JOTI JOURNAL

OCTOBER 2012 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL OCTOBER - 2012

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

PART-IV
(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

FROM THE PEN OF THE EDITOR

Manohar Mamtani
Director, JOTRI

Esteemed Readers!

This is the last but one issue of this year and once again I have an opportunity of sharing my views with you all having nexus with Justice Delivery System. This issue is delayed due to some administrative reasons but mainly due to continuous multi-dimensional training programmes at the Institutional and regional levels.

Recently, the Apex Court has reminded us the qualities and duties of a Judge and expressed:

> "The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty."
>
> – Hon'ble Mr. Justice R.M. Lodha, Judge, Supreme Court of India in ***R.C. Chandel v. High Court of M.P. & Anr., AIR 2012 SC 2962***

In another judgment, the highest Court of the country has held:

> "The object of "fair trial" the Court should leave no stone unturned to do justice and protect the interest of the society as well. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served."

– Hon'ble Mr. Justice Swatanter Kumar, Judge, Supreme Court of India in ***Dayal Singh & ors. v. State of Uttaranchal, AIR 2012 SC 3046***

A good Judge should do nothing from his own preference or from the prompting of his private desire but he should pronounce according to law and justice.

Therefore, we cannot ignore our duties or take casually our duties regarding dispensation of justice. We have to work till justice reaches upto the last man of the society by our sincere efforts. As this issue pertains to the month of October, it will be relevant to quote one of the last notes left behind by the Father of our Nation, Mahatma Gandhi in the year 1948 expressing his deepest social thought:

> "I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man (woman) whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him (her), will he (she) gain anything by it? Will it restore him (her) to a control over his (her) own life and destiny? In other works, will it lead to swaraj (freedom) for the hungry and spiritually starving millions?
>
> Then you will find your doubts and your self melt away."
>
> – Source: ***Mahatma Gandhi [Last Phase, Vol. II (1958), P. 65]***

Before concluding this month's Editorial, let me give you a glimpse of the activities of the Institute in the months of September and October. The Institute conducted training on ***Application of Information and Communication Technology to District Judiciary from*** 10.09.2012 to 14.09.2012, ***Refresher Course*** training to the sixth Batch of Civil Judges Class II of 2008 from 17.09.2012 to 22.09.2012.

Apart from these trainings, the Institute under the approved Scheme of Grant-in-Aid provided under the recommendations of the XIII Finance Commission, conducted Regional Training Progammes on ***Negotiable Instruments Act, 1881*** at Rewa and Protection of Women from ***Domestic Violence Act, 2005*** at Betul as well as ***Specialised Trainings*** at State Medico-legal Institute, Bhopal and State Forensic Science Laboratory, Sagar. In addition to that, the Institute also conducted ***two days' Colloquium on – Prevention of Corruption Act, 1988*** which was conceived and designed for the Higher Judicial Services presiding over the Special Courts constituted under this Act and also one day Training programme on ***Juvenile Justice (Care & Protection of Children) Act, 2000*** for the Principal Magistrates and Members of the Juvenile Justice Boards.

In this Journal, Part I and Part II contains important Articles on bi-monthly topics as well as judicial pronouncements of Hon'ble the Supreme Court and our High Court.

I hope that this issue will help to enhance our legal acumen.

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WELCOME TO HON'BLE THE CHIEF JUSTICE SHRI SHARAD ARVIND BOBDE

Hon'ble Shri Justice Sharad Arvind Bobde has been appointed as the Chief Justice of High Court of Madhya Pradesh.

His Lordship was born on 24th April, 1956 at Nagpur and passed Higher Secondary School Examination from SFS School, Nagpur in 1972 and obtained Bachelors Degree of Arts from SFS College in 1975 and Law Degree from Nagpur University in 1978.

His Lordship was enrolled as an Advocate with the Bar Council of Maharashtra on 13th September, 1978 and practiced at the Nagpur Bench of Bombay High Court for over 21 years. His Lordship had also practised in the Supreme Court of India and was designated as Senior Advocate in 1998.

His Lordship is a keen sportsman and has special interest in Tennis and had played tennis representing University College of Law which won the Intercollegiate Championship. His Lordship has also played for Nagpur University in the All India Inter-Universities Tournament.

His Lordship was elevated to the Bench of Bombay High Court on 29th of April, 2000 as Additional Judge and thereafter, as permanent Judge on 29th of April, 2002.

After rendering more than ten years of valuable services as a Judge in the High Court of Maharashtra, His Lordship was appointed as Chief Justice of High Court of Madhya Pradesh and was administered oath of office by the Governor of M.P. on 16th October, 2012 in an impressive ceremony organized at Raj Bhavan, Bhopal. His Lordship was accorded welcome ovation on 17th October, 2012 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

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

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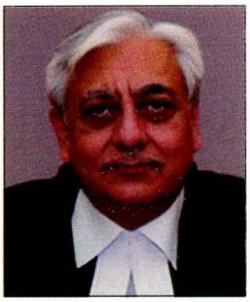
FAREWELL TO HON'BLE THE ACTING CHIEF JUSTICE SHRI SUSHIL HARKAULI



Hon'ble Shri Justice Sushil Harkauli who served as Acting Chief Justice of High Court of Madhya Pradesh has been transferred to the Allahabad High Court.

Born on 2nd August, 1951. Was enrolled as an Advocate with the State Bar Council of Allahabad in 1976 after completing Law Graduation from the Allahabad High Court and worked mainly in civil, constitutional, company, testamentary, matrimonial, arbitration and criminal sides. Elevated to the Bench of High Court of Allahabad as Permanent Judge on 5th February, 1999.

As a Judge of Allahabad High Court delivered landmark judgments in cases relating to Trade Tax Act, Wealth Tax Act, Income Tax Act and other Statutes including Criminal Law.

Was transferred to Jharkhand High Court on 1st July, 2009. Was also Executive Chairman of Jharkhand State Legal Services Authority. In His Lordship's 12 years of Judgeship, acquired rich judicial and administrative experience. His Lordship was transferred to the High Court of Madhya Pradesh and took oath on 8th April, 2011 and was Administrative Judge. On transfer of Hon'ble the then Chief Justice Shri Syed Rafat Alam, His Lordship became the Acting Chief Justice of High Court of Madhya Pradesh from 8th August, 2011.

On transfer to Allahabad High Court, His Lordship was accorded farewell ovation at the South Block of High Court of Madhya Pradesh on 11th October, 2012

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

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HON'BLE SHRI JUSTICE S.C. SINHO DEMITS OFFICE

Hon'ble Shri Justice S.C. Sinho demitted office on 20.08.2012 on His Lordship's attaining superannuation. Was born on 20.08.1950. Joined Judicial Service as Civil Judge Class II on 20.06.1975. Was promoted to the post of Additional District Judge on 22.06.1989. Worked as Registrar in Arbitration Tribunal, Bhopal from 08.09.1992. Worked as District and Sessions Judge in Satna and Indore. Also worked as Registrar (Vigilance), High Court of M.P. from 31.03.2005 to May, 2005. Was Registrar General, High Court of M.P., Jabalpur prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 15.05.2006 and as permanent Judge on 15.01.2009.

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

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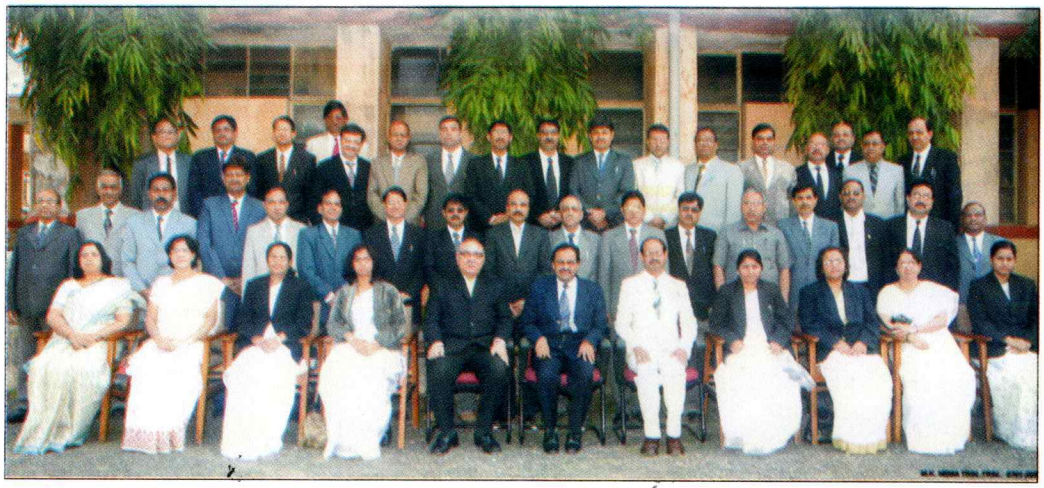
When Mahatma Gandhi appeared for the London Matriculation Examination, there appeared a question on general knowledge which was: "What is more golden than gold?"

Gandhiji wrote in reply: "Truth"

TRAINING PROGRAMMES CONDUCTED BY THE INSTITUTE UNDER THE APPROVED SCHEMES FOR UTILIZATION OF GRANT-IN-AID RECOMMENDED BY THE XII FINANCE COMMISSION



Colloquium on - Prevention of Corruption Act, 1988
(6th & 7th October, 2012 at JOTRI, Jabalpur)

Specialised Training Programme on
Cyber Law & Computer Forensics for Judges of HJS Cadre
(08.10.2012 to 10.10.2012 at C.B.I. Academy, Ghaziabad)

PART - I

सिविल प्रक्रिया संहिता, 1908 के आदेश 23 नियम 1 ए के अधीन पक्षकारों के पक्षान्तरण सहित आदेश 23 नियम 1 के अधीन वादों के प्रत्याहरण एवं परित्याग से संबंधित विधि की व्याख्या

न्यायिक अधिकारीगण
जिला देवास, पन्ना, राजगढ़ एवं उज्जैन

विधि का यह मान्य सिद्धांत है कि विधि किसी व्यक्ति को कोई अधिकार, हित व लाभ प्रदान नहीं करती जो वह नहीं चाहता है (***invito beneficium non datur***)। आदेश 23 नियम 1 सी.पी.सी. के वाद के प्रत्याहरण और उसके परित्याग के उपबंध उक्त विधि सिद्धांत पर आधारित है वाद के प्रत्याहरण व उसके परित्याग के उपबंध लगभग समान हैं लेकिन वाद के प्रत्याहरण के उपबंध वाद के परित्याग के उपबंधों से कुछ सीमा तक अधिक व्यापक है लेकिन दोनों का विधिक प्रभाव समान है। सर्वप्रथम हम वाद के प्रत्याहरण की विधि के बारे में विचार करेंगे।

वाद का प्रत्याहरण :–

आदेश 23 नियम 1 (3) सी.पी.सी. के अनुसार जहां न्यायालय का यह समाधान हो जाता है कि :–

(ए) वाद किसी प्रारूपिक त्रुटि के कारण विफल हो जायेगा, अथवा

(बी) वाद की विषय–वस्तु या दावे के भाग के लिये नया वाद संस्थित करने के लिये वादी को अनुज्ञात करने के पर्याप्त आधार हैं।

वहां वह ऐसे निबंधनों पर जिन्हें वह ठीक समझे, वादी को ऐसे वाद की विषय–वस्तु या दावे के ऐसे भाग के संबंध में नया वाद संस्थित करने की स्वतंत्रता रखते हुये ऐसे वाद से या दावे के ऐसे भाग से अपने को प्रत्याहृत करने की अनुज्ञा दे सकेगा।

आदेश 23 नियम 1 (4) (बी) सी.पी.सी. के अनुसार जहां वादी उप नियम 3 में निर्दिष्ट अनुज्ञा के बिना वाद से या दावे के भाग से प्रत्याहृत कर लेता है, वहां वह ऐसे खर्च के लिये दायी होगा जो न्यायालय अधिनिर्णीत करे और वह ऐसे विषय–वस्तु या दावे के ऐसे भाग के बारे में कोई नया वाद संस्थित करने से प्रवारित होगा।

उक्त उपबंध से यह स्पष्ट है की वादी दो प्रकार से वाद को प्रत्याहृत कर सकता है :–

प्रथम – न्यायालय की अनुज्ञा से,

द्वितीय – न्यायालय के अनुज्ञा के बिना।

न्यायालय की अनुज्ञा से वाद का प्रत्याहरण करने के लिये उपर उल्लेखित दोनों या उनमें से कोई एक आधार अर्थात प्रारूपिक त्रुटि के कारण वाद का विफल होना या अन्य पर्याप्त आधार मौजूद

होना चाहिए। यदि उक्त दोनों आधार या उनमें से कोई एक आधार मौजूद नही हो तो न्यायालय वाद के प्रत्याहरण की अनुज्ञा नहीं दे सकता।

न्यायालय के अनुज्ञा के बिना वाद वापस लेने के लिये ऊपर उल्लेखित आधार या कोई अन्य आधार मौजूद होने की अपेक्षा नहीं है अर्थात वादी के द्वारा बिना अनुज्ञा के दावा वापस लेने का आवेदन प्रस्तुत कर देना पर्याप्त है वादी के द्वारा उक्त आशय का आवेदन पेश करने पर वाद विधिक रूप से वापस होना मान लिया जाता है।

न्यायालय की अनुज्ञा से वाद वापस लेने व न्यायालय के अनुज्ञा के बिना वाद वापस लेने हेतु आवेदन स्वीकार हो जाने पर उनके विधिक परिणाम में भी अंतर है। जहां वादी न्यायालय की अनुज्ञा से वाद वापस लेता है वहां वह परिसीमा विधि के अधीन रहते हुये वाद की विषय–वस्तु या दावे के संबंध में या उसके भाग के संबंध में नया वाद प्रस्तुत करने के लिये स्वतंत्र रहता है अर्थात उसके द्वारा उसी वाद हेतुक के लिये नया वाद पेश किया जा सकता है यदि वाद हेतुक उत्पन्न होने के दिनांक से नया दावा विहित कालावधि में है।

इसके विपरीत यदि वादी ने वाद न्यायालय के अनुज्ञा के बिना वापस लिया है तो वह उस वाद की विषय–वस्तु या उस वाद के किसी भाग के बारे में नया वाद संस्थित करने से प्रवारित हो जाता है अर्थात उसी वाद हेतुक पर नया दावा प्रस्तुत नहीं कर सकता है।

प्रारूपिक त्रुटि से वाद विफल होना :–

आदेश 23 नियम 1 (3) (ए) सी.पी.सी. में प्रारूपिक त्रुटि को परिभाषित नहीं किया गया है लेकिन उसका आशय उस त्रुटि से है जो वाद के प्रारूप (Form) से प्रगट होती है और वह गुणदोष से संबंधित नहीं है इस संबंध में न्याय दृष्टांत ***कुर्जी जीना भाई कोटेचा विरूद्ध अम्बा लाल कान जी भाई पटेल, ए.आई.आर. 1972 गुजरात 63, सोमल राजू विरूद्ध सोमनाथू शिवराजी गणेश, ए.आई.आर. 2009 ए.पी. 12, फतेह साह विरूद्ध मूसम्मात बेगा, ए.आई.आर. 1964 जे.के. 8 (डी.बी.)*** अवलोकनीय है।

शासन के विरूद्ध प्रस्तुत वाद में धारा 80 सी.पी.सी. के अंतर्गत नोटिस का अभाव एक प्रारूपिक त्रुटि है इस संबंध में न्याय दृष्टांत ***सर्टिफिकेट ऑफिसर विरूद्ध कस्तूरी चंद, ए.आई.आर. 1970 उड़ीसा 239*** अवलोकनीय है।

वाद में आवश्यक पक्षकारों का असंयोजन प्रारूपिक त्रुटि नहीं है इस संबंध में न्याय दृष्टांत ***विमल कुमार गुप्ता विरूद्ध रामदेवी शिवहरे, 2008 (1) एम.पी.जे.आर. 177 एवं खातून विरूद्ध रामसेवक कांशीनाथ, ए.आई.आर. 1986 उड़ीसा 1*** अवलोकनीय है। भागीदारी फर्म का अपंजीकृत होना उक्त न्याय दृष्टांत खातून में प्रारूपिक त्रुटि नहीं माना गया है।

अन्य पर्याप्त कारण :–

अन्य पर्याप्त कारण को भी आदेश 23 नियम 1 सी.पी.सी. में परिभाषित नहीं किया गया है पर्याप्त कारण शब्द के पूर्व प्रयुक्त शब्द "अन्य" महत्वपूर्ण है जो यह स्पष्ट करता है कि अन्य पर्याप्त कारण

प्रारूपिक त्रुटि से अलग है कुछ मामले ऐसे होते है जिनमें अभिभाषक, विधि सलाहकार या अन्य किसी के त्रुटि के कारण वाद विफल होता है यह विफलता खुद वादी की ओर से या अन्य कारण से हो सकती है इन परिस्थितियों में न्यायालय के द्वारा प्रकरण के तथ्यों और परिस्थितियों के अनुसार न्याय के उद्देश्य को प्राप्त करने के लिये वादी को वाद के प्रत्याहरण की अनुमति दी जा सकती है इस प्रकार अन्य पर्याप्त कारण का अर्थ केवल प्रारूपिक त्रुटि तक या उसके समान कारणों तक सीमित नहीं किया जा सकता इस संबंध में न्याय दृष्टांत ***बसप्पा विरूद्ध मीमप्पा, ए.आई.आर. 1969 मैसूर 141*** अवलोकनीय है।

एक वाद निष्कासन हेतु संपत्ति अंतरण अधिनियम के अंतर्गत प्रस्तुत हुआ बाद में यह प्रकट हुआ की वाद में स्थान नियंत्रण अधिनियम के उपबंध लागू होंगे ऐसे में नया वाद पेश करने की अनुमति के साथ प्रत्याहरण हेतु उचित कारण माना गया अवलोकनीय न्याय दृष्टांत ***नूमाजर दोराब मेहता विरूद्ध असम कंपनी लिमिटेड, ए.आई.आर. 2006 कलकत्ता 204***।

विचारण की दशा में पेश साक्ष्य वाद को प्रमाणित करने के लिये अपर्याप्त होना, अन्य पर्याप्त कारण नहीं माना गया अवलोकनीय न्याय दृष्टांत ***के. चीना बेरा थेवर विरूद्ध एस. बेरा थेवर, ए.आई.आर. 1983 मद्रास 160***।

अंतिम तर्क की स्टेज पर वाद में नये तथ्य समाहित करने का आवेदन अस्वीकृत होने पर वाद वापस लेना इसे अन्य पर्याप्त कारण नहीं माना गया अवलोकनीय न्याय दृष्टांत ***व्ही. नारायणप्पा विरूद्ध नारायणप्पा, ए.आई.आर. 1971 मैसूर 334***।

एक से अधिक वादी होने पर :–

जहां एक से अधिक व्यक्ति वादी की हैसियत से वाद में पक्षकार होते है उस स्थिति में केवल एक वादी या उनमें से कुछ वादी अन्य वादीगण की सहमति के बिना पूर्ण वाद या अपने हक की सीमा तक का वाद वापस नहीं ले सकते इसके लिये अन्य वादीगण की सहमति आवश्यक है जैसा कि आदेश 23 नियम 1 (5) सी.पी.सी. से ही स्पष्ट है।

एक से अधिक प्रतिवादी होने पर :–

आदेश 23 नियम 1 में ऐसा कोई प्रतिबंध नहीं है कि जहां एक से अधिक प्रतिवादी हो वहां कुछ प्रतिवादीगण के विरूद्ध वाद वापस लेने में अन्य प्रतिवादीगण की सहमति आवश्यक होती है अतः वादी उसकी इच्छानुसार कुछ प्रतिवादीगण के विरूद्ध वाद वापस ले सकता है और कुछ प्रतिवादीगण के विरूद्ध वाद आगे जारी रख सकता है।

लेकिन यदि वाद हेतुक का विभाजन नहीं हो सकता हो उस स्थिति में वादी कुछ प्रतिवादीगण के विरूद्ध वाद वापस लेकर शेष के विरूद्ध जारी नहीं रख सकता अर्थात जहां किसी हित व अधिकार का विनिश्चय समग्र रूप से व एक साथ सभी प्रतिवादीगण के विरूद्ध किये जाने की अपेक्षा हो, विवाद के पूर्ण व प्रभावी निराकरण के लिये तथा प्रभावी डिक्री पारित करने हेतु सभी प्रतिवादीगण की आवश्यकता हो तथा वाद हेतुक को प्रतिवादीगण के अनुसार पृथक–पृथक करके उसका निराकरण

न किया जा सकता हो उस स्थिति में या तो समग्र वाद वापस लेना होगा या सभी प्रतिवादीगण के विरूद्ध उसे जारी रखना पड़ेगा।

यदि दावा दो संविदाओं से उत्पन्न होता है जिन्हें आसानी से अलग–अलग किया जा सकता है वहां वादी एक संविदा संबंधी उसके दावे के भाग को छोड़ सकता है इस संबंध में न्याय दृष्टांत ***नेशनल एग्रीकल्चर्स कॉपरेटिव मार्केटिंग फेडरेशन ऑफ इंडिया विरूद्ध एलिमेरा, ए.आई.आर. 1989 एस.सी. 818*** अवलोकनीय है।

जहां वादी अवयस्क या प्रतिनिधि स्वरूप का वाद हो :–

अवयस्क वादी के मामले में वाद का संचालन वाद मित्र के द्वारा किया जाता है उस अवंस्था में और प्रतिनिधि स्वरूप के वादों में भी वाद मित्र या वाद का संचालन करने वाले मुख्य वादी की पूर्व अनुज्ञा के बिना वाद वापस नहीं लिया जा सकता आदेश 23 नियम 1 सी.पी.सी. में इस संबंध में स्पष्ट प्रावधान नहीं है और जो प्रावधान है वे वाद के परित्याग के बारे में है प्रत्याहरण के बारे में नहीं है लेकिन अवयस्क के हितों का संरक्षण करना न्यायालय का दायित्व है साथ ही प्रतिनिधि स्वरूप के वाद में सार्वजनिक हित का संरक्षण करना भी न्यायालय का दायित्व है अतः आदेश 32 नियम 7 और आदेश 1 नियम 8 सी.पी.सी. के प्रावधानों का आशय देखते हुये जहां वादी अवयस्क हो या प्रतिनिधि स्वरूप का वाद हो वहां वाद के प्रत्याहरण के पूर्व न्यायालय की अनुमति आवश्यक होती है।

वाद का परित्याग :–

आदेश 23 नियम 1 (1) सी.पी.सी. के अनुसार वाद संस्थित किये जाने के पश्चात किसी भी समय वादी सभी प्रतिवादीगण या उनमें से किसी के विरूद्ध अपने वाद का परित्याग या अपने दावे के भाग का परित्याग कर सकेगा :

लेकिन जहां वादी अवयस्क है या विकृतचित्त है वहां न्यायालय के अनुमति के बिना वाद का या दावे के किसी भाग का परित्याग नहीं किया जा सकता साथ ही न्यायालय वाद मित्र का शपथ पत्र और प्लीडर का प्रमाण पत्र लेकर ही परित्याग की अनुमति देते हैं।

वाद के परित्याग के लिये न्यायालय की अनुमति अपेक्षित नहीं है और ऐसे परित्याग के बाद नया दावा पेश करने का कोई विकल्प नहीं होता है और न ही न्यायालय इस आशय की अनुमति दे सकता है आदेश 23 नियम 1 (4) (ए) सी.पी.सी. के प्रावधान है इस बारे में स्पष्ट है।

सशर्त अनुज्ञा :–

आदेश 23 नियम 1 (3) सी.पी.सी. के अनुसार न्यायालय वाद के प्रत्याहरण का आवेदन स्वीकार करते समय कुछ शर्ते भी अधिरोपित कर सकता है जिसमें प्रतिकारात्मक खर्च अदा करने की शर्त भी हो सकती है और ऐसी शर्त की पूर्ति यदि नहीं की जाती है और युक्तियुक्त समय के भीतर वादी परिव्यय अदा नहीं करता है तब न्यायालय वाद खारिज कर सकता है इस संबंध में न्याय दृष्टांत ***कोंकण ट्रेडिंग कंपनी विरूद्ध सुरेश गोविन्द कामथ तारकर, ए.आई.आर. 1986 एस.सी. 1009*** अवलोकनीय है।

निर्वाचन संबंधी मामले :–

न्याय दृष्टांत ***इनामति मालप्पा बासप्पा विरूद्ध देसाई बासव राज अयप्पा, ए.आई.आर. 1958 एस.सी. 698*** तीन न्याय मूर्तिगण की पीठ में यह प्रतिपादित किया गया है कि आदेश 23 नियम 1 सी.पी.सी. के प्रावधान निर्वाचन याचिकाओं में लागू नहीं होते है क्योंकि ये विवाद दो व्यक्तियों से संबंधित विवाद नहीं होते है बल्कि इसमें कई व्यक्तियों का हित जुड़ा होता है।

न्याय दृष्टांत ***बिजिया नंद विरूद्ध एस. साबू, ए.आई.आर. 1963 एस.सी. 1566*** के मामले में निर्वाचन याचिका के विरूद्ध अपील के मामलों में अपीलार्थी को अपील वापस लेने का अधिकारी होना पाया गया था।

क्लेम मामले :–

न्याय दृष्टांत ***शुभ्रा सक्सेना विरूद्ध अशोक कुमार, 2006 (4) एम.पी.एल.जे. 603*** में यह अवधारित किया गया है कि आदेश 23 नियम 1 सी.पी.सी. के अंतर्गत नवीन क्लेम याचिका प्रस्तुत करने से तभी रोका जा सकता है जब द्वितीय क्लेम याचिका उन्हीं पक्षकारों के बीच हो लेकिन जहां द्वितीय क्लेम भिन्न प्रत्यर्थी के विरूद्ध पेश किया गया हो वहां वह आदेश 23 नियम 1 सी.पी.सी. से वर्जित नहीं होता।

प्रत्याहरण आवेदन का प्रत्याहरण :–

आदेश 23 नियम 1 सी.पी.सी. में प्रत्याहरण के आवेदन का प्रत्याहरण करने का प्रावधान नहीं है लेकिन उचित मामले में न्यायालय अपनी अंतर्निहित शक्तियों के तहत ऐसा आवेदन वापस लेने की अनुमति दे सकता है इस संबंध में न्याय दृष्टांत ***राजेन्द्र प्रसाद गुप्ता विरूद्ध प्रकाश चन्द्र मिश्र, ए.आई.आर. 2011 एस.सी. 1137*** अवलोकनीय है।

न्याय दृष्टांत ***जेट प्लाईवूड प्राईवेट लिमिटेड विरूद्ध मधुकर नवलखा, ए.आई.आर. 2006 एस.सी. 1260*** के अनुसार वाद के प्रत्याहरण का आदेश हो जाने के बाद न्यायालय धारा 151 सी. पी.सी. के तहत ऐसे आदेश को अपास्त कर सकता हैं।

विषय–वस्तु समान होना :–

आदेश 23 नियम 1 सी.पी.सी. का वर्जन तभी लागू होता है जब बाद में प्रस्तुत किये गये वाद की विषय–वस्तु समान हो यदि न्यायालय के अनुमति के बिना वाद वापस लिया गया हो और बाद में प्रस्तुत वाद की विषय–वस्तु भिन्न है तब आदेश 23 नियम 1 (4) सी.पी.सी. का वर्जन लागू नहीं होगा।

न्याय दृष्टांत ***बल्लभ दास विरूद्ध डॉ. मदन लाल, ए.आई.आर. 1970 एस.सी. 987*** में समान विषय–वस्तु को स्पष्ट किया गया है।

पूर्व न्याय के बारे में :–

वाद वापस लेने या वाद का परित्याग कर देने के आदेश पर धारा 11 सी.पी.सी. या आदेश 2 नियम 2 सी.पी.सी. के प्रावधान आकर्षित नहीं होते और इस आदेश को डिक्री नहीं माना गया है अतः प्रतिवादी पश्चातवर्ती वाद में प्रतिरक्षा करने से वर्जित नहीं होता है जैसा की न्याय दृष्टांत ***कंडा पझा नाडार विरूद्ध चित्रगनियाम्माला, ए.आई.आर. 2007 एस.सी. 1575*** में प्रतिपादित किया गया है।

वादी का अधिकार :–

आदेश 23 नियम 1 (1) सी.पी.सी. के अनुसार वाद के प्रत्याहरण या परित्याग का वादी को आत्यांतिक अधिकार (Absolute Right) है यदि वादी नया वाद पेश करने के अनुमति के बिना वाद को वापस लेना चाहता है या उसका परित्याग करना चाहता है तब न्यायालय उसे बाध्य नहीं कर सकती कि वह वाद का संचालन आगे करे जैसा की न्याय दृष्टांत मेसर्स ***हूलास राय बैजनाथ विरूद्ध फर्म के.बी. बास एण्ड कंपनी, ए.आई.आर. 1968 एस.सी. 111*** में तीन न्याय मूर्तिगण की पीठ में प्रतिपादित किया है।

लेकिन जहाँ बटवारे के या लेखों के हिसाब के वाद में प्रारंभिक डिक्री पारित हो गई है वह प्रतिवादी के पक्ष में कुछ अधिकार निहित व सृजित हो गये है उस स्थिति में वादी का उक्त अधिकार सीमित हो जाता है जैसा कि न्याय दृष्टांत ***आर. राममूर्ति अय्यर विरूद्ध राजेश्वर राव, ए.आई.आर. 1973 एस.सी. 643*** में प्रतिपादित किया गया है।

न्याय दृष्टांत स्***नेह गुप्ता विरूद्ध देवी स्वरूप, (2009) 6 एस.सी.सी. 194*** में यह प्रतिपादित किया गया है कि वाद के प्रत्याहरण का अधिकार वादी का असीमित अधिकार होगा यदि विपक्षी को कोई अधिकार उत्पन्न न हुये हों और यदि विपक्षी को कोई अधिकार उत्पन्न हो गये हों तब उसे सूचना पत्र दिया जाना आवश्यक बताया गया।

न्याय दृष्टांत ***अजब राव विरूद्ध देवी लाल, 2002 (1) एम.पी.जे.आर. 303, द्वारका प्रसाद विरूद्ध निर्मला, 2010 (2) एम.पी.एल.जे. 249 एस.सी.*** भी इस संबंध में अवलोकनीय है।

द्वितीय वाद पेश करने के बाद प्रत्याहरण आवेदन :–

न्याय दृष्टांत ***विमलेश कुमारी कुलश्रेष्ठ विरूद्ध सम्भाजी राव, (2008) 5 एस.सी.सी. 58*** के मामले में द्वितीय वाद प्रस्तुत करने के बाद वाद के प्रत्याहरण का आवेदन पेश किया गया जो नवीन वाद प्रस्तुत करने की स्वतंत्रता के बिना स्वीकार हुआ। यह प्रतिपादित किया गया कि द्वितीय वाद निरस्त नहीं किया जा सकता।

परिसीमा :–

आदेश 23 नियम 2 सी.पी.सी. के अनुसार एक वादी जो नवीन वाद लाने के अनुमति के साथ अपने वाद का प्रत्याहरण करता है वह परिसीमा विधि से उसी प्रकार बाध्य होता है मानो उसके द्वारा प्रथम वाद प्रस्तुत नहीं किया गया हो।

न्याय दृष्टांत ***बख्तावर सिंह विरूद्ध सदाकौर, ए.आई.आर. 1996 एस.सी. 3488*** में यह मत व्यक्त किया गया है जहां पूर्व वाद को न्यायालय के क्षेत्राधिकार के संबंध में किसी प्रारूपिक त्रुटि के आधार अथवा उसी प्रकार के किसी अन्य कारण से वापस लेने की अनुमति प्रदान की गई हो केवल तभी धारा 14 (3) परिसीमा अधिनियम के प्रावधान का लाभ उठा सकते हैं।

न्यायालय का विवेकाधिकार :–

न्याय दृष्टांत ***दुर्गाप्रसाद विरूद्ध लक्ष्मीनारायण, 2008 (2) एम.पी.एल.जे. 23*** के अनुसार आदेश 23 नियम 1 (3) सी.पी.सी. के प्रावधान के अनुसार वाद के प्रत्याहरण की अनुमति देना न्यायालय का विवेकाधिकार है न्यायालय के लिये यह आज्ञापक नहीं है कि वह ऐसी अनुमति दे।

न्याय दृष्टांत ***के. एस. भूपति विरूद्ध कोकिला, ए.आई.आर. 2000 एस.सी. 2132*** में वाद की वापसी या परित्याग के संबंध में पेश आवेदन के निराकरण के समय न्यायालय के कर्त्तव्य स्पष्ट किये गये हैं जिन्हें ध्यान में रखना चाहिये।

न्याय दृष्टांत ***भूषण विरूद्ध बालाप्रसाद, 2007 (3) एम.पी.एच.टी. 338*** के मामले में वादी ने आदेश 23 नियम 1 (3) सी.पी.सी. के तहत आवेदन प्रस्तुत किया न्यायालय ने दावे को वापस लेने की अनुमति देते हुये नया वाद प्रस्तुत करने की स्वतंत्रता अस्वीकार कर दी यह प्रतिपादित किया गया कि आवेदन अंशतः स्वीकार किया गया जो उचित नहीं है।

इस तरह ऐसा आवेदन या तो पूरी तरह स्वीकार किया जाना चाहिये या पूरी तरह अस्वीकार किया जाना चाहिये।

न्याय दृष्टांत ***भारत विरूद्ध रामप्रताप, ए.आई.आर. 1985 इलाहाबाद 61*** के मामले में वादी का वाद प्रत्याहरण का आवेदन स्वीकार किया गया नया दावा पेश करने की अनुमति का उल्लेख आदेश में नहीं था यह प्रतिपादित किया गया कि यह अनुमान नहीं निकाला जा सकता कि प्रार्थना अस्वीकार कर दी गई है।

पक्षकारों के पक्षांतरण के बारे में :–

आदेश 23 नियम 1 ए सी.पी.सी. के अनुसार जहाँ नियम 1 के अधीन वादी द्वारा वाद का प्रत्याहरण या परित्याग किया जाता है और प्रतिवादी आदेश 1 के नियम 10 के अधीन वादी के रूप में पक्षांतरित किये जाने के लिये आवेदन करता है वहाँ न्यायालय, ऐसे आवेदन पर विचार करते समय इस प्रश्न पर सम्यक ध्यान देगा कि क्या आवेदक का कोई सारवान प्रश्न है जो अन्य प्रतिवादियों में से किसी के विरूद्ध विनिश्चित किया जाना है।

इस प्रकार इस उपबंध की 3 शर्तें है :–

1. आदेश 23 नियम 1 के अधीन वादी द्वारा वाद का प्रत्याहरण या परित्याग किया जाना,

2. उस वाद के प्रतिवादीगण या किसी प्रतिवादी के द्वारा उसे वादी के रूप में पक्षांतरित किये जाने के लिए आदेश 1 नियम 10 सी.पी.सी. के अंतर्गत आवेदन पेश किया जाना, और

3. उस प्रतिवादी अर्थात आवेदक के संबंध में वाद में ऐसा सारवान प्रश्न मौजूद होना जो अन्य प्रतिवादीगण में से किसी के विरूद्ध विनिश्चय किया जाना है।

न्याय दृष्टांत ***जेठी बेन विरूद्ध मणीबेन, ए.आई.आर. 1983 गुजरात 194*** में आदेश 23 नियम 1 ए सी.पी.सी. के प्रावधान के उद्देश्य और क्षेत्र की व्याख्या की गई है जिसके अनुसार जो प्रतिवादी पक्षांतरण चाहता है उसके वाद में हित वादी के हित के समान व कॉमन होना चाहिये वादी के द्वारा वाद वापस लिये जाने के कारण अन्य प्रतिवादीगण के विरूद्ध सारभूत प्रश्न निराकृत करने की अपेक्षा होना चाहिये इस उपबंध का उद्देश्य वाद बाहुल्य रोकना है साथ ही पक्षांतरण चाहने वाले प्रतिवादी के संबंध में विनिश्चय के लिये सारवान प्रश्न होना चाहिये।

न्याय दृष्टांत ***मथुरा बाई विरूद्ध दरियानामल, ए.आई.आर. 1995 एम.पी. 202*** के अनुसार किसी भी व्यक्ति को उसकी इच्छा से ही वादी के रूप में पक्षांतरित किया जा सकता है जो व्यक्ति पक्षांतरण के लिये तैयार नहीं है और वाद को आगे नहीं चलाना चाहता है उसे पक्षांतरित होने के लिए बाध्य नहीं किया जा सकता।

न्याय दृष्टांत ***संपत बाई विरूद्ध मधुसिंह, ए.आई.आर. 1960 एम.पी. 84*** में आदेश 1 नियम 10 (2) सी.पी.सी. की कसौटी को स्पष्ट किया गया है।

अपील की स्टेज पर पक्षांतरण :–

मूल अपीलार्थी द्वारा अपील का परित्याग करने या उसको वापस लेने पर प्रत्यार्थी को आदेश 23 नियम 1 ए सी.पी.सी. के तहत अपीलार्थी के रूप में पक्षांतरित किया जा सकता है इस संबंध में धारा 141 और धारा 107 (2) सी.पी.सी. के प्रावधान ध्यान रखे जाने योग्य हैं जिनके अनुसार वाद के लिये विहित प्रक्रिया विविध कार्यवाही में भी लागू होती है और अपील न्यायालय को भी वही शक्तियाँ होती है जो आरंभिक अधिकारिता वाले न्यायालय को होती है।

न्याय दृष्टांत ***गोविन्दा अय्यर विरूद्ध कुमार ए.आई.आर. 1980 मद्रास 232*** के अनुसार प्रत्यार्थी को अपीलार्थी के रूप में पक्षांतरित किया जा सकता है लेकिन जब ऐसे पक्षांतरण से अपील के क्षेत्र में फैलाव हो रहा हो वह विचारण के लिये नये आधार पैदा हो रहे हों वहां पक्षांतरण मान्य नहीं करना चाहिये। इस मामले में यह भी मत व्यक्त किया गया कि धारा 21 परिसीमा अधिनियम के प्रावधान ऐसे पक्षांतरण के समय लागू नहीं होंगे बल्कि परिसीमा उस दिनांक से परिगणित होगी जब मूल अपील पेश हुई थी।

इस तरह आदेश 23 नियम 1 एवं आदेश 23 नियम 1 बी सी.पी.सी. के तहत प्रस्तुत आवेदन पत्र का निराकरण करते समय उक्त वैधानिक स्थितियों को ध्यान में रखना चाहिये।

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विशेष अधिनियमों के अधीन अपराधों के संदर्भ में जमानत संबंधी विधि की व्याख्या

न्यायिक अधिकारीगण
जिला जबलपुर, शाजापुर एवं दमोह

सामान्य विधि में जमानत के बारे में दण्ड प्रक्रिया संहिता, 1973 की धारा 436 से 439 में प्रावधान है लेकिन विशेष विधि में अलग–अलग अधिनियम में जमानत के बारे में अलग–अलग प्रावधान है दैनिक न्यायिक कार्य में उपयोगी कुछ अधिनियमों में जमानत के बारे में विधिक स्थिति जानना अत्यंत आवश्यक है। यहाँ हम ऐसे ही कुछ अधिनियमों में जमानत के बारे में विधिक स्थिति के बारे में विचार करेंगे।

1. म.प्र. आबकारी अधिनियम, 1915

इस अधिनियम की धारा 59 (1) के अनुसार धारा 59–ए में विनिर्दिष्ट अपराधों के सिवाय, इस अधिनियम के अधीन दण्डनीय समस्त अपराध, दण्ड प्रक्रिया संहिता, 1973 के अर्थ के अंतर्गत **जमानतीय** होंगे।

धारा 59–ए (1) के अनुसार धारा 49–ए के अधीन दण्डनीय अपराध में और धारा 34 की उपधारा (1) के खण्ड (ए) या खण्ड (बी) के अंतर्गत आने वाले किसी अपराध में यदि मदिरा की मात्रा 50 बल्क लीटर से अधिक हो तब अग्रिम जमानत का कोई आवेदन ग्रहण नहीं किया जायेगा।

धारा 59–ए (2) के अनुसार धारा 49 –ए के अधीन दण्डनीय किसी अपराध में और धारा 34 की उपधारा (1) के खण्ड (ए) या (बी) के अंतर्गत आने वाले किसी अपराध में जहां मदिरा की मात्रा 50 बल्क लीटर से अधिक हो अभियुक्त को जमानत का लाभ तभी दिया जायेगा जब :–

