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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

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(ARTICLES & MISC.)

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The society reposes a great faith on Judiciary as a warden of rights of common people. On account of the effect of globalization and up-gradation of the living condition, the people became little more conscious of their rights, which resulted in the explosion of cases. On the other hand, due to changing socio-economic and political spectrum of the society, the administration of justice is facing many challenges relating to excessive load of work, complexity in litigation, enactment of new legislations from time to time and the ever increasing expectations of the litigant public from the judiciary. Besides that, Judiciary is in the gaze of the audio-visual media. Therefore, to face challenging environment, efforts should be made to adopt skills of management and information and communication technology in the Judiciary which revolutionized each and every sphere of human life. Their worth has also been proved in the other Institutions. These tools should be applied in Judiciary in a positive attitude. If a judicial officer has sufficient knowledge of Information and Communication Technology and application skills of Management and co-ordination, he can easily overcome the new challenges and definitely strengthen his ability to enhance qualitative and quantitative output in order to provide timely justice.

The world has opened up so much that one cannot remain aloof to the various fields that have sprang up in such a short span of time. At present a person cannot remain in a cocoon. He should have a wide spectrum of knowledge and Judicial Officers are also no exception to this. A Judicial Officer has to function in a systematic way. In disciplining himself in the day-to-day activities, managerial skills plays a very important role. If he develops managerial skills, he can bring the best in Judiciary. To perform any work in a proper and better way, planning and management play a key role. Undoubtedly, by adopting the skills of planning and management, a Judicial Officer can increase the quality and quantity of work. By developing these skills, we can also render unpolluted and expeditious justice to the litigants. Looking to the importance of this aspect, National Judicial Academy is organizing a series of workshops/trainings in this field to acclimatize and train most of the Judicial Officers across the country.

Co-ordination is also a part of good management. Therefore, maintaining co-ordination among various agencies of the justice delivery system is very important and play a vital role for better administration of justice. If a judicial officer creates a stress free environment at work in which all stakeholders of justice delivery system feel at ease and motivated to perform their part of work without any burden, then he will get a qualitative output. Sometimes, due to lack of proper co-ordination with the lawyers, police officers, court staff, local administration, etc., instead of supporting the judicial officer try to create hurdles

or problems which adversely affects his work. This situation can be avoided by maintaining proper co-ordination.

Likewise, Information and Communication Technology also plays a great role for getting judicial excellence. If the Judicial Officer has knowledge in this field, he can have an easy access to the various developments that have taken place in the field of law and can keep himself abreast with it. It reduces his dependency on his subordinate staff in the Court while delivering judgments. He can take the assistance of the legal software. A click of a button is enough to sail through the unending sea of knowledge.

Therefore, as judicial officers we should try to develop our knowledge in the above fields gradually so as to improve ourselves, for getting excellence in our work and also to face the new challenges and responsibilities that are coming up before us in our day to day working.

The Institute has organized Second Phase Induction Training to newly recruited Civil Judges Class II in the months of February-March, 2009. With this training programme, the task of imparting Induction Training, in two phases, to all the newly recruited Civil Judges Class II of 2008 batch has been completed. These Judicial Officers were given training not only in procedural and substantive laws but also on practical aspects like judgment writing, Order-sheet writing, framing of issues, framing of charges, accused statement etc. Besides this, they were acquainted with the importance of other aspects like Court Management, Case Management and Judicial Ethics.

As usual, in Part I of the Journal bi-monthly articles, in Part II of the Journal important judgments of the Supreme Court and High Court and in Part III & IV important notification and Act find place.

I hope that through this Journal the Institute will always continue to cater to the needs of the Judicial Officers so as to retain its utility amongst the judicial fraternity.

To sum up, let me quote what Daniel Starch had said:

To get a job excellently,
Co-ordinate all persons and process necessary and set each in motion at the right time,
Follow through so that no step or link in reaching that final result had been omitted or forgotten,
Maintain the required level of quality.
Set time limits and see that each phase is done on time,
Demand co-operation from all people involved,
Do a 'Plus' job – just a little more than the minimum called for.

Thank you

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Hon'ble the Chief Justice Shri A.K. Patnaik addressing the participants in the "Foundation Training Programme for the directly appointed Additional District & Sessions Judges" held in the Institute from 12.01.2009 to 31.01.2009. Sitting on His Lordship's left is Hon'ble Shri Justice Ajit Singh.

