKLAL

Where reference is to an even number of arbitrators, an umpire is required to be appointed. Umpire when to be appointed effect of death of one arbitrator.

Death of one of the two Arbitrators during pendency of arbitration proceedings. So long as vacancy caused is not filled up in accordance with procedure under section 8 the other Arbitrator cannot continue with arbitration proceedings and deliver award individually. Award delivered in such case is a nullity and could not be made rule of court by passing a decree in terms thereof. Russel on Law of Arbitration (17th Edition) 149, referred to.

4. ARBITRATION ACT. SECTIONS 30 AND 33:(2000) 8 SCC 1
UNION OF INDIA Vs. POPULAR BUILDERS, CALCUTTA

Part of award allowing a claim made after acceptance of final payment by claimant Contractor, held, may be set aside if objection that such claim was no longer arbitrable, had been specifically raised during arbitration proceedings.

5. ARBITRATION AND CONCILLIATION ACT, SECTIONS 11, 11(C), 7 AND 11(4) AND (5): WHETHER THE PERIOD OF 30 DAYS IS MANDATORY OR NOT: THE SUPREME COURT HAD NOT DECIDED THE QUESTION:- (2000) 8 SCC 151

DATAR SWITCHGEARS LTD. Vs. TATA FINANCE LTD.

The question under Section 11 that whether order under Section 11 is an administrative order and so not subject to jurisdiction of Supreme Court under Art. 136 of Constitution of India. Question was not gone into and the Supreme Court decided the appeal on merits. The party which has not disputed the arbitration clause is normally bound by it and is obliged to comply with the procedure laid down under it. Such procedure must be given due importance by the Court as being part of the terms of the contract of arbitration.

If party having responsibility of appointing arbitrator does not do so within 30 days of demand being made by the other party, it was held that the right to make appointment is not automatically forfeited. The appointment can still be made, but before the other party moves the court under Section 11. Once the other party moves the court the right to make the appointment ceases to exist. Dispute arising between parties to a lease agreement. Respondent 1 lessor issuing notice demanding payment (of over Rs. 2,84,00,000). Stipulated that in case of failure by appellant to pay within time the notice was to be treated as one issued under arbitration clause of agreement under which arbitrator was "to be nominated by lessor". Payment was not made. Respondent 1 not appointing arbitrator within 30 days of failure of payment, but filing application under S, 9 for interim protection. One month after filing S. 9 application, Respondent 1 appointing Respondent 2 as arbitrator. Appellant then filing application under S. 11 challenging appointment and praying for appointment of another arbitrator. It was held that High Court, rightly dismissed the appellant's application.

#### WORDS AND PHARSES: "NOMINATION" AND "APPOINTMENT" EXPLAINED:-

Paragraphs 25 and 26 of the judgment are reproduced:

Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention.

In P. Ramanatha Aiyar's Law Lexicon (2nd Edn.) at pp. 1310-11, the meaning of the word "nomination" is given as follows:

"1. The action, process or instance of nominating; 2. the act, process or an instrument of nominating; an act of right of designating for an office or duty.

'Nomination' is equivalent to the word 'appointments', when used by a major in an instrument executed for the purpose of appointing certain persons to office."

6. BHOPP SINGH VS. RAMSING. (1995) 5 SCC. 709 REGISTRATION ACT 1908-S. 17 (2) (VI) COMPULSORY REGISTRATION OF DECREE- EXCEPTIONS PRIN-CIPLES LAID DOWN THAT DECREE OR ORDER, INCLUDING COMPROMISE DE-CREE, CREATING NEW RIGHT, TITLE OR INTEREST IN PRAESNIT IN IMMOV-ABLE PROPERTY OF VALUE OF Rs. 100 OR ABOVE IS COMPULSORILY REGISTRABLE. WITH THE COURTESY OF EASTERN BOOK COMPANY PART OF THE PORTION REPRODUCED.

The father of the present petitioner, the father of the plaintiffs and the father of G were sons of the common ancestor J. The petitioner filed a suit which was disposed of by ordering that "a declaratory decree in respect of the property in suit fully detailed in the heading of the plaint to the effect that the plaintiff will be the owner in possession from today in lieu of the defendant after his death and the plaintiff deserves his name to be incorporated as such in the revenue papers, is granted in favour of the plaintiff against the defendant, in view of the written statement filed by the dependent admitting the claim of the plaintiff to be correct". Subsequently, the plaintiffs filed a suit claiming one-third share in the suit land as heirs of J. The petitioner contended that in view of the aforesaid order passed in the earlier suit, the dispute did not survive and he alone was entitled to be in possession of the land. The court, inter alia, held that the said decree, having not been registered, could not have conferred any right to the petitioner. This view has been principally assailed in the present petition. Dismissing the petition.

#### Held:

The exception under clause (vi) of Section 17 (2) is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs. 100 or upwards. Any other view would find the mischief of avoidance of registration, which requires payment of stamp duty, embedded in the decree or order. It would, therefore, be the duty of the court to examine in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or inter-

est in praesenti in immovable property of the value of Rs 100 or upwards in favour of other party for the first time, either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable.

The legal position qua clause (vi) can be summarised as below:

- (1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.
- (2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100 or upwards in favour of any party to the suit the decree or order would require registration.
- (3) If the decree were not to attract any of the clauses of sub-section (1) of Section 17, as was the position in the Privy Council and the Supreme Court's cases, it is apparent that the decree would not require registration.
- (4) If the decree were not to embody the terms of compromise, as was the position in Lahore case, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.
- (5) If the property dealt with by the decree be not the "subject-matter of the suit or proceeding", clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated.

In the present case the decree, having purported to create right or title in the plaintiff for the first time that is not being a declaration of pre existing right, require registration. The first suit cannot really be said to have been decreed on the basis of compromise, as the suit was decreed "in view of the written statement filed by the defendant admitting the claim of the plaintiff to be correct". Decreeing of suit in such a situation is covered by Order 12 Rule 6, and not by Order 23 Rule 3, which deals with compromise of suit, whereas the former is on the subject of judgment on admissions. The first appellate court held the decree in question as 'collusive' as it was with a view to defeat the right of others who had bona fide claim over the property. The High Court also took the same view. Thus the impugned judgment does not suffer from any legal infinitely.

7. CONSTITUTION OF INDIA, ART. 226 (2): TERRITORIAL JURISDICTION OF THE HIGH COURT UNDER THE SAID ARTICLE: C.P.C., SECTION 20: THE WORD 'CAUSE OF ACTION' EXPLAINED: (2000) 7 SCC 640

NAVINCHANDRA Vs. STATE OF MAHARASHTRA

High Court will have jurisdiction if any of the cause of action arises within the territorial limits of its jurisdiction even though the seat of Government or authority or residence of person against whom direction, order or writ is sought to be issued is not within the said territory.

In brief writ petition was filed before Bombay High Court for quashing of criminal complaint filed at Shillong on ground that it was false and had been filed with the mala fide

intention of causing harassment and putting pressure on the petitioner to reverse the transaction relating to transfer of company shares, which had entirely taken place at Mumbai. There was an alternative prayer made in the petition for issuance of writ of mandamus to State of Maghalaya for transfer of the investigation to Mumbai Police. It was held that the Mumbai High Court erred in dismissing Writ Petition on the ground that it had no jurisdiction to quash the complaint filed at Shillong as prayed for.

Paragraphs 17, 18, 22, 27, 29, 37, 38, 41, 43, 44, and 45 are reproduced:

From the provision in clause (2) of Article 226 it is clear that the maintainability or otherwise of the writ petition in the High Court depends on whether the cause of action for filing the same arose, wholly or in part, within the territorial jurisdiction of that Court.

In legal parlance the expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.

So far as the question of territorial jurisdiction with reference to a criminal offence is concerned the main factor to be considered is the place where the alleged offence was committed.

Tested in the light of the principles laid down in the cases noted above the judgment of the High Court under challenge is unsustainable. The High Court failed to consider all the relevant facts necessary to arrive at a proper decision on the question of maintainability of the writ petition, on the ground of lack of territorial jurisdiction. The Court based its decision on the sole consideration that the complainant had filed the complaint at Shillong in the State of Maghalaya and the petitioner had prayed for quashing the said complaint. The High Court did not consider the alternative prayer made in the writ petition that a writ of mandamus be issued to the State of Meghalaya to transfer the investigation to Mumbai Police. The High Court also is not take note of averments in the writ petition that filing of the complaint at Shillong was a malafide move on the part of the complainant to harass and pressurise the petitioners to reverse the transaction for transfer of shares. The relief sought in the writ petition may be one of the relevant criteria for consideration of the question but cannot be the sole consideration in the matter. On the averments made in the writ petition gist of which has been noted earlier it cannot be said that no part of the cause of action for filing the writ petition arose within the territorial jurisdiction of the Bombay High Court.

Considering the peculiar fact-situation of the case we are of the view that setting aside the impugned judgment and remitting the case to the High Court for fresh disposal will cause further delay in investigation of the matter and may create other complications. Instead, it will be apt and proper to direct that further investigation relating to complaint filed by J.B. Holdings Ltd. should be made by the Mumbai Police.

The object of the amendment by inserting clause (2) in the article was to supersede the decision of the Supreme Court in *Election Commission Vs. Sake Venkata Subba Rao*, *AIR 1953 SC 210: 1953 SCR 1144* and to restore the view held by the High Courts in the decisions cited above. Thus the power conferred on the High Court under Article 226 could as well be exercised by any High Court exercising jurisdiction in relation to territories within which "the cause of action, wholly or in part, arises" and it is no matter

that the seat of the authority concerned is outside the territorial limits of the jurisdiction of that High Court. The amendment is thus aimed at widening the with of the area for reaching the writs issued by different High Courts.

- 38. "Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action, wholly or in part, arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the courts. As per that section the suit could be instituted in a court within the legal limits of whose jurisdiction the "cause of action wholly or in part arises". Judicial pronouncements have accorded almost a uniform interpretation to the said compendious expression even prior to the Fifteenth Amendment of the Constitution as to mean "the bundle of facts which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the court."
- 41. Even in the context of Article 226 (2) of the Constitution this Court adopted the same interpretation to the expression "cause of action, wholly or in part, arises" vied State of Rajasthan v. Swaika Properties (1985) 3 SCC 217. A three-Judge Bench of this Court in Oil and Natural Gas Commission v. Utpal Kumar Basu (1994) 4 SCC 711 observed that it is well settled that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed to entitle him to a judgment in his favour. Having given such a wide interpretation to the expression Ahmadi, J. (as the learned Chief Justice then was) speaking for M.N. Venkatachaliah, C.J. and B.P. Jeevan Reddy, J., utilised the opportunity to caution the High Courts against transgressing into the jurisdiction of the other High Courts merely on the ground of some insignificant event connected with the cause of action taking place within the territorial limits of the High Court to which the litigant approaches at his own choice or convenience. The following are such observations. (SCC p. 722, para 12)

"If an impression gains ground that even in cases which fall outside the territorial jurisdiction of the court, certain members of the court would be willing to exercise jurisdiction on the plea that some event, however trivial and unconnected with the cause of action had occurred within the jurisdiction of the said court, litigants would seek to abuse the process by carrying the cause before such members giving rise to avoidable suspicion. That would lower the dignity of the institution and put the entire system to ridicule. We are greatly pained to say so but if we do not strongly deprecate the growing tendency we will, we are afraid, be failing in our duty to the institution and the system of administration of justice. We do hope that we will not have another occasion to deal with such a situation."

