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मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH
JABALPUR - 482 007

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PART-IV

(LATEST IMPORTANT AMENDMENTS IN CENTRAL/STATE ACTS)

WE ARE THANKFUL TO THE PUBLISHERS OF S.C.C., M.P.L.J. AND A.N.J. FOR USING SOME OF THEIR MATERIAL IN THIS JOURNAL.

- EDITOR

FROM THE PEN OF THE EDITOR

A.K. SAXENA
Director

All the Judicial Officers must have received the August part of JOTI Journal. I am sure you have noticed the change. We have further assailed to change the design of the cover page. I shall be delighted to know your comments about these changes. There can be no end to make the Journal worth reading. There is a lot of scope for improvement and I am keen to know what further should be done to make this Journal complete in itself. Your suggestions will be highly gratifying. I am also glad to inform you that on my request the Judicial Officers of our state have started taking active participation as they are sending their articles to this Institute. It is, indeed, a great encouragement for us.

I told you in the last part of the JOTI Journal that we are aiming at diversification and expansion of the functions of the Institute and I feel privileged to acquaint you that the Institute is going to start research work on various legal subjects and to demonstrate it, the name of our Institute has been changed to some extent. Now the name of our Institute will be "Judicial Officers' Training & Research Institute" (in short "JOTRI") in place of "Judicial Officers' Training Institute" (in short "JOTI").

We are aware of the report of Shetty Commission and the judgment passed by the Supreme Court in case of ***All India Judges Association & Ors. Vs. Union of India & Ors.*** I can understand that all the Judicial Officers might be interested in various aspects and outcome of this report including pay, allowances, etc. but we should not forget the aspect of training to the Judicial Officers which is one of the most important facets of the report of Shetty Commission and pronouncement of the Supreme Court. Shetty Commission has discussed the importance of training to Judicial Officers at length in its report. To quote :

> "It is beyond doubt that there is an imperative need for organised programme of judicial education and training not only at the time of selection and appointment but on a continuing basis during service ... Everything needs to be done to make the trainees take the programme seriously and internalise the learning for better judicial performance. Motivation is the key for achievement. Admittedly, the trainees in judicial academies even at the induction stage lack motivation. It is imperative for the judicial establishment to consider how the motivational level of trainees could be increased... Judicial Officers, undeniably are the key figures in determining the quantity and quality of output which the public gets as justice out of litigation in Courts. Any investment in updating their knowledge and skills will be doubly repaid in the delivery of justice and in the efficiency of judicial administration."

The report of Shetty Commission has put forward the goals and objects of train-

ing. The need for raising the competency of Judicial Officers was highlighted by several reports of the Law Commission of India. The training programme for Judicial Officers has been recommended by the Supreme Court in the above case.

In the light of above recommendations, we chalked out the training programme covering a number of topics of different fields for the training session for recently promoted and directly recruited Additional District Judges. The training session commenced on August 5, 2002 and concluded on August 14, 2002. Thirty six promoted Additional District Judges and eight directly recruited Additional District Judges were the participants.

Hon'ble the Chief Justice and Hon'ble the Administrative Judge of our High Court visited the Institute to bless the trainee Judicial Officers. Some of the Hon'ble Sitting Judges and Hon'ble Former Judges of our High Court also visited the Institute to enlighten these Judicial Officers on various topics which was a rare opportunity for trainees. The Institute has also arranged several lectures on medical and other technical aspects of legal field. The topics of court management, accounts etc. were also covered in this session. We have endeavoured to achieve the goals and objects of the judicial training by preparing exhaustive curriculum for the training session. The Judicial Officers who participated in this training session are the best persons to evaluate our efforts.

At this juncture, I would like to clarify that the Institute is not meant to provide readymade solutions to different problems and one should not use this Institute to solve the problems of a particular case during preparation of writing the judgment. The institutional training cannot interfere with judicial independence. Any Judicial Officer can refer any genuine problem to this Institute after full preparation and that too with the reasonings and conclusion and then the Institute will certainly discuss the problem with you. But, you have to think how to arrive at a conclusion with the help of precedents. This will certainly help you to enrich your knowledge. I hope the Judicial Officers will take keen interest in the future programme of training.

Rest in the next issue.

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■ ***Whatever I dig from thee, O Earth,***
may that have quick growth again.
O Purifier, may we not injure thy vitals or thy heart.

- Atharva Veda

■ ***A teacher affects eternity; he can never tell where his influence stops.***

- Henry Brooks Adams

PART - I

OFFENCES AGAINST WOMEN AND ISSUE OF GENDER JUSTICE

SHRI DIPAK MISRA
Judge
M.P. High Court

The subject 'offences against women and issue of gender justice' is of enormous magnitude and of mammoth ramification inasmuch as it engulfs and encapsules an all embracing and illimitable canvas and, therefore, my humble endeavour would be to focus on the essential and intrinsic features so that the subtleties and niceties of the topic are comprehended and assimilated in proper perspective. The first aspect is relatable to the offences against women and the second facet is fastened with gender justice but to have a wholesome understanding of the matter and the theme, it is thought apposite to deal with the second aspect first.

2. The issue of gender justice has been gaining ground in many nations and in many an area for some centuries. Though the traditional view of gender injustice has been given quite a quietus and treated as an event of bygone days, yet the malady still remains, sometimes pouncing with ungenerous monstrosity giving a free play to the inferior endowments of nature in a man thereby making the whole concept a ridicule anaesthetizing the entire edifice built in the last few decades. The recent exploitation of a young girl in her early 20s in the Capital of the Nation not only exhibits how such treatment is basically an anathema to the concept of gender justice but also exposes the burial of idea that is required to be nurtured, cherished and believed with a deep conviction and maintained with a sanguine resolve. Everyone should keep in mind that no crack or break is permissible. The days of yore should be over when women were treated as fragile, feeble and dependent persons. The gender equality is the call of the day and attempts are to be made to achieve satisfactory results. There has to be gender synthesization and while saying so let it not be understood, that gloss is put on the said terms. Everybody should be prepared to fight against the 'City Halls' and no regress or retrogress step is permissible.

3. Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Susan B. Anthony proclaimed on March 18, 1869 "Join the union girls, and together say, "Equal pay for equal work".

   The same personality again spoke in July 1871: "Women must not depend upon the protection of man but must be taught to protect themselves."

   Giving emphasis on the role of women, Ralph Waldo Emerson stated thus:

   "A sufficient measure of civilisation is the influence of the good women"

   Speaking about the democracy in America, Alexis De Tocqueville wrote thus:

"If I were asked... to what singular prosperity and growing strength of that people (Americans) aught mainly to be attributed, I should reply; to the superiority of their women."

One of the greatest Germans had said: "The Eternal Feminine draws us upwards".

4. Our Constitution, the fountain-head of all laws and the Organic law of the land, as a matter of principle, recognises equalities of sexes and prohibits discrimination on the basis of sex. It also provides legislation to be made to confer more rights on women by making special provisions. Reformatory measures qua women are permissible. Article 15 (3) of the Constitution makes such postulation. Article 243-D and 243-T of the Constitution provides reservation for women in local self-government. There are also provisions in the State enactment, by virtue of the Constitutional mandate, to reserve the office of Chairpersons and the Presidents in certain Municipal Corporations and Municipalities, Zila Panchayats and Janpad Panchayats for women. It is noteworthy to state here that under the Consumer Protection Act, there is a provision that one of the members shall be a lady and under the Family Court Act, preference is given to women for appointment. Sometimes question arises as to what extent equality is to be extended. The people who put this elementary question forget or deliberately do so that all men are born equal and the division or bifurcation by the society between man and woman is the craftsmanship of the male chauvinism. It has to be borne in mind that in the absence of equality of gender, human rights remain in the inaccessible realm. In most of the nations women are ascribed a secondary role. The secondary role has to be metamorphosed to the primary one to bring women at an equal stratum with men. To achieve so, a different outlook in law has to be perceived. This perceptual shift is absolutely essential, in a way mandatory. For this reason, various provisions as has been indicated hereinbefore, have been engrafted in the Constitution.

5. Presently I shall proceed to refer to certain landmark decisions rendered by the Supreme Court of India as well as by some High Courts as to how endeavour has been made to see that no one is denied justice or discriminated only on account of one's gender. Before I come to the recent past it is appropriate to take a journey in time machine, how women were treated in the first three decades of the last century. I am not adverting prior to the said period because by that time the cause of women was canvassed in a very slow and crawling manner. In the Victorian Era it was quite impossible to claim equality. Women were denied the right of franchise. To propagate the concept of equality many a writer made efforts to amplify the individuality of women in its connotative and conceptual eventuality. Nora in Henrik Ibsen's 'A Doll's House' when told by Halmer that she is first and foremost a wife and a mother, she proclaimed:

> "I do not believe any more, I believe that first and foremost I am an individual just much as you are".

6. The combat continued but it did not achieve the requisite goal. Back home, In Calcutta in the case of **In re Regina Guha, AIR 1917 161** the High Court re-

jected the application of a woman for enrolment under the Legal Practitioners Act. Similar view was expressed by the High Court of Patna in the case of **In re Sudhanshu Bala, AIR 1922 Patna 269.**

7. From the aforesaid state of affairs one has to take a leap to the 8th decade of the last century. In the case of ***Air India Vs. Nergesh Meerza, AIR 1981 SC 1829*** the Apex Court, while dealing with the fixation of different ages of retirement between male and female employees and prevent the female employees from having child, expressed the view to the effect that the retirement of air hostesses in the event of marriage taking place within four years of the service does not suffer from any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional being violative of Article 14 of the Constitution.

8. In this context, I may profitably refer to the decision rendered in the case of ***M/s Mackunnon Mechenize and co. Vs. Aurdry D' Costa, AIR 1987 SC 1281.*** The question involved in the said case was getting of equal pay for equal work. In the said context, their Lordships ruled that when lady stenographers and male stenographers were not getting equal remuneration that was discriminatory and any settlement in that regard did not save the situation. Their Lordships also expressed the view that discrimination between male stenographers and lady stenographers was only on the ground of sex and that being not permissible the employer was bound to pay the same renumeration to both of them when they were doing practically the same kind of work.

9. In the case of ***Dr. Upendra Baxi Vs. State of U.P., AIR 1987 SC 191*** the Apex Court expressed the view with regard to making provisions of minimal hygiene, shelter and medical facilities for women under the State Protection.

10. In this context it is useful to refer to the decision rendered in the case of ***Sellammal Vs. Nellammal, AIR 1977 SC 1265*** wherein the Apex Court held that the Hindu Marriage Act will override the U.P. Jamindari Abolition and Land Reforms Act and also held that exclusive right to male succession may be suspended till female dependent adopt another mode of livelihood.

11. Many a time question arises with regard to rights of women qua property. Various High Courts have interpreted Section 27 of the Hindu Marriage Act in a different manner. As far as the High Court of Madhya Pradesh is concerned the Court in the case of ***Ashok Kumar Chopra v. Smt. Visandi and others, AIR 1996 MP 226*** held that 'Stridhan' is the property of the wife in her individual capacity and the husband is merely trustee of that property and the husband is liable to return that property and value thereof under the substantive law and in equity. The power has been conferred by the M.P. High Court on the matrimonial courts in respect of certain properties.

12. In this regard it is necessary to refer that Hindu women who were not entitled to right to property have been given equal share alongwith male heir and they have presently been given equal rights.

13. The concept of equality is the bedrock of gender justice. In the case of ***Neera Mathur Vs. LIC of India, AIR 1992 SC 392*** a lady candidate was required to

furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. When the matter came before the Apex Court, their Lordships held that such declarations were improper. Their Lordships directed that the Corporation would do well to delete such column in the declaration.

14. It is to be noted that the State has the authority to make legislation to discriminate in favour of women against men but not vice-versa. This view has been taken in the case of ***Dattatreya Motiram More Vs. State of Bombay, AIR 1953 Bombay 311.*** Similar view has been reiterated in the case of ***Shahdad Vs. Mohd. Abdullah, AIR 1967 J & K 120.***

15. In the case of Bombay Labour Union Vs. International Franchise, AIR 1966 SC 42, the Apex Court axed down the restriction imposed on the employment of married women. In the case of ***C.B. Muthamma Vs. Union of India and others, AIR 1979 SC 1968,*** their Lordships spoke thus:

> "The Provisions in Service Rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnised and denying right to be appointed on ground that the candidate is a married woman are discriminatory against women. The equality of opportunity in matters relating to employment does not, however, mean that men and women are equal in all occupations and all situations and do not exclude the need to pragmatics where the requirements of particular employment, the sensitivities of sex or the peculiarities of social sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern."

16. In the case of ***Maya Devi Vs. State of Maharashtra, (1986) 1 SCR 743,*** the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid being unconstitutional. Their Lordships have observed that such a requirement is an anachronistic obstacle to women's equality.

17. In this context it is noteworthy to mention that in the case of ***Associate Banks Officers Association Vs. State Bank of India, AIR 1998 SC 32,*** the Apex Court has held that women workers are in no way inferior to their malecounterparts, and hence there should be no discrimination on the ground of sex against women.

18. Every woman has the right of privacy. The same right also cannot be denied to a woman of easy virtue. The Apex Court, in the case of **Madhukar Narain Mardikar,** has held as under:

> "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one lying so also does not open any other person to violate her person as and conscious. She is entitled to protect her person if there is an attempt to violate against her wish. She is equally entitled to the protection of law."

19. Recently in the case of ***Gayatri Devi Pansari Vs. State of Orissa and others (2000) 4 SCC 221,*** the Apex court, while setting aside the decision of the High

Court, which had come to hold that a lady candidate was given preference, ruled thus:

> "Otherwise, by the mere fact of any lapse or omission on the part of the ministerial officers to identify a shop, the legitimate claims of a lady applicant could not be allowed to suffer defeating the very purpose and object of reservation itself. The view taken by the High Court has the consequence of overriding and defeating the laudable object and aim of the State Government in formulating and providing welfare measures for the rehabilitation of women by making them self-reliant by extending to them employment opportunities. Consequently, we are of the view that the High Court below ought not to have interfered with the selection of the appellant for running the 24 hours' medical store in question."

20. It is worthnoting that Convention of Elimination of Discrimination Against Women (CEDAW) was accepted by the United Nations Organisation in the year 1979 and India has accepted most part of it barring certain Articles. The whole purpose of adopting the same is to establish gender equality and to avoid gender inequality. Efforts are being made to see that women get adequate importance in all fields of the society. In this context it is also noteworthy to mention that the guardianship right of women has undergone a sea change by the interpretation given by the Apex Court in the case of ***Geeta Hariharan Vs. Reserve Bank of India, AIR 1999 SC 1149.*** Their Lordships while interpreting the word 'after' used in Section 6 of the Hindu Minority and Guardianship Act, 1956 held that the mother could be the guardian in absence of the father.

21. It is noteworthy to mention here that the Apex Court took note of harassment of women at the work place and laid down the guidelines in the case of ***Vishakha Vs. State of Rajasthan, (1997) 6 SCC 241.*** Their Lordships observed as under:

> "Each Incident of sexual harassment of woman at workplace results in violation of fundamental rights of "Gender Equality" and the "Right to Life and Liberty".

22. In this context I may refer with profit to the decision rendered in the case of ***Apparel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC 625*** wherein services of the said Chopra were terminated for causing sexual harassment to a subordinate female employee. The High Court of Delhi allowed the writ petition on the base that he had not actually molested. The Apex Court overturned the judgment and observed that the conduct of the said Chopra was against decency and was offensive to her modesty. Their Lordships observed that reduction of punishment in a case of this nature would be a retrograde step.

23. Now I shall deal with the facet relating to offences against women. The offences are of various types. They find mention in many an enactment. Firstly, it is apposite to deal with the sexual offences as the said offences are quite rampant, wide-spread and often form a part of deliberation in every sphere. Offences enumerated under Section 304-B, 354, 361, 366, 372, 376, 376-A 376-B, 376-D, 494, 498 and 498-A are the main offences under the Indian Penal

Code against women. Certain offences are general against all women and certain offences are applicable in respect of married women. The Apex Court dealt with Section 354 and interpreted the term 'women' denoting female of any age. This has been done in the case of ***State of Punjab Vs. Major Singh, AIR 1967 SC 63.*** It is also worthnoting here that an offence which does not amount to rape may come under the sweep of Section 354 of IPC. In this context the decision rendered in the case of ***State Vs. Musa, 1991 CrLJ 2168*** is worthnoticing. The aforesaid offence caught the eye of the nation when a senior police officer misbehaved with another senior officer belonging to the IAS cadre. The lady officer was slapped before the members of the elite society. The High Court quashed the FIR. The said decision was dislodged by the Apex Court. Their Lordships observed that the allegations made in the FIR were neither absurd nor inherently improbable. The Supreme Court dwelled upon Section 482 of CrPC and laid down the principles by following the earlier decisions. The citation is ***Rupen Deo Bajaj Vs. Kanwar Pal Singh Gill, AIR 1996 SC 309.*** The Offence under this section should not be treated lightly as it is quite a grave offence. In certain western countries privacy to person and even privacy to procreation are regarded as very sacrosanct rights and if this offence is studied in that prospect the offence would clearly show that it affects the dignity of women and, therefore, the accused of this offence, when proved, should be appropriately dealt with. Indecent assault by no stretch of imagination should be marginalised and brushed aside. In the case of ***People's Union for Democratic Rights Vs. Police Commissioner Delhi Police Head Quarter and another, (1989) 4 SCC 730*** the Apex Court after holding that the accused was guilty of offence under Section 354 of IPC awarded compensation to be recovered from the salary of the guilty officers. How certain acts constitute these offences may be seen on a perusal of the decision rendered in the case of ***Pramod Singh Vs. State of J&K, AIR 1995 SC 1964.***

24. Presently, I shall proceed to deal with regard to offence of rape. Offence of rape is regarded as one of the most heinous crimes. Every person's physical body is a temple in itself. No one has the right to encroach and create a turmoil. When there is any kind of invasion or trespass, it offends one's right. The right of a woman to live in her physical frame with dignity is an epitomization of sacrosanctity. An impingement or incursion creates a sense of trauma in the mind of the person. Not only does the body suffer but the mind also goes through such agony and tormentation that one may not be in a position to forget throughout her life. She becomes a different person in the eyes of the society for no fault of hers. That apart the offence of rape is an offence which creates a dent in the social marrow of the collective and a concavity in the morality of the society. A sense of fear looms large and the menace is extremely arduous to cross over. The perversity ushers in a sense of despondency and mass melancholia. While dealing with offences of this nature a judge has to be exceedingly sensitive. A desensitised approach is not appreciated. It is the bounden duty of the judge to show greater sensitivity. The Judge should show careful attention and greater sensitivity as has been highlighted by the Apex Court in the case of ***State of***

Haryana Vs. Mange Ram, AIR 2000 SC 2798. Their Lordships gave emphasis highlighting that the evidence in the case of this nature should be appreciated on broader probabilities and the Judge should not be carried away by insignificant contradictions.

25. A judge should refrain himself from giving stigmatic observations on the character of the prosecutrix. It should be kept in mind that a finding recorded in this sphere is to be treated as irresponsible. A woman who is even acquainted to sexual intercourse has every right to refuse to submit herself to sexual intercourse as a woman is not a vulnerable object or prey for being sexually assaulted by any one. This is the view expressed by their Lordships of the Apex Court in the case of ***State of AP Vs. Ganula Satya Murthy, AIR 1997 SC 1588.*** It is appropriate to mention here that in the said case, the Supreme Court also observed that it is an irony that while we are celebrating women's rights in all spheres we show little or no concern for their honour. Their Lordships further observed that the Courts must deal with rape cases with utmost sensitivity and appreciate the evidence of the totality on the background of the entire case and not in isolation.

26. An aspect which needs to be stated here is that a woman who has been raped is not an accomplice. She is the victim of a carnal desire. In a case of rape, corroboration need not be searched for by the judge if in the particular circumstances of the case before him he is satisfied that it is safe to rely on the evidence of the prosecutrix. The evidence of the prosecutrix should be appreciated on the basis of the probability and conviction can be based solely on such testimony if her evidence is credible, unimpeachable and inspires confidence. There is no rule of law that her testimony can not be acted upon without corroboration in material particulars. If the prosecutrix is able to give a vivid account of how she was subjected to sexual harassment and the intercourse, the same can be placed reliance upon and the conviction can be recorded. This is the view of the Apex Court in the decisions rendered in the cases of ***State of Punjab Vs. Gurmeet Singh, 1996 (2) SCC 384, State of Rajasthan Vs. N.K., AIR 2000 SC 1812*** and ***State of Sikkim Vs. Padam Lal Pradhan, (2000) 10 SCC 112.***

27. While dealing with this offence certain more decisions are also to be kept in mind so that they can be applied in the facts of the case. In the case of ***State of Maharashtra Vs. M.M. Mardikar, AIR 1991 SC 207*** it has been emphatically laid down that there is no rule of law or prudence requiring corroboration of the victims in a case of rape.

28. In this context it is profitable to refer to the decision rendered in the case of ***Dilip and another Vs. State of M.P., (2001) 9 SCC 452*** wherein their Lordships in paragraphs 12 and 13 stated as under :-

> "12 The law is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corrobaration

should be present to the mind of the Judge. In ***State of H.P. Vs. Gian Chand*** on a review of the decision of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on. This Court relied upon the following statement of law from ***State of Punjab V. Gurmit Singh SCC*** (para 21) :

"If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implict reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplince. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations....."

13. In ***Madan Gopal Kakkad v. Naval Dubey*** this court has held (vide para 23) that lack of oral corroboration to that of a prosecutrix does not come in the way of a safe conviction being recorded provided the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming."

29. In this regard another aspect which is noteworthy to state is that factors like character and reputation of the victim are inconsequential. The same can never serve either as mitigating or extenuating circumstances for imposing the minimum sentence. This view has been expressed by the Apex Court in the case of ***State of Haryana Vs. Prem Chand, AIR 1990 SC 538.***

30. At this juncture I may state that sometimes the trial Courts give emphasis on absence of physical injuries, lack of corroboration by medical evidence, non-raising of alarm, no-evidence of showing resistance and such other ancillary factors. From these angles the prosecution is disbelieved or the Court arrives at the conclusion that there is consent. The Apex Court in the case of ***State of H.P. Vs. Mange Ram, AIR 2000 SC 2798*** has clearly laid down that if the prosecutrix submits her body under fear or terror the same would never amount to consent. In the said case their Lordships also held that in the absence of any violence to the body of the victim in all circumstances would not give rise to inference of consent. In this context, it is profitable to refer to the observation made in the case of ***State of Rajasthan Vs. N.K., AIR 2000 SC 1812*** wherein the Apex Court held that the absence of injuries on the person of the prosecutrix is not necessary to falsify the allegation or be regarded as an evidence of consent on the part of the prosecutrix. Their Lordships have further held that it would depend upon the facts and circumstances of each case. In the aforesaid case the statement of the father of the prosecutrix was treated to be admissible

under Section 157 of the Evidence Act as her father's statement corroborating her testimony under section 8 of the said Act as evidence of her conduct. The Apex Court laid stress on the testimony of the father keeping in view the tradition of the society where a father would not come to depose to jeopardise the prospects of marriage of his daughter.

31. In this backdrop some other decisions of the Apex Court are also to be kept in mind. In the case of ***Ranjeet Hajarika Vs. State of Assam, (1998) 8 SCC 635*** their Lordships held that the absence of injuries on the victim's private parts does not belie her testimony as she has no where stated that she bled from her vagina. In the facts and circumstances of the case their Lordships had also expressed that corroboration of testimony by medical evidence was not essential. The Apex Court further observed that her evidence received ample corroboration from her mother and father whom she immediately informed about the incident.

32. It is appropriate to state here that their Lordships were of the opinion that 'probabilities factor' operated against the prosecutrix. The medical evidence did not lend corroboration. The blood stains were not confirmed by the Forensic Science Laboratory. The Apex Court found it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault, as alleged, was comitted on her. As the correctness of the story as told by the prosecutrix was disbelieved, their Lordships did not place implicit reliance on the statement of the victim.

32-A. Another aspect which is worth mentioning is that in a case relating to rape the Court should keep in mind the sentence provided in the proviso of the said section. Unless adequate and special reasons are given, order reducing the sentence cannot be sustained because an accused has remained in custody for a considerable length of time. Recording of special reason is a must. In this context the decision rendered in the case of State of ***Rajasthan vs. Kishan Lal, (2002) 5 SCC 424*** be perused.

33. If all these decisions are understood in their correct and proper perspective the ratio that emerges is that if the evidence of prosecutrix is totally reliable, credible, truthful and unimpeachable, corroboration need not be sought for. But if the version does not inspire confidence, the Judge may seek corroboration from medical and other spectrums.