1. लोक अभियोजक को जमानत के आवेदन का विरोध करने का अवसर दिया गया हो और,
2. अभिलेख पर उपलब्ध सामग्री से न्यायालय का यह समाधान होना चाहिये कि यह विश्वास करने के युक्तियुक्त आधार हैं कि अभियुक्त ऐसे अपराध का दोषी नहीं है और जमानत पर रहने पर यह संभावना नहीं है कि वह कोई अपराध करेगा।

परंतु धारा 34 की उपधारा (1) के खण्ड (ए) या खण्ड (बी) के अंतर्गत आने वाले किसी अपराध में जहां मदिरा की मात्रा 50 बल्क लीटर से अधिक है 60 दिन की कुल अवधि के लिये तथा जहां वह अपराध धारा 49–ए से संबंधित है वहां 120 दिन की कुल अवधि के लिये ही अनुसंधान के दौरान अभियुक्त निरोध में रखा जायेगा और यदि उक्त 60 दिन या 120 दिन की अवधि के बाद भी अभियोग पत्र या परिवाद प्रस्तुत नहीं होता है तो अभियुक्त को जमानत प्रस्तुत करने पर निर्मुक्त कर दिया जायेगा।

धारा 59–ए (1) की संवैधानिकता पर विचार करते हुये न्याय दृष्टांत ***नरेश कुमार विरूद्ध स्टेट ऑफ एम.पी., 2004 (4) एम.पी.एच.टी. 205 (डी.बी.)*** में यह प्रतिपादित किया गया है कि धारा 59 ए (1) के प्रावधान संविधान के अनुच्छेद 21 के विरूद्ध नहीं है।

न्याय ***दृष्टांत बंसी लाल विरूद्ध स्टेट ऑफ एम.पी., 2003 (2) एम.पी.डब्ल्यू.एन. 88*** में धारा 59–ए (2) के उक्त प्रतिशोध की व्याख्या की गई है और यह प्रतिपादित किया गया है कि जमानत आवेदन पर विचार करते समय **प्रथमतः** न्यायालय को लोक अभियोजक को जमानत आवेदन का विरोध ा करने का अवसर उपलब्ध करवाना चाहिये ऐसा विरोध युक्तियुक्त और न्याय संगत होना चाहिये केवल विरोध के लिए विरोध युक्तियुक्त और न्याय संगत नहीं कहा जा सकता **द्वितीयतः** न्यायालय को केस डायरी में संग्रहित सामग्री के आधार पर यह देखना चाहिये कि क्या अभियुक्त प्रथम दृष्ट्या अपराध का दोषी नहीं है और वह जमानत पर रहने के दौरान कोई अपराध नहीं करेगा इन मामलों में जमानत आवेदन पर विचार करते समय विधायिका द्वारा समाज के हित में लगाये गये उक्त प्रतिशोध ा और नागरिकों की स्वतंत्रता के बीच एक संतुलन बनाना चाहिये।

अतः धारा 49–ए एवं धारा 34 की उपधारा (1) के खण्ड (ए) एवं खण्ड (बी) के अंतर्गत आने वाले उक्त मामलों में जमानत आवेदन पर विचार करते समय उक्त न्याय दृष्टांत ***बंसी लाल*** से मार्गदर्शन लेना चाहिये।

न्याय दृष्टांत ***राजेन्द्र विरूद्ध स्टेट ऑफ एम.पी., 2002 (4) एम.पी.एच.टी. 186*** के अनुसार धारा 437 (6) दण्ड प्रक्रिया संहिता के प्रावधान म.प्र. आबकारी अधिनियम के अधीन दण्डनीय अपराधों के लिये लागू होते हैं।

न्याय दृष्टांत ***अर्जुन विरूद्ध स्टेट ऑफ एम.पी., 2011 (4) एम.पी.एच.टी. 137*** के अनुसार अभियुक्त का समान प्रकार के अपराध करने का अभ्यस्त अपराधी होना धारा 437 (6) दण्ड प्रक्रिया संहिता के आवेदन को निरस्त करने का एक वैध आधार है।

इस तरह म.प्र. आबकारी अधिनियम, 1915 के मामलों में जमानत आवेदन पर विचार करते समय धारा 49–ए एवं धारा 34 की उपधारा (1) के खण्ड (ए) या खण्ड (बी) के ऐसे मामले जिसमें मदिरा की मात्रा 50 बल्क लीटर से अधिक है उनमें उक्त वैधानिक स्थितियों को ध्यान रखना चाहिये। धारा 59 (1) के अनुसार शेष अपराध जमानतीय बतलाये गये हैं।

2. भ्रष्टाचार निवारण अधिनियम, 1988

इस अधिनियम में जमानत के संबंध में पृथक से कोई प्रावधान नहीं है अतः धारा 4 (2) दण्ड प्रक्रिया संहिता, 1973 के प्रकाश में सामान्य विधि दण्ड प्रक्रिया संहिता, 1973 की प्रथम अनुसूची के भाग दो के प्रावधान जमानत के बारे में लागू होंगे और अपराध में दिया जाने वाला दण्ड यदि 3 वर्ष या उससे अधिक है तब ऐसे सभी अपराध अजमानतीय होंगे।

अधिनियम में धारा 7 से 15 तक के विभिन्न अपराधों में 3 वर्ष से 7 वर्ष तक का दण्ड निर्धारित है अतः सभी अपराध अजमानतीय हैं।

न्याय दृष्टांत ***मदन कुमार विरूद्ध स्टेट, एम.सी.आर.सी. 697/2012*** आदेश दि.19.01.2012 द्वारा माननीय म.प्र. उच्च न्यायालय ने अभियुक्त का अग्रिम जमानत आवेदन निरस्त किया और यह आधार दिया कि मामले में भारी मात्रा में राशि का दुर्विनियोग किया गया है और शासन को हानि पहुंचाई गई है यह मामला भ्रष्टाचार निवारण से संबंधित था।

न्याय दृष्टांत ***लालू प्रसाद विरूद्ध स्टेट, 2002 सी.आर.एल.जे. 2762*** में माननीय झारखण्ड उच्च न्यायालय ने यह प्रतिपादित किया है कि अभियुक्तगण द्वारा जाली बिल कोषालय में पेश करके कपट पूर्वक भारी राशि निकालने व उसका दुर्विनियोग करने का मामला था जिसमें अभियोग की गंभीरता को देखते हुये जमानत आवेदन निरस्त किया गया।

न्याय दृष्टांत ***अजय कुमार जैन विरूद्ध स्टेट ऑफ महाराष्ट्र, 2000 (4) क्राइम्स 27*** में माननीय बॉम्बे उच्च न्यायालय ने यह प्रतिपादित किया है कि न्यायालय को अपराध की गंभीरता और उसकी प्रकृति को ध्यान में रखना चाहिये इस मामले में अभियुक्त का अग्रिम जमानत निरस्त किया गया था।

इस तरह भ्रष्टाचार निवारण अधिनियम, 1988 के अंतर्गत सभी मामले अजमानतीय होते हैं और विशेष न्यायालय को अपराध की प्रकृति और दण्ड प्रक्रिया संहिता के जमानत संबंधी प्रावधान को ध्यान में रखते हुये जमानत आवेदन पर विचार करना होता है।

3. विद्युत अधिनियम, 2003

इस अधिनियम की धारा 151–बी के अनुसार दण्ड प्रक्रिया संहिता, 1973 में अंतर्विष्ट किसी बात के होते हुये भी धारा 135 से 140 या धारा 150 के अधीन दण्डनीय अपराध संज्ञेय और **अजमानतीय** होंगे।

उक्त प्रावधान से यह स्पष्ट है कि शेष अपराध अर्थात धारा 141, 142, 143, 146 **जमानतीय** होंगे।

न्याय दृष्टांत ***चक्रवर्ती प्रसाद विरूद्ध स्टेट ऑफ बिहार, (2002) 10 एस.सी.सी. 390*** के मामले में अभियुक्त ने माननीय उच्च न्यायालय के आदेशानुसार 20 लाख रूपये की राशि जमा करवा दी थी और उसे 6 माह के भीतर 21 लाख रूपये 3 समान किस्तों में जमा करवाने पर अग्रिम जमानत का लाभ दिया गया था।

अतः समुचित मामलों में अभियुक्त को जमानत का लाभ विशेष न्यायालय अपने विवेकाधिकार से दे सकती है।

4. आवश्यक वस्तु अधिनियम, 1955

इस अधिनियम में भी वर्तमान में जमानत के बारे में कोई विशेष प्रावधान नहीं है पूर्व में धारा 10 ए में जमानत बावत् प्रावधान थे जो वर्तमान में निष्प्रभावी हो चुके हैं अतः धारा 4 (2) दण्ड प्रक्रिया संहिता, 1973 के प्रकाश में सामान्य विधि दण्ड प्रक्रिया संहिता, 1973 की प्रथम अनुसूची के भाग दो के प्रावधान जमानत के बारे में लागू होंगे और अपराध में दिया जाने वाला दण्ड यदि 3 वर्ष या उससे अधिक है तब ऐसे सभी अपराध अजमानतीय होंगे।

अधिनियम की धारा 7 (1) (ए) (1) के मामलों में 1 वर्ष तक के कारावास और अर्थ दण्ड का प्रावधान है।

अधिनियम की धारा 7 (1) (ए) (2) एवं धारा 7 (2), धारा 7 (2ए) और (2बी) के मामलों में 7 वर्ष तक के कारावास और अर्थ दण्ड का प्रावधान है।

अतः इस अधिनियम के तहत जमानत के बारे में विचार करते समय सामान्य विधि दण्ड प्रक्रिया संहिता, 1973 को ध्यान में रखना होगा और उसी अनुसार अपराध जमानतीय या अजमानतीय दण्ड के अनुसार देखे जायेंगे।

न्याय दृष्टांत ***बलवंत साहेब लाल विरूद्ध स्टेट ऑफ एम.पी., 2002 सी.आर.एल.जे. 335*** एवं ***हरिओम विरूद्ध स्टेट ऑफ एम.पी., आई.एल.आर. (2010) एम.पी. 764*** से भी जमानत के संबंध में मार्गदर्शन लिया जा सकता है जिनमें यह प्रतिपादित किया गया है कि इस अधिनियम के मामलों में जमानत के बारे में दण्ड प्रक्रिया संहिता की प्रथम अनुसूची लागू होगी।

5. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989

इस अधिनियम की धारा 18 के अनुसार धारा 438 दण्ड प्रक्रिया संहिता के प्रावधान इस अधिनियम के अधीन अपराध करने वाले व्यक्ति के गिरफ्तारी के मामले में लागू नहीं होते हैं।

इसके अतिरिक्त अधिनियम में जमानत के संबंध में और कोई प्रावधान नहीं है। अतः धारा 4 (2) दण्ड प्रक्रिया संहिता, 1973 के प्रकाश में सामान्य विधि दण्ड प्रक्रिया संहिता, 1973 की प्रथम अनुसूची के भाग दो के प्रावधान जमानत के बारे में लागू होंगे और अपराध में दिया जाने वाला दण्ड यदि 3 वर्ष या उससे अधिक है तब ऐसे सभी अपराध अजमानतीय होंगे।

अधिनियम की धारा 4 में 1 वर्ष तक के कारावास का प्रावधान है जबकि धारा 3 (1) एवं धारा 3 (2) में 5 वर्ष या उससे अधिक के दण्ड का प्रावधान हैं।

अधिनियम में विशेष न्यायालय के गठन का प्रावधान है।

माननीय म.प्र. उच्च न्यायालय के आदेश कमांक 1414/कॉन्फिडेंशियल /96 जबलपुर/2(2)21 /63 पार्ट 2 दिनांक 03.09.1996 के अनुसार अधिनियम के अधीन नियुक्त विशेष न्यायाधीश के अनुपस्थिति में जमानत आवेदन पर सत्र न्यायाधीश महोदय को और विशेष न्यायाधीश और सत्र न्यायाधीश महोदय दोनों की अनुपस्थिति में वरिष्ठ अपर सत्र न्यायाधीश को जमानत आवेदन सुनने का अधिकार होता हैं।

जहां तक अग्रिम जमानत आवेदन का संबंध है न्याय दृष्टांत ***दुलेसिंह विरूद्ध स्टेट ऑफ एम.पी., 1993 (1) एम.पी.जे.आर. 223*** में माननीय म.प्र. उच्च न्यायालय ने यह प्रतिपादित किया है कि जहां प्रथम दृष्ट्या मामला ही नहीं बनता हो वहां अग्रिम जमानत आवेदन पत्र वर्जित नहीं होता है।

न्याय दृष्टांत ***ताराचंद विरूद्ध स्टेट, 2007 सी.आर.एल.जे. 3047*** के अनुसार धारा 2 (के) किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000 में परिभाषित किशोर के मामले में अग्रिम जमानत आवेदन पत्र प्रचलन योग्य होता है और धारा 18 का वर्जन या 'बार' लागू नहीं होता।

जहां तक न्यायिक मजिस्ट्रेट द्वारा धारा 437 दण्ड प्रक्रिया संहिता की शक्तियों के प्रयोग का संबंध है चूंकि अधिनियम में जमानत के संबंध में पृथक से कोई प्रावधान नहीं है अतः समुचित मामलों में न्यायिक मजिस्ट्रेट इन शक्तियों का प्रयोग कर सकते हैं और जमानत का लाभ दे सकते हैं जैसा

कि न्याय दृष्टांत मिर्ची उर्फ ***राकेश जैन विरूद्ध स्टेट ऑफ एम.पी., 2001 (3) एम.पी.एल.जे. 356, संजय नरहर मालसे विरूद्ध स्टेट ऑफ महाराष्ट्र, 2005 सी.आर.एल.जे. 2984, ए.एम. अली विरूद्ध स्टेट ऑफ केरला, 2000 सी.आर.एल.जे. 2721, एलेक्स विरूद्ध स्टेट ऑफ केरला, 2007 सी.आर.एल.जे. 2835*** में प्रतिपादित किया गया है।

इस तरह इस अधिनियम के अंतर्गत जमानत के मामले में दण्ड की मात्रा को देखते हुये और उक्त वैधानिक स्थितियों को देखते हुये विचार करना चाहिये।

6. स्वापक औषधि मनः प्रभावी पदार्थ अधिनियम, 1985

इस अधिनियम में धारा 37 (1) (बी) के अनुसार दण्ड प्रक्रिया संहिता, 1973 में किसी बात के होते हुये भी धारा 19 अथवा धारा 24 अथवा धारा 27 ए के अंतर्गत अपराध और **वाणिज्यिक मात्रा** के संबंध में अपराध के लिये भी दण्डनीय अपराध के अभियुक्त व्यक्ति को जमानत पर तभी छोड़ा जायेगा जब :–

1. लोक अभियोजक को आवेदन का विरोध करने का अवसर दे दिया गया हो और
2. लोक अभियोजक आवेदन का विरोध करता है वहां न्यायालय का यह समाधान हो गया है कि यह विश्वास करने के युक्तियुक्त आधार है कि अभियुक्त ऐसे अपराध का दोषी नहीं है और जमानत पर रहने के दौरान उसके द्वारा कोई अपराध किये जाने की संभावना नहीं है।

उक्त प्रावधान से यह स्पष्ट है धारा 37 में उल्लेखित उक्त अपराधों के अलावा शेष अपराधों के मामले में धारा 4 (2) दण्ड प्रक्रिया संहिता, 1973 के प्रकाश में दण्ड प्रक्रिया संहिता की प्रथम अनुसूची के भाग दो से दण्ड की मात्रा के आधार पर मार्गदर्शन लेना होगा।

अधिनियम में मादक पदार्थो की मात्रा के आधार पर दण्ड के प्रावधान है जिस बारे में अधिसूचना क्रमांक 1055 (ई) दिनांक 19.10.2001 अवलोकनीय है।

यदि मादक पदार्थ **मध्य मात्रा** में हो तब 10 वर्ष तक के कारावास और 1 लाख रूपये तक के अर्थदण्ड का प्रावधान है अतः ये मामले **अजमानतीय** हैं और इन मामलों में धारा 439 दण्ड प्रक्रिया संहिता के प्रावधान लागू होंगे।

अल्प मात्रा में मादक पदार्थ के मामलों में 6 माह के कठोर कारावास और 10 हजार रूपये तक का अर्थदण्ड के प्रावधान हैं ये मामले न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा विचारणीय होते हैं अतः ये अपराध **जमानतीय** होते हैं जैसा कि न्याय दृष्टांत अब्दुल ***अजीज विरूद्ध स्टेट ऑफ यू.पी., 2002 सी.आर.एल.जे. 2913*** एवं ***मिन्नी खादिम अली विरूद्ध स्टेट एन.सी.टी. देहली, डब्ल्यू.पी. (क्रिमिनल) 338/2012 एवं क्रिमिनल म.प्र. 2824/12 निर्णय दिनांक 08.05.2012*** में प्रतिपादित किया गया है।

न्याय दृष्टांत ***यूनियन ऑफ इंडिया विरूद्ध रतन मलिक, (2009) 2 एस.सी.सी. 624*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि धारा 37 (1) (बी) अधिनियम में दो शर्ते लगायी गई हैं और ये शर्ते वैकल्पिक नहीं हैं बल्कि दोनों शर्ते पूर्ण होना चाहिये अर्थात लोक अभियोजक

को आवेदन के विरोध का अवसर भी देना चाहिये और यह विश्वास करने के युक्तियुक्त आधार भी होना चाहिये कि अभियुक्त अपराध का दोषी नहीं है और जमानत पर रहने के दौरान उसके द्वारा अपराध करने की संभावना नहीं है। इस संबंध में न्याय दृष्टांत ***कलेक्टर ऑफ कस्टम न्यू देल्ही विरूद्ध ए. नोडीरा, (2004) 3 एस.सी.सी. 549*** भी अवलोकनीय है।

न्याय दृष्टांत ***यूनियन ऑफ इंडिया विरूद्ध शिवशंकर केशरी, (2007) 7 एस.सी.सी. 798*** के अनुसार धारा 37 (1) (बी) (2) अधिनियम के अनुसार न्यायालय के लिये यह आवश्यक नहीं है कि वह ऐसा निष्कर्ष दे की अभियुक्त दोषी नहीं है इस न्याय दृष्टांत में युक्तियुक्त आधार शब्द को भी स्पष्ट किया है।

न्याय दृष्टांत ***एन.आर. मून विरूद्ध मोहम्मद नसीमुद्दीन, (2008) 6 एस.सी.सी. 721*** के अनुसार यदि धारा 37 (1) (बी) अधिनियम की पालना किये बिना जमानत दी गई है तो वह स्थिर रखे जाने योग्य नही है।

न्याय दृष्टांत ***बबुआ उर्फ ताजमूल हुसैन विरूद्ध स्टेट ऑफ बिहार, ए.आई.आर. 2001 एस. सी. 1052*** के अनुसार साक्ष्य के स्तर पर यह नहीं कहा जा सकता की अभियुक्त अपराध का दोषी नहीं है। यह समाज के हित में है कि समाज के विरूद्ध घोर अपराध करने वाले को विचारण तक अभिरक्षा में रखा जावे।

न्याय दृष्टांत ***के.के. असरफ विरूद्ध स्टेट ऑफ केरला, 2010 सी.आर.एल.जे. 3141*** के अनुसार मादक पदार्थ की वाणिज्यिक मात्रा का प्रमाण जमानत के स्तर पर सुसंगत होता है इस संबंध में न्याय दृष्टांत ***चेतन विरूद्ध यूनियन ऑफ इंडिया, 2011 (1) एम.पी.डब्ल्यू.एन. 29*** भी अवलोकनीय है।

किशोर के मामलों में धारा 12 किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000 लागू होता है और उसका धारा 37 एन.डी.पी.एस. एक्ट पर अधिभावी प्रभाव होता है इस संबंध में न्याय दृष्टांत ***प्रवीण कुमार मोर्य विरूद्ध स्टेट ऑफ यू.पी., 2011 सी.आर.एल.जे. 200*** अवलोकनीय है।

न्याय दृष्टांत ***डॉ. बिपिन शांति लाल पंचाल विरूद्ध स्टेट ऑफ गुजरात, ए.आई.आर. 1996 एस.सी. 2897*** तीन न्याय मूर्तिगण की पीठ के मामले में यह प्रतिपादित किया गया है कि अभियोग पत्र प्रस्तुत हो जाने के बाद धारा 167 (2) दण्ड प्रक्रिया संहिता के तहत् अभियुक्त को नियत अवधि में अभियोग पत्र पेश न होने के आधार पर जमानत पाने का अधिकार नहीं होता है।

न्याय दृष्टांत ***यूनियन ऑफ इंडिया विरूद्ध थामी सरारी, 1995 (4) एस.सी.सी. 190*** के अनुसार यदि अधिनियम द्वारा निर्धारित अवधि में अभियोग पत्र प्रस्तुत नहीं होता है तो अभियुक्त धारा 167 (2) दण्ड प्रक्रिया संहिता के प्रावधान का उपयोग कर सकता है।

धारा 36 ए (4) एन.डी.पी.एस. एक्ट के प्रावधान धारा 167 (2) दण्ड प्रक्रिया संहिता के क्रम में ध्यान रखे जाने योग्य हैं।

इस तरह इस अधिनियम के तहत प्रस्तुत जमानत आवेदन पत्रों में उक्त वैधानिक स्थिति ध्यान में रखना होती है।

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PRINCIPLES, RULES AND DISCRETION INVOLVED IN CASES RELATING TO ELECTRONIC EVIDENCES

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Evidence law is a mixture of principles, rules and discretion. In today's society, people utilize various electronic media and computers in numerous aspects of their lives. It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances of science. With this perspective it is very important for us to understand the rules and discretion involved with the admissibility and probative value of electronic evidences as the topic involves technical percepts intermingled with judicial discretion and matters of fair trial principles. The article first discusses how the investigation must be done, which is also useful for judges to understand various issues relating to genuineness of the electronic evidences, then it goes on to discuss various issues relating to admisiibility and probative value of these kind of evidences.

Passing of IT Act,2000 and amendments in Indian Evidence Act, 1872 and other legislations have collectively introduced electronic evidence in Indian legal scenario. Digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial. Evidence includes any electronic records produced for the inspection of the Court. According to Section 2 (c) of the Information Technology Act, 2000 "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro record. The word 'data' includes 'a representation of information, knowledge and facts' which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored initially in the memory of computer. Electronic evidence may be found in emails, digital photographs, hard disk, databases, information exchanged through mobile, audio or video files, ATM receipts, CCTV files, telephonic conversations, storage media like pen drive or memory cards etc. which come into existence through an electronic device with or without human interference.

INVESTIGATION:

The nature of electronic evidence is a complex one and it demands extra caution and care during the investigation. Cases may be sometimes won or lost based on how well the parties perform these tasks rather than on the merits of the case. In United States there is a duty of the parties to preserve electronically stored information. But the Indian law does not prescribe any such duty. Therefore the court must always be vigilant about the conditions in which it was recorded, the nature of custody from which the evidence is obtained and the nature in which it must be preserved.

As to investigation the first thing to remember is the "golden rule of electronic evidence" for investigation is – never, in any way, modify the original media if at all possible. Thus, before any data analysis occurs, it usually makes sense to create an exact, bit stream copy of the original storage media that exists on the subject computer. Imaging the subject media by making a bit-for-bit copy of all sectors on the media is a well-established process that is commonly performed on the hard drive level, hence often referred to as hard drive imaging, bit stream imaging or forensic imaging.

Once imaging is completed, any good tool should generate a digital fingerprint of the acquired media, otherwise known as a hash. A hash generation process involves examining all of the 0's and 1's that exist across the sectors examined. Altering a single 0 to a 1 will cause the resulting hash value to be different. Both the original and copy of the evidence are analyzed to generate a source and target hash. Assuming they both match, we can be confident of the authenticity of the copied hard drive or other media.

The evidence should be stored at normal room temperature, without being subject to any extremes of humidity and free from magnetic influence such as radio receivers. Some computers are capable of storing internal data by use of batteries. If the battery is allowed to become flat, internal data may be lost.

In the case of ***Mrs. Havovi Kersi Sethna v. Mr. Kersi Gustad Sethna, 2011 (3)MHLJ 564= 2011 (3) Cwcc 356*** of the Bombay High Court, which was a case involving CD produced in a civil case the Court held that the requirement of sealing the recorded conversation would not be applicable in this case. It has nevertheless to be shown to be accurate and untampered with. That requirement is of essence in a criminal case where during investigation the conversation of a party is recorded by the investigating officer. Investigating officer in criminal cases must seal what he has recorded and keep it safe from tampering for the examination by the Court. Therefore, it must be remembered that during investigation and at the pre-trial stage integrity and continuity of evidence establishing chain of possession is of paramount importance.

PRE-TRIAL:

After investigation during the pretrial stage also the accused must be provided with the copies of such electronic evidence which the prosecution seeks to rely upon in compliance with Section 207 of Cr.P.C. In the case of ***Dharambir v. Central Bureau of Investigation, 2008 (148) DLT 289,*** of the Delhi High Court, held that hard disks being document must be given to the defence under Section 207 of CrPC. One cannot obviate the statutory requirement under Section 207(v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

But the court observed the judgment of the Chancery Division in England in ***Darby and Co. Ltd. v. Weldon, 1991 (2) All. ER. Ch D 901*** where it was pointed out that "there was a discretion in the court to consider 'if necessary in the light of expert evidence, what information is or can be made available, or how far it is

necessary for there to be inspection of copying of the original document (database) or whether the provision of printouts or hard copies is sufficient, what safeguards should be incorporated to avoid damage to the database." Based on it the court ordered that it would be appropriate if, consistent with the requirement of Section 207(v) CrPC that the accused petitioners are permitted to listen to the original recordings of the relevant intercepted telephonic conversations relied upon by the prosecution by having the said original recordings played directly from the hard discs in the presence of the accused or their representatives, their counsel and the learned Judge. The parties will be permitted to listen to these conversations as they are played from the HDs and make notes. It will not foreclose the right of the accused, at the stage of the trial, for the purposes of cross- examining the witnesses of the APFSL to have access to the hard discs.

TRIAL:

As per Section 65B of the Indian Evidence Act 1872, computer output may be printed on paper, recorded, stored or copied in magnetic or optical media. Electronic evidences produced before a court are generally of two types. ***First*** is the active accessible information contained in any electronic device, which can be assessed by the court itself. It includes files containing audio files, video files etc. The ***second*** category includes the records that are print out or out put of any information contained in any electronic or digital device. Different forms of production may be appropriate for different types of electronically stored information. For example, an email sent by the accused demanding extortion money may be printed and produced before the court while a telephonic conversation demanding extortion money recorded may be produced which was copied in CD and is intended to be played before the Court.

Any electronic information stored may be original and secondary copy of some other electronic information. But Section 65B (1) states that any information contained in electronic record which is copied in optical media or magnetic media is also a document. What is relevant here is that it must be established that it is the true copy of the information contained in original electronic record that is also at the time of evidence and final appreciation. The rules relating to admissibility and nature of proceedings may change depending upon the nature of the electronic evidence led.

Before proceeding further it must be kept in mind that the admissibility of evidence is totally distinct and separate from the weightage given to the evidence or its probative value. The Hon'ble Apex Court has also emphasized this point in many cases while discussing the law relating to electronic evidence.

In ***Bharat v. Rajeshvari, Special criminal application No. 2426 of 2008 dated 25th January, 2010,*** the Hon'ble Gujrat High Court observed that Section 65B of the Act makes secondary evidence of electronic documents admissible subject to conditions mentioned in Sub-section (2) thereof. Only upon fulfillment of those conditions such documents can be exhibited. Even then, as rightly pointed out

on behalf of respondent No.1, question of proof of contents of such documents would remain open. In any case, by mere production and granting provisional exhibit numbers, contents of the documents do not get automatically proved. It is burden of the petitioner to prove such documents and it is for him to decide how to discharge such burden.

It is now settled that information contained in electronic or digital form is also a document. Section 65B of the Indian Evidence Act also states that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer referred to as computer output is also deemed to be a document. After the court comes to conclusion that the evidence forwarded is relevant to fact in issue the court may allow the evidence only after the conditions relating to admissibility are fulfilled. Irrespective of the type of electronic evidence led by the party, the rules relating to their admissibility contained under Section 65A and 65B are applicable. Section 65B (1) states that electronic evidence shall be admissible, without further proof or production of the original, as evidence of contents of the original or of any fact stated therein. For example, a person filing the printout of an email in the court can rely upon it as an original without the need to actually file the original soft copy. The primary purpose is to sanctify proof by secondary evidence.

The conditions under which this may be done are contained under sub-clause 2 of Section 65B which reads as follows:

> "The conditions referred to in Sub-section (1) in respect of a computer output shall be the following, namely:
>
> (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer. (b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities; (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

To demonstrate compliance with the requirements extracted above, a certificate is required to be made in court. This statement or certificate is nothing but an affidavit under Section 65B. Under Section 65B (4) the certificate must identify the electronic record containing the statement, describe the manner in which it was produced giving the particulars of the device involved in the production of that record, deal with the conditions mentioned in Section 65B(2) and must be signed by a person occupying a responsible position in relation to the operation of the relevant device. In the case of ***Ark Shipping Co. Ltd. v. Grt Ship Management Pvt. Ltd., 2007 (6) BCR 311,*** the Hon'ble Bombay High Court extracted an affidavit under Sec. 65B as below and found it in the facts and circumstances of the case in sufficient compliance of Section 65B of the Evidence Act. A model affidavit based on the same affidavit may be given as below-

1. I state that I was employed/working/owner as....., address.....
2. I state that being employed/working at ....., I was personally involved in the transaction/recording/ receiving..... I state that all emails/transaction/ messages/record management etc were done through computer terminals/device in ..... ,by me.
3. I state that by virtue of my employment/work/ ownership I was authorized to use the computer/device at..... Further, the computer terminals/device used by me were functioning normally at all times. Further, since I was personally involved in the transaction/recording/receiving, I in fact personally authored/saw the records.
4. I hereby produce hard copies of the ..... records which represent ..... The said records are annexed hereto as Exhibit "A".
5. I confirm that the contents of the hard copies of the records..... are identical to the ..... information exchanged/received/recorded through the computer/device operated by me. I further state and confirm that the contents of the hard copies of the emails at Exhibit "A" are identical to the hard copies of the records.....
6. Accordingly, I am making this present affidavit to certify that the hard copies of the records..... annexed at Exhibit "A" to ..... hereto are a "true copy"/ reproduction of the electronic record which was regularly fed into/transmitted through my computer terminal at ..... in the ordinary course

of activities. I further state that at all times the computer terminals utilized by me were operating properly and there is no distortion in the accuracy of the contents of the hard copies of the records.....

7. The above affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Section 65B of the Evidence Act. The above print outs as taken out from the computer, therefore, can be treated as certified copy. The office/me has also endorsed the remark "as Certified original print out" as stated on oath may be treated as original after obtaining directions from the Court.

The Court may accept an affidavit under Section 65B based on above extract depending upon the facts and circumstances of the case. The court may also insist on adding of any affirmation in the above affidavit in order to comply with Section 65B.

But the requirement of producing the above affidavit is also not absolute. The Hon'ble Supreme Court in case of ***State v. Navjot Sandhu, AIR 2005 SC 3820*** when examining Section 65B, held that even when an affidavit/certificate under Section 65B is not filed it would not foreclose the court from examining such evidence provided it complies with requirements of Sections 63 and 65 of Indian Evidence Act. The case dealt with the proof and admissibility of call records which were print outs from the servers recording them. The Court held that printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing company can be led into evidence through a witness who can identify the signatures of the certifying officer or otherwise speak to the facts based on his personal knowledge. Irrespective of the compliance of the requirements of Section 65B which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 and 65. Further the court held that in absence of certificate also a cross examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken, was sufficient to prove the call records.

Hence, even when a certificate as required by Section 65B is not filed, computer output, for example a printout being a secondary evidence, can be admitted if it fulfills the conditions laid down by Section 65 of Evidence Act. The Hon'ble Delhi High Court in case of ***State v. Mohd. Afzal, 107 (2003) DLT 385 decided on 29.10.2003*** observed that sub section (4) of Section 65B provides an alternative method to prove electronic record and not the only method to prove electronic evidence.

In case of any information contained in an electronic record which is printed in paper for example an email printed on paper or digital photograph, the

submission of a certificate/affidavit as per Section 65B or fulfillment of conditions contained under Sections 63 and 65 may suffice for the admission of the evidence. For example, in case of production of call records obtained of a particular number, the service provider shall produce the printouts obtained from the servers recording it with an affidavit/certificate annexed. At the same time since these servers being voluminous are of such nature that not to be easily movable, the print outs taken by mechanical process being secondary evidence are also admissible. Of course the reliability of the evidence has to be established by witnesses relating to it.

Other than these, there may be evidences forwarded by a party which are governed by the The Bankers Book Evidence Act, 1891. Section 2(8) of the Act talks about certified copy which includes printout taken from electronic data storage device certified in accordance with Section 2A. A bankers book entry certified in that manner, according to Section 4 shall be prima facie evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case to the same extent as of original entry.

For evidences in second category which are accessible by the court itself or information which the parties wish to play before the court, for example an audio file or video file contained in a CD, the court will have to conduct the voir dire i.e. a trial within a trial, in which the Court determines disputed facts that have to be established before certain items of evidence can be admitted. A party will be needed to give an affidavit under Section 65B but it will also have to fulfill the conditions for admissibility of tape recordings as given by the Apex Court in plethora of cases which were there before the IT Act amendments. It may be mentioned that the tape-recorded conversation/video can be heard or viewed by the Court itself by playing it over.

In case of ***Ram Singh v. Col. Ram Singh, AIR 1986 SC 3*** the Apex Court stated conditions for admissibility of a tape recorded statement as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out.

(4) The statement must be relevant according to the Evidence Act.

(5) It must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

Recently, in ***Tukaram S. Dighole v. Manikrao Shivaji Kokate, AIR 2010 SC 965*** the Supreme Court held that, though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasised that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence.

In case of ***State of Gujarat v. Shailendra Kamalkishor Pande, 2008 Cri LJ 953*** the Hon'ble Gujarat High Court after discussing principles relating to tape recorded conversation enumerated in various cases and summarized ***Ram Singh case*** (supra) held that Court will also consider the aforesaid principles while considering the authenticity of the CD in this behalf. A recording of the telephone conversation or ephemeral electronic communication shall also be covered by the rules laid down for tape recorded conversation.

Once again it must be reminded that these conditions are supplementary to need of Certificate under Section 65B for admissibility. It must also be understood that for the evidences falling in the first category in which the printout is forwarded the proving of genuinness is a question of appreciation and affidavit in itself is sufficient for admissibility. But for the evidences falling in second category like video or audio files, the genuiness is precondition for admissibility because of the dictum of the Apex Court in various cases.

The authenticity of an electronic record such as a CD or a cassette would be determined by the proof of the original electronic record. This proof may be given by production of that record itself which can be compared with the CD produced by the parties or any other evidence, direct or circumstantial, which the Court would then consider, examine and appreciate. Also the proof of malfunctioning of the original mechanical processes or its unreliability may render the evidence forwarded as unreliable. In case of ***P. Padmanabh v. M/s. Syndicate Bank Ltd., AIR 2008 Kar 42 (Karnataka High Court)*** where malfunctioning of ATM machine was proved, the suit of the plaintiff bank for a recovery of money on the basis of extracts of ATM entries was dismissed and the provisions of Section 65B were held to be of no help.

In case of ***R.M. Malkani vs. State of Maharashtra, AIR 1973 SC 157,*** the court held that tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue secondly, there is identification of voice and thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident.

In case of ***Mrs.Havovi Kersi Sethna*** (supra) of the Hon'ble Bombay High Court, the husband relied on CD on which conversation between the wife and the husband has been recorded by the husband. The Court held that the CD sought to be relied upon is a copy obtained by the mechanical/electronic process of having the original tape recorded conversation uploaded on a computer from the original electronic record and copied on the CD. Such copy is, therefore, secondary evidence under Section 63 of the Evidence Act and, therefore, can be used only upon production of the original record of such taped conversation under Section 65B of the Evidence Act. The court emphasized upon the production of the original recording not only from the point of view of the evidence led being secondary evidence but also to prove the authenticity of the CDs produced. The court held that-

> "If the Plaintiff admits the contents, it would be read in evidence. If the Plaintiff disputes the contents, the Defendant would have to prove, by direct or circumstantial evidence in his own examination-in-chief, the accuracy of the recorded conversation. For that proof, the Defendant may produce the original electronic record itself. The Defendant may seek to play it before the Court to have the voice of the Plaintiff, hitherto disputed, identified in Court. The Defendant may himself identify the voice and get it produced in evidence and apply for playing it on record for the Court to appreciate the identified document being the recorded conversation on the CD. The Defendant may produce any other circumstantial evidence to prove the authenticity of the CD as he would for any other documentary evidence. The Defendant would also be entitled, but as a last resort, to have the forensic evidence to identify the voice of the Plaintiff by having the voice of the Plaintiff recorded as an admitted document and compared by an expert in the forensic laboratory to verify that voice with the voice on the taped conversation on the CDs."

In Court on its own Motion v. State, 2009 Cri LJ 677, the Hon'ble Delhi High Court observed that in the case of digital recordings, such as the ones that we are concerned with, the original is not the video footage but the chip or the microchip on which the recording is made. To put it loosely, the chip or microchip is the negative while the video footage is the photograph produced from that negative. All original chips (except one) on which the recordings were made are available with NDTV and were produced and we viewed the contents thereof. The Court after viewing the originals held that "A viewing of the original chips and video recordings leaves us in no manner of doubt of the genuineness and reliability of the footage. In view of the above, we have no hesitation in rejecting the contention of Mr. Anand and Mr. Khan regarding the integrity of the video recordings and certainly that of the chips."

The voice recorded must be identified by admissible evidence and if there is a challenge to the authenticity of the recording, the court must be satisfied on this matter before admitting it. The genuineness of the evidence must be established by way of oral evidence or other evidences which may include expert evidence. It can be concluded that audio and video evidence of events, acts or transactions shall be admissible provided is shall be shown, presented or displayed to the court and shall be identified, explained or authenticated by the person who made the recording or by some other person competent to testify on the accuracy based on above rules.

In case if the defendant wishes to produce a CD to contradict prosecution witness during the cross examination, the Court must not allow the defence to produce the CD at that stage if the genuineness is still in question or the person in question denies being part of such recording. This can be done by recalling the witness once the genuineness of the evidence has been established. In ***Shailendra Kamalkishor Pande*** (supra) it was held that once it is proved that the CD which is sought to be produced is not tempered with, the defence can be permitted to use the said CD, and at that time, if the Court is satisfies about the authenticity and genuineness of the CD, the Court may permit the defence to recall the witness as per Section 311 CrPC which provides power to summon material witness or person present.

When a CD containing video and audio event or transaction is played before the Court, the Court must be very cautious as the judge is being placed in the position of a witness because they actually see what happened. Based on it the judge may compare the voice or identity of the person in question, it may be done by a witness who knows the person in question and also by experts of facial mapping skills. Further, the playing must be in open court, with judge, counsel and accused present. Before permitting the CD to be produced and played, before the Court, the Court may insist that the entire dialogue i.e. question and answers be reduced in writing in the form of a transcript authenticated by a responsible person who has recorded the entire conversation.

Other than this while recording and viewing the electronic evidence other rules of relevancy, admissibility and appreciation apply as it is in case of any documentary or oral evidence. In ***Yusufalli Esmail Nagree v. The State of Maharashtra, AIR 1968 SC 147*** the Apex Court held as following-

> "Having due regard to the decisions referred to above, it is clear that a previous statement made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146(1), Exception 2 to Section

146(1), Exception 2 to Section 153 and Section 155(3) of the Evidence Act."

The above law can be simultaneously applied in cases of audio or video files presented before the Court.

Electronic evidence because of its nature must be dealt with caution from the very stage of investigation till the disposal of property. During the investigation it is important to maintain the originality and chain of possession as well as safe and proper custody for their admissibility and reliability. The court must also be extra cautious while dealing with these evidences but should recognize that it is just a piece of evidence like any other documentary evidences having few special rules. The law relating to it is still in development not only in India but also in developed countries. In cases of first impression what must be remembered that the discretion must be exercised so as to check the genuineness of the evidence, maintaining the proper custody of the electronic evidence and the parties must be given every opportunity to have effective trial.