43. We make it clear that the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another State. Nor are we to be understood that any person can create a fake cause of action or even concoct one by simply jutting into the territorial limits of another State or by making a sojourn or even a permanent residence therein. The place of residence of the person moving a High Court is not the criterion to determine the contours of the cause of action in that particular writ

- petition. The High Court before which the writ petition is filed must ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends upon the facts in each case.
- 44. In the present case, a large number of events have taken place at Bombay in respect of the allegations contained in the FIR registered at Shillong. If the averments in the writ petition are correct then the major portion of the facts which led to the registering of the FIR have taken place at Bombay. It is unnecessary to repeat those events over again as Mohapatra, J. has adverted to them with precision and the needed details.
- 45. In the aforesaid situation it is almost impossible to hold that not even a part of the cause of action has arisen at Bombay so as to deprive the High Court of Bombay of total jurisdiction to entertain the writ petition filed by the petitioner. Even the very fact that a major portion of the investigation of the case under the FIR has to be conducted at Bombay itself, shows that the cause of action cannot escape from the territorial limits of the Bombay High Court.
- 8. CONSTITUTION OF INDIA, ARTICLE 226, C.P.C. O. 20 R. 5: SEEKING OF RE-LIEF: COMPETENCY OF THE COURT TO GRANT, NOT SOUGHT: (RFER Or. 7 R. 7 C.P.C.)

(2000) 7 SCC 675

RHONE-POULENC (INDIA) LTD. Vs. STATE OF U.P.

COURT CAN GRANT RELIEF.

If the High Court interferes beyond the subject-matter of the writ petition, impermissible. The reference seeking determination of legality of workman's dismissal and the relief, if any, he is entitled to.

Paragraph 7 of the judgment is reproduced:

The High Court has also held that Respondent 3 is entitled to the same amount of 7. salary/arrears of salary after he was reinstated by the award of the Labour Court which his counterparts (medical representatives) in the appellant Company were receiving under the settlement dated 25-6-1988 and has further held that the said settlement is applicable to the case of Respondent 3 as well and the appellant is stopped from taking the plea of its non-applicability in case of Respondent 3. Mr. Reddy contends that the aforesaid whether Respondent 3 is entitled or not to the benefit of settlement dated 25-6-1988 was not the subject-matter of the award which directed the reinstatement of workman in service along with consequential benefits. What consequential benefits Respondent 3 would be entitled to was not the subjectmatter of the writ petitions before the High Court. According to the appellant, Respondent 3 is not entitled to the benefits of settlement dated 25-6-1988 was not the subject-matter of the award which directed the reinstatement of workman in service along with consequential benefits. What consequential benefits Respondent 3 would be entitled to was not the subject matter of the writ petitions before the High Court. According to the appellant, Respondent 3 is not entitled to the benefits under the settlement whereas Respondent 3 claims such benefits. This question may have to be adjudicated by a competent authority at an appropriate stage when the question of grant of consequential relief is raised or it is contended that full consequential reliefs in terms of the award have been denied to Respondent 3. The stage of implementation of the award had not come when the matter was pending before the High Court. The only question before the High Court was with regard to the legality of the award and the order dated 22-9-1993 whereby the two preliminary issues were decided by the Labour Court. In this view, we set aside the impugned judgment to the extent it directs that Respondent 3 is entitled to the same amount of salary/ arrears of salary which his counterparts are receiving under the settlement dated 25-6-1988 as also the finding that the said settlement is applicable to Respondent 3 and that the appellant is estopped from taking the plea of its nonapplicability. We leave these questions open without expressing any opinion as to the applicability or otherwise of the settlement to the case of Respondent 3 or the validity of other legal pleas including that of estoppel. It would be open to the appellant and Respondent 3 to raise such pleas as may be available to them in law at the appropriate stage and it goes without saying that the said aspects will be decided on its own merits in accordance with law.

NOTE:- Please also see O. 7 R. 7 CPC.

9. CONSTITUTION OF INDIA, ARTICLES 226 AND 32: LOCUS STANDI TO PERSON NOT SEEKING RELIEF:(2000) 7 SCC 552

M.S. JAYARAJ Vs. COMMISSIONER OF EXCISE, KERALA

A bidder in auction for the priveledge of vending foreign liquor within a circumscribed range and holding licence in Form FL 1 failed to find out a suitable place to locate his shop within that range. Therefore, on his request, he was permitted by the Excise Commissioner to locate his shop in another range. A hotelier holding licence in Form FL 3 and doing business in the latter range challenged the said order of the Excise Commissioner before the High Court. A Single Judge dismissed the writ petition Before a Division Bench the respondent raised on objection against the locus standi of the writ petitioner but that was not taken seriously and the Division Bench quashed the said order of the Excise Commissioner on merits. The appellant (respondent before the High Court) contended that the words "outside the limits specified in this sub-rule" occurring in the first proviso below Rule 6 (2) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 could have relation to the limits specified in Rule 6 (1). Rejecting this contention and dismissing this appeal, the Supreme Court held that in recent cases, the Supreme Court has shifted from the earlier strict interpretation regarding locus standi adopted in Nagar Rice & Flour Mills and Jashhai Motibhai cases and a much wider canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, it would not be proper to nip the motion out solely on the ground of locus standi and allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition had strictly no locus standi. So the contentions require to be considered on merits.

Paragraphs 12, 13 and 14 of the judgment are reproduced:

12. In this context we noticed that this Court has changed from the earlier strict interpre-

tation regarding locus standi as adopted in *Nagar Rice & Flour Mills v. N. Teekappa Gowda & Bros.* (1970) 1 SCC 575 and *Jashhai Motibhai Desai v. Roshan Kumar* and a much wider canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. A four-Judge Bench in jashhai Motibhai Desai (1976) 1 SCC 671 pointed out three categories of persons vis-a-vis the locus standi: (1) a person aggrieved; (2) a stranger; and (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that anyone belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgment has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following (SCC p. 683, para 38)

"38. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved'."

- A recent decision delivered by a two-Judge Bench of this Court (of a which one of us is a party-Sethi, J.) in *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465 after making a survey of the later decisions held thus: (SCC pp. 478-79, para 17)
- In the context of public interest litigation, however, the Court in its various judgments has given the widest amplitude and meaning to the concept of locus standi, In People's Union for Democratic Rights v. Union of India (1982) 3 SCC 235 it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. (See also Bandhua Mukti Morcha v. Union of India (1983) 3 SCC 161 and State of H.P. v. A Parent of a Student of Medical College (1985) 3 SCC 169 on the right to approach the court in the realm of public interest litigation. In Bangalore Medical Trust v. B.S. Muddappa (1991) 4 SCC 54 the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative vardstick of the rule of locus standi or the absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere 'busybody'."

- 14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who field the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits.
- 10. CONSTITUTION OF INDIA, ARTICLE 21 : COMPENSATION FOR WRONGFUL IM-PRISONMENT FOR 5 YEARS :-(2000) 8 SCC 139 HUSSAIN Vs. STATE OF KERALA

Compensation for wrongful imprisonment for 5 years due to wrong conviction. Accused due to inadequate legal representation wrongly convicted. Ultimately acquired by the Supreme Court. It was held that he is entitled to compensation of imprisonment wrongly suffered, as per remedies under the law.

Paragraph 12 of the judgment is reproduced:

It is unfortunate that the aforesaid points have not been put forward before the trial court or the High Court. We feel that the conviction and sentence imposed on his appellant were without the sanction of law. the appellant is unlawfully deprived of his personal liberty for such a long period of 5 years on account of overlooking the aforesaid facts and legal position.

11. COURT FEES ACT, SECTION 7 (IV) (D): COURT FEES: AVOIDANCE OF PAY-MENT: 2) C.P.C., O. 7 R. 11:- REJECTION OF PLAINT:-2000 (3) M.P.L.J. 522 (FB) SUBHASH CHAND JAIN Vs. CHAIRMAN, M.P.E.B.

Suit seeking relief of restraining M.P.E.B. from disconnecting electricity supply to plaintiff's workshop pursuant to Bills amounting to Rs. 2,14, 747. Plaintiff had valued the suit for Rs. 600/- and paid the Court fees accordingly of Rs. 60/-. On defendant's objection regarding valuation, the Trial Court held that plaintiff was liable to pay ad-valorem Court fee. In revision application challenging the order by the plaintiff order requring payment of ad-valorem court fee confirmed.

Judgment on Jagdish Prasad Vs. M.P.E.B., 1987 MPLJ, 452 overruled.

It was held that settled legal position seems to be that plaint has to be read as a whole. Allegation in the plaint including the substantive relief claimed must be the basis for settling the Court fee payable by the plaintiff. More astutenes in drafting the plaint would not glaze the jurisdiction of Court for looking at the substance of the relief asked for. The nature of suit under section 7 (iv) is such where the Legislature could not lay down fixed standard thereby leaving it to the plaintiff to mention it. But where he attemps to under-value the plaint and the reliefs, Court has to intervene. While doing so, concept of real money value which can be objectively ascertained. Where a plaintiff has been made liable to pay specified amount and asked to pay the same and he claims to avoid it, obvi-

ously, he seeks relief to that effect and in case, he avoids payment of Court fee by drafting the plaint in such a way that results in under valuation of the plaint and the relief, it will be a case of arbitrary and unreasonable under-valuation which Court is bound to correct. Substantial relief asked for in the context of the facts of the case forms basis for settling correct Court fee payable in the cases. 1987 MPLJ 452 has not been decided correctly and is therefore overruled. View taken in (1997) ii Weekly Notes Note 480 is approved. Order of the trial Court requiring the plaintiff to pay ad-valorem court fee confirmed. 1987 MPLJ 452, Overruled.

The suits which are mentioned under section 7 (iv) of the Court Fees Act of 1870 are of such nature where it is difficult to lay down any standard of valuation. This means that the valuation of the reliefs will have to be made by the plaintiff under the entry against which the suit is preferred. Provisions of O. 7 R. 11 (b) of the Civil Procedure Code provide inter alia that the plaint shall be rejected where the relief claimed is under-valued and the plaintiff, on being required by the Court to correct the valuation within a time fixed by it, fails to do so. Under this provision, Court has to reach a finding of under-valuation, specify the correct valuation of the relief, determine the same and require the plaintiff to correct the same within the time fixed by the Court. Failure to do so would entail rejection of the plaint. Obviously, the Court would undertake this enquiry in the interest of revenue after realising that the valuation of plaintiff is demonstratively unreasonable and case for interference is made out. Otherwise the plaintiff is free to make his own estimation of the reliefs sought in the plaint and the valuation both for purposes of Court fee and jurisdiction has to be ordinarily accepted.

NOTE: Judicial Officers are requested to go through 1982 MPLJ Short Note 56, 1981Weekly Note II 63, 1969 MPLJ 10. Kindly go through the provisions of O. 7 R. 11 sub clause (a) and (b) under which proper opportunity is to be given to the party to value the suit property correctly and to pay court fees. Time should also be granted if required under Section 149 of the CPC. Further kindly go through Section 148 relating to enlargement of time also.

12. C.P.C., SECTION 10 : STAY OF SUIT AND N.I. ACT, SECTION 138 :- 2000 (2) VIDHI BHASVAR 238

NEMICHAND Vs. HARISH KUMAR

A civil suit for recovery of money cannot be stayed for pendency of criminal proceedings under S. 138 of N.I. Act.

NOTE: Judicial Officers are requested to go through the judgment State of M.P. Vs. Naval Singh, 1971 JLJ S.N. 13.

13. C.P.C. O. 1 R. 10 (2) AND 13:-2000 (2) VIDHI BHASVAR 231 NIRMAL BAGHELA Vs. RANJIT SINGH

This provision empowers the Court to implead any person as party as plaintiff or defendant. It can be done for effectual and complete adjudication of suit. The parties impleaded having direct interest in suit property. They are necessary parties for effectual and complete adjudication of suit.