Hon'ble Shri Justice R.S. Garg, Administrative Judge, High Court of M.P. & Chairman, High Court Training Committee addressing the participants in the "Foundation Training Programme for the directly appointed Additional District & Sessions Judges" held in the Institute from 12.01.2009 to 31.01.2009

PART - I

अकिंचन के रूप में एवं धारा 35 न्यायशुल्क अधिनियम, 1870 के अन्तर्गत म.प्र. शासन द्वारा जारी अधिसूचना क्रमांक 9.1.83-B-XXI दि. 1.4.83 के अन्तर्गत न्यायशुल्क से निर्मुक्त व्यक्ति के रूप में प्रस्तुत वाद में विधिक एवं प्रक्रियात्मक अंतर

न्यायिक अधिकारीगण
जिला – बालाघाट

विधि में कुछ व्यक्तियों को न्यायशुल्क अदा करने से निर्मुक्त करने के प्रावधान किए गए हैं जिनमें 'अकिंचन' के रूप में वाद प्रस्तुति हेतु व्यवहार प्रक्रिया संहिता, 1908 (जिसे अत्रपश्चात 'संहिता' के नाम से संबोधित किया जावेगा) का आदेश 33 प्रावधान करता है, वहीं दूसरी और न्यायाशुल्क अधिनियम, 1870 (जिसे अत्रपश्चात् 'अधिनियम' के नाम से संबोधित किया जावेगा) के अन्तर्गत धारा 35 द्वारा संबंधित सरकार को इस सम्बन्ध में सशक्त किया गया है कि वह समय–समय पर राजपत्र में अधिसूचना प्रकाशित कर अनुसूची 1 एवं 2 में वर्णित न्यायशुल्क के संदाय से पूर्णतः या अंशतः छूट दे सकती है। इसी तारतम्य में म.प्र. शासन द्वारा अधिसूचना क्रमांक 9.1.83.B-XXI दिनांकित 1.04.1983 जारी कर उसके अन्तर्गत कुछ विशिष्ट वर्ग के व्यक्तियों को न्यायाशुल्क अदा करने से निर्मुक्ति प्रदान की गई है। आदेश 33 के अधीन अकिंचन व्यक्ति द्वारा वाद पर देय न्यायाशुल्क के संदाय का स्थगन होता है वहीं अधिनियम की धारा 35 के अन्तर्गत जारी अधिसूचना के द्वारा न्यायाशुल्क से छूट मिलती है।

अधिनियम की धारा 35 के अधीन जारी अधिसूचना एवं संहिता के आदेश 33 के अधीन न्यायशुल्क से मुक्ति हेतु पात्रता एवं विधिक अंतर –

म. प्र. शासन की उक्त अधिसूचना द्वारा सम्पूर्ण मध्य प्रदेश राज्य में, निम्नलिखित वर्गों के व्यक्तियों द्वारा, जिनकी वार्षिक आय, वाद प्रस्तुति के ठीक पूर्ववर्ती दिनांक को समस्त स्त्रोंतो से 6 हजार रूपये से अधिक नहीं है अधिनियम की प्रथम अनुसूची के अनुच्छेद 1–क एवं 2 तथा द्वितीय अनुसूची के अनुच्छेद 5, 17, 21 के अधीन वादपत्रों पर देय फीस से मुक्ति प्रदान की गई है, अर्थात (एक) अनुसूचित जाति का सदस्य, (दो) अनुसूचित जनजाति का सदस्य, (तीन) अवयस्क, (चार) महिलायें, (पाँच) शिल्पी, (छः) अकुशल श्रमिक, (सात) भूमिहीन श्रमिक और (आठ) समाज के कमजोर वर्ग के व्यक्ति। संहिता के आदेश 33 के अंतर्गत व्यक्ति विशेष का कोई वर्ग निरूपित नहीं किया गया है वरन् ऐसे व्यक्ति जो निर्धन है और जिनके पास पर्याप्त साधन नहीं हैं, को न्यायशुल्क अदा किये जाने से कुछ समय तक के लिए छूट प्रदान की गई है। संहिता के अधीन 'निर्धन' व्यक्ति वह माना गया है जिसके पास इतने पर्याप्त साधन नहीं है कि वह उस वाद में वादपत्र के लिए विधि द्वारा विहित फीस दे सके अथवा कोई फीस विहित न होने की दशा में वह एक हजार रूपये के मूल्य की संपत्ति का हकदार नहीं है, इन दोनों ही दशाओं में पर्याप्त साधन सा संपत्ति की संगणना करने में डिक्री के निष्पादन में कुर्की से छूट प्राप्त संपत्ति और वाद की विषय वस्तु से संबंधित संपत्ति छोड़ दी जायेगी किंतु ऐसी संपत्ति को ध्यान में रखा जाएगा जिसे आवेदक ने निर्धन व्यक्ति के रूप में वाद चलाने की अनुज्ञा के लिए अपना आवेदन प्रस्तुत करने के बाद और आवेदन का विनिश्चय होने के पूर्व अर्जित किया है, जबकि उक्त जारी