GUIDING PRINCIPLES FOR ADMISSIBILITY AND CHECKING THE PROBATIVE VALUE OF VARIOUS KINDS OF ELECTRONIC EVIDENCES:

Emails or Post on Social Networking Site:- A printout of the page in question may be admitted with an affidavit under Section 65B stating the source and other conditions. The authenticity will have disclosed, in the context of emails, by recipient's email ID and the sender's ID and the relevant information available in the text of mails containing those details. The correctness and the exact reproduction in print out version could be still issues in the cross-examination and the Court will then consider whether the text could have been altered or morphed. Evidence authenticating the user may also be procured from the agency maintaining the site.

Digital Photographs:- An affidavit may be produced as required under Section 65B of the person who has taken the photograph and also produced the hard copy of the Photograph. To establish the genuineness of the photograph, the photographer may be examined in the Court or the memory card, in which the digital photograph was stored, may be produced. In absence of the memory card or deletion of the soft copy from the memory card, they may be produced as secondary evidence on fulfillment of the conditions under Section 65 of the Evidence Act.

Hard Disk:- The Hard Disk may itself be produced in the Court being the primary evidence itself. The documents or information contained in it may be produced by way of printouts or other medium of output depending upon the nature of information accompanied by an affidavit under Section 65B.

SMSs or Other information stored in mobile: An information contained in mobile may also be produced by way of an output accompanied by an Affidavit under Section 65B. Generally there are two kinds of memory storage system in a mobile. An information received by a mobile may be stored in its internal

memory or in the external micro memory card attached to the mobile. In case it is stored in the internal memory the mobile itself or the internal chip taken out by the expert may be produced or in case of external card the card itself may be produced to establish the genuineness of the output. Any audio or video file will have to proved as provided in next point. The service provider may also authenticate the sender of the SMS.

Audio/video files: In addition to the affidavit, the Court will be required to reach at a point where the conditions stipulated for a tape recorded conversation are fulfilled as described in the Article before to allow the admissibility of these evidences. The court may allow it to be played in the Court itself and the genuineness need to be established as required by various case laws. The original recorder must be produced in the court to establish the genuineness.

ATM receipts: ATM receipts being an output of an ATM machine it is necessary that the well functioning of the ATM machine must be proved before the Court. The receipt may be submitted with an Affidavit of the the Bank Officer in charge for the maintenance of the ATM machine. The evidence of the Bank Officer incharge for maintaining the machine will be very important to prove the genuineness of the receipt.

CCTV files: CCTV files are generally recorded by a camera and stored in memory disk directly. The CCTV files may be played before the court. The person operating the CCTV will have to file an affidavit and also the memory disk in which the original CCTV footage is saved. A person may also identify the person in question or the information contained in the CCTV footage who is familiar with the information. The conditions for admissibility will be same as for the tape recorded conversations as laid down by the Hon'ble Apex Court again and again.

Telephonic/Call Details: the call details of a particular number used by a person are recorded in huge servers maintained by the service providers. These details may be produced by way of printout of these details accompanied by an Affidavit of the person incharge of these servers. Also as these servers are voluminous and not easily movable, their printouts are admissible as the conditions specified in Section 65(d) of the Evidence Act are also fulfilled. But in these cases as the servers cannot be produced themselves, the evidence of the employee of the service provider incharge becomes very crucial to prove the genuineness of the records.

Pen Drive/Memory cards/Compact Disc: these data storage instruments may be produced in the Court and the information contained may be produced by way of an affidavit. They may be proved depending upon their nature for example, it is a file which must be played before the court or a document which may be submitted by way of printout. But because of the nature of these instruments, the Court must be satisfied that they are the original copy and not a copy of the copy i.e. secondary evidence and not secondary of a secondary evidence.

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विधिक समस्याएं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती है। ऐसी समस्याओं के विधि समस्त समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायदान में विलम्ब की संभावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तंभ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे।)

परक्राम्य लिखत अधिनियम, 1881 की धारा 138 के अधीन विचारण योग्य परिवाद का निराकरण लोक अदालत के माध्यम से होने पर परिवादी को ऐसे परिवाद के साथ संदत्त न्यायालय फीस वापसी संबंधी विधि क्या होगी?

न्यायालय फीस अधिनियम, 1870 की अनुसूची–II की प्रविष्टि 1(b) के अधीन परक्राम्य लिखत अधिनियम, 1881 की धारा–138 के अधीन विचारण योग्य परिवाद पर प्रभार्य न्यायालय फीस विहित की गई है जो सुसंगत मामले में प्रश्नगत चेक की धनराशि के अनुसार निर्धारित होती हैं।

न्यायालय फीस अधिनियम, 1870 की धारा–16 के अधीन वाद (Suit) का निराकरण सिविल प्रक्रिया संहिता, 1908 की धारा–89 में विहित प्रविधियों में से, जिनमें लोक अदालत के माध्यम से समझौता भी सम्मिलित है, किसी के भी अधीन निराकरण होने पर वादी (Plaintiff)ऐसे मामले में संदत्त सम्पूर्ण न्यायालय फीस वापस पाने हेतु प्राधिकृत है। यह ध्यातव्य है कि यह प्रावधान केवल सिविल विवादों से संबंधित है तथा परक्राम्य लिखत अधिनियम की धारा 138 के अधीन विचारण योग्य मामलों, जो कि आपराधिक प्रकृतिक के है, पर प्रयोज्य नहीं है। अतः न्यायालय फीस अधिनियम, 1870 की धारा–16 के अधीन परक्राम्य लिखत अधिनियम की धारा 138 के अधीन विचारण योग्य परिवाद के लोक अदालत में निराकृत होने पर न्यायालय फीस वापस नहीं की जा सकती है। अतएव प्रश्न यह है कि क्या ऐसे मामलों मे न्यायालय फीस परिवादी को वापस होगी ?

न्यायालय फीस अधिनियम, 1870 की धारा–35 के अधीन राज्य सरकार को इस अधिनियम की प्रथम या द्वितीय सूची के अधीन प्रभार्य शुल्कों को अधिसूचना द्वारा कम या उनका परिहार करने की शक्ति प्रदान की गई है। इसी शक्ति का प्रयोग करते हुए म.प्र. शासन द्वारा दिनांक 10 अप्रैल 1987 को निम्नलिखित अधिसूचना निर्गत की गयी है जो ऐसे मामलों के संबंध में सुसंगत है–

"फा. क्र. 9–1–86–ब–इक्कीस, दिनांक 10 अप्रेल 1987–

न्यायालय फीस अधिनियम, 1870 (1870 का सं. 7) की धारा 35 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा–

(1) सक्षम अधिकारिता वाले न्यायालय को–

(क) लोक अदालत के समक्ष या उसके माध्यम से किये गये समझौते के निबन्धनों के अनुसार डिक्री पारित की जाने के लिये,

(ख) डिक्री या आदेश का समायोजन अभिलिखित करने के लिये जबकि ऐसा समायोजन लोक अदालत के समक्ष या उसके माध्यम से किये गये लिखित निपटान या समझौते से हुआ हो,

(ग) लोक अदालत के समक्ष या उसके माध्यम से किये गये किसी समझौते के परिणाम स्वरूप किसी अपराध की दण्ड प्रक्रिया संहिता, 1973 (1974 का सं. 2) या तत्समय प्रवृत्त किसी अन्य विधि के उपबन्धों के अधीन शमन करने के लिये किये गये किसी आवेदन पर, और

(2) सक्षम अधिकारिता वाले न्यायालय के समक्ष प्रस्तुत किये गये वादपत्र पर, जो लोक अदालत के समक्ष या उसके माध्यम से किये गये समझौते के निबन्धनों के अनुसार बनाया गया हो–

देय न्यायालय फीस से पूरे मध्यप्रदेश राज्य में छूट प्रदान करती है,

(3) यदि किसी सक्षम न्यायालय के समक्ष लम्बित मामले का समझौता लोक अदालत के अभिकरण के माध्यम से होता है तो पक्षकार उसके द्वारा पहले ही संदत्त की गई न्यायालय फीस वापस पाने का हकदार होगा,

2. यह अधिसूचना तारीख 19 नवम्बर 1985 से प्रवृत्त हुई समझी जायेगी।"

(रेखांकित भाग पर बल दिया गया)

इस अधिसूचना के उक्त रेखांकित भाग के अधीन किसी भी मामले का निराकरण लोक अदालत के माध्यम से होने पर उसका पक्षकार पूर्व में संदत्त न्यायालय फीस वापस पाने का अधिकारी है। इसके अधीन मामलों के सिविल अथवा दाण्डिक होने तथा पक्षकार के परिवादी अथवा वादी होने का कोई भेद नहीं किया गया है। अतएव यह नियम परक्राम्य लिखित अधिनियम की धारा 138 के अधीन विचारण योग्य परिवाद, जो दाण्डिक मामला है, पर भी प्रयोज्य है तथा परिवादी उसके मामले का निराकरण लोक अदालत के माध्यम से होने पर परक्राम्य लिखत अधिनियम की धारा–138 के अधीन परिवाद की प्रस्तुति के समय संदत्त न्यायालय फीस की राशि वापस पाने का अधिकारी है। इस हेतु मामले के लोक अदालत द्वारा निराकरण के पश्चात् कलेक्टर से पूर्व में संदत्त न्यायालय फीस की वापसी बावत् प्रमाण पत्र परिवादी को प्रदान किया जाना चाहिए।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

***273. ACCOMMODATION CONTROL ACT, 1961 – Sections 12 (1) (c) and 12 (1) (f)**

Denial of title – Defendant never renounced his character as tenant and has nowhere setup title of the premises in him or in a third party and was bonafidely calling upon the plaintiff to prove his ownership without disowning his character as tenant – This act of tenant was not in any way injurious to landlord/plaintiff and he has not done any act which may likely to affect adversely and substantially to the interest of the plaintiff.

Bonafide requirement – In order to obtain decree under Section 12 (1) (f), the plaintiff is not only required to prove that he is landlord but also required to prove that he is owner – Plaintiff admitted that his name was never recorded in the revenue records from 1978 to 1996 and was recorded in the names of other persons – Tenant was also inducted by other persons in whose name the property was recorded – As the plaintiff is not found to be the owner of the suit property, therefore, it can not be said that suit accommodation is needed by him bonafide for his own requirement.

Dayal Das (Dead) Through L.Rs. v. Rajendra Prasad Gautam

Judgment dated 01.03.2012 passed by the High Court of M.P. in S. A. No. 863 of 2003, reported in ILR (2012) M.P. Short Note 86

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274. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11

Once a party files an application for appointment of an Arbitrator under Section 11 (6) of the Act, the other party who failed to appoint an Arbitrator on receipt of notice, extinguishes his right to appoint an Arbitrator in terms of the agreement.

M/s Dakshin Shelters P. Ltd. v. Geeta S. Johari

Judgment dated 21.02.2012 passed by the Supreme Court in Special Leave Petition No. 33448 of 2011, reported in AIR 2012 SC 1875

Held:

It is clear that the petitioner declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Development Agreement. The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent.

In view of the above, it cannot be said that the Designate Judge committed any error in nominating Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner. The order of the learned Single Judge is in conformity with the decision of this Court in ***Union of India v. Bharat Battery Manufacturing Co. (P) Ltd., (2007) 7 SCC 684*** wherein this Court stated as follows:

> "Once a party files an application under section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator."

The petitioner's right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the learned senior counsel for the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator.

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275. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 19 and 34

(i) An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act – A Court cannot sit in appeal over the award of an Arbitral Tribunal by re-assessing or re-appreciating the evidence.

(ii) An Arbitral Tribunal can use their expert or technical knowledge or general knowledge about a particular trade in deciding a matter – He cannot make use of his personal knowledge about the facts of the dispute.

P.R. Shah, Shares & Stock Broker (P) Ltd. v. M/s B.H.H. Securities (P) Ltd. & ors.

Judgment dated 14.10.2011 passed by the Supreme Court in Civil Appeal No. 9238 of 2003, reported in AIR 2012 SC 1866

Held:

A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Arbitration and Conciliation Act, 1996. The arbitral tribunal has examined the facts and held that both second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non- member, had no jurisdiction to

decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under section 34(2) of Arbitration and Conciliation Act, 1996, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

The appellant contends that the arbitration had used personal knowledge to decide the matter. Attention was drawn to the following observation in the award by the majority:

> "Also, it is known fact which is known to the arbitrators that as per the market practice such kind of transactions of one Broker takes place with another Broker either in their own name or in their firm's name or in the name of different entity which is also owned by the member." Same way these transactions are done by respondent no.2 (appellant herein) in the name of respondent no.1 (second respondent herein)."

An arbitral tribunal cannot of course make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. But an arbitral tribunal can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter. In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields. All that the arbitrators have referred is the market practice. That cannot be considered as using some personal knowledge of facts of a transaction, to decide a dispute.

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276. CIVIL PROCEDURE CODE, 1908 – Section 9
TRANSFER OF PROPERTY ACT, 1882 – Section 53-A
LAND REVENUE CODE, 1959 – Section 190
Suit for recovery of possession – Co-owner – A Co-owner can file a suit for recovery of property from a person in wrongful possession and that such a suit is regarded as one on behalf of all the co-owners – Part performance, condition precedent for applicability of doctrine of – Law discussed.
Possession – Defendants instead of filing suit for specific performance of contract initiated proceedings before revenue Court for acquisition of title – They have also not pleaded the readiness and willingness to perform their part of contract – Defendants are not entitled to benefit of Section 53-A of Transfer of Property Act.

Manik Rao & Ors. v. Ramesh & Ors.

Judgment dated 16.04.2012 passed by the High Court of M.P. in S. A. No. 380 of 1996, reported in ILR (2012) M.P.,1644

Held :

In *Smt. Pilanoni Janakram v. Anandsingh Sakharam, 1960 MPLJ 962,* the Division Bench of this Court has held that it is settled view that a co-owner can file a suit for recovery of property from a person in wrongful possession and that such a suit is regarded as one on behalf of all the co-owners. Thus, even assuming the plaintiff to be the co-owner, the suit filed by him shall be treated as on behalf of all the co-owners. Thus, the first substantial question of law framed by this Court in the facts of the case does not arise.

The condition precedent for applicability of Section 53-A of the Transfer of property Act are firstly, that there should be a contract to transfer for consideration any immovable property; secondly, that the contract should be in writing and its terms can by ascertained. With reasonable certainty; thirdly, that the transferee in part-performance of the contract has taken possession of the property or any part thereof or if he is already in possession, he continues in possession in part-performance of the contract; fourthly, that the transferee has done some act in furtherance of the contract; and fifthly, that the transferee has performed or is willing to perform his part of the contract. Besides that, a party relying on Section 53-A of the Transfer of Property Act has to plead and prove the readiness and willingness on its part to perform the contract.

From perusal of paragraph 3(Ka) of the written statement, it is apparent that defendants instead of filing the suit for specific performance of the contract, had. initiated proceedings before the revenue court for acquisition of title. The defendants in their written statement have failed to plead the readiness and willingness to perform their part of the contract. On the other hand, the defendants had initiated the proceedings under Section 190 of the M.P. Land Revenue Code, 1959 for conferral of Bhumiswami rights in 1967 and therefore, the defendants are not entitled to benefit of Section 53-A of the Transfer of Property Act.

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***277. CIVIL PROCEDURE CODE, 1908 – Section 11 and Order 17 Rules 2 & 3 Res Judicata – First civil suit was dismissed for non-production of evidence but instead of drawing a schedule of costs a decree was drawn – Held, as the previous suit was not decided on merits, the provisions of Section 11 of CPC will not attract.**

Narayan Singh v. Babulal and others

Judgment dated 27.03.2012 passed by the High Court of M.P. in Civil Revision No. 395 of 2011, reported in 2012(3) M.P.H.T. 417

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***278. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 11 Rule 21 Scope of exercise of powers under Order 11 Rule 21– Provision is not available when only production of documents is directed and not produced – Non-Production at the most would lead the Court to draw an adverse inference – The defence cannot be struck in case the defendant fails to produce the document.**

Inherent powers – If the Court does not have a jurisdiction under an express provision it does not assume powers under Section 151 – Inherent powers of the Court can not over ride the express provision of law.

Manisha Lalwani (Smt.) v. Dr. D.V. Paul

Judgment dated 27.04.2012 passed by the High Court of M.P. in W.P. No. 4069 of 2012, reported in ILR (2012) M.P. Short Note 60

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279. **CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 18 Rule 17 Recall of witnesses – Power, procedure and precautions explained.**

Mohansingh Raghuvanshi v. Ujjain Municipal Corporation and others

Judgment dated 02.11.2012 passed by the High Court of M.P. in W. P. No. 6980 of 2010, reported in 2012(3) MPLJ 53

Held:

From perusal of the record it is evident that documents Ex. P/43 to P/47 were tendered in evidence in cross-examination of respondent No. 3 on 13-11-2009. Thereafter, case was fixed for evidence on 30-12-2009 and lastly on 1-1-2010 when the cross-examination was completed. The application was filed by respondents No. 3 and 4 on 15-2-2010. Previously Rule 17-A of Order 18, Civil Production Code was enforced according to which there was a provision for production of evidence not previously known or which could not be produced despite due diligence. This provision was deleted by the Amendment Act No. 1999 which came in force w.e.f. 1-7-2002. However, Rule 17 of Order 18 remained in force.

In the matter of ***K.K. Velusamy v. N.Palanisamy, 2011 AIR SCW***, wherein the suit was filed on 26.03.2007 and case was fixed for final argument on 11.11.2008, the application was filed under Section 151, Civil Procedure Code with a prayer to re-open the evidence for the purpose of further cross-examination of plaintiff and the attesting witnesses, the Hon'ble Apex Court observed as under :-

> "There is no specific provision in the code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the Court, the inherent power under

section 151 of the Code, subject to its limitations, can be invoked in appropriate case to re-open the evidence and/ or recall witnesses for further examination. This inherent power of the Court is not affected by the express power conferred upon the Court under Order 18, Rule 17 of the Code to recall any witness to enable the Court to put such question to elicit any clarification. The respondent contended that section 151 cannot be used for re-opening evidence or for recalling witnesses. Submission cannot be accepted as an absolute proposition. However, section 151 of the Code cannot be routinely invoked for re-opening evidence or recalling witnesses."

"The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only menas that the amended structure of the Code found no need for such a provision as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments."

Keeping in view the aforesaid position of law and the fact that the documents Ex. P/43 to P/47 were tendered in evidence for the first time in cross-examination by respondent No. 3, this Court is of the opinion that no illegality has been committed by the learned Court below in allowing the application filed by the respondent No. 3 However, it is made clear as a word of caution that the power under section 151 or Order 18, Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the Court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the proeess does not become a protracting tactics. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the Court finds that evidence was not genuine or relevant did not warrant the re-opening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract

the proceedings, the Court should reject the application. If the evidence sought to be produced is an electronic record the court may also listen to the recording before granting or rejecting the application. It is further made clear that since the learned Court below has also given right to respondent Nos. 3 and 4 to adduce evidence by way of examining the documents by the handwriting expert, therefore, the petitioner shall also be at liberty to adduce the evidence in rebuttal, if any in that regard only.

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280. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10
SPECIFIC RELIEF ACT, 1963 – Section 16
Impleadment of parties in a suit for specific performance of contract – Broad principles governing the disposal of such application enunciated.

Vidur Implex and Traders Pvt. Ltd. and Ors. v. Tosh Apartments Pvt. Ltd. and Ors.

Judgment dated 21.08.2012 passed by the Supreme Court in Civil Appeal No. 5918 of 2012, reported in AIR 2012 SC 2925

Held:

After considering the observations and principles laid down by the Apex Court in its previous judgments in ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, 1992 AIR SCW 846, Anil Kumar Singh v. Shivnath Mishra, 1995 AIR SCW1782, Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd., AIR 2010 SC 3109, Kasturi v. Iyyamperumal, AIR 2005 SC 2813, Amit Kumar Shaw v. Farida Khatoon, 1995 AIR SCW 1782, Savita Devi v. DJ, Gorakhpur, AIR 1999 SC 976, Vinod Seth v. Devinder Bajaj, 2010 AIR SCW 4860, Sarvinder Singh v. Dalip Singh, (1996) 5 SCC 539 and Bibi Zubaida Khatoon v. Nabi Hassan, AIR 2004 SC 173,*** the Apex Court has observed as under:

Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.
2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.
3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

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***281. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 10**

Territorial jurisdiction – Marriage solemnized at New Delhi – Parties came to Bhopal to attend wedding reception – Thereafter, they went to U.S.A. and stayed there – Petition for divorce filed at Bhopal – Respondent admitted that even today both the parties are residing at USA – Facts which confer jurisdiction on the Court has to be pleaded clearly and specifically – Plaint do not disclose that where the parties had last resided together – It cannot be inferred that parties had last resided together at Bhopal – Plaint directed to be returned for presentation of the same before the court of competent jurisdiction.

Nitu Agrawal v. Shireesh Agrawal

Judgment dated 08.02.2012 passed by the High Court of M.P. in W.P. No. 6078 of 2011, reported in ILR (2012) M.P. 1129

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***282. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**

Rejection of plaint – While deciding the application under Order 7 Rule 11 CPC, the Court has to examine only the averments in the plaint and pleas taken by the defendants in their written statements would be irrelevant.

Bhau Ram v. Janak Singh & Ors.

Judgment dated 20.07.2012 passed by the Supreme Court in Civil Appeal No. 5343 of 2012, reported in AIR 2012 SC 3023

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283. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

Rejection of Plaint – Scope of scrutiny – Is confined only to the averments made in the plaint – Question relating to the validity of the documents should not be determined at this stage of deciding an application.

Rajabhaiya Gupta v. Kamlabai & Ors.

Judgment dated 05.07.2012 passed by the High Court of M.P. in M. A. No. 1177 of 2005, reported in ILR (2012) M.P.1656

Held :

In this case, the following three documents are in question :- (1) Registered sale deed dated 9.2.66, which was executed by late Kashiram in favour of Ramesh Chandra Brijpuriya (2) The will dated 15.8.68, which was executed by late Kashiram in favour of Gayadeen and (3) Another sale deed (BENAMA) dated 29.5.93, which was executed by Jharokhabai w/o late Kashiram in favour of Rajabhaiya.

The plaint is based on the said documents. Therefore, it is necessary to examine all these documents before completion of the trial to establish their validity so as to find out the cause of action. The question relating to the validity of the aforesaid documents cannot be determined without holding enquiry into the factual aspects of the dispute at the stage of deciding an application under Order VII Rule 11 of CPC. The Trial Court should not have decided validity of the documents at the time of deciding the application because the scope of scrutiny at this stage under Order VII Rule 11 of CPC is confined only to the averments made in the plaint. In these circumstances, it cannot be concluded that the plaint is manifestly vexatious and without any merit.

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284. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 1 and Order 8 Rule 10 Pleadings – Object is to enable the adversary to know the case of other party – In order to have fair trial, it is imperative that party should state the essential material facts – Detailed pleadings about the property in respect of which the person is either claiming possession or title must be made.

Written statement – Even if the defendant fails to file the written statement, the Court should proceed cautiously and exercise its discretion in a just manner – Burden of proof would remain on plaintiff and his mere assertion in plaint affidavit would not be sufficient to discharge the burden.

Chandrabhan Singh & Anr. v. Ganpat Singh & Ors.

Judgment dated 05.07.2012 passed by the High Court of M.P. in S. A. No. 560 of 1999, reported in ILR (2012) M.P. 1917

Held:

It is pertinent to mention here that the suit was filed on 06.07.1987 in which initially the claim with regard to the share of Devi Singh was based on two grounds, firstly, on the basis of oral Will dated 12.11.1984, and secondly, on the basis of acquisition of title under Section 190 M.P. Land Revenue Code, 1959. Thereafter, by way of amendment on 09.05.1991, it was pleaded that Daulat Singh's sister was married to Mathura Singh and therefore, Mathura singh and

Devi Singh were related to each other as uncle and nephew. It is pertinent to mention here that in paragraph-1(a) of the plaint, name of the sister of Daulat Singh has not been disclosed. Besides that, the plaintiffs have not based their claim of title in the suit lands in respect of share of Devi Singh on the ground that they are legal representatives of deceased Devi Singh. From the relief claimed in the plaint, it is apparent that the plaintiffs have claimed title in respect of the share held by Devi Singh on the basis of oral will. It is trite law that no party should be permitted to travel beyond its pleadings and should bring all necessary and material particulars in support of the case set up by it. The object and purpose of the pleadings is to enable the adversary to know the case of the other party. In order to have a fair trial, it is imperative that party should state the essential material facts, so that other party cannot be taken by surprise. See:- ***Ram Sarup Gupta (Dead) by LR's v. Bishun Narain Inter College and Others (1987)2SCC 555 & Bachhaj Nahar v. Nilima Mandal and another (2008)(17) SCC 491.***

From careful scrutiny of the plaint, it is clear that the plaintiffs have not claimed title in respect of the share held by Devi Singh, being the legal representatives of late Devi Singh. Besides that, the pleadings in this regard is vague as is evident from paragraph-1(a) of the plaint. It appears to be after thought as the suit was filed in the year 1987 and thereafter, amendment was made after a period of approximately four years ie, in the year 1991. It is also pertinent to mention that the trial Court has not framed any issue with regard to the acquisition of title by the plaintiffs on the basis of their being the legal representatives of the deceased Devi Singh. The lower appellate Court while decreeing the claim of the plaintiffs has made out a new case and has travelled beyond the pleadings of the parties which is impermissible in law. In the absence of proper pleadings, the evidence, if any adduced, in this regard, cannot be looked into.

It is equally well settled in law that even if the defendant does not file the written statement, the court should proceed cautiously and exercise its discretion in a just manner. Even, in the absence of written statement, burden of proof would remain on the plaintiff and his mere assertion in the plaint affidavit, would not be sufficient to discharge the burden. [See: ***(2012) 5 SCC 265 C.N. Ramappa Gowda v. C.C Chandregowda (Dead) by LR's and another***]. It is also well settled in law that detailed pleadings about the property in respect of which the person is either claiming possession or title must be made. See: ***Maria Margarida Sequeira Fernandes and Others v. Erasmo Jack De Sequeira (Dead) throuth LR's (2012) 5 SCC370.*** In the absence of pleadings with regard to acquisition of title on the ground of survivorship and taking into account the fact that the plaintiffs have not claimed title in respect of the suit land on the basis of their being the legal representatives of deceased Devi Singh, the lower appellate Court committed an error of law in making out a new case on behalf of the plaintiffs while decreeing the claim of the plaintiffs in entirety.

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285. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 9(1)

Bar on bringing a fresh suit under the provision, applicability of – For attracting the provisions of Order 9 Rule 9(1) of the Code, it has to be demonstrated that the cause of action in the previous and subsequent suits are same.

Biharilal v. Ramprasad and others

Judgment dated 19.04.2012 passed by the High Court of M.P. in S. A. No. 361 of 1998, reported in 2012(3) MPLJ 253

Held :

The counsel for the appellants arguing this question has placed reliance upon Ex. P-6 by which the C.S. No. 18-A/88 filed by the defendant No. 2 Beeram for permanent injunction was dismissed in default. For attracting the provisions of Order 9, Rule 9(1) of the Civil Procedure Code the appellants are required to show that the C.S. No. 18-A/88 was in respect of the same cause of action. He is also required to show that the C.S. No. 18-A/88 was filed in respect of the same property. Learned counsel for the appellants by referring to the pleadings and evidence on record has not been able to show that C.S. No. 18-A/88 was filed for the same property for which the present counter-claim is filed and cause of action for filing the earlier suit was also the same. Thus, the counter-claim of the defendant cannot be held to be barred under Order 9, Rule 9(1) of the Civil Procedure Code. Even otherwise C.S. No. 18-A/88 was filed by the defendant No. 2 Beeram whereas the counter-claim in the present suit has been filed by both the defendants, therefore, on the basis of Ex.P-6 it cannot be held that the provisions of Order 9, Rule 9(1) of the Civil Procedure Code is attracted in respect of the counter-claim of the defendant No. 1 Deviram.

The counsel for the appellants has placed reliance upon the judgment of the Supreme Court in the matter of ***Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others, AIR 1965 SC 295*** in that judgment also the Supreme Court has laid down that when first suit is dismissed in default, Order 9, Rule 9(1) of the Civil Procedure Code precludes the second suit in respect of the same cause of action. The said judgment is of no help to the appellants since he has failed to demonstrate the cause of action in the two suits, is the same. Counsel for the appellants has also placed reliance upon the judgment of this Court in the matter of ***Smt. Karuna Chaturvedi and others v. Smt. Sarojini Agarwal and others, AIR 2010 M.P. 109*** but the said judgment is also on no help to him because in that case subsequent suit was held barred on same cause of action whereas in the present case the cause of action in the first suit has not been established by the appellants. The subject-matter property involved in the first suit and the cause of action of first suit is not on record.

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286. CIVIL PROCEDURE CODE, 1908 – Order 15 Rule 1

Suit for permanent injunction and written statement thereof is also filed on the same day – Statement is recorded and decree is passed within three days – Suit based on alleged family arrangement – In alleged document, defendant a rustic, illiterate lady gave her exclusive property to plaintiff in lieu of nothing and suffered consent decree – Decree found to be fraudulent.

Smt. Badami (deceased) by her L.R. v. Bhali

Judgment dated 22.05.2012 passed by the Supreme Court in Civil Appeal No. 1723 of 2008, reported in AIR 2012 SC 2858

Held:

We may usefully refer to the decision in ***Santosh v. Jagat Ram and another, AIR 2010 SC (Supp) 65,*** wherein this Court was dealing with a situation almost similar to the present nature.

In the said case the day the plaint was presented, on the same day written statement was also filed, evidence of the plaintiff and the defendant was recorded and the judgment was also made ready along with a decree on the same day. In that context, this Court observed as follows:-

> "This, by itself, was sufficient to raise serious doubts in the mind of the courts. Instead, the appellate court went on to believe the evidence of Dharam Singh (DW 1), record keeper, who produced the files of the summons. One wonders as to when was the suit filed and when did the Court issue a summons and how is it that on the same day, the written statement was also ready, duly drafted by the other side lawyer S.K. Joshi (DW 3)."

The Bench further proceeded to observe as follows:-

> "We are anguished to see the attitude of the Court, who passed the decree on the basis of a plaint and a written statement, which were filed on the same day. We are also surprised at the observations made by the appellate court that such circumstance could not, by itself, prove the fraudulent nature of the decree.
>
> A fraud puts an end to everything. It is a settled position in law that such a decree is nothing, but a nullity."

From the aforesaid decision it becomes quite clear that this Court expressed a sense of surprise the way the suit in that case proceeded with and also expressed its anguish how the court passed a decree on the foundation of a plaint and a written statement that were filed on the same day.

It is seemly to note that the Code of Civil Procedure provides how the court trying the suit is required to deal with the matter. Order IV Rule 1 provides

for suit to be commenced by plaint. Order V Rule 1(1) provides when the suit has been duly instituted, a summon may be issued to defendant to appear and answer the claim on a day to be therein specified. As per the proviso to Order V Rule 1 no summon need be issued if the defendant appears and admits the claim of the plaintiff. Order X deals with the examination of parties by the court. Rule 1 of Order X provides for ascertainment whether allegations in pleadings are admitted or denied. It stipulates that "at the first hearing" of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court is required to record such admissions and denials. Use of the term 'first hearing of the suit' in Rule 1 has its own signification. Order XV Rule 1 lays a postulate that where "at the first hearing" of the suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce the judgment. Recently, this Court in ***Kanwar Singh Saini v. High Court of Delhi (2012) 4 SCC 307***, while dealing with the concept of first hearing, speaking through one of us (Dr. B.S. Chauhan, J) has opined thus:-

> "12. The suit was filed on 26-4-2003 and notice was issued returnable just after three days i.e. on 29-4-2003 and on that date the written statement was filed and the appellant appeared in person and the statement was recorded. Order 10 Rule 1 CPC provides for recording the statement of the parties to the suit at the "first hearing of the suit" which comes after the framing of the issues and then the suit is posted for trial i.e. for production of evidence. Such an interpretation emerges from the conjoint reading of the provisions of Order 10 Rule 1, Order 14 Rule 1(5) and Order 15 Rule 1 CPC. The cumulative effect of the above referred provisions of CPC comes to that the "first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues.
>
> On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed.
>
> 13. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the court

proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words "first day of hearing" do not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. (Vide ***Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816, Sham Lal v. Atme Nand Jain Sabha, AIR 1987 SC 197, Siraj Ahmad Siddiqui v. Prem Nath Kapoor, AIR 1993 SC 2525 and Mangat Singh Trilochan Singh v. Satpal, AIR 2003 SC 4300."***

After so stating, it has been further observed as follows:-

"From the above fact situation, it is evident that the suit was filed on 26-4-2003 and in response to the notice issued in that case, the appellant-defendant appeared on 29.4.2003 in person and filed his written statement. It was on the same day that his statement had been recorded by the court. We failed to understand as to what statutory provision enabled the civil court to record the statement of the appellant-defendant on the date of filing the written statement. The suit itself has been disposed of on the basis of his statement within three weeks of the institution of the suit."

Keeping in view the aforesaid pronouncement of law relating to the procedure and the lapses committed by the trial court in the case at hand, the stand of the original defendant, the predecessor-in-interest of the present appeal gets fructified. From the evidence brought on record, it is perceptible that Badami was a rustic and an illiterate woman; that she had one daughter who was married and there was no animus between them to exclude her from the whole property; and that the concept of family arrangement is too farfetched to give any kind of credence. That apart, the filing of written statement, the recording of statement and taking the thumb impression in a hurried manner further nurtures the stance that the defendant was totally unaware as to what had happened. The averments in the plaint show that the plaintiff was put in possession but as she was going to alienate the property because of record of rights reflected name of Badami, the suit was filed for permanent injunction restraining her from alienating in any manner and the defendant conceded to the same. The averments in the plaint show that the defendant had refused the request of the plaintiff on 11.11.1973 not to interfere with the possession yet she accompanied him to suffer a consent

decree. It is worth noting that there is evidence on record that she was brought to the court premises to execute the lease deed for a period of two years and she had faith in Bhali. It is a matter of grave anguish that in the first suit the court had not applied its mind to the real nature of the family arrangement. The learned counsel for the appellant has submitted that there was no need for a family settlement because Badami had got a part of the property in an earlier family arrangement. She had a daughter and a son-in-law and she had no cavil with plaintiff. She had also to support herself. He fairly submitted that the family arrangement need not be construed narrowly and it need not be registered but it must prima facie appear to be genuine which is not so in the case at hand.

In ***Kale and others v. Deputy Director of Consolidation and others AIR 1976 SC 807,*** it has been held that the object of the arrangement is to protect family from filing long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Their Lordships opined that the family is to be understood in the wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of claim or even if they have a spes successionis so that future disputes are sealed forever and litigation are avoided. What could be the binding effect and essentials for a family settlement were expressed thus:-

> "In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:-
>
> (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (3) The family arrangements may be even oral in which case no registration is necessary;
>
> (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not

fall within the mischief of S. 17(2) (Sec. 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

If the present factual matrix tested on the anvil of the aforesaid decisions, the family arrangement does not remotely appear to be a bona fide. Bhali had not semblance of right in the property. All rights had already been settled and she was the exclusive owner in possession. It is difficult to visualise such a family settlement. More so, it is absolutely irrational that Badami would give everything to Bhali in lieu of nothing and suffer a consent decree. That apart, there was no reason to exclude the daughter and the son-in-law. Had there been any likely possibility of any future legal cavil between the daughter and Bhali the same is understandable. It is well nigh impossible to perceive any dispute over any property or the possibility of it in future. On the contrary in this so called family settlement the whole property of Badami is given to Bhali. We are unable to accept it to be a bona fide settlement.

It would not be an exaggeration but on the contrary an understatement if it is said that all facets of fraud get attracted to the case at hand. A rustic and illiterate woman is taken to court by a relation on the plea of creation of a lease deed and magically in a hurried manner the plaint is presented, written statement is drafted and filed, statement is recorded and a decree is passed within three days. On a perusal of the decree it is manifest that there is no reference of any kind of family arrangement and there is total non-application of mind. It only mentions there is consent in the written statement and hence, suit has to be decreed. Be it noted, it was a suit for permanent injunction. There was an allegation that the respondent was interfering with the possession of the plaintiff. What could have transpired that the defendant would go with the plaintiff and accede to all the reliefs. It not only gives rise to a doubt but on a first look one

can feel that there is some kind of foul play. However, the learned trial Judge who decreed the first suit on 27.11.1973 did not look at these aspects. When the second suit was filed in 1984 for title and the third suit was filed for possession thereafter, the courts below had routinely followed the principles relating to consent decree and did not dwell deep to find out how the fraud was manifestly writ large. It was too obvious to ignore. The courts below have gone by the concept that there was no adequate material to establish that there was fraud, though it was telltale. That apart, the foundation was the family arrangement. We have already held that it was not bona fide, but, unfortunately the courts below as well as the High Court have held that it is a common phenomenon that the people in certain areas give their property to their close relations. We have already indicated that by giving the entire property and putting him in possession she would have been absolutely landless and would have been in penury. It is unimaginable that a person would divest herself of one's own property in entirety in lieu of nothing. No iota of evidence has been brought on record that Bhali, the respondent herein, had given anything to Badami in the arrangement. It is easily perceivable that the rustic woman was also not old. Though the decree was passed in 1973 wherein it was alleged that the defendant was already in possession, she lived up to 1992 and expired after 19 years. It is a matter of record that the possession was not taken over and inference has been drawn that possibly there was an implied agreement that the decree would be given effect to after her death. All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them. It is fraudulent all the way. The whole thing was buttressed on the edifice of fraud and it needs no special emphasis to state that what is pyramided on fraud is bound to decay. In this regard we may profitably quote a statement by a great thinker:-

> "Fraud generally lights a candle for justice to get a look at it; and rogue's pen indites the warrant for his own arrest."

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287. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 2
EVIDENCE ACT, 1872 – Section 73
Whether executing Court has power to compare the signatures on the documents filed before it? Held, Yes – Court has ample power to compare the signature by exercising powers under Section 73 of the Evidence Act but for that Court is required to have the disputed and admitted signatures before it.
Recording of satisfaction by executing Court, object of – The object is to ensure that the Court executing the decree shall not be troubled with any dispute between the parties with regard to any payments or adjustment unless the same has been duly certified or recorded – Executing Court cannot recognize any payment or adjustment which has not been certified or recorded.

Sitabai and others v. Mansingh

Judgment dated 18.10.2011 passed by the High Court of M.P. in W. P. No. 2863 of 2011, reported in 2012(3) MPLJ 311

Held :

From perusal of the record, it is evident that respondent has examined himself and also the witnesses Ramsingh, Mohansingh, Shankarsingh and Mohan. It is evident that for proving the signatures Ex. P/1 and P/2 were filed but none of the witness has proved the signature of Chhatarsingh. It is submitted that signature of these witnesses were marked as A to A, but in the same manner signature of deceased Chhatarsingh were not marked. It is true that the Court is having ample power to compare the signature by exercising powers under Section 73 of the Indian Evidence Act but for that Court is required to have the disputed and admitted signatures before it. Since none of the witness has stated that Ex. P/1 and P/2 bears the signature of deceased Chhatarsingh, therefore, in the circumstances of the case the comparison which was made by learned executing Court was not in accordance with law. Apart from this so far as payment relating to satisfaction of decree is concerned, Rule 2 of Order 21, Civil Procedure Code deals with payment out of Court to decree-holder. According to sub-rule (1) of Rule 2 where any money payable under a decree of any kind is paid out of Court, in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty is to execute the decree, and the Court shall record the same accordingly. Sub-rule (2) of Rule 2 lays down that the judgment-debtor or any person who has become surety for the judgement – debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. Sub-rule (A) of Rule 2 of Order 21, Civil Procedure Code, which has been inserted by amendment No. 104 of 1976 lays down that no payment or adjustment shall be recorded at the instance of the judgment-debtor unless – (a) the payment is made in the manner provided in Rule 1; or (b) the payment or adjustment is proved by documentary evidence, or (c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of Rule 1, or before the Court sub-rule (3) of Rule 2 of Order XXI lays down that the payment of adjustment which is not certified or recorded as aforesaid, shall not be recognized by any Court executing the decree. The object of this rule is to ensure that the Court executing the decree shall not be troubled with any dispute between the parties with regard to any payments or adjustments unless the same has been duly certified or recorded. Recording of payment order adjustment has to be made under sub-rule (2) and in doing so, the Court is subjected to the restriction provided in sub-rule (2) of Rule 2. Sub-rule (2-A)

is inserted to operate as a proviso to sub-rule (2). Sub-rule (3) imposes bar upon the Court executing the decree and prevents it from recognizing any payment or adjustment which has not been certified or recorded as required by the rule.