**NOTE:-** Judicial Officers are requested to make a distinction between necessary parties and proper parties.

14. C.P.C., O. 43 R. 1 (r) AND O. 39 Rr. 1 AND 2:-2000 (2) VIDHI BHASVAR 221 FIRATRAM Vs. SARPANCH, GRAM PANCHAYAT

The order of injunction granted by trial Court was vacated by the appellate Court without material aspects being considered. Therefore, the case was remanded.

15. C.P.C., SECTION 10: STAY OF SUIT:2000 (3) M.P.L.J. S.N. 23
SHRI MAHILA GRIH UDYOG LIJJAT PAPAD Vs. SMT. PUSHPA BERRY

Issues involved in earlier suit and present suit not substantially the same. Order staying suit passed by the District Judge set aside.

16. C.P.C., O. 22 R. 4 AND O. 1 R. 10 2000 (2) JLJ 401 AGARWAL (SMT.) Vs. ARYA VIDHYA SABHA

The provisions enshrined under Order 22 Rule 4 are not applicable in respect of the defendant who had died before the institution of the suit. In view of this, it can irresistibly be concluded that the learned trial Judge had acted within his jurisdiction when he refused to exercise the powers under O. 22 R. 4 of the Code. *United Commercial Bank Vs. Dharam Paul Singh and others, AIR 1989 HP 56, State Trading Corporation of India Limited Vs. K.V. Vaidyalingam and others AIR 1978 Madras 294 and Mohammad Aleem Vs. Magsood Alam and others, AIR 1989 Raj. 43 relied on.* 

In respect of a defendant who dies during the pendency of the suit, application under O. 22 R. 4 is rejected, the affected/aggrieved party cannot take recourse to O. 1 R. 10 of the Code. Kanjhu Gauda Vs. D. Kodardi Dora, AIR 1986 Orissa 191 and Durga, Charan Parida Vs. Basanta Kumar Parida (1974) 40 CLT 885 relied on.

In a suit where there are three joint defendants and one of them had died before the institution of the suit, the legal heirs of the deceased can be added under O. 1 R. 10 (2) of the Code after expunging the name of the deceased defendant. M/s Nevandram Javermal Vs. Devikabai Haridas Gandhi and others. AIR 1982 Bombay 589 and Musammat Ashgari Bibi Vs. Shamal Kumar Basu Mallick and others, AIR 1986 Calcutta 227 relied on.

17. C.P.C. O. 41 R. 19 AND O. 9 R. 9 : APPLICATION FOR RESTORATION OF

2000 (3) M.P.L.J. S.N. 25 RAMPYARI Vs. STATE

Application for restoration of appeal filed under O. 9 R. 9 when it should have been under O. 41, R. 19. Application was rejected summarily by observing that the application has been filed under O. 9 R.9 of the CPC, while there is a specific provision for restoration

of the appeal; hence, the application was not tenable. The Appellate Courts should have treated it as an application under O. 41 R. 19 CPC and should have proceeded to decide it on merits. The impugned order dismissing application for restoration of appeal set aside and lower Appellate Court directed to decide it on merits.

NOTE: The Judicial Officers are requested to go through the following case law for further study on the same point:

- 1. Subhash Chandra Vs. Nanelal, 1981 JLJ 587
- 2. Shankar Rao Vs. State, 1981JLJ S.N. 15
- 3. Premchand Vs. Hiralal, 1981 (1) M.P.W.N. 47
- 4. Chatursingh Vs. Addl. Collector, 1980 JLJ 405
- 5. Gorakhnath Vs. Govt. of M.P., 1979 JLJ 548
- 6. Umrao Singh Vs. State, 1979 (1) M.P.W.N. 284
- 7. Pamandas Vs. Kimatray, 1978 (ii) M.P.W.N. 200
- 8. Dayashankar Vs. Mohan Singh, 1978 (1) M.P.W.N. 361
- 9. Khedu Ram Vs. Supet, 1969 JLJ 843.

## 18. C.P.C., O. 23 R. 1: INCOME OF APPLICANT ONLY TO BE CONSIDERED: 2000 (3) M.P.L.J. 558 KAPIL Vs. Dr. SHIVMANGAL AWASTHY

Suit by indigent person. Court cannot take into account properties standing in the name of father.

Please go through the following citation regarding income from properties how to be considered which was published in 1997 Joti Journal, February part at page 26 Tit Bit No. 18 which is reproduced here for ready reference:

18. (1981 CCLJ NOTE NO. 102) GOPAL Vs. GORDHANLAL (O. 33 R. 1 CPC)

The trial court held that the appellant failed to prove that he was not possessed of means to pay the court fee and dismissed the application. Aggrieved by the order passed by the trial Court the plaintiff has preferred this appeal.

The High Court held that the Trial Court has rejected the prayer of the plaintiff mainly on the ground that apart from these five shops there are five other shops in which the plaintiff also has his share and that the plaintiff has also a share in another house. However, it is not the case of respondents that the plaintiff is in possession of any realisable assets. The other shops and the house are in possession of the plaintiff's father. Apart from the house and the other shops it is not shown that the plaintiff is possessed of any other means to pay the court fee. The house and the shops cannot be held to be realisable assets. Appeal allowed."

This is an individual right, i.e. a personal right that on his death it does not survive to the legal heirs unless the legal heirs are able to establish that they are also indigent. 1997 (1) JLJ 370 Vandan Bhargava Vs. Kapil Bhargava.

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19. (1) C.P.C., O. 33 R. 1 CPC (2) SECTION 34 ARBITRATION ACT : SUBMISSION TO THE JURISDICTION OF THE COURT 2000 (3) M.P.L.J. 590

MAHESH KUMAR BANWARILAL Vs. SURESH KUMAR BANWARILAL

Provisions under Section 34 of Arbitration Act are in sweep with the provisions of O. 33 R. 1 CPC. Application under O. 33 R. 1 amounts to legal proceedings within the sweep of Section 34 of the Arbitration Act, 1940. An application to sue as an indigest person amounts to a legal proceeding in the ambit and sweep of section 34 of the Arbitration Act. AIR 1977 NOC 242 Delhi referred.

NOTE: Please refer to the JOTI Journal 2000, December part page 695, Tit Bit No. 5, Hombonna Nagappa Vs. F.C.I. (1999) 1 703 in which it is said that since no steps had been taken under section 34 of the Arbitration Act, defendant should be deemed to have submitted to the jurisdiction of the Courts. Please also go through the ruling of Bansidhar Vs. E.B. Sukhiya, 1957 JLJ 70.

20. 1) C.P.C. SECTION 47AND 115, (2) M.P. GRAMIN RIN VIMUKTI ADHINIYAM, 1972, SECTION 7 AND (3) SAMAJ KE KAMJOR......ADHINIYAM. SECTION 14:-2001 (1) M.P.H.T. 39

WAMAN Vs. BALDEVDAS

Respondent/plaintiff filed suit to recover it. Petitioner/defendant did not contest suit and ex parte decree passed. Respondent sought to execute decree. Defendant opposed it contending that the decree is a nullity as it is hit by section 14 of Adhiniyam, 1976 and section 7 of Adhiniyam 1982. Executing Court held that defendant did not contest the suit and accordingly execution was bound to proceed. Against it this revision was preferred. It was held that plaint did not reveal that it was a transaction with the holder of agricultural land. Hence, Executing Court has no jurisdiction to question the validity of decree. Judgement debtor cannot be permitted to take a plea of this nature to challenge the decree to be a nullity. Defendant has not raised plea in the suit that Section 7 of Adhiniyam creates a jurisdictional bar. Hence, Executing Court cannot declare decree a nullity. Revision dismissed.

Transactions of loan and sale of land etc. with the holder of agricultural land are prohibited. Controversy relating to such transactions cannot be agitated before Civil Court.

21. C.P.C., SECTION 11 EXPLNS. VII AND VIII: THE EXPRESSION OF "COURT OF LIMITED JURISDICTION" OCCURING IN EXPLANTION 8 OF SECTION 11:- (2000) 8 SCC 99

RAJENDRA KUMAR Vs. KALYAN (DEAD) BY LRS.

The expression of "Court of limited jurisdiction" occuring in Explanation 8 of Section 11 CPC ought to be given widest possible amplitude and not a limited or restrictive interpretations. The High Court rightly held that the effect given to explanations 7 and 8 inserted in Section 11 of the Code (Amendment) would act and come within the seep of sub-section 2 (a) of the amending Act and it would be regulated by Section 97 (3) thereof. As on the date of the commencement of the amending Act the present suit was pending in the Court of the Civil Judge, Senior Division, the amended provisions of Section 11 would

apply to it. However, some differentiation exists between a procedural statute and statute dealing with substantive rights and in the normal course of events, matters of procedure are presumed to be retrospective unless there is an express ban on its retrospectivity.

#### HINDU LAW : ADOPTION :-

Widow adopting to her deceased husband a child who was born after the latter's death. In such circumstances the child's contention that by a legal fiction he took the interest of the deceased with effect from the year of his death was rejected.

22. CR.P.C., SECTIONS 432 AND 433-A; CONSTITUTION OF INDIA, ART. 161 : PRE-MATURE RELEASE OF LIFE CONVICT :-(2000) 7 SCC 626= AIR 2000 SC 2762 LAXMAN NASKAR (LIFE CONVICT) Vs. STATE OF W.B. & OTHERS

The Supreme Court laid down guide lines in case of *Laxman Nascare Vs. Union of India, (2000) 2 SCC 595* and held that facts of a particular case be considered in the light of the guidelines laid down in that judgment. Remission of sentence of life imprisonment and release of prisoner under Sections 432 and 433-A explained. Even if a person undergoing life sentence earns remission under Prison Rules or any law, he will be entitled to be released only when the appropriate Government passes an order remitting the balance period of the sentence. In absence of such an order, the life convict cannot claim any right to be automatically released.

Paragraphs 6 to 9 of the judgment are reproduced:

- 6. This Court also issued certain guidelines as to the basis on which a convict can be released prematurely and they are as under: (SCC p. 598, para 6)
  - "(i) Whether the offence is an individual act of crime without affecting the society at large.
  - (ii) Whether there is any chance of future recurrence of committing crime.
  - (iii) Whether the convict has lost his potentiality in committing crime.
  - (iv) Whether there is any fruitful purpose of confining this convict any more.
  - (v) Socio-economic condition of the convict's family".
- 7. In the present case, the report of the jail authorities is in favour of the petitioner. However, the Review Committee constituted by the Government recommended to reject the claim of premature release of the petitioner for the following reasons;
  - (1) that the police report has revealed that the two witnesses who had deposed before the trial court and the people of the locality are all apprehensive of acute breach of peace in the locality in case of premature release of the petitioner;
  - (2) that the petitioner is a person of about 43 years and hence he has the potential of committing crime; and
  - (3) that the incident in relation to which the crime had occurred was the sequel of the political feud affecting the society at large.
- 8. If we look at the reasons given by the Government, we are afraid that the same are palpably irrelevant or devoid of substance. Firstly, the views of the witnesses who had been examined in the case or the persons in the locality cannot determine whether

the petitioner would be a danger if prematurely released because the persons in the locality and the witnesses may still live in the past and their memories are being relied upon without reference to the present and the report of the jail authorities to the effect that the petitioner has reformed himself to a large extent. Secondly, by reason of one's age one cannot say whether the convict has still potentiality of committing the crime or not, but it depends on his attitude to matters, which is not being taken note of by the Government. Lastly, the suggestion that the incident is not an individual act of crime but a sequel of the political feud affecting society at large, whether his political views have been changed or still carries the same so as to commit crime has not been examined by the Government.