34. Sometimes it is noticed that the courts, because of some obtaining factual matrix, the milieu, the status of the parties and efflux of time, marriage of the accused and such other facts, take a lenient view in sentencing. In this context, it is obligatory to refer to the decision rendered by the Apex Court in the case of ***State of Haryana Vs. Jang Bahadur, (1998) SCC (Cri) 693*** wherein their Lordships held that when a young girl of 13 years was raped by holding out threat, the marriage of the accused and the long lapse of time deserved no leniency in the matter of sentence.

35. In this regard it is also worthnoting that the Apex Court has laid down that loose

moral is of no consequence. This has been said in the case of ***State of U.P. Vs. Om (1990) SCC (Cri) 1343.***

36. A victim of rape suffers from deathless shame. To acquit an accused because of loopholes in the prosecution would be adding insult to injury. In the case of defective investigation the court has to be circumspect in evaluating the evidence but it would not be correct in acquitting the accused for the said defect. If the courts pave that path, it would tantamount to playing into the hands of the investigating officer if the investigation has been designedly made defective. Another aspect which I intend to highlight is that as per law laid down by the Apex court and also the provisions in the statute book the trial of a rape case is to be held in camera and it should be the duty of the Court to see that she is not harassed. In the case of ***State of Punjab vs. Gurmeet Singh, 1996 (2) SCC 384*** the Apex Court observed as under :

> 21. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court while every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination, is not made a means of harassment or causing humiliation ot the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings, what she had been subjected to, she may be too ashemed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepencies and contradiction' in her evidence."

37. Recently in the case of ***State of H.P. Vs. Gyan Chand, AIR 2001 SC 2075*** the Apex Court reiterated the principle that minor inconsistencies should not be given weightage. In the same case their Lordships also emphasised that the Court should shoulder a great responsibility while considering a rape case and such cases must be considered with utmost sensitivity. The Court should examine the broader probabilities of the case and not get swayed away by minor contradictions.

38. Another fact is delay in filing of FIR. In a case of rape it is dependent upon the facts of each case. The prosecutrix does not immediately rush to the Police Station to lodge an FIR. She has to overcome the trauma. There is consultation

with the family members and a decision is taken. All these circumstances are to be kept in mind.

39. It is noticed that some judges unnecessarily give emphasis on the presence of spermatozoa in the victim's private parts. It is to be borne in mind that the definition of rape has a different connotation. A mild penetration would meet the ingredients of the crime. There may be several circumstances which affect the presence of the spermatozoa and hence, emphasis on the same is unwarranted.

40. Every trial Judge should be vigilant and alert. He should see to it that the trial is properly conducted and the prosecutrix is not unnecessarily harassed. In this context, I may profitably quote a line by Edmund Burke :

> "A Judge is not placed in the high situation merely as a passive instrument of the parties. He has duty of his own, independent of them and that duty is to be investigate truth."

In this regard I may refer to the observation of Lumpkin, J, in the case of ***Epps V. State,*** which reads thus :

> "Counsel seek only for their client's success, but the Judge must watch that justice triumphs."

41. Before I close this aspect it is apposite to refer to a passage from the decision rendered in the case of ***Bharwada Bhoginibhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753*** wherein M.P. Thakkar, J. authoring the judgement spoke thus:-

> "Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assult in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society."

His Lordship further proceeded to hold as under :-

> "A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occured. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. If she is unmarried she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built in assurance that the charge is genuine rather than fabricated."

42. The other offences which relate to women and have become wanton and excessive are offences under Section 304-B and 498-A. One would not be pedantic if one says that these offences have become quite epidemic and pandemic. There is a feeling at some quarters that there is an abuse of these offences. The fact remains that these offences do occur and that too quite often and its impact on the society cannot be marginalised. Any marginalisation on this score would amputate the collective harmony and social poise, and amplify and endanger gender inequality. The Apex Court has given a broader meaning to the concept of cruelty enshrined under Section 498-A of IPC. A case may not fall under Section 304-B when ingredients are not satisfied but when cruelty is otherwise proved, the trial Judge is entitled to record a conviction u/s 498-A. The ingredients which are necessary to be satisfied for an offence under Section 304-B are:

(i) the death of the woman is caused by any burns or bodily injuries.

(ii) occurs otherwise than under abnormal circumstances.

(iii) and the aforesaid two factors spring within seven years of the girl's marriage, and

(iv) soon before her death, she was subjected to cruelty and harassed by her husband or his relatives; and

(v) this is in connection with the demand of dowry.

In this context, the decision rendered in the case of ***Pavan Kumar Vs. State of Haryana, AIR 1998 SC 958*** should be read with adequate alertness. It should be kept in mind that when a young colleen gets into wed-lock she has the aspiration for happy days but when she is meted with ill treatment by her husband and his family members then not only her dreams get shattered but aspiration also gets mulcated and the woman becomes a victim of dowry death. This perception should be kept in view while dealing with the offences of this nature. In this context offences under Section 306 of IPC also should be kept in mind.

43. When one talks about gender equality one cannot be unobservant with regard to the dowry problem which has become an incurable menace to the society. One would not be very much incorrect to say that it has corroded the core and kernel of the society. Enactments have been made to check the evils of dowry. Definition has been given defining dowry death. Section 113(b) has been inserted in the Evidence Act raising presumption as to dowry death in certain circumstances. All force and energy should be exerted to repress and check the move of this despot. Sometimes it is felt that despite denunciation from all quarters the malignancy of dowry permeates. It appears to be wholly ubiquitous. While dealing with the offence relating to this sphere the Court has to adopt a realistic yardstick. In this context, I may profitably quote a passage from the decision rendered in the case of ***Kundula Bala Subrahmanyam v. State of A.P., 1993 Cri.L.J. 1635 :***

"Laws are not enough to combat the evil.

(i) A wider social movement of educating women of their rights, to

conquer the menace, is needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation.

It is expected that (ii) the Courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of precedural technicalities or insignificant lacunae in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. (iii) The Courts are expected to be sensitive in cases involving crime against women. The verdict of acquittal made by the trial Court in the case is an apt illustration of the lack of sensitivity on the part of the trial Court."

44. In this context, I may refer with profit to the reflection of a woman author who has spoken with quite a speck of sensibility :

"Dowry is an intractable disease for women,

a bed of arrows for annihilating self-respect,

but without the boon of wishful death."

In these lines the agony of the woman is writ large.

45. I had stated in the beginning, the theme encases a colossal arena. The topic cannot be dealt with clinical precision. One is compelled and intellectually coerced to stutter. However, I have made a modest attempt to inform and acquaint you in regard to the basic creed and credo of gender equality. All of us are quite cognizant about the present state of affairs but we have to be consciously assiduous to eradicate the inequality as the law mandates and the Organic law of the Nation commands.

●

■ ***The extension of women's rights is the basic principle of all social progress.***

- Charles Fourier

■ ***A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge.***

- Samuel Johnson

विचारण व अपील स्तर पर साक्ष्य का क्रमबंधन, मूल्यांकन तथा पूर्व न्यायिक दृष्टांत का निर्णय में प्रतिपादन

न्यायाधिपति के.के. वर्मा
पूर्व न्यायाधीश
म.प्र. उच्च न्यायालय

(1)

1. विचारण और अपील में साक्ष्य का क्रमबंधन एवं मूल्यांकन की प्रक्रियाएं प्रकरणों में निर्णय देने और लिखने या लिखवाने के पूर्व की जाती हैं।

साक्ष्य अधिनियम की धारा 3 में "प्रूब्ड और डिस्प्रूब्ड" की परिभाषा में कहा गया है कि किसी तथ्य पर उसकी विश्वसनीयता या अविश्वसनीयता पर निर्णय देने के पूर्व न्यायालय अपने समक्ष प्रस्तुत वस्तु सामग्रियों (मैटर्स) पर विचार करेगा। उपर्युक्त वस्तु सामग्री में न्यायालय में साक्षी द्वारा शपथ पर दी गई अभिसाक्ष्य और न्यायालय के निरीक्षण के लिए प्रस्तुत किए सभी दस्तावेजों को 'साक्ष्य' की संज्ञा मिली है। इस 'साक्ष्य' के अतिरिक्त न्यायालय अन्य जानकारियां देने वाली निम्नलिखित वस्तु सामग्रियों पर भी विचार करेगा।

2. 1. भौतिक वस्तुओं (मटेरियल आब्जेक्ट) जैसे हथियार, कपड़े, मिट्टी इत्यादि।

2. न्यायालय ने साक्षी को देखने से जिस तरह का अनुभव किया और उसके द्वारा साक्ष्य के समय उसके हावभाव, आचरण और उसकी भावभंगिमा से संबंधित तथ्यों का अवलोकन (देखें दं.प्र.सं. की धारा 280 एवं व्य.प्र.सं. के आदेश 18 नियम 12)

3. साक्ष्य अधि. की धारा 56 कहती है कि जिस तथ्य के अस्तित्व को मनुष्य नकार ही नहीं सकता, उसे न्यायालय बिना किसी साक्ष्य के स्वीकार कर सकता है। न्यायालय द्वारा तथ्य–स्वीकृति की इस प्रक्रिया को अपनाए जाने पर कहा जाता है कि अमुक तथ्य का न्यायालय ने 'जुडीशियल नोटिस' लिया। धारा 57 में 13 विषयों का उल्लेख कर कहा गया है कि न्यायालय तत्संबंधित तथ्यों का 'जुडीशियल नोटिस' अवश्य लेगा, (शैल टेक)। इस धारा में न्यायालय को यह भी छूट है कि वह उपर्युक्त 13 विषयों की तथा इतिहास, साहित्य, विज्ञान या कला की जानकारी पुस्तकों तथा संदर्भ दस्तावेजों से प्राप्त कर सकता है। इन तथ्यों को प्रकरण के प्रश्नों से संबंधित तथ्यों के मूल्यांकन के लिए उपयोग किया जा सकता है।

4. ऐसे तथ्य जिनको पक्षकार या उसके वकील ने न्यायालय में स्वीकार किया हो।

5. न्यायाधीश द्वारा स्थल निरीक्षण में मिली जानकारी (देखें आदेश 18 नियम 18 सीपीसी एवं दं.प्र.सं. की धारा 310 (1) एवं (2)। उपर्युक्त निरीक्षण का उपयोग न्यायालय में प्रस्तुत साक्ष्य को समझने के लिए ही किया जावेगा, न कि विवादास्पद तथ्यों को स्वीकारने या अस्वीकारने के लिए स्वतंत्र साक्ष्य के रूप में।

6. धारा 313 दं.प्र.सं. के अंतर्गत प्रकरण में अभियुक्तों के उत्तर।

7. धारा 315 (1) दं.प्र.सं. के अंतर्गत अभियुक्त का बचाव साक्षी के रूप में शपथ पर अभिसाक्ष्य।

8. साक्ष्य अधि. की धारा 130 के अंतर्गत 2 या दो से अधिक अभियुक्तों में से किसी अभियुक्त द्वारा दोष अभिस्वीकृति के कथन में सहअभियुक्त के विरूद्ध प्रयुक्त किए जा सकने वाले तथ्य।

(2)

3. विचारण में पूर्व उल्लिखित वस्तु सामग्रियों का विधि द्वारा निर्धारित पद्धति के अनुसार अभिलेख पर लाया जाना अभिप्रेत है।

4. परन्तु पक्षकार किस क्रम से अपने साक्षियों का परीक्षण करेगा और किस साक्षी से किस विचारणीय मुद्दे पर प्रश्न करेगा और किस क्रम से दस्तावेजी साक्ष्य प्रमाणित करेगा; और विरोधी पक्षकार उस साक्षी से प्रतिपरीक्षण में उस मुद्दे पर या अन्य मुद्दों पर, या उस साक्षी की विश्वसनीयता, उसकी साक्ष्य तथा दस्तावेजी साक्ष्य को नैसर्गिक मानव व्यवहार और अधिसंभावनाओं की कसौटियों पर परखने के लिए किस क्रम में प्रश्न करेगा या नहीं करेगा, यह पक्षकार, उनके अभिभाषकों के विवेक पर साक्ष्य अधिनियम और प्रकरण से संबंधित विधि की प्रक्रिया संहिता ने छोड़ दिया है।

5. उपर्युक्त कारणों से अभिलेख पर आई साक्ष्य व वस्तु सामग्री किसी निर्धारित क्रम और पूर्व निर्धारित व्यवस्थित रूप में उपलब्ध नहीं रहती। इसलिये उपर्युक्त साक्ष्य व वस्तु सामग्रियों का पद्धति युक्त अध्ययन करने के लिए न्यायाधीश को उनका क्रमबंधन (सिलसिलेवार जमाया जाना या मार्शलिंग) करना पड़ता है। यह क्रमबंधन जितने व्यवस्थित और तर्क–संगत रूप में किया जावेगा, उतना ही अच्छा साक्ष्य का मूल्यांकन होगा और मूल्यांकन के नतीजे और उनके लिए निर्धारित कारण स्पष्ट रूप से न्यायालय के समक्ष आ सकेंगे। अतएव सबसे पहले, साक्षिक सामग्रियों के क्रमबंधन करने की पद्धति के विषय में सुझाव दिए जावेंगे।

6. सबसे पहले संबंधित प्रकरण में निर्धारित किए गए या निर्धारित किए जाने योग्य विवाद्यक तथ्य (फैक्ट्स इन इशू) को उनकी प्राथमिकता या प्रथमता के क्रम में क्रमांक देकर एक रजिस्टर में लिख लिया जावे।

7. फिर पक्षकारों के साक्षियों के नाम व क्रमांक, प्रमाणित दस्तावेजों के संक्षिप्त विवरण व क्रमांक लिखे जावें।

8. साक्षियों के कथनों और प्रमाणित दस्तावेजों को सरसरी तौर पर पढ़ें। फिर उभयपक्ष के मध्य स्वीकृत तथ्यों को, यदि हों, तो लिख लिया जावे। इसके बाद सबसे प्राथमिकता वाले विवाद्यक तथ्य को ध्यान में रखते हुए प्रत्येक साक्षी के कथन को तथा दस्तावेजों को इस दृष्टि से पढ़ें और टीप लें कि संबंधित विवाद्यक तथ्य पर किसने मुख्य परीक्षण में और फिर प्रतिपरीक्षण में और फिर पुनर्परीक्षण में विवाद्यक तथ्य से संबंधित तथ्यों के बारे में जानकारी कहां है। उदाहरणार्थ –

1. क्या बच्चूलाल की मृत्यु 12 फरवरी 2001 को मानवघात से हुई?

वादी सा.1	वादी सा.2	वादी सा.3
मुख्य परीक्षण–कंडिका 2 एवं 3	मुख्य परीक्षण कंडिका 4	डाक्टर मुख्य परीक्षण
प्रतिपरीक्षण–कंडिका 7,11	प्रतिपरीक्षण कंडिका 8	कंडिका 1 से 7 तथा
	अभियुक्त परीक्षण	पोस्टमार्टम रिपोर्ट (प्रदर्श)
	प्रश्न क्र. 5 एवं 7 के उत्तर	प्रतिपरीक्षण कंडिका 8 एवं 9

बचाव साक्षी क्र.1
मुख्य परीक्षण कंडिका 3
प्रतिपरीक्षण कंडिका 5 से 8

9. इसके बाद प्रत्येक साक्षी की अभिसाक्ष्य को पढ़ें और नोट करें कि मुख्य परीक्षण के किस अंश पर प्रतिपरीक्षण नहीं हुआ है।

10. इसके बाद नोट करें कि साक्षी के कथन की पुष्टि के लिए मुख्य परीक्षण में, या उस साक्ष्य की अविश्वसनीयता दिखाने के लिए कोई दस्तावेजी साक्ष्य प्रमाणित हुआ है या नहीं। इसके बाद यह नोट करें कि साक्षी की उसके पक्षकार से रिश्तेदारी मैत्री के बारे में और विरोधी पक्षकार से विरोधीभाव के बारे में और उसकी स्मरण शक्ति के बारे में प्रश्न पूछे गए या नहीं। यदि प्रश्न पूछे गये तो उत्तर किस कंडिका में है, यदि प्रश्न नहीं पूछे गये हों तो यह तथ्य भी नोट किया जावे।

11. यह भी नोट करें कि पक्षकार के अमुक साक्षी की साक्ष्य का समर्थन या बेमेलपन उसी पक्षकार के अन्य साथियों की साक्ष्य में मुख्य परीक्षण, प्रतिपरीक्षण या पुनर्परीक्षण में किस कंडिका में मिलेगा।

12. इसी तरह विरोधी पक्ष के साथियों की साक्ष्य का क्रमबंधन किया जावे। यह अवश्य लिखा जावे कि इन साक्षियों की अभिसाक्ष्य से विरोधी पक्ष की किस साक्ष्य का समर्थन मिलता है या उसको चुनौती मिलती है और यह सामग्री किस कंडिका में है।

13. अभियुक्त के कथन का विश्लेषण कर लिखा जावे कि वह इन्कारी के अलावा अमुक–अमुक अभियोजन साक्षी को अपना विरोधी या विरोधी पक्षकार का हितैषी बताता है।

14. (1) पूर्व वर्णित दृष्टांत के रूप में माने गए– प्रकरण में विवाद्यक तथ्य क्र.1 के बाद निम्नलिखित तीन विवाद्यक तथ्य भी माने जा सकते हैं।

(2) क्या अभियुक्त जमना प्रसाद ने मृतक बच्चूलाल को स्वेच्छया से चोटें पहुंचाई जिनसे उसकी मृत्यु हुई?

(3) क्या अभियुक्त जमना प्रसाद ने उपर्युक्त चोटें बच्चूलाल को इरादतन (इंटेन्शनली) पहुंचाई थीं?

(4) क्या उपर्युक्त चोटें या उनमें से कोई चोट, प्रकृति के सामान्य कालक्रम में मृत्यु कारित करने के लिए पर्याप्त थी?

15. विवाद्यक क्र.2 से 4 से संबंधित साक्ष्य का भी क्रमबंधन, विवाद्यक तथ्य क्र.1 की साक्ष्य के क्रमबंधन के लिए अपनाई गई पद्धति के अनुसार करना चाहिए।

16. इसके बाद, साक्ष्य इत्यादि का उनके क्रमबंधित रूप में, भलीभांति अध्ययन करके, उसके मूल्यांकन की प्रक्रिया में जुटना होगा। मूल्यांकन की प्रक्रिया का उद्देश्य यह है कि विवाद्यक तथ्य को साबित माना जावे या गैर साबित माना जावे– ऐसा निर्णय दिया जावे और साथ ही उन कारणों का, जिनकी जड़ें साक्ष्य में हों, विनिश्चय किया जावे। कारणों का निर्णय में उल्लेख अत्यंत आवश्यक है। (देखें धारा 354 (1) बी दं.प्र.सं. तथा आदेश–20 नियम 4 (2) व्य.प्र.सं.)

17. यह उल्लेखनीय है कि साक्ष्य अधिनियम या किसी अधिनियम में न्यायालयों के समक्ष आये विषयों के मूल्यांकन की ऐसी पद्धति नहीं बताई गई है, जिसको ही अपनाकर न्यायालय विवाद्यक तथ्यों पर अंतिम या निश्चयात्मक उत्तर दें।

18. केवल इतनी सी बात विधायिका साक्ष्य अधिनियम की धारा 134 में कहती है कि किसी मामले में किसी तथ्य को साबित करने के लिए साक्षियों की कोई विशिष्ट संख्या नहीं होगी।

19. साक्ष्य अधिनियम, 1872 की धारा 3 में प्रूव्हड (साबित) और "डिस्प्रूव्हड" (ना साबित) पदों की परिभाषाएं निम्नानुसार बताई गई हैं :–

"साबित" : कोई तथ्य साबित हुआ कहा जाता है, जब न्यायालय अपने समक्ष के विषयों पर विचार करने के पश्चात या तो यह विश्वास करे कि उस तथ्य का अस्तित्व है या उसके अस्तित्व को इतना अधिसंभाव्य समझे कि उस विशिष्ट मामले की परिस्थितियों में किसी प्रज्ञावान व्यक्ति को इस अनुमान पर कार्य करना चाहिये कि उस तथ्य का अस्तित्व है।

"नासाबित" : कोई तथ्य नासाबित हुआ कहा जाता है, जब न्यायालय अपने समक्ष विषयों पर विचार करने के पश्चात् या तो यह विश्वास करे कि उसका अस्तित्व नहीं है या इसके अनस्तित्व को इतना अधिसम्भाव्य समझे कि उस विशिष्ट मामले की परिस्थितियों में किसी प्रज्ञावान व्यक्ति को इस अनुमान पर कार्य करना चाहिये कि उस तथ्य का अस्तित्व नहीं है।

20. उपर्युक्त परिभाषाओं में विधायिका की ओर से न्यायालयों को ऐसा संदेश और संकेत है कि वे अपने समक्ष के विषयों पर, दुनियादार व्यक्ति का दृष्टिकोण अपनाकर, दुनियादारी के अपने ज्ञान और अनुभव से, तर्कयुक्त विचार करके विवादास्पद तथ्यों पर अपने निर्णय देंगे।

21. न्यायालयों से अपेक्षा है कि वे अपने समक्ष के विषयों का मूल्यांकन करने में साक्ष्य अधिनियम की धारा 4 में "अवधारणा कर सकेगा (मे प्रिज्यूम) अवधारणा करेगा। (शैल प्रिज्यूम) तथा निश्चयात्मक सबूत (कान्क्लूजिव्ह प्रूफ) को परिभाषाओं के तारतम्य में धारा 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 111 एवं 112, 113, 113–ए, 113–बी, 114, 114–ए में वर्णित कयासों (प्रिजम्पशन), तथा सबूत के भार (बर्डन ऑफ प्रूफ) से संबंधित धाराओं (धारा 101 से 111 तक की) के उपबंधों पर विचार करें।

22. सह–अपराधी की अभिसाक्ष्य का मूल्यांकन साक्ष्य अधिनियम की धारा 133 के उपबंधों पर न्यायालयों की नजीरों के अनुरूप करना पड़ेगा।

23. अन्य अधिनियमों के भी, विवाद्यक तथ्यों और साक्ष्य से संबंधित विषयों में कयासों एवं सबूत के भार के उपबंधों पर साक्ष्य के मूल्यांकन के समय ध्यान रखना होगा। उदाहरण के लिए, द नारकोटिक

ड्रग्स एण्ड साइकोट्रापिक सब्सटेन्सेज एक्ट, 1985 की धारा 35 (1) एवं (2) धारा 54 तथा धारा 66 में कयासों से संबंधित उपबंध है। इसी तरह भ्रष्टाचार निवारण अधिनियम, 1988 में धारा 20 (1) एवं (2) में कयासों के उपबंध है। परन्तु धारा 20 की उपधारा (3) में उल्लेख है कि उसमें वर्णित विशिष्ट परिस्थिति में न्यायालय धारा 20 (1) एवं (2) के कयासों को अभियुक्त के विरूद्ध उपयोग करने से इंकार कर सकता है।

24. पूर्ववर्ती कंडिका में उल्लिखित धारा 35, नारकोटिक ड्रग्स एण्ड साइकोट्रोपिक सब्सटेंसेज एक्ट 1985 (16/1985) के पद उल्लेखनीय है। उनमें भारतवर्ष में मान्य ज्यूरिस प्रूडेन्स में स्वीकृत मान्यताओं के अनुरूप पूर्व प्रचलित कयासों और सबूत के भारों के लिए मापदंडों को दर्शाने के लिए न्यायालयों द्वारा प्रयुक्त पदों को विधायिका द्वारा अपनाया गया है, वरन् उन पदों को अपनाकर अभियुक्तों के विरूद्ध कयासों और सबूत के भार के उपबंधों को अधिनियमित किया है।

25. धारा 35 इस प्रकार है :

35:- Presumption of culpable mental state-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation- In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

26. उपर्युक्त उपबंध भारतवर्ष के न्यायालयों की नजीरों में स्थापित निम्नलिखित सर्वमान्य नियमों के संदर्भ में अधिनियमित हुए।

27. फौजदारी प्रकरणों में न्यायालय आरंभ से इस कयास को अपनाकर चलेगा कि अभियुक्त निर्दोष है और इसलिए अभियोजन पर आदि से अंत तक न टलने वाला सबूत का भार रहेगा कि वह न्यायालय का समाधान करे कि उसकी साक्ष्य से, युक्तियुक्त शंका के परे (बियांड ए रीजनेबल डाउट) अभियुक्त पर आरोपित अपराध के तत्व और अभियुक्त की दोषिता प्रमाणित करने के लिए पर्याप्त सभी तथ्य स्थापित होते हैं। न्यायालयों का कहना है कि अभियोजन के विरूद्ध अपनाये गये कयास और उस पर लादे गये सबूत के भार निम्नलिखित परिस्थितियों के बावजूद अटल माने जावेंगे।

(1) अभियुक्त ने कोई बचाव या बचाव साक्ष्य प्रस्तुत नहीं किया।

(2) अभियुक्त ने झूठा बचाव या बचाव साक्ष्य प्रस्तुत किया है।

28. दूसरे शब्दों में, अभियुक्त पर यह दायित्व नहीं है कि वह अपनी निर्दोषिता साबित करे और इस हेतु अभियोजन की साक्ष्य के खंडन के लिए और/ या अपने बचाव को प्रमाणित करने के लिए कोई दलील रखे और कोई साक्ष्य दे।

एक वाक्य में, अभियोजन आरोप को अपनी साक्ष्य के बल पर युक्तियुक्त शंका से परे साबित करे (प्रूव्हड बियांड ए रीजनेबल डाउट) (देखे ***प्रभू वि. एम्परर एआईआर 1941 इलाहाबाद 402***)।

29. धारा 35 (2) एन डी पी एस एक्ट 1985) में "प्रीप्रान्ड्रेन्स ऑफ प्राबेबिलिटी" (अधिसंभाव्यता की प्रबलता) का उल्लेख किया है। भारतीय न्यायालयों में एक ओर इस पद का प्रयोग दीवानी प्रकरणों में पक्षकारों पर सबूत का भार उठाने के दायित्व की कसौटी के रूप में तो किया, (देखे ***गुलाबचंद वि. कुडीलाल एआईआर 1969 म.प्र. 151***) तो दूसरी ओर इसी कसौटी को अभियुक्त द्वारा धारा 105 साक्ष्य अधिनियम में उल्लिखित अपवादों का लाभ उठाने के बचाव और बचाव साक्ष्य की पर्याप्तता बताने के लिए पर्याप्त बताया। परन्तु धारा 35 (2) में इस कसौटी को अपर्याप्त बताया जाकर यह कहा गया है कि अभियुक्त वर्जित तथ्य को युक्तियुक्त शंका से परे साबित करे।

30. अतः विशेष अधिनियमों के अंतर्गत निर्मित अपराधों के लिए कोई विशेष विशिष्ट कयास या सबूत के भार के उपबंध है कि नहीं, इसका समाधान कर साक्ष्य का क्रमबंधन और मूल्यांकन करना चाहिए।

(4)

31. इस स्थान पर युक्तियुक्त संदेह के लाभ के सिद्धान्त पर प्रकाश डालना समीचीन होगा।

32. किशोरचंद वि. हिमाचल प्रदेश राज्य (1991) 1 एस.सी.सी. 286 की कंडिका क्र. 4 और 5 में परिस्थितिजन्य साक्ष्य के मूल्यांकन के सिद्धान्तों पर प्रकाश डालकर कंडिका 6 में कहा गया :

"It is necessary to distinguish between facts which may be called primary or basic facts on the one hand and inferences of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt.