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288. CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 4 and 9
Substitution of Legal Heirs – Appellants were aware of the death of respondents as necessary applications were filed in revenue cases – Delay of 16, 14 and 1 year in filing application for substitution of their L.Rs. and setting aside abatement cannot be condoned – Applications dismissed consequently, appeal is also dismissed.

Lolar (Smt.) & anr. v. Gulab Singh & Ors.

Judgment dated 02.03.2012 passed by the High Court of M.P. in S. A. No. 407 of 1994, reported in ILR (2012) M.P. 1638

Held :

A party cannot be permitted to submit an application based upon false averments by concealing reality. Very conveniently in the applications it has been submitted by appellants that they had no connection with the respondents and they were not aware about the factum of their death and hence they could not file the applications well in time. But, if we uplift the veil, the appellants are exposed and just like a naked truth it is apparent that they were quite aware about the factum of death of these persons because necessary applications were filed in the revenue case, the description whereof has been mentioned hereinabove for compromise and the order has also been procured by the appellants and in the compromise application before the Tahsildar, Chandrawati Singh (widow of respondent no. 4 Suryabali Singh) was one of the party and she described herself to be the widow of Suryabali Singh. Similarly, second appellant Sukhmanti was also a party in the said compromise application which was filed in the revenue case and hence if the applications are allowed it would mean to over power the false averments upon the true facts which were well known to the appellants and which law would never permit them.

In this view of the matter, I am of the view that looking to the abnormal delay of 16 years, 14 years and more than a year after the death of respondent nos. 1,4 and 2 respectively, it cannot be condoned and all these three applications deserve to be and are hereby dismissed.

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***289. CIVIL PROCEDURE CODE, 1908 – Order 38 Rule 5**
Attachment before judgment – Satisfaction of court – Court must be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be passed – Also, there must be some material

on record to indicate that the satisfaction is not illusory – Power under the rule is extra-ordinary and should be exercised sparingly and strictly. (*Gagrat and Co. M/s. v. Ismail, 1964 MPLJ 34* and *Raman v. Solanki Traders, (2008) 2 SCC 302* relied on.)

Emerald Industries v. Neeraj Pratibha "JV" and others
Judgment dated 03.01.2012 passed by the High Court of M.P. in W. P. No. 11353 of 2010, reported in 2012(3) MPLJ 127

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290. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2
Temporary Injunction – A *prima facie* case made out and the ingredients of irreparable loss and balance of convenience were also existing in favour of the plaintiff – But the intervening public interest (construction of an Air Port on the suit property), is likely to be hampered, if the temporary injunction is granted – The plaintiff was not entitled for grant of any temporary injunction.

State of M.P. & Anr. v. Shri Govind Gaushala Datia & Anr.
Judgment dated 02.02.2012 passed by the High Court of M.P. in W.P. No. 7156 of 2011, reported in ILR (2012) M.P. 1125

Held :

To establish a case of temporary injunction under Order 39 Rules 1 and 2 of CPC, three basic ingredients of prima-facie case, irreparable loss and balance of convenience in favour of the party seeking temporary injunction should not only exist, but should co-exist and the existence of only on ingredient will not satisfy the requirement for grant of temporary injunction unless all the three said ingredients exist simultaneously.

Moreover, the very basic ingredient for entitlement of temporary injunction is making out of a prima-facie case and it is only when a prima-facie case is made out that the Court concerned is required to ensure the co-existence of the other two ingredients, i.e., irreparable loss and balance of convenience.

In the instant case, it is to be seen that the gift deed executed by the plaintiff was revocable after three years on the failure of the beneficiary to carry out the purpose of the gift deed and since the period of three years had expired without fulfilling the purpose, the gifted land automatically reverted to the plaintiff impelling the plaintiff to file the Civil Suit for claiming declaration of title of the said suit land in his favour and a permanent injunction against the defendant. It is further to be seen that the plaintiff in his suit stated that he was in possession, but both the Courts below have rightly held that the plaintiff has not established on a prima-facie that he was in possession as the documents available on record indicate that the possession was handed over by the plaintiff.

From the facts available before the Court below, it is evident that the plaintiff certainly had a prima-facie case in his favour, but could not establish the factum of possession over the suit land.

The element of irreparable loss, which has also been gone into by the Court below requires some consideration. The first appellate Court has held that irreparable loss may be caused to the plaintiff if the defendants are permitted to undertake the construction which they intend over the disputed land. The factual matrix involved in the case indicates that if the construction of Airport is permitted to proceed, the plaintiff may be put to irreparable loss as the property in question on account of the proposed construction might undergo irretrievable changes.

From the above detailed discussion, this Court is of the view that a prima-facie case having been made out by the plaintiff, the ingredients of irreparable loss and balance of convenience were also existing in favour of the plaintiff.

Having held so, this Court is further required to consider the aspect, of public interest raised by the State which appears to be the main factor compelling the State to approach this Court under Article 227 of the Constitution of India.

The State contends that there is a proposal for construction of an Airport on the suit property, for which consent has already been accorded. The construction of the Airport is without doubt a public purpose, which involves urgency as the said public purpose has a direct bearing on the over all development of the area concerned. It is held by various decisions that if the grant of temporary injunction leads to adverse effect to any work involving public interest, then the temporary injunction should not be granted even if the said three basic ingredients for the same have been made out. The decisions in the cases of ***American President Lines Ltd. v. Board of Trustees, Bombay port AIR 2004 BOM 162 (166); Nagar Nigam Aligarh v. Udai Singh AIR 2003 All 34(42); Sambhu Chandra Sarkar v. State of West Bengal AIR 2004 NOC 146; Simanchal Padhy and etc. v. State of Orissa, AIR 2003 NOC 386; Envision Engg. v. Sachin Infa Enviro Ltd., AIR 2003 Guj 164 (171); Satya Prakash v. Ist Additional District Judge, Etah, AIR 2002 All 198(202);*** and ***Jokin Kurkalang Kseh v. Governing Body Upper Shillong College AIR 2002 NOC 90 (Gau)*** can profitably be referred to for this purpose.

In the conspectus of the facts and the discussion made above, this Court is though of the view that a prima-facie case for grant of temporary injunction was made out by the plaintiff/respondent, but on account of the intervening public interest, which is likely to be hampered, if the temporary injunction is granted, the plaintiff was not entitled to grant of any temporary injunction and the first appellate Court, therefore fell in error to ignore the all important aspect of public interest.

Accordingly the impugned order dated 29.09.2011 passed in MCA No. 02/ 2011 is hereby set aside and the order of the trial Court dated 25.02.2011 is upheld.

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291. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

(i) Scope of the appellate Court's power to interfere with an interim order passed by the Court of first instance – Reiterated.

(ii) Interim injunction sought against demolition of illegal construction – Such construction found in violation of sanctioned plan by the Trial Court and the High Court and the same was refused – Order not liable to be interfered with.

Esha Ekta Apartments CHS Ltd. and Ors. v. The Municipal Corporation of Mumbai and Anr.

Judgment dated 29.02.2012 passed by the Supreme Court in Special Leave Petition (Civil) No. 33471 of 2012, reported in AIR 2012 SC 1718

Held:

(i) The scope of the appellate Court's power to interfere with an interim order passed by the Court of first instance has been considered by this Court in several cases. In ***Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727,*** the Court was called upon to consider the correctness of an order of injunction passed by the Division Bench of the High Court which had reversed the order of the learned Single Judge declining the respondent's prayer for interim relief. This Court set aside the order of the Division Bench and made the following observations:

> "In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

In ***Skyline Education Institute (India) Pvt. Ltd. v. S.L. Vaswani, AIR 2010 SC 3221,*** the 3-judges Bench considered a somewhat similar question in the context

of the refusal of the trial Court and the High Court to pass an order of temporary injunction, referred to the judgments in ***Wander Ltd. (supra), N.R. Dongre v. Whirlpool Corpn., (1996) 5 SCC 714*** and observed:

> "The ratio of the abovenoted judgments is that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity."

(ii) The trial Court and the High Court have, after threadbare analysis of the pleadings of the parties and the documents filed by them concurrently held that the buildings in question were constructed in violation of the sanctioned plans and that the flat buyers do not have the locus to complain against the action taken by the Corporation under Section 351 of 1888 Act. Both, the trial Court and the High Court have assigned detailed reasons for declining the petitioners' prayer for temporary injunction and we do not find any valid ground or justification to take a different view in the matter.

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292. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

Temporary injunction in suit for specific performance of contract of agency with alternative relief of damages – Plaintiff has a *prima facie* case but will not suffer irreparable loss – Grant of temporary injunction improper.

M/s Best Sellers Retail (India) Pvt. Ltd. v. M/s Aditya Birla Nuvo Ltd. & ors.

Judgment dated 08.05.2012 passed by the Supreme Court in Civil Appeal No. 4313 of 2012, reported in AIR 2012 SC 2448

Held:

It is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider (i) whether there is a prima facie case in favour of the plaintiff; (ii) whether the balance of convenience is in favour of passing the order of injunction; and (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for.

The settled principle of law that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. In ***Dalpat Kumar & Anr. v. Prahlad Singh & Ors., AIR 1993 SC 276*** this Court held:

> "Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages."

In the present case, the respondent no.1 itself had claimed in the plaint the alternative relief of damages to the tune of Rs.20,12,44,398/- if the relief for specific performance was to be refused by the Court.

Despite this claim towards damages made by the respondent no.1 in the plaint, the trial court has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of proceedings and thereby the respondent no.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent no.1 is a limited company carrying on the business of readymade garments and we fail to appreciate what mental agony and hardship it will suffer except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, the respondent no.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and the respondent no.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, the respondent no.1 will not suffer irreparable injury. To quote the words of Alderson, B. in ***The Attorney-General vs. Hallett [153 ER 1316: (1857) 16 M. & W.569***]:

> "I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause."

For the aforesaid reasons the Apex Court has set aside the order of temporary injunction.

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*293. **CIVIL PROCEDURE CODE, 1908 – Order 40 Rule 1**

Appointment of receiver – Appointment of the receiver cannot be made to affect the rights *inter se* of the parties – The object of the appointment of a receiver is to secure and preserve the property in controversy as it stands.

Appointment of receiver – Pending judicial determination of the rights of the parties for preservation of the subject-matter of the litigation, the power so embodied may be exercised by appointing a receiver when it appears to be just and convenient for doing so – Merely showing adverse and conflicting claims to property, without showing any emergency or danger or loss demanding immediate action without having clear picture from doubt, the discretion should not be exercised.

Shivnarayan Mahant v. Registrar, Public Trust & ors.

Judgment dated 10.01.2012 passed by the High Court of M.P. in M.A. No. 3927 of 2010, reported in ILR (2012) M.P. Short Note 70

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294. **CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 5**

Stay of execution proceedings of eviction decree by appellate court – It is the matter of discretion to be exercised after taking into consideration the facts and circumstances of each individual case – In this case the standard rent of ₹ 20,000/- per month has been claimed by the decree-holder before R.C.A., hence an additional condition also imposed that judgment-debtor shall also deposit a monthly sum of ₹ 20,000 as mesne profits in addition to contractual rent regarding the stay of execution proceedings.

M/s Gurunanak Timber Mart, a Partnership Firm v. Anil Kumar Gulatee and others

Judgment dated 14.05.2012 passed by the High Court of M.P. in F.A. No. 265 of 2010, reported in 2012 (4) M.P.H.T. 10

Held :

The accommodation, having an area 13506 Square Feet (1254.56sq. meters), is situated in the City of Jabalpur on the Main Road from Madan Mahal Chowk to Amanpur Gangasagar Garha Road and the respondents have claimed mesne profits at a monthly rate varying between minimum of Rs. 85,247/- and maximum of Rs. 2,67,320/- per month. However, fact of the matter is that, admittedly, in their application, under Section 10 of the Act. [registered as Case No. 4-A-90 (1)/2006], before the Rent Controlling Authority, Jabalpur, they have prayed for fixation of standard rent in relation to the suit accommodation @ Rs. 20,000/- per month only and the prayer has remained un-amended as yet.

Question of stay of execution of decree by an Appellate Court is a matter of discretion to be exercised after taking into consideration the facts and

circumstances of each individual case. The stay of execution is granted with a view to prompting the disruption of rights vested in the appellant subject to suitable compensation to the respondents who have succeeded in the Lower Courts. For this, attention has been invited to the following observations made by the Privy Council in the case of ***Roger v. Comptoir D.S. Escompte De Paris, 3 LR P.C. Page 745*** :-

> "One of the first and highest duty of all the Courts is to take care that the act of Court does no injury to anyone of the suitors and when the act of Court is used it does not mean merely the act of primary court or any intermediate Court of appeal but the act of Court as a whole the highest Court, which finally disposes of the cases."

The decision in ***State of Maharashtra v. Super Max International Pvt. Ltd., (2009)9 SCC 772,*** also lays down guideline in the following terms :-

> "Needless to say that in fixing the amount subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount."

Taking into consideration all these legal as well as factual aspects of the matter, I am of the view that the respondents are entitled to get additional sum as mesne profits, equivalent to the amount claimed as the standard rent of the accommodation.

In the result, I.A. No.9186/11 stands allowed in Part. The interim stay order dated 29.06.2010, passed upon I.A. No. 4212/10, is hereby modified and it is directed that execution of the impugned decree shall remain stayed till decision of the appeal subject to an additional condition that the appellant shall also deposit a monthly sum of Rs. 20,000/- as mesne profits in addition to the contractual rent w.e.f. the date of decree. For depositing the arrears of mesne profits payable under this order, two month's time is granted to the appellant.

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295. CONSTITUTION OF INDIA – Articles 16, 226 and 235

(i) Judge – Judge holds an office of public trust – A Judge must be a person of impeccable integrity and unimpeachable independence – Qualities expected from a Judge stated.

(ii) Compulsory retirement of a Judge – Where ample material existed before the Full Court for taking decision regarding question of compulsory retirement of a Judge – Then Court cannot go into adequacy or sufficiency of such materials – Even confirmation as District Judge and grant of selection grade and super time scale do not wipe out the earlier adverse entries as the overall profile of a judicial officer is the guiding factor for this purpose

R.C. Chandel v. High Court of M.P. & Anr.

Judgment dated 08.08.2012 passed by the Supreme Court in Civil Appeal No. 5790 of 2012, reported in AIR 2012 SC 2962

Held:

Judicial service is not an ordinary Government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an office of public trust. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge, like Caesar's wife, must be above suspicion. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with integrity, impartiality and intellectual honesty.

It is clear that the appellant did not have unblemished service record all along. He has been graded "Average" on quite a few occasions. He was assessed "Poor" in 1993 and 1994. His quality of judgments and orders was not found satisfactory on more than one occasion. His reputation was observed to be tainted on few occasions and his integrity was not always found to be above board. In 1988-89, the remark reads, "never enjoyed clean reputation". In 1993, the remark "his reputation was not good" and in 1994 the remark "officer does not enjoy good reputation", were recorded. His representations for expunction of these remarks failed. The challenge to these remarks on judicial side was unsuccessful right upto this Court. In 1993, it was also recorded that quality of performance of the appellant was poor and his disposals were below average. In 1994, the remark in the service record states that the performance of the appellant qualitatively and quantitatively has been poor. With this service record, can it be said that there existed no material for an order of compulsory retirement of the appellant from service? We think not. The above material amply shows that the material germane for taking decision by the Full Court whether the appellant could be continued in judicial service or deserved to be retired compulsorily did exist. It is not the scope of judicial review to go into adequacy or sufficiency of such materials.

It is true that the appellant was confirmed as District Judge in 1985; he got lower selection grade with effect from 24.03.1989; he was awarded super time scale in May, 1999 and he was also given above super time scale in 2002 but

the confirmation as District Judge and grant of selection grade and super time scale do not wipe out the earlier adverse entries which have remained on record and continued to hold the field. The criterion for promotion or grant of increment or higher scale is different from an exercise which is undertaken by the High Court to assess a judicial officer's continued utility to the judicial system. In assessing potential for continued useful service of a judicial officer in the system, the High Court is required to take into account the entire service record. Overall profile of a judicial officer is the guiding factor. Those of doubtful integrity, questionable reputation and wanting in utility are not entitled to benefit of service after attaining the requisite length of service or age.

The conduct of the appellant in involving an M.P. and the Ministry of Law, Justice and Company Affairs, in a matter of the High Court concerning an administrative review petition filed by him for expunging adverse remarks in ACRs of 1993 and 1994 is most reprehensible and highly unbecoming of a judicial officer. His conduct has tarnished the image of the judiciary and he disentitled himself from continuation in judicial service on that count alone. A Judge is expected not to be influenced by any external pressure and he is also supposed not to exert any influence on others in any administrative or judicial matter.

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296. CONSTITUTION OF INDIA – Article 21

(i) Just and fair trial – The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape – Both are public duties of the Judge – To ensure fair trial, the Court should leave no stone unturned to do justice and protect the interest of the society as well – Trial Judge is expected to work objectively and in a correct perspective – Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, the Court has to be deeply cautious to ensure that despite such an attempt, the determinative process is not sub-served.

(ii) Duties of Investigating Officer and Expert Witness – Deliberate dereliction can be liable for their disciplinary action – Court should record specific finding against these officers in this regard.

Dayal Singh & Ors. v. State of Uttaranchal

Judgment dated 03.08.2012 passed by the Supreme Court in Criminal Appeal No. 529 of 2010, reported in AIR 2012 SC 3046

Held:

(i) Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance

to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused.

The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In ***Kamaljit Singh v. State of Punjab, 2004 Cri.LJ 28,*** the Court, while dealing with discrepancies between ocular and medical evidence, held,

> "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eye-witnesses, the testimony of the eye-witnesses cannot be thrown out."

Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. (Plz. see ***Madan Gopal Kakad v. Naval Dubey & Anr., (1992) 3 SCC 204)***

The purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be

two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

In this case the Trial Court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr. C.N. Tewari. The consistent statement of the eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW3, Dr. C.N. Tewari and PW6 S.I. Kartar Singh are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eye-witness which was reliable and worthy of credence has justifiably been relied upon by the court.

After analysing and discussing in detail, finally in para 39 in this context, the order passed as under:

(A) The appeal is dismissed both on merits and on quantum of sentence.

(B) The Director Generals, Health Services of UP/Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the Trial Court dated 29th June, 1990.

(C) The above-said officials are hereby directed to take disciplinary action against Dr. C.N. Tewari, PW3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report (Exhibits Ka-6 and Ka-7) and statement of PW6. The bar on limitation, if any,

under the Rules will not come into play because they were directed by the order dated 29th June, 1990 of the Court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against Dr. C.N. Tewari.

(D) Director Generals of Police UP/Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by direction of the Court that such enquiry shall be conducted.

(ii) The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution.

It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. We may illustrate such kind of investigation with an example where a huge recovery of opium or poppy husk is made from a vehicle and the Investigating Officer does not even investigate or make an attempt to find out as to who is the registered owner of the vehicle and whether such owner was involved in the commission of the crime or not. Instead, he merely apprehends a cleaner and projects him as the principal offender without even reference to the registered owner. Apparently, it would prima facie be difficult to believe that a cleaner of a truck would have the capacity to buy and be the owner, in possession of such a huge quantity, i.e., hundreds of bags, of poppy husk. The investigation projects the poor cleaner as the principal offender in the case without even reference to the registered owner.

Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the Court. It cannot be considered a case of

bona fide or unintentional omission or commission. It is not a case of faulty investigation simplicitor but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot free.

The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons.

The police manual and even the provisions of the CrPC require the investigation to be conducted in a particular manner and method.

Having analysed and discussed in some elaboration various aspects of this case, we pass, we hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the Courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.

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297. CONSTITUTION OF INDIA – Articles 21 and 39-A
Free legal aid – Is available both at trial as well as appellate stage – To ensure fair trial, Court is duty bound to enquire of accused or convict whether he or she requires legal representation at State expenses.

Rajoo alias Ramakant v. State of Madhya Pradesh

Judgment dated 09.08.2012 passed by the Supreme Court in Criminal Appeal No. 140 of 2008, reported in AIR 2012 SC 3034

Held:

Article 39-A of the Constitution reads as follows:-

> "39A. *Equal justice and free legal aid* –The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

Section 12 of the Act lays down the criteria for providing legal services. It provides, inter alia, that every person who has to file or defend a case shall be entitled to legal services, if he or she is in custody. Section 13 of the Act provides that persons meeting the criteria laid down in Section 12 of the Act will be entitled to legal services provided the concerned authority is satisfied that such person has a prima facie case to prosecute or defend.

Sections 12 and 13 of the Act do not make any distinction between the trial stage and the appellate stage for providing legal services. In other words, an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the Constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost.

Pending the enactment of the Legal Services Authorities Act, the issue of providing free legal services or free legal aid or free legal representation (all terms being understood as synonymous) came up for consideration before the Apex Court in ***Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, AIR 1979 SC 1369, Khatri (II) v. State of Bihar, AIR 1981 SC 928*** and ***Suk Das v. Union Territory of Arunachal Pradesh, AIR 1986 SC 991,*** the Court has taken a rather proactive role in the matter of providing free legal assistance to persons accused of an offence or convicted of an offence.

An obligation is cast on the Court to enquire of the accused or convict whether he or she requires legal representation at State expense. Neither the constitution nor the Legal Services Authorities Act makes any distinction between a trial and an appeal for the purposes of providing free legal aid to an accused or a person in custody.

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298. CONTRACT ACT, 1872 – Sections 126 and 128

(i) Liability of guarantor/surety – The liability of guarantor/surety is co-extensive with that of principal-debtor – He has neither any right to restrain execution of the decree against him until the decree-holder has exhausted his remedy against debtor nor any right to dictate terms to the creditor as he should make the recovery against the principal-debtor at his instance.

(ii) Recovery of public money – Should be recovered expeditiously – But at the same time financial institutions should not be permitted to behave like property dealers – They must be sold to secure assets at best price – Law explained.

Ram Kishun & ors. v. State of UP & ors.

Judgment dated 24.05.2012 passed by the Supreme Court in Civil Appeal No. 6204 of 2009, reported in AIR 2012 SC 2288

Held:

There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/ guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide ***The Bank of Bijhar Ltd. v. Dr. Damodar Prasad & Anr., AIR 1969 SC 297; Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulum & Anr., AIR 1982 SC 1497, Union Bank of India v. Manku Narayana, AIR 1987 SC 1078*** and ***State Bank of India v. Messrs. Indexport Registered & Ors., AIR 1992 SC 1740***)

In ***State Bank of India v. M/s Saksaria Sugar Mills Ltd. & Ors., AIR 1986 SC 868,*** this Court while considering the provisions of Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See ***also: Industrial Investment Bank of India Ltd. v. Biswasnath Jhunjhunwala, AIR SCW 5359*** and ***United Bank of India v. Saryawati Tondon & Ors., AIR 2010 SC 3413***)

Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.

A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of statute. [Vide ***Lachhman Dass v. Jagat Ram & Ors., AIR 2007 SC (Supp) 1169*** and ***Narmada Bachao Andolan v. State of Madhya Pradesh & anr., AIR 2011 SC 1989***]

Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance of the statutory provisions.

In case the property is disposed of by private treaty without adopting any other mode provided under the statutory rules etc., there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. In The ***State of Orissa & Ors. v. Harinarayan Jaiswal & ors., AIR 1972 SC 1816,*** this Court held that the highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has

fetched the appropriate price and there has been no collusion between the bidders.

In *Haryana Financial Corporation & Anr. V. Jagdamba Oil Mills & Anr., AIR 2002 SC 834,* this Court considered this aspect and while placing reliance upon its earlier judgment in ***Chairman and Managing Director, SIPCOT Madras & Ors. v. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras & Anr., AIR 1995 SC 1632,*** held that in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

Therefore, it becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward, treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals.

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299. COURT FEES ACT, 1870 – Section 7 (iv) (c) and (v)
Suit for declaration, permanent injunction and possession of property as a consequential relief – Land was situated within municipal area – Plaintiff is liable to pay *ad valorem* court fees as per the value of the sale deed which is the subject-matter of the suit.

Ashok Kumar Bafna v. Kewalchand Bafna & ors.
Judgment dated 20.04.2012 passed by the High Court of M.P. in Writ Petition No. 1888 of 2012, reported in AIR 2012 MP 113

Held:

Before dwelling upon the issue relevant it would be to take note of relief sought for by the petitioner in the suit which is as under:

"अ. यह घोषित किया जावे कि वादी वादोक्त सम्पत्ति भूखण्ड खसरा नम्बर 140/2 जिसका कुल क्षेत्रफल 260 वर्गफुट का स्वामी है तथा प्रतिवादी क्र. 1 द्वारा निष्पादित बिक्री पत्र दिनांक 22–3–1999 वादी पर बन्धनकारी नहीं है व उसके प्रति शून्य है।

ब. वादोक्त सम्पत्ति का भौतिक आधिप्त वादी को दिलाया जावे।

स. आधिप्त वादी को प्राप्त होने के बाद उसकी सम्पत्ति में किसी प्रकार से प्रतिवादी दखलअंदाजी नहीं करें, ऐंसी स्थाई निषेधाज्ञा जारी की जावे।

द. प्रतिवादी क्र. 01 और 02 से वादी को सम्पूर्ण न्यायालय व्यय दिलाया जावे।

इ. अन्य अनुतोष राय अदालत दिलाई जावे।"

Thus, beside seeking declaration and permanent injunction and that the sale deed 22-03-1999 be declared null and void, petitioner also seeks the relief of physical pos-session over the suit property which is con-sequential to the declaration sought for by the petitioner in the suit. The petitioner admittedly paid the fixed court fees of Rs. 2,000/- for declaration and Rs. 100/- for permanent injunction. The sale deed in question is valued at Rs. 2,50,000/-.

In the case at hand since the land in question is not assessed to the land revenue being not an agricultural land as it is situated within the, municipal limit is the value of the subject- matter would be the basis on which the court fees is leviable. In this con-text reference can be had of the decision in ***Suhrid Singh alias Sardool Singh v. Randhir Singh and others: AIR 2010 SC 2807*** wherein it is held:-

> "7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to deek a declaration that the deed is invalid, or non est, or illegal or that it is not bending on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(c) of the Act.
>
> Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential

relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7."

In the case at hand since the petitioner beside seeking declaration also seeks a consequential relief of possession, he is liable to pay ad valorem court fees as per the value of the sale deed which is a subject matter of the suit.

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300. CRIMINAL PROCEDURE CODE, 1973 – Section 154
INDIAN PENAL CODE, 1860 – Section 120-B

(i) FI.R. – Omission of name of one of the accused – Effect of – Held, an accused who has not been named in the F.I.R. but to whom a definite role has been attributed in the commission of crime can be punished on being found guilty.

(ii) Criminal conspiracy – Where accused was charged with an offence u/s 302 r/w/s 120-B, no separate charge would require u/s 302 r/w/s 34 I.P.C. – Once the Court finds an accused guilty of Section 120-B, where the accused had conspired to commit an offence and actually committed the offence with other accused, they all shall individually be punishable for the offence for which such conspiracy was hatched.

Jitender Kumar v. State of Haryana

Judgment dated 08.05.2012 passed by the Supreme Court in Criminal Appeal No. 1763 of 2008, reported in (2012) 6 SCC 204

Held:

The law is well settled that merely because an accused has not been named in the FIR would not necessarily result in his acquittal. An accused who has not been named in the FIR, but to whom a definite role has been attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. Every omission in the FIR may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the court, including the physical and mental condition of the informant, the normal behaviour of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused. The court has to examine these aspects with caution. Further, the court is required to examine such challenges in the light of the settled principles while keeping in mind as to whether the name of the accused was brought to light as an afterthought or on the very first possible opportunity.

The court shall also examine the role that has been attributed to an accused by the prosecution. The informant might not have named a particular accused in the FIR, but such name might have been revealed at the earliest opportunity

by some other witnesses and if the role of such an accused is established, then the balance may not tilt in favour of the accused owing to such omission in the FIR.

The court has also to consider the fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopaedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a situation. Reference in this regard can be made to ***State of U.P v. Krishna Master, (2010) 12 SCC 324*** and ***Ranjit Singh v. State of M.P., (2011) 4 SCC 336.***

Coming to the argument on behalf of accused Jitender that he had been acquitted by the trial court for an offence under Section 302 read with Section 102-B IPC, this argument is again devoid of any merit. The accused Jitender was charged with an offence punishable under Section 120-B IPC for he and other co-accused had conspired to do an illegal act and commit the murder of Indra. It is hereby correct that no separate charge under Section 302 read with Section 34 IPC had been framed against the accused Jitender. However, he was charged with an offence punishable under Section 323 read with Section 34 IPC for which he was acquitted.

It is also correct that the learned trial court has specifically noticed in its judgment that the accused Jitender Kumar had not been charged separately for an offence under Section 302 read with Section 34 IPC and if he was also present, then the provisions of Section 149 IPC would be applicable and in the event, the charge ought to be framed under that provision. We are unable to find any error in this approach of the trial court. But, equally true is that the trial court, for valid reasoning and upon proper appreciation of evidence, convicted this accused for an offence under Section 120-B IPC and, thus, for an offence under Section 302 IPC as well.

A bare reading of Section 120-B IPC provides that:

> "***120-B. Punishment of criminal conspiracy.*** – (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in [the IPC] for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence."

In other words, once the court finds an accused guilty of Section 120-B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be punishable for the offence for which such conspiracy was hatched. Thus, we do not find any error in the judgment of the trial court in convicting the accused for an offence under Section 120-B read with Section 302 IPC.

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301. CRIMINAL PROCEDURE CODE, 1973 – Section 154
INDIAN PENAL CODE, 1860 – Section 302/149
Prompt F.I.R. – Value of – Incident had occurred at about 4:30 pm, F.I.R. was registered on same day at 6:30 pm thereafter, investigation started immediately – Witness had given eye witness version of occurrence – Held, prosecution case established.
Murder trial – Variation in testimony of injured witness – Credibility of – Every variation or discrepancy in statement of an injured witness cannot belie case of prosecution *per se*.
Common object to murder – Determination of – Intention on part of accused persons to kill deceased was manifest as is evident from statement of eye witness, accused persons were hiding themselves in fields, they appeared all of a sudden at the place of occurrence, the cause for having such an intent is also proved – Manner in which all accused assaulted deceased, clearly shows that accused person has a pre-determined mind to kill deceased – Conviction of all accused u/s 302/149 confirmed.

Atmaram and others v. State of Madhya Pradesh

Judgment dated 10.05.2012 passed by the Supreme Court in Criminal Appeal No. 2003 of 2008, reported in (2012) 5 SCC 738

Held:

From a bare reading of the statements of witnesses, it is clear that according to PW1, not only Gokul, the accused, had caused injury on the head of the deceased by farsi but accused persons had also caused injuries to him with lathis etc. However, according to PW2, Gokul, the accused, had caused injuries on the head of the deceased, both hands, above the eyes and on the wrist while other accused hit her. This cannot be termed as a material contradiction in the statements of these two witnesses. These are two eye-witnesses who themselves were injured by the accused. Every variation is incapable of being termed as a serious contradiction that may prove fatal to the case of prosecution.

It is a settled canon of criminal jurisprudence that every statement of the witness must be examined in its entirety and the Court may not rely or reject the entire statement of a witness merely by reading one sentence from the deposition in isolation and out of context.

Before dealing with the contention raised on behalf of the appellants, we may usefully refer to some pertinent aspects of the case of the prosecution. In this case, the incident had occurred at about 4.30 p.m. on 6th November, 1993 and the FIR itself was registered at 6.30 p.m. on the statement of PW1 recorded in the hospital. In the hospital itself, the doctor had also recorded the dying declaration Ext. P-6 of the deceased.

The relevant part of the declaration reads as under :

> "My First question was : What is your name?
>
> Ans : Gokulsingh S/o Laljiram Lalsingh.
>
> Q: Where do you live?
>
> Ans: Dhuankheri.
>
> I again asked what happened to you when he replied that the well of Kanhaiya, myself, my brother Udayram and sister were hit by 5 brothers Ramchand, Umrao, Vikram, Gokul and Atmaram sons of Devaji of Balai caste. He stated so. Thereafter I asked where all have you received injuries whereupon he replied that on head, hands and legs. Thereafter I again asked who saw you being beaten up then he replied that we were seen by Udaysingh, Gokulsingh, Gajrajsingh, Ramchandra etc. I again asked what did you do thereupon he replied, what could we do, we were un-armed, we kept shouting. Our sister had tried to rescue us."

After recording of the FIR, Ext. P-37 the investigation was started immediately and on the second day, the accused were taken into custody. Names of all the accused were duly shown in Column No.7 of the FIR. Two witnesses, PW1 and PW2, have given the eye witness version of the occurrence. All the accused persons were hiding themselves in the field and had a clear intention to kill the deceased. The motive for commission of the offence which, of course, is not an essential but is a relevant consideration, has also been brought out in the case of the prosecution that the deceased had allegedly burnt their soyabean crops and, therefore, the accused wanted to do away with the deceased Gokul and his brother.

These factors have been clearly brought out in the statement of PW1 and PW2. The fact that these injuries were inflicted by a collective offence upon the deceased and the injured witnesses is duly demonstrated not only by the medical report, but also by the statements of the doctors, PW4 and PW14. Thus, the prosecution has been able to establish its case.

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302. CRIMINAL PROCEDURE CODE, 1973 – Section 154
EVIDENCE ACT, 1872 – Section 32

(i) F.I.R. by itself is not substantial evidence – If its scriber had turned hostile, it will not lose its relevancy and can be taken into as a relevant circumstance of the evidence produced by investigation agency.

(ii) Oral dying declaration is an exception of rule of inadmissibility of hearsay evidence.

(iii) Where there exist cogent, reliable and credible evidence against one accused, mere acquittal of other accused will not affect the prosecution's case.

Bable alias Gurdeep Singh v. State of Chhattisgarh Tr. P.S. O.P. Kursipur

Judgment dated 10.07.2012 passed by the Supreme Court in Criminal Appeal No. 106 of 2010, reported in AIR 2012 SC 2621

Held:

Once registration of the FIR is proved by the Police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. The FIR, Ext. P1, has duly been proved by the statement of PW10, Sub-Inspector Suresh Bhagat. According to him, he had registered the FIR upon the statement of PW1 and it was duly signed by him. The FIR was registered and duly formed part of the records of the police station which were maintained in normal course of its business and investigation. Thus, in any case, it is a settled proposition of law that the FIR by itself is not a substantive piece of evidence but it certainly is a relevant circumstance of the evidence produced by the Investigating Agency. Merely because PW1 had turned hostile, it cannot be said that the FIR would lose all its relevancy and cannot be looked into for any purpose. In the present case, PW11 and PW14 are the two persons who had reached the place of incident immediately after the occurrence. They were instantaneously told by the deceased as to who the assailants were. They have substantially supported what had been recorded in the FIR which further stands corroborated by the medical evidence and the statements of other witnesses. In these circumstances, we cannot discredit the statements of PW11 and PW14 merely because PW1 has turned hostile. Besides this, in furtherance to the statements of the accused persons, recovery of the weapons used in the crime was effected.

The dying declaration made by the deceased to PW14 cannot be lost sight of by the Court. To the rule of inadmissibility of hearsay evidence, oral dying declaration is an exception. The dying declaration in this case is reliable, cogent and explains the events that had happened in their normal course which was not only a mere possibility but leaves no doubt that such events actually happened as established by the prosecution. Once there exist reliable, cogent

and credible evidence against one of the accused, the mere acquittal of other accused will not frustrate the case of the prosecution. Where the High Court, exercising its judicial discretion ultra-cautiously, acquitted the unnamed accused in the FIR, there the High Court for valid reasons held the present appellant guilty of the offence. The High Court had recorded reasons in support of both these conclusions. [Ref. ***Krishan Lal v. State of Haryana, AIR 1980 SC 1252***].

●

303. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 and 178 (8)

(i) A police investigation may start with the registration of the FIR while in other cases like CBI etc, an inquiry may lead to the registration of an FIR and thereafter, regular investigation may begin in accordance with the provisions of Criminal Procedure Code – In both the cases, registration of FIR is essential.

(ii) The Magistrate has power to direct further investigation under Section 178 (8) of the CrPC – This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made.

(iii) A suspect has no right of being heard prior to initiation of investigation.

Samaj Parivartan Samudaya & ors. v. State of Karnataka & ors.
Judgment dated 11.05.2012 passed by the Supreme Court in IA No. Nil of 2012 in Writ Petition (Civil) No. 562 of 2009, reported in AIR 2012 SC 2326 (3-Judge Bench)

Held:

(i) The machinery of criminal investigation is set into motion by the registration of a First Information Report (FIR), by the specified police officer of a jurisdictional police station or otherwise. The CBI, in terms of its manual has adopted a procedure of conducting limited pre- investigation inquiry as well. In both the cases, the registration of the FIR is essential. A police investigation may start with the registration of the FIR while in other cases (CBI, etc.), an inquiry may lead to the registration of an FIR and thereafter regular investigation may begin in accordance with the provisions of the CrPC. Section 154 of the CrPC places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in- charge of a police station. A police officer is authorised to investigate such cases without order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered under Section 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of the CrPC. Such an order of the Magistrate under Section 156(3) CrPC is in the nature of a pre-emptory reminder or intimation to police, to exercise their plenary power of investigation under that Section. This would result in a police report under Section 173, whereafter the Magistrate may or may not take

cognizance of the offence and proceed under Chapter XVI CrPC. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly under Section 200 CrPC, or to adopt the above procedure. [Ref. ***Gopal Das Sindhi & Ors. v. State of Assam & Anr., AIR 1961 SC 986; Mohd. Yusuf v. Smt. Afaq Jahan & Anr., AIR 2006 SC 705;*** and ***Mona Panwar v. High Court of Judicature of Allahabad Through its Registrar & Ors., AIR 2011 SC 529***].

Once the investigation is conducted in accordance with the provisions of the CrPC, a police officer is bound to file a report before the Court of competent jurisdiction, as contemplated under Section 173 CrPC, upon which the Magistrate can proceed to try the offence, if the same were triable by such Court or commit the case to the Court of Sessions.

(ii) It is significant to note that the provisions of Section 173(8) CrPC open with non-obstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate. Thus, under Section 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. [Ref. ***Hemant Dhasmana v. Central Bureau of Investigation & Anr., AIR 2001 SC 2721***]. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. It has been held in ***Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandha Maharaj v. State of Andhra Pradesh and Ors., AIR 1999 SC 2332*** that the casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard.

(iii) A suspect has no indefeasible right of being heard prior to initiation of the investigation, particularly by the investigating agency. Even, in fact, the scheme of the Code of Criminal Procedure does not admit of grant of any such opportunity. There is no provision in the CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying an investigation prior to registration of case against the suspect. The CBI, as already noticed, may even conduct pre-registration of case against the suspect. The CBI, as already noticed may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialized agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court.

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304. CRIMINAL PROCEDURE CODE, 1973 – Section 300

(i) Double jeopardy – Test to determine whether both the offences are same – Where ingredients of both the offences and not the allegations are same, they are called same offences.

(ii) What is the difference between issue estoppel and double jeopardy? Issue estoppel precludes to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial – It does not prevent the trial of any offence – The issue estoppel rule is a facet of doctrine of *autrefois acquit*.
But double jeopardy is based on doctrine of *autrefois acquit* as guaranteed under Article 20 (2) of the Constitution and Section 300 of Cr.PC.

(iii) Whether an accused who was tried for offence under Section 138 of the Negotiable Instruments Act, 1881, be again tried for offence under Sections 407, 420 and 114 of IPC? Held, Yes, as both are different offences.

Sangeetaben Mahendrabhai Patel v. State of Gujarat & Anr.