- 9. On the basis of the grounds stated above the Government could not have rejected the claim made by the petitioner. In the circumstances, we quash the order made by the Government and remit the matter to it again to examine the case of the petitioner in the light of what has been stated by this Court earlier and our comments made in this order as to the grounds upon which the Government refused to act on the report of the jail authorities and also to take not of the change in the law by enacting the West Bengal Correctional Services Act 32 of 1992 and to decide the matter afresh within a period of three months from today. The writ petition is allowed accordingly. After issuing rule the same is made absolute.
- 23. CR.P.C., SECTIONS 313, 357 (1) AND 357 (3): COMPENSATION CAN BE ORDERED TO BE PAID WITHOUT IMPOSING A FINE:2000 (2) JLJ 291
  BALARAM SINGH Vs. STATE OF M.P.

In a case in which compensation is to be awarded, there need not be imposition of any fine. Both the provisions, i.e. 357 (1) and 357 (3) are independent to each other. Therefore, such Court is permissible to ask the accused to pay compensation under Section 357 (3) Cr.P.C. without imposing fine. Such fine can be utilised in the modes provided under Section 357 (1).

Accused not taking plea of impotency in his statement under Section 313 of Cr.P.C. Plea is said to be not proved.

NOTE: - Judicial Officers are requested to go through the following Rulings also

Suraj Pal Singh Vs. State of M.P., 1972 JLJ 1008. It says that stand not taken by the accused in examination under Section, no value of such defence when circumstances point against it.

Statement of accused part when can be taken in to account against him. This was stated in *State of M.P. Vs. Murat Singh*, 1971 JLJ 889.

Statement of the accused how far it can be used in evidence against the accused is explained in *Sampat Singh Vs. State of Rajasthan*, Criminal Appeal No, 146 of 1967 decided on 2nd January, 1969 (SC).

The answers given by the accused cannot be used as substantial evidence against him. Purpose of the examination of accused conviction based solely on such answers is illegal. *Devilal Vs. State*, 1965 JLJ 148.

Statement of accused when may be used as evidence is stated in *Jamuna Das Vs. State*, 1962 JLJ 876.

Stand not taken by the accused in examination under Section 313 (old 342). No value of such defence when circumstances point against it.

No cross-examination of prosecution witnesses on what is being projected for the defence. Defence version after thought rightly rejected. *Motilal Vs. State*, 1990 Pt II CCRJ 1.

CUSTODY: It means immediate charge and control exercised by a person or authority. Custody and authority are not synonymus terms. 1984 Cr.L.J. 134, 149 and 77 Indian Cases 499 Relied on.

NOTE: Judicial Officers are requested to go through the Article written by Hon'ble the Chief Justice, Shri Bhawani Singh which is reported in AIR 1980 CrLJ, General Section 43 regarding "Custody and Arrest". Judicial Officers are further requested to go through this ruling as above by Hon'ble Shri Justice A.K. Mishra which is of immense importance on the law relating to, delay in filing FIR, Expert's opinion, plea of the accused under S. 313 Cr.P.C. and formation of evidence under Section 376 or 376-B in case of a rape by a police officer.

## 24. CR. P.C., SECTION 197: SANCTION WHEN REQUIRED: 2000 (3) M.P.L.J. S.N. 17 GIRIJA SHANKAR Vs. MOINUDDIN

Petitioner Government Officer. Private complaint lodged by respondent No. 1 under Sections 294, 504 and 506, Indian Penal Code against petitioner in respect of incident that took place in office of petitioner when respondent No. 1 visited for some grievance. It was held that on facts that act complained of was not intimately and integrally connected with official duty of petitioner. It can never be duty of any officer to abuse public man approaching with grievance. Sanction under Section 197 for prosecution of petitioner is not necessary.

## 25. CR.P.C., SECTION 374 :- GRAT OF LEGAL AID 2000 (3) M.P.L.J. S.N. 19 GABBU SINGH Vs. STATE

The accused challenged conviction under Section 394 IPC who was sentenced to 3 years RI. Absence of the counsel for appellant himself at the time of hearing of appeal. Appeal dismissed on merits. Appeal cannot be heard and decided on merits without hearing the applicant and in case of his absence without appointing lawyer/counsel at the state cost by the Court. The appeal can only be dismissed for non-prosecution. Appeal directed to be decided afresh.

**NOTE:** Judicial Officers are requested to go through the provisions of O. 41 R. 17 of the CPC and in particular explanation to that rule which direct that in absence of the appellant the Court has jurisdiction to dismiss the appeal but the Court cannot decide the appeal on merits. Hearing a criminal case the Court has no jurisdiction to dismiss the appeal in absence of the appellant/accused. It is to be decided on merits after due formalities.

The principle relating to criminal appeal is to be applied mutatis mutandis in criminal revisions also and revisions should be decided on merits after due formalities are observed. Minaram Vs. Zeevalu, 1974 Cr.L.J. 718, H.S. Nair Vs. H.H. Nair (1983) 1 Cr. L. Cases 43 (Bom) and Kastoor Bhai Vs. B.B. Chougulal 1983 Maharashtra Law Reporter 85.

Please see Note No. 49-50 "Dismissal of revision for default of petitioner" and restoration from Sohani's Cr.P.C. 18th Edition Vol. 5 page 4116.

26. CR.P.C. SECTION 313 (1)(B): EXAMINATION OF ACCUSED BY COURT: (2000) 8 SCC 740

BASAVRAJ R. PATIL Vs.STATE OF KARNATAKA

Examination of accused by the Court held per majority: though court has to question the accused "personally", but in exigent conditions court can allow the counsel for the accused to answer the questions on his behalf. For this accused is required to file before the Court an application and an affidavit sworn by himself. The Supreme Court laid down the procedure. If such application is made the Court can make suitable order. In the present case the trial Court dispensed with the personal appearance of the accused who were in U.S.A. Their counsel was allowed to answer and to questions on their behalf.

NOTE:- Kindly refer to AIR 1989 SC 2163=1989 Cr.L.J. 296 Chandulal Chandrakar's case. The case was referred in article appearing in 1998 Joti Journal June part at page 17. The object and nature of the provision is to benefit the accused. The provision is based on natural justice principle of audialterem Partem.

CR.P.C. SECTION 313: OBJECTION REGARDING NON COMPLIANCE OF SECTION:-

Objection regarding non-compliance with the mandate of section 313 can be raised only by the accused and not by the complainant or the prosecution.

27. CR.P.C. SECTION 321: WITHDRAWAL OF CASE: RAJKUMAR'S CASE, (1) ABDUCTED BY VEERAPPAN: PRINCIPLE LAID DOWN: (2000) 8 SCC 710=AIR 2001 SC 116

ABDUL KARIM Vs. STATE OF KARNATAKA

The discretion is that of public prosecutor. He has to be, on consideration of all relevant material and in good faith, satisfy that withdrawal is in public interest. The satisfaction of the public prosecutor cannot be based on information which he could not varify. In the present case, it was further said that permission to withdraw has been obtained by misleading the court. The Public prosecutor is to be straight, forthright and honest and has to admit the arrangement and inform the court that the real arrangement is to ultimately facilitate the release of these accused from judicial custody.

(2) DUTY OF THE COURT FOR PERMITTING TO WITHDRAW FROM THE PROSECUTION:-

The true power of the Court under S. 321 of Cr.P.C. is supervisory but that does not mean that while exercising that power the consent has to be granted on mere asking. The court has to examine that all relevant aspects have been taken into consideration by the

public prosecutor and / or by the Government in exercise of its executive function. The Court while granting consent has to ensure that Public Prosecutor has applied his mind individually and that public prosecutor acting in good faith is of the opinion that withdrawal is in public interest.

In paragraph 25 of the judgment Supreme Court has said that a public prosecutor have considered and answered the following questions for himself before decided to exercise his discretion in favour of such withdrawal.

- 1. Was there material to show that the police and intelligence authorities and the State Government had a reasonable apprehension of such civil disturbances as would justify the dropping of charges against Veerappan and others accused of TADA offences and the release on bail of those in custody in respect of the other offences they were charged with?
- 2. What was the assessment of the police and intelligence authorities and of the State Government of the risk of leaving Veerappan free to commit crimes in future, and how did it weigh against the risk to Rajkumar's life and the likely consequent civil disturbances?
- 3. What was the likely effect on the morale of the law-enforcement agencies?
- 4. What was the likelihood of reprisals against the many witnesses who had already deposed against the respondents-accused?
- 5. Was there any material to suggest that Veerappan would release Rajkumar when some of Veerappan's demands were not to be met at all?
- 6. When the demand was to release innocent persons languishing in the Karnataka Jails, was there any material to suggest that Veerappan would be satisfied with the release of only the respondents-accused?
- 7. In any event, was there any material to suggest that after the respondents-accused had secured their discharge from TADA charges and bail on the other charges Veerappan would release Rajkumar?
- 8. Given that the Government of the States of Karnataka and Tamil Nadu had not for 10 years apprehended Veerappan and brought him to justice, was this a ploy adopted by them to keep Veerappan out of the clutches of the law?

**NOTE**:-These questions are reproduced for the guidance of the Judges, so that in future when they permit withdrawal, they should ask whether such conditions are complied with by the public prosecutor.

Paragraph 44 of the judgment is also reproduced:

Besides the eight questions noticed in the main judgment, the question and aspect of association of Veerappan with those having secessionist aspirations were also not considered. Further, though it may have been considered as to what happened on 1st August, immediately after the abduction of Rajkumar, but what does not seem to have been considered is that those were spontaneous outbursts and the authorites may have been taken unaw are but what would be the ground realities when the law enforcing agencies have sufficient time to prepare for any apprehended contingency.

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28. CR.P.C, SECTIONS 311 : PROVISIONS OF :2001 (1) M.P.H.T. 65
NARAIN SINGH Vs. STATE OF M.P.

Provisions of section 311 Cr.P.C. are in two parts. First is discretionary and the later is mandatory.

29. CR.P.C., SECTIONS 475 AND 397, (2) ARMY ACT, SECTIONS 125 AND 126 (3) CRIMINAL COURTS AND COURT-MARTIAL (ADJUSTMENT OF JURISDICTION) RULES, 1952, RULES 3 AND 4:-2000 (1) M.P.H.T. 72

CAPTAIN P.K. REKWAL Vs. STATE OF M.P.

Edible oil was ordered to be purchased from local market. It is alleged that petitioners in conspiracy with other co-accussed deliberately purchased adulterated oil. Enquiry was entrusted to C.B.I. After completion of investigation C.B.I. filed challan against petitioners and co-accused in the Court of Special Judge (C.B.I.). By impugned order charges were framed against petitioners for offence punishable under sections 120-B and 420 IPC, under Section 13 (1)(d) and 13 (2) of Prevention of Corruption Act, 1988 and section 7/16 of Prevention of Food Adulteration Act, 1954. Against it criminal revision was preferred. Question of jurisdiction of the learned Special Judge (C.B.I.) for holding trial against petitioners is considered in this revision. It was held under Section 475 of the Code rules consistent with Cr.P.C. and Army Act may be framed and Magistrate shall have regard to such rules. If ordinary Criminal Court decides to try accused who is subject to Army Act, it will have to give notice to the Army authorities as per mandatory provisions in sections 125 and 126 of the Act and Rules 3 and 4 of the Rules, 1952. As mandatory procedure has not been followed the trial against petitioners is vitiated. The impugned order framing charges against petitioners is quashed and proceedings stayed. Petition allowed. (1971) 3 SCC 86 Distinguished. Cr.L.R. (SC).1986 page 309 and AIR 1972 SC 2548 followed. AIR 1961 SC 1762 referred to.

The military authorities did not hand-over the petitioners for trial before the ordinary Criminal Court, they simply entrused the investigation to the C.B.I. and therefore after investigation it is open before which Court the petitioners should be tried. Merely because the investigation into the alleged offence was entrusted by the Military Officers to the C.B.I., the requirement of mandatory provisions of Section 125 and 126 of the Army Act and the Rules 3 and 4 of the above Rules does not come to an end.