33. पूर्ववर्ती कंडिका में उद्धत अंश के अंतिम वाक्य को पढ़ने के बाद यह कथन निहित रूप से सामने आता है "और यदि ऐसे निष्कर्ष नहीं निकाले जा सकते तो अभियुक्त को संदेह का लाभ देकर उसे दोषमुक्त करना चाहिए।"

34. अतः विवाद्यक तथ्य को साबित या गैर–साबित करने के लिए दी गई प्रत्यक्ष साक्ष्य पर न्यायालय उस विवाद्यक तथ्य के विषय में या तो यह उत्तर दे कि ऐसा विवाद्यक तथ्य घटित हुआ था या, यह कहे कि ऐसा विवाद्यक तथ्य घटित ही नहीं हुआ।

35. परन्तु न्यायालय प्रत्यक्ष साक्ष्य को सीधे अस्वीकार करने के बजाय उसे यह कहकर प्रभावहीन नहीं बना सकता कि वह उस साक्ष्य के बारे में अभियुक्त को संदेह का लाभ देता है और इसी आधार पर उस साक्ष्य के साबित करने की योग्यता के (अभियोजन के) दावे को विचार योग्य नहीं पाता।

36. किसी अभियुक्त को संदेह का लाभ देने का सिद्धान्त केवल निम्नलिखित परिस्थितियों में लागू होता है। अभियोजन प्रत्यक्ष साक्ष्य से साबित तथ्यों को आधार न बताते हुए उनसे अनुमान (इनफरेन्स) से निकाली गई परिस्थितियों के आधार पर न्यायालय से निवेदन करे कि इन परिस्थितियों से अपराध के सभी तत्व साबित होते हैं और अभियुक्त की दोषिता की पुष्टि होती है और उसकी निर्दोषिता का कयास खंडित होता है। यदि न्यायालय इस निष्कर्ष पर पहुंचे कि प्रमाणित अनुमित परिस्थितियों के बावजूद अपराध का अमुक तत्व उनकी परिधि के बाहर रह गया है और/ या उनके बावजूद यह युक्तियुक्त गुन्जाइश है कि अभियुक्त के सिवाय कोई अन्य व्यक्ति द्वारा उस अपराध के किए जाने की संभावना को परे नहीं किया जा सकता, तो न्यायालय कह सकता है कि इन परिस्थितियों में अभियुक्त को संदेह का लाभ देकर उसे दोषमुक्त किया जाता है।

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37. सुप्रीमकोर्ट ने कई निर्णयों में यह व्यवस्था दी है कि सुप्रीमकोर्ट और उच्च न्यायालय अपने समक्ष प्रस्तुत साक्ष्य के मूल्यांकन के लिए जिस प्रक्रिया को अपनाकर उस साक्ष्य से जिस तरह के कारण निकालकर उनको आधार मानकर तथ्यों पर जिस तरह, और जिस तरह के, निष्कर्ष निकालते हैं– इन बिन्दुओं पर उनके निर्णय अधीनस्थ न्यायालयों पर बन्धनकारक नहीं हैं। दूसरे शब्दों में, अधीनस्थ न्यायालय पर कोई बाध्यता नहीं है कि वे अपने समक्ष प्रस्तुत साक्ष्य के मूल्यांकन की प्रक्रिया उसी तरह की अपनाएं, उन्हीं कारणों को अपनाएं और उन्हीं कारणों की तरकीब के अनुरूप तथ्यों पर निष्कर्ष दे, हूबहू अपनाएं जो सुप्रीमकोर्ट और उच्चन्यायालयों ने अपने निर्णय में अपनाई है।

38. उदाहरण के लिए, तीन न्यायाधीशों की बेन्च ने ***प्रकाशचन्द्र वि.उत्तरप्रदेश राज्य (एआईआर 1960 एस.सी.) 195 की कंडिका 8*** में कहा है।

"Learned counsel for the appellant cited before us a number of reported decisions of this court bearing on the appreciation of circumstantial evidence. We need not refer to those authorities. It is enough to say that decisions even of the highest court on questions which are essentially questions of facts, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well-established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the court. That question has to be determined by the court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another. Therefore, it will serve no useful purpose to decide this case with reference to the decisions of the court in previous cases. (Emphasis supplied).

39. ***चरनसिंह वि. पंजाब राज्य (ए.आई.आर. 1975 सुप्रीमकोर्ट 246)*** में दो न्यायाधीशों की बेंच ने कंडिका 32 में यह कहा गया :

32. In the context of what value should be attached to the statements of the witnesses examined in this case our attention has been invited by the learned counsel for the appellants to a numbers of authorities. We have refrained from referring to those authorities because in our opinion reference to those authorities is rather misplaced. **The face of the present case like every other criminal case depends upon its own facts and the intrinsic worth of the evidence adduced in the case rather than what was said about the evidence of witnesses in other decided cases in the context of facts of those cases. The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impression is created by his evidence taken in the context of the other facts of the case.** Criminal cases can not be put in a straight-jacket. Though there may be similarity between the facts of some cases, there would always be shades of difference and quite often that difference may prove to be crucial. The same can also be said about the evidence adduced in one case and that produced in another" (Emphasis supplied)

40. उपर्युक्त निर्णय के उपर्युक्त कथन के कहने के बाद यह बताया गया कि पूर्व न्याय निर्णयों से किस तरह की सहायता ली जा सकती है :

"Decided cases can be of help **if there be a question of law like the admissibility of evidence. Likewise decided cases can be of help if the question be about the applicability of some general rule of evidence e. g. the weight to be attached to the evidence of an accomplice.** (Emphasis supplied)

41. न्यायालय ने तुरन्त यह व्यवस्था दुहरा दी।

This apart, reference to decided cases hardly **seems apposite when the question before the court is whether the evidence of a particular witness should or should not be accepted** (Emphasis supplied).

42. उपर्युक्त न्याय निर्णयों में पूर्व–निर्णयों के निष्कर्षों का उपयोग बाद के प्रकरण में तथ्यों के निष्कर्ष पर पहुंचने के लिए बन्धनकारक नहीं कहे जाने के कारणों को रफीक वि. उत्तरप्रदेश राज्य (एआईआर 1981 सुप्रीमकोर्ट पृष्ठ 559) की कंडिका 5 के कथनों में पाया जा सकता है। न्यायालय ने कहा :

4. ..... but counsel cited a decision of this court in ***Pratap Misra Vs. State of Orissa, AIR 1977 SC (1307)*** and urged that absence of injuries on the person of the victim was fatal to the prosecution and that corroborative evidence was an imperative component of judicial credence in rape cases.

5. We do not agree. For one thing, Pratap Misra's case (Supra) laid down no inflexible axiom of law on either point. **The facts and circumstances often vary from case to case. The crime situation and myriad psychic factors, social conditions and people's lifestyle may fluctuate and so rules of prudence relevant in one fact-situation may be inept in**

another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given cirmustances. **Indeed from place to place, from age to age, from varying lifestyles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity test rigidity in the shape of rule of law in this area be introduced through a new type of presidential tyranny.** (Emphasis supplied)

43. पर ध्यान रहे कि उपर्युक्त निर्णयों में दी गई व्यवस्थाओं से अधीनस्थ न्यायालयों को यह छूट नहीं मिली है कि वे सुप्रीमकोर्ट और उच्च न्यायालयों के निर्णयों में प्रतिपादित साक्ष्य–मूल्यांकन के सिद्धान्तों को सही मानने, या उनको अपनाने, से इंकार कर दें। वस्तुतः ये सिद्धान्त अधीनस्थ न्यायालयों पर बंधनकारक है, पर ये न्यायालय साक्ष्य पर अपने अनुभव और ज्ञान व तर्कशक्ति से विचार कर अपने को ठीक जंचने वाले कारणों को अपनाकर अपने को स्वीकार्य, तथ्यों के निष्कर्षों पर पहुंचने के लिए, स्वतंत्र हैं।

44. यहां पर यह बताना समीचीन हो जाता है कि ***महाराष्ट्र राज्य वि. नरसिंहराव गंगाराम पिंपले (एआईआर 1984 एस.सी. पृष्ठ 63)*** की कंडिका 15 में यह कहा गया है।

"It is well-settled that a plea of alibi must be proved with absolute certainty, so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence.

यह व्यवस्था कानूनी प्रश्न पर है इसलिये अधीनस्थ न्यायालयों पर बन्धनकारक है।

45. इस तरह, अधीनस्थ न्यायालय तथ्यों को साबित या गैर–साबित करने के लिए आई साक्ष्य का मूल्यांकन प्रज्ञावान पुरूष के दृष्टिकोण को अपनाकर अपने ज्ञान, अनुभव और तर्क बुद्धि से, कयासों और सबूत के भारों के अधिनियमित उपबन्धों तथा सुप्रीमकोर्ट और हाईकोर्टो के निर्णयों से स्थापित साक्ष्य के मूल्यांकन के सिद्धान्तों के प्रकाश में तथ्यों पर, अपने–पाये कारणों से समर्थित, निष्कर्ष देने के लिए स्वतंत्र हैं।

46. न्यायालयों को साक्ष्य के मूल्यांकन में निम्नलिखित बातों पर विचार करना चाहिए। साक्षियों की अभिसाक्ष्य और प्रमाणित दस्तावेजों में प्रस्तुत वृत्तांतों पर प्रतिपरीक्षण का क्या प्रभाव पड़ा है, क्या किसी पक्ष की भिन्न–भिन्न साक्ष्यों पर सम्यक विचार के बाद, उनमें एक साक्ष्य का दूसरे से मेल होना पाया जाता है, या उनमें पारस्परिक बेमेलपन पाया जाता है? क्या साक्ष्य प्रकरण के स्वीकृत तथ्यों से मेल खाती है या उनसे बेमेल ठहरती है? क्या साक्ष्य अधिसंभावनाओं से मेल खाती है, या उनसे बेमेल ठहरती है? क्या साक्षी अपने पक्षकार से हितबद्ध हैं और/ या विरोधी पक्षकार से बैर रखते हैं और क्या उपर्युक्त आधारों पर उनकी साक्ष्य को या उसके किसी अंश को विश्वसनीय नहीं मानने के लिए पर्याप्त कारण मिले हैं? क्या अमुक साक्ष्य के खण्डन में कोई साक्ष्य है और यदि हां, तो क्या वह खंडन साक्ष्य समाधानकारक है?

47. उपर्युक्त प्रश्नों पर विचार करने के समय न्यायालयों को यह दायित्व भी निभाना है कि वे साक्ष्य के आधार पर दिए जाने वाले निष्कर्षों तक पहुंचने के पहले उन निष्कर्षों के लिए साक्ष्य पर आधारित कारणों को विनिश्चित अवश्य करें क्योंकि इन कारणों का निर्णयों में उल्लेख करना न्यायालयों पर कानूनी तौर पर बन्धनकारक है।

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48. पूर्ववर्ती सभी कंडिकाओं की वस्तु सामग्री का दीवानी और फौजदारी के विचारणों (ट्रायल) और धारा 96 व्य.प्र.सं. के अंतर्गत प्रस्तुत प्रथम दीवानी अपील और धारा 374 (3) दं.प्र.सं. के अंतर्गत दोषसिद्धि के विरूद्ध की गई अपील में साक्ष्य–क्रमबंधन और साक्ष्य मूल्यांकन की प्रक्रियाओं में समान रूप से लागू होती है।

परन्तु प्रथम दीवानी अपील में कुछ परिस्थितियों में साक्ष्य क्रमबंधन व साक्ष्य मूल्यांकन के विस्तार–क्षेत्रों में संकुचन, पर दोषसिद्धि के विरूद्ध के अपील में कुछ परिस्थितियों में साक्ष्य क्रमबंधन व साक्ष्य मूल्यांकन के विस्तार क्षेत्र में बढ़ती कानूनन हो सकती है। इसलिये इन विषयों पर विचार आवश्यक है।

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49. पहले दीवानी अपीलों को लें। प्रथम दीवानी अपील में अपीलार्थी पर यह प्रारंभिक भार रहता है कि वह बताए कि अपीलाधीन निर्णय गलत है। अतएव यदि अपीलार्थी अवसर मिलने पर भी बहस नहीं करता या बहस करने से इंकार करता है, तो अपील न्यायालय साक्ष्य पर विचार किए बिना अपील खारिज कर सकता है।

50. यदि विचारण न्यायालय के निर्णय में वादी को एक से अधिक अनुतोष मिलें, पर प्रतिवादी अपील में सब नहीं, बल्कि उनसे कम अनुतोष (अनुतोषों) को चुनौती देता है, जैसे वादी को प्रतिवादी से निष्कासन और बकाया किराये के अनुतोष विचारण न्यायालय से मिले, पर प्रतिवादी केवल निष्कासन के विरूद्ध अपील करता है तो अपील न्यायालय को केवल निष्कासन से संबंधित साक्ष्य का क्रम–बंधन और मूल्यांकन करना पड़ेगा।

51. वादी ने कर्जदार और जमानतदार पर संयुक्त एवं एकल रूप की देनदारी थोपते हुए, धनवसूली की डिक्री दी। कर्जदार डिक्री के विरूद्ध अपील नहीं करता है, पर जमानतदार अपील करता है। ऐसी दशा में, अपील न्यायालय उन मुद्दों की साक्ष्य का मूल्यांकन नहीं करेगा, जिसका संबंध केवल कर्जदार की वैयक्तिक देनदारी से है। अपील न्यायालय जमानतदार की देनदारी से संबंधित मुद्दों से संबंधित साक्ष्य का ही क्रमबंधन और मूल्यांकन करेगा।

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52. धारा 374 (3) दं.प्र.सं. के अंतर्गत दोषसिद्धि के विरूद्ध की गई अपील में अभियुक्त अवसर मिलने पर बहस करने से मना कर दे या इंकार कर दे या गुणदोष पर बहस करे, दोनों स्थितियों में तब भी अपील न्यायालय का यह दायित्व रहेगा कि वह संपूर्ण साक्ष्य का क्रमबंधन और स्वतंत्र रूप से मूल्यांकन कर यह देखे कि दोषसिद्धि सही है और यदि वह इस निष्कर्ष पर नहीं पहुंचता तो उसे अपीलार्थी को दोषमुक्त करना पड़ेगा।

53. यदि पांच और अधिक अभियुक्तों पर भारतीय दंड संहिता की धारा 149 के अंतर्गत, या दो और अधिक अभियुक्तों के विरूद्ध धारा 34, 109, 114, 120–बी (भा.दं.सं.) की सहायता से सारवान् अपराधों के आरोपों का विचारण हो, पर न्यायालय धारा 149 वाले प्रकरण में केवल दो अभियुक्तों को सारवान अपराध के लिए दोषसिद्ध ठहराए या धारा 34, 109, 114, 120 बी की सहायता से आरोपित सारवान् अपराधों के लिए कुछ अभियुक्तों को दोषसिद्ध कर शेष अभियुक्तों को दोषमुक्त करे और सभी दोषसिद्ध अभियुक्त धारा 374 (3) के अंतर्गत अपील करते हैं। ऐसी स्थिति में अपील न्यायालय को साक्ष्य क्रमबंधन और मूल्यांकन की क्या शक्ति है?

54. ऐसी अपील में अधीनस्थ फौजदारी न्यायालय द्वारा दोषमुक्त अभियुक्तों के पक्ष में दिए निष्कर्ष और उन निष्कर्षों के लिए दिए कारणों के सहीपन की जांच अपील न्यायालय संपूर्ण साक्ष्य के क्रमबन्धन और मूल्यांकन पर स्वतंत्र ढंग से कर सकता है। अपील न्यायालय ऐसे निष्कर्ष दे सकता है कि अधीनस्थ न्यायालय के दोषमुक्त अभियुक्तों के पक्ष में दिए निष्कर्ष और उनके लिए दिए कारण गलत हैं। अपील न्यायालय दोषमुक्त अभियुक्तों के विरूद्ध सकारण ऐसी उपपत्ति दे सकता है कि वे भी दोषी ठहराये जाने के पात्र थे, और ऐसी उपपत्तियों के प्रकाश में, अपील करने वाले अभियुक्तों के विरूद्ध आई साक्ष्य का क्रमबंधन और मूल्यांकन कर उनकी दोषसिद्धि कायम रख सकता है। (देखें ब्राथी उर्फ सुखदेव सिंह विरूद्ध पंजाब राज्य 1991 (1) एससीसी 519)

55. उक्त प्रकरण में सुचासिंह की हत्या के अपराध के लिए तेजासिंह पर धारा 302 भा.द.वि. तथा उसके भतीजे ब्राथी पर धारा 302/34 के अंतर्गत आरोप लगाये गये।

56. दो चक्षुदर्शी, साक्षियों के अनुसार ब्रार्थी के कृपाण के वार को सुचासिंह ने हाथ पर झेला जिससे उसके अंगूठे पर चोट आई। तेजासिंह ने सुचासिंह के सिर पर कृपाण मारा तो सुचासिंह गिर पड़ा। फिर ब्राथी ने सुचासिंह के कान की बांई तरफ और तेजासिंह ने सुचासिंह के जबड़े के नीचे कृपाणों से 1–1 चोट पहुंचाई। सुचासिंह अस्पताल में मर गया। डाक्टरी परीक्षण के अनुसार सिर वाली चोट प्राणघातक थी। चारों चोटों से हुए रक्त प्रवाह और सदमे से मृत्यु हुई।

57. तेजासिंह ने "एलीबी" की दलील को प्रमाणित करने के लिए बचाव साक्ष्य दी। उपर्युक्त साक्ष्य से आश्वस्त हो विचारण न्यायाधीश ने कहा कि तेजासिंह को झूठा फंसाया गया है, परन्तु उन्होंने ब्राथी के विरूद्ध दी साक्ष्य को स्वीकार कर उसे धारा 302 के अंतर्गत दोषी ठहराया।

58. राज्य ने तेजासिंह की दोषमुक्ति के आदेश के विरूद्ध अपील नहीं की। ब्राथी ने अपनी दोषसिद्धि के विरूद्ध उच्च न्यायालय में अपील की। उच्च न्यायालय ने सुन्दरसिंह वि. पंजाब राज्य (एआईआर 1962 एस.सी.1211) पर आसरा करते हुए संपूर्ण साक्ष्य का पुनर्मूल्यांकन कर कहा कि विचारण न्यायालय का तेजासिंह को निर्दोष ठहराने का आदेश त्रुटिपूर्ण था। उच्च न्यायालय ने कहा :

As is clear from the prosecution case, the appellant along with Tejasing attacked the deceased sharing common intention in a planned manner with deadly weapons like kripans and the injuries given on his person were on the vital. It is thus obvious that from what has been stated above that we are unable to agree with the finding recorded by the learned trial Judge that Tejasing was falsely implicated in the case.

उच्च न्यायालय ने ब्राथी को दोषसिद्धि को धारा 302 के बजाय धारा 302/34 के अंतर्गत बदलकर उसकी अपील खारिज की।

59. ब्राथी ने सुप्रीमकोर्ट में अपील की। सुप्रीमकोर्ट ने अपने निर्णय ***ब्राथी वि. पंजाबराज्य 1991 (1) एससीसी 519) में हर्शदसिंह वि. गुजरात (एआईआर 1977 एस.सी. 710, (1976) 4 एस.सी.सी. 640 सुंदरसिंह वि. पंजाब राज्य, एआईआर 1962 एस.सी. 1211*** की व्यवस्थाओं के अनुरूप दृष्टिकोण अपनाते हुए, कंडिका 10 में सुन्दरसिंह के मामलों में दी व्यवस्था का उल्लेख कर कहा,

Para 10- These observations indicate that the High Court is entitled to evaluate the prosecution case and arrive at its own conclusion. Such assessment is for the limited purpose of determining whether the infirmity which led to the acquittal of one of the accused persons could be availed of by the other accused who had been convicted. On re-examination of the evidence the appellate court is free to reach its own conclusion which may be contrary to the one reached by the trial court while acquitting the co-accused. It can certainly come to an independent finding that evidence against the acquitted co-accused was satisfactory and would not have been discarded. On the basis of such finding the appellate court does not proceed to disturb the order of acquittal which has become final. It can certainly consider the impact of its conclusion on the case of the appellant before it. If on the evidence the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of section 34 is legal. It would be a travesty of justice if no conviction can be founded with the aid of section 34, not withstanding that the acquitted person was in fact one of the participants in the offence.....

सुप्रीमकोर्ट ने प्रार्थी की अपील खारिज की।

(9)

60. अंततः साक्ष्य का क्रम–बंधन सम्पूर्ण सारवान् और सारयुक्त साक्ष्य के महत्वपूर्ण पहलुओं को उजागर करने की प्रक्रिया है जो न्यायाधीश के साक्ष्य मूल्यांकन के कार्य को सहज और समाधानकारक बनाता है। दूसरी ओर साक्ष्य के मूल्यांकन के सर्वमान्य सिद्धान्तों की जानकारी और उन सिद्धान्तों के अनुरूप साक्ष्य को मूल्यांकित करने की विधि में दक्षता साक्ष्य के क्रमबंधन की प्रक्रिया को सक्षम बनाने, व्यवहृत करने में सहायक होगी।

61. इन दोनों प्रक्रियाओं को मूर्तरूप लिखे निर्णय में मिलता है। अतः निर्णय लिखने में निम्नलिखित बातों का निर्वहन होना चाहिए। तथ्यों के निष्कर्षों को विवाद्यक तथ्यों के सभी तत्वों के उत्तरों के रूप में लिखा जावे। इन तीनों बातों का निर्वहन ही सक्षम साक्ष्य–बंधन और समाधानकारक साक्ष्य–मूल्यांकन का प्रमाण बनेगा।

1. निर्णय सहज बोधगम्य भाषा में लिखा जावे।
2. तथ्यों पर निष्कर्षों के आधारों और कारणों को तर्कसंगत रूप में लिखा जावे।
3. तथ्यों के निष्कर्षों को विवाद्यक तथ्यों के सभी तत्वों के उत्तरों के रूप में लिखा जावे।

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EXAMINATION OF ACCUSED UNDER SECTION 313 CR.P.C. - OBJECT AND PROCEDURE

A.K. SAXENA
Director

OBJECT

The provision of examination of accused under Section 313 Cr.P.C. is based on the principle involved in the maxim **"Audi Alteram Partem".** It expresses an elementary rule of fairness that no person should be condemned unheard. This section is meant to enable the accused to explain the circumstances appearing in the evidence against him. The provision of this section does not infringe the Article 20 (3) of the Constitution of India because the section does not convert the accused into a witness. The provision is mainly intended to benefit the accused. The accused may place some evidence or may explain some circumstances in support of his defence at the time of his examination. It is an important provision which cannot be ignored by the Courts. Even the conviction can be found upon confession/admissions of guilt made by the accused at the stage of making statements under Section 313 Cr.P.C. This indicates the importance of the provision.