Judgment dated 23.04.2012 passed by the Supreme Court in Criminal Appeal No. 645 of 2012, reported in AIR 2012 SC 2844

Held:

The rule against double jeopardy provides foundation for the pleas of autrefois acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 300Cr.P.C; Section 26 of the General Clauses Act; and Section 71 I.P.C.

In ***Maqbool Hussain v. State of Bombay, AIR 1953 SC 325,*** the Constitution Bench of this Court dealt with the issue wherein the central issue arose in the context of the fact that a person who had arrived at an Indian airport from abroad on being searched was found in possession of gold in contravention of the relevant notification, prohibiting the import of gold. Action was taken against him by the customs authorities and the gold seized from his possession was confiscated. Later on, a prosecution was launched against him in the criminal court at Bombay charging him with having committed the offence u/s. 8 of the Foreign Exchange Regulation Act, 1947 (hereinafter called 'FERA') read with the relevant notification. In the background of these facts, the plea of "autrefois acquit" was raised seeking protection u/art. 20(2) of the Constitution of India, 1950 (hereinafter called the 'Constitution'). This court held that the fundamental right which is guaranteed u/art. 20 (2) enunciates the principle of "autrefois convict" or "double jeopardy" i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim ***"nemo debet bis punire pro uno delicto"***, that is to say that no one ought to be twice punished for one offence. The plea of ***"autrefois convict"*** or ***"autrefois acquit"*** avers that the person has been previously convicted or acquitted on a charge for the same offence as

that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not that the facts relied on by the prosecution are the same in the two trials. A plea of "autrefois acquit" is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.

The Constitution Bench of this Court in ***S. A. Venkataraman v. Union of India & Anr., AIR 1954 SC 375,*** explained the scope of doctrine of double jeopardy, observing that in order to attract the provisions of Art. 20 (2) of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words 'prosecuted' and 'punished' are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attractive.

In ***Om Prakash Gupta v. State of U.P., AIR 1957 SC 458;*** and ***State of Madhya Pradesh v. Veereshwar Rao Agnihotri, AIR 1957 SC 592,*** this Court has held that prosecution and conviction or acquittal u/s. 409, IPC do not debar trial of the accused on a charge u/s. 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content.

In ***Leo Roy Frey v. Superintendent, District Jail, Amritsar & Anr., AIR 1958 SC 119,*** proceedings were taken against certain persons in the first instance before the Customs Authorities u/s. 167(8) of the Sea Customs Act and heavy personal penalties were imposed on them. Thereafter, they were charged for an offence under Section 120-B IPC. This Court held that an offence under Section 120-B is not the same offence as that under the Sea Customs Act:

> "The offence of a conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

In ***The State of Bombay v. S.L. Apte and Anr. AIR 1961 SC 578,*** the Constitution Bench of this Court while dealing with the issue of double jeopardy u/art. 20(2), held:

> "To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore,

necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.

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The next point to be considered is as regards the scope of S. 26 of the General Clauses Act. Though S. 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked."

In ***Roshan Lal & Ors. v. State of Punjab, AIR 1965 SC 1413,*** the accused had caused disappearance of the evidence of two offences 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences u/s. 201 IPC. It was held that neither s. 71 IPC nor s. 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences u/s. 201 IPC, though it would be appropriate not to pass two separate sentences. A similar view has been reiterated by this Court in ***Kharkan & Ors. v. State of U.P., AIR 1965 SC 83.***

This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue. (Vide: ***Pritam Singh & Anr. v. The State of Punjab, AIR 1956 SC 415; Manipur Administration, Manipur v. Thokchom Bira Singh, AIR 1965 SC 87; Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda, AIR 1970 SC 87; and Bhanu Kumar Jain v. Archana Kumar & Anr., AIR 2005 SC 626***).

The law is well settled that in order to attract the provisions of Art. 20(2) of the Constitution i.e. doctrine of autrefois acquit or S. 300 Cr.P.C. or S. 71 IPC or S. 26 of General Clauses Act, ingredients of the offences in the earlier case as

well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge.

Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of S.138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with S. 114 IPC. In the prosecution under S.138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable u/s. 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

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305. CRIMINAL PROCEDURE CODE, 1973 – Sections 311 and 242

(i) Power to recall main witnesses for cross–examination as their cross–examination deferred by defence council who wanted to cross–examine them after trap laying officer's evidence – Power should be accepted though deferring of cross–examination not clearly reflected from record.

(ii) Discovery of truth is the essential purpose of any trial or enquiry – It is trite that creditability of witness can be tested only when the testimony is put through the fire of cross–examination.

(iii) Fairness of trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue – A possible prejudice to prosecute is not even a price leave alone on that would justify denial of a fair opportunity to the accused to defend himself.

P. Sanjeeva Rao v. State of A.P.

Judgment dated 02.07.2012 passed by the Supreme Court in Criminal Appeal No. 874 of 2012, reported in AIR 2012 SC 2242

Held:

The two prosecution witnesses were not cross-examined by the counsel for the appellant not because there was nothing incriminating in their testimony against the appellant but because counsel for the appellant had indeed intended

to cross-examine them after the Trap Laying Officer had been examined. The fact that the appellant did not make a formal application to this effect nor even an oral prayer to the Court to that effect at the time the cross-examination was deferred may be a mistake which could be avoided and which may have saved the appellant a lot of trouble in getting the witnesses recalled. But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

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306. CRIMINAL PROCEDURE CODE, 1973 – Section 386
EVIDENCE ACT, 1872 – Section 3

(i) Justification of interference in appeal against acquittal – Where there are compelling circumstances and the impugned judgment is found to be perverse and there are good reasons for interference, then appellate Court is justified to interfere in that judgment.

(ii) Evidence of hostile witness – It is settled legal position that evidence of such witness cannot be rejected in toto or treated as effaced or washed off the record altogether but the same can be accepted to the extent, their version is found to be dependable on a careful scrutiny thereof.

(iii) **Appreciation of evidence – If the maxim *falsus in uno falsus in omnibus* is applied in all cases, it is to be feared that criminal justice system would come to a dead stop – Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence and merely because in some respects the Court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.**

(iv) **Reasonable doubt is a fair doubt based upon reason and common sense – It is not an imaginary, trivial or merely possible or fanciful doubt.**

Ramesh Harijan v. State of U.P.

Judgment dated 21.05.2012 passed by the Supreme Court in Criminal Appeal No. 1340 of 2007, reported in AIR 2012 SC 1979

Held:

The law of interfering with the judgment of acquittal is well- settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. (Vide: ***State of Rajasthan v. Talevar & Anr., AIR 2011 SC 2271; State of U.P. v. Mohd. Iqram & Anr., AIR 2011 SC 2296; Govindaraju @ Govinda v. State by Srirampuram Police Station & Anr., (2012) 4 SCC 722 ;*** and ***State of Haryana v. Shakuntla & Ors., (2012) 4 SCALE 526***).

It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: ***Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848;*** and ***Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC***).

In ***State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766,*** this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in ***Balu Sonba Shinde v. State of Maharashtra, AIR 2002 SC 3137; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516 ; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v.***

Daroga Singh & Ors., AIR 2008 SC 320; and *Subbu Singh v. State by Public Prosecutor, 2009 AIR SCW 3937.*

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See ***also:*** *C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718 and* ***Himanshu @ Chintu v. State (NCT of Delhi), AIR 2011 SC (Cri) 426.***)

Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly, that of Kunwar Dhruv Narain Singh (PW.1), Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8). However, it is the duty of the court to unravel the truth under all circumstances.

In ***Balka Singh & Ors. v. State of Punjab, AIR 1975 SC 1962,*** this Court considered a similar issue, placing reliance upon its earlier judgment in ***Zwinglee Ariel v. State of Madhya Pradesh, AIR 1954 SC 15*** and held as under:

> "The Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the true is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

In ***Sukhdev Yadav & Ors. v. State of Bihar, AIR 2001 SC 3678,*** this Court held as under:

> "It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment, sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness-box details out an exaggerated account."

A similar view has been re-iterated in ***Appabhai & Anr. v. State of Gujarat, AIR 1988 SC 696,*** wherein this Court has cautioned the courts below not to give undue importance to minor discrepancies which do not shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses now-a-days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

In *Sucha Singh v. State of Punjab, AIR 2003 SC 3617,* this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim ***falsus in uno falsus in omnibus*** has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra, AIR 1973 SC 2622,* this Court held :

> "...Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant..."

[See also: ***Bhagwan Singh & Ors. v. State of M.P., AIR 2002 SC 1621; Gangadhar Behera & Ors. v. State of Orissa, AIR 2002 SC 3633; Sucha Singh, AIR 2003 SC 3617) (supra);*** and ***S. Ganesan v. Rama Raghuraman & Ors., (2011) 2 SCC 83***]

Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

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307. CRIMINAL PROCEDURE CODE, 1973 – Section 482

Adverse remarks against members of subordinate Court by Judges of Superior Court – Concept of – A Judge of the Superior Court however, strongly he may feel about the unmerited and fallacious order passed by an officer is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint – The concept of *loco parentis* has to take a foremost pace in the mind to keep at bay any uncalled for unwarranted remarks.

Amar Pal Singh v. State of U.P. & anr.

Judgment dated 17.05.2012 passed by the Supreme Court in Criminal Appeal No. 651 of 2009, reported in AIR 2012 SC 1995

Held:

For more than four decades this Court has been laying emphasis on the sacrosanct duty of a Judge of a superior Court how to employ the language in judgment so that a message to the officer concerned is conveyed. It has been clearly spelt out that there has to be a process of reasoning while unsettling the judgment and such reasoning are to be reasonably stated with clarity and result orientation. A distinction has been lucidly stated between a message and a rebuke. A Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on use of dignified language and sustained restraint, moderation and sobriety. It is not to be forgotten that independence of judiciary has an insegregable and inseparable link with its credibility. Unwarranted comments on the judicial officer creates a dent in the said credibility and consequently leads to some kind of erosion and affects the conception of rule of law. The sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because it is obligatory on the part of the superior Courts to take recourse to correctional measures. A reformative method can be taken recourse to on the administrative side. It is condign to state it should be paramount in the mind of a Judge of superior Court that a Judicial officer projects the face of the judicial system and the independence of judiciary at the ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy. A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for any unwarranted remarks.

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308. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – Sterling witness – Should be of very high quality and caliber – His version should be unassailable and acceptable on its face value – Qualities of such a witness restated.

Rai Sandeep alias Deepu v. State of NCT of Delhi

Judgment dated 07.08.2012 passed by the Supreme Court in Criminal Appeal No. 2486 of 2009, reported in AIR 2012 SC 3157

Held:

The 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness.

The witness should be in a position to withstand the cross- examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him.

Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

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309. EVIDENCE ACT, 1872 – Section 3

HINDU MARRIAGE ACT, 1955 – Sections 13 (i), (i-a) and 25

(i) Appreciation of evidence – In matrimonial disputes, it would not be appropriate to expect outsiders to come and depose – Family members, relatives, friends and neighbours are the most natural witnesses – The evidence of such witnesses not to be thrown out on the ground of relationship to either spouse but to be tested on objective parameters.

(ii) How to assess mental cruelty? Explained.

(iii) Whether in a divorce petition, on the ground of cruelty, subsequent events can be looked into and considered? Held, Yes.

(iv) At the time of fixation of permanent alimony, amount paid by virtue of interim order should not be deducted.

Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal
Judgment dated 04.07.2012 passed by the Supreme Court in Civil Appeal No. 4905 of 2012, reported in AIR 2012 SC 2586

Held:

Whether the appellant/husband had made out a case for mental cruelty to entitle him to get a decree for divorce. At this juncture, we may unhesitantly state that the trial court as well as the first appellate court have disbelieved the evidence of most of the witnesses cited on behalf of the husband on the ground that they are interested witnesses. In a matrimonial dispute, it would be inappropriate to expect outsiders to come and depose. The family members and sometimes the relatives, friends and neighbours are the most natural witnesses. The veracity of the testimony is to be tested on objective parameters and not to be thrown overboard on the ground that the witnesses are related to either of the spouse. Exception has been taken by the courts below that the servants of the house should have been examined and that amounts to suppression of the best possible evidence. That apart, the allegations made in the written statement, the dismissal of the case instituted by the wife u/s. 494 of the Indian Penal Code, the non-judging of the material regard being had to the social status, the mental make-up, the milieu and the rejection of subsequent events on the count that they are subsequent to the filing of the petition for divorce and also giving flimsy reasons not to place reliance on the same, we are disposed to think, deserve to be tested on the anvil of "perversity of approach". Quite apart from the above, a significant question that emerges is whether the reasons ascribed by the courts below that the allegations made in the written statement alleging extra marital affair of the appellant-husband with Neeta Gujarathi has been established and, therefore, it would not constitute mental cruelty are perverse and unacceptable or justified on the basis of the evidence brought on record. These are the aspects which need to be scrutinized and appositely delved into.

The appellant-husband, examining himself as PW-1, has categorically stated that the wife used to hide the pressed clothes while he was getting ready to go to the factory. Sometimes she used to crumple the ironed clothes and hide the keys of the motorcycle or close the main gate. In the cross-examination, it is clearly stated that the wife was crumpling the ironed clothes, hiding the keys of the motorcycle and locking the gate to trouble him and the said incidents were taking place for a long time. This being the evidence on record, we are at a loss to find that the courts below could record a finding that the appellant used to enjoy the childish and fanciful behaviors of the wife pertaining to the aforesaid aspect. This finding is definitely based on no evidence. Such a conclusion cannot be reached even by inference. If we allow ourselves to say so, even surmises and conjectures would not permit such a finding to be recorded. It is apt to note here that it does not require Solomon's wisdom to understand the embarrassment and harassment that might have been felt by the husband. The level of disappointment on his part can be well visualised like a moon in a cloudless sky.

Now we shall advert to the allegation made in the written statement. The respondent-wife had made the allegation that the husband had an illicit relationship with Neeta Gujarathi. The learned trial Judge has opined that the said allegation having been proved cannot be treated to have caused mental cruelty. He has referred to various authorities of many High Courts. The heart of the matter is whether such an allegation has actually been proven by adducing acceptable evidence. It is worth noting that the respondent had filed a complaint, RCC No. 91/95, u/s. 494 of the Indian Penal Code against the husband. He was discharged in the said case. The said order has gone unassailed. The learned trial Judge has expressed the view that Neeta Gujarathi was having a relationship with the husband on the basis that though the husband had admitted that she was working in his office yet he had not produced any appointment letter to show that she was appointed as a computer operator. The trial Judge has relied on the evidence of the wife. The wife in her evidence has stated in an extremely bald manner that whenever she had telephoned to the office in the factory, the husband was not there and further that the presence of Neeta Gujarathi was not liked by her in-laws and the elder son Vishal. On a careful reading of the judgment of the trial court, it is demonstrable that it has been persuaded to return such a finding on the basis of the incident that took place on 11.10.1995. It is worth noting that the wife, who examined herself as RW-1, stated in her evidence that Vishal was deposing against her as the appellant had given him a scooter. The learned trial Judge has given immense credence to the version of the social worker who, on the date of the incident, had come to the house of the appellant where a large crowd had gathered and has deposed that she had seen Neeta going and coming out of the house. The evidence of the wife, when studiedly scrutinized, would show that there was more of suspicion than any kind of truth in it. As has been stated earlier, the respondent had made an allegation that her son was influenced by the appellant-husband. The learned trial Judge as well as the appellate court have accepted the same. It is germane

to note that Vishal, the elder son, was approximately 16 years of age at the time of examination in court. There is remotely no suggestion to the said witness that when Neeta Gujarati used to go to the house, his grandfather expressed any kind of disapproval. Thus, the whole thing seems to have rested on the incident of 11.10.1995. On that day, as the material on record would show, at 4.00 p.m., the wife arrived at the house of the husband. She has admitted that she wanted to see her father-in-law who was not keeping well. After she went in, her father-in-law got up from the chair and went upstairs. She was not permitted to go upstairs. It is testified by her that her father-in-law came down and slapped her. She has deposed about the gathering of people and publication in the newspapers about the incident. Vishal, PW-5, has stated that the mother had pushed the grandfather from the chair. The truthfulness of the said aspect need not be dwelled upon. The fact remains that the testimony of the wife that the father-in-law did not like the visit of Neeta does not appear to be true. Had it been so, he would not have behaved in the manner as deposed by the wife. That apart, common sense does not give consent to the theory that both, the father of the husband and his son, Vishal, abandoned normal perception of life and acceded to the illicit intimacy with Neeta. It is interesting to note that she has deposed that it was published in the papers that the daughter-in-law was slapped by the father-in-law and Neeta Gujarathi was recovered from the house but eventually the police lodged a case against the husband, the father-in-law and other relatives under Section 498A of the Indian Penal Code. We really fail to fathom how from this incident and some cryptic evidence on record, it can be concluded that the respondent-wife had established that the husband had an extra marital relationship with Neeta Gujarathi. That apart, in the application for grant of interim maintenance, she had pleaded that the husband was a womaniser and drunkard. This pleading was wholly unwarranted and, in fact, amounts to a deliberate assault on the character. Thus, we have no scintilla of doubt that the uncalled for allegations are bound to create mental agony and anguish in the mind of the husband.

Another aspect needs to be taken note of. She had made allegation about the demand of dowry. RCC No. 133/95 was instituted under Section 498A of the Indian Penal Code against the husband, father-in-law and other relatives. They have been acquitted in that case. The said decision of acquittal has not been assailed before the higher forum. Hence, the allegation on this count was incorrect and untruthful and it can unhesitatingly be stated that such an act creates mental trauma in the mind of the husband as no one would like to face a criminal proceeding of this nature on baseless and untruthful allegations.

Presently to the subsequent events. The courts below have opined that the publication of notice in the daily "Lokmat" and the occurrence that took place on 11.10.1995 could not be considered as the said events occurred after filing of the petition for divorce. Thereafter, the courts below have proceeded to deal with the effect of the said events on the assumption that they can be taken into consideration. As far as the first incident is concerned, a view has been

expressed that the notice was published by the wife to safeguard the interests of the children, and the second one was a reaction on the part of the wife relating to the relationship of the husband with Neeta Gujrathi. We have already referred to the second incident and expressed the view that the said incident does not establish that there was an extra marital relationship between Neeta and the appellant. We have referred to the said incident as we are of the considered opinion that the subsequent events can be taken into consideration. In this context, we may profitably refer to the observations made by a three-Judge Bench in the case of *A. Jayachandra v. Aneel Kaur, AIR 2005 SC 534*:-

> "The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."

Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus, analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce.

In our considered opinion, the amount that has already been paid to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the

respondent-wife has sustained herself without spending the said money. Keeping in view the totality of the circumstances and the social strata from which the parties come from and regard being had to the business prospects of the appellant, permanent alimony of Rs.50 lacs (rupees fifty lacs only) should be fixed and, accordingly, we so do. The said amount of Rs.50 lacs (rupees fifty lacs only) shall be deposited by way of bank draft before the trial court within a period of four months and the same shall be handed over to the respondent-wife on proper identification.

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310. EVIDENCE ACT, 1872 – Sections 3 and 8
INDIAN PENAL CODE, 1860 – Section 302

(i) Murder trial – Appreciation of singular related witnesses – Evidence of solitary witness, who is brother of deceased, found worthy of credence and also corroborated by medical evidence, recovery of weapon, FSL report etc. – Conviction proper.

(ii) Motive – Existence of motive for committing a crime is not an absolute requirement of law but is always a relevant factor which will be taken into consideration by the Courts as it will render assistance to the Courts while analyzing the prosecution evidence and determining the guilt of the accused.

Alagupandi alias Alagupandian v. State of Tamil Nadu
Judgment dated 08.05.2012 passed by the Supreme Court in Criminal Appeal No. 1315 of 2009, reported in AIR 2012 SC 2405

Held:

We are not impressed with the contention that PW1 is the sole and interested witness and, therefore, his statement cannot be relied upon by the Court for returning the finding of conviction. It is a settled principle of law that the Court can record a finding of guilt while, entirely or substantially, relying upon the statement of the sole witness, provided his statement is trustworthy, reliable and finds corroboration from other prosecution evidence. In the case of ***Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr., AIR 2012 SC 1292,*** this Court held as under:

> "11. Now, we come to the second submission raised on behalf of the appellant that the material witness has not been examined and the reliance cannot be placed upon the sole testimony of the police witness (eye-witness). It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In the case of ***Lallu Manjhi and Anr. v. State of Jharkhand, AIR***

2003 SC 854, this Court had classified the oral testimony of the witnesses into three categories:-

a. Wholly reliable;

b. Wholly unreliable; and

c. Neither wholly reliable nor wholly unreliable.

12. In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty. Reference in this regard can be made to the cases of ***Joseph v. State of Kerala AIR 2003 SC 507 and Tika Ram v. State of Madhya Pradesh (2007) 15 SCC 760.*** Even in the case of ***Jhapsa Kabari and Others v. State of Bihar AIR 2002 SC 312,*** this Court took the view that if the presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.

13. In the case of ***Jhapsa Kabari*** (supra), this Court noted the fact that simply because one of the witnesses (a 14 years old boy) did not name the wife of the deceased in the fardbayan, it would not in any way affect the testimony of the eye-witness i.e. the wife of the deceased, who had given graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eye-witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the

testimony of a solitary witness as long as the said witness is reliable and trustworthy."

In view of the settled position of law, we find that the statement of PW1 inspires confidence and is truthful and reliable. His statement does not suffer from any material contradictions. On the other hand, it gives a correct eye-version of what this witness saw. If PW1 intended to lie, nothing prevented him from saying that he was also an eye-witness to the scene of stabbing of the deceased by the accused. He only stated that this crime was witnessed by the two minor children of the deceased and he had merely seen the accused running out from the house of the deceased with a knife in his hand. Where a sole witness has stated exactly what he had actually seen and the said statement otherwise fits into the case of the prosecution and is trustworthy, the Court normally would not be inclined to reject the statement of such sole witness. Furthermore, it is contended that the statement of PW-1 cannot be relied upon by the Court also for the ground that he is an interested witness. This argument is equally without merit. The presence of PW1 at the house of his sister is natural. He was working as a cleaner and was staying with his sister in the same village. He was sleeping outside the house of the deceased and went towards the house upon hearing her screams. Every witness, who is related to the deceased cannot be said to be an interested witness who will depose falsely to implicate the accused. In the present case, the accused is also related to PW1 and there could be no reason for PW1 to falsely implicate the accused.

We have already discussed that the statement of PW1 is worthy of credence. In the case of ***Mano Dutt & Anr. v. State of U.P. [Crl. Appeal No. 77 of 2007*** decided on 29th February, 2012], a Bench of this Court held that it is not the quantity but the quality of the evidence which would bring success to the case of the prosecution or give benefit of doubt to the accused. Statement of every related witness cannot, as a matter of rule, be rejected by the Courts.

It will now be appropriate to refer to the statement of PW14, the doctor, who performed the autopsy upon the body of the deceased. According to this witness, he had found multiple injuries on the person of the deceased and that too, at the vital parts. We have already noticed the injuries caused, in some detail. The accused inflicted injury on the breast of the deceased wherein it pierced into the left ventricle of the heart. Another stab injury was caused by him on the left side of the rib through which the small intestine had protruded out. Still, another injury was caused on the right side of the rib through which also the small intestine had come out. This is besides the injuries he caused on the left hip, wrist and stomach of the deceased. This clearly shows that the deceased had come to the house of the deceased with the definite intention to kill her. The accused, by inflicting these multiple injuries on vital parts of her body, ensured that she died instantaneously. There appears dual motive for the accused to commit the crime. Firstly, the deceased was his step-mother, whose behaviour towards him was not acceptable to the accused. Secondly, the entire

properties left by the father of the accused and husband of the deceased, were being enjoyed by the deceased herself. Furthermore, every time the accused had to ask for money from the deceased and more often than not, she refused to give him the money. These circumstances emerging from the record clearly show reason for some kind of animosity and ill-will on the part of the accused towards the deceased. Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analysing the prosecution evidence and determining the guilt of the accused.

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311. EVIDENCE ACT, 1872 – Sections 3, 24 and 27
CRIMINAL PROCEDURE CODE, 1973 – Section 313
INDIAN PENAL CODE, 1860 – Section 302

(i) Last seen together – Witnesses last seen deceased with accused in the evening, next morning dead body of deceased was found – The postmortem indicates that the death had occurred within 24 hours – As duration between last seen and recovery of dead body is not so long, it should not be disbelieved.

(ii) Extra–judicial confession – If it is made voluntarily, inspires confidence and by no means tainted, should not be disbelieved on the ground of delay or relationship of witness.

(iii) Weapon of offence recovered on the instance of the accused after 18 days of incident – The blood stain found on it did not match with the blood of deceased – Whether a ground to disbelieve the recovery of weapon? Held, No – More so, when doctor has clearly opined the injuries on the dead body could be caused by that weapon.

(iv) Murder trial – Circumstantial evidence – If the accused has not given any explanation as regards the circumstances put to him on his examination, the same can be counted as providing a missing link for completing the chain of circumstances.

Jagroop Singh v. State of Punjab

Judgment dated 20.07.2012 passed by the Supreme Court in Criminal Appeal No. 67 of 2008, reported in AIR 2012 SC 2600

Held:

What is argued is that there is a long gap between the last seen and recovery of the dead body of the deceased. As per the material on record, the informant searched for his son in the village in the late evening and next day in the morning, he went to the fields and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons.

There is no dispute that the confession was made before Natha Singh after 18 days. The fact remains that Natha Singh was not in the village and three days after his arrival in the village, the confession was made before him. He has clearly deposed that Jagsir Singh and Roop Singh alias Jagroop Singh had confessed before him. The appellant Jagroop Singh had confessed about the crime and he had produced them before the ASI. True it is, he has improved his version in the cross-examination that he has strained relationship with the complainant which he had not stated in his statement under Section 161 Cr.P.C but the same cannot make the testimony tainted. Barring that, there is nothing in the cross-examination to discredit his testimony. That apart, there is no suggestion that he had not produced the appellant before the police. There may be some relationship between the informant and this witness but the evidence is totally clear and the confessional statement is voluntary and, in no way, appears to be induced and gets further strengthened by the fact that he produced them before the police. There is no suggestion whatsoever that he had applied any kind of force. It is borne out from that record that Bikkar Singh, another accused, had absconded and the present appellant along with Jagsir Singh came to Natha Singh and confessed and Bikkar Singh confessed before Gurdev Singh, PW-10. In the confessional statement, he has stated about the place where the spade was hidden and led to the recovery to which Natha Singh is a witness. Appreciated from these angles, we are of the considered opinion that the said confessional statement inspires confidence as the same is totally voluntary and by no means tainted.

In the case at hand, the accused persons were arrested after 18 days and recovery wás made at that time. The blood stain found on the weapon has been found in the serological report as human blood. In the case of ***Sattatiya alias Satish Rajanna Kartalla v. State of Maharashtra, AIR 2008 SC 1184,*** the recovery was doubted and additionally, non-matching of blood group was treated to be a lacuna. It is worth noting that the clothes and the weapon were sent immediately for chemical examination. Here the weapon was sent after 18 days as the recovery was made after that period. The accused have not given explanation how human blood could be found on the spade used for agriculture which was recovered at their instance. In this context, we may profitably reproduce a passage from ***John Pandian v. State Represented by Inspector of Police, Tamil Nadu, (2010) 14 SCC 129***:

> "The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

Thus viewed, we do not find any substantial reason to disbelieve the disclosure statement and the recovery of the weapon used. It is apt to mention here that the doctor, who has conducted the post mortem, has clearly opined that the injuries on the person of the deceased could be caused by the weapon (blade of such spade) and the said opinion has gone unrebutted.

Another aspect is to be taken note of. Though the incriminating circumstances which point to the guilt of the accused had been put to the accused, yet he could not give any explanation under Section 313 of the Code of Criminal Procedure except choosing the mode of denial. In ***State of Maharashtra v. Suresh, (2000) 1 SCC 471,*** it has been held that when the attention of the accused is drawn to such circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision only to highlight that the accused has not given any explanation whatsoever as regards the circumstances put to him under Section 313 of the Code of Criminal Procedure.

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312. EVIDENCE ACT, 1872 – Sections 8, 25, 27, 32 (1) and 106
CRIMINAL TRIAL
Confession of accused to police officer – Admissible part there of – The statements made to the police that would implicate the accused himself is barred by Section 25 but other part of the statement not relating to the crime would be admissible under Section 8 – Legal position explained.
Dying declaration – Capability of making – In the present case, it is true that, by pouring of acid, injuries might have been caused on head of the deceased but by no stretch of imagination do those injuries appear to have caused any severe damage to the mouth of the deceased, much less to the extent of preventing her from making any statement – More so, the doctor by stating that he was not in a position to state whether after receipt of injury she would have been in a position to speak or not, also did not rule out the possibility of the deceased making any statement irrespective of injuries sustained by her.
Facts especially within accused's knowledge – Burden of proof in such a situation lies on accused – When according to the accused, they were not present at the place of occurrence, the burden was on them to have established the said fact, since it was within their special knowledge.
Circumstantial evidence – Forensic DNA test – The circumstance, namely, the report of DNA in having concluded that accused was the biological father of the recovered foetus of deceased was thus, one of the relevant circumstances to prove guilt of the accused.

Sandeep v. State of Uttar Pradesh

Judgment dated 11.05.2012 passed by the Supreme Court in Criminal Appeal No. 1651 of 2009, reported in (2012) 6 SCC 107

Held:

When the accused Sandeep took a positive stand that he was not present at the place of occurrence by relying upon a fact situation, namely, he was not responsible for bringing the Indica car belonging to his mother at the place of occurrence along with the deceased, the burden was heavily upon him to establish the plea that the car was stolen on that very date of occurrence, namely, 17.11.2004 and, therefore, he could not have brought the deceased in that car at that place. Unfortunately, by merely making a sketchy reference to the alleged theft of the car in the written statement and the so-called complaint said to have been filed with the Geeta Colony police station nothing was brought out in evidence to support that stand. In this situation, S.106 of the Evidence Act gets attracted. When according to the accused, they were not present at the place of occurrence, the burden was on them to have established the said fact since it was within their special knowledge.

In this context, the recent decision of this Court reported in - ***Prithipal Singh v. State of Punjab, (2012) 1 SCC 10*** can be usefully referred to where it has been held as under in para 53 :

> "In ***State of W.B. v. Mir Mohammad Omar, (2000) 8 SCC 382*** this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. S. 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. S. 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused....."

The contention of accused Sandeep was, therefore, bound to fail and the said defence taken was not proved to the satisfaction of the Court. The failure of the accused Sandeep in not having taken any steps to prove the said fact strikes at the very root of the defence, namely, that he was not present at the place of occurrence. As a sequel to it, the case of the prosecution as demonstrated before the Court stood fully established.

Having regard to the above conclusion that the deceased did narrate the occurrence right from the invitation made by the accused Sandeep to her over phone at 6 p.m. under the guise of taking her to Haridwar to marry her, that after she responded to the said call and met him from where she was picked up by both the accused in the Indica car belonging to the mother of accused Sandeep, and the other sequence of events, namely, the threat posed to the deceased to get the foetus aborted and her refusal ultimately enraged the appellants to cause the assault with the weapon, namely, jack and pana, shaving blades and chemical acid was quite convincing and there were no good grounds to disbelieve her statement. No other motive or any other basis was shown to disbelieve her statement. In that respect, when we consider the reliance placed upon the admissible portion of the statement of the accused, we are unable to reject outrightly the entirety of the statement by application of S.25 of the Evidence Act.

According to learned senior counsel for the appellants, the prosecution could not have relied upon the confessional statement of the accused implicating themselves in the offence alleged against them by virtue of S. 25 of the Evidence Act.

As against the said submission of learned senior counsel appearing for the State rightly pointed out that S. 25 of the Evidence Act can be pressed into service only insofar as it related to such of the statements that would implicate himself while the other part of the statement not relating to the crime would be covered by S. 8 of the Evidence Act and that a distinction can always be drawn in the statement of the accused by carefully sifting the said statement in order to identify the admission part of it as against the confession part of it.

Going by the description of the injuries, as noted by the doctor who conducted the post-mortem, it is difficult to accept the statement of learned senior counsel for the accused that the injury in the mouth was such as the deceased could not have made any oral statement at all to the witnesses. It is true that by the pouring of the acid, injury might have been caused on the head and other parts of the body of the deceased but by no stretch of imagination, those injuries appear to have caused any severe damage to the mouth of the deceased, much less to the extent of preventing her from making any statement to the witnesses.

In this context, when we peruse the evidence of the Doctor (PW-6), he has specifically expressed an opinion that he was not in a position to state whether after receipt of injury on the body of the deceased she would have been in a position to speak or not. In other words, the doctor who had examined the injuries sustained by the deceased did not rule out the possibility of the deceased making any statement irrespective of injuries sustained by her.

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313. EVIDENCE ACT, 1872 – Sections 25 and 27
CRIMINAL PROCEDURE CODE, 1973 – Section 313
Discovery of fact – Significance of – Statement of the accused leading to the recovery of dead body was made while he was in custody – Recovery of dead body, therefore, is a fact, which is admissible in evidence under Section 27 of the Evidence Act.
Examination of accused – Where all incriminating circumstances put to the accused and no material irregularity causing any prejudice to the accused can be attributed to the prosecution – Alleged defect in the examination of the accused insignificant.

Chunda Murmu v. State of West Bengal

Judgment dated 10.05.2012 passed by the Supreme Court in Criminal Appeal No. 1357of 2008, reported in (2012) 5 SCC 753

Held:

The learned counsel for the appellant has vehemently contended that the prosecution version that the accused was arrested on 15.03.1990 and that after his arrest he had made a statement leading to recovery of the dead body cannot be believed inasmuch as it is proved and established by the other materials on record that the appellant was produced before the Magistrate on 17.03.1990 following his arrest which is claimed to have been made on 15.03.1990. According to the learned counsel, the very fact that the accused appellant was produced before the Magistrate on 17.03.1990 would go to show that the prosecution version with regard to his arrest on 15th March and the alleged statements made by him on the said date are extremely doubtful.

It is further urged by the learned counsel that the alleged statement made by the accused was not in the presence of police officers but the same was made before the witnesses examined by the prosecution. It is also contended by the learned counsel that at the time of recovery of the dead body, PW 15- the Block Development Officer, could not identify the accused. Learned counsel had further pointed out that in the course of the examination of the accused under Section 313 Cr.P.C., the recovery of the dead body and other articles as made by the prosecution had not been put to the accused so as to enable him to explain the said circumstances appearing against him.

From the evidence of Investigating Officer it is also clear that the statement of the accused leading to the recovery of dead body was made while he was in custody and the same was in the presence of police officers, though, at that time some other persons were also present in the police station. The recovery of the dead body, therefore, is a fact which is admissible in evidence under Section 27 of the Evidence Act. The absence of identification of the accused by PW 15 at the time of recovery of the dead body, according to us, will not affect the core of the prosecution case.

Insofar as the alleged defects in the examination of the accused under Section 313 Cr.P.C. is concerned, having perused the record, we find that all

incriminating circumstances relevant to the case had been put to the accused and no material irregularity causing any prejudice to the accused can be attributed to the prosecution in this regard. All the circumstances relied upon by the prosecution, therefore, can be held to be proved beyond reasonable doubt. The said circumstances, in our considered view, are more than adequate to enable us to come to the conclusion that the conviction of the accused so far as the offences under Sections 302 and 201 IPC is concerned had been correctly made in the facts and circumstances of the present case. We, therefore, affirm the aforesaid part of the order of the High Court.

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***314. EVIDENCE ACT, 1872 – Section 32**

(i) Dying declaration – Normally the courts attach the intrinsic value of truthfulness to such statement – Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person then the courts can safely rely on such dying declaration and it can form the basis of conviction – Moreso, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

(ii) *Multiple dying declarations*

Where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent – The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence – Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court is such matters.

Sudhakar v. State of M.P.

Judgment dated 24.07.2012 passed by the Supreme Court in Criminal Appeal No. 2472 of 2009, reported in AIR 2012 SC 3265

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315. EVIDENCE ACT, 1872 – Section 58

Judicial Admissions – Judicial admissions or admissions in pleadings made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions – Former class of admissions are fully binding on the party that makes them and constitute a waiver of proof – On the other hand evidentiary

admissions are by themselves not conclusive and can be shown to be wrong and also can be explained.

Ramsajivan v. Lalji Ram

Judgment dated 01.03.2012 passed by the High Court of M.P. in S. A. No. 729 of 1994, reported in ILR (2012) M.P. 1633

Held:

The admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves, can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the trial as evidence are by themselves not conclusive. They can be shown to be wrong and also can be explained. In this context, I may profitably place reliance on *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others, AIR 1974 SC 471,* Since clear and unambiguous admission has been made by defendant no. 3 Rajeev Lochan in his written-statement admitting that before the transaction of exchange took place, the plaintiff was owner of Survey No. 380, therefore, I am of the view that the case of plaintiff comes in the former category of admission made by the defendant, and if that would be the position, it stands on a higher footing and is fully binding upon the plaintiff and not only this, it constitutes the waiver of proof. By such admission, the foundation of the rights of the parties can be determined. Hence, I am of the view that it has been proved that the plaintiff was the owner of Survey No. 380 and because the theory of exchange has been negatived by learned First Appellate Court, he (plaintiff) was entitled to take back the possession of Survey No. 380.

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***316. EVIDENCE ACT, 1872 – Section 65**

Secondary evidence, admissibility of – Non-readable photocopy of a fax notice cannot be allowed to be taken on record as secondary evidence. (*Yeshoda v. K. Shobharani, AIR 2007 SC 1721* relied on in which it was held that if any photocopy of the document sought to be produced can not be compared with the copy with which a document on which reliance is placed upon by the applicant, such copy cannot be taken into consideration under Section 65 of the Evidence Act.)

M/s Zotica Exim, New Delhi and another v. Super Steel Manufacturing Co. Pvt. Ltd., Indore

Judgment dated 02.03.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 3217 of 2010, reported in 2012(3) M.P.H.T. 537

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*317. EVIDENCE ACT, 1872 – Section 67

Exhibiting of document – Exhibiting of document in Court does not amount to proof of its contents – It amounts to admission of its contents but not their truth – Genuineness, truthfulness of the document is an essence to prove it even on exhibiting and admitting the said document in the Court.

Vinod Agrawal & Ors. v. Bharat Kumar Lathi & Ors.

Judgment dated 15.03.2012 passed by the High Court of M.P. in F. A. No. 368 of 2001, reported in ILR (2012) M.P. Short Note 84

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318. EVIDENCE ACT, 1872 – Section 119

(i) **Recording evidence of deaf and dumb person – If a deaf and dumb witness is able to read and write, it is most desirable to adopt that method being more satisfactory than any sign language – In other cases, if found necessary, his statement can be recorded in sign language with the aid of an interpreter who has no interest in the case and should be administered oath.**

(ii) **Competent witness – A deaf and dumb person is a competent witness in light of Section 119 of the Evidence Act.**

(iii) **Administration of oath – Effect of omission – The main purpose of administering of an oath is to render persons who give false evidence liable to prosecution and to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking truth. The omission of administration of oath does not invalidate any evidence.**

State of Rajasthan v. Darshan Singh alias Darshan Lal

Judgment dated 21.05.2012 passed by the Supreme Court in Criminal Appeal No. 870 of 2007, reported in AIR 2012 SC 1973

Held:

The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.

In *Meesala Ramakrishan v. State of A.P., (1994) 4 SCC 182,* this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal' statement does not amount to 'oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

To sum up, a deaf and dumb person is a competent witness.

If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing.

In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.

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319. FAMILY COURT ACT, 1984 – Sections 7, 8 and 20
Jurisdiction of Family Court – Suit filed with respect of properties of parties to a marriage – The exclusive jurisdiction of the suit will be of Family Court – Further, suit for return of Stridhan against the husband and his family members is maintainable before the Family Court.

Om Prakash Tiwary and Others v. Neetu Tiwary
Judgment dated 06.03.2012 passed by the High Court of M.P. in F. A. No. 405 of 2011, reported in 2012 (3) MPLJ 44 (DB)

Held:

Sections 7 and 8 specifically provide that the Family Courts shall have

exclusive jurisdiction in respect of the suit of the nature under sub-section (1) to section 7. In this provision, the emphasis is of the nature of suit and not the parties. When the suit is filed with respect of properties of the parties, who are parties to a marriage, the exclusive jurisdiction will be of Family Court. Meaning thereby that the Family Court shall have jurisdiction in respect of the property of the parties or of either of them. The suit filed by the respondents was definitely maintainable before the Family Court.