The nature of offence should be an offence of which cognizance can be taken by ordinary criminal court and Court Martial.

Cr.P.C. SECTION 475 - SPECIAL JUDGE: Status of Special Judge is deemed to be a Magistrate for the purpose of Rules framed under Section 475 of the Code. AIR 1961 SC 1762 referred to.

30. CR.P.C., SECTON 173 (2):-2001 (1) M.P.H.T. 89 RESHAMLAL Vs. STATE

Investigation should be made with fullest fairness. Entire material collected during investigation should be produced.

It is not for the prosecution agency/police to pre-judge the matter and have the approach of vengeance. It is expected of them that without fear or favour and with fullest fairness they shall make the investigation and produce the entire material collected by them during the course of the investigation with the final report submitted under Section 173 (2) of Cr.P.C.

31. 1) CR.P.C., SECTION 197 R/W SECTION 64 (3) KERALA POLICE ACT, 1960:
2) APPLICATION OF CHAPTER 36 OF THE CODE OF CRIMINAL PROCEDURE:
EXPLAINED:(2000) 8 SCC 131

P.P. UNNIKRISHANAN Vs. PUTTIYOTTIL ALIKUTTY

The Court can extend period of limitation under, only where period of limitation is prescribed as per provisions of Ch. 36 of the Code and not where the period is prescribed under any other enactment.

Period of limitation prescribed under Keral Police Act for taking cognizance of offence cannot be extended by invoking Section 473 Cr.P.C. as powers under that provision can be exercised only in respect of period of limitation prescribed in Ch. 36 Cr.P.C.

### KERALA POLICE ACT, 1960 : SECTION 64(3) :-

The bar against taking cognizance of the offence under the Act is not restricted to the offences specified in the Act alone but can encompass offences under other enactments including the ordinary Code. Provisions of Section 64(3) of the Keral Police Act are different from section 197(1) Cr.P.C. While section 64(3) of the Act imposes absolute ban against taking cognizance of offences under Section 197(1) Cr.P.C. does not impose any absolute ban. The expression "on account of any act done in pursuance of any duty" in Section 64(3) and "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" in Section 197(1) explained.

"SECTION 64(3):- (3) No Court shall take cognizance of any suit or complaint, in respect of any offence or wrong alleged to be committed or done by a Magistrate, police officer or other person on account of any act done in pursuance of any duty imposed or authority conferred on him by this Act or any other law for the time being in force or of any rule, order or direction lawfully made or given thereunder unless the suit or complaint is filed within six months of the date on which the offence or wrong is alleged to have been committed or done."

Paragraphs 18 and 19 of the judgment are reproduced:

The commission of an offence, while acting or purporting to act in the discharge of his official duty is of a wider radius when compared with an offence committed on account of an act done in pursuance of any duty or authority. In the latter, the act done itself should be an exercise in discharge of his duty or authority and that act should amount to an offence. It is not enough that the act complained of was only purported to be in exercise of his duty though it may be sufficient under the former. So the scope under section 64(3) of the KP Act is much narrower than the amplitude of section 197(1) of the Code for a public servant to claim protection.

Even under section 197 of the code no protection has been granted to public servants for the type of acts alleged in the case against the appellants. Decisions are a legion relationg to the scope of the protection under Section 197(1) of the code. In *Matajog Dobey Vs. H.C. Bharati, AIR 1956 SC 44*, this Court made a slight deviation from the view adopted by the judicial Committee of the Privy Council in Gill case, AIR 1948 PC 128. This court after referring to earlier decisions summed up the scope of section 197(1) of the Code thus:

"There must be a reasonable connecion between the act and the discharge of official duty; the act must bear such relation to the duty that accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

32. CRIMINAL TRIAL: APPRECIATION OF EVIDENCE OF PROSECUTRIX: CRIMINAL TRIAL: DELAY IN LODGING F.I.R. AND CRIMINAL TRIAL: EVIDENCE ACT SECTIONS 118 AND 156 A MINOR GIRL: APPRECIATION OF EVIDENCE: 2000 (2) VIDHI BHASVAR 204 (DB)

GAJRAJ SINGH Vs. STATE OF M.P.

Evidence of prosecutrix duly corroborated with evidence of other witnesses and medical evidence. It is sufficient to prove the evidence under Section 376 IPC. The delay in lodging FIR was duly explained and was consistent with the human behaviour and therefore it has no adverse effect.

The prosecutrix being a minor girl, her evidence need be examined with caution and it should be corroborated also.

33. EVIDENCE ACT, SECTIONS 26 AND 27 : INFORMATION BY ONE ACCUSED USED AGAINST ANOTHER :- 2000 (2) JLJ 391 PAPPU Vs. STATE

Fact discovered on information of one accused cannot be utilised against any other person but only against the accused who furnished the information.

34. EVIDENCE ACT S.3 :APPRECIATION OF EVIDENCE OF RELATED WITNESSES: 2000 (2) JLJ 356
NARAYAN SINGH Vs. STATE

Eye witnesses being near relatives of the deceased evidence cannot be brushed aside. They are last persons to allow real culprit to escape and falsely implicate innocent persons.

### I.P.C., SECTION 34 AND "FREE FIGHT" :-

Injuries caused to two persons. Complainant party came on spot thereafter and free fight began. Each accused is liable for his own act.

## 35. EVIDENCE ACT, SECTION 65 : SECONDARY EVIDENCE :2001 (1) M.P.H.T. 3 (CG) DUM RAM Vs. BHANWAR LAL

This section simply requires that if a party satisfies that Judicial conscience of the Court that the document would be material to discharge the issue between the parties, the original of the same is not available, nor can easily brought or party praying secondary evidence, cannot produce the said document in the Court.

It is the discretion of the Court to grant permission to lead secondary evidence, but the discretion has to be exercised in accordance with law looking to the contingencies and exigencies.

### 36. EVIDENCE ACT, SECTIONS 65 AND 66 : SECONDARY EVIDENCE, PERMISSION WHEN TO BE GRANTED :-

2001 (1) M.P.H.T. 13 (CG)

BANK OF BARODA Vs. NARESH ASWANI

Secondary evidence cannot be permitted unless a notice under Section 66 of Evidence Act has been given to the party in whose possession the document is. Such permission can only be granted if it is proved to the satisfaction of Court that the person in whose possession such document is, out of reach of or not subject to the process of the Court. This part of secion 65 (a) is only applicable to a party to suit and not to third party in whose possession the document is.

### 37. GOODS TARIFF NO. 37 PART-I (VOL.I), R. 115 AND RAILWAY ACT SECTIONS 74, 74 (3) AND 76:-

2000 (2) VIDHI BHASVAR 249

HASMUKH RUPANI Vs. UNION OF INDIA

The goods were not actually weighed at the time of loading. Weight mentioned in Railway receipt cannot be the basis for claiming damages of short delivery. The goods were booked at 'owner's risk rate'. No delay or detention in transit was there. Owner not proving negligence or misconduct on the part of defendant or its employees, not entitled to compensation. Section 76 is a proviso or exception to S. 74 (3). Section 74 (3) governs all cases of loss, destruction or deterioration. Section 76 applies only to cases of delay or detention.

### 38. HINDU MARRIAGE ACT, 1955 : SECTION 12 (1) (C) : SOLEMNIZATION OF MARRIAGE FREELY CONSENTED :-

2000 (2) JLJ 249

PRAKASH SINGH THAKUR Vs. SMT. BHARTI

Marriage could not be avoided by saying that he was induced to marry by fraudulent statements relating to family etc. The respondent was earlier married and a divorcee. The fact as to whether the respondent was earlier married and was a divorcee would amount to such material fact and circumstance of the respondent and therefore concealment of such a fact, would provide a ground to the petitioner to seek annulment of his or her

marriage with the respondent. Parties known to each other even before marriage. Wife proving disclosure of fact, of marriage. The appeal of the husband was dismissed.

### 39. HINDU LAW: WHETHER A FEMALE MEMBER CAN BE A COPARCENER: 2001 (1) M.P.H.T. 31 TILLOMAL THADANI Vs. SMT. BACHHI BAI

The parties are governed by Mitakshara School of Hindu law. Therefore, female member/non-applicant Bachhi Bai cannot be treated as coparcenar qua joint Hindu family. C.P.C. O. 39 Rr. 1 and 2:-

Non-applicant female member (here not declared as a coparcener) filed a suit for partion against applicant/defendant. She also sought injunction restraining the applicant from selling or alienating the immovable and movable property. Since the non-applicant is not a co-parcener such application is not tenable. A suit for permanent injunction by a coparcener against Karta from restraining him from alienating house or property belonging to the joint family would not be maintainable.

## 40. (A) HINDU SUCCESSION ACT, SECTIONS 3 (1)(J), 8 AND SCHEDULE :- 2001 (1) M.P.H.T. 83 KHUMAN Vs. BARELAL

No presumption of valid marriage can be drawn merely on the basis of long cohabitation between deceased and plaintiff Khema, particularly when, first wife Sarua and husband of Khema Bai to whom, she was previously married were alive. The Act does not expressly equate illegitimate children to legitimate children in the matter of inheritance and succession. The two did not stand at par, but stand apart. If the marriage is void ab initio child born out of such marriage, status of legitimate child cannot be conferred.

The facts of the case were as under:

Appellant/plaintiff is son of Khema Bai who was kept as wife by Sarua. First wife or Sarua and husband of Khema Bai to whom she was previously married were alive. Respondent/defendant is son of first wife of Sarua. After death of Sarua dispute arose regarding agricultural land which fell to the share of deceased. Respondent/defendant got mutation of disputed land of his father on the basis of 'Will'. Appellant/plaintiff brought suit for cancellation of mutation and claimed share in suit property. Trial Court decreed the suit. First Appellate Court reversed judgment of Trial Court. Hence, this appeal was preferred. Status of illegitimate son in self acquired property of deceased father.

The High Court held that married wife of Sarva was alive when mother of appellant was kept as mistress by deceased. Even the long cohabitation of Khema Bai with Sarua would not confer status of the legal wife to her. Son begotten of such a cohabitation being illegitimate has no right to inherit the property of deceased. Appeal dismissed. 1994 MPLJ 446 and 2000 (3) MPHT 514=AIR 2000 MP 288 relied on. AIR 1978 SC 1557 and 1978 MPLJ 507 referred to.

### (B) GENERAL CLAUSES ACT: SECTION 3 (57):- DEFINITION OF 'SON':-

It includes only 'adopted son'. 'Illegitimate son' is not included.

(C) WILL: - Oral will is not admissible.

41. I.P.C., SECTION 84 : BENEFIT :-2000 (2) JLJ 327 BAIJANTI BAI Vs. STATE

Accused found in full sense when brought out of well narrating reason for jumping in well with baby. She is not entitled to benefit under Section 84 IPC.

#### I.P.C., SECTION S. 302, 304-A 304 PART II AND 309 :-

Act done with knowledge of consequences not prima facie murder. It becomes murder only in absense of excuse. Wife having without knowledge of husband throwing herself in well with baby because of ill treatment of husband. Attempt to commit suicide taking baby in lap not without reason, accused suffering from severe stomach pain cannot be equated with ladies receiving ill treatment from husbands.

42. JUDGE :-

2000 (2) JLJ 312

RAHISH MOHD. QURESHI Vs. STATE OF M.P.

JUDGE: Judge cannot be dragged into arena. We are bound to accept the statement of judges recorded in their judgment as to what transpired in Court. Statement of the judges cannot be allowed to be contradicted by statement at Bar or by affidavit and other evidence.