अधिसूचना में ऐसा कोई प्रतिबंध नहीं है एवं उसके अधीन न्यायशुल्क से मुक्ति पाने हेतु इतना पर्याप्त है कि वह उक्त दर्शाए विशिष्ट वर्गो में से किसी वर्ग का व्यक्ति हो और वाद प्रस्तुति के ठीक पूर्ववर्ती दिनांक को समस्त स्त्रोतों से उसकी वार्षिक आय छः हजार रूपये से अधिक न हो।

संहिता के आदेश 33 एवं अधिनियम की धारा 35 के अधीन जारी अधिसूचना के तहत अकिंचन के रूप में वाद प्रस्तुत किए जाने में एक महत्वपूर्ण विधिक अंतर यह भी है कि आदेश 33 नियम 10 के तहत निर्धन व्यक्ति के वाद में सफल हो जाने की दशा में शासन को डिक्री में दिए आदेशानुसार न्यायाशुल्क वसूलने का अधिकार होगा और यह न्यायशुल्क वाद की विषय वस्तु पर प्रथम भार होगा। इसी प्रकार आदेश 33 नियम 11 के तहत निर्धन व्यक्ति के वाद में असफल हो जाने या अनुज्ञा प्रत्याहरित कर लिए जाने, तामीली के लिए प्रभार्य फीस या वाद पत्र की प्रतियाँ प्रस्तुत करने में असफलता की दशा में न्यायालय वादी या सह वादी के रूप में जोड़े गए किसी व्यक्ति को फीस अदा करने का आदेश देगा। इस प्रकार आदेश 33 के प्रावधान किसी व्यक्ति को न्यायशुल्क से मुक्ति की अस्थाई छूट प्रदान करते हैं जबकि अधिनियम की धारा 35 में उसके तहत जारी अधिसूचना में ऐसा कोई प्रावधान न होने से एक बार न्यायाशुल्क मुक्ति प्रदान कर दिए जाने की दशा में पुनः न्यायशुल्क अदा किए जाने के आदेश देने की विधिक स्थिति उत्पन्न नहीं होती।

संहिता के आदेश 33 के अधीन और अधिसूचना के अधीन प्रस्तुत वाद में प्रक्रियात्मक अंतर –