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***320. HINDU LAW**

Presumption of joint property – There is a presumption of Joint Hindu Family but there cannot be any presumption that joint family possess a joint property – It is for the person who claims it to be joint has to prove that from the funds of HUF, it was purchased.

Joint Property – Plaintiffs pleaded that the property was purchased from the funds of HUF in the name of Plaintiff No. 1 – Defendant No.1 claimed the said property to be his self–acquired property – Defendant No.1 merely stated that he was employed in Police Department – No mention in written statement that on which post he was appointed – No pleadings or evidence that what was his salary and whether he was fetching that much of salary so that within a short span of five years only, he could purchase the suit property – No receipt of money orders also filed – It can be gathered that by utilizing the funds of HUF, suit property was purchased – Appeal allowed.

Gopinath v. Shiv Prasad & Ors

Judgment dated 06.03.2012 passed by the High Court of M.P. in S.A. No. 389 of 1994, reported in ILR (2012) M.P. Short Note 56

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321. HINDU SUCCESSION ACT, 1956 – Section 14

Succession – Son died issueless during the lifetime of his father – Father died prior to commencement of the Act of 1956 – Provisions of Act, 1956 would not apply – Share of deceased son would devolve on his father.

None Joo & Anr. v. Karan Singh & Ors.

Judgment dated 13.04.2012 passed by the High Court of M.P. in S. A. No. 55 of 1996, reported in ILR (2012) M.P. 1641

Held :

Admittedly, Ganpat died on 30.10.1954. At the time of his death, his father namely Rajaram was alive. Rajaram expired on 5.9.1956 i.e. prior to commencement of Hindu Succession Act, 1956. Chapter IV of the Hindu Law deals with order of inheritance of males according to Mitakshara Law. Paragraph 36 provides that under Mistakshara, the right to inherit arises from propinquity, that is, proximity of relationship. Para 38 deals with classes of heirs namely

Gotraja sapindas, Samanodakas and Bandhus. Para 39(ii) provides that Gotraja Sapindas of a person according to Mitakshara are his six male ascendants in the male line, the wives of the first three of them, and probably also of the next three, that is his father, father's father, father's father's father, etc. Admittedly, Ganpat died issueless prior to commencement of the Hindu Succession Act. Therefore, the provisions of Hindu Succession Act would not apply to the devolution of the property in the facts of the case.

Therefore, the share of Ganpat in the property would devolve on his father namely Rajaram who was alive at that time and after Rajaram, to devolve on the plaintiffs and the defendants.

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322. INDIAN PENAL CODE, 1860 – Section 279

(i) Rash and negligent driving in cases of road accidents – To be examined in the light of attendant circumstances – Only driving speedily does not, but the manner of driving that endangers human life, is the determinative factor to attract the penalty contemplated u/s 279 IPC.

(ii) *Res ipsa loquitur* – This doctrine is applicable to the cases of motor accident, provided the attendant circumstances and the basic facts are proved.

Ravi Kapur v. State of Rajasthan

Judgment dated 16.08.2012 passed by the Supreme Court in Criminal Appeal No. 1838 of 2009, reported in AIR 2012 SC 2986

Held:

(i) Rash and negligent driving has to be examined in light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of S. 279 IPC. That is why the legislature in its wisdom has used the words 'manner so rash or negligent as to endanger human life'. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under S.279 IPC is attracted.

'Negligence' means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person

guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the Court. In a given case, even not doing what one was ought to do can constitute negligence.

The Court has to adopt another parameter, i.e., 'reasonable care' in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others.

(ii) The doctrine of ***res ipsa loquitur*** is equally applicable to the cases of accident and not merely to the civil jurisprudence provided the attendant circumstances and basic facts are proved.

The doctrine of res ipsa loquitur serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct.

In the case of ***Thakur Singh v. State of Punjab, (2003) 9 SCC 208,*** the petitioner drove a bus rashly and negligently with 41 passengers and while crossing a bridge, the bus fell into the nearby canal resulting in death of all the passengers. The Court applied the doctrine of res ipsa loquitur since admittedly the petitioner was driving the bus at the relevant time and it was going over the bridge when it fell down. The Court held as under:

> "4. It is admitted that the petitioner himself was driving the vehicle at the relevant time. It is also admitted that bus was driven over a bridge and then it fell into canal. In such a situation the doctrine of res ipsa loquitur comes into play

and the burden shifts on to the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. He did not succeed in showing that the accident happened due to causes other than negligence on his part."

Still, in the case of ***Mohd. Aynuddin alias Miyam v. State of A.P., AIR 2000 SC 2511,*** this Court has also stated the principle :

> "8. The principle of res ipsa loquitur is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrongdoer."

It has also been stated that the effect of this maxim, however, depends upon the cogency of the inferences to be drawn and must, therefore, vary in each case.

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323. INDIAN PENAL CODE, 1860 – Section 302 r/w/s 34
EVIDENCE ACT, 1872 – Sections 9, 24, 27 and 114 III. (a)
CRIMINAL PROCEDURE CODE, 1973 – Section 313
CRIMINAL TRIAL:

(i) Murder trial based on circumstantial evidence – A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence – Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed – Legal position reiterated.

(ii) Forensic evidence, appreciation of – Finger prints of accused present at crime scene, a place where accused was not supposed to be present in normal course – Failure of accused to explain existence of his finger prints at such place, points to his involvement in crime.

(iii) Discovery of weapons of offence as a result of information given by accused and recovery of stolen property at accused's instance – Held, would form a valid and admissible piece of evidence.

(iv) Extra judicial confession – History given to the doctor at the time of treatment would not be strictly an extra judicial confession, but would be a relevant piece of evidence, as these documents had been prepared by doctor in the normal course of business.

(v) **Delay in identification parade – Delay *per se* cannot be fatal to the validity of holding an identification parade, in all cases, without exception.**

(vi) **Test identification parade – Publication of photograph of accused in newspaper, effect of – Photographs printed in the newspaper months prior to the holding of identification parade would have lost its effect on the minds of the witnesses – Position explained.**

(vii) **Statement of accused u/s 313 Cr. P.C. – Purpose there of – Statement of accused is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly, to use denials of established facts as incriminating evidence against him – If the legal position explained accused gave incorrect or false answers during the course of his examination u/s 313 Cr.P.C, the Court can draw an adverse inference against him.**

Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh through Public Prosecutor, Hyderabad, Andhra Pradesh

Judgment dated 08.05.2012 passed by the Supreme Court in Criminal Appeal No. 1316 of 2008, reported in (2012) 6 SCC 174

Held:

There can be no doubt that the present case is one of circumstantial evidence. There is no witness to the commission of crime. Thus, there is a definite requirement of law that a heavy onus lies upon the prosecution to be discharged to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. To prove this chain of events, prosecution had examined as many as 49 witnesses. This included the persons who were working at the bungalow, neighbours, the worker at the petrol pump from which Accused no.2 purchased petrol, the doctors, forensic experts, fingerprint expert and the only surviving member of the family i.e., daughter Meenal Seth, PW12. This ocular evidence is obviously in addition to the documentary and expert evidence brought by the prosecution on record.

A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. This Court has clearly stated the principles and the factors that would govern judicial determination of such cases.

The attempt on behalf of the accused to object to the evidence of the finger prints on the ground that the investigating officer has not told in his examination-in-chief that he had taken the finger prints of the accused and sent

them to the expert does not carry much weight in view of the above documentary, ocular and expert evidence. It was expected of the Investigating Officer to make a statement in that behalf, but absence of such statement would not weight so much against the prosecution that the court should be persuaded to reject the evidence of PW38 along with the clinching evidence of Ext. P-52, P-72 and P-73 respectively.

Equally without merit is the submission on behalf of the appellant that the finger print could be there upon the almirah in the normal course of business, as accused No. 1 was the domestic servant working in the bungalow. What is important is that the presence of finger prints of accused No. 2 found in the house and particularly on the almirah in the bedroom of the deceased, remain unexplained and secondly, no attempt was made by any of the accused persons to take a stand to explain their conduct.

The reliance upon the case of ***Chandran v. State of Kerala [1991 Supp. (1) SCC 39,*** is again not of help to the accused inasmuch as the facts of that case were totally different and the accused had taken up the plea that the finger prints upon the glass had been taken by the police by coercion. The Court, on the facts of that case and upon the evidence before the Court, came to the conclusion that finger print evidence was not reliable because among all glass pieces, only two had matching finger prints and no appropriate explanation has been given.

In the present case, lifting of chance finger prints and on comparison being found to be matching with the sample finger prints of the accused, taken by the Police, is not the only piece of evidence. There is corroborating evidence of the prosecution witnesses on the one hand, and on the other, evidence of PW-12, the daughter of the deceased, who identified the gold ornaments, which were stolen by the accused from the almirah, as belonging to her deceased mother and which were recovered from the possession of accused persons.

The statements in so far as they concern the use of various articles in commission of crime and recovery of such articles and stolen items, would form a valid and admissible piece of evidence for the consideration of the court. The history given to the doctor at the time of treatment would not be strictly an extra judicial confession, but would be a relevant piece of evidence, as these documents had been prepared by PW33 in the normal course of her business. Even the accused do not dispute that they were given treatment by the doctor in relation to these injuries. Thus, it was for the accused to explain this aspect.

Another contention of the accused is in relation to the identification of the accused being conducted in a manner contrary to law. The counsel, while relying upon the case of ***Rajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428,*** submitted that the identification parade of the accused was conducted much after their arrest. They were arrested on 19th March, 2003 and the identification parade of the accused was conducted on 20th June, 2003. Furthermore, the photograph of the accused had been published in the newspaper on 19th March,

2003. In the case relied upon by the appellant, the accused who was stated to be having a beard and long hair and was so described in the First Information Report was required to be clean-shaven by the police. The fact that no person similar to the person whose description was given in FIR was included in the Test Identification Parade, the Court expressed dissatisfaction and held that it was required for the prosecution to show how and under what circumstances the complainant and the witnesses came to recognise the accused. This case on facts, therefore, is of no assistance to the accused.

There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade.

There is nothing on record before us to say that the photographs of the accused were actually printed in the newspaper. Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused. However, we hasten to clarify that it is always appropriate for the investigating agency to hold identification parade at the earliest, in accordance with law, so that the accused does not face prejudice on that count.

Besides all this circumstantial evidence, another very significant aspect of the case is that none of the accused, particularly accused No.2, offered any explanation during the recording of their statements u/s. 313CrPC. It is not even disputed before us that the material incriminating evidence was put to accused No. 2 while his statement u/s. 313 CrPC was recorded. Except for a vague denial, he stated nothing more. In fact, even in response to a question relating to the injuries that he had suffered, he opted to make a denial, which fact had duly been established by the statements of the investigating officers, doctors and even the witnesses who had seen him immediately after the crime.

It is a settled law that the statement of S.313 CrPC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him.

If the accused gave incorrect or false answers during the course of his statement u/s. 313CrPC, the Court can draw an adverse inference against him. In the present case, we are of the considered opinion that the accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution.

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324. INDIAN PENAL CODE, 1860 – Sections 302 and 376(2) (f)
CRIMINAL PROCEDURE CODE, 1973 – Section 313
EVIDENCE ACT, 1872 – Section 106
CRIMINAL TRIAL
Rape and murder trial – Incriminating circumstances against accused enumerated by Trial Court – Conviction confirmed.
Examination of accused – Duty of accused – It is the duty of accused to explain incriminating circumstances proved against him.
Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances.
Rape and murder of minor by father – Death sentence – Principles of awarding death sentence reiterated.

Neel Kumar alias Anil Kumar v. State of Haryana

Judgment dated 07.05.2012 passed by the Supreme Court in Criminal Appeal No. 523 of 2010, reported in (2012) 5 SCC 766

Held:

The court enumerated the said incriminating circumstances as under:

(I) The victim was in the custody of accused Neel Kumar alias Anil Kumar.

(II) No explanation from the side of this accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone.

(III) Non-information of the crime by the accused to the police or other members of the family.

(IV) Recovery of the bloodstained clothes of the victim and the accused from the possession of accused on his disclosure statement.

(V) Presence of blood on the clothes of the accused and no explaination thereof.

(VI) Abscondence of the accused after the occurrence.

(VII) Strong motive against the accused for murder as charges of rape were being raised against him.

The learned Sessions Court further remarked that as the victim was in the custody of the appellant, there had been no explanation from the side of the accused as to how such severe injuries were suffered by the victim and how she met with the death as these facts were in his special knowledge alone. The provisions of Section 106 of the Evidence Act, 1872 (hereinafter called "the Evidence Act") were fully applicable in this case. The appellant was the guardian of the child and was duty-bound to safeguard the victim. The accused had kept mum and had not given any information to any law enforcing agency or even to the mother of the victim.

It comes out from the statement of Roopa Devi (PW 3) that the information about rape and murder to her was telephonically given by co-accused Ramesh Kumar. If somebody else would have committed the offence it was but natural that appellant Neel Kumar alias Anil Kumar must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him.

The High Court has agreed with the findings recorded by the trial court and confirmed the death sentence after re-appreciating the evidence. In our opinion, the Courts below have taken a correct view so far as the application of Section 106 of the Evidence Act is concerned.

This Court in ***Prithpal Singh v. State of Punjab, (2012) 1SCC 10*** considered the issue at length placing reliance upon its earlier judgments including ***State of W.B. v.Mir Mohammad Omar, AIR 2000 SC 2988*** and ***Sahadevan v. State, AIR 2003 SC 215*** and held as under:

> "That if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

(See also ***Santosh Kumar Singh v. State, (2010) 9 SCC 747*** and ***Manu Sao v. State of Bihar, (2010) 9 SCC 747.***)

Thus, findings recorded by the courts below in this regard stand fortified by the aforesaid judgments.A shirt and pants belonging to the appellant recovered on the basis of his disclosure statement (Ext. P-23) and taken into possession vide memo, Ext. P-25 were sent to the FSL for examination. The report of FSL (Ext. P-18) shows that shirt and pants of the appellant were stained with blood. However, no explanation has been given by the appellants as to how the blood was present on the clothes.

In ***Pradeep Singh v. State of Rajasthan, AIR 2004 SC 3781*** the accused had not given any explanation for the presence of bloodstains on his pants and

shirt. He had simply pleaded false implication. The presence of blood on his clothes was found to be incriminating circumstance against him.

It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under SEction 313 Cr.P.C. Keeping silent and not furnishing any explanation for such circmstance is an additional link in the chain of circumstances to sustain the charges against him. REcovery of incrimination material at his disclosure statement duly proved is a very positive circumstance against him. (See also ***Aftab Ahmad Anasari v. State of Uttaranchal, AIR 2010 SC 773.***)

In view of the above, we do not find any cogent reason to take a view different from the view taken by the courts below and this leads us to the further question regarding the sentence as to whether it could be a rarest of rare case where imposition of death penalty is warranted.

The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.

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325. INDIAN PENAL CODE, 1860 – Sections 304-A and 304 Part II
MOTOR VEHICLES ACT, 1988 – Sections 185, 203 and 205

(i) Drunken driving – Breath Analyzer Test can be applicable only when person is driving or attempting to drive vehicle – It cannot be applied where driver has fled away from place of occurrence.

(ii) Death by rash/negligent act or culpable homicide – Accused driving car in high speed in inebriated state and without licence – Mowing down six persons standing on road in wee hours – Even not stopped to give help to such injured persons but fled away from the spot, causing their death – Accused though not intending to cause death, but certainly had knowledge that his act may result in death.

State Tr. P.S. Lodhi Colony, New Delhi v. Sanjeev Nanda
Judgment dated 03.08.2012 passed by the Supreme Court in Criminal Appeal No. 1168 of 2012, reported in AIR 2012 SC 3104

Held:

(i) The accused, in this case, escaped from the scene of occurrence,

therefore, he could not be subjected to Breath Analyser Test instantaneously, or take or provide specimen of his breath for a breath test or a specimen of his blood for a laboratory test. Cumulative effect of the provisions of Sections 185, 203 and 205 of the Motor Vehicles Act, 1988 would indicate that the Breath Analyzer Test has a different purpose and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions "while driving" and "attempting to drive" in the above sections have a meaning "in praesenti". In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A Breath Analyzer Test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyzer test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyzer test instantaneously. All the same, the first accused was taken to AIIMS hospital at 12.29 PM on 10.01.1999 when his blood sample was taken by Dr. Madulika Sharma, Senior Scientific Officer (PW16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW16/A was duly proved by the Doctor. Over and above in her cross-examination, she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving.

Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the Courts below. Judgments referred to by the counsel that if a particular procedure has been prescribed u/ss. 185 and 203, then that procedure has to be followed, has no application to the facts of this case. Judgments rendered by the House of Lords were related to the provision of Road Safety Act, 1967, Road Traffic Act, 1972 etc. in U.K. and are not applicable to the facts of this case.

In the instant case, the presence of alcohol content was much more (i.e. 0.115%) than the permissible limit and that the accused was in an inebriated state at the time of accident due to the influence of liquor and in the accident, six human lives were lost.

(ii) Section 304A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide not amounting to murder u/s. 299 or murder u/s. 300. Section 304A excludes all the ingredients of Sections 299 or Section 300.

In ***State of Gujarat v. Haidarali Kalubhai, AIR 1976 SC 1012*** this Court held that if a person willfully drives a motor vehicle in the midst of a crowd and thereby causes death to some persons, it will not be a cause of mere rash and negligent

driving and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused.

The scope of the above mentioned provisions came up for consideration before this court in the judgment of ***Naresh Giri v. State of M.P., AIR 2007 SC*** (Supp) 1190; wherein this court held as follows:

> "Section 304A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Ss. 299 and 300 IPC. Section 304A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304A."

In a recent judgment in ***Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648,*** this Court after surveying a large number of judgments on the scope of Sections 304A and 304(II) of the IPC, came to the conclusion that in a case of drunken driving resulting in the death of seven persons and causing injury to eight persons, the scope of Sections 299, 300 and 304(I) and (II) of the IPC stated to be as follows:

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

The principle mentioned by this court in ***Alister Anthony Pareira*** (supra) indicates that the person must be presumed to have had the knowledge that, his act of driving the vehicle without a licence in a high speed after consuming liquor beyond the permissible limit, is likely or sufficient in the ordinary course of nature to cause death of the pedestrians on the road. In our view, ***Alister Anthony Pareira*** (supra) judgment calls for no reconsideration. Assuming that learned senior Counsel appearing for the accused is right in contending that while he was driving the vehicle in a drunken state, he had no intention or knowledge that his action was likely to cause death of six human beings, in our view, at least, immediately after having hit so many human beings and the bodies scattered around, he had the knowledge that his action was likely to cause death of so many human beings, lying on the road unattended. To say, still he had no knowledge about his action is too childish which no reasonable man can accept as worthy of consideration. So far as this case is concerned, it has been brought out in evidence that the accused was in an inebriated state, after

consuming excessive alcohol, he was driving the vehicle without licence, in a rash and negligent manner in a high speed which resulted in the death of six persons.

The accused had sufficient knowledge that his action was likely to cause death and such an action would, in the facts and circumstances of this case fall u/s. 304(II) of the IPC and the trial court has rightly held so and the High Court has committed an error in converting the offence to Section 304A of the IPC.

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326. INDIAN PENAL CODE, 1860 – Section 304-B

Unnatural death within 2½ years of marriage – Deceased was harassed for dowry by the accused husband 2 days prior to the incident – It is difficult to imagine a more proximate link between harassment and cruelty in connection with the demand for dowry and the death of the victim resulting from it – Defence of accidental death not tenable.

Sharad v. State of Maharashtra

Judgment dated 31.01.2012 passed by the Supreme Court in Criminal Appeal No. 11 of 2006, reported in AIR 2012 SC 1818

Held:

PW.1 in his deposition before the court said that Savita last came to them to see her ailing father just two days before committing suicide. In that visit also she told her father that unless he paid Rs.5,000/-, she would not remain alive and it would be the end of her life. The following day, she left her father's place and went to her matrimonial home and in the evening of the same day she committed suicide. PW.3, who was one of the neighbours of Savita's parents, said that Savita came to see her ailing father on a Sunday and she went back on Monday. She had then told her that her father was ill and the accused were demanding dowry and ill-treating her. She also told her that she would not remain alive thereafter. On the next day, they got the message that Savita died due to burn injuries. We find it difficult to imagine a more proximate link between harassment and cruelty in connection with the demand of dowry and the death of the victim resulting from it.

Counsel for the appellant next tried to advance the plea that it was in fact a case of accidental burn and Savita caught fire by falling down on the chulha. It is seen above that Savita died from burn injuries within two and a half year of her marriage with the appellant. It is also established that soon before her death she was subjected to cruelty or harassment by the appellant in connection with the demand for the unpaid amount of the dowry. All the three facts and circumstances put together clearly attracts the provision of section 113-B of the Evidence Act and the burden lay upon the appellant to prove the defence plea that it was a case of accidental burn. There is, however, no evidence on record even to remotely support the plea of accidental burn.

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327. INDIAN PENAL CODE, 1860 – Section 304-B

(i) Persistent demand of dowry has been proved by evidence of PW 1 and PW 2, mother and uncle of deceased – In letter she did not mention about dowry – The letter did not mention about her well being except ill-treatment and cruelty, so evidence has to be appreciated in its entirety – Neither the letters can be ignored nor the oral evidence of PW1 and PW2.

(ii) Sentence – Dowry death case – Offence has been committed in brutal manner for satisfaction of dowry demands – Accused takes the false defence that it was an accidental death – It is a fit case for awarding life imprisonment.

Rajesh Bhatnagar v. State of Uttarakhand

Judgment dated 10.05.2012 passed by the Supreme Court in Criminal Appeal No. 851 of 2010, reported in AIR 2012 SC 2866

Held :

(i) It is clear that there was persistent demand of dowry by the accused persons and they had killed her by sprinkling kerosene on her and putting her on fire. There can be no dispute that the deceased died an unnatural death within seven years of her marriage. Thus, the ingredients of Section 304B are fully satisfied in the present case. We are least satisfied with the contention of the learned counsel appearing for the appellants, that merely because the letters on record do not specifically mention the dowry demands, such letters have to be construed by themselves without reference to other evidence and rebutting the presumption of a dowry death, giving the benefit of doubt to the accused. These letters have to be read in conjunction with the statements of PW1 and PW2. It is difficult for one to imagine that these letters should have been worded by the deceased as submitted on behalf of the accused. She never knew with certainty that she was going to die shortly. The letters clearly spell out the beatings given to her, the cruelties inflicted on her and reference to the conduct of the family. The evidence has to be appreciated in its entirety. Neither the letters can be ignored nor the statements of PW1 and PW2. If the letters had made no reference to beatings, cruelty and ill-treatment meted out to the deceased and not demonstrating the grievance, apprehensions and fear that she was entertaining in her mind, but were letters simpliciter mentioning about her well being and that she and her in-laws were living happily without complaint against each other, the matter would have been different. In the judgment relied upon by the learned counsel appearing for the accused, it has specifically been recorded that the letters produced in those cases had clearly stated that relations between the parties were cordial and there was no reference to any alleged cruelty or harassment meted out to the deceased by any of the accused in that case. On the contrary, in the letters, it was specifically recorded that the deceased was happy with all the members of the family. The oral and documentary evidence in those cases had clearly shown that the deceased was never subjected to any

cruelty or harassment. In those cases, there was no evidence of demand of dowry and cruelty to the deceased, which certainly is not the case here. In the case before us, there is definite ocular, expert and documentary evidence to show that the deceased died an unnatural death, she was subjected to cruelty and ill-treatment, there was demand of dowry of specific items like refrigerator, television and cooler and she died within seven years of her marriage.

Now we are left with the last contention of the counsel for the appellant that this is a case where the Court may not uphold the sentence of life imprisonment imposed by the courts below. We see no mitigating circumstances in favour of the accused which will persuade us to take any view other than the view taken by the Trial Court on the question of quantum of sentence. Even in the case of ***Hemchand v. State of Haryana, AIR 1995 SC 120,*** relied upon by the appellant, this Court had said that it is only in rare cases that the Court should impose punishment of life imprisonment. When the offence of Section 304B is proved, the manner in which the offence has been committed is found to be brutal, it had been committed for satisfaction of dowry demands, particularly, for material goods like television or cooler and furthermore the accused takes up a false defence before the Court to claim that it was a case of an accidental death and not that of dowry death, then the Court normally would not exercise its judicial discretion in favour of the accused by awarding lesser sentence than life imprisonment.

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328. INDIAN PENAL CODE, 1860 – Section 376
EVIDENCE ACT, 1872 – Sections 53 and 54

(i) A conviction can be based on single testimony of the rape victim if it lends assurance of her version.

(ii) Whether in a case of rape, the prosecutrix is of easy virtue/ unchaste woman itself is a determinative factor? Held, No – The Court is required to adjudicate whether the accused committed rape on the prosecutrix on the occasion complained of.

Narender Kumar v. State (NCT of Delhi)

Judgment dated 25.05.2012 passed by the Supreme Court in Criminal Appeal No. 2066 of 2009, reported in AIR 2012 SC 2281

Held:

It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing

out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: ***Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr., AIR 2003 SC 818; and Vishnu v. State of Maharashtra, AIR 2006 SC 508***).

Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: ***State of Maharashtra & Anr. v. Madhukar Narayan Mardikar, AIR 1991 SC 207; State of Punjab v. Gurmit Singh & Ors., AIR 1996 SC 1393; and State of U.P. v. Pappu @ Yunus Anr., AIR 2005 SC 1248***).

In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: ***Tukaram & Anr. v. The State of Maharashtra, AIR 1979 SC 185;*** and ***Uday v. State of Karnataka, AIR 2003 SC 1639***).

Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper

legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

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***329. INTEREST ON DELAYED PAYMENTS TO SMALL SCALE AND ANCILLARY INDUSTRIAL UNDERTAKINGS ACT, 1993 – Section 6**

Suit only for interest or high rate of interest

A suit for interest alone is maintainable under the provisions of Section 6 of the Act of 1993 – The supplier may also file a suit only for higher rate of interest on delayed payment made by the buyer, as a new vested right to claim a higher claim of interest as prescribed under the Act of 1993, accrues to the supplier.

M/s Purbanchal Cables & Conductors Pvt. Ltd. v. Assam State Electricity Board & Anr.

Judgment dated 10.07.2012 passed by the Supreme Court in Criminal Appeal No. 2348 of 2003, reported in AIR 2012 SC 3167

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330. LAND ACQUISITION ACT, 1894 – Sections 4 and 6
CIVIL PROCEDURE CODE, 1908 – Section 9

(i) Civil Court has no jurisdiction to entertain a suit to challenge the acquisition after the award was rendered as the Land Acquisition Act, 1894 provides for the entire mechanism as to how acquisition is to be effected and remedies to the aggrieved parties.

(ii) Civil Court also has no jurisdiction to go into the question of validity or legality of the notification under Section 4 and declaration under Section 6 of the Land Acquisition Act which could be done only by the High Court in a proceeding under Article 226 of the Constitution.

Girish Vyas & Anr. v. State of Maharashtra & ors.

Judgment dated 12.10.2011 passed by the Supreme Court in Civil Appeal No. 198 of 2000, reported in AIR 2012 SC 2043

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331. LAND ACQUISITION ACT, 1894 – Sections 23 and 28

(i) Where there are several exemplars, sale transactions with reference to similar lands, one with the highest of exemplars should be accepted, provided it is a bonafide one.

(ii) It is undesirable to take an average of various sale deeds placed before the Courts for fixing fair compensation.

(iii) The land owner is entitled to get interest on the aggregate compensation including solatium and additional market value.

Mehrawal Khewaji Trust (Regd.) Faridkot & Ors. v. State of Punjab & Ors.

Judgment dated 27.04.2012 passed by the Supreme Court in Civil Appeal No. 4005 of 2012, reported in AIR 2012 SC 2721

Held:

When there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction has to be considered and accepted. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality is shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. In our view, it seems to be only fair that where sale-deeds pertaining to different transactions are relied on behalf of the Government, the transaction representing the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. It is not desirable to take an average of various sale deeds placed before the authority/court for fixing fair compensation.

So far additional market value is concerned, in ***Ranjit Singh v. Union Territory of Chandigarh, AIR 1993 SC 227,*** this Court applied the rule of 10% yearly increase for award of higher compensation. In ***Delhi Development Authority v. Bali Ram Sharma & Ors., AIR 2004 SC 4114,*** this Court considered a batch of appeals and applied the rule of annual increase for grant of higher compensation. In ***ONGC Ltd. v. Rameshbhai Jivanbhai Patel, AIR 2008 SC (Supp) 465,*** this Court held that where the acquired land is in urban/semi-urban areas, increase can be to the tune of 10% to 15% per annum and if the acquired land is situated in rural areas, increase can be between 5% to 7.5% per annum. In ***Union of India v. Harpat Singh & Ors. AIR 2009 SC (Supp) 1422,*** this Court applied the rule of 10% increase per annum. Based on the above principle, we fix the annual increase at 12% per annum and with that rate of increase, the market value of the appellants' land would come to Rs.1,82,000 per acre as on the date of notification.

The other grievance of the appellants is that interest on solatium and additional market value was not granted. This aspect has been considered and answered by the Constitution Bench in the case of ***Sunder v. Union of India, AIR 2001 SC 3516.*** This Court held that the interest awardable u/s. 28 would include

within its ambit both the market value and the statutory solatium. In view of the same, it is clear that the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium. The above position has been further clarified by a subsequent Constitution Bench judgment in *Gurpreet Singh v. Union of India, (2006) 8 SCC 457.* Based on the earlier Constitution Bench decision in *Sunder* (supra), the present Constitution Bench held that the claimants would be entitled for interest on solatium and additional market value if the award of the Reference Court or that of the appellate Court does not specifically refer to the question of interest on solatium and additional market value or where the claim had not been rejected either expressly or impliedly. In view of the same, we hold that the appellants are entitled to interest on solatium and additional market value as held in the above referred two Constitution Bench judgments.

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332. LAND ACQUISITION ACT, 1894 – Sections 23 and 54

(i) Factors for fixing market value of acquired land stated.

(ii) The acquired land was in the proximity of National Highway and construction of bridge brought it closer to Bombay and was also close to industrial estate – The Appellate Court did not advert above factors and reduced the compensation by mechanically applying the distance criteria i.e. distance of acquired land from Highway – Not proper.

Sabhia Mohammad Yusuf Abdul Hamid Mulla (D) by L.Rs and Ors. v. Special Land Acquisition Officer and Ors.

Judgment dated 02.07.2012 passed by the Supreme Court in Civil Appeal No. 3590 of 2012, reported in AIR 2012 SC 2709

Held:

It is settled law that while fixing market value of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors:

(i) Existing geographical situation of the land.

(ii) Existing use of the land.

(iii) Already available advantages, like proximity to National or State High Way or road and/or developed area.

(iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

In *Viluben Jhalejar Contractor v. State of Gujarat, AIR 2005 SC 2214,* this Court laid down the following principles for determination of market value of the acquired land: "Section 23 of the Act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub- section (1) of Section 4. One of the principles for

determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered. The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by placing the two in juxtaposition. The positive and negative factors are as under:

Positive factors	**Negative factors**
(i) smallness of size	(i) largeness of area
(ii) proximity to a road	(ii) situation in the interior at a distance from the road
(iii) frontage on a road	(iii) narrow strip of land with very small frontage compared to depth
(iv) nearness to developed area	(iv) lower level requiring the depressed portion to be filled up
(v) regular shape	(v) remoteness from developed locality
(vi) level vis-à-vis land under acquisition	(vi) some special disadvantageous factors which would deter a purchaser.
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage	

Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price."

In *Atma Singh v. State of Haryana, AIR 2008 SC 709,* the Court held:

> "In order to determine the compensation which the tenure-holders are entitled to get for their land which has been acquired, the main question to be considered is what is the

market value of the land. Section 23(1) of the Act lays down what the court has to take into consideration while Section 24 lays down what the court shall not take into consideration and have to be neglected. The main object of the enquiry before the court is to determine the market value of the land acquired. The expression "market value" has been the subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arm's length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. See ***Kamta Prasad Singh v. State of Bihar, AIR 1976 SC 2219, Prithvi Raj Taneja v. State of M.P., AIR 1977 SC 1560, Administrator General of W.B. v. Collector, Varanasi, AIR 1988 SC 943*** and ***Periyar Pareekanni Rubbers Ltd. v. State of Kerala AIR 1990 SC 2192.*** For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing or has prospect of development have to be

taken into consideration. See ***Collector v. Dr. Harisingh Thakur, AIR 1979 SC 472, Raghubans Narain Singh v. U.P. Govt., AIR 1969 SC 465 and Administrator General, W.B. v. Collector Varanasi (supra). It has been held in Kausalya Devi Bogra v. Land Acquisition Officer, AIR 1984 SC 892*** and ***Suresh Kumar v. Town Improvement Trust, AIR 1980 SC 1222*** that failing to consider potential value of the acquired land is an error of principle."

In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. In ***Kasturi v. State of Haryana, AIR 2003 SC 202,*** the Court held:

".....It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired land subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for roads and other civic amenities to develop the land so as to make the plots for residential or commercial purposes. A land may be plain or uneven, the soil of the land may be soft or hard bearing on the foundation for the purpose of making construction; may be the land is situated in the midst of a developed area all around but that land may have a hillock or may be low-lying or may be having deep ditches. So the amount of expenses that may be incurred in developing the area also varies. A claimant who claims that his land is fully developed and nothing more is required to be done for developmental purposes, must show on the basis of evidence that it is such a land and it is so located. In the absence of such evidence, merely saying that the area adjoining his land is a developed area, is not enough particularly when the extent of the acquired land is large and even if a small portion of the land is abutting the main road in the developed area, does not give the land the character of a developed area. In 84 acres of land acquired even if one portion on one side abuts the main road, the remaining large area where planned development is required, needs laying of internal roads, drainage, sewer, water, electricity lines, providing civic amenities, etc. However, in cases of some land where there are certain

advantages by virtue of the developed area around, it may help in reducing the percentage of cut to be applied, as the developmental charges required may be less on that account. There may be various factual factors which may have to be taken into consideration while applying the cut in payment of compensation towards developmental charges, may be in some cases it is more than 1/3rd and in some cases less than 1/3rd. It must be remembered that there is difference between a developed area and an area having potential value, which is yet to be developed. The fact that an area is developed or adjacent to a developed area will not ipso facto make every land situated in the area also developed to be valued as a building site or plot, particularly when vast tracts are acquired, as in this case, for development purpose."

The rule of 1/3rd deduction was reiterated in ***Tejumal Bhojwani v. State of U.P., AIR 2003 SC 3791, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal Revenue Officer, AIR 2004 SC 1185, H.P. Housing Board v. Bharat S. Negi, AIR 2004 SC 1800*** and ***Kiran Tandon v. Allahabad Development Authority, AIR 2004 SC 2006. In Lal Chand v. Union of India, AIR 2010 SC 170,*** the Court indicated that percentage of deduction for development to be made for arriving at market value of large tracts of undeveloped agricultural land with potential for development can vary between 20 and 75 per cent of the price of developed plots and observed:

"The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works...

Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed layout, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorised private layout or an industrial layout. It is also well known that the development cost incurred by statutory agencies is much higher than the cost incurred by private developers, having regard to higher overheads and expenditure."

In ***A.P. Housing Board v. K. Manohar Reddy, 2010 AIR SCW 6231,*** the rule of 1/3rd deduction towards development cost was invoked while determining market value of the acquired land. In ***Subh Ram v. State of Haryana, AIR 2010 SC*** (Supp) 241, this Court held as under:

"Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land

with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost". Two factors have a bearing on the quantum (or percentage) of deduction in the "retail price" as development cost. Firstly, the percentage of deduction is decided with reference to the extent and nature of development of the area/layout in which the small developed plot is situated. Secondly, the condition of the acquired land as on the date of preliminary notification, whether it was undeveloped, or partly developed, is considered and appropriate adjustment is made in the percentage of deduction to take note of the developed status of the acquired land.

The percentage of deduction (development cost factor) will be applied fully where the acquired land has no development. But where the acquired land can be considered to be partly developed (say for example, having good road access or having the amenity of electricity, water, etc.) then the development cost (that is, percentage of deduction) will be modulated with reference to the extent of development of the acquired land as on the date of acquisition. But under no circumstances, will the future use or purpose of acquisition play a role in determining the percentage of deduction towards development cost."

(ii) In these appeals, we find that while determining the amount of compensation at the rate of Rs.25/- per square meter, the Reference Court had taken notice of the fact that the acquired land was in the proximity of National Highway No.4, Panvel-Sion Highway and the construction of Thane Creek Bridge which brought various villages including village Roadpali (Kolhekhar) close to Bombay. The Reference Court also noted that civic amenities were available to Panvel town prior to 1970 and industrial estates had been developed at Taloja and Panvel and concluded that the acquired land was available for non-agricultural use and the only obstruction was the absence of conversion. The High Court did not advert to the factors noted by the Reference Court and reduced the amount of compensation by mechanically applying the distance criteria, i.e., distance of the acquired land from Bombay-Pune Highway adopted in the earlier judgments. Therefore, the impugned judgment and order cannot be sustained.

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333. LEGAL SERVICES AUTHORITY ACT, 1987 – Sections 22-A(b), 22-C(8) and 22-D

CONSTITUTION OF INDIA – Articles 39-A, 226 and 227

(i) Permanent Lok Adalat – The alternative institutional mechanism with regard to the disputes concerning public utility service is intended to provide an affordable, speedy and efficient mechanism to secure justice – Under this scheme the litigation concerning public utility services is sought to be nipped in the bud by first affording the parties to such dispute and opportunity to settle their dispute through the endeavours of the Permanent Lok Adalat and if the process of conciliation and settlement fails, then to have the dispute between the parties adjudicate through the decision of the permanent Lok Adalat – The powers so conferred on permanent Lok Adalat if they do not relate to any offence as provided under Section 22-C (8) of the Act of 1987, cannot be said to be unconstitutional and irrational – An authority empowered to adjudicate disputes between the parties and act as Tribunal may not necessarily have all the trappings of the Court.

(ii) ***Award passed is final – No appeal is provided.***
Every award of the Permanent Lok Adalat, either on merits or in terms of a settlement is final and binding on all the parties thereto and on persons claiming under them – No appeal is provided but aggrieved party can approach the High Court under Article 226/227.

Bar Council of India v. Union of India

Judgment dated 03.08.2012 passed by the Supreme Court in Writ Petition (Civil) No. 666 of 2002, reported in AIR 2012 SC 3246

Held:

(i) Article 39A of the Constitution enjoins upon the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity and in particular to provide free legal aid by suitable legislation or schemes or in any other way and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Equal justice to all and free legal aid are hallmark of Article 39-A. Pursuant to these objectives, the 1987 Act was enacted by the Parliament to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

Later on it was felt that the system of Lok Adalat provided in the 1987 Act sometimes results in delaying the dispensation of justice where the parties do not arrive at any compromise or settlement in Lok Adalat and the case is returned

to the court of law or the parties are advised to pursue appropriate remedy for redressal of their grievance. Therefore, for providing compulsory pre-litigative mechanism for conciliation and cases relating to public utility services, the establishment of Permanent Lok Adalat was provided in the Amended Act, 2002 by way of new Chapter VI-A (Section 22A to 22E)

The title of Chapter VI-A is "Pre-litigation Conciliation and Settlement". Section 22-A(a) defines "Permanent Lok Adalat" to mean a Permanent Lok Adalat established under sub-s. (1) of Section 22-B. "Public utility service" is defined in Section 22-A(b). It means

(i) transport service for the carriage of passengers or goods by air, road or water; or

(ii) postal, telegraph or telephone service; or

(iii) supply of power, light or water to the public by any establishment; or

(iv) system of public conservancy or sanitation; or

(v) service in hospital or dispensary; or

(vi) insurance service. If the Central Government or the State Government declares in the public interest, any service to be a public utility service for the purposes of Chapter VI-A, such service on declaration is also included in the definition of 'public utility service' under Section 22-A(b).