**JUDGMENT :-** Facts as to what transpired at the hearing recorded in judgment of the Court are conclusive. Happenings wrongly recorded in judgment, very judges should be approached to get them corrected. If no such step is taken, matter ends.

Matters of judicial record are unquestionable. Judgments cannot be treated as mere counters in the game of litigation.

NOTE: Judicial Officers are requested to go through Section 121 of Evidence Act with its illustrations for further studies in this respect, which is reproduced below:

"121. JUDGES AND MAGISTRATES: No Judge or Magistrate shall except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting."

#### **ILLUSTRATIONS**

- (a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B, cannot be compelled to answer questions as to this, except upon the special order of a superior Court.
- (b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.
- (c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

43. M.B. ZAMINDARI ABOLITION ACT, 1951, SECTION 4 (2), M.B. LAND REVENUE AND TENANCY ACT, 1950, SECTIONS 50 AND 52, EVIDENCE ACT SECTIONS 35 AND 114 ILLUSTRATION (E): INTERPRETATION OF STATUTES, BASIC RULES, LEGISLATIVE INTENT, DETERMINATION OF: M.P. ABOLITION OF PROPRIETOARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1950, SECTION 4 (2):-

(2000) 7 SCC 611 KASTURCHAND Vs. HARBILASH

Entries in annual village papers (Khasra) create a rebuttable presumption in favour of the person whose name is recorded.

Where a provision confers rights on cultivators of land on the principle of "land for the tiller", it was held that the proprietor in personal cultivation of his land should not be deprived of the benefit of the provision. Possession on the date of vesting not decissive. A proprietor claiming the right under Section 4 (2), must show that he was in possession, as khudkasht cultivator and that this fact was recorded in the khasra before the date of vesting. It was clearified that for the purpose of section the relevant and material entries are the ones made for the period preceding the date of vesting. Possession on the date of vesting not decisive. Conditions for continuing in possession are different from those in S. 4 (2) of the M.B. Zamindari Abolition Act.

Paragraphs 8 to 18 of the judgment are reproduced :-

- A Perusal of Sub-Section (2) makes it clear that it vests a right in the proprietor to continue to remain in possession of his Khudkasht land so recorded in the annual village papers before the date of vesting. This conferment of the right to remain in possession of the khudkasht land is notwithstanding the vesting of the land in subsection (1) of Section 4. A proprietor claiming the right to continue to remain in possession of the khudkasht land, has to show that he was in possession of the land as a khudkasht cultivator and that fact is recorded in the khasra-the annual village papers- before the date of vesting. The date of vesting, as noted above is 2-10-1951 which falls in Samvat year 2008. Obviously for purposes of sub-section (2) the entries in the Khasra for Samvat year 2007 would be relevant. The legislative policy behind this section appears to be that when the rights are being conferred on cultivators of land on the principle of "land for the tiller" a proprietor should not be deprived of the same if he is also in personal cultivation of the land and that he should be conferred the same benefits as are available to other tillers of the soil under the Act. Because the date of vesting falls in the middle of Samvat year 2008, the legislature deemed it fit to place reliance on the records of the annual village papers before the date of vesting. Thus, it follows that for purposes of Section 4 (2) of the Abolition Act what is relevant and material is the entries in the khasra maintained by the Revenue Department for the period earlier to the date of vesting.
- 9. There is no dispute in this case that for Samvat years 2006 and 2007 (Exhibits P-2 and P-3) the names of the appellants are recorded as khudkasht possessors. Though according to the respondents Gayadeen was in possession of the suit land in those years yet admittedly his name was not recorded in the khasra of Samvat years 2006 and 2007 which is a significant fact to belie the case of the respondents. If that be so,

the appellants are entitled to continue in possession of the suit land under Section 4 (2) of the Abolition Act. However, if they are dispossessed thereafter, as they claim, their right extends to recover the possession from the persons in unauthorised occupation thereof so that they can continue in possession of the suit land. Section 4 (2), in our view, does not put an embargo on the right of the person whose possession of the suit land is recorded in the Khasra of the years earlier to the date of vesting to recover possession of the land from a trespasser, if he was subsequently dispossessed from the land.

- 10. The learned counsel for the respondents, Mr. Mehrotra relied on a judgment of this Court in *Ramkhilawandhar v. Gajodharprasad* (1985) 2 SCC.58 to contend that as the plaintiffs were not in possession of the land in dispute on the date of vesting, they cannot succeed in a suit for recovery of possession. That case arose under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (for short "the M.P. Act"). Section 4 (2) of the M.P. Act reads as follows:
  - "4. (2) Notwithstanding anything contained in sub-section (1), the properietor shall continue to retain the possession of his homestead, home-farm land, and in the Central Provinces also of land brought under cultivation by him after the Agricultural Year 1948-49 but before the date of vesting."
- 11. It is true that the expression "the proprietor shall continue to retain the possession" in Section 4 (2) of the M.P. Act and the expression "the proprietor shall continue to remain in possession" in Section 4 (2) of the Abolition Act convey the same meanings but the requirements of these provisions to continue in such possession are different. The provisions of Section 4 (2) of the two Acts are not in *haec verba*: whereas under the M.P. Act bringing the land under cultivation after the Agricultural Year 1948-49 but before the date of vesting is a prerequisite, under the Abolition Act, the criteria are: (1) Khudkasht of the land, (2) entry of the Khudkasht of the land in the annual village papers before the date of vesting. Therefore, under the Abolition Act the fact of khudkasht of the land, has to be ascertained from the entries recorded in the annual village papers before the date of vesting. That this is the import of Section 4 (2) of the Abolition Act, derives support from the following observations of this Court in *Meharban Singh v. Naresh Singh* (1969) 3 SCC 542 which also arose under the Abolition Act: (SCC p. 547, para 7)

"The proprietor, however, notwithstanding other consequences of the vesting in a State, is entitled to continue to remain in possession of his khudkasht land which is so recorded in the annual village papers before the date of vesting." (emphasis supplied)

12. The same view is reiterated in a latter decision between the same parties *Meharban* Singh v. Bhagwant Singh (1980) 2 SCC-284 thus: (SCC p. 288, para 6)

"It would follow that if, in a given case, it was shown that a proprietor had khudkasht land which was so recorded in the annual village papers before the date of vesting of the lands in the State, he was entitled to continue to remain in possession of those lands". (emphasis supplied)

13. A Full Bench of the Madhya Pradesh High Court in *Deorao Jadhav v. Ramchandra* 1982 MPLJ 414 (MPLJ at p. 425) relying on the aforementioned observation of this Court in *Meharban Singh v. Bhagwant Singh* concluded as follows:

"The determining factor is khas possession under Section 6, whereas under Section 4 (2) the determining factor is record, i.e., khudkasht land so recorded in the annual village papers before the date of vesting although the definition of khudkasht in Section 2 (c) of the M.B. Act is similar to the definition of khas possession in Section 2 (k) of the Bihar Act."

- 14. This being the position, the courts below as well as the High Court have misdirected themselves in not placing reliance on the entries in the khasras of Samvat years 2006 and 2007 (Exhibits P-2 and P-3), recorded earlier to the date of vesting. Therefore, the findings recorded by them are vitiated and not binding on this Court.
- 15. Mr Mehrotra next contends that entries in the khasra cannot be regarded as sacrosanct as to be binding on the parties with regard to the actual position. We cannot accept this broad contention.
- 16. The entries in the annual village papers create a presumption albeit rebuttable in favour of a person whose name is recorded. We find that a procedure is prescribed to challenge the entries made in the annual village papers. The procedure is contained in the Madhya Bharat Land Revenue and Tenancy Act of 1950 (for short "the Land Revenue Act"). Section 45 of that Land Revenue Act specifies that khasra, jamabandi or khatauni and such other village papers as the Government may from time to time prescribe shall be annual village papers. Section 46 enjoins preparation of annual village papers each year for each village of a district in accordance with rules made under the Act. Section 52 embodies the presumption that all entries made under that chapter in the annual village papers shall be presumed to be correct until the contrary is proved and Section 50 prescribes the method or procedure for correction of wrong entries in the annual village papers by superior officers. Thus it is clear that in the event of wrong entries in the annual village papers the same is liable to be corrected under Section 50 and unless they are so corrected the presumption under Section 52 will govern the Position.
- 17. Insofar as Samvat year 2008 is concerned it is not in dispute that initially the names of the appellants were recorded. They were subsequently scored off by the Patwari and the name of Gayadeen was entered. There is nothing to show that this correction was made in accordance with the procedure prescribed under Section 50 of the Land Revenue Act. Indeed it is not the case of the respondent that correction was carried out under the said provisions. Therefore, the subsequent entry will be of no consequence and it confers no benefit either on Gayadeen or anybody claiming through him.
- 18. For all these reasons we hold that the judgment and decree of the High Court under appeal cannot be sustained. Accordingly, the judgment and decree of the High Court confirming the judgment of the first appellate court and that of the trial court, are set aside. The appeal is accordingly allowed and the original suit is decreed. Having regard to the circumstances of the case we direct the parties to bear their own costs.

### 44. MOTOR VEHICLES ACT, 1939, SECTION 110B: ASSESSMENT OF JUST COM-PENSATION:-

2000 (2) VIDHI BHASVAR 197 (DB) KULSUM BAI Vs. KALLU

Parents losing son. Present earning through deceased by parents is not necessary. Reasonable expectation of service or pecuniary benefit to family may be taken into account but compensation cannot be awarded for their injured feeling. In fact it is an award for financial loss real and probable. In the present case the deceased was a child of 12 years age. Looking to the family background, capacity of parents etc. compensation of Rs. 50,000/- was awarded.

## 45. MOTOR VEHICLES ACT, 1988, SECTIONS 149 (2), 170 AND 173:2000 (2) VIDHI BHASVAR 256 (DB) NEW INDIA ASSURANCE CO. LTD. Vs. INDER SINGH

The insurance Company was exparte in trial Court. If the permission was not sought in Tribunal (lower Court) no complaint can be made in appeal. The provisions apply at inquiry stage before the Tribunal. The insured cannot be permitted to raise all defences. This provision has no application at appellate stage and therefore the quantum of compensation and negligence of driver are not open to challenge by insurer at appellate stage.

## 46. MOTOR VEHICLES ACT. SECTION 168: DISBURSEMENT OF COMPENSATION 2000 (2) JLJ 414 MAGNIBAI Vs. SURESH

Disbursement of compensation there cannot be a hard and fast rule applicable to all cases. Some claimants may have urgent needs. Compensation not ordered to be released at time of need, would be a computerised mechanical order not in line with benevolent spirit of the enactment.

The directions given by the Supreme Court in **Susamma Thomas's case** are to be applied to the cases coming before the MACT keeping in view facts of each case. There cannot be a hard and fast rule applicable to all the cases. Some claimants may be needy and some may not be needy. Some claimants may be having their urgent needs and if the amount which has been awarded to them as compensation is not released for using it at the time of difficult situation, there would be nothing else but hard ship to such hapless claimants. The MACT has to act with a broader approach and has to inform itself about the realities of the life and difficulties of the poor villagers and poor persons.

This Court has made it clear in previous judgments also that the justice is to be administered in proper spirit and for the purpose of giving solace to the litigants. A computerised mechanical emotionless order would not carry the flag ahead which benevolent spirit of the enactment has indicated. The optimum utilisation has to be always obtained by informing one self with bitter realities of the life. Such hapless claimants should not be permitted to see the dreams of the increasing interest in the Bank accounts with fire of hunger in the stomach. Susamma Thomas case referred to.