जहाँ तक उक्त दोनों दशाओं में जाँच हेतु अपनाई जाने वाली प्रक्रिया का संबंध है, आदेश 33 नियम 1–क के तहत निर्धनता की जांच, जब तक कि न्यायालय अन्यथा निर्देश न दे तब तक, प्रथम बार में न्यायालय के मुख्य लिपिक वर्गीय अधिकारी द्वारा की जाएगा और न्यायालय ऐसे अधिकारी की रिपोर्ट को अपने निष्कर्ष के रूप में मान सकेगा या न्यायालय उस प्रश्न की जाँच स्वयं कर सकेगा। आवेदन की विषयवस्तु क्या होगी, आवेदन कैसे उपस्थापित किया जायेगा, आवेदन किन आधारों पर नामंजूर होगा, आवेदन नामंजूर न होने की दशा में साक्ष्य लेने और सुनवाई में क्या प्रक्रिया होगी, इस संबंध में आदेश 33 के नियम 2 से 7 में प्रावधान किए गए हैं जिनके मुताबिक वादपत्र के लिए विहित रीति से ही हस्ताक्षरित और सत्यापित आवेदन आवेदक द्वारा या उसके प्राधिकृत अभिकर्ता द्वारा उचित प्रारूप में और सम्यक रूप से उपस्थापित किए जाने पर आवेदक/अभिकर्ता की परीक्षा दावे के गुणागुण और संपत्ति के बारे में की जायेगी एवं नियम 5 के अधीन आवेदन नामंजूर न होने की दशा में आवेदक की निर्धनता के सबूत में और खण्डन में साक्ष्य देने के लिए नियत दिन की कम से कम पूरे दस दिन की सूचना विरोधी पक्षकार और सरकारी प्लीडर को दी जाएगी तदोपरांत ऐसे नियत दिन को नियम 7 के अनुरूप साक्ष्य लेखबद्ध की जाएगी तब न्यायालय आवेदक को निर्धन व्यक्ति के रूप में वाद लाने के लिए अनुज्ञात करेगा या अनुज्ञा देने से इंकार करेगा। आदेश 33 नियम 8 में यह उल्लेख किया गया है कि आवेदन मंजूर किए जाने की दशा में उसे संख्याकित व रजिस्ट्रीकृत किया जाएगा और उस वाद में उसे वाद पत्र समझा जाएगा और अन्य सभी बातों में वह वाद मामूली रीति से संस्थित वाद के रूप में आगे चलेगा, सिवाय इसके कि वादी किसी याचिका, प्लीडर की नियुक्ति या वाद से संसक्त अन्य कार्यवाही के संबंध में कोई न्यायालय फीस (या आदेशिका की तामील के लिए देय फीस) देने का दायी नहीं होगा। म.प्र. शासन द्वारा जारी अधिसूचना में इस प्रकार के कोई प्रावधान जांच बाबत नहीं हैं । ऐसी स्थिति में अधिसूचना के आधार पर न्यायशुल्क मुक्ति हेतु अपनाई जाने वाली प्रक्रिया संहिता के आदेश 33 के अनुरूप होगी या नहीं, इस संबंध में न्यायदृष्टांत रामजी शर्मा विरूद्ध उच्च न्यायालय म.प्र. आदि, ए.आई.आर. 1989 एम.पी. 247

में माननीय म.प्र. उच्च न्यायालय की खण्डपीठ द्वारा विनिश्चित किया जाकर बताया गया है कि संहिता के आदेश 33 के प्रावधानों का स्वरूप अधिनियम की धारा 35 के अन्तर्गत जारी अधिसूचना के प्रावधानों से सर्वथा भिन्न हैं, अतः अधिनियम की धारा 35 के अधीन जारी अधिसूचना के तहत प्रदत्त छूट के बारे में जाँच हेतु संहिता के आदेश 33 में विहित प्रक्रिया के अनुसरण की आवश्यकता नहीं है एवं न्यायालय इस हेतु सक्षम है कि वह ऐसी प्रक्रिया अपनाए जो मामले के शीघ्र निराकरण में सहायक हो। इस तरह अधिनियम की धारा 35 के अधीन जारी अधिसूचना के तहत दी गई छूट हेतु जाँच में ऐसी प्रक्रिया का अनुसरण किया जाना चाहिए जिसका निर्देश विभिन्न न्यायदृष्टांतों से मिलता हो और जो नैसर्गिक न्याय के सिद्धातों के अनुरूप हो तथा मामले के द्रुत निराकरण में सहायक हो।

अधिनियम की धारा 35 के अधीन जारी अधिसूचना एवं संहिता के आदेश 33 के अधीन कार्यवाहियाँ आरम्भ होने के बाद कुछ मुद्दे ऐसे आते हैं जो अपनाई जाने वाली प्रक्रिया से जुड़े होते हैं, साथ ही जिनके बारे में संहिता में या अधिनियम में प्रत्यक्षतः कोई प्रावधान नहीं हैं। ऐसे विषयों पर विषयवार विधिक स्थिति निम्नानुसार हैं –