MANDATORY PROVISIONS

Section 313 (1) (b) Cr.P.C. provides :

"In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court.

(a) xxxxxxx

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under Clause (b)".

In plain words it can be said that in cases other than the summons-case, if the Court has dispensed with the personal attendance of the accused, the Court cannot dispense with the examination of accused under Clause (b). The provisions are mandatory irrespective of how weak or scanty the prosecution evidence was in that respect. The relevant principle has been laid down in a case of ***State of Maharashtra Vs. Sukhdev Singh Alias Sukha and others, (1992) 3 SCC 700*** and it has been held in this case as follows :

"Section 313 embodies the fundamental principle of fairness based on the maxim **audi alteram partem.** The purpose of the examination of the accused under section 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The stage of examination of the accused under clause (b) of sub-section (1) of Section 313 is reached only after the witnesses for the prosecution have been examined and before the accused

is called on to enter upon his defence. The trial Judge is not expected before he examines the accused under section 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so we would be to pre-judge the evidence without hearing the prosecution under section 314 of the Code. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the Court finds that no incriminating material has surfaced that the accused may not be examined under section 313 of the Code. If there is material against the accused he must be examined."

PROCEDURE

The questions for examination of accused should be prepared carefully. The Judge or Magistrate should have the provisions of rules 161 to 168 of Rules & Orders (Criminal) in his mind before preparing the questions on the basis of evidence produced by the prosecution. Each and every accused should be examined separately and the statement shall be signed by the accused.

The examination of accused is not mere idle formality and therefore, the questions which may be put to accused should not be long, complicated or confusing and he should be examined in regard to all incriminating circumstances brought out against him in the prosecution evidence. Each question must be relating to individual circumstances. The accused must not be cross-examined during his examination and before recording his statement, no oath should be administered to him. The answers given by one accused during his examination cannot be used against his co-accused.

If the charge has been amended or new charge has been framed and no further prosecution evidence was adduced after that, then further examination of accused is not required but when after examining the accused if a witness is called and examined or re-examined, then it is the duty of the Court to examine the accused, further.

From the above discussion it is clear that the examination of accused under Section 313 is not mere formality. Hon'ble the High Court of Madhya Pradesh has held in a case ***Raju alias Rajendra Prasad Vs. State of M.P., 2002 (3) MPLJ 277*** **that mere giving the name and number of documents, is not sufficient in accused statement because on the basis of which accused would not be able to understand the contents and its effect and it certainly causes prejudice to him.** The citations ***AIR 1984 SC 1622 (Sharad Birdhichand Sarda Vs. State of Maharashtra). AIR 1978 SC 315 (State of Himachal Pradesh Vs. Wazir Chand***

and others). AIR 1976 SC 2140 (Harnam Singh Vs. State (Delhi Administration), AIR 1992 SC 2100 (State of Maharashtra Vs. Sukhdeo Singh and others) were also relied on in this case.

Sometimes a question arises before the Courts that the accused of a case other than a summons case who is exempted from personal appearance is not present or is unable to remain present in the Court, how can he be examined under Section 313. This important question with some examples of exigencies has been dealt with by Hon'ble the Supreme Court in a case ***Basavaraj R. Patil and others Vs. State of Karnataka and others, AIR 2000 SC 3214.*** I must reproduce the para 21 to 27 of this judgment to show how can a Court dealt with the situation when such type of exceptional exigencies come before the Court.

"21. But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases, the accused must answer, by personally remaining present in Court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the Court not alleviate the difficulties. If the Court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in Court. If there are other accused in the same case, and the Court has already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the Court personally and answer the Court questions? Why should a criminal court be rendered helpless in such a situation?

22. The one category of offences which in specifically exempted from the rigour of section 313 (1) (b) of the Code is "Summons cases". It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a "summons case". Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, cannot the Court extend a helping hand to an accused who is placed in a predicament deserving such a help?

23. Section 243 (1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in

written statements (Section 233 (2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

24. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in clause (b) to section 313 (1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfied the Court that he is unable to reach the venue of the Court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How this could be achieved?

25. If the accused (who is already exempted from personally appearing in the Court) makes an application to the Court praying that he may be allowed to answer the questions without making his physical presence in Court on account of justifying exigency the Court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters : (a) A naration of facts to satisfy the Court of his real difficulties to be physically present in Court for giving such answers. (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning. (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

26. If the Court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the Court to supply the questionnaire to his advocate (containing the questions which the Court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precatuion the Court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for answers). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the Court, he shall forfeit his right to seek personal exemption from Court during such questioning.

27. In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code."

We should always have in our mind that the provision under Section 313 (1) (b) is mandatory and that has to be complied with in each case other than a summons case but mode of recording of the answers of the accused whose personal attendance has been dispensed with, may vary according to exceptional exigencies but if no exceptional exigency exists at the stage of examination of accused, then the accused must remain present in the Court to answer the questions put to him. It is the duty of the Court to find out that any exceptional exigency exists or not?

EXAMINATION OF DEAF & DUMB ACCUSED :

At times a question arises that how can a deaf and dumb accused be examined under section 313 of the Code? We have to examine this question on the basis of various aspects. the provisions of Cr.P.C. are silent regarding deaf and dumb persons. The principles laid down in case of **In re: Beda, AIR 1970 Orissa 3** are relevant in respect of deaf and dumb accused persons. It has been laid down in this case that when it is alleged in any criminal proceeding that an accused is deaf and dumb, the Court may proceed with the enquiry or trial, but if should first enquire into the antecedents of the accused and should also make an endeavour to find out as to how his friends and close relatives are accustomed to communicate with him in ordinary affairs and record its own conclusions, if necessary, by taking evidence.

The proceedings of enquiry or trial must show that the Magistrate had tried to see whether it was possible to communicate with the accused. Even the services of experts may also be taken in this respect. It is necessary to conduct a preliminary enquiry to ascertain whether the accused is really deaf and dumb. We have to adopt some means to communicate with the deaf and dumb accused. Although it is a difficult job but one has to go with it.

We can also take guidance from the above case laws where a deaf and dumb accused is able to proceed the proceedings then he can be examined with the aid of his close relatives and friends or even experts. If a deaf and dumb accused is educated person and is able to note down the answers on questionnaire sheet, then he can himself write the answers of the questions put to him under Section 313 Cr.P.C. The examination of deaf and dumb accused is an exceptional exigency and a Judge or Magistrate can find out the means of his examination on the basis of guidelines given in the above case laws.

Thus, we come to the conclusion that the provisions under Section 313 (1) (b) Cr.P.C. are mandatory for the cases other than summons case and recording of examination of accused is not mere formality and all precautions must be taken into account in this respect. The deaf and dumb accused must also be examined under section 313 (1) (b) as per exigency occurred in each and every case. In summons-cases, if the accused has been dispensed with his personal attendance, then the trial court may also dispense with the examination of him but, in other cases the trial Court has to examine the accused as per provisions of this section and according to the prevailing exigencies.

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COMPUTATION OF COURT FEES IN DECLARATORY SUITS WITH OR WITHOUT CONSEQUENTIAL RELIEF

By VED PRAKASH
Addl. Director

Section 34 of the Specific Relief Act, 1963 Provides that any person may claim declaratory relief in respect of one's right or character with or without further relief depending upon the facts and circumstances of the case. Such further relief may be a consequential relief or an independent relief. A suit for relief of declaration simplicitor or in case of a declaratory relief with further relief which is not a consequential relief requires to be valued differently then a suit in which further relief in the form of consequential relief has been prayed. Article 17 (iii) of Schedule.II of the court Fees Act (hereinafter referred to as 'the Act') and section 7 (iv) (c) respectively deal with such suits. In the former case for declaratory relief plaintiff is required to pay a fixed court Fees under Art. 17 (iii) of Schedule II of 'the Act' but in the later case the court fees has to be payed on the value of the relief u/s 7 (iv) (c) of 'the Act'. In this respect provisions of section 8 of the Suits Valuation Act, 1887 also come into play which provide that in suits falling Under Section 7 (iv) (c) (as well as some other provisions of 'the Act'). the valuation for the purpose of computation of court Fees shall be the valuation for the purpose of pecuniary jurisdiction of the Court.

EFFECT OF SECTION 8 OF SUITS VALUATION ACT.

The Apex Court while examining the effect of section 8 of the Suits Valuation Act in relation to the provisions of Section 7 (iv) of 'the Act' has laid down in ***Sathappa Chattier Vs. Ramnath Chattier, AIR 1958 SC 245*** that valuation for the purpose of jurisdiction and court fee in cases falling Under Section 7 (iv) of 'the Act' shall be the same and valuation for the purpose of jurisdiction is dependent upon the valuation for computation of court Fees and not vice-versa.

In the aforesaid legal background it becomes amply clear that in cases falling under section 7 (iv) (c) of 'the Act' the question of payment of court fees in intimately and inextricably connected with the question of pencuniary jurisdiction of the court. Therefore, question of determination of court fees all the more becomes important.

In the above context the question which arises for consideration is as to what should be the basis of determination or computation of Court Fees? In this respect two basic propositions were laid down by the Apex Court in **Sathappa Chattier's case (Supra.)**

Firstly : the court fees payable on a plaint has to be decided in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit.

Secondly : all the material allegations contained in the plaint should be construed and taken as a whole.

Two more propostions in this respect were further laid down by the Apex Court in ***Samsher Singh Vs. Rajendra Prasad, AIR 1973 SC 2384.***

Firstly : the question whether the plaintiff's suit will have to fail for failure to ask for consequential relief is of no concern to the court at that stage.

Secondly : The court should look into the allegations in the plaint to see what is the substantative relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for.

Thus keeping in view the aforesaid parameters of law the court is required to determine what is the actual relief claimed by the plaintiff and whether there is a consequential relief in form of further relief or otherwise hidden behind the apparent relief claimed in the matter.

"CONSEQUENTIAL RELIEF:"

The expression 'consequential relief' has not been defined in 'the Act', therefore, it should be given its ordinary dictionary meaning. According to Oxford Dictionary the word 'consequential' means following a result or inference. Word 'consequential' need not be confused with the word 'connected' which simply means joined in sequence. A connected relief may or may not be a consequential relief, likewise further relief as used in Section 34 of Specific Relief Act may or may not be a consequential relief.

Relying on the Apex Court's decision in **Sharmsher Singh (Supra.)** it was laid down by our own High Court in the case of ***Sabina Vs. Abdul Basit 1997 (i) MPJR. 374*** that 'consequential relief" means a relief which follows the relief of declaration and which cannot be claimed independent of the declaratory relief. Therefore, it can safely be said that a relief is consequential if it cannot be granted without the declaration; and whenever this issue comes before the court it ought to be answered in the light of the following two questions :-

(i) Does the second relief follow as a consequence of declaratory relief?

(ii) Supposing the declaratory relief is not granted, does it follow that the plaintiff cannot obtain the second relief?

In view of the above, a relief which can be claimed independent of declaration cannot be categorised as 'consequential relief'. The legal position may further be understood in the light of some illustrative cases.

In ***Sabina Vs. Md. Abdul Basit (Supra)*** the plaintiff sued for declaration of title in respect of immovable property which was in her possession and further for the relief of perpetual injunction for restraining defendent from interfering in her possession. The relief of injunction was not found to be a consequential relief because plaintiff could have claimed injunction simplicitor on the strength of possession without asking for the relief of declaration.

In ***Ramchabila Vs. Satyanarayan, 1935 ALJ 1319*** Plaintiff prayed for following two reliefs, claiming them to be independent:

(a) A declaration that the plaintiff had exclusive right to sit at Dadri Mela Ghat, to have 'sankalp' done and to take 'dan dakshna' as his right.

(b) A perpectual injunction restraining the defendants from sitting at the ghats and interfering with the 'plaintiff's exclusive right of sitting at same ghats.

However, it was held that the relief (b) which was a relief of injunction was a

consequential relief within the meaning of Section 7 (iv) (c) of 'the Act', because it could not had been allowed without the relief of declaration.

While dealing with the question of the consequential relief, it has further to be kept in mind that, if declaratory relief alone has been prayed for, the court cannot superadd a consequential relief which it thinks the plaintiff ought to have prayed for and treat it as a consequential relief. (see : ***Bishan Sarup Vs. Musa Mal, AIR 1935 ALI 817 (FB).*** Likewise, if only a substantive relief is prayed for, it is not upon to a court to add or read a declaratory relief also into it and treat it as a declaratory relief with a consequential relief. (See. T***he vishnu Pratap Sugar Works (P) Ltd. Vs. Chief Inspector of Stamps U.P., A.I.R. 1968 SC. 102.***)

In **Vishnu Pratap Sugar Works (P) Ltd. (Supra).** Plaintiff Challenged by way of an injunction suit the imposition of cess/tax on the ground that the statute under which the cess/tax were sought to be realised were invalied and void. No declaratory relief was sought. It was argued on behalf of the State that in substance it was a case of declaratory relief with an injunction as consequential relief. Rejecting this plea, the Apex Court held that the suit was for an independent relief of injunction and the same was not a consequential relief.

The mere fact that the relief prayed has been expressed in a declaratory form does not necessarily imply that the suit is for a mere declaration and nothing. In **Shamsher Singh (Supra.)** the suit was by a Hindu son against his father and the mortgagee decree holder for a declaration that the mortgage executed by the father in respect of the Joint Family property was null and void for want of legal necessity and consideration. The plaintiffs sued for a declaration that the decree obtained by the defendants against their father was not binding on them. It was held by the Apex Court that the plaint though couched in a declaratory form, the plaintiffs were really asking either for setting aside the decree or for consequential relief of injunction restraining the decree holder from executing the decree, and, therefore, the suit was covered by Section 7 (iv) (c) of 'the Act'.

VALUATION OF THE RELIEF

In **Sathappa Chattiar (Supra.)** the Apex court after considering the scheme of 'the Act' regarding computation of Court Fees under Section 7 (iv) enunciated that in respect of suits falling under section 7 (iv) a departure has been made and liberty has been given to plaintiff to value his claim for the purpose of the relief claimed. while the plaintiff is at liberty to value the relief claimed, he cannot be allowed to put an arbitrary value and if he does so and the Court considers that it is too low or unreasonable and that it bears no relation to the right litigated, the court may require the plaintiff to correct the valuation.

Elaborating this point the Apex Court further laid down in ***Smt. Taradvi Vs. Thakur Radha Krishna Mahanty (AIR 1987 SC 2085)*** that no doubt ordinarily valuation put by the plaintiff under Section 7 (iv) (c) of 'the Act' has to be accepted, but in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary and unreasonable and plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same.

REAL MONEY VALUE TEST :

No doubt the plaintiff has a discretion to put his own valuation for the relief sought and he is not required to value the thing affected, and again there may be cases where the relief claimed may be incapable of valuation having no objective money value, but where property involved has real money value, then that should be the valuation of the relief sought. The aforesaid proposition of the law was clearly laid down in ***Badrilal Bholaram Vs. State of M.P., 1963 MPLJ 717 (DB).*** It was further held in this case that where the relief sought itself has a real money value then any other value ascribed to it will be arbitrary and unreasonable. Recently in ***Subash Chandra Jain Vs. the Chairman, M.P.E.B., Jabalpur 2001 (1) MPJR 22.*** a Full Bench of our own High Court approved the aforesaid legal proposition of law. This was a case for the relief of injunction against disconnection of the power supply in respect of additional bills amounting to Rs. 2,14,747/- The plaintiff valued the suit for the relief of injunction for Rs. 600/- and paid Court fees of Rs. 60/- only. It was held that where plaintiff by mere astuteness in drafting attempts to undervalue the reliefs then the court has to intervene and while doing so concept of real money value form intergral part of court inquiry. The plaintiff was held liable to pay Court fee advalorem on the basis of the demand bill. Earlier pronouncement made in the case of ***Jagdish Prasad Vs. M.P.E.B. 1987 MPLJ 452*** (contra view) was also expressly overruled.

The aforesaid proposition of law is in consonance with the view taken by the Apex Court in ***M/s.Commercial Aviation and Travel Company Vs. Vimal Pannalal, AIR 1988 SC 1636*** to the effect that where there is an objective standard of valuation to put a valuation on the relief ignoring such an objective standard, might be demonstratively an unreasonable valuation and the Court would be entitled to interfere with the matter.

'INJUNCTION' SUBSTANTIVE RELIEF :

If the relief of injunction is a consequential relief then it has to be valued under section 7 (iv) (c), of 'The Act', but on the other hand if the relief of injunction is not consequential but independent one then no doubt in respect of declaratory relief a fixed court fees may be paid under Article 17 (iii) Schedule II of 'the Act' but the independent or substantive relief of injunction is required to be valued under section 7 (iv) (d) of 'the Act' for which same legal parameters are applicable which are applicable in case of section 7 (iv) (c) of 'the Act'. (See. ***Mehtab Singh Vs. Manju, 1997 (1) MPJR 252***).

'DECLARATION AND POSSESSION'

In a suit for declaration of title and recovery of possession of immovable property, the relief of possession may amount to a consequential relief in some cases or may not amount in some other cases.

The principle governing such cases is that where right to possession depends upon the relief of declaration then relief as to declaration will be an essential/main part of the relief and the relief of possession a consequential relief. But where the relief of declaration is only illusary or formal or sometimes ancillary to the relief of

possession then the suit should be treated principally and basically for the relief of possession. In ***Purushottam Das Vs. Ulphatrai, AIR 1954 M.B. 17 (DB),*** the plaintiff sought declaration that an alienation of certain joint family property made by his uncle was not binding on him. Relief of possession was also sought. Relying on the privy council pronouncement in ***Bijoy Gopal Vs. Smt. Krishna Devi, 34 Cal 329 (D),*** it was held that his suit was not one for cancellation of the document of sale, as he was not a party to the sale deed. As the plaintiff was not bound to have the sale deed cancelled or declared inoperative before claiming possession of the property, therefore, the suit was basically for relief of possession and was accordingly liable to be valued for the purpose of court fees.

SUIT FOR AVOIDING EFFECT OF DECREE/AGREEMENT/ DOCUMENT/ LIABILITY.

The concept of real money value test is also applicable where a person, who is bound by a decree agreement, instrument or liability wants to avoid its effect. The legal position on this point was examined in detail by a Full Bench of our own High Court in ***Santosh Chandra and other Vs. Gyansunder Bai and other 1970 JLJ 290 (FB)*** and it was laid down that where a plaintiff is not a party to such a decree, agreement, instrument or liability and he cannot be deemed to be a representative-in-interest of the person who is bound by the decree, agreement, instrument or liability, he can sue for a declaration simplicitor, provided he is also in possession of the property. The matter may be different if he is not in possession of the property. In that event the proviso to section 42 of the Specific Relief Act (old, new Section 34) might be a bar to the tenability of a suit framed for the relief of declaration simpliciter. But that would be a different aspect. All the same if the plaintiff is not bound by that decree or agreement or liability, and if he is not required to have it set aside, he can claim to pay Court Fees under any of the subclauses of Article 17 Schedule II of 'the Act'.

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POISONING IN INDIA

BY DR. M.P. GOUTAM
Joint Director
F.S.L. Sagar

In India both human poisoning and cattle poisoning are prevalent, and it is a sad fact that cases of poisoning of all types are increasing day by day.

HUMAN POISONING

This may be suicidal, homicidal, stupefying or accidental. Because of the ease with which poisons are available and the carelessness with which they are stored, all types of cases of poisoning are comparatively more common in India than in advanced countries.

SUICIDAL

The poisons used for suicidal purposes are : potassium cyanide, hydrocyanic acid, opium, barbiturates, organo-phosphorus compounds, oxalic acid, oleander, and

arsenic, according to availability and use in the particular place. Suicide by coal gas poisoning which is common in advanced countries is not common here.

HOMICIDAL

The poisons used for homicidal purposes are : arsenic, antimony aconite, organophosphorus compounds, oleander, madar, strychnine; powdered glass, rarely insulin, and very rarely cultures of disease germs. Opium is some-times used to kill children.

STUPEFYING

The poisons used for stupefying purposes are: dhatura, bellandonna, hyoscyamus, cannabis indict, and cigarettes containing arsenic. In advanced countries and occasionally in India, chloral hydrate mixed with drink is used for stupefication.

ACCIDENTAL

Accidental poisoning commonly takes place as a result of the carelessness with which the poisonous and the non-poisonous materials are stored together. It may also occur from the remedies used by the quacks, who claim to cure all diseases from common cold to cancer. The injudicious administration of love philters may be responsible for some cases. On occasions, bites by poisonous animals may be the sole cause of it. Of late, a number of cases of accidental poisoning have been reported from the greater use of chemicals in industry and for household purposes.

CATTLE POISONING

This is either accidental or is the action of an enemy desiring to take revenge. Cattle poisoning is generally resorted to by chamars for the sake of hides. Rarely, cattle are destroyed by owners when they are useless. Accidental poisoning occurs when cattle happen to eat material containing poisonous substances, such as madar, kadvi juar or linseed. The serum of madar contains a crystalline substance known as gigantin which is a very virulent poison. Kadvi juar contains poisonous glycocide. The poisons used to destroy cattle are-abrus precatorius, arsenic, yellow oleander or parathion. Sometimes, aconite, madar, nux vomica seeds and snake venom are also used. White arsenic is principally used in our country.

CLASSIFICATION OF POISONS

No classification of poisons is entirely satisfactory, a many poisons fall into more than one group. However the classification given below, according to the mode of action of poisons, the poisons are classified in three main group : viz.,

(1) Corrosives

(2) Irritants, and

(3) Neurotics.

CORROSIVES

A corrosive poison is simply a highly active irritant and not only produces inflammation but also actual ulceration of the tissues. This group consists of strong acid and strong alkalies. These include mineral acids, such as sulphuric acid, nitric

acid, hydrochloric acid; organic acids, such as oxalic acid, carbolic acid; vegetable acid & for example, hydrocyanic acid; and concentrate alkalies, such as caustic soda, caustic potash, and carbonates of ammonium, sodium. and potassium.

IRRITANTS

Irritant poisons produce symptoms of pain in the abdomen, vomiting and purging. The postmortem appearances are usually evident to the naked eye and show redness or ulceration of the gastrointestinal tract. This group consists of inorganic, organic, and mechanical substance. Corrosives in dilute solutions act as irritants.

INORGANIC :

The inorganic subgroup consists of nonmetallic and metallic poisons. The nonmetallic poisons include phosphorus, chlorine, bromine, iodine, and boron. The metallic poisons include arsenic, antimony, mercury, copper, lead, thallium, zinc, bismuth, iron, tin, and silver.

ORGANIC :

The organic subgroup consists of vegetable and animal poisons. The vegetable poisons include-castor oil seeds, croton oil, abrus precatorius, colocynth, ergot, marking nut, madar, and aloes. The animal poisons include cantharides, snakes, scorpions, spiders, and poisonous insects.

MECHANICAL :

The mechanical subgroup includes powdered glass, chopped hair, dried sponge, and diamond dust.

NEUROTICS

Neurotic poisons act chiefly on the nervous system. though some neurotics have a local irritant action. They act after absorption, and even though greatly diluted with water still exert their poisonous effects. All alkaloidal poisons fall into this group. The chief symptoms in general are usually headache, drowsiness, giddiness, delirium, stupor, coma, and sometimes convulsions or paralysis, though individual poisons may have characteristic effects. Postmortem examination usually shows no naked eye effects on the organs, and the cause of poisoning has to be inferred from the history and symptoms or from the result of analysis of the organs. This group consists of poisons which have specific action on the cerebrum, spinal cord, and peripheral nerves, and also on heart and lungs.