The establishment of Permanent Lok Adalat is done under Section 22-B. The Central Authority and every State Authority, as the case may be, have been mandated to establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be notified. The composition of Permanent Lok Adalat is provided in Section 22-B (2). Accordingly, every Permanent Lok Adalat shall consist of

(a) a person who is or has been a District Judge or Additional District Judge or has held judicial office higher in rank than that of a District Judge and

(b) two other persons having adequate experience in public utility service to be nominated by the Central Government or by the State Government, as the case may be on the recommendation of the Central Authority or by the State Authority (as the case may be). The judicial officer, namely, the District Judge or Additional District Judge or the Judicial Officer higher in rank than that of a District Judge shall be the Chairman of the Permanent Lok Adalat.

Section 22-C provides for the procedure for raising dispute before the Permanent Lok Adalat. Sub-section (1) provides that any party to a dispute may make an application to the Permanent Lok Adalat for the settlement of dispute before the dispute is brought before any court. However, Permanent Lok Adalat has no jurisdiction to deal w\th any matter relating to an offence not compoundable under any law. The second proviso puts a cap on the pecuniary

jurisdiction inasmuch as it provides that the Permanent Lok Adalat shall not have jurisdiction in a matter where the value of the property in dispute exceeds ten lakh rupees. The Central Government, however, may increase the limit of ten lakh rupees in consultation with the Central Authority by notification.

Sub-section (2) of Section 22-C puts an embargo on the parties to a dispute after an application has been made by any one of them under sub-s. (1) in invoking jurisdiction of any court in the same dispute.

Sub-section (3) of Section 22-C provides for the procedure to be followed by the Permanent Lok Adalat once an application is made before it by any party to a dispute under sub-section (1). This procedure includes filing of a written statement by each party to the application stating therein the facts and nature of the dispute and highlighting the points or issues in such dispute and the documents and other evidence in support of their respective written statement and exchange of copy of such written statement together with copy of documents/ other evidence.

The Permanent Lok Adalat may require any party to the application to file additional statement before it at any stage of the conciliation proceedings. Any document or statement received by Permanent Lok Adalat from any party to the application is given to the other party. On completion of the above procedure, the Permanent Lok Adalat proceeds with conciliation proceedings between the parties to the application under sub-section (4) of Section 22- C. During conduct of the conciliation proceedings under sub-s. (4) of Section 22-C, the Permanent Lok Adalat is obliged to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner. Every party to the application has a duty to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

On satisfaction that there is likelihood of settlement in the proceedings, the Permanent Lok Adalat may formulate the terms of possible settlement of the dispute and give to the parties for their observations and where the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement/agreement and Permanent Lok Adala\t then passes an award in terms thereof and furnishes a copy of the same to each of the parties concerned.

Chapter VI-A inserted by the 2002 Amendment Act in 1987 Act, as its title suggests, provides for pre-litigation conciliation and settlement procedure. The disputes relating to public utility service like transport service for carriage of passengers or goods by air, road or water or postal, telegraph or telephone service or supply of power, light or water or public conservancy system or sanitation or service in hospital or dispensary or insurance service, etc., in the very scheme of things deserve to be settled expeditiously. Prolonged dispute in respect of the above matters between the service provider and an aggrieved party may result in irretrievable damage to either party to the dispute.

Today, with increasing number of cases, the judicial courts are not able to cope with the heavy burden of inflow of cases and the matters coming before them. The disputes in relation to public utility service need urgent attention with focus on their resolution at threshold by conciliation and settlement and if for any reason such effort fails, then to have such disputes adjudicated through an appropriate mechanism as early as may be possible. With large population in the country and many public utility services being provided by various service providers, the disputes in relation to these services are not infrequent between the service providers and common man. Slow motion procedures in the judicial courts are not conducive for adjudication of disputes relating to public utility service.

By bringing Chapter VI-A in this law, the litigation concerning public utility service is sought to be nipped in the bud by first affording the parties to such dispute an opportunity to settle their dispute through the endeavours of the Permanent Lok Adalat and if such effort fails then to have the dispute between the parties adjudicated through the decision of the Permanent Lok Adalat. The mechanism provided in Chapter VI-A enables a party to a dispute relating to public utility service to approach the Permanent Lok Adalat for the settlement of dispute before the dispute is brought before any court.

Parliament can definitely set up effective alternative institutional mechanisms or make arrangements which may be more efficacious than the ordinary mechanism of adjudication of disputes through the judicial courts. Such institutional mechanisms or arrangements by no stretch of imagination can be said to be contrary to constitutional scheme or against the rule of law.

The establishment of Permanent Lok Adalats and conferring them jurisdiction upto a specific pecuniary limit in respect of one or more public utility services as defined in Section 22-A(b) before the dispute is brought before any court by any party to the dispute is not anathema to the rule of law. Instead of ordinary civil courts, if other institutional mechanisms are set up or arrangements are made by the Parliament with an adjudicatory power, in our view, such institutional mechanisms or arrangements cannot be faulted on the ground of arbitrariness or irrationality.

It is necessary to bear in mind that the disputes relating to public utility services have been entrusted to Permanent Lok Adalats only if the process of conciliation and settlement fails. The emphasis is on settlement in respect of disputes concerning public utility services through the medium of Permanent Lok Adalat. It is for this reason that sub- s. (1) of Section 22-C states in no unambiguous terms that any party to a dispute may before the dispute is brought before any court make an application to the Permanent Lok Adalat for settlement of dispute.

Thus, settlement of dispute between the parties in matters of public utility services is the main theme. However, where despite the endeavours and efforts of the Permanent Lok Adalat the settlement between the parties is not through

and the parties are required to have their dispute determined and adjudicated, to avoid delay in adjudication of disputes relating to public utility services, the Parliament has intervened and conferred power of adjudication upon the Permanent Lok Adalat. Can the power conferred on Permanent Lok Adalats to adjudicate the disputes between the parties concerning public utility service upto a specific pecuniary limit, if they do not relate to any offence, as provided under Section 22-C(8), be said to be unconstitutional and irrational? We think not. It is settled law that an authority empowered to adjudicate the disputes between the parties and act as a tribunal may not necessarily have all the trappings of the court. What is essential is that it must be a creature of statute and should adjudicate the dispute between the parties before it after giving reasonable opportunity to them consistent with the principles of fair play and natural justice. It is not a constitutional right of any person to have the dispute adjudicated by means of a court only.

Chapter VI-A has been enacted to provide for an institutional mechanism, through the establishment of Permanent Lok Adalats for settlement of disputes concerning public utility service before the matter is brought to the court and in the event of failure to reach any settlement, empowering the Permanent Lok Adalat to adjudicate such dispute if it does not relate to any offence.

(ii) The provisions under Section 22-C(8) provides that where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute.

This provision followed by Section 22-D which, inter-alia, provides that while deciding a dispute on merit the Permanent Lok Adalat shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 and Section 22-E which accords finality to the award of Permanent Lok Adalat under sub-s. (1) and the provision made in sub-s. (4) that every award made by the Permanent Lok Adalat shall be final and hence shall not be called in question in any original suit, application or execution proceedings form mainly bone of contention.

The alternative institutional mechanism in Chapter VI-A with regard to the disputes concerning public utility service is intended to provide an affordable, speedy and efficient mechanism to secure justice. By not making applicable the Code of Civil Procedure and the statutory provisions of the Indian Evidence Act, there is no compromise on the quality of determination of dispute since the Permanent Lok Adalat has to be objective, decide the dispute with fairness and follow the principles of natural justice. Sense of justice and equity continue to guide the Permanent Lok Adalat while conducting conciliation proceedings or when the conciliation proceedings fail, in deciding a dispute on merit.

There is no inherent right of appeal. Appeal is always a creature of statute and if no appeal is provided to an aggrieved party in a particular statute, that by itself may not render that statute unconstitutional. Section 22-E(1) makes every award of the Permanent Lok Adalat under 1987 Act either on merit or in terms of a settlement final and binding on all the parties thereto and on persons

claiming under them. No appeal is provided from the award passed by the Permanent Lok Adalat but that, in our opinion, does not render the impugned provisions unconstitutional. In the first place, having regard to the nature of dispute upto a specific pecuniary limit relating to public utility service and resolution of such dispute by the procedure provided in Section 22-C(1) to 22-C(8), it is important that such dispute is brought to an end at the earliest and is not prolonged unnecessarily. Secondly, and more importantly, if at all a party to the dispute has a grievance against the award of Permanent Lok Adalat he can always approach the High Court under its supervisory and extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

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334. LIMITATION ACT, 1963 – Section 21
SPECIFIC RELIEF ACT, 1963 – Section 34
Substitution of parties – Where after the institution of the suit, a new plaintiff or defendant is substituted, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.
Suit for declaration – Respondent filed suit against appellant No.1 and the appellant No.2 now wants to dispossess the plaintiff – Appellant No.2 was a necessary party however, was impleaded as a defendant at a much later stage – Held, cause of action accrue on 11-04-1999 therefore, suit against appellant No.2 should have been filed within 3 years from 11-4-1999 – Relief as claimed by respondent could not have been granted without impleadment of appellant No.2 – As the suit filed by respondent against the appellant No.2 was barred by limitation, therefore, the suit filed by respondent is liable to be dismissed.

Vinod Guru & Anr. v. Parul Soni

Judgment dated 07.03.2012 passed by the High Court of M.P. in F. A. No. 368 of 2007, reported in ILR (2012) M.P. 1911

Held :

The law is well settled that the effect of substituting or adding new plaintiff or defendant would be governed by the provisions of Section 21 of the Limitation Act. It is specifically provided that where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. The proviso prescribed under the said Section empowers the Court to direct that the suit, as regards such plaintiff or defendant, shall also be deemed to be instituted on any earlier date but for that an application is required to be made, the bonafides are required to be shown and then only the Court can enlarge the period. Now in view of the aforesaid facts, it is to be examined whether the suit so filed by the respondent could be said to be filed within limitation as against the appellant No. 2.

The factual aspects indicate that the respondent/plaintiff was fully aware of the fact that a cloud is cast on his title over the disputed house. the execution of the sale-deed in favour of appellant No.1 was claimed to be done by the appellant No.2, who too was the transferrer of the property in favour of the respondent/plaintiff. The reliefs as were claimed in unamended plaint could not have been granted to the respondent without impleadment of the necessary party, i.e. appellant No.2. If this was within the knowledge of the respondent, it was the duty on the part of the respondent to implead appellant No.2 as a party immediately in the suit. There was callous negligence on the part of the respondent in not adding such a necessary party in the suit. The Court has passed no order on the date when the application of adding appellant No.2 as a party in the suit was allowed extending the limitation for filing of the suit as against the appellant No.2. The order simply says that the appellant No.2 was a necessary party and, therefore, is to be added as defendant in the suit. While allowing the application for amendment because of allowing the I.A. No.5, the Trial Court has passed no order in this respect exercising the powers conferred on it under the proviso to Section 21 of the Limitation Act. The record indicates that no application for the said purposes was made by the respondent/plaintiff. Thus, it is to be inferred that the suit was deemed to be filed against the appellant No.2 on 06.04.2010 when she was impleaded as a party in the suit. If that is the position, it is to be considered whether the suit as against the newly added person could be said to be within the limitation or not.

Apparently the cause of action accrued to the respondent when the suit was said to be filed against the appellant No.1 as has been described in the plaint in paragraph 14 where in it is said that the cause of action accrued on 11.04.1999 when a threat was given by the appellant No.1 to the respondent. For such a suit where there is no limitation prescribed under the Limitation Act, the limitation of 3 years is available for filing of the suit. From 11.04.1999, the suit should have been filed against the appellant No.2 within a period of 3 years. The same cause of action is also made available for the appellant No.2 but the suit cannot be said to be filed against her within limitation on the date when she was impleaded as a party. This being so, the learned lower Court has not rightly considered this issue whether the suit as filed by the respondent was within the limitation or not. In fact the issue in this respect was not framed but was required to be framed. At least when the claim of the respondent was being considered in view of Issue No.3, this particular aspect was required to be examined. Since this has not been done, the judgment and decree passed by the Court below cannot be said to be as per law.

The Court in the case of ***Mahesh Singh and others v. Sewaram and others, 2000 (I) JLJ 373,*** has considered these aspects whether the limitation for filing of the suit can be examined at a particular stage or not. This Court has held that the question of limitation being a mixed question of law and facts, can be raised at any time even if it was not raised before the lower Court. It is further held by this Court in case of ***Central India Chemicals Private Ltd., Sehore v. Union of India, Railways, AIR 1962 M.P. 301,*** in para 14, which reads thus:

"Thus, in the suit limitation under Art. 30 has not been expressly pleaded. Still it does not help the plaintiff. One has, in this respect to distinguish between a case where limitation is an arguable point and has therefore to be pleaded and one where it is patent and non-controversial on the proved facts. Here, for example the two crucial dates are on the plaint itself and do not admit of the least doubt or controversy. Thus, under Sec. 3 of the Limitation Act, the Court has to dismiss it whether or not limitation has been set up as a defence."

This proposition of law has further been considered by the Apex Court in various cases and it has been held that if a suit, appeal or application are preferred beyond the limitation prescribed, the same are liable to be dismissed in view of the specific provisions of sub-section (1) of Section 3 of the Limitation Act, 1963. In the case of ***Noharlal Verma v. District Cooperative Central Bank Ltd., 2009 RN 42,*** the Apex Court considered these aspects and has categorically held that such core issues are to be decided fist.

Thus, it is clear that the suit filed by the respondent as against the appellant No.2 was not maintainable, being barred by limitation. Secondly, the effective relief as was claimed in the unamended plaint could not have been granted to the respondent by the Court below without the impleadment of the necessary party, i.e. appellant No.2. In view of these provisions of law, the suit of the respondent was liable to be dismissed.

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335. MOTOR VEHICLES ACT, 1988 – Section 168

Determination of compensation in case of permanent disablement – Amount under the Head of loss of earning capacity is distinct from pain and suffering, loss of enjoyment of life or medical expenses – Future medical expenses and life expectancy should also be considered.

Kavita v. Deepak and Ors.

Judgment dated 22.08.2012 passed by the Supreme Court in Civil Appeal No. 5945 of 2012, reported in AIR 2012 SC 2893

Held:

In determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses.

In this case the injured claimant, aged 31 years suffered 90% permanent disability, was working as partner in Tirupati Enterprises for which income was taken at the rate of Rs. 2000/- per month with life expectancy upto 55 years and looking to future regular medical expenses and necessity of an attendant, etc. the claimant held entitled to a compensation under different heads as under:

Head	Values	Calculation	Total
Medical treatment	as awarded by the High Court		Rs. 7,76,480/-
Medical expenses during the pendency of the appeal	as awarded by the High Court		Rs. 50,000/-
Attendant charges	Rs.2,000/- per month for 25 years	Rs.2000 x 12 x 25	Rs.6,00,000/-
Future medical expenses (physiotherapy)	Rs.3,000/- per month for 25 years	Rs.3000 x 12 x 25	Rs.9,00,000/-
Loss of earning during the period of treatment	Rs.2,000/- monthly income for the period between date of accident 2.5.2004 and High Court order 18.5.2010	Rs.2000 x 12 x 6 + Rs.2000 x 16/30	Rs.1,45,067/-
Loss of future earnings on account of permanent disability	taking multiplier of 17 for age of 30 years, disability as 90%, annual income as Rs.24,000/-	Rs.24,000 x17 x90/100	Rs.3,67,200/-
Physical and mental pains			Rs. 3,00,000/-
Loss of amenities and loss of expectation of life			Rs.3,00,000/-
Total			**Rs.34,38,747/-**

336. MOTOR VEHICLES ACT, 1988 – Section 168

(i) Determination of income of a deceased/victim who is self-employed or is engaged on fixed wages in motor accident cases – Held, It would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time.

(ii) Personal expense of a deceased who earned ₹ 1,500 per month having a family consisting of five persons – Held, such deceased, at best spend 1/10th of his income on himself and leave the rest for his family.

(iii) Major son does not cease to be a dependant unless he has some source of income.

Santosh Devi v. National Insurance Company Ltd. and others
Judgment dated 23.04.2012 passed by the Supreme Court in Civil Appeal No. 3723 of 2012, reported in AIR 2012 SC 2185

Held:

Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people.

After referring the guidelines enumerated in ***Sarla Verma v. Delhi Transport Corporation, AIR 2009 SC 3104,*** the Apex Court observed that we find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in ***Sarla Verma's case*** (supra) that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the Actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances.

In our view, it will be naive to say that the wages or total emoluments/ income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. The rise in the cost of living affects everyone across the board.

It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/ emoluments. They are the worst affected people.

Therefore, they put extra efforts to generate additional income necessary for sustaining their families. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions

have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour.

In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths.

If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self- employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

It is also not possible to approve the view taken by the Tribunal which has been reiterated by the High Court albeit without assigning reasons that the deceased would have spent 1/3rd of his total earning, i.e., Rs. 500/-, towards personal expenses. It seems that the Presiding Officer of the Tribunal and the learned Single Judge of the High Court were totally oblivious of the hard realities of the life. It will be impossible for a person whose monthly income is Rs.1,500/- to spend 1/3rd on himself leaving 2/3rd for the family consisting of five persons. Ordinarily, such a person would, at best, spend 1/10th of his income on himself or use that amount as personal expenses and leave the rest for his family.

The Tribunal's observation that the two sons of the appellant cannot be treated dependant on their father because they were not minor is neither here nor there.

In the cross-examination of the appellant, no question was put to her about the source of sustenance of her two sons. Therefore, there was no reason for the Tribunal to assume that the sons who had become major can no longer be regarded dependant on the deceased.

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337. NATIONAL GREEN TRIBUNAL ACT, 2010 (NGT ACT, 2010) – Sections 14, 29, 30 and 38

CONSTITUTION OF INDIA – Article 32

Bhopal gas disaster – Cases relating to gas disaster and raising environmental issues whether filed before or after enforcement of NGT Act, 2010 are advised/directed to be transferred to National Green Tribunal from all Courts.

Bhopal Gas Peedith Mahila Udyog Sangathan & Ors v. Union of India & Ors.

Judgment dated 09.08.2012 passed by the Supreme Court in Writ Petition (C) No. 50 of 1998, reported in AIR 2012 SC 3081

Held:

Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short the 'NGT Act') particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule 1 should be instituted and litigated before the National Green Tribunal (for short 'NGT'). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice.

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338. N.D.P.S. ACT, 1985 – Section 52-A

(i) Pilferage of contraband and its return to market place for circulation is, in our opinion, a major hazard against which the system must guard at all cost, if necessary by making suitable changes wherever the same are called for – Necessary guidelines in this regard to identify the weak links in the chain of the procedure of search, disposal or destruction of the narcotics and the remedial steps, if any, needed to plug the holes.

(ii) Hazardous nature of the substance seized in large quantities all over country must not be let loose on the society because of

human failure or failure of the system that is purported to have been put in place.

(iii) To ensure that the quantities that are seized by the police and other agencies do not go back in circulation on account of neglect or apathy on the part of those handling the process of seizure, storage and destruction of narcotic drugs and psychotropic substances, necessary directions to collect information from the concerned agencies issued.

Union of India v. Mohanlal & Anr.

Judgment dated 03.07.2012 passed by the Supreme Court in Criminal Appeal No. 652 of 2012, reported in AIR 2012 SC 2653

Held:

We had passed an order on 11th April, 2012 in which we said:

> "We have been taken through the contents of the Standing Order also which prescribes the procedure for search, disposal and destruction of the seized contraband. We are not, however, very sure whether the said procedure is being followed as it ought to be. The pilferage of the contraband and its return to the market place for circulation is, in our opinion, a major hazard against which the system must guard at all cost if necessary by making suitable changes wherever the same are called for. Before any exercise to that end is undertaken it is necessary to examine whether the procedure is being followed in letter and spirit. For that purpose in view we request Mr. Ajit Kumar Sinha, learned senior counsel to assist this Court as Amicus Curiae and identify if possible, by reference to the standing order and the available material, the weak links in the chain of the procedure of search, disposal or destruction of the narcotics and the remedial steps, if any, needed to plug the holes. To that extent we are inclined to enlarge the scope of this appeal for we are of the view that the hazardous nature of the substance seized in large quantities all over the country must not be let loose on the society because of human failure or failure of the system that is purported to have been put in place."

Pursuant to the above we have heard learned senior counsel appearing in the Court as amicus curiae, who argued that the procedure prescribed for destruction of the contraband seized in different States has not been followed resulting in a very peculiar situation arising on account of such failure and accumulation of the seized drugs and narcotics in large quantities thereby increasing manifold the chances of pilferage for re-circulation in the market from the stores where such drugs are kept. In support of that submission He

placed reliance upon a press report published in the timesofindia.indiatimes.com dated 12th July, 2011, under the heading "Bathinda's police stores bursting at seams with seized narcotics". From a reading of the said report it appears that the inventory of the drugs seized by the police over the past many decades include drug seized as far as back as in the early eighties. Large quantities of seized drugs are said to have lost their original colour and texture, making even the task of preparing the inventories difficult.

It was further stated that, not only traditional drugs like, opium, poppy hušk, charas etc. but other drugs and modern narcotic substances are also awaiting disposal which includes 39 lakh sedatives and narcotic tablets, 1.10 lakh capsules, over 21,000 drug syrups and 1828 sedative injections apart from 8 kgs. of smack and 84 kgs. of ganja.

The position is, according to amicus curiae, no better in some other States like Gujarat, Rajasthan and Bihar whose boundaries touch international borders. He submitted that in the absence of proper data from the concerned authorities it will not be possible to take stock of the magnitude of the problem no matter challenges posed by rampant drug abuse have attained formidable proportions affecting especially the youth and driving them towards crime and anti-social activities. Our attention was drawn by amicus curiae, to the judgment of this Court in ***Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638,*** where this Court has emphasized the need for a proper and prompt exercise of the power to destroy the seized contrabands and recommended supervision by the registry of the High Court concerned to see that the rules in this regard are implemented properly. He also drew our attention to an order dated 3rd December, 2010 passed by the High Court of Judicature at Patna in which the High Court had recommended overhaul of the existing system so far as the procedure of seizure, sampling and sending of the seized articles to the FSL is concerned. The Court in that case noticed that 57% of the samples sent for testing were pending examination for four years causing delay in the trial of NDPS cases which was unfortunate to say the least. The Court also noticed steps to be taken in checking the despatch of reports from the FSL and recommended a revamp of the system. A similar order was passed by the Punjab and Haryana High Court in CWP No.1868 of 2011 where the High Court was informed by the State of Punjab and Haryana that incinerators for the destruction of such contrabands and drugs shall be provided by March 2012.

The amicus curiae supplemented his submissions by filing written submissions relying upon Article 47 of the Constitution of India and Section 52A of the NDPS Act, 1985 besides Section 451 of the Cr.P.C. to argue that destruction of seized narcotic drugs is not only a statutory duty but a constitutional mandate. He also relied upon United Nations Convention against Illicit Traffic and Narcotic Drugs and Psychotropic Substances and urged that India being a signatory to the Convention had no doubt promptly added Section 52A to the NDPS Act but much more was required to be done to reduce the vulnerability of such contrabands to substitution or theft while in storage in poorly secured and

ramshackle storage facilities. Referring to SAARC Convention for Narcotic Drugs and Psychotropic Substances, 1990, it was urged by amicus curiae that while most of the countries were committed to elimination of drug abuse from their society, the ground reality is that there was no will to take follow up action by the concerned authorities. He, therefore, prayed for issue of appropriate directions to the States to furnish information relating to the nature and the extent of the problem faced by them so that this Court could, upon consideration of the matter, direct systemic changes having regard to the procedure followed and the experience of other countries in the world faced with similar problems.

We find considerable merit in the submissions made by the amicus curiae. The problem is both wide-spread and formidable. There is hardly any State in the country today which is not affected by the production, transportation, marketing and abuse of drugs in large quantities. There is in that scenario no gainsaying that the complacency of the Government or the officers dealing with the problem and its magnitude is wholly misplaced. While fight against production, sale and transportation of the NDPS is an ongoing process, it is equally important to ensure that the quantities that are seized by the police and other agencies do not go back in circulation on account of neglect or apathy on the part of those handling the process of seizure, storage and destruction of such contrabands. There cannot be anything worse than the society suffering on account of the greed or negligence of those who are entrusted with the duty of protecting it against the menace that is capable of eating into its vitals. Studies show that a large section of the youth are already victims of drug abuse and are suffering its pernicious effects. Immediate steps are, therefore, necessary to prevent the situation from going out of hand. We, therefore, consider it necessary to direct collection of the information from the police heads of each one of the States through the Chief Secretary concerned on the following aspects:

Seizure

1. What narcotic drugs and psychotropic substances (natural and synthetic) have been seized in the last 10 years and in what quantity? Provide year-wise and district-wise details of the seizure made by the relevant authority.
2. What are the steps, if any, taken by the seizing authorities to prevent damage, loss and pilferage of the narcotic drugs and psychotropic substances (natural and synthetic) during seizure/transit?
3. What are the circulars /notifications /directions /guidelines, if any, issued to competent officers to follow any specific procedure in regard to seizure of contrabands, their storage and destruction? Copies of the same be attached to the report.

Storage

1. Is there any specified/notified store for storage of the seized contraband in a State, if so, is the storage space available in each district or taluka?
2. If a store/storage space is not available in each district or taluka, where is the contraband sent for storage purposes? Under what conditions is

withdrawal of the contraband permissible and whether a Court order is obtained for such withdrawal?

3. What are the steps taken at the time of storage to determine the nature and quantity of the substance being stored and what are the measures taken to prevent substitution and pilferage from the stores?
4. Is there any check stock-register maintained at the site of storage and if so, by whom? Is there any periodical check of such register? If so, by whom? Is any record regarding such periodic inspection maintained and in what form?
5. What is the condition of the storage facilities at present? Is there any shortage of space or any other infrastructure lacking? What steps have been taken or are being taken to remove the deficiencies, if any?
6. Have any circulars/notifications/directions/guidelines been issued to competent officers for care and caution to be exercised during storage? If so, a copy of the same be produced.

Disposal/ Destruction

1. What narcotic drugs and psychotropic substances (natural and synthetic) have been destroyed in the last 10 years and in what quantity? Provide year-wise and district-wise details of the destruction made by the relevant authority. If no destruction has taken place, the reason therefor.
2. Who is authorised to apply for permission of the Court to destroy the seized contraband? Has there been any failure or dereliction in making such applications? Whether any person having technical knowledge of narcotic drugs and psychotropic substances (natural and synthetic) is associated with the actual process of destruction of the contraband?
3. Was any action taken against the person who should have applied for permission to destroy the drugs or should have destroyed and did not do so?
4. What are the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed?
5. What are the steps taken by competent authorities to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances (natural and synthetic) during transit from point of storage to point of destruction?
6. Is there any specified facility for destruction of contraband in the State? If so, a list of such facilities along with location and details of maintenance, conditions and supervisory bodies be provided.
7. If a facility is not available, where is the contraband sent for destruction purposes? Under whose supervision and what is the entire procedure thereof?
8. Is any record, electronic or otherwise prepared at the site of destruction of the contraband and by whom? Is there any periodical check of such record?

What are the ranks/designation of the supervising officers charged with keeping a check on the same?

Judicial Supervision

1. Is any inspection done by the District and Sessions Judge of the store where the seized drugs are kept? If drugs are lying in the store, has the Sessions Judge taken steps to have them destroyed?
2. Is any report of the inspection conducted, submitted to the Administrative Judge of the High Court or the Registry of the High Court? If so, has any action on the subject being taken for timely inspection and destruction of the drugs?
3. Are there any pending applications for destruction of drugs in the district concerned, if so, what is the reason for the delay in the disposal of such application?
4. What level officers including the judicial officers are associated with the process of destruction?
5. At what stages are the magistrates/ judicial officers/ any other officer of the Court associated with seizure/storage/destruction of drugs?
6. Are there any rules framed by the Court regarding its supervisory role in enforcement of the NDPS Act as regards seizure/storage/destruction of drugs?
7. What is the average time for completion of trial of NDPS matters?

The Chief Secretaries of the States shall ensure that a questionnaire on the above lines is served upon the Director General of Police of the State for a report and on receipt of the report forward the same to the Registrar General of the State High Court.

The Registrar General of the High Court in each State shall be the Nodal Officer and shall ensure collection of the reports from the Chief Secretary of the State concerned, scrutinise the same, get clarifications and further information wherever necessary and submit the report to this Court containing a summary of the information so collected, as early as possible but not later than three months from the date of a copy of this order being received by him.

The Registrar Generals shall independently secure from the concerned District and Sessions Judges, in their respective States, answer to the queries specified under the head "Judicial Supervision" within the same period.

Chiefs of Central Government agencies viz. Narcotics Control Bureau, Central Bureau of Narcotics, Directorate General of Revenue Intelligence and Commissionerates of Customs & Central Excise including the Indian Coast Guard shall issue similar questionnaire to the concerned officers and submit a report detailing the information required in terms of this order within three months from today.

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***339. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 141 and 142**

Complaint by Company – If the payee is a Company, the complaint should be filed in the name of Company – Section 142 does not specify that who should represent the company – A Company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney – Company means any body corporate and includes a firm or other association of individuals. (*National Small Industries Corporation Ltd. v. State, AIR 2009 SC 1284* relied on.)

Sai Tractors, Sagar v. Sai Tractors, Bina

Judgment dated 12.04.2012 passed by the High Court of M.P. in M.Cr.C. No. 13223 of 2011, reported in ILR (2012) M.P.1773

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340. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13

(i) Proof of demand of bribe is necessary – Mere recovery of tainted money not sufficient but burden lies on appellant to establish that money was accepted other than as money or as reward – Appellant was not able to prove any enmity – Conviction proper.

(ii) Trap case – It is always desirable to have a shadow witness in the trap party, but mere absence of such witness would not vitiate the whole trap proceedings.

Mukut Bihari & Anr. v. State of Rajasthan

Judgment dated 25.05.2012 passed by the Supreme Court in Criminal Appeal No. 870 of 2012, reported in AIR 2012 SC 2270

Held:

The courts below considered the facts properly and appreciated the evidence in correct perspective and then reached the conclusion that the charges stood fully proved against the appellants. The explanation furnished by the appellants that they had falsely been enroped due to enmity could not be proved for the reason that no evidence could be brought on record indicating any previous enmity between the complainant and the appellants nor any evidence was available to show that the complainant was not satisfied with the treatment given to his father and he could act with some oblique motive in order to falsely implicate the appellants. Thus, under the garb of donation, he had offered the tainted money to the appellants and got them arrested.

The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal

gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person.

The case of the appellants has no merit as the case is squarely covered by the judgment of this Court in ***C.M. Sharma v. State of A.P. TH. I.P., AIR 2011 SC 608***, wherein a similar issue had been raised that the complainant alongwith the shadow witness went to the office of the accused but the accused asked the shadow witness to go out of the chamber. Shadow witness left the chamber. However, the complainant brought the shadow witness in the chamber and explained to the accused that he was his financer. Despite that the accused again asked the shadow witness to leave the chamber and thus, he went out. The accused demanded the money and the complainant paid over the tainted money to him, which he received from his right hand and kept in right side pocket of the trouser. A signal was given, whereupon he was trapped by the team which apprehended the accused and conducted sodium carbonate test on the fingers of the right hand and right trouser pocket of the accused, which turned pink. The tainted notes were lying on the floor of the office, which were recorded.

This Court, after considering various judgments of this Court including ***Panalal Damodar Rathi v. State of Maharashtra, AIR 1979 SC 1191*** and ***Smt. Meena Balwant Hemke v. State of Maharashtra, AIR 2000 SC 3377*** held that acceptance of the submission of the accused that the complainant's version required corroboration in all circumstances, in abstract would encourage the bribe taker to receive illegal gratification in privacy and then insist for corroboration in case of the prosecution. Law cannot countenance such situation. Thus, it is not necessary that the evidence of a reliable witness is necessary to be corroborated by another witness, as such evidence stands corroborated from the other material on record. The court further distinguished the case of ***Panalal Damodar Rathi*** (supra) on the ground that in that case the Panch witness had not supported the prosecution case and therefore, the benefit of doubt was given to the accused. In ***Smt. Meena Balwant Hemke*** (supra) as the evidence was contradictory, the corroboration was found necessary.

Undoubtedly, in ***Smt. Meena Balwant Hemke*** (supra), this Court held that law always favours the presence and importance of a shadow witness in the

trap party not only to facilitate such witness to see but also overhear what happens and how it happens.

This Court in *Chief Commercial Manager, South Central Railway, Secunderabad & Ors. v. G. Ratnam & Ors., AIR 2007 SC 2976,* considered the issue as to whether non-observance of the instructions laid down in para nos. 704-705 of the Railway Vigilance Manual would vitiate the departmental proceedings. The said manual provided for a particular procedure in respect of desirability/necessity of the shadow witness in a case of trap. This Court held that these were merely executive instructions and guidelines and did not have statutory force, therefore, non-observance thereof would not vitiate the proceedings. Executive instructions/ orders do not confer any legally enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

In *Moni Shankar v. Union of India & Anr., AIR 2008 SC (Supp) 1657,* this Court held that instructions contained in Railway Vigilance Manual should not be given a complete go-bye as they provide for the safeguards to avoid false implication of a railway employee.

So far as the instant case is concerned, the appellants had been working under the health department of the State of Rajasthan. No provision analogous to the paragraphs contained in Railway Vigilance Manual, applicable in the health department of the State of Rajasthan at the relevant time had been brought to the notice of the courts below, nor had been produced before us. Therefore, it can be held that it is always desirable to have a shadow witness in the trap party but mere absence of such a witness would not vitiate the whole trap proceedings.

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341. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 13 and 20 CONSTITUTION OF INDIA – Article 142

(i) A legal presumption under Section 20 of the Prevention of Corruption Act casts an obligation on the Court to apply it in every case brought under Section 7 of the Act though it is rebuttable.

(ii) Bribe money recovered from appellant's possession by raiding party – Demand and acceptance proved – Conviction proper.

(iii) Where minimum sentence is prescribed in law, it would not be at all appropriate for even the Supreme Court to reduce the sentence on the ground of mitigating factor in exercise of power under Article 142 of the Constitution of India.

Narendra Champaklal Trivedi v. State of Gujarat

Judgment dated 29.05.2012 passed by the Supreme Court in Criminal Appeal No. 97 of 2012, reported in AIR 2012 SC 2263

Held:

In the case at hand, the money was recovered from the pockets of the accused-appellants. A presumption under Section 20 of the Act becomes obligatory. It is a presumption of law and casts an obligation on the court to apply it in every case brought under Section 7 of the Act. The said presumption is a rebuttable one. In the present case, the explanation offered by the accused-appellants has not been accepted and rightly so. There is no evidence on the base of which it can be said that the presumption has been rebutted.

The learned counsel for the appellant has submitted with immense force that admittedly there has been no demand or acceptance. To bolster the said aspect, he has drawn inspiration from the statement of the complainant in examination-in-chief. The said statement, in our considered opinion, is not to be read out of context. He has clarified as regards the demand and acceptance at various places in his examination and the cross- examination. The shadow witness has clearly stated that there was demand of bribe and giving of the same. Nothing has been brought on record to doubt the presence of the shadow witness. He had given the signal after which the trapping party arrived at the scene and did the needful. All the witnesses have supported the case of the prosecution. The currency notes were recovered from the possession of the appellants. In the lengthy cross- examination nothing has really been elicited to doubt their presence and veracity of the testimony. The appellants in their statement under Section 313 of the Code of Criminal Procedure have made an adroit effort to explain their stand but we have no hesitation in stating that they miserably failed to dislodge the presumption. PW-2 has categorically stated that the complainant took out Rs.50/- from his pocket and gave it to the accused appellant as directed. Thus analysed and understood, there remains no shadow of doubt that the accused-appellants had demanded the bribe and accepted the same to provide the survey report. Therefore, the conviction recorded by the learned trial Judge which has been affirmed by the learned single Judge of the High Court, does not warrant any interference.

In view of the decisions in ***Vishweshwaraiah Iron and Steel Ltd. v. Abdul Gani and Ors. (Supreme Court Bar Association v. Union of India), AIR 1998 SC 1895, Kehsabhai Malabhai Vankar v. State of Gujarat, 1995 Supp (3) SCC 704*** and ***Laxmidas Morarji (dead) by L.Rs. v. Behrose Darab Madan, (2009) 10 SCC 425,*** where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency. In fact,

reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile.

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342. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 1 (3) and 3

Operation of the Act – The Act has no retrospective effect – As the Act wasn enforced from 26th October 2006, incidents of cruelty occurred before the date are not covered by the Act.

Devkaran v. Smt. Sanjana Bai

Judgment dated 07.02.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 8009 of 2009, reported in 2012(4) M.P.H.T. 104

Held :

It is submitted that in so far as the allegation of cruelty is concerned, they are already a subject matter of proceeding under Section 125 of Cr.PC, whereas the fresh application made with respect to allegation, dated 6th of June, 2006, the Court of JMFC have not taken cognizance since those allegations are prior to the Act. They also relied upon the judgment of this Court delivered in the matter of ***Shyamlal s/o Jagannath and another v. Kantabai d/o Badrilal,*** dated 29th of April, 2009, passed in M.Cr.C. No. 3876/2008. In the said judgment, it has been observed that :-

> "So far as M.Cr.C. No. 3876/2008 is concerned since the respondent is living separately prior to coming into force of the Domestic Violence Act, which came in force with effect from 26.10.2006 and the same is not having the retrospective effect, is allowed and the impugned order dated 4.4.2008 passed in Criminal Revision No. 1087/2007 and the order dated 10.10.2007 passed by JMCF in Cri. Case No. 61/2007 and complaint filed by respondents stands quashed."

Another judgment also relied upon by the petitioner is the judgment delivered in the case of ***Navin s/o Ramkishore Marmat***, dated 2.3.2009 passed in M.Cr.C. No. 6741/2008, where also the Court taking note of the submission of the petitioner regarding the allegations made prior to coming into force of the Act, made following observations:-

> "After going through the complaint, it cannot be said that the offence was continuing even after 6.6.2006. If that would have been the position, then, there was no need to mention that the offence was between 12.11.2005 to 6.6.2006. In view of this, the petition filed by the petitioner is allowed and the impugned order dated 24.09.2008 passed by learned JMFC, Indore in Criminal Case No. 2/2008, whereby

the application filed by the petitioners for quashment of the proceedings initiated against the petitioners for the offence punishable under Sections 9 and 37 of the Act, 2005 and the criminal proceeding pending before the learned Trial Court stands dropped."

Learned Counsel appearing for the responsent has relied upon the judgment delivered by Gauhati High Court in rebuttal. In the case of ***Bulu Das (Smt.) v. Ratan Das, 2009 Femi-Juris CC 942 (Gauhati)***, it has been observed that:-

> "Taking into consideration the submission of the learned Counsels appearing for the parties and keeping in view the ratio laid down by the Apex Court in ***Vanka Radhamanohari case*** (supra) and ***Deokaran Nenshi case*** (supra) this Court is of the considered view that there is a continuing cause of action for filing the said case, i.e., No. 81-M/2006 before the learned SDJM, Dibrugarh, by the present petitioner wife. Admittedly, the Protection of Women from Domestic Violence Act, 2005 came into force on 26.10.2006 vide S.O. 1776(E), dated 17.10.2006. Since, there is continuing cause of action for the reasons discussed above, this Court is of the firm view that the provisions of the said Act, 2005 are attracted to the present case; and accordingly, the petitioner-whife filed the said case, i.e., Misc. Case No. 81-M/2006 under the Act, 2005."

However, in the present case, the allegations are very specific, i.e., the allegation of cruelty caused upon the respondent/complainant on 6th of June, 2006. Such allegation cannot be taken as continuing for the purpose of confirming the jurisdiction to the Court.

Consequently, present petition is allowed and the order passed by the Sessions Judge and the Court of JMFC Directing continuing further proceedings of complaint filed by the respondent are set aside and it is ordered that the complaint by the respondent on the ground of allegation made regarding her going to matrimonial home of the petitioner on 6th of June, 2006 are quashed on the ground of jurisdiction.

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343. REGISTRATION ACT, 1908 – Section 17
TRANSFER OF PROPERTY ACT, 1882 – Section 54
MUSLIM LAW
Hiba-bil-iwaz – It is distinguishable from hiba or simple gift – it is a gift for consideration – In reality it is a sale and where the value of the property is more than Rs. 100/- it must be effected by a registered instrument.
Interpretation of document – Nature of document – In order to ascertain the nature of a document, intention of the parties has to be seen and the document has to be read as a whole.