छूट की पात्रता के संबंध में प्रारम्भिक वाद विषय की आवश्यकता –

न्यायशुल्क मुक्ति के प्रश्न को क्या पृथक से वाद प्रश्न बनाकर तय करना चाहिए या वाद के विचारण के पूर्व इस बिन्दु पर संक्षिप्त जांच कर अग्रसर होना चाहिए ? इस संबंध में संहिता के आदेश 33 के प्रावधानों का अवलोकन करें तो यह स्पष्ट है कि वाद के विचारण के पूर्व ही न्यायशुल्क मुक्ति के बिन्दु पर साक्ष्य लेकर जांच की जाना चाहिए तदोपरांत आवेदन ग्रहण होने पर ही उसे संख्याकित व रजिस्ट्रीकृत किया जाएगा। जहाँ तक अधिनियम की धारा 35 के अधीन जारी अधिसूचना का संबंध हैं, न्यायदृष्टाँत के.एम. निजाम व एक अन्य विरूद्ध यूनियन बैंक ऑफ इंडिया आदि, 1991 एम.पी.एल.जे. 669 के मामले में माननीय उच्च न्यायालय की एकल पीठ द्वारा इस तथ्य को विधिसम्मत ठहराया है कि न्यायशुल्क में छूट का बिन्दु प्रारम्भिक वाद विषय बनाकर तय किया जाना चाहिए। इस मामले में न्यायदृष्टांत संतोषचन्द्र आदि विरूद्ध ज्ञानसुदंर बाई आदि, 1970 जे.एल.जे. 290 (पूर्णपीठ) का अवलंब लिया जाकर यह धारित किया गया है कि वाद के वर्जन, परिसीमा, न्यायशुल्क के प्रश्न संहिता के आदेश 14 के नियम 1 व 2 के अधीन प्रारम्भिक वाद विषय के रूप विनिश्चित करना चाहिए। संतोषचन्द्र वाला यह निर्णय व्यवहार प्रक्रिया संहिता के आदेश 14 नियम 2 में वर्ष 1976 में हुए संशोधन के पूर्व का है और इस संशोधन द्वारा संहिता में प्रावधान किया गया है कि प्रारम्भिक वाद प्रश्न के रूप में विधि संबंधी ऐसे वाद प्रश्न का निराकरण किया जा सकता है जो न्यायालय की अधिकारिता या विधि द्वारा वाद के वर्जन के विषय में हो। न्यायशुल्क छूट का प्रश्न इन दोनों ही बिन्दुओं से संबधित नहीं है अतः इस विधिक स्थिति के परिप्रेक्ष्य में न्यायशुल्क छूट हेतु प्रारम्भिक वाद विषय बनाया जाना विधिसम्मत नहीं है। इस तथ्य की पुष्टि न्यायदृष्टांत आर.एन. राय विरूद्ध शेषनारायण राय आदि, 1990 एम.पी.एल.जे. 528 में माननीय उच्च न्यायालय की एकल पीठ द्वारा किए गए विनिश्चय से भी होती है जिसमें माननीय मध्य प्रदेश उच्च न्यायालय ने अभिनिर्धारित किया है कि आदेश 33 नियम 1 व्य.प्र.सं. एवं न्याय शुल्क अधिनियम की धारा 35 के तहत म.प्र. शासन की अधिसूचना दिनांक 1.4.83 के तहत न्यायशुल्क मुक्ति के संदर्भ में छूट की वांछा की दशा में न्यायालय वाद में अग्रसर होने के पूर्व प्रथमतः यह प्रश्न विनिश्चित करने के लिए बाध्य है कि उसे न्यायशुल्क से छूट (Remition) प्रदान की जाना है या वादी को निर्धन व्यक्ति के रूप में मान्य किया जाना है। इस तरह उक्त दोनों स्थितियों में न्यायाशुल्क से छूट के बिन्दू व का विनिश्चय दावे में अन्य कार्यवाही के लिए अग्रसर होने के पूर्व ही (अर्थात लिखित कथन और वाद विषय विरचना के पूर्व) कर लेना चाहिए।