CEREBRAL :

The poisons acting on the cerebrum may have a somniferous, inebriant or deliriant effect. The somniferous poisons include opium and its alkaloids; the inebriant ones include alcohol, anaesthetics (ether, chloroform), sedatives and hypnotics (chloral hydrate, barbiturates, fuels (petroleum, kerosene, naphtha), and insecticides, (organophosphorus compounds, chloro-compounds, and coal-tar insecticide, naphthalene); while the deliriant ones include dhatura, belladonna, hyoscyamus, cannabis indica, and cocaine.

SPINAL :

The poisons acting on the spinal cord include nux vomica and its alkaloids, and gelsemium.

PERIPHERAL :

The poisons acting on the peripheral nerves include conium, and curare.

CARDIAC :

The poisons acting on the heart include aconite, digitalis, oleander and tobacco.

ASPHYXIANTS :

The poisons acting on lungs include irrespirable gases, such as coal gas, carbon monoxide, sewer gas, and war gases.

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THE FAMILY COURTS

K.K. BHARADWAJ
Presiding Judge
Family Court, Jabalpur

Just a few months before in the month of May-June 2002 seven Family Courts have started functioning in the State of Madhya Pradesh in the Municipal limits of Jabalpur, Bhopal, Sagar, Indore, Ujjain, Gwalior, Rewa. This article is an attempt to give an introduction of the aims and objects of establishing Family Courts, the jurisdiction of the Family Court, and the role to be played by the Family Courts Judges.

AIMS AND OBJECTS OF THE FAMILY COURTS

The preamble to the Family Court Act 1984 is significant to understand the aims and object behind the establishment of Family Courts, which I quote below :

> "An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith."

The preamble, thus, suggests that the Family Courts should (i) promote conciliation between the spouse and (ii) endeavour settlement of disputes between spouse and this should be done expeditiously. The preamble also reflects that this legislation is made in public interest i.e. to protect and preserve the institution of marriage and to promote the welfare of children. Every spouse and their children are the constituents of the society and the growth of a healthy society depends on the harmonious relationship of the family members. The famous British author A.J. Cronin said "Through centuries the family has taken the foremost place not only in safeguarding of morality, but in the evolution of human culture. Whenever the family flourishes in a state of vigour and unity, there will be found a strong and sound society.

JURISDICTION OF FAMILY COURTS

Explanation to Section 7 (1) of the Family Courts Act, 1984 provides that the Family Courts shall have jurisdiction in respect of suits or proceedings between parties to the marriage (i) for a decree of nullity of marriage (ii) restitution of conjugal

rights (iii) judicial separation (iv) validity of marriage (v) matrimonial status of any person (vi) disputes regarding properties of either of the parties or joint property (vii) for injunction arising out of marital relations (viii) legitimacy of any person (ix) for maintenance (x) guardianship or custody of, or access to, any minor.

In view of the provisions contained in section 8 the Family Court has exclusive jurisdiction in respect of the matters shown in section 7 (1) explanation (a) to (g) and proceedings under chapter IX of the Criminal Procedure Code, which deals with maintenance proceedings.

After the establishment of the Family Courts all the suits of the nature shown in explanation to section 7 (1) and all the proceedings under chapter IX of the Code of Criminal Procedure stood transferred to Family Court of the places concerned. This includes all the pending executions. Now the civil court and magistrates have ceased to exercise jurisdictions in respect of these suits and proceedings.

The Family Courts do not have jurisdiction in respect of proceedings under the Muslim Woman (Protection of rights on divorce) Act, 1986 because the legislature has not conferred jurisdiction upon Family Court under sub-section (2) of section 7 of the Family Courts Act. Hence the jurisdiction of the Judicial Magistrate First Class continues in respect of the proceeding under the Muslim Woman (Protection of rights on divorce) Act, 1986. ***Shakinabai Vs. Fakruddin, II (1999) DMC 576 (MP)*** and ***Karim Abdul Rahman Shaikh Vs. Shehnaz Karim Shaikh, II (2000) DMC 634 (FB) (Bom).***

THE JUDGE OF THE FAMILY COURT

Family Disputes arise between spouses mostly due to lack of understanding, financial constrainsts, dubious characters, cruel natures, egoistic temperaments and such other factors. If a mediator tactfully and convincingly deals with the problem the parties may reconcile and forget the disputes by adjusting themselves. This endeavour is required to be made by the Judge of the Family Court assuming himself the role of the mediator and well-wisher than as a Judge of a Court. Viewed with this angle, the proceedings in the Family Courts are of informal nature. The Judge of the Family Court has to assist and persuade the parties in arriving at an amicable settlement as a person interested in the welfare of the parties (***Mohd. Sharif Vs. Nasrini, A.I.R. 1996 Rajsthan 23*** and ***Dr. Sini Vs. Suresh Jyoti A.I.R. 1996 Keral 160***). At the same tine the Family Court is not expected to act in a biased manner. (***Anita Laxmi N. Singh Vs. Laxmi Narayan Singh, A.I.R. 1992 S.C. 1148***).

Section 4 sub-section (2) of the Family Courts Act lays down that the Judge of the Family Court will be designated "Principal Judge" and any other Judge/Judges of additional Family Courts will be designated as "Additional Principal Judge". The State of M.P. and the High Court of M.P. has, however, posted District Judges with Super Time Scale to be the "Presiding Officer" of the Family Courts, (This needs correction in keeping with the legal position mentioned above).

According to section 4 sub-section (5) of the Family Courts Act the age of retirement of Family Court Judge is 62 years. There is no provision of revision or appeal against the interlocutory orders of the Family Courts and the appeal against the

final orders are to be heard by two Judges of the High Court. Thus, it appears that the Family Court Judge occupies a place equivalent to the member of a Tribunal.

The legislative intent in posting the senior District Judges to preside over the Family Court appears to be that the Judge should have enough experience in settling disputes by conciliation and counselling and this should be reflected in each stage of proceedings, orders and judgments of the Family Courts. He should have an ideal family background, wordily wisdom and practical approach to the problems. He should have the quality of a well-wisher and a Judge blended in one. While assisting and persuading the spouse for reconciliation and settlement of dispute the Family Court Judge should not be sensitive about his position as a Judge. He should keep in mind that his efforts in the above direction may sometime present unpleasant situation or a bitter taste due to unprecedented behaviour of either of the parties. On such occasions he should control himself. He should not loose his temper. He should keep in mind that the spouse have reposed confidence in him by exposing the very personal problems of their life, under the impression and belief of having an informal and confidential hearing by a well-wisher.

In conclusion, the Family Court Judge should endeavour to promote the aims and object of the Family Courts Act, 1984.

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ELEVATION OF HON'BLE SHRI JUSTICE AKHIL KUMAR SHRIVASTAVA AS ADDITIONAL JUDGE OF HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Akhil Kumar Shrivastava has been appointed as Additional Judge of High Court of Madhya Pradesh and swearing-in-ceremony was held on September 2, 2002. Born on January 31, 1952 at Gwalior. Joined Bar in July, 1976 at Jabalpur and shifted to Gwalior in January 1977, where he started practising under the guidance of his father Shri Jagannath Prasad Shrivastava. Practised in constitutional, civil, revenue and labour matters. His Lordship was accorded ovation in the Conference Hall, South Block of the High Court, Jabalpur.

We on behalf of JOTI Journal welcome His Lordship and wish a successful and happy tenure as Judge of the High Court.

PART - II

NOTES ON IMPORTANT JUDGMENTS

85. EVIDENCE ACT- Section 114, illustration (e)
Presumption regarding official acts- Applies to acts of Police Officers also:-
Jitendra Vijay Narain Raghuvanshi Vs. State of M.P., 2002 (2) MPLJ 157

The Presumption under section 114 illustration (e) of the Evidence Act that all official acts have been done rightly and regularly attaches to the acts of the Police Officers also as to other officers. It is not proper approach to proceed with doubt or disbelief unless there is something to excite suspicion. It is true that the prosecution is required to prove its case beyond reasonable doubt but it is not the law that it has to rule out every fantastic possibility or lurking suspicion. It was observed long back that the benefit of doubt is not like a frail willow bending to every whiff of hesitancy and the defence cannot be permitted to make a mountain out of the mole hill. Perfect proof is seldom to be had in this imperfect world.

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86. HINDU SUCCESSION ACT, 1956, Section 14 (1) and 14 (2) :-
Property acquired by Hindu female 'in lieu of maintenance' is in lieu of preexisting right-would become absolute property u/s 14 (1) of the Act :-
Rameshprasad and others Vs. Smt. Bhagwati Bai 2002 (2) MPLJ 174

Placing reliance on ***V. Tulasamma Vs. Sesha Reddy, AIR 1977 SC 1944*** and other authorities of the Apex Court is was held :

That where the property is acquired by a female Hindu "in lieu of maintenance". It is in lieu of a preexisting right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property. Such an acquisition in lieu of preexisting right of maintenance blossoms into full estate. It would make no difference whether the property was allotted to Hindu widow after her husband's death before 1937 or after her husband's death which took place after the Hindu Women's Right to Property Act, 1937 came into force.

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87. SPECIFIC RELIEF ACT, 1963, Section 16 (c) :
Readiness and willingness- Pleadings need not be in specific words- substantial compliance necessary :-
Hazarilal (deceased) through L. Rs. Ashok Kumar Adalia And others Vs. Munnibai and others, 2002 (2) MPLJ 17

Held :

In ***Syed Dastagir Vs. T.R. Gopalkrishna Setty, AIR 1999 SC 3029*** it has been held that "the language in section 16 (c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for

mechanical production of the exact words of statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded".

Similarly in ***Motilal Jain Vs. Ramdasi Devi, AIR 2000 SC 2408*** the Supreme Court has again observed that an averment of readiness and willingness in the plaint is not a mathematical formula which sould only be in specific words. If the averments in the plaint as a whole clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit. The fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale.

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88. LEASE AND LICENCE- DISTINCTION :-
Recitals In the document not decisive- Real intent of the parties must be seen :-
R. Swaminathan Vs. Rekha Handa 2002 (2) MPLJ 24

NOTE : Paragraphs 7, 8 and 9 of the judgment are reproduced :

7. The leading case on the point is the decision of the Supreme Court by a three-judge Bench in ***Associated Hotel of India vs. R.N. Kapoor, AIR 1959 SC 1962.*** In that case the agreement was described as "deed of licence"- and the parties were described as licensor and licensee. There were recitals to the effect that the licensor granted to the licensee the right to use and occupy the premises. The document used the phraseology appropriate to a licence, Subba Rao, J. observed: "it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties". The following propositions may, therefore, be taken as well-established; (1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties- whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; (4) if under the document a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. After adverting to the terms of the agreement it was observed that the clever phraseology used or the ingenuity of the document-writer hardly conceals the real intent.

8. There have been numerous decisions of the Supreme Court on lease vs. Licence but the principles laid down in the above case are of classic significance and have remained undiluted to this date. The latest decisions are ***Vayallakath Muhammedkutty vs. Illikkal Moosakutty, (1996) 9 SCC 382 and Sultana Begum vs. Prem Chand Jain, AIR 1997 SC 1006.*** The pith and substance must be seen. The right to exclusive possession is the basic feature of the tenancy created by lease. Licensee's possession, on the contrary, is only permissive and "he can be thrown out at any time". It would be enough to refer to one more decision of the Supreme Court in ***Lakhi Ram vs. M/s Vidyut Cable***

and Rubber Industry, 1970 MPLJ 69 (SC) where it has been observed that several landlords attempt to bypass the provisions of the statutes affording protection to the tenants against eviction by entering into contracts which have a superficial appearance of licences. Therefore, it is the duty of the Court to go behind the facade and find out the real nature of the contract.

9. It is thus well settled that if the document creates an interest in the property it must be held to be a lease. Placing a party in "exclusive possession" of the property is indicative of lease. The recitals in the document are not decisive. The Court can always go behind the facade to reach the factum. The veil of documentation is not conclusive or final and can be pierced open or lifted. the real intent must be seen. The contracting out of the Accommodation Control Act or Rent Acts by resorting to camouflage, clever phraseology, ingenuity or dexterity in drafting, "distinctive flavour or deceptive labels", or rhetorical recitations is not permissible.

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89. BENAMI SALE : Sale whether benami or not- General criteria for determination :-

Mahesh Kumar Malaviya and others Vs. Tarabai and others, 2002 (2) M.P.L.J. 35

Held :

Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question no absolute formula or acid test, uniformly applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour, (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale; and (6) the conduct of the parties concerned in dealing with the property after the sale. The above indica are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, vis., the source from which the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

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90. COURT FEES ACT, 1870 : Art. 17 (Sch. II) Suit for declaration that sale deed void- Court Fee- Determination of :-

Laxmikant Dube and others Vs. Smt. Piyaria and others, 2002 (2) MPLJ 44

Held :

The Full Bench of M.P. High Court has held more than 30 years ago in ***Santosh Chandra and others Vs. Smt. Gyansunder Bai, 1970 MPLJ 363*** that if the plaintiff is not bound by the decree, agreement or liability and if he is not required to have it set aside, he can claim to pay Court fee under any of the sub-clauses of Article 17, Schedule II of the Court Fees Act. Therefore, it is settled law that a person who is

not a party to the sale-deed and who is not bound by it need not pay ad-valorem court fee on the basis of the consideration shown in the sale deed. Similarly, a party who alleges that the sale-deed is sham and bogus document need not pay ad-valorem Court fee. He is required to pay ad valorem Court fee only when the sale-deed has been executed by him and he seeks to avoid it on the ground of fraud or misrepresentation practised on him as to the contents of the sale-deed.

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91. WAKF ACT, 1995, SECTION 85
Scheme- Power of Civil Court to decide jurisdictional facts :
Amil Hakimuddin and others Vs. Abbas Hussain and others, 2002 (2) M.P.L.J. 50

NOTE : Paragraphs 6 and 7 of the report reproduced in toto :

6. The Wakf Act, 1995 has come into force from 1-1-1996. Section 112 of this Act repeals the earlier law on the subject. By virtue of section 112 (3) the Wakf (Madhya Pradesh Amendment) Act, 1994 which came into force on 5-1-1995 stands repealed. The relevant provisions of the new Act must be examined. Section 4 provides for appointment of Survey Commissioner of Wakf by the State Government for the purpose of making a survey of wakf existing in the State at the date of the commencement of this Act. The Survey Commissioner is required to make such inquiry as he may consider necessary and submit a report to the State Government in respect of the existing wakfs. As per section 5 the State Government has to forward a copy of this report to the Wakf Board. The Board has to examine this report and publish it in the official gazette as per section 5 (2). This is known as "list of wakfs" defined in section 3 (g). Section 6 is the provision which is heavily relied upon by the petitioners. According to this section if any question arises whether a particular wakf property specified as wakf property in the list of wakfs is wakf property or not, the Wakf Board or the Mutawalli of the Wakf or "any person interested therein" may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matters shall be final : provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of publication of the list of wakfs. There is an Explanation added to section 6 (1) which has a material bearing. It provides that for the purposes of this section and section 7, the expression "any person interested therein", shall, in relation to any property specified as Wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakfs concerned, is interested in such property and "to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under section 4. Sub-section (4) of section 6 provides that the list of Wakfs shall unless it is modified in pursuance of a decision of the Tribunal under sub-section (1), be final and conclusive. Subsection (5) of section 6 further provides that on and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in sub-section (1).

7. Section 40 (1) provides that the Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not, "after such enquiry as it may deem fit". decide the question. As per section 40 (2) the decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final. Under Section 83 (1) the State Government has been empowered to constitute a Tribunal "for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act". As per section 83 (7) the decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court. Section 85 provides that no suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

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92. C.P.C., 1908, SECTION 152 :
Amendment of decree- Decree confirmed In appeal- only appellate Court could correct or amend
Lekhram and others Vs. Phoolchand Bagdi and others, 2002 (2) MPLJ 63

Held :

It is well settled that an act or omission of the Court shall prejudice none and it has a duty to correct its errors so that its record represents a true State of affairs. This is the salutary rule on which section 152, Civil Procedure Code is based. The Court can correct clerical and arithmetical errors in its records even suo motu without the need of any application from either side. There is no limitation for doing so. Such correction can be made at any time. The normal rule is that it is the Court which commits the mistake must correct it.

The clerical or arithmetical errors can be corrected by the Appellate Court deciding the appeal under Order 41, Rule 32, Civil Procedure Code on an application under section 152, Civil Procedure Code or sou motu on the principle of the merger of the decree of the trial Court in the decree of the Appellate Court. It was held by a Division Bench of this Court long back in ***Kanhaiyalal Vs. Prabhakar, 1960 MPLJ Note 214*** that if a decree of confirmation was passed by the Appellate Court after hearing the parties, the decree of the trial Court merges in the decree of the Appellate Court which then becomes the substantive decree and an application for amendment of the decree must be made to the Appellate Court. This decision was followed in ***Mojuddin Vs. Hiralal, 1967 MPLJ Note 38.*** The same view has been taken by the Full Bench of Keral High Court in ***Kannan Vs. Narayani, AIR 1980 Ker. 76*** where it has been held that where there has been an appeal and it is decided after hearing both sides the decree under appeal merges in the decree in appeal and it is only the Appellate Court that could correct or amend the decree under section 152 of the Code.

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93. ARBITRATION AND CONCILIATION ACT, 1996, SECTION 43 (1)
Claim before Arbitrator- Whether within limitation- Has to be decided by the Arbitrator :
National Dairy Development Board, Anand (Gujarat) and another Vs. Suraj Singh s/o Garibelal, 2002 (2) M.P.L.J. 72

Held :

The question whether the claim of the applicant is within limitation or not is to be decided by the arbitrator as per section 43 (1) of the Act. The provisions of the Limitation Act, 1963, by virtue of section 43 (1) of the Act shall apply to arbitrators as it applies to proceedings in Court. It is for the arbitrator to decide whether any claim is within limitation or not as the Court decides in an action brought before it. ***Panchu Gopal Bose Vs. Board of Trustees, Calcutta Port, AIR 1994 SC 1615.***

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94. CONTRACT ACT, 1872, SECTIONS 128 AND 171 :
i) Liability of surety- Co-extensive with that of principal debtor (Section 128)
ii) Banker's General Lien- Bank authorised to appropriate pledged F.D.R's of J.D. against amount due (Sec. 17)
State Bank of India Vs. Goutmi Devi Gupta, 2002 (2) MPLJ 105

Placing reliance on the pronouncement of Supreme Court in ***State Bank of India Vs. M/s Indexport Registered, AIR 1992 SC 1740,*** it was held :

That a surety in the eye of law is a favoured debtor. Under Section 128 of the Contract Act, save as otherwise provided in the contract, the liability of the surety is coextensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate and simultaneous. It is not deferred until the creditor exhausts his remedies against the principal debtor either personally or against the property mortgaged or hypothecated by him. The creditor gets the right to recover the amount straight away from the surety. The right of the creditor to proceed against the surety is not dependent or contingent upon his remedy being exhausted against the borrower. The creditor cannot be asked to pursue his remedies against the principal debtor either personally or against his mortgaged or hypothecated property in the first instance.

Further held :

The Supreme Court in ***Syndicate Bank Vs. Vijay Kumar, AIR 1992 SC 1066*** has laid down the law on "Banker's lien". It has been held after a detailed survey of various authorities on English law on the subject that by mercantile system the Bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is

also applicable to negotiable instruments including FDRs which are remitted to the Bank by the customer for the purpose of collection. There is no gainsaying that such a lien extends to FDRs also which are deposited by the customer. In this case the words used in the letter accompanying the FDRs gave the authority to the Bank to retain the deposits "so long as any amount on any account" is due from the judgment debtor. The Supreme Court held that the recital in the letter shows that a general lien is created in favour of the appellant Bank in respect of those two FDRs. The Bank was given the authority to retain FDRs so long as any amount on any account is due from the judgment-debtor. Thus, the appellant Bank had a right to set-off in respect of these FDRs if there was a liability of the judgment-debtor due to the Bank.

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95. CIVIL PROCEDURE CODE, 1908, SECTION 151
Inherent Powers of the Court- Stay of the Suit under?
Prakash Chand Soni Vs. Anita Jain, 2002 (2) M.P.L.J. 121

It is true that in an appropriate case not covered by section 10, Civil Procedure Code the Court can stay the trial of a suit under section 151, Civil Procedure Code in exercise of its inherent powers ex debio justitiae, but in such a case also there must be substantial identity of the subject matter and field of controversy between the parties in the two suits and the Court must be satisfied that the continuance of the trial of the other suit would be oppressive or vexatious to the defendant and the stay would not cause injustice to the other side. In other words the trial of a previously instituted suit can also in a suitable case be stayed if the matter directly and substantially in issue in the subsequent suit is also the same in the earlier suit if such a course is really in the interest of justice. But the principles on which the question of stay of the suit under Section 151 is to be considered are the same which are applicable to the stay of the trial of the suit under section 10, civil Procedure Code.

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96. CODE OF CRIMINAL PROCEDURE, 1973,-SEC. 374 And 386.
Criminal appeal- disposal after admission -
method-appellate court is required to reappricate evidence
Rama & Ors. Vs. State of Rajasthan.
(Judg. dt. 5.4.2002 passed by the S.C. in Cr. Appeal No. 447/2002)
Reported in (2002) 4 SCC 571.

Held :

It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law.

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97. CRIMINAL TRIAL.

Appreciation of evidence-concept of falsus in uno falsus in omnibus not applicable in cr. cases-embellishments in evidence-effect-court is required to scrutinize the matter more closely and carefully-same principle applicable to a faulty or Tainted investigation :

(ii) Death sentence-murder of 2 sons aged 12 and 7 years by accused father-accused suspecting the character of his wife-imposition of death penalty not approved-principles to be followed :

Dharmendra Singh Vs. State of Gujarat.

(Judg. dt. 17.4.2002 passed by the S.C.in Cr. Appeal. No. 927/2001) Reported in (2002) 4 SCC 679

The chances of making, some embellishment here and there in the statement are not ruled out even in cases of otherwise truthful and reliable witnesses. The concept of falsus in uno and falsus in omnibus has been discarded long ago. Therefore, in such circumstances the court may have to scrutinize the matter a bit more closely and carefully to find out as to how far and to what extent the prosecution story as a whole is demolished or it is rendered unreliable. For this purpose the statement of the witnesses will have to be considered along with other corroborating evidence and independent circumstances so as to come to conclusion that the contradiction in the statement of a witness could be considered as an embellishment by the witness under one or the other belief or notion or it is of a nature that the whole statement of the witness becomes untrustworthy affecting the prosecution case as a whole. The same principle will apply to a faulty or tainted investigation. Other relevant facts and circumstances cannot be totally ignored altogether. While appreciating the matter, one of the relevant considerations would be that chances of false implications are totally eliminated and the prosecution story as a whole rings true and inspires confidence. In such circumstances, despite the contradictions of the defective or tainted investigation, a conviction can safely be recorded.

(ii) Every murder is a heinous crime. Apart from personal implication, it is also a crime against the society but in every case of murder death penality is not to be awarded. Under the present legal position, imprisonment for life is the normal rule for punishing crime of murder and sentence of death, as held in different cases referred to above, would be awarded only in the rarest of rare cases. A number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug trafficking or the like. Chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately as held in several cases, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck.

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98. CONSTITUTION OF INDIA-ART. 141.
Precedent-'declared Law'- what amounts to? : difference between ratio decidendi and obiter dicta-extent of their binding nature-disposal on concession- whether binding?
Director of settlements A.P. & Ors. Vs. M.R. Apparao and another.
(Judg. dt. 20.3.2002 passed by 3 Judges bench of the S.C. in Civil Appeal No. 2517 of 1999)
Reported in (2002) 4 SCC. 638.

Held

Article 141 of the constitution unequivocally Indicates that the law declared by the S.C. shall be binding on all courts within the territory of India. The aforesaid Article empowers the S.C. to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statement of the court on matters other then law like facts may have no binding force as the facts of the two cases may not be similar. But what is binding is the ratio of the decision and not any finding of fact.

(i) It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.

(ii) **An 'obiter dictum'** as distinguished from a **'ratio decidendi'** is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.

(iii) The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see ***Ballabhadas Mathurdas Lakhani V. Municipal Committee, Malkapur AIR 1970 SC 1002 and AIR 1973 SC 794***). When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court.

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99. C.P.C.-O-20,R- 18 AND 0-26, R-13/14.
Partition-valuation of property-effective date-ordinarily it is the date of final decree.

(II) HINDU LAW
Partition of joint family property- mere severance of Status of Joint family does not change character of Joint Family property.

M.L. Subbarya Setty (dead) By L.R's. Vs. M.L. Nagappa Setty (dead) Ry.L.R's & Ors.
(Judg. dt. 23.4.2002 passed by the S.C. in Civil Appeal. No. 2892/2002) reported in (2002) 4 SCC. 743.