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47. MOTOR VEHICLES ACT. SECTION 166 (NEW) :- ACCIDENT : COMMISSION OF CRIME : ENTITLEMENT OF COMPENSATION :-

2000 (3) M.P.L.J. 603

VIRENDRA KUMAR SHIV KUMAR Vs. SMT. DASODA DEVI

Commission of crime is not required to be proved in the proceedings before the tribunal beyond reasonable doubt as is required in the criminal trial. What is required is the probability of the involvement of tort-feasor(s) in the accident.

#### THE POWER OF ATTORNEY AND THE POWER OF THE ADVOCATE :-

The appeal was filed by the driver of the vehicle, but the record demonstrated that he did not execute the power of attorney in favour of the counsel and memo of appearance had not been signed by him. That apart, memo of appearance did not legalise filing of the appeal. Appeal has to be accompanied by power by attorney signed by executant in favour of the counsel. Memo of appearance enables the counsel to argue the matter. The appeal being without power of attorney was not competent.

48. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (F) AND C.P.C. SECTION 100:-

2000 (2) VIDHI BHASVAR 242 (SC) RAMJIDAS Vs. RAMBABU

The minor son of land lord becoming major in 1987. Eviction suit for the need of son in that very year. Previous conduct of landlord during 1975-80 is irrelevant. The landlord is entitled to an eviction decree on fresh ground. The Court below merely dismissed the suit on the basis of the past conduct of the landlord and the evidence on fresh need of the landlord was not considered. It was held that High Court was justified in interfering with the judgment of the lower Court.

49. M.P. ACCOMMODATION CONTROL ACT, CHAPTER III-A AND SECTION 23-J (II) 2000 (3) M.P.L.J. 537

MOHAN KRISHNA DWIVEDI Vs. BHAU SAHIB

Retired employee of Madhya Pradesh Electricity Board can resort to eviction of tenant under Chapter III-A being landlord as defined under section 23-J (ii) of the M.P. Accommodation Control Act, M.P.E.B. being a 'company' within the definition in section 23-J (ii) of the Act. Ranjit Naryan Haksar Vs. Surendra Verma, 1995 MPLJ 221 and Surendra Verma Vs. Ranjit Naryan Haksar, 1995 MPLJ 560 relied on.

50. M.P. ACCOMMODATION CONTROL ACT SECTIONS 23-A AND 23-J:-2000 (3) M.P.L.J. 609 SUBHASH KUMAR Vs. SHANKAR LAL

Application filed by non-applicant under section 23-A of the 1961 Act for eviction of applicant from the premises on ground of bonafide need. Non-applicant working as a teacher in the **Municipal Corporation**. Municipal Corporation is an independent entity separate from Government and can never be regarded as a statutory corporation brought into existence or controlled by State Government. Non-applicant not a 'landlord' as men-

tioned under section 23-J of the Act. Application under section 23-A was therefore not maintainable. Order of eviction as passed set aside. 1995 MPLJ 21 not applicable. But 1986 MPRCJ 341 was relied on.

### 23-J. DEFINITION OF LANLORD FOR THE PURPOSES OF CHAPTER III-A:-

For the purposes of this Chapter 'landlord' means a landlord who is-

- (i) a retired servant of any Government including a retired member of Defence Services; or
- (ii) a retired servant of a company owned or controlled either by the Central or State Government; or
- (iii) a widow or a divorced wife; or
- (iv) physically handicapped person; or
- (v) servant of any Government including a member of defence services who, according to his service conditions, is not entitled to Government accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of a penal rent on his posting to such a place."
- 51. MUNICIPALITIES ACT, SECTIONS, 86, 87, 89, 110, 105, 123 AND 127 :- MUNICIPAL SERVICES (EXECUTIVE) RULES, 1973, Rr. 2 (b), 11, 5, 22, 48 AND 49 AND FUNDAMENTAL RULES, RS. 22-A AND 22-B :- 2000 (2) JLJ 268 (FB)

  SURESH CHANDRA SHARMA Vs. STATE OF M.P.

Cumulative effect of the provisions is that Chief Municipal Officer of a municipality is a servant of State Government. Power to levy taxes, collection thereof, duties to be performed under the Act by the Municipality makes it a State.

52. N.D.P.S. ACT, SECTION 35, 42, 43, 49, 52 (3) (B) AND 55:DISTINCTION BETWEEN "OFFICER IN CHARGE OF THE NEAREST POLICE STATION" AND "OFFICER EMPOWERED UNDER S. 53":(2000) 7 SCC 632

KARNAIL SINGH Vs. STATE OF RAJASTHAN

In case of resort to cl. (a) of S. 52 (3), S. 55 would be attracted but in case resort to cl. (b) of S. 52 (3), S. 55 would not be attracted. When power exercised under Section 49 r/w S. 43 by reading party comprising an Inspector and other employees of Narcotics Deptt. resort having been taken to S. 52 (3) (b). procedure under S. 55 need not be complied with.

With the courtesy of the Eastern Book Company, Lucknow following portion is reproduced:

For attracting the applicability of Section 42, it is necessary that the officer empowered thereunder, before exercise of his right, should have reason to believe from personal knowledge or information regarding the movement of narcotic drug or psychotropic substance. If the action is taken not upon his personal knowledge or information, the requirements of Section 42 would not be applicable. However, in the present case the procedure

prescribed under Section 49 read with Section 43 was attracted, which, on facts, has been found to be followed.

There is no substance in the contention that as after the seizure the goods were sent to the Superintendent, Central Narcotics Bureau, Kota, who, as per law, was in charge of a police station but had not affixed seal on the articles and the samples, the whole of the procedure followed became illegal, entitling the appellant to be acquitted. With the application of Section 41 read with Sections 52 and 53, the officer required to affix the seal etc., under Section 55, would be "the officer in charge of the nearest police station" as distinguishable from an officer in charge of a police station empowered under Section 53. If resort is had to the procedure prescribed under Section 52 (3) (a), the applicability of Section 55 would be attracted but if the arrested person and the seized articles are forwarded under Section 52 (3) (b) to the officer empowered under Section 53, the compliance with Section 55 cannot be insisted upon. The distinction between the officer in charge of the nearest police station and the officer empowered under Section 53 is based upon a reasonable object. The distinction is also evidence from Section 52-A (2). Keeping in view the multifarious activities and the duties cast upon the officer in charge of the police station under the Code of Criminal Procedure and he being apparently busy with the duties under the Code, the officers mentioned in Section 53 of the Act have been mandated to take action for disposal of the seized narcotic drugs and psychotropic substances by filing an application which, when filed, has to be allowed by the Magistrate as soon as may be.

The appellant had not discharged the burden of proof in any manner to rebut the presumption envisaged under Section 35 of the Act. he has been proved to be transporting the opium with a conscious mind and full knowledge. All ingredients of the offence with which he had been convicted and sentenced had been proved by the prosecution.

Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513: 2000 SCC (Cri) 496, reffered to.

### 53. (A) PENAL LAW: RIGHT OF PRIVATE DEFENCE: 2001 (1) M.P.H.T. 45 (DB) KRISHAN KUMAR Vs. STATE OF M.P.

A mere reasonable apprehension is enough to put the right of private defence into operation. AIR 1963 SC 612 followed.

### (B) WORDS AND PHRASES: "SETTLED POSSESSION":-

It means such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner.

### (C) I.P.C. SECTION 498-A AND (D) CR.P.C. SECTIONS 178, 182 (1) AND 482 :- JURISDICTION OF THE CRIMINAL COURTS :-

Offence under section 498-A is a continuing offence. The act of mental cruelty continued as these letters were received at Bhopal where she was forced to live with her parents. Hence the Courts at Bhopal has territorial jurisdiction to try offence.

The alleged cruelty continued to be meted out to the complainant Smt. Mishail till the

date she was allegedly forced to leave her matrimonial house and to live at her parents house at Bhopal, as well as when her father received the said two letters at Bhopal. Apparently the offence has allegedly been committed partly at Mehsana or Lucknow, and partly at Bhopal. Therefore the learned C.J.M. Bhopal has territorial jurisdiction to try the offence in view of the provisions of Section 178 Cr.P.C.

The provisions of section 182 Cr.P.C. relate to the offence of cheating and other similar offences where the offence is committed by letters etc. But the provisions of Section 182 (1) Cr.P.C. are not the exhaustive provisions so far as the question of territorial jurisdiction is concerned.

54. PENOLOGY: SENTENCE: QUANTUM OF: CONSIDERATION FOR GRANTING: PROBATION:-

2000 (1) M.P.H.T. 1 (CG)

NATHU RAM Vs. STATE OF CHHATTISGARH

Neither the applicant is a hardened criminal nor he came on the spot with prior preparation to commit the offence. He came on the spot all of a sudden and gave a lathi blow to one of the victims. He was 70 years of age. Therefore, jail sentence was reduced to the period already undergone and a fine sentence of Rs. 1000/- was imposed.

55. SERVICE LAW: JAMMU & KASHMIR CIVIL SERVICES (CCA) RULES, 1956, RULE NO. 5: POWER TO RELAX THE RULES: WORDS & PHRASES: "INDIVIDUAL CASES": - CONDITIONS PRECEDENT FOR EXERCISE OF SUCH POWER: (2000) 7 SCC 561

SURAJ PRAKASH GUPTA Vs. STATE OF J & K

Such powers can be exercised on the ground of hardships in individual cases. What amounts to individual cases explained. Recruitment Rules themselves cannot be treated to be producing hardship and bypassed on that ground.

Paragraphs 24 and 26 of the judgment are reproduced:

The relaxation rule, namely, Rule 5 of the J & K (CCA) Rules, 1956 referred to earlier, enables the power of relaxation to be exercised on the ground of "hardship" in "individual cases". Reason have to be recorded in writing.

Reason for so-called relaxation of Recruitment Rules - Cabinet decision of 19-12-1997.

Some relaxation rules permit relaxation of conditions of service and some permit relaxation of rules. Some permit relaxation in any particular case and some permit relaxation in favour of a person or class of person. In *J.C Yadav Vs. State of Haryana*, (1990) 2 SCC 189 a three- Judge Bench while dealing with Rule 22 of the relevant Rules which permitted relaxation, in case of hardship, in "any particular case", held that the above words did not mean a particular person but meant "pertaining to an event, situation or circumstances". The power could therefore be exercised even in favour of group. (Two earlier decisions)

# 56. SERVICE LAW: AGE: JURISDICTION OF THE HIGH COURT UNDER WRIT (A) (JUDICIAL REVIEW):(2000) 8 SCC 696 G.M. BHARAT COKING COAL LTD. Vs. SHIB KUMAR

Determination of date of birth where question regarding correctness of date of birth as entered in service record raised by employee long after his joining the service and the employer decided the question following the procedure prescribed by statute, statutory rules or instruction, it was held, in absense of any arithmetical or typographical error apparent on the face of the record, High Court should not interfere with such decision of the employer in exercise of its extraordinary jurisdiction under Art.226, writ jurisdiction.

Certificate produced by the employee regarding the date of birth and entered in the official record is different. It is a disputed question of fact. The High Court should not undertake an inquiry into such question of fact.

### (B) EVIDENCE ACT : BURDEN OF PROOF :

Retirement age, determination of date of birth where the date of birth as entered in service record is question before the Court by an employee shortly before his retirement, burden lies heavily on him to establish his stand by producing acceptable evidence of clinching nature.

### (C) DUTY OF THE COURT : GRANTING OF STAY : GENERAL :-

Court should not pass interim order for continuance of such employee beyond the date of superannuation as per his service record.

NOTE: Please refer to (1977) 5 SCC 181, State of Orissa Vs. Ramnath Patnaik, Union of India Vs. Major R.N. mathur, (1977) 1 SCC 225 and Burn Standard Company Vs. Shri Din Bureau, JT 1995 (4) SC 23 = AIR 1995 SC 1499 = (1995) 4 SCC 172.