Mohd. Iqbal Khan & Ors. v. Late Manzoor Ahmad Khan & Ors.
Judgment dated 09.07.2012 passed by the High Court of M.P. in S. A. No. 283 of 2000, reported in ILR (2012) M.P. 1922

Held:

From careful scrutiny of the written statement filed by the defendant, it is apparent that there is no pleading by the defendant to the effect that vide Ex. D/1 dated 26.08.1976 Haliman Bi had partitioned the suit house amongst plaintiff, defendant's wife, Kasimullah and herself and, therefore, the evidence in this regard cannot be looked into. However, since the substantial question of law have been framed in this regard, it is apposite to notice the legal position with regard to gift under the Mahomedan Law. The essentials of a gift under the Mahomedan Law are a declaration of Hiba by the donar, an acceptance express or implied of the gift by the donee and delivery of possession of the property which is the subject matter of the gift accordingly to its nature. See: ***Mohamad Abdul Ghani v. Fakhr Jahan Begum, AIR 1922 Privy Council 281, Mahboob Sahab v. Syed Ismail and others, AIR 1995 SC 1205*** and ***Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner and others 2000(1) MPLJ 198 (SC).*** It is equally well settled legal position under the Mahomedan Law that there could be a gift of immovable property without there being a registered document. See: ***Noorul Huque v. Riyazul Haque, AIR 1963 MP 277.*** Hiba-bil-iwaz as distinguished from a hiba or simple gift, is a gift for consideration. It is in reality a sale where the property is immovable and is of a value of Rs. 100/- upwards, it must be effected by a registered instrument, as required by Section 54 of the Transfer of Property Act. See: ***Zainab Bi v. Jamalkhan, (1949) Nagpur 426, Gulam Abbas v. Razia Begum (1950) All.L.J.30*** and in ***A.I.R. 1927 P.C. 174.*** Similar view has been taken by this Court in the case of ***Iftikhar Jahan Begum v. Hadeeqa Begum, 1977 MPLJ S.N.57.*** It is equally well settled legal proposition that in order to ascertain the nature of a document, intention of the parties has to be seen and the document has to be read as a whole.

In the backdrop of aforesaid well settled legal position, if the document Ex. D/1 is seen, it is apparent that one portion of the house in question has been given to Kasimullah in lieu of loan of Rs. 3000/- which was to be paid by Haliman Bi to aforesaid Kasimullah. The document is titled as 'gift'. Aforesaid Kasimullah has been allotted share in the property for a consideration, therefore, the document Ex.D/1, is not gift in question simplicitor but is a gift for consideration. The transaction of the character contained in Ex.D/1 is nothing but a sale and, therefore requires registration. Admittedly, Ex.D/1 is not registered. As stated supra, there is no specific pleading in the written statements that vide Ex.D/1, the partition took place amongst the plaintiff, defendant's wife Hamida Bi and Kasimullah. For this reason also, the evidence adduced by the defendant that vide Ex.D/1, the suit house was subjected to partition cannot be looked into.

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344. SPECIFIC RELIEF ACT, 1963 – Sections 16 (c) and 20

(i) Readiness and willingness – The concurrent findings regarding readiness and willingness to perform part of the agreement of the respondent cannot be set aside merely on the ground of absence of specific pleading about continued readiness and willingness and availability of funds – There is no straitjacket formula for it – Issue has to be decided keeping in view the facts and circumstances relevant to intention and conduct of the party concerned.

(ii) Escalation of price – Escalation in the price of the land cannot by itself be a ground for denying relief of specific performance, moreso, where the defendant had not pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement.

Narinderjit Singh v. North Star Estate Promoters Limited

Judgment dated 08.05.2012 passed by the Supreme Court in Civil Appeal No. 4307 of 2012, reported in AIR 2012 SC 2035

Held:

In our view, the concurrent findings recorded by the trial Court and the lower appellate Court on the issues of execution of the agreement by the appellant's father and the respondent's readiness and willingness to perform its part of the agreement were based on correct evaluation of the pleadings and evidence of the parties and the learned Single Judge of the High Court did not commit any error by refusing to upset those findings. The argument of the learned senior counsel for the appellant that in the absence of specific pleading about continued readiness and willingness of the respondent to perform its part of the agreement and availability of funds necessary for payment of the sale consideration, the High Court should have set aside the concurrent finding recorded by the Courts below sounds attractive but on a careful scrutiny of the record we do not find any valid ground to entertain the same. In ***R.C. Chandiok v. Chuni Lal Sabharwal, AIR 1971 SC 1238,*** this Court observed that "readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned". The same view was reiterated in ***D'Souza v. Shondrilo Naidu, AIR 2004 SC 4472. In N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr), AIR 1996 SC 116,*** the Court found that the appellant was dabbling in real estate transaction without means to purchase the property and observed:

> "S. 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness

on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

We are also inclined to agree with the lower appellate Court that escalation in the price of the land cannot, by itself, be a ground for denying relief of specific performance. In ***K. Narendra v. Riviera Apartments (P) Ltd., AIR 1999 SC 2309*** this Court interpreted S. 20 of the Act and laid down the following propositions:

"S. 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 and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant."

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*345. **SPECIFIC RELIEF ACT, 1963 – Section 20 (2) (b)**

Whether denial of grant of specific performance on the ground of hardship is justified where defendant had not taken any such defence and such issue was also not framed? Held, No – Being a question of fact, in absence of any such issue and evidence, it is not proper to deny such relief.

Prakash Chandra v. Narayan

Judgment dated 23.04.2012 passed by the Supreme Court in Civil Appeal No. 8102 of 2011, reported in AIR 2012 SC 2826

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346. **SPECIFIC RELIEF ACT, 1963 – Section 38**

CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 1, Order 6 Rule 1 and Order 14 Rule 1

(i) **Suit for permanent injunction against dispossession –Watchman, caretaker or servant employed to look after the property can never acquire interest in the property irrespective of his long possession.**

(ii) **Importance of proper framing of issues – If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light – Careful framing of issues also helps in proper examination and cross examination of witnesses and final arguments in the case.**

(iii) **Applicability of Order 10 Rule 2 CPC – It enables the Court in its search for the truth, to go to the core of the matter and narrows down or even eliminates disputes.**

(iv) **Judicial proceedings – The ultimate object of the judicial proceeding is to discern the truth and do justice – It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.**

A. Shanmugam v. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, Represented by its President

Judgment dated 27.04.2012 passed by the Supreme Court in Civil Appeal No. 4012 of 2011, reported in AIR 2012 SC 2010

Held:

(i) On the facts of the present case, following principles emerge:

1. It is the bounden duty of the Court to uphold the truth and do justice.
2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.
3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

5. It is the bounden obligation of the Court to neutralize any unjust and/ or undeserved benefit or advantage obtained by abusing the judicial process.

6. Watchman, caretaker or a servant employed to look after the property can never acquire interest in the property irrespective of his long possession. The watchman, caretaker or a servant is under an obligation to hand over the possession forthwith on demand. According to the principles of justice, equity and good conscience, Courts are not justified in protecting the possession of a watchman, caretaker or servant who was only allowed to live into the premises to look after the same.

7. The watchman, caretaker or agent holds the property of the principal only on behalf the principal. He acquires no right or interest whatsoever in such property irrespective of his long stay or possession.

8. The protection of the Court can be granted or extended to the person who has valid subsisting rent agreement, lease agreement or licence agreement in his favour.

(ii) Framing of issues is a very important stage of a civil trial. It is imperative for a judge to critically examine the pleadings of the parties before framing of issues. If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light. The relevant evidence can also be carefully examined. Careful framing of issues also helps in proper examination and cross-examination of witnesses and final arguments in the case.

(iii) Rule 2 of Order X CPC enables the Court, in its search for the truth, to go to the core of the matter and narrow down, or even eliminate the controversy. Rule 2 of Order X reads as under:-

"2. Oral examination of party, or companion of party. - (1) At the first hearing of the suit, the Court -

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any

party appearing in person or present in Court or his pleader is accompanied.

(2) xxx xxx xxx

(3) xxx xxx xxx

It is a useful procedural device and must be regularly pressed into service. As per Rule 2 (3) of Order X CPC, the Court may if it thinks fit, put in the course of such examination questions suggested by either party. Rule 2 (3) of Order X CPC reads as under:-

"2. (1) xxx xxx xxx

(2) xxx xxx xxx

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.".

(iv) The entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in ***Dalip Singh v. State of U.P. and others, (2010) 2 SCC 114*** observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system.

After referring the observations in ***Maria Margarida Sequeria Fernandes and others v. Erasmo Jack de Sequeria (dead) through LRs., 2012 AIR SCW 2162,*** the Apex Court reiterated that the pleadings are foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded.

The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands.

It is imperative that judges must have complete grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases.

Ensuring discovery and production of documents and a proper admission/ denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the Courts should encourage interrogatories to be administered.

The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.

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347. STAMP ACT, 1899 – Article 45 (d) of Schedule 1 – A [as amended by Stamp (M.P. Amendment) Act, 2002]
Stamp duty on power of attorney to sell immovable property – Fixing of different rates of duty as introduced by Stamp (M.P. Amendment) Act, 2002 – Validity of – By creating two categories, namely, an agent who is a blood relation and an agent other than the kith and kin, without consideration, the legislature has sought to curve inappropriate mode of transfer of immovable properties – Held, constitutionally valid.

State of Madhya Pradesh v. Rakesh Kohli and Another
Judgment dated 11.05.2012 passed by the Supreme Court in Civil Appeal No. 684 of 2004, reported in (2012) 6 SCC 312

Held:

The 1899 Act has been amended from time to time by the Madhya Pradesh State Legislature insofar as its application to the State of Madhya Pradesh is concerned. The stamp duty on power of attorney was originally prescribed in Article 48, Schedule - 1-A of the 1899 Act. Cl. (f) in original Article 48, Schedule 1-A read as under:

"SCHEDULE-1A
Stamp Duty on Instruments
(See section 3)

Description of Instruments	Proper Stamp Duty
(1)	(2)
48. Power of Attorney, [as defined by S.2(21), not being a Proxy (No.52)]. * *	*
(f) when giving for consideration and authorizing the attorney to sell any immovable property;	The same duty as Conveyance (No. 23) for a market value equal to the amount of the consideration.

Section 3 of the M.P. 1997 Act brought in amendment in the 1899 Act, inter alia, as under :

"3. Amendment of Schedule I-A. – In Schedule 1-A of the Principal Act, in Article 48–

(i) for clause (f), the following clauses shall be substituted, namely:-

(f) when given for consideration and authorizing the attorney to sell or transfer any immovable property.	The same duty as a conveyance u/art. 23 on the market value of the property
(f-1) when given without consideration in favour of persons who are not his or her spouse or Children, or mother or father and authorizing the attorney to sell or transfer any immovable property	The same duty as a conveyance u/art. 23 on the market value of the property

(ii) the existing explanation shall be renumbered as explanation I thereof and after explanation I as so renumbered, the following explanation shall be inserted, namely : –

> '*Explanation II:* – Where under clauses (f) and (f-1) duty has been paid on the power of attorney and a conveyance relating to that property is executed in pursuance of power of attorney between the executant of power of attorney and the person in whose favour it is executed, the duty on conveyance shall be the duty calculated on the market value of the property reduced by duty paid on the power of attorney".

The Objects and Reasons for the above amendment were to check the tendency to execute power of attorney authorising the attorney to sell or transfer immovable property in place of a conveyance deed and to increase the revenue of the Government in the State of Madhya Pradesh.

Article 48 in the 1899 Act as amended by M.P. 1997 Act was substituted by M.P. 2002 Act. The new provision, Art. 45 in respect of power of attorney in Schedule 1-A which was brought in by M.P. 2002 Act reads as follows :

"SCHEDULE-1A
Stamp Duty on Instruments
(See section 3)

Description of Instrument	Proper Stamp Duty
(1)	(2)
45. Power of attorney [as defined by s. 2(21)] not being a proxy:-	
(a) when authorizing one person or more to act in single transaction, including a power of attorney executed for procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents;	Fifty rupees.
(b) when authorizing one person to act in more than one transaction or generally; or not more than ten persons to act jointly or severally in more than one transaction or generally;	One hundred rupees.

(c) when given for consideration and authorizing the agent to sell any immovable property.	The same duty as a conveyance (No. 22) on the
(d) when given without consideration to a person other than the father, mother, wife or husband, son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property situated in Madhya Pradesh.	Two percent on the market value of the property
(e) In any other case;	Fifty rupees for each person authorized

Explanation-I. – For the purpose of this article, more persons than one when belonging to the same firm shall be deemed to be one person.

Explanation-II. – The term 'registration' includes every operation incidental to registration under the Registration Act, 1908 (16 of 1908)."

In our opinion, the High Court was clearly in error in declaring Clause (d), Art. 45 of Schedule 1-A of the 1899 Act which was brought in by the M.P. 2002 Act as violative of Art. 14 of the Constitution of India. It is very difficult to approve the reasoning of the High Court that the provision may pass the test of classification but it would not pass the requirement of the second limb of Art. 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality. The High Court failed to keep in mind the well defined limitations in consideration of the Constitutional validity of a statute enacted by Parliament or a State Legislature.

The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the Constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the Constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

By creating two categories, namely, an agent who is a blood relation, i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the Legislature has sought to curb inappropriate mode of transfer of immovable properties. Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power of attorney to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power of attorney, he may execute the conveyance himself. The legislative idea behind Clause (d), Art. 45 of Schedule 1-A is to curb tendency of transferring immovable properties through power of attorney and inappropriate documentation. By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode of transfer by providing that power of attorney given to a person other than kith or kin, without consideration,

authorizing such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is subject matter of power of attorney.

In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible document, the real intention of which is the transfer of immovable property. The classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the 1899 Act. The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable.

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348. SUITS VALUATION ACT, 1887 – Section 8
COURT FEES ACT, 1870 – Section 7(iv) (c)
Court fees – Suit for declaration of gift deed to be void – Plaintiff is not party to the document as it does not bear the thumb impression of plaintiff – No error in holding (by trial Court) that no *ad valorem* court fee is required – Plaintiff is not required to value the suit as per valuation of the document – Petition dismissed.

Santosh Kumar Chopra & Ors. v. State of M.P. & Ors.
Judgment dated 07.03.2012 passed by the High Court of M.P. in W. P. No. 8527 of 2011, reported in ILR (2012) M.P. 1852

Held:

In the matter of ***Manzoor Ahmed v. Jaggi Bai, 2010(I) MP JR 8*** Divisional Bench of this Court has held that the main question for consideration is whether ad valorem Court fees is required to be paid. Document is shown to be void not voidable. Plaintiff has averred that she was never told about the sale deed which has been obtained by playing fraud. She never intended to execute the sale deed, she wanted to obtain the loan and taking the advantage of her advanced age and disability, sale deed was obtained No consideration was paid. The averments made in the plaint indicate that document is shown to be void not voidable. There is difference in incident of payment of Court fees in case document is voidable at the instance of executant ad valorem Court fees is required to be paid, not in the case of void document in such cases injunction which has been prayed flows from the relief of declaration. In the matter of ***Sunil Radhelia v. Awadh Narayan, 2010(III) MPJR (FB) 412*** wherein in the relief clause, the plaintff sought a declaration that he be declared to be entitled to receive an amount of Rs. 14,80,000/- as the detained salary from the defendant No. 1. He also claimed a relief that the agreement dated 26/06/2000, which was executed for an amount of Rs. 3,45,000/- be declared as null and void, Full Bench of this Court has held that to sum up, the questions referred to this Court are answered thus: (1) Ad valorem Court-fee is not payable when the plaintiff makes an allegation that the instrument is void and hence not binding upon him. (2) The decision rendered in ***Narayan Singh*** (supra) lays down the law correctly that the plaintiff a party to the instrument is not required to pay ad

valorem court-fee as he had made an allegation that the instrument was void on the ground that the document was forged one and it does not bear the signature of the executant. In the matter of ***Suhrid Singh @ Sardool Singh v. Randhir Singh, AIR 2010 SC 2807*** in a suit for declaration that sale deed executed by plaintiffs father is null and void and for joint possession, Hon'ble Apex Court held that it is not a suit for cancellation of sale deed, hence Court-fee need not be paid on sale consideration mentioned in sale deeds.

From perusal of the record it is evident that the case of the respondent No.2 is that he is not the executent of the gift deed dated 26/12/09. Further case of respondent No.2 is that the petitioners have prepared a forged document, which does not bear his thumb impression. In the matter of ***Ambika Prasad*** (Supra) the plaintiff was executent of the document and the case of the plaintiff was that the document was got executed by playing fraud and misrepresentation, therefore, this case has no application in the present case. In the matter of ***Manzoor Ahmed*** (Supra) also the case of the plaintiff was that she never intended to executed the sale deed, she wanted to obtain loan and taking the advantage of her advance age and disability sale deed was obtained and in the circumstances the Divisional Bench of this Court has held that void document does not required payment of ad valorem Court fee.

Keeping in view the principle laid down by the Full Bench of this Court in the matter of ***Sunil Radhelia*** (Supra) and also keeping in view the facts stated in the plaint wherein it is alleged that the respondent No. 1 is not party to the document, as it does not bear the thumb impression of respondent No.1, this Courts is of the view that the learned Court below committed no error in holding that no ad valorem Court fee is required. Since the respondent No. 1 is not party to the document as alleged, therefore, also respondent No. 1 is not required to value the suit as per valuation of the document.

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349. TRANSFER OF PROPERTY ACT, 1881 – Section 105
EASEMENT ACT, 1882 – Section 52
Determination of lease or licence explained.

Dr. Sandeep Sharma & Ors. v. M/s Sai Chhaya Autolink (P) Ltd.
Judgment dated 30.03.2012 passed by the High Court in Arbitration Case No. 74 of 2010, reported in AIR 2012 MP 98

Held:

The question has been considered by a Division Bench of this Court in the case of ***Mangal Amusement (P) Ltd. & Anr. v. State of M.P. & Ors., 2011 (5) MPHT 485*** and the principle with regard to difference between the 'lease' and 'license' is discussed in paras 16 and 17 which is crystallized as under :

We may now address ourselves to the first issue which is a core issue involved in the case, namely, whether the deed dated 06.05.1994 (Annexure-P/13) is a lease or license. In Halsbury's Laws of England IV edition, the expression "lease" is defined to mean "an instrument in proper form by which the conditions

of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the tenant, either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the tenant".

The term "Licence" has been defined in ***Halsbury's Laws of England*** IV Edition in following words –

> "A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negative the presumption of the grant of a tenancy. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence, even though the agreement may employ words appropriate to a lease."

Section 105 of the Transfer of Property Act, 1882 defines "lease" of immovable property as under :-

> "105. Lease defined.- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other things of value, to be rendered periodically or on specified occasion, to the transfer or by the transferee, who accepts the transfer on such term"

Section 52 of the Indian Easements Act, 1882 defines a "licence" to mean:-

> "52. "Licence" defined.- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

Thus, a lease is essentially a transfer of an interest in immovable property entitling the lessee to the enjoyment of such immovable property which includes the right to possession thereof. Another essential feature of a lease is that the transfer must be for consideration, though it may be for a limited period or in perpetuity. A lease can be effected only by a bilateral transaction in which both lessor and lessee should be the parties. On the other hand, the characteristics of licence are that it grants the licensee right to do something on the property which otherwise would have been unlawful for him to do so. The distinction between the lease and licence has been considered by the Supreme Court in catena of decisions, namely, ***Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, Uttam Chand v. S. M. Lalwani, AIR 1965 SC 716, L. B. M. Loll v.***

M/s Dunlop Rubber Co. (India) Ltd. and another, AIR 1968 SC 175, Konchada Ramamurty Subudhi (dead) v. Gopinath Naik and others, AIR 1968 SC 919, Board of Revenue v. A. M. Ansari, (1976) 3 SCC 512, Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala, AIR 1988 SC 184, Capt. B. V. D. Souza v. Antonio Fausto Fernandes, AIR 1989 SC 1816, Corporation of Calicut v. K. Sreenivasan, (2002) 5 SCC 361 and *Chandy Varghese and others v. K. Abdul Khader and others, (2003) 11 SCC 328.* From a close scrutiny of the aforesaid decisions, following tests for determination whether a document creates a lease or licence can be taken as well established:-

(i) To ascertain whether a document creates licence or lease, substance of the document must be preferred to the form. The Court must refer to the object and the circumstances under which document is executed. The character of the transaction turns on the operative intent of the parties.

(ii) The real test is the intention of the parties. The Court must apply the test of dominant intention of the parties. The Court must determine the character of the document by asking itself as to what was the dominant intention of the parties in executing the document. The question whether a particular transaction creates a lease or licence is always the question of intention of the parties and, therefore, has to be inferred from the facts and circumstances of each case.

(iii) If a document creates an interest in the property, it is a lease but if it permits another party to make use of the property, of which the legal possession continues with the owner, it is a licence.

(iv) 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. However, the test of exclusive possession is not conclusive by itself to arrive at the conclusion that the transaction in question is a lease. Merely exclusive possession is not decisive for drawing an inference that the document in question is a lease and not licence.

(v) A lease is a transfer of right to enjoy the premises whereas the licence is a privilege to do something on the premises which otherwise would be unlawful.

(vi) Occupation of licensee is permissive by virtue of a grant of licence in his favour, though he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked and/or he is not evicted from its occupation either in accordance with law or otherwise.

After considering all these aspects of the matter as contained in the agreement, the finding recorded was that the document is a 'license' and not a 'lease' as the interest in the property continued to vest with the Indore Development Authority which gives the license to M/s Mangal Amusement (P) Ltd. If the terms and conditions of the present license agreement Annexures P-1 are taken note of, it would be seen that the title speaks about a lease and license agreement. It is executed a s 'license' and the licensor namely the respondent herein is shown as owner of the property. The duration of the agreement is shown to be 5 years, even though the word 'lease' is used but it is indicted that the license month shall be the English calendar month. License fee is fixed. Provision for security deposit and extension are incorporated. Payment of taxes are by the Licensor and the Licensee is prohibited from sub-letting or making further construction in the area. The Licensee is only given the right to maintain the property in a good and tenable condition. The terrace rights is vested with the Licensor who is given liberty to construct on the terrace and give it to any other company. The Licensee is prevented from making any structural alteration or addition or modification either temporary or permanently. If the license agreement Annexure P-1 and the earlier lease agreement Annexure R-1 entered into between the parties are taken note of, the following distinguishable feature emerge in the license agreement Annexure P-1 dated 01.04.2009. Under Clause 6 for the purpose of payment of taxes, it is clearly indicate that it is the Licensor who shall pay all liability, who shall discharge all liability for payment of taxes as may be levied by the State Govt. or the Central Govt. In the agreement Annexure R-1, there was no such provision for payment of taxes by the Licensor. Under Clause 8 of the License agreement Annexure P-1, there is a total prohibition on the part of the Licensee to sub-let, assign or underlet any part of the property.

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350. TRANSFER OF PROPERTY ACT, 1881 – Section 105
REGISTRATION ACT, 1908 – Section 17
An agreement between the parties in which certain terms of tenancy were defined and described is not a lease deed so it does not require registration.

Manish Anand v. Ramniwas Gupta

Judgment dated 21.02.2012 passed by the High Court in Writ Petition No. 920 of 2012, reported in AIR 2012 MP 90

Held:

A Division Bench in ***Smt. Kamla Devi v. Vishnudas, W.P. No. 2017/2008*** held as under:-

> "For ascertaining the nature of document, the definition of 'lease' in Section 105 of the Act has to be looked into. Section 105 of the Transfer of Property Act specifically provides that a lease of immovable property is transfer of a right to enjoy such property, made for certain time, express

of (sic or) implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops. Service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms. The essential ingredient of lease are (i) that by the document immovable property should be transferred with a right to enjoy the property in lieu of rent. (ii) there must be lessor and lessee. (iii) the term or period of lease (iv) the consideration or rent in cash or in kind. So it is clear that the lease is not a mere contract, but is a transfer of an interest of immovable property in lieu of consideration may be cash or kind and ownership remains to lessor though right to enjoy property is transferred to the lessee. Until and unless the aforesaid essential ingredients are found place in a document, only then the document can be termed as lease".

The Division Bench in extenso laid down essential ingredients of the lease. Applying the said litmus test on Annexure C/1 it shows that Annexure C/1 is not a lease. On the contrary, it is only an agreement between the parties wherein certain terms of tenancy were defined and described. In al-most, similar situation the Division Bench opined that the documents in question is of agreement and not the agreement of the lease. In this view of the matter, I am unable to hold that Annexure C/1 is a lease and, therefore, the judgment cited by Shri Katare have no application. Apart from this, on the forehead of Annexure C/1, it is clearly mentioned that it is an agreement regarding rent. It is further mentioned in para-1 of this document that tenancy was as per oral arrangement. Thus as per Annexure C/1 also the tenancy was continuing prior to the agreement Annexure C/1 and it was on the basis of oral arrangement. In oral arrangement, needless to mention, that the aforesaid ingredients cannot be examined to show whether it was lease or not. Thus, I am unable to hold that Annexure C/1 is a lease.

In this view of the matter, the Court below has rightly applied the principle laid down in ***Maharaj Singh and another v. Prem Narain and Others, AIR 1980 MP 117*** in other words Annexure C/1 cannot be said to be a lease and therefore, the question of its registration does not arise.

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***351. URBAN LAND CELING ACT, 1976 – Section 10 (5)**

Notice of taking possession – Notice although issued in the name of holder of land, was served on his minor grandson – Service of notice on minor grandson is no service in the eye of law – However, it is clear from the application filed by holder of land for grant of interim stay in revision, that he was aware of the proceedings initiated under Section 10(5) of Act of 1976 therefore, no prejudice is caused due to service of notice on minor grandson and only because of this lapse, the entire action was not to be vitiated at all.

Information of stay order – Non-communication of interim order – Unless and until the prohibitory order is brought to the knowledge of the executing authority, it can not be said that act done by the said authority is a nullity.

Manohar Kumari Daga (Smt.) & Ors. v. State of M.P. & Ors.
Judgment dated 21.03.2012 passed by the High Court of M.P. in W. P. No. 1133 of 2008, reported in ILR (2012) M.P. Short Note 88

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352. WAKF ACT, 1995 – Sections 3, 4, 13, 14, 43 and 112
Distinction between Muslims wakfs and trusts created by Muslims – Management of wakf properties and properties registered as trust property – The wakf properties are dedicated to God and the "wakif" and dedicator does not retain any title over the wakf properties – As far as trusts are concerned the properties are not vested in God – Legal position explained.

Maharashtra State Board of Wakfs v. Yusuf Bhai Chawala and Others
Judgment dated 11.05.2012 passed by the Supreme Court in SLPs (C) No.31288 of 2011, reported in (2012) 6 SCC 328

Held:

Broadly speaking, the grievance of the petitioners in these special leave petitions is with regard to the vesting of powers of management and supervision of Muslim wakf estates in Maharashtra in the Charity Commissioner by virtue of the impugned order of the High Court. Undoubtedly, the Wakf Board was constituted under the provisions of the Wakf Act, 1995, but not at full strength as envisaged in Sections 13 and 14of the aforesaid Act. Whatever may be the reason, the factual position is that today there is no properly constituted Board of Wakfs functioning in the State of Maharashtra. At the same time, the administration of wakfs in Maharashtra cannot be kept in vacuum.

The Bombay High Court did what it thought best to ensure that there was no vacuum in the administration of wakf properties in Maharashtra by directing that till such time the Board was properly constituted, the Charity Commissioner would continue to administer the Muslim wakf properties, including English trust properties, which had already been registered as trust properties with the Charity Commissioner under the Bombay Public Trusts Act. As a corollary, the list of wakfs published by the truncated Board of Wakfs was also set aside by the Bombay High Court. The question is: whether the Bombay High Court had the jurisdiction to make such orders in the writ jurisdiction and particularly to vest the management of all wakf properties in the Charity Commissioner in view of the provisions of Section 112 and in particular sub-section (3) thereof, of the Wakf Act, 1995?

Section 112 concerns repeal and savings. By virtue of the said provisions, the 1954 Wakf Act and the 1984 Wakf (Amendment) Act were repealed. Sub-section (3) specifically provides as follows:

> *"Repeal and savings.* – (1)-(2)
>
> (3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed: "

Although it cannot be said that the Bombay Public Trusts Act was a corresponding law and, therefore, stood repealed, it cannot also be said that the same would be applicable to wakf properties which were not in the nature of public charities.

There is a vast difference between Muslim wakfs and trust created by Muslims. The basic difference is that wakf properties are dedicated to God and the "wakif" or dedicator does not retain any title over the wakf properties. As far as trusts are concerned, the properties are not vested in God. Some of the objects of such trusts are for running charitable organizations such as hospitals, shelter homes, orphanages and charitable dispensaries, which acts, though recognized as pious, do not divest the author of the trust from the title of the properties in the trust, unless he relinquishes such title in favour of the trust or the trustees. At times, the dividing line between public trusts and the wakfs may be thin, but the main factor always is that while wakf properties vest in God Almighty, the trust properties do not vest in God and the trustees in terms of deed of trust are entitled to deal with the same for the benefit of the trust and its beneficiaries.

In the present case, the difference between trusts and wakfs appears to have been overlooked and the High Court has passed orders without taking into consideration the fact that the Charity Commissioner would not ordinarily have any jurisdiction to manage the wakf properties.

In these circumstances, in our view, it would be in the interest of all concerned to maintain the status quo and to restrain all those in management of the wakf properties from alienating and/or encumbering the wakf properties during the pendency of the proceedings before this Court. The order of the High Court staying the operation of its judgment has led to the revival of interim orders which have rendered such stay otiose. The said order of stay cannot also be continued during the pendency of these proceedings in its present form,

Accordingly, at this stage, we direct that in relation to wakf properties, as distinct from trust created by Muslims, all concerned, including the Charity Commissioner, Mumbai, shall not permit any of the persons in management of such wakf properties to either encumber or alienate any of the properties under their management, till a decision is rendered in the pending special leave petitions.

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NOTE: (*) Asterisk denotes short notes

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) (AMENDMENT) RULES, 2011

[Ministry of Social Justice and Empowerment Notification No. G.S.R. 896(E), dated the 23rd December, 2011. Published in Gazette of India (Extraordinary) Part II Section 3 (i) dated 23.12.2011 pages 88-137]

In exercise of the powers conferred by sub-section (1) of Section 23 of the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989),* the Central Government hereby makes the following rules to *amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995,* namely: –

1. (1) These rules may be called the **Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities)(Amendment) Rules, 2011**

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

2. In the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as the principal rules), in clause (iv) of sub-rule (1) of rule 16, for the words and figure "Director/Deputy Director, National Commission for the Scheduled Castes and the Scheduled Tribes", the words, "representatives of the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes" shall be substituted.

3. In the principal rules, for the Schedule and Annexure-I, the following shall be substituted, namely: –

"SCHEDULE

Annexure

[See Rule 12(4)]

NORMS FOR RELEIF AMOUNT

Sl. No.	Name of the Offence	Minimum amount of Relief
(1)	(2)	(3)
1.	Drink or eat inedible or obnoxious substance [Section 3 (1) (i)]	Rs. 60,000/- or more depending upon the nature and gravity of the offence to each victim and also commensurate with the indignity, insult, injury and defamation suffered by the victim.
2.	Causing injury insult or annoyance [Section 3(1) (ii)]	

3.	Derogatory act [Sec. 3(1) (iii)]	Payment to be made as follows: I. 25% when the charge sheet is sent to the Court II. 75% when accused are convicted by the lower court.
4.	Wrongful occupation or cultivation of land, etc. [Section 3(1)(iv)]	At least Rs.60,000/- or more depending upon the nature and gravity of the offence. The land/premises/water supply shall be restored where necessary at Government cost, Full payment to be made when charge-sheet is sent to the court.
5.	Relating to land, premises and water [Section 3(1)(v)]	
6.	Begar or forced or bonded labour [Section 3(1) (vi)]	Atleast Rs.60,000/- to each victim, payment of 25% at FIR stage and 75% on conviction in the lower court.
7.	Relating to right to franchise [Section 3(1)(vii)]	Upto Rs.50,000/ - to each victim depending upon the nature and gravity of the offence.
8.	False, malicious or vexatious legal proceedings [Section 3(1) (viii)]	Rs.60,000/- or reimbursement of actual legal expenses and damages or whichever is less after conclusion of the trial of the accused.
9.	False and frivolous information [Section 3 (1)(ix)]	
10.	Insult, intimidation and humiliation [Section 3 (1)(x)]	Upto Rs.60,000/- to each victim depending upon the nature of the offence. Payment of 25% when charge-sheet is sent to the court and rest on conviction.
11.	Outraging the modesty of a woman [Section 3 (1) (xi)]	Rs.1,20,000/- to each victim of the offence. 50% of the amount may be paid after medical examination and remaining 50% at the conclusion of the trial.
12.	Sexual exploitation of a woman [Section 3(1)(xii)]	
13.	Fouling of water [Section 3 (1) (xiii)]	Upto Rs. 2,50,000/- or full cost of restoration of normal facility, including cleaning when the water is fouled. Payment may be made at the stage as deemed fit by District Administration.
14.	Denial of customary rights of passage [Section 3(1) (xiv)]	Upto Rs.2,50,000/- or full cost of restoration of right of passage and full compensation of the loss suffered, if any. Payment of 50% when charge sheet is sent to the court and 50% on conviction in lower-court.

15.	Making one desert place of residence [Section 3(1) (xv)]	Restoration of the site/right to stay and compensation of Rs.60,000/- to each victim and reconstruction of the house at Govt. cost, if destroyed, to be paid in full when charge sheet is sent to the lower court.
16.	Giving false evidence [Section 3(2)(i) and (ii)]	At least Rs.2,50,000/- or full – compensation of the loss or harm sustained, 50% to be paid when charge sheet is sent to Court and 50% on conviction by the lower court.
17.	Committing offences under the Indian Penal Code punishable with imprisonment for a term of 10 years or more [Section 3 (2)]	Atleast Rs.1,20,000/- depending upon the nature and gravity of the offence to each victim and or his dependents. The amount would vary if specifically otherwise provided in the Schedule.
18.	Victimization at the hands of a public servant [Section 3(2)(vii)]	Full compensation on account of damages or loss or harm sustained. 50% to be paid when charge-sheet is sent to the Court and 50% on conviction by lower court.
19.	Disability. The definition of disability shall be as given in Section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and guidelines for their assessment shall be as contained in the Ministry of Social Justice & Empowerment, G.O.I. Notification No. 154, dated 01.6.2001, as amended from time to time. A copy of the Notification is at Annexure – II to the Schedule.	
	(a) 100% incapacitation	
	(i) Non-earning Member of a family	At least Rs.2,50,000/- to each victim of offence, 50% on FIR and 25% at charge sheet and 25% on conviction by the lower court.
	(ii) Earning Member of a family	At least Rs.5,00,000/- to each victim of offence, 50% to be paid on FIR/Medical examination stage, 25% when charge-sheet sent to court and 25% at conviction in lower court.

	(b) Where incapacitation is less than 100%	The rates as laid down in a (i) and (ii) above shall be reduced in the same proportion, the stages of payments also being the same. However, not less than Rs.40,000/- to non earning member and not less than Rs.80,000/- to an earning member of a family.
20.	Murder /Death	
	(a) Non-earning Member of a family	At least Rs.2,50,000/- to each case. Payment of 75% after postmortem and 25% on conviction by the lower court.
	(b) Earning Member of a family	At least Rs. 5,00,000/- to each case. Payment of 75% after postmortem and 25% on conviction by the lower Court.
21.	Victim of murder, death, massacre, rape mass rape and gang rape, permanent incapacitation and dacoity	In addition to relief amounts paid under above items, relief may be arranged within three months of date of atrocity as follows:- (i) Pension to each widow and/or other dependents of deceased SC and ST @ Rs. 3,000/- per month, or Employment to one member of the family of the deceased, or provision of agricultural land, an house, if necessary by outright purchase. (ii) Full cost of the education and maintenance of the children of the victims. Children may be admitted to Ashram Schools/ residential schools. (iii) Provision of utensils, rice, wheat, dals, pulses, etc. for a period of three month.
22.	Complete destruction/burnt houses	Brick/stone masonary house to be constructed or provided at Government cost where it has been burnt or destroyed."

[Annexures not Reproduced]

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FROM THE PEN OF THE EDITOR

Manohar Mamtani
Director, JOTRI

Esteemed Readers!

By the time this issue reaches your hand, leaving behind the leap year, we have entered into the fourteenth year of this millennium with new thoughts and resolutions but it also requires introspection to evaluate what we have been able to contribute to the justice delivery system to strengthen the public confidence and still we are expected to perform in future. On behalf of this prestigious Institute, I wish all our esteemed readers a warm, happy, thoughtful and purposeful NEW YEAR. May this new year bring many new opportunities to explore every possible avenues to do justice and bring smiles to the hundreds of litigants who are waiting impatiently for access to justice.

During the year 2012 the Institute has organized 42 training programmes comprising regular Induction and Refresher as well as under the approved Plan - Training of Judicial Officers under TFC. Besides, the Institute has commenced various Schemes under the XIII Finance Commission such as Development of Video Conferencing Facility with all the District Training Centres of JOTRI, Supply of Books to the Judicial Officers of Madhya Pradesh, Tour to other States; namely Maharashtra, Tamil Nadu and Delhi for Study of Best Practices, Specialized Training Programmes to other Institutes like Medico-Legal Institute, Bhopal, State Forensic Laboratory, Sagar as well at State Forest Research Institute, Jabalpur. Apart from the trainings at other Institutes, Judicial Officers were also sent to Central Bureau of Investigation Academy, Ghaziabad and SVP National Police Academy, Hyderabad for training on ***Cyber Laws.*** The Institute has also conducted training programmes for the ministerial staff of District Courts covering 21 districts.

The most important mission was streamlining various Schemes under XIII Finance Commission namely Training of Judicial Officers and Strengthening of State Judicial Academy. I feel a deep sense of satisfaction that with the co-ordination of concerned authorities and committed efforts of my colleagues Shri Pradeep Kumar Vyas, Shri Ramkumar Choubey and Shri Awdhesh Kumar Gupta, most of these Schemes are running successfully.

It was a great honour to be a part of this magnificent Institute. I joined this Institute in the year 2008 and my tenure in the Institute has throughout been an opportunity for me to learn not only law but also tools and techniques of dispensation of effective, qualitative and responsive justice. I tried best with my ability, knowledge, skills and genuine strength to contribute to the various activities of the Institute certainly with the dedicated team of my colleagues. Whatever could be achieved during this period was a result of team efforts of all concerned. The fact remains that whatever I have achieved was the result of the trust,

motivation, guidance and support of Hon'ble the Chief Justice, Hon'ble the Chairman and Members of the Training Committee and Hon'ble Members of the Monitoring Committee (TFC). Apart, I also got immense support from the Sitting Judges, Registrar General and other Registry Officers of the High Court especially Shri M.K. Mudgal and Shri Ved Prakash Sharma, who have throughout extended their fullest co-operation to the Institute as regular visiting faculty in various training programmes. I also feel highly indebted to my fellow Judicial Officers of District Court especially Shri Deep Kumar Kesharwani, ADJ, Jabalpur. The staff has also played their part efficiently. I hope that the Institute will flourish to achieve infinite success in the field of Judicial Education and improving justice delivery system of District Judiciary of the State of Madhya Pradesh.

Time has come to wipe out the old quote -

"Justice delayed is justice denied"

by replacing with a new one

"Justice quick, Justice shine,

Every concerned feel fine".

- By ***Manohar Mamtani***

As usual Part I, Part II, Part III and Part IV contain articles, pronouncements of Hon'ble the Supreme Court and High Court, Notifications and Act, respectively.

Finally, once again to remind that having a smile on your face is a good compliment to life, but putting a smile on others face by your efforts is the best compliment. I sincerely pray to the Almighty to give us the courage and conviction to do justice with humility, wisdom and compassion.

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Somebody asked Charles Dickens what was the secret of his success in life. He replied, "Whatever I have tried to do in life, I have tried with all my heart to do well, whatever I have devoted myself to, I have devoted myself completely."