Held :

The date of valuation of the properties in a suit of partition has to be the date of the passing of the final decree and not the date of filing of the suit for partition. In a given case, however, there may be exception of this general rule. It is a matter of common knowledge that such suits for partition take considerable time for disposal. There is a big time-lag between the date of filing of the suit and date of the decision thereof. There is also considerable lapse of time between passing of preliminary decree and passing of final decree.

Ordinarily, though it is the date of final decree but in reality the date of valuation which the Commissioner takes into view in the report, that is taken into consideration by the Court. But that would again depend on the facts of each case. in a given case, there may be a gap of years between the date of the report of the Commissioner and the date of the final partition. In the meanwhile, there may have been a sharp increase or decrease in the values of the property or properties. In such event, the Court may have to balance the equities and pass other directions in order to partition the properties between the parties as per their respective shares. The preliminary decree declares the shares of the parties and the properties which are joint and are required to be divided between the co-shares.

(ii) The legal position is well settled that on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition. In ***Bhagwant P. Sulakhe V. Digambar Gopal Sulakhe, AIR 1986 SC 79*** this Court held that the character of any joint family property does not change with the severance of status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-shares.

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100. NEGOTIABLE INSTRUMENTS ACT- SEC- 138
Deposit of cheque amount during pendency of Cr. Complaint will not itself absolve accused of criminal liability- cheques issued on behalf of the company under the sig. of the director- dishonour of-notice to the director inspite of company is sufficient notice.
Rajneesh Agrawal Vs. Amit. J. Bhalla.
(2002) ANJ. SC. 238

Held :

So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. But by no stretch of imagination criminal pro-

ceeding could be quashed on account of deposit of money in the Court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court.

The object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques. It is Amit Bhalla, who had signed the cheques as the Director of M/s Bhalla Techtran Industries Ltd. When the notice was issued to said Shri Amit Bhalla, Director of M/s Bhalla Techtran Industries Ltd., it was incumbent upon Shri Bhalla to see that the payments are made within the stipulated period of 15 days. It is not disputed that Shri Bhalla has not signed the cheques, nor is it disputed that Shri Bhalla was not the Director of the Company. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter.

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101. CRIMINAL PROCEDURE CODE. SCC. 353.
Judgment- need of writing brief but speaking orders impressed
Amina Ahmad Dossa & Ors. Vs. State of Maharashtra.
Judg. dt. 15-1-2001 passed by the S.C. in Cr. Appeal
No. 757 & ors of 2000.
(Reported in AIR 2001 S.C. 656).

Held :

We have noted with concern that the Special Court has unnecessarily spent valuable public time in writing the lengthy judgment for disposing of the claims of the appellants which, we feel, could have been decided by a brief but speaking orders. Brevity of orders on application of mind and not the length of the order is the criterion for adjudicating the rights of the parties which are otherwise subject to the decision of a Civil Court, it would be appreciated that the Designated Courts which are otherwise over-burdened shall refrain themselves from writing, such unnecessary lengthy judgments and pass appropriate brief orders, surely dealing with all points, while adjudicating the claims of all parties. At any rate we do not appreciate such lengthy orders for deciding interlocutory matters.

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102. Cr.P.C. SEC. 439
BAIL- Considerations for grant of bail in heinous offences like murder- liberty of individual not the sole guiding factor-need of society for protection from criminal elements also to be considered.
(II) BAIL-CANCELLATION OF-basic factors to be considered.
Ram Govind Upadhyay Vs. Sudershan singh & Ors.
2002 (2) ANJ (SC) 596

Held :

While liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals, but this

protection can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stand qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs a protection from these elements since the later are having the capability of spreading a reign of terror so as to disrupt the life and the tranquillity of the people in the society. The protection thus to be allowed upon proper circumspection depending upon the fact situation of the matter.

Grant of bail though being a discretionary order but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for Bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always very from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail-more heinous is a crime, the greater is the chance or rejection of the bail though, however, dependent on the factual matrix of the matter.

Apart from the above, certain other points which may be attributed to be relevant considerations may also be noticed at this juncture though, however, the same are only illustrative and nor exhaustive neither there can be any. The considerations being;

(a) While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of event, the accused is entitled to an order of bail.

(II) While it is true that availability of overwhelming circumstances is necessary for an order as regard the cancellation of a bail order, the basic criterion, however, being interference or even an attempt to interfere with the due course of administration of justice and/or any abuse of the indulgence/ privilege granted to the accused.

Undoubtedly, considerations applicable to the grant of bail and considerations

for cancellation of such an order of bail are independent and do not overlap each-other, but in the event of non-consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on to the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago.

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103. I.P.C.- SEC. 279, 337, 338, and 304-A

Rash and negligent driving- death of 4 persons and injury to one-proper sentence?

State of karnataka Vs. Sharanappa Basnagouda,
2002 (2) ANJ (S.C.) 616

Held :

If the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly.

The sentence imposed by the courts should have deterrent effect on potential wrong-doers and it should commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system.

In the facts and circumstances of this case, we are inclined to interfere with the judgment of the learned Single Judge and hold that the respondent is liable to undergo the sentence imposed by the trial Magistrate and affirmed by the appellate court. Consequently we direct that for the offence punishable under Section 304-A, the respondent be taken into custody to undergo a simple imprisonment for six month. As regards offences under Section 279, 337 and 338 I.P.C., no separate sentence has been awarded by the trial magistrate. The direction of the trial Magistrate is maintained.

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104. I.P.C.- SEC. 498-A and 306.

Cruelty in terms of sec. 498-A-explained-charges u/s 306 and 498-A are independent-acquittal in one not ispo-facto acquittal in other;
Girdhar Shankar Tawade Vs. State of Maharashtra,
2002 (2) ANJ (S.C.) 622

The basic purport of the statutory provision is to avoid 'cruelty' which stands defined by attributing a specific statutory meaning attached thereto as noticed hereinbefore. Two specific instance have been taken note of in order to ascribe a meaning to the word 'cruelty' as is expressed by the legislatures : Whereas explanation (a) involves three specific situations viz., (I) to drive the woman to commit suicide or (II) to cause grave injury or (III) danger to life, limb or health, both mental and physical and thus involving a physical torture or atrocity. In explanation (b) there is absence

of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury; whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of section 498-A.

As regards the core issue as to whether charges under Section 306 and 498-A of the Indian Penal Code are independent of each other and acquittal of one does not lead to acquittal on the other as noticed earlier, there appears to be a long catena of cases in affirmation thereto as such further dilation is not necessary, neither we are inclined to do so, but in order to justify a conviction under the later provision there must be available on record some material and cogent evidence.

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105. I.P.C.- SEC. 306

Abetment to commit suicide- instigation-asking the deceased 'to go and die'- that itself without requisite mens-rea does not constitute instigation.

Sanju @ Sanjay Singh Sengar Vs. State of Madhya Pradesh, 2002 (2) ANJ. SC. 634

NOTE :- Para 8,9,10 and 11 reproduced in toto :-

In ***Swamy Parahaladdas Vs. State of M.P. & Anr. 1995 Supp. (3) S.C.C. 438,*** the appellant was charged for an offence under Section 306 I.P.C. on the ground that the appellant during the quarrel is said to have remarked the deceased 'to go and die' This Court was of the view that mere words uttered by the accused to the deceased 'to go and die' were not even prima facie enough to instigate the deceased to commit suicide.

In ***Mahendra Singh Vs. State of M.P., 1995 Supp. (3) S.C.C. 731*** the appellant was charged for an offence under Section 306 I.P.C. basically based upon the dying declaration of the deceased, which reads as under :

> "My mother-in-law and husband and sister-in law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reason and being harassed I want to die by burning."

This Court, considering the definition of 'abetment' under section 107 I.P.C., found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abatement are attracted on the statement of the deceased.

In ***Ramesh Kumar Vs. State of Chhattisgarh, 2001 (9) S.C.C. 618*** this Court while considering the charge framed and the conviction for an offence under Section 306 I.P.C. on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she

had poured kerosene on herself and had set fire. Acquitting the accused this Court said :

"A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

Even if we accept the prosecution story that the appellant did tell the deceased 'to go and die', that itself does not constitute the ingredient of 'instigation'. The word 'instigate' denotes incitement or urging to do some drastic or inadvisable action or to stimulate of incite. Presence of mens-rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens-rea.

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106. PREVENTION OF CORRUPTION ACT, 1988- Sec. 13 (1) (d)- Word 'obtains' (used in sec 13 (1) (d) as against accepts or obtain (used in sec.- 7, 13 (1) (a) and 13 (1) (b)- connotation of- connotes element of effort on the part of the receiver- mere acceptence of money without any other evidence not sufficient for conviction u/s 13 (1) (d).
Subash Parbat Sonvane Vs. State of Gujarat,
2002 (2) ANJ (S.C.) 644

Note :- Para 5,6,7 and 9 reproduced in toto :

5. In our view, mere acceptance of money without there being any other evidence would not be sufficient for convicting the accused under Section 13 (1) (d) (i). Section 13 (1) (d) is as under :

"13. Criminal misconduct by a public servant- A public servant is said to commit the offence of criminal misconduct,

(d) If he,

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage : or

(II) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage : or

(III) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."

6. In Section 7 and 13 (1) (a) and (b) of the Act, the Legislature has specifically used the words 'accepts' or 'obtains'. As against this, there is departure in the language used in clause (1) (d) of section 13 and it has omitted the word 'accepts' and has emphasized the word 'obtains'. Further, the ingredient of sub-clause (i) is that by corrupt or illegal means, a public servant obtains any valu-

able thing or pecuniary advantage : under clause (ii), he obtains such thing by abusing his position as public servant : and sub- clause (iii) contemplates that while holding office as the public servant, he obtains for any person any valuable thing or pecuniary advantage without any public interest. Therefore, for convicting the person under Section 13 (1) (d), there must be evidence on record that accused'obtained' for himself or for any other person any valuable thing or pecuniary advantage by either corrupt or illegal means or by abusing his position as a public servant or he obtained for any person any valuable thing or pecuniary advantage without any public interest.

7. This Court interpreted similar provisions under the prevention of corruption Act, 1947 in ***Ram Krishan & Anr. vs. The State of Delhi, (1956) S.C.R. 183).*** In the said case, the Court dealt with similar clause (d) of sub-section 1 of section 5 and held that there must be proof that the public servant adopted corrupt or illegal means and thereby obtained for himself or for any other person any valuable thing or pecuniary advantage.

The court observed.

> ".... In one sense, this is no doubt true but it does not follow that there is no overlapping of offences. We have primarily to look at the language employed and give effect to it. One Class of cases might arise when corrupt or illegal means are adopted or pursued by the public servant to gain for himself a pecuniary advantage. The word "obtains". on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion: in each case, he obtains a pecuniary advantage by abusing his position as a public servant...."

The Court further observed that.

> ".... It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive of reward for showing favour or disfavour..."

9. Same is the position of statutory presumption under section 20 of the Act and is available for the offence punishable under section 7 or Section 11 or Clause (a) or clause (b) of sub-section (1) of section 13 and not for clause (d) of sub. section (1) of section 13.

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107. Cr.P.C.- SEC. 401,
Revisional Jurisdiction-Scope of.
Jagannath Choudhary & Ors. Vs. Ramayan Singh and Anr,
2002 (2) ANJ (S.C.) 669

Held :

The object of the revisional jurisdiction as envisaged under section 401 was to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction, in

order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness or treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals. (See in this context the decision of this Court in ***Janata Dal Vs. H.S. Chowdhary & Ors., 1992 (4) S.C.C. 305.*** The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. If however, the same has been an appeal, the applicant would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, but in revision the only question is whether the court should interfere in the interests of justice. Where the court concerned does not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction. While it is true and now well-settled in a long catena of cases that exercise of power under section 401 cannot but be ascribed to be discretionary-this discretion, however, as is popularly informed has to be judicious exercise of discretion and not an arbitrary one. Judicial discretion cannot but be a discretion which stands "informed by tradition, methodised by analogy and disciplined by system"- resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law and thus a flagrant miscarriage of justice exercise of revisional jurisdiction under the statute ought not to be called for. It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice.

...It is not an appellate forum wherein scrutiny of evidence is possible; neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its application though in the event of there being a failure of justice there can be said to be no limitation as regards the applicability of the revisional power.

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108. CRIMINAL TRIAL :-

(i) Testimony of Police Officer- Evidentary value- If reliable can form basis for conviction.

(ii) N.D.P.S. ACT : Sections 55 and 57
Sec. 55- Article already sealed- there is no question of sealing it again: Section 57 is directory not mandatory- Mere omission to send written report to superior officer- Not fatal to the case.

(iii) Evidence Act, Section 114 illustration (e) : Official Act performed by Police Officers - Presumption about regularity available u/s 114.

Ladharam Vs. State of M.P.
(Judgment dated 9.8.2002 passed by the High Court of Madhya Pradesh, Jabalpur in Cr. Appeal No. 2654 of 98)

Held :

The testimony of the police officers can form the basis of conviction if it is fully reliable. This Court has held in ***Vinod Kumar Shukla Vs. State of M.P., 1999 Cr.L.J. 4507*** that the principle which is deducible from the decisions of the Supreme Court on the point in issue is that legally conviction can be based on the sole testimony of the police officer who conducted the search and seizure. That cannot be disbelieved on the ground that no independent witness was examined to prove the search or that witness turns hostile in the court. In other words if the evidence of the police officer is reliable, inspires confidence and is of sterling character the same can form the basis for conviction. In case the evidence is not fully reliable or is of doubtful character, it would be difficult to base conviction on his evidence. Much depends upon the intrinsic worth of the evidence of the police officer. The salutary principle that evidence is to be weighed and not counted and the quality of the evidence is more important than the quantity assumes significance. Therefore, if the testimony of the police officer is of unimpeachable character and he is honest and truthful that can be accepted without any corroboration by the independent witness. This will essentially be a question of fact in each case whether the evidence of such an officer passes through this test or not. It is well known that "there is no such thing as a judicial precedent on facts". Recently in ***P.P. Beeran Vs. State of Kerala, AIR 2001 SC 2420*** it has been held by a three-judge Bench of the Supreme Court that the evidence of the Sub-Inspector, even if not corroborated by any other, can be made the sole basis for conviction. Similarly in ***State Govt. of NCT of Delhi Vs. Sunil and another, (2001) 1 SCC 652*** it has been observed that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature.

(ii) Section 55 of the Act provides that an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

It is clear from this section that the officer-in-charge of the police station shall allow the officer who may accompany the article to affix his seal to the samples. But if the article is already sealed, there is no question of sealing it again. Again if such officer takes sample from the commodity which has been deposited, then it shall be sealed with a seal of the officer-in-charge of the police station. Therefore, the argument in the present case that it was necessary for the officer-in-charge to affix his seal on the bottle deposited by the Sub Inspector is not acceptable. There is no such

legal requirement that the sample which is already sealed by the seizing officer and which has been deposited in the Malkhana should again be sealed by the officer-in-charge of the police station.

In ***Gurubax Singh Vs. State of Haryana, AIR 2001 SC 1002*** it has been held by the Supreme Court that the provision of section 57 is directory and violation of this provision would not ipso facto violate the trial or conviction. However, Investigating Officer cannot totally ignore such provision and such failure "will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article." Earlier in ***State of Punjab Vs. Balbir Singh, (1994) 3 SCC 299*** it has been held that the provisions of sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under sections 41 and 44 are by themselves not mandatory. This legal position has been reiterated recently again by a three judge Bench in ***Sajan Abraham Vs. State of Kerala, (2001) 6 SCC 692*** where it has been observed that in construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a **pragmatic approach.** The law under the aforesaid Act being stringent to the persons involved in the filed of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection.

(iii) It has been held by this Court in ***Jitendra Vs. State of M.P., 2002 (2) M.P.L.J. 157*** that the presumption under section 114 illustration (e) of the Evidence Act that all official acts have been done rightly and regularly attaches to the acts of the police officers also as in respect of other officers. It is not proper approach to proceed with doubt or disbelief unless there is something to excite suspicion. The Supreme Court has also recently observed in ***Devender Pal Singh Vs. State of NCT of Delhi and another, (2002) 5 SCC 234*** that there is a statutory presumption under section 114 of the Evidence Act that judicial and official acts have been regularly performed. The accepted meaning of section 114 (e) is that when an official act is proved to have been done, it will be presumed to have been regularly done. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds thereof.

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109. EVIDENCE ACT, SECTION 32 (1)
DYING DECLARATION-Recording of By Police Officer-Cannot Be Discarded As a Rule- But better modes if available be adopted for recording dying declaration :-
(ii) Cr. P.C., Section 354 (3) : Sentencing Policy - Death Sentence :-

Pyare Khan Vs. State of M.P.
(Judgment dated 30-7-2002 passed by the High Court of Madhya Pradesh in Cr. Appeal No. 408/2002)

It is true that where better and more reliable modes of recording dying declaration of an injured person could be taken recourse to and where the time and facilities are available, such better modes should be adopted, but dying declarations recorded by the police Sub-Inspector cannot be as a rule discarded (See ***Ramvati Devi Vs. State of Bihar, AIR 1983 SC 164.***) The practice of investigating officer himself recording a dying declaration during the course investigation cannot be encouraged but it is the obligation of the investigating officer to record the F.I.R., and also the statement under section 161 of the Code of Criminal Procedure.

Justice demands that the Courts should impose punishment befitting the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering imposition of appropriate punishment. Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for a tooth rather having its due impact on the society; while undue harshness is not required but inadequate punishment may lead to sufferance of the community at large. While imposing rarest of the rare punishment i.e. death penalty, the Court must balance mitigating and aggravating circumstances of the crime.

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110. PREVENTION OF FOOD ADULTERATION ACT : Section 16-A, Section 2 (XII-A) and 2 (XIII)
Case not tried summarily but as warrant case- No prejudice caused to the accused- Trial not vitiated.
(ii) Expression 'Primary Food' used In Section 2 (XII-A) of the Act- 'MILK' is not a primary food.
(iii) 'Sale within meaning of Section 2 Clause (XIII) of the Act- Sale of an article to a Food Inspector- Is a sale
Ram Bhajan Vs. State of M.P. & ANR.
(Judgment dated 2-8-2002 passed by the High Court of M.P., Jabalpur in Cr. Revision No. 361/1994.

Held

It is true that the trial court has not passed the specific order for trying the cases as warrant case but on that ground proceedings would not vitiate for non-compliance of provisions of Section 16-A of the Act. The magistrate is also empowered to try the case as a warrant trial and the accused was given full opportunity to contest the case. Non mentioning of reason for not trying the case in a summary way would at the most amount to irregularity and would not vitiate the trial. A trial conducted in violation of Section 16-A of the Act cannot be held to be vitiated without first finding out the prejudice if any caused to the accused.

(ii) The word agriculture does not appear to have been used in Section 2 (xii-a) of the Act in a wider sense. Whether the word should be taken in a narrower or wider sense should be determined keeping in view the various provisions of the

statute in which it is used. Agriculture includes cultivating the ground, preparation of soil, planting of the seeds and harvesting of the crop. Though horticulture has been included in section 2 (xii-a) but dairy farming and live stock breeding has not been included in the definition of primary food. If the Parliament intended to include management of live stock also it would have expressly so added in the definition while adding horticulture. Definition given in section 2 clause (xii-A) of the Act is not an inclusive definition. It means any article or food being a produce of agriculture or horticulture. It is true that the wider definition of agriculture includes horticulture, seed growing, dairy farming and live stock breeding and keeping but had the intention been to use the word agriculture in wider sense the Parliament would not have simply used the word produce of agriculture. Specifically adding the word horticulture suggests that the object was to include only agriculture and horticulture produce and exclude dairy farming and live stock breeding. Definition include horticulture which involves production of food, flowers, vegetables, it may include growing up trees or plants but it is not wide enough to include the management of live stock. It is evident from the definition which is not inclusive that milk is not a primary food. The scope of restricted definition of "Primary Food" cannot be enlarged. It is impressible to defeat legislative intent.

(iii) A sale of an article of food to the Food Inspector for using it for analysis would be a sale and is specifically mentioned in Clause (xiii) of Section 2 as a sale, whether it is voluntary or not and even though there is an element of compulsion in it. [(See ***Mohd. Yamin Vs. The State of U.P. and another, AIR 1973 SC 484*** & ***The Food Inspector Calicut Vs. Cherukattil Gopalan and another (AIR 1971 SC 1725)***].

When the seller readily agrees to allow the Food Inspector to take the sample and accepts the price it will be a case of voluntary sale. If the vendor does not agree to the sample being taken, Food Inspector may take the sample even against his wishes. In that case also it will be a sale under clause (xiii) of Section 2 of the Act. When the Food Inspector tenders the price there is a full compliance with Section 10 (3) of the Act and the transaction would be a sale irrespective of the fact that the seller declined to accept the price. It is not necessary for the prosecution to prove that the accused sold the article to other persons or carried on the business of sale of the article as a regular feature. A vender in an article of food cannot escape the clutches of the law merely on technical grounds.

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111. C.P.C., O.9, R.7:

Scope of- Order to proceed ex-parte- defendant is entitled to appear and participate in subsequent proceedings as of right- application under rule 7 required only when defendant prays for being relegated to original position :

Vijay Kumar Madan And Others Vs. R.N. Gupta Technical Education Society and Others, (Judg. dt. 18.4.02 passed by S.C. in Civil Appeal No. 1890/ 2000) reported in (2002) 5 SCC 30

Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "upon such terms as the court directs as to costs or otherwise". It is settled with the decision of this court in ***Arjun Singh Vs. Mohindra***

Kumar, AIR 1964 SC 993 that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be relegated back and re-open the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the Court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the Court may not in the grab of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of **Arjun Singh** the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.

Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the court may direct may take care of the time of mode of proceedings required to be taken pursuant to the order under Rule 7. For example, keeping in view the conduct of the defendant applicant, the Court may direct that though the ex parte proceedings are being set aside, the defendant must file the written statement within an appointed time or recall for cross-examination at his own cost and expenses the witnesses examined in his absence or that the defendant shall be allowed not more than one opportunity of adducing his evidence and so on. How the terms are to be devised and made a part of the order would depend on the facts and circumstances of a given case. In short, the court cannot exercise its power to put the defendant-applicant on such terms as may have the effect of prejudging the controversy involved in the suit and virtually decreeing the suit though ex parte order has been set aside or put the parties on such terms as may be too onerous.

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112. RENT CONTROL AND EVICTION :

'Rent' Meaning of :

Abdul Kader Vs. G.D. Govindaraj (Dead) By L. Rs. (Judg. dt. 24.4.02 by the S.C. in Civil Appeal No. 644/2001) reported in (2002) 5 SCC 51.

As held in ***Karnani Properties Ltd. Vs. Augustine (Miss), AIR 1957 SC 309*** the term 'rent' is comprehensive enough to include, all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenance but also furnishing, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord. It was very fairly conceded by learned counsel for the appellant that ever since the decision of this Court in the case of **Karnani Properties Ltd.,** the view being taken consistently by the High Court of Madras is that in the event of taxes having been agreed to be paid by the tenant, the same forms part of the rent.

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113. CONTRACT ACT, SECTIONS 56 AND 141 :

Contract of guarantee- Nature of :

(ii) Doctrine of Frustration- Essential conditions of applicability :-

Industrial Finance Corporation of India Ltd. Vs. Cannanore Spinning and Weaving Mills Ltd. and Others, (Judg. dt. 12.4.02 passed by the S.C. in Civil Appeal No. 3239/95) Reported in (2002) 5 SCC 54.

Adverting to the contract of guarantee, be it noted that though it is not a contract regarding a primary transaction, but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefore the statute has provided both the creditor and the guarantor some relief as specified in this chapter of the Contract Act (between Sections 130 to 141). Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor.

(ii) In Davis Contractors' decision (***Davis Contractors Vs. Fereham U.D.C., 1956 AC 696***) an oft-cited decision as regards the doctrine of frustration, Lord Redcliffe formulated the doctrine of frustration in the following manner :

> "frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

Needless to record that on a true perspective of Section 56 of the Contract Act, three essential conditions appear to be the realistic interpretation of the statute. The conditions being : (i) a valid and subsisting contract between the parties; (ii) there must be some part of the contract yet to be performed; and (iii) the contract after it is entered into becomes impossible of performance.

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114. Cr.P.C., SECTIONS 173 (5) AND 173 (8)

Police Report- Word 'shall' used in Section 173 (5) is not mandatory but directory- documents/ material not submitted with charge sheet- may be submitted later on with the permission of the Court.