### 57. SERVICE LAW: NATURAL JUSTICE: EXPLAINED:-2001 (1) M.P.H.T. 10 (CG) BODH SINGH Vs. STATE

It is trite law that if there are statutory rules then the same are required to be observed, but in absense of certain statutory rules, regulations, directions or the policies, the principles of natural justice are required to be followed because they always play a vital role and at least control the whim, caprice and arbitrariness of the person in authority.

#### 58. SERVICE LAW: COMPASSIONATE APPOINTMENT:-2000 (1) M.P.H.T. 1 SANJAY KUMAR Vs. STATE OF BIHAR

Petitioner's mother was working as an Excise constable. Petitioner was10 years of age at the time of death of his mother. Petitioner sought compassionate appointment after the death of his mother. His applications for seeking compassionate appointment were rejected as time-barred. High Court also dismissed the petitions against the said order. Hence, this SLP was filed. It was held that there cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years. Further it was held that compassionate appointment is intended to enable the family of the deceased em-

ployee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood. Petition dismissed. (1998) 2 Pat LRJ (SC) 181=1998 AIR SCW 2122=AIR 1998 SC 2230=1998 Lab. IC 2123 relied on. (1997) 1 Pat. LJR 626 overruled.

59. SPECIFIC RELIEF ACT, SECTIONS 10 EXPLN. (1) AND 20 : ESCALATION OF REAL ESTATE PRICES :- (2000) 7 SCC 548

GOBIND RAM Vs. GIAN CHAND

No ground to deny specific relief. Specific Performance of agreement for sale of immovable property may be granted where vendor attempts to wriggle out of the contract only because of escalation of real estate prices. However, vendor's hardship may be mitigated by directing vended to pay further compensatory amount in this case the transaction was for Rs. 16,000. The Supreme Court directed the respondent to pay Rs. 3,00,000 more.

Paragraphs 2 to 10 of the judgment are reproduced :-

2. We may briefly state the undisputed facts :

The appellant agreed to sell the disputed property situated at Lajpat Nagar IV, New Delhi for a consideration of Rs. 16,000 to the respondent and accordingly on 24-1-1973 an agreement to sell was executed and a sum of Rs. 1000 was paid as earnest money to the appellant. The respondent filed the suit for specific performance of the contract as the appellant failed to execute the sale deed within time. On 6-10-1976 the suit was decreed and the respondent deposited balance consideration of Rs 15,000 in the trial court. The appeal filed by the appellant in the High Court was also dismissed by the impugned judgment dated 20-12-1991. However, to mitigate the hardship to the appellant and as the respondent agreed to pay more sum, the High Court directed the respondent to deposit a further sum of Rs. 1,00,000 which was to be released to the appellant on giving possession of the suit property. The said sum was also deposited in the Registry of the High Court by the respondent and it is being kept in interest-bearing fixed deposit. The appellant has filed the present appeal and that is how the parties are before us.

- 3. We have heard learned Senior Counsel for the parties. The only contention urged before us by the learned Senior Counsel for the appellant is that instead of decree for specific performance, compensation may be awarded.
- 4. At the time of issuance of notice in the special leave petition, learned Senior Counsel for the appellant offered to pay Rs. 1,16,000 to the respondent to cancel the contract and get out of the decree. The respondent after his appearance before this Court offered another sum Rs. 50,000 so as to make the total consideration of Rs. 1,50,000. In view of the above position leave was granted. When the matter came up before us another attempt was made for a settlement, which failed. At that time learned Senior Counsel for the respondent on instruction made on offer that the respondent would pay further sum of Rs. 1,50,000 as consideration.
- 5. Learned Senior Counsel for the appellant has relied on this Court's judgment in Damacherla Anjaneyulu v. Damcherla Venkata Seshaiah. AIR 1987 SC 1641. On

- the facts of that case the Court recorded the finding that in case of grant of a decree of specific performance hardship would be caused to the defendant and therefore compensation was granted. Facts of the present case are different.
- Next decision on which learned Senior Counsel for the appellant relied is in Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son AIR 1987 SC 2328. We may extract the relevant portion of the said judgment: (SCC p. 345, para 14)
  - "14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff".
- 7. It is the settled position of law that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principle of justice, equity and good conscience. As stated in P.V. Joseph's Son Mathew the court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered.
- 8. The High Court considering the facts of this case observed as follows:
  - "We are conscious of the fact that the defendant has been in possession of the said quarter for the last several decades and logical consequence of affirming the judgment of the trial court would mean considerable hardship to him, at the same time the conduct of the defendant does not justify any further indulgence by the court. We have no doubt that the defendant has tried to wriggle out of the contract between the parties because of the tremendous escalation in the prices of real estate properties all over the country and in Delhi, in particular in the last few years."
- 9. In view of the above clear finding of the High Court that the appellant tried to wriggle out of the contract between the parties because of escalation in prices of real estate properties, we hold that the respondent is entitled to get a decree as he has not taken any undue or unfair advantage over the appellant. It will be inequitable and unjust at this point of time to deny the decree to the respondent after two courts below have decided in favour of the respondent. While coming to the above conclusion we have also taken note of the fact that the respondent deposited the balance of the consideration in the trial court and also the amount in the High Court, as directed. On the other hand the appellant, as held by the High Court, tried to wriggle out of the contract in view of the tremendous escalation of prices of real estate properties. However, to mitigate the hardship to the appellant we direct the respondent to deposit a further sum of Rs 3,00,000 within 4 months from today with the Registry of this Court and the amount shall be kept in short-term deposit in a nationalised bank. While giving the above direction we have taken note of the offer made to us on behalf of the respondent. This amount is to be paid to the appellant on his giving possession of the suit property to the respondent within 6 months from the date of the deposit of the above amount. The appellant shall also be entitled to with-

draw the amount already deposited in the trial court and the amount of Rs. 1,00,000 which has been kept in interest-bearing fixed deposit in the Registry of the High Court.

- 10. With the above modification of the judgment of the High Court, the appeal is dismissed. However, on the facts and circumstances of the case parties are directed to bear their own costs.
- 60. SPECIFIC RELIEF ACT, SECTION 6: (3) CPC SECTION 115:- REVISION LIES 2000 (3) M.P.L.J. 593
  SUKHJEET SINGH Vs. SIRAJUNNISA

If the facts and circumstances show that the trial Court has disposed of the case on an obvious misapprehension as to the legal postion, the decision of the lower Court under Section 6 of the Specific Relief Act may be inferred within revision under Section 115 CPC.

Suit by plaintiff under section 6 alleging that defendant did not deliver back possession even though plaintiff had parted with possession on the express assurance that possession will be handed back after the marriage ceremony for which the premises were handed over to the defendant. Suit under section 6 not tenable as there was consent when the possession was handed over by the plaintiff to the defendant.

NOTE: There is no appeal against the judgment and decree passed under Section 6 (3) of the Specific Relief Act and therefore revision lies against it before the High Court. So far as the scope of the revision is concerned please refer to 2000 (3) M.P.L.J. 537 Mohan Krishna Vs. Bhavu Saheb in which it was held that the scope of revision under Section 23 of the M.P. Accommodation Act is more that revision under Section 115 CPC.

61. WORKMEN'S COMPENSATION ACT, SECTION 26: FALSE PLEA TAKEN BY IN-SURER: COMPENSATORY COST AWARDED:-2000 (2) JLJ 318 MUNNI BAI Vs. ORIENTAL FIRE AND GENERAL ASSURANCE CO.

Insurance Company denying insurance by its company in trial Court. On direction the policy was produced before the appellate Court. It was made liable to pay compensation and cost of Rs. 10,000.

62. WORDS AND PHARSES: "APPRECIATION":2000 (2) JLJ 379
KAILASH CHANDRA Vs. PUNJAB NATIONAL BANK

The word "appreciation" means always that it is to be understood by keeping one self in reasonable thinking position.

Paragraph 16 of the judgment is reproduced :-

The evidence which has been adduced by the appellant has to be properly understood and it is to be weighed in view of the needs expressed by the appellant. It is to be appreciated. Word "appreciate" always means that it is to be understood by keeping one-self in reasonable thinking position. The things are to be understood by informing oneself

about the need which has been expressed by landlord. Every need expressed by the landlord is not to be doubted and is not to be looked with suspicion. It has to be kept in mind that every landlord has a reasonable right to enjoy his property for functioning comfortably in his business. It automatically means that unreasonable, fanciful, imaginary need putforth by the landlord would not be a ground for evicting the tenant. But equally, if the need which has been putforth by the landlord is found reasonable, that is not to be thrownout as if it is an instrument for evicting the tenant.

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### संशोधन

माह अगस्त 2001 के ज्योति में अक्षर संयोजन एवं विन्यास में जो त्रुटियां त्वरित दृष्टिगोचर हो सकी हैं वे इस प्रकार हैं। कृपया संशोधन कर लें। असुविधा हेतु खेद है।

### दोष निवारण

- 1. पृष्ठ क्र. 231 में झूमो नाचो गाओ शीर्षक में 7वीं व 8वीं पंक्ति में क्या कही आपमें के स्थान पर क्या कहा आपने पढ़ा जावे एवं 18वीं पंक्ति में अनुभव होगा पश्चात पूर्ण विराम लोप हो।
- 2. पृष्ठ 232 पर संपादकीय टिप्पणी का अंतिम शब्द क्या का लोप करना।
- 3. पृष्ठ 238 पर H चरण के अंतर्गत चौथी पंक्ति पश्चात Copy of the..... से Book useful for Judges का लोप करना।
- 4. पृष्ठ 240 पर आजकल शब्द से प्रारम्भ होने वाले चरण में चौथी पंक्ति में वादी के स्थान पर प्रतिवादी पढें।
- पृष्ठ 242 पर 5वीं पंक्ति में गृहयाग्नि का गृह्याग्नि पढ़ें।
- 6. हिन्दू विवाद आशय एवं उद्देश्य से प्रारम्भ शीर्षक के अंतर्गत पांचवी पंक्ति में रजखला के स्थान पर रजस्वला पढ़ें।
- 7. सप्तपदी के सात श्लोक शीर्षक के अंत में द्वितीय पंक्ति में ययुण के स्थान पर ऋण शब्द पढ़ें।
- 8. पृष्ठ 260 पर द्वितीय सुभाषित के अंतिम पंक्ति में Knowledge के स्थान पर Knowledgeable पढ़ें।
- 9. पृष्ठ 268 पर शीर्षकी द्वितीय पंक्ति में प्रदार्थ के स्थान पर पदार्थ पढ़ें।
- 10. पृष्ठ 277 के अंतिम परिपत्र के शीर्षक की चतुर्थ पंक्ति में Bood के स्थान पर Book पढ़ें। एवं परिपत्र की 8वीं पंक्ति में hand book के स्थान पर Hand book पढ़ें।
- 11. पृष्ठ 279 पर टिट बिट क्र. 4 के ठीक ऊपर की पंक्ति में Section 47 के स्थान पर Sections 37-38 पढें।
- 12. पृष्ठ 285 पर टिट बिट क्र. 10 के ऊपर की Note का लोप करें।
- 13. पृष्ठ 288 पर टिट बिट क्र. 16 में धारा 439 के पश्चात AND S. 389 भी जोड़ें।
- 14. पुष्ठ 292 पर टिट बिट क्र. 27 में धारा 428 A को स्थान पर 498 A पढ़ें।
- 15. पृष्ठ 297 पर टिट बिट क्र. 38 में द्वितीय पंक्ति में धारा 7 के स्थान पर धारा 47 पढ़ें।

OPINIONS AND VIEWS EXPRESSED IN THE MAGAZINE ARE OF THE WRITERS OF THE ARTICLES AND NOT-BINDING ON THE INSTITUTION AND FOR JUDICIAL PROCEEDINGS.