Central Bureau of Investigation Vs. R.S. Pai And Another,

Judg. dated 3-4-02 by the Supreme Court in Cr. Appeal No. 1045/2000 (reported in (2002) 5 SCC 82).

From the aforesaid sub-sections, i.e. sec 173 (5) and 173 (8), it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is comitted in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word 'shall' used in

sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under section 173 (4) of the Code of Criminal Procedure, 1898 was considered by the Apex Court in ***Narayan Rao Vs. State of A.P., AIR 1957 SC 737*** and it was held that the word "shall" occurring in sub-section (4) of section 173 and sub section (3) of section 207- A is not mandatory but only directory. Further the scheme of sub-section (8) of section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused.

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115. CRIMINAL TRIAL :

Duty Doctor's report to police regarding injured being brought to hospital- duty doctor is not required to hold enquiry about the occurrence-

(ii) Duty doctor reporting matter to police-relatives not making seperate report to police- effect.

Sukhchain Singh Vs. State of Haryana And Others

Judgment dated 24.4.02 by the Supreme Court in Cr. Appeal No. 57/1996 (reported in (2002) 5 SCC 100)

It is neither the requirement of law nor usually expected that names of all the relatives of the injured should be mentioned in the medico-legal report prepared by the doctor in his discretion. The mention of the injured having been beaten by somebody in the doctor's intimation to the police station has been used to hold that in fact by that time the witness did not know the name of any of the assailants and that the case was a blind murder case. The intimation given by the doctor was regarding the admission of the patient in unconscious position requesting the police to take necessary action. Mentioning of the names or holding the inquiry regarding occurrence was neither the duty of the doctor not usually expected from him.

(ii) After admission of the patient in the hospital if his relations who were none else than brothers and cousin were not found standing by the side of the injured, it cannot be imagined, by any stretch of imagination, that they actually had not come to the hospital and were telling lies. Non-reporting and non-mentioning the names of the accused at the police station before 8.30 a.m. is stated to be a reason to hold that the witnesses had not seen the occurrence. Such a finding, apparently, appears to be perverse as it is in the evidence that the doctor had reported to the police about the admission of the injured in the hospital in the presence of the witnesses which justified them to pay more attention for the treatment of the injured and wait for the police to come.

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116. C.P.C. O. 9, R. 13

Ex-parte decree-Scope of challenge by way of appeal u/s 96 CPC and application to set aside u/o 9, R. 13- either of the remedy available to the defendant.

P. Kiran Kumar Vs. A.S. Khadar And Others

Judg. dated 3.5.2002 by the Supreme Court in Civil Appeal No. 3285/2002 (reported in (2002) 5 SCC 161)

NOTE : Referring to its earlier decision in ***Rani Choudhary Vs. Lt. Col. Suraj Jit Choudhary, (1982) 2 SCC 596*** the Apex Court held that.

Explanation was added to Order 9 Rule 13 with effect from 1.2.1977 by the Code of Civil Procedure (Amendment) Act, 1976. Prior to its enactment, a defendant burdened by an ex parte decree could apply under Order 9 Rule 13 for setting aside the ex parte decree. He could also file an appeal under section 96 against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial court decree merged with the order of the appellate court by reversal, confirmation or varying it, the trial court was precluded from setting aside the expert decree. Where the trial Court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex parte decree. Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to impaled the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two-pronged attacks on the decree i.e. by preferring an application to the trial court under Order 9 Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order 9 Rule 13 is to confine the defendant to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex parte decree. With the introduction of the Explanation, no application to set aside the ex parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal had been withdrawn by the appellant.

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117. SERVICE LAW :

Selection vis-a-vis appointment- no right accrues by selection simpliciter

S. Renuka & Ors. Vs. State of A.P. And Another

Judg. dated 21.7.02 passed by the Supreme Court in W.P. No. 490/2000 (reported in 2002 (1) SCC 195.

Held :

It is settled law that no right accrues to a person merely because a person is selected and his or her name is put on a panel. The petitioners have no right to claim an appointment.

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118. CRIMINAL TRIAL :

Proof beyond reasonable doubt- scope and meaning :

(ii) I.P.C., Section 120-B :

Criminal conspiracy-essential ingredients

(iii) Death sentence- imposition of- principle to be followed :

Devendra Pal Singh Vs. State of NCT of Delhi And Another. Judg. dated 22.3.02 passed by the Supreme Court in Cr. Appeal No. 993/2001 (reported in (2002) 5 SCC 234)

Held :

Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See ***Gurbachan Singh Vs. Satpal Singh, (1990) 1 SCC 445***). Prosecution is not required to meet any and every hypothesis put forward by the accused. (***See State of U.P. Vs. Ashok Kumar Srivastava, (1992) 2 SCC 86.***).

If a case is proved perfectly, it is argued that it is artificial ; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rate innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (***See Inder Singh Vs. State (Delhi Admn.) (1978) 4 SCC 161.***). Vague hunches cannot take the place of judicial evaluation.

> "A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape.. Both are public duties" (Per Viscount Simon in ***Sirland Vs. Director of Public Prosecution. 1944 AC 315 quoted in State of U.P. Vs. Anil Singh, 1988 Supp SCC 686.***).

(ii) The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situation criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub section (2) of section 120-A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the Act would fall within the trappings of the provisions contained in Section 120-B.

(iii) From ***Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 and Macbhi Singh Vs. State of Punjab, (1983) 3 SCC 470*** the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed :

The community may entertain such sentiment in the following circumstances :

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meannes; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When a murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry death' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

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119. CRIMINAL TRIAL

Appreciation of evidence- Traditional dogmatic hypertechnical approach has to be replaced by rational, realistic and genuine approach- post event conduct of witness- cannot be on predicted lines :

State of Orissa Vs. Dibakar Naik And Others

Judg. dated 23.4.02 passed by the Supreme Court in Cr. App. No. 534/94 (reported in (2002) 5 SCC 323)

Held :

This Court in ***State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh, (1974) 3 SCC 277*** has held that a criminal trial is not like a fairy tale where one is free to give flight to one's imagination and fantasy. It concerns itself with the ques-

tion as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. In ***State of H.P. Vs. Lekh Raj, (2000) 1 SCC 247*** this Court held :

"The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The Court cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind."

Post-event conduct of a witness cannot be predicted on specified lines. It varies from person to person as different people react differently under different situations. PW 1 had lost his wife in a most ghastly crime committed by the culprits. He apprehended danger to his life and was under shock. PWs 10 and 13 did not ask him about the names of the persons involved in the crime not did he think it proper to disclose such names. Under such circumstances, no adverse inference could be drawn against PW 1 making his testimony doubtful or unbelievable. In ***Ramani Vs. State of M.P., (1999) 8 SCC 649*** the Apex Court held :

"This Court has said time and again that the post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different."

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120. MUNICIPALITIES ACT (M.P.) 1961-
Sec. 319-Suit for enforcement of contract-Notice u/s 319 not required.
Hari Ram Vs. Nagar Palika Prashashak Tikamgarh.
2002 (2) MPLJ. 215.

Held :

This was a suit for enforcement of a contract and, therefore, notice under section 319 of the M.P. Municipalities Act, 1961 was not required. This was not a suit for enforcement of any liability imposed upon the Municipal Council by this Act. It has been held by this Court in ***Buddiprakash Vs. Nagar Palika, Joura, 1991 MPLJ 933*** that for enforcement of a contractual obligation no notice under section 319 of the M.P. Municipalities Act is required.

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121. N.D.P.S. ACT 1985-SEC. 41

N.D.P.S. (Amendment) Act 2001 (Coming into force on 2-10-2001)- Case pending on 2-10-2001 before Special Court- The Court Continues To Have Jurisdiction To Dispose Off The Case :
Mohd. Ayub Vs. Union of India.
2002 (2) MPLJ 286

Held

The case of the petitioner is already pending before Special Court, Mandsaur duly established under the provision of section 36 of the Act, therefore, section 41 of amended NDPS Act, 2001 reproduced (supra) will come into play and according to the provisions of this section all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed off in accordance with the provision of principal Act as amended by this Act. It is crystal clear that this provision is giving fullest jurisdiction to the Special Court as well as to the Sessions Court for disposing of the pending cases in accordance with the provision of principal Act.

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122. Cr.P.C. SEC.-125

Claim under Section 125 by divorced muslim wife-she cannot claim maintenance beyond Iddat period or till her re-marriage.
Munni @ Mubarik Vs. Shabbaz Khan.
2002 (2) MPLJ. 340

Held:

Under Section 125 of the Code of Criminal Procedure, a divorced Muslim-wife cannot claim maintenance beyond the IDDAT period or till her re-marriage. In the judgment of ***Danial Latifi and another Vs Union of India, (2001) 7 SCC 240*** the question of validity of Sections 3 (1) (a) and 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 was involved and while upholding the validity of the Act, the Supreme Court, in para 36 ruled as follows :-

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well, such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of section 3 (1) (a) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under section 3 (1) (a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

4. In the present case, right from the beginning the application was under Section 125 of the Code of Criminal procedure. Under this General provision of the Code, divorced Muslim's Woman/wife cannot seek and granted maintenance beyond Iddat-period or till her remarriage.

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123. HINDU LAW

Partition- There may be partial partition either in respect of property or In respect of persons

Laxminaryan Vs. Smt. Prembai & Ors.

2002 (2) MPLJ 381 (H.C.)

Held :

Mulla in his principles of Hindu Law vide section 328 admit a possibility of partial partition either in respect of property or in respect of persons making it. In ***Lilawati Vs. Paras Ram, AIR 1977 HP*** (1) Such possibility is accepted. Though of course in such cases normal presumption is that all the property was divided and the party alleging that some of the property in the exclusive possession of one of the brothers is joint and is liable to be partitioned has to prove his case. ***Tejraj and ors. Vs. Mohanlal and ors., AIR 1955 Rajasthan 157.***

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124. EVIDENCE ACT- SEC. 92

Documentary evidence-When oral evidence can be tendered to show mistake In document :

Tulsiram Rajaram Vs. Durga Prasad Ram Prasad.

2002 (2) MPLJ 435 (H.C.)

Held :

The general rule is that there is exclusion of oral evidence by documentary evidence. The terms of a document should not be allowed to be varied contradicted, added or subtracted from. But there are exceptions incorporated in the provisions to section 92 of the Evidence Act. Under the proviso (1) oral evidence can be given to show that due to mistake in fact or law the written instrument does not correctly express the agreement which the parties had really entered into. The law permits in such a case to prove the mutual mistake. It can be shown that the contract is contrary to the concurrent intention of the parties. The oral evidence, in case of mutual

mistake, can be led to vary the written contract. The mistakes contemplated in this proviso are genuine and accidental mistakes, just as the misdes-cription of the property.

If there is a mutual mistake as to the description of a piece of land in a registered mortgage-deed oral evidence is admissible. ***Kota China Vs. Kannekanti, 31 IC 671.*** Such a mistake can be pleaded by way of defence also. ***Janardan Vs. Venkatesh, AIR 1939 Bom. 151.*** The combined effect of Section 92 proviso (1) and Section 26 of the Specific Relief Act, 1963 is to enable either party to prove a mistake without prior rectification of an instrument. A mistake relating to a survey number in a sale-deed can be permitted to be proved. ***Rajaram Vs. Mink., 1954 NLJ 12=AIR 1952 Nag. 90, Bala Prasad Vs. Asmabi, 1954 NLJ 573=AIR 1954 Nag. 328*** and ***Rikhiram Pyarelal Vs. Ghasiram, 1978 MPLJ 527=AIR 1978 M.P. 189.***

125. EVIDENCE ACT SEC. 145, Cr. P.C. SEC. 162.

Previous Statement- Use of for contradicting a witness during cross examination in a Criminal Trial- It is not limited to statement recorded u/s 162 Cr.P.C.- other previous statement may also be used.
Jagdish Chamriya Barela Vs. State of M.P.
2002 (2) MPLJ 448. (H.C.)

Held :

This section (i.e. Sec. 145) is meant for cross-examination with previous statement. There is no prohibition imposed by this section for contradicting the witness from his previous statement recorded otherwise then during investigation under section 162 of criminal procedure code relevant with the fact of the concerned case. Section 145 is very clear on the point that witness can be contradicted from his previous statement. It has nowhere qualified that the witness can be contradicted with the statement recorded under section 161 of Criminal procedure Code during the course of investigation.

Reference can safely be made of judgment passed by this Court in ***Ram Charan Vs. Harpa, 1964 MPLJ SC. 145=1964 JLJ SN 174*** as well as ***Kallu V.S. State of M.P., 1987 MPLJ 475*** this Court has held in the case of ***Ram Charan Vs. Harpa*** as under :-

Section 145 of the Evidence Act is a general provision which enables a party to contradict a witness by his previous statement in order to show that the evidence of the witness is false. Section 162, Criminal Procedure Code lays an embargo on the use of a statement made to a Police Officer in the course of an investigation under Chapter XIV of that Code But the only fetters which are attached to such a statement are that it cannot be used for any purpose (save as therein provided) of any enquiry or trial in respect of any offence under investigation at the time when such statement was made. The expressions used only prevent the statement to be used "at any enquiry or trial....." Undoubtedly these fetters are confined to a criminal enquiry or trial otherwise there would have been a full stop after the parenthetic clause "save as hereinafter provided in sub-section (1) of Section 162, Criminal

Procedure Code." This main Section and the proviso, read together, prohibit such a statement to be used in a criminal enquiry or trial for any purpose, except by the accused and with the permission of the Court by the prosecution for the purposes of section 145 of the Evidence Act. that Section nowhere lays an impediment to the use of such statement in the trial of a civil suit.

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126. M.P. ACCOMMODATION CONTROL ACT, 1961, SEC. 13 (i) and 13 (2)
Dispute as to arrears of rent but not as to the rate of rent-Dispute not covered u/s 13 (2)- Dispute outside the ambit of Sec. 13 (2), Sec. 13 (2) becomes inoperative.
(ii) Delay in deposit of month to month rent-may be condoned.
Prakash Gupta Vs. Smt. Ramrati Debi,
(2002) (2) MPLJ 459 (HC)

Held :

It is submitted on behalf of the defendant that he had raised the dispute as to arrears of rent and, therefore, he was not obliged to deposit the rent till the time the dispute was decided by the trial Court. This argument cannot be accepted in view of the decision of the Supreme Court in ***Jamnalal vs. Radheshyam, 2000 (2) MPLJ 385*** in which it has been held that where there is no dispute about the rate of rent the dispute is not covered by Section 13 (2) of the Act and a tenant takes the risk of suffering an order of eviction by raising dispute in regard to the amount of rent payable by him while admitting the rate of rent and not making payment or deposit under sub-section (1) because where the dispute raised by the tenant is outside the ambit of sub-section (2), sub-section (1) of section 13 of the Act does not become inoperative.

(ii) Legally speaking, the delay or default can be condoned and that is permissible even in respect of the rent which becomes due from month to month after the institution of the suit as held by the Supreme Court in ***Shyamcharan Vs. Dharamdas, AIR 1980 SC 587, Ram Murti Vs. Bhola Nath, AIR 1984 SC 1392*** and by this Court in ***Manoharlal Vs. Abdul Mazidkhan, 1997 (I) MPLJ 232.*** The time for deposit of future rent can be extended where the failure of the tenant to make such payment or deposit was "due to circumstances beyond his control".

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127. CRIMINAL PROCEDURE CODE- SECTION-195.
Bar contained u/s 195 (i) (b) (ii)- Not applicable when forgery of the document committed before its production in court- No legal bar for the court to direct prosecution in such case.
Prakash Asnani Vs. Tikamdas,
(2002) (2) MPLJ 461 (HC).

Para 4 and 5 is reproduced in toto:-

Held :

It is contended on behalf of the appellant that section 195, criminal procedure

code is not attracted in the present case as the forgery of the rent-note is said to have been committed before it was produced in the court. It is pointed out that the forgery is not said to have been committed when the document was custodia legis and, therefore, there is no need of filing the complaint by the court under Section 195, criminal procedure Code and non-applicant Tikamdas or Laxmibai if they so desire may launch prosecution against the appellant. Reliance is placed on the decisions of the Supreme Court in ***Patel Laljibhai Vs. State of Gujarat, AIR 1971 SC 1935, Mohan Lal Vs. State of Rajasthan, AIR 1974 SC 299, Raghunath Vs. State of U.P., AIR 1973 SC 1100*** and of Punjab and Harayana High Court in ***Harbans Singh Vs. State of Punjab, AIR 1987 Punjab and Harayana 19.*** To the list of citations the latest decision of the Supreme Court in ***Sachida Nand Singh Vs. State of Bihar, (1998) 2 SCC 493=AIR 1998 SC 1121*** may be added in which it has again been clarified that it is difficult to interpret section 195 (1) (b) (ii), Criminal Procedure Code as containing a bar against initiation of prosecution proceedings merely because the document concerned was produced in a court albeit the act of forgery was perpetrated prior to its production in Court. It would be a strained thinking that any offence involving forgery of a document if committed far out side the precincts of the court and long before its production in the court, could also be treated as one affecting administration of justice merely because that document later reached the Court records. It must, therefore, be held that the bar contained in section 195 (1) (b) (ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a Court.

(ii) In view of the legal position discussed above a complaint by the Court under section 195 Criminal Procedure code is not a sine quo non to enable a Magistrate to take cognizance of the offence of forgery of the rent-note which is said to have been committed in the present case before its production in the Court. But there is no legal bar for the Court to direct prosecution against a person who is found to have committed forgery in respect of such a document. It is said that anyone can set the criminal law in motion against any person who has committed a crime. The doctrine of locus standi has a very limited application in the field of criminal law, for example, the cases covered by sections 198 and 199 of the code. The general rule is that anyone can put the criminal law into motion as a complainant, except where the statute which creates that offence indicates to the contrary expressly or impliedly. Therefore, a court which finds the commission of the offence of forgery or any other offence is competent to file a complaint before a Magistrate or direct investigation by the police. The powers of a Court are not circumscribed in ordering prosecution of anyone in the interest of justice. Therefore, a Court is competent to direct filing of a complaint or report even in those cases which are not covered by section 195, Criminal Procedure Code. In the cases covered by section 195 (1) (b) (ii) the Magistrate cannot take cognizance of the offence without the complaint of the Court. But the Court can order prosecution even in case de hors section 195 of the Code.

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128. NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985- SEC. 50.

Applicability of Section 50- Only in case of search of the person-Search of the baggage/luggage or vehicle is not search of the person.
Prahlad Haricharan Vs. State of M.P.
2002 (2) MPLJ 562 (H.C.)

Held :

It has been held by the Constitution Bench of the Supreme Court in the ***State of Punjab Vs. Baldeo Singh, AIR 1999 SC 2378*** that section 50 of the Act would come into play only in the case of a search of a person as distinguished from search of any premises etc. Now the question arises what is the search of a "person"? It has been illustrated in a number of subsequent decisions of the supreme Court. In ***Sarjudas Vs. State of Gujrat, AIR 2000 SC 403*** charas was not found on the person of the accused but it was found kept in a bag which was hanging on scooter which he was riding. It was held that the said search cannot be said to be illegal on the ground that the accused was not informed of his right under section 50 of the Act to be searched in the presence of a Gazetted officer or a Magistrate.

(ii) In ***kalema Tumba Vs. State of Maharashtra, (1999) 8 SCC 257*** the search was made of the "baggage" of the accused which had arrived at the airport. It was held that it was not a case of search of the "person" of the accused. Again in ***Kanhaiyalal Vs. State of M.P., (2001) 10 SCC 380*** the opium was found from a bag which was being "carried by the appellant". It was held that it is not the case of the search of the "Person" of the accused.

(iii) In ***A.R. Mansuri Vs. State of Gujrat, AIR 2000 SC 821*** there was search of an autorickshaw, gunny bags were found stacked therein. It was held that it was also not the case of the search of a "person". It was observed that the place where the gunny bags were found stacked was "not inextricably connected with the person" of the appellant. This is a three Judge Bench judgment. Reference was made to the two earlier decisions of **kalema Tumba** and **Sarjudas** in this case and the law laid down in those cases was approved.

(iv) The learned counsel for the appellant has placed reliance on a recent decision of the Supreme Court in ***Gurubaksh Singh Vs. State of Haryana, (2001) 3 SCC 28.*** In that case also a passenger train arrived at Karnal Railway station and the accused was found sitting in a compartment. He left the train and he was found "carrying a katta (gunny bag) on his left shoulder". It was found that there was poppy-straw in the bag. After making reference to the constitution Bench Judgment in **Baldeo Singh's case,** it was held that section 50 of the Act was not attracted in this case as it was not the case of search of a "person" but of the bag hanging on his shoulder. It has been reiterated that section 50 of the Act would be applicable only in those cases where the search of the "person" is carried out.

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129. N.D.P.S. ACT, 1985 SEC. 37

N.D.P.S. Amendment Act of 2001- Effect- Applicable to pending cases also- Amended Sec. 37- Effect- no provision of bail in the Act in respect of small/ medium quantity hence Schedule I-II Cr.P.C. applicable.

Sharad Kewat Vs. State of Madhya Pradesh Order dt. 9-8-02 passed by the M.P. High Court Jabalpur in Cr. Appeal No. 1759/2001.

The Amendment Act of 2001 came into force on 2-10-2001. By Section 41 of the Amendment Act it has been made applicable to the pending cases also.

By the notification dated 19-10-2001 of the Central Government as per Serial No. 56 heroin weighing 5 gram has been described as "small quantity" and 250 grams as "commercial quantity". In the present case, the quantity of heroin which is involved is more than the small quantity but less than the commercial quantity. Section 37 of the Act has also been amended in 2001. Now there is no provision of bail in this Act in respect of small quantity and medium quantity. Therefore, the reference must be made to schedule I-II of the Code of Criminal Procedure, 1973. According to this Schedule, an offence punishable with imprisonment for more than three years is non-bailable. Thus the rigour of Section 37 which stood earlier has been softened in respect of small quantity and medium quantity.

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130. MOTOR VEHICLE ACT 1988-SEC. 170

Determination of compensation in Death Cases- Choice of Multiplier- Method.

H.S. Ahammed & Anr Vs. Irfan Ahammed & Anr.

2002 (2) ANJ (SC) 692.

Held.

It is well settled that life expectancy of the deceased or the beneficiaries whichever is shorter is an important factor. Reference in this connection may be made to the decision of this Court in the case of ***C.K. Subramonia Iyer and others Vs. T. Kunhikuttan Nair and other A.I.R. 1970 S.C. 376.*** In the case of ***National Insurance Co. Ltd. Vs. M/s. Swaranlata Das and other 1993 Suppl. (2) S.C.C. 743,*** it was observed that "The appropriate method of assessment of compensation is the method of capitalisation of net income choosing a multiplier appropriate to the age of the deceased or the age of the dependants whichever multiplier is lower"

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131. SPECIFIC RELIEF ACT, 1963-SEC- 20

Grant of decree for specific performance-Is a discreationery matter.

V. Muthusami (Dead) By Lrs. Vs. Angammal & Ors.

2002 (2) ANJ (SC) 729.

Held :

It is settled position of law that grant of a decree for specific performance is a discretionary one. This Court in ***K Narendra Vs. Raiviera Apartments (P) Ltd (1999 (5) S.C.C. 77)*** held that section 20 of the Specific Relief Act. 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so, the discretion of the court is

not arbitrary but sound and reasonable, guided by judicial principles. It was further held that if performance of a contract involve some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, in one of the circumstances in which the Court may properly exercise discretion not to decree specific performance and the doctrine of comparative hardship has been statutorily recognized in India. (Findings in **K. Narendra 1999 (5) S.C.C. 77** followed).

In ***Her Highness Maharani Shantidevi P. Gaikwad Vs. Savibhai Patel and other (2001 (5) S.C.C. 101*** a Bench of three learned Judges held as follows :

"The grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The Court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. One of the grounds on which the Court may decline to decree specific performance is where it would be inequitable to enforce specific performance."

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132. LIMITATION ACT 1963-SEC-5. C.PC. ORDER 22 RULE 9
Sufficient Cause-Meaning of.
Ram Nath Sao @ Ram Nath Sahu &ors. Vs. Gobardhan Sao & ors.
2002 (2) ANJ (SC) 789.

Held.

The expression "sufficient cause" within in meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception, more so when no negligence or inaction or want of bona-fide can be imputed to the defaulting party. On the other hand, while considering the matter the court should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pendantic and hyper-technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by the default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

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PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADSEH, JABALPUR

MEMORANDOM

No. 4/12060/II-6-6/87 Jabalpur, dated the 13th Nov. 1987.

To,

The District & Sessions Judge,

Subject : Duty to notice and give effect to case-law in Judgments and orders of the subordinate Courts.

It has been brought to the notice of the High Court that some Judicial Officers do not sufficiently appreciate their plain duty to ascertain and apply law to proven facts while deciding matter before them and in the process do not even refer to case-law brought to their notice. I am directed to impress upon Judicial Officers working under you that duty **supra** should neither be by-passed nor slurred over by them and the orders to be passed or judgments to be delivered, should reflect an awareness on the part of Judges/Magistrates concerned for translating such duty into actual practice by noticing precedents brought to their notice, and by giving effect to legal principle to the construction put on a particular provision of law and whereever necessary by recording findings and/or moulding relief in the light of such exposition of law, save in cases where preceedent may have been over-ruled, or can be distinguished on facts or can be held to be irrelevant.

Sd/-
(J.A. Khare)
13.11.1987
Registrar

●

मध्यप्रदेश शासन

वित्त विभाग

मंत्रालय, वल्लभ भवन, भोपाल

क्रमांक 594/964/2002/सी/चार, भोपाल, दिनांक 11 अप्रैल 2002

प्रति,

शासन के समस्त विभाग
अध्यक्ष, राजस्व मण्डल, ग्वालियर
समस्त विभागाध्यक्ष
समस्त संभागीय आयुक्त
समस्त जिलाध्यक्ष
समस्त मुख्यकार्यपालन अधिकारी जिला पंचायत
मध्यप्रदेश।

विषय : अग्रिम रूप से राशियों का आहरण।

वित्तीय वर्ष 2001-2002 की समाप्ति के तुरंत पश्चात कराई गई जांच में पाया गया कि राज्य शासन के अनेक कार्यालयों/विभागाध्यक्षो/जिलाध्यक्षों/ आहरण एवं संवितरण अधिकारियों द्वारा बहुत बड़ी राशियों अग्रिम में आहरित कर अपने पास रख ली गई थी, यह कार्यवाही वित्त संहिता भाग–1 के नियम 6, 8, 9 एवं 10 के सर्वथा विपरीत है तथा गंभीर वित्तीय अनियमितता की श्रेणी में आती है।

जांच में यह भी पाया गया कि कतिपय जिलों में बिना वित्तीय स्वीकृति के राशियों अग्रिम रूप से आहरित की गई है, शासन आदेशों द्वारा क्रय पर प्रतिबंध होने के वाबजूद भी साजो सामान क्रय के उद्देश्य से अग्रिम राशियों का आहरण किया जाना, शासन निर्देशों का स्पष्ट उल्लंघन है।

अतः निर्देशित किया जाता है कि उपरोक्त प्रकार की अनियमितता/नियमों के उल्लंघन के प्रत्येक प्रकरण की तत्काल जांच की जावे एवं दोषी अधिकारियों को दंडित किया जाये साथ ही की गई अनियमितता की सूचना अधोहस्ताक्षरकर्ता को तत्काल की जाये।

मध्यप्रदेश के राज्यपाल के नाम से तथा
आदेशानुसार
सही/–
(अशोक दास)
सचिव
म.प्र. शासन वित्त विभाग

●

MINISTRY OF HEALTH AND FAMILY WELFARE (DEPARTMENT OF HEALTH) NOTIFICATION NO. G.S.R. 310 (E) DATED THE 1ST MAY, 2002. PUBLISHED IN THE GAZETTE OF INDIA (EXTRAORDINARY) PART II SECTION 3 (I) DATED 1-5-2002 PAGES 3-4.

In exercise of powers conferred by section 23 of the **Prevention of Food Adulteration Act, 1954 (37 of 1954),** the Central Government, after consultation with the Central Committee for Food Standard, hereby makes the following rules further to **amend the Prevention of Food Adulteration Rules, 1955,** namely :-

1. (1) These rules may be called **the Prevention of Food Adulteration (2nd Amendment) Rules, 2002.**

(2) They shall come into force after six months from the date of their publication in the Official Gazette.

2. In the Prevention of Food Adulteration Rules, 1955 in Appendix B,

(a) In item A. 11.02.18, relating to INFANT MILK FOOD, in the standards, after serial number 32, the following shall be inserted, namely,:-

"33. Yeast and mould count ..... absent in 0.1 gm

34. Salmonella and Shigella ..... absent in 0.1 gm

35. E. Coli ..... absent in 0.1 gm

36. Vibrio cholera and V. Paraheamolyticus..... absent in 0.1 gm

37. Faecal streptococci and Staphylococcus aureas..... absent in 0.1 gm

(b) in item A. 11.02.18.01, relating to INFANT FORMULA, in the standards after serial number 32, the following shall be inserted, namely,-

"33. Yeast and mould count ..... absent in 0.1 gm

34. Salmonella and Shigella ..... absent in 0.1 gm

35. E. Coli ..... absent in 0.1 gm

36. Vibrio cholera and V. Paraheamolyticus ..... absent in 0.1 gm

37. Faecal streptococci and Staphylococcus aureas .... absent in 0.1 gm".

(c) in item A. 11.02.18.02, relating to MILK-CEREAL BASED WEANING FOOD, in the standards, after serial number 12, the following shall be inserted namely,-

"13. Yeast and mould count ..... absent in 0.1 gm

14. Salmonella and Shigella ..... absent in 0.1 gm

15. E. Coli ..... absent in 0.1 gm

16. Vibrio cholera and V. Paraheamolyticus ..... absent in 0.1 gm.

17. Faecal streptococci and Staphylococcus aureas ..... absent in 0.1 gm".

(d) in item A. 11.02.18.03, relating to PROCESSED CEREAL BASED WEANING FOOD, in the standards, after serial number 15, the following shall be inserted, namely,

"16. Yeast and mould count ..... absent in 0.1 gm

17. Salmonella and Shigella ..... absent in 0.1 gm

18. E. Coli ..... absent in 0.1 gm

19. Vibrio cholera and V. Paraheamolyticus ..... absent in 0.1 gm.

20. Faecal streptococci and Staphylococcus aureas ..... absent in 0.1 gm".

(e) in item A. 18.12, relating to MALTED MILK FOOD, in the standards, after serial number (j), the following shall be inserted, namely,-

"(k) Yeast and mould count .....absent in 0.1gm

(l) Salmonella and Shigella ..... absent in 0.1 gm

(m) E.Coli ..... absent in 0.1 gm

(n) Vibrio cholera and V. Paraheamolyticus ..... absent in 0.1 gm

(o) Faecal streptococci and Staphylococcus aureas..... absent in 0.1 gm".

(f) in item A. 18.12.01, relating to MALT BASED FOOD (MALT FOOD), in the standards, after serial number (j), the following shall be inserted, namely,

"(k) Vibrio cholera and V. Paraheamolyticus ..... absent in 0.1 gm

(l) Faecal streptococci and Staphylococcus aureas ..... absent in 0.1 gm".

THE CENTRAL GOVERNMENT VIDE ITS NOTIFICATION NO. S. O. 1055 (E). DATED THE 19TH OCTOBER, 2001, PUBLISHED IN GAZETTE OF INDIA (EXTRAORDINARY) PART II, SECTION 3 (II), DATED 19-10-2001, PAGES 15-32 HAS SPECIFIED SMALL AND COMMERCIAL QUANTITY IN RELATION TO VARIOUS NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES.

The Notification includes a large number of Narcotic Drugs and Psychotropic Substances out of which some important Narcotic Drugs and Psychotropic Substances and quantities specified therefore are reproduced hereunder :-

(NOTE : For details please refer to M.P. Law Times 2002, Part III at page 33)

Sl. No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Other non-Proprietary name	Chemcial Name	Small Quantity (in gm.)	Commercial Quantity (in gm/kg.)
1	2	3	4	5	6
1.	Cannabis and cannabis resin	Charas Hashish	Extracts and Tinctures of Cannabis	100	1 kg.
2.	Coca leaf			100	2 kg.
3.	Dihydromorphine	PARA-MORFAN		5	100 gm.
4.	Ganja			1000	20 kg.
5.	Heroin		Diacetylmorphine	5	250gm.
6.	Morphine		Morphine	5	250 gm.
7.	Morphine methobromide		And other penta valent nitrogen morphine derivatives, including in particular the morphine-N-Oxide derivatives, one of which is codeine -N-oxide	2	50 gm.
8.	Morphine-N-oxide	GENOMORPHINE-N-OXYMORPHINE		2	50 gm.
9.	Opium		And any preparation containing opium	25	2.5 kg.
10.	(+) Lysergide	LSD, LSD-25	9,10-didehydro-N, N-Diethyl 1-6 methy-lergoline-8-Betacarboxamide	0.002	0.1 gm
11.		MMDA, ECSTACY	2-methoxy-alpha methy1-4,5-(methylendioxy) phenethylamine	0.5	10gm.

* Lesser of the Small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

** Lesser of the Commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

NOTE :-

(1) The small quantity and the commercial quantity given against the respective drugs listed above apply to isomers, within specific chemical designation, the esters, ethers and salts of these drugs, including salts of esters, ethers and isomers; whenever existence of such substance is possible.

(2) The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of note 1 above.

(3) "Small Quantity" and "Commercial Quantity" with respect to cultivation of opium poppy is not specified separately as the offence in this regard is covered under clause (c) of section 18 of the Narcotic Drugs and Psychotropic Substances Act. 1985.

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NOTE : Section 6 of M.P. Recognised Examination Act, 1937 empowers the State Government to authorise Judicial Magistrate First Class to try offences under the Act in a summary manner. The State Government has issued Notification No. F. 73/43/82/C-3 /38, dated 11-7-84 which has been published in M.P. Gazette Pt. I, dated 21.12.84 page 1436. The Notification is reproduced as under :

GOVERNMENT OF MADHYA PRADESH
HIGHER EDUCATION DEPARTMENT

No. F. 73/43/82/3/38 Bhopal 11th July, 1984.

NOTIFICATION

In exercise of the powers conferred by Section 6 of the Madhya Pradesh Recognised Examination Act 1937 (No. x of 1937) the State Government hereby empower all Judicial Magistrates first Class in the State for the purpose of the said section.

By order and in the name of the
government of M.P.
sd/-(G.L. Gupta)
Deputy Secretary to Govt.
Madhya Pradesh
Higher Education Department

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मध्यप्रदेश शासन

वित्त विभाग

मंत्रालय, वल्लभ भवन, भोपाल

क्रमांक 25/26/2002/चार/पी.डब्ल्यू.सी. भोपाल, दिनांक 23 मार्च 2002

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मण्डल, ग्वालियर,
समस्त विभागाध्यक्ष,
समस्त संभागीय आयुक्त,
समस्त जिलाध्यक्ष,
समस्त मुख्यकार्यपालन अधिकारी, जिला/जनपद पंचायत
मध्यप्रदेश।

विषय : सामान्य भविष्य निधि के अन्तिम भुगतान बावत्।

उपरोक्त विषय में आदेशानुसार निर्देशित किया जाता है कि वित्त विभाग के परिपत्र क्र. बी- 9-1-82/नि-2/चार, दिनांक 20/1/1982 के अनुसार विभाग द्वारा अंतिम भुगतान प्रकरण भेजते समय सेवा निवृत्ति/मृत्यु तिथि तक अभिदाता को दिये गये आंशिक अंतिम आहरणों की सूची अनिवार्यतः संलग्न की जाना चाहिए। परंतु प्रायः यह देखा गया है कि विभाग द्वारा उक्त अवधि की सूची प्रस्तुत नहीं की जाती है और पेंशन प्रकरणों के निराकरण में अनावश्यक विलम्ब होता है। जैसा कि प्रावधान है कि अभिदाता को उसके भविष्य निधि खाते से दिनांक 5-6-72 से लिये गये आंशिक अंतिम विकर्षण के भुगतान की प्रविष्टि उसकी सेवा पुस्तिका में अनिवार्य रूप से की जावे तथा महालेखाकार को प्रकरण भेजते समय सूची अनिवार्यतः संलग्न की जावे।

2. साथ ही निर्देशित किया जाता है कि, महालेखाकार, ग्वालियर द्वारा अंतिम भुगतान के लिए चाहे गए अभिलेख एक बार में ही महालेखाकार, ग्वालियर को भेजे जावें, ताकि सामान्य भविष्य निधि के अंतिम भुगतान के प्रकरणों के निराकरण में अनावश्यक विलम्ब न हो।

मध्यप्रदेश के राज्यपाल के नाम से तथा
आदेशानुसार
सही/–
(संजय श्रीवास्तव)
अवर सचिव
म.प्र. शासन वित्त विभाग

●

■ ***He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god.***

- Aristotle

PART - IV

LATEST IMPORTANT AMENDMENTS IN CENTRAL/STATE ACTS

THE INDIAN DIVORCE (AMENDMENT) ACT, 2001
NO. 51 OF 2001

An Act further to amend the Indian Divorce Act, 1869.

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows :

1. Short title and commencement- (1) This Act may be called the Indian Divorce (Amendment) Act, 2001.

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

2. Amendment of section 1.- In section 1 of the Indian Divorce Act, 1869 (4 of 1869) (hereinafter referred to as the principal Act), the word "Indian" shall be omitted.

3. Amendment of section 3.- In section 3 of the principal Act,

(a) In clause (3), for the words "or of whose jurisdiction under this Act", the words "or of whose jurisdiction under this Act the marriage was solemnized or" shall be substituted:

(b) clauses (6) and (7) shall be omitted.

4. Omission of section 7.- Section 7 of the principal Act shall be omitted.

5. Substitution of new section for section 10.- For section 10 of the principal Act, the following section shall be substituted, namely :

10. Grounds for dissolution of marriage.- (1) Any marriage solemnized, whether before of after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent.

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; of

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition. been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality".

6. Insertion of new section 10A.- After section 10 of the principal Act, the following section shall be inserted, namely :-

"10A. Dissolution of marriage by mutual consent.- (1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree".

7. Substitution of new section for section 11.- For section 11 of the principal Act, the following section shall be substituted, namely :-

"11. Adulterer or adulteress to be co-respondent.- On a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the petitioner is excused by the Court from so doing on any of the following grounds, namely :-

(a) that the wife, being the respondent is leading the life of a prostitute

or the husband, being respondent is leading an immoral life and that the petitioner knows of no person with whom the adultery has been committed.

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

(c) that the alleged adulterer or adulteress is dead".

8. Amendment of section 13.- In section 13 of the principal Act, the last paragraph shall be omitted.

9. Amendment of section 14.- In section 14 of the principal Act, in paragraph 4, the words "in the manner and subject to all the provisions and limitations in sections 16 and 17 made and declared" shall be omitted.

10. Amendment of section 15.- In section 15 of the principal Act,-

(a) the words "without reasonable excuse" shall be omitted;

(b) for the words "her adultery and cruelty", the words "her adultery or cruelty" or desertion". shall be substituted;

(c) for the words "such cruelty", the words "such adultery, cruelty" shall be substituted.

11. Amendment of section 16.- In section 16 of the principal Act, the words "not being a confirmation of decree of a District Court," shall be omitted.

12. Substitution of new section for section 17.- For section 17 of the principal Act, the following section shall be substituted, namely :-

"**17. Power of High Court to remove certain suits.-** During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a court of original jurisdiction, and the provisions contained in section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary, to enable him to make a decree in accordance with the justice of the case."

13. Omission of section 17A.- Section 17A of the principal Act shall be omitted.

14. Amendment of section 18.- In section 18 of the principal Act, the words "or to the High Court" shall be omitted.

15. Amendment of section 19.- In section 19 of the principal Act, in the last paragraph, for the words "jurisdiction of the High Court", the words "jurisdiction of the District Court" shall be substituted.

16. Omission of section 20.- Section 20 of the principal Act shall be omitted.

17. Amendment of section 22.- In section 22 of the principal Act the words "without reasonable excuse " shall be omitted.

18. Amendment of sections 23, 27 and 32.- In sections 23, 27 and 32 of the principal Act, the words "or the High Court" shall be omitted.

19. Omission of section 34.- Section 34 of the principal Act shall be omitted.

20. Omission of section 35.- Section 35 of the principal Act shall be omitted.

21. Amendment of section 36.- In section 36 of the principal Act, the proviso shall be omitted.

22. Amendment of section 37.- In section 37 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "the husband shall". the words "Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall" shall be substituted.

23. Omission of section 39.- Section 39 of the principal Act shall be omitted.

24. Amendment of section 40.- In section 40 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "may inqure into". the words "The District Court may, before passing a decree for dissolution of the marriage or a decree of nullity of marriage, inquire into" shall be substituted.

25. Amendment of section 43.- In section 43 of the principal Act, for the portion beginning with the words "In any suit for obtaining" and ending with the words "deems proper", the words "In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in a District Court, the Court may from time to time before making its decree, make such interim orders as it may deem proper" shall be substituted.

26. Amendment of section 44.- In section 44 of the principal Act, for the portion beginning with the words "The High Court" and ending with the words "may upon application", the words "Where a decree of dissolution or nullity of marriage has been passed, the District Court may, upon application" shall be substituted.

27. Amendment of section 45.- In section 45 of the principal Act, for the words "Code of Civil Procedure", the words and figures "Code of Civil Procedure, 1908 (5 of 1908)" shall be substituted.

28. Amendment of section 52.- In section 52 of the principal Act, for the portion beginning with the words "by a wife" and ending with the words "without reasonable excuse", the words "by a husband or a wife, praying that his or her marriage may be dissolved by reason of his wife or her husband, as the case may be, having been guilty of adultery, cruelty or desertion" shall be substituted.

29. Amendment of section 55.- In section 55 of the principal Act,-

(a) the first proviso shall be omitted.

(b) in the second proviso, for the words "Provided also", the words "Provided" shall be substituted.

30. Substitution of new section for section 57.- For section 57 of the principal Act, the following section shall be substituted. namely:-

"57. Liberty to parties to marry again.- Where a decree for dissolution or nullity of marriage has been passed and either the time for appeal has expired without an appeal having been presented to any court including the Supreme Court or an appeal has been presented but has been dismissed and the decree or dismissal has become final, it shall be lawful for either party to the marriage to marry again."

31. Amendment of section 62.- In section 62 of the principal Act, for the words "Code of Civil Procedure", the words and figures "Code of Civil Procedure, 1908 (5 of 1908)" shall be substituted.

32. Repeal.- The Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo 5, 40), the Indian and Colonial Divorce Jurisdiction Act, 1940 (3 and 4 Geo, IV C, 35) and the Indian Divorce Act, 1945 (9 Geo, VIC 51) are hereby repealed.

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NOTE : Transfer of Property Act, 1882, Indian Stamp Act, 1899 and Registration Act, 1908 have been amended by the Indian Parliament Act (No. 48 of 2001) published in Gazette of India, Extraordinary, Part II, Section 1, No. 56, dated September, 24, 2001. The Amendment Act is reproduced hereunder.

INDIAN PARLIAMENT ACT NO. 48 OF 2001

An Act further to amend the Registration Act, 1908, the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899.

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows :-

CHAPTER-I

PRELIMINARY

1. Short title.-This Act may be called **The Registration and Other Related Laws (Amendment) Act, 2001.**

"Statement of Objects and Reasons.- The Registration Act, 1908 was enacted to consolidate the law relating to the registration of documents. The Conference of Chief Ministers and Finance Ministers of States and Union territories, convened by the Union Finance Minister held on the 14th September, 1998 at New Delhi, inter alia, arrived at the following conclusions, namely:

(i) Sub-section (2) of Section 30 of the Registration Act, 1908 should be repealed;

(ii) registration of general power of attorney which is in the nature of a contract to sell immovable property be made compulsory and consequential amendments be made in the Registration Act, 1908, the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899;

(iii) to make affixing of the photograph and fingerprints of the executants compulsory at the time of registration of documents;

(iv) to make an enabling provision for computerisation of registration records.

2. Based on the above conclusions arrived at the said Conference, it is proposed.

(i) to insert a new sub-section (1-A) in Section 17 of the Registration Act, 1908 for making registration of the documents containing contracts to transfer for consideration any immovable property compulsory for the purpose of Section 53-A of the Transfer of Property Act, 1882 and for consequential amendments in Section 56 of the said Act, Section 53-A of the Transfer of Property Act, 1882 and Schedule I to the Indian Stamp Act, 1899;

(ii) to omit sub-section (2) of Section 30 and Section 67 of the Registration Act, 1908;

(iii) to insert new Section 16-A in the Registration Act, 1908 to enable the State Governments to computerise registration records;

(iv) to insert new Section 32-A to make affixing of the photographs and fingerprints on the documents compulsory at the time of registration.

3. The Bill seeks to achieve the above objects.

2. Insertion of new section 16A.- In the Registration Act, 1908 (16 of 1908) (hereinafter in this Chapter referred to as the Registration Act), after section 16, the following section shall be inserted, namely:

"16A. Keeping of books in computer floppies, diskettes, etc.- (1) Notwithstanding anything contained in section 16, the books provided under subsection (1) of that section may also be kept in computer floppies or diskettes or in any other electronic form in the manner and subject to the safeguards as may be prescribed by the Inspector-General with the sanction of the State Government.

(2) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy or extracts from the books kept under sub-section (1) given by the registering officer under his hand and seal shall be deemed to be a copy given under section 57 for the purposes of sub-section (5) of that section."

3. Amendment of section 17.- In section 17 of the Registration Act.-

(a) after sub-section (1), the following sub-section shall be inserted, namely:

"(1.A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.", "

(b) in sub-section (2), in clause (v), for the opening words "any document", the words, brackets, figure and letter "any document other than the documents specified in sub-section (1A)" shall be substituted.

4. Amendment of section 30.- In section 30 of the Registration Act, sub-section (2) shall be omitted.

5. Insertion of new section 32A.- After section 32 of the Registration Act, the following section shall be inserted, namely:

"32A. Compulsory affixing of photograph, etc.- Every person presenting any document at the proper registration office under section 32 shall affix his passport size photograph and fingerprints to the document.

Provided that where such document relates to the transfer of ownership of immovable property, the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document."

6. Amendment of section 49.- In section 49 of the Registration Act, in the proviso, the words, figures and letter "or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882 (4 of 1882)," shall be omitted.

7. Amendment of section 52.- In section 52 of the Registration Act, in subsection (1), in clause (a), after the words "and place of presentation", the words, figures and letter "the photographs and fingerprints affixed under section 32A" shall be inserted.

8. Omission of section 67.- Section 67 of the Registration Act shall be omitted.

9. Amendment of section 69.- In section 69 of the Registration Act, in subsection (1), after clause (a), the following clause shall be inserted, namely:

"(aa) providing the manner in which and the safeguards subject to which the books may be kept in computer floppies or diskettes or in any other electronic form under sub-section (1) of the section 16A".

CHAPTER III

AMENDMENT OF THE TRANSFER OF PROPERTY ACT, 1882

10. Amendment of section 53A of Act 4 of 1882.- In section 53A of the Transfer of Property Act, 1882, the words "the contract, though required to be registered, has not been registered, or," shall be omitted.

CHAPTER IV

AMENDMENT OF THE INDIAN STAMP ACT, 1899

11. Amendment of Schedule I of Act 2 of 1899.- In Schedule I to the Indian Stamp Act, 1899,-

(a) under column heading "Description of Instrument", in article No. 23, in exemption, the portion beginning with the words "Assignment of Copyright" and ending with the word and figure "section 5." Shall be numbered as clause (a) thereof, and after clause (a) as so numbered, the following clause shall be inserted, namely:-

"(b) for the purpose of this article, the portion of duty paid in respect of document falling under article No. 23 A shall be excluded while computing the duty pay-

able in respect of a corresponding document relating to the completion of the transaction in any Union territory under this article".

(b) after article No. 23 and the entries relating thereto, the following article No. 23A and the entries shall be inserted, namely:

Description of Instrument	Proper Stamp-duty
"23 A. CONVEYANCE IN THE NATURE OF PART PERFORMANCE- Contracts for the transfer of immovable property in the nature of part performance in any Union territory under section 53A of the Transfer of Property Act, 1882 (4 of 1882).	Ninety percent of the duty as a Conveyance (No. 23)'

12. Saving.- Notwithstanding anything contained in sections 6 and 10, any-

(a) right of a transferor or any person claiming under him debarred under section 53A of the Transfer of Property Act, 1882 (4 of 1882) immediately before commencement of this Act shall remain so debarred as if section 10 had not come in force in respect of such right; and

(b) unregistered document relating to the right referred to in clause (a) may be received as evidence of part performance of a contract for the purposes of section 5 of the Transfer of Property Act, 1882 (4 of 1882) as if section 6 had not come into force in respect of such document.

■ ***Nothing is more dangerous than a idea, when you have only one idea.***

- Alain

■ ***He who has health has hope, and he who has hope has everything.***

- Arabian Proverb