कलेक्टर को सूचना पत्र –

के. एम. निजाम (पूर्वोक्त) के न्यायदृष्टांत में रामजी शर्मा (पूर्वोक्त) के मामले में किए गए विनिश्चय के प्रकाश में यह कहा गया है कि अधिनियम की धारा 35 के अधीन दी गई छूट हेतु सम्पादित जाँच में कलेक्टर को सूचनापत्र देना अनिवार्य हैं। वस्तुतः रामजी शर्मा के मामले में ऐसा कोई विनिश्चय नहीं किया गया है वरन मात्र मत व्यक्त किया गया है तथा इस वस्तुस्थिति को न्यायदृष्टांत सत्यनारायण जायसवाल विरूद्ध प्रेमलता सेवक, 2000 (2) एम. पी. एल. जे. 46 में भी स्पष्ट किया गया है। इन न्यायदृष्टांतों से यह स्थिति स्पष्ट हो जाती है कि धारा 35 के अधीन न्यायशुल्क से छूट की जाँच में कलेक्टर को सूचना पत्र भेजना विधिक अनिवार्यता नहीं है और चूंकि न्यायशुल्क की छूट से राज्य का राजस्व प्रतिकूलतः प्रभावित होता है अतः विचारण न्यायालय को यह अधिकारिता है कि वह न्यायशुल्क छूट विषयक जांच में कलेक्टर को सूचना दे तथा नैसर्गिक न्याय के सिद्धांतों के अनुरूप ऐसी छूट के विरोध में कलेक्टर को भी सुने और कलेक्टर यदि खण्डन में साक्ष्य प्रस्तुत करता है तो उस पर भी विचार किया जाना चाहिए।

प्रतिदावा एवं मुजरा में प्रयोज्यता –

संहिता के आदेश 33 के नियम 17 के अनुरूप अकिंचन व्यक्ति द्वारा मुजरा या प्रतिदावा पेश किया जा सकता है और निर्धन व्यक्ति के रूप में वह न्यायशुल्क दिए बगैर मुजरा या प्रतिदावा चला सकता है बशर्ते जांच पर उसका निर्धन व्यक्ति के रूप में मुजरा या प्रतिदावा चलाने का आवेदन आदेश 33 के नियम 8 के अधीन ग्रहण कर लिया जावे किंतु अधिनियम की धारा 35 के अधीन जारी अधिसूचना के अंतर्गत प्रतिदावा पर देय न्यायशुल्क में छूट की मांग अनुज्ञेय नहीं है जैसा कि न्यायदृष्टांत मेसर्स टॉवर इंजी. वर्क्स विरूद्ध यूनियन बैंक ऑफ इंडिया व अन्य, 2003 (4) एम.पी.एच.टी. 241 में माननीय मध्यप्रदेश उच्च न्यायालय द्वारा व्यक्त किया गया है कि यद्यपि आदेश 8 नियम 6–ए (4) व्यवहार प्रक्रिया संहिता प्रावधित करता है कि प्रतिदावे के संबंध में वाद के सभी नियम प्रयोज्य होंगे लेकिन इसका अर्थ यह नहीं है कि अधिसूचना दिनांकित 1.4.83 द्वारा वाद पत्र पर न्यायशुल्क के विषय में दी गई छूट प्रतिदावे के लिए भी प्रयोज्य होगी।

अपील में प्रयोज्यता –

माननीय उच्च न्यायालय की एकल पीठ ने जगदम्बे निवाड़ कम्पनी विरूद्ध पंजाब नेशनल बैंक, 1992 जे.एल.जे. 10 के मामले में यह निर्णीत किया है कि अधिसूचना के अधीन दी गई छूट का लाभ अपीलों पर भी समान रूप से लागू होता है किन्तु माननीय उच्च न्यायालय की खण्डपीठ द्वारा न्यायदृष्टांत रामस्वरूप वशिष्ट विरूद्ध म.प्र.राज्य, 1991 (2) एम.पी.जे.आर. 166 में एवं न्यायदृष्टांत चन्दूलाल घासीराम विरूद्ध सेन्ट्रल बैंक ऑफ इंडिया, 1992 एम.पी.एल.जे. 381 में निर्णीत किया गया है कि अधिनियम की धारा 35 के अधीन प्रकाशित अधिसूचना के तहत दी गई छूट का लाभ अपील ज्ञापन पर अनुज्ञेय नहीं है। इस तथ्य की सम्पुष्टि माननीय शीर्षस्थ न्यायालय द्वारा न्यायदृष्टांत मोहम्मद महीबुल्ला विरूद्ध सेठ चमनलाल, 1992 (1) एम.पी. वीकली नोट्स 5 (एस.सी.) में किये गए विनिश्चय से भी होती है। इसके विपरीत संहिता के आदेश 33 का लाभ पक्षकार अपील में भी उठा सकता है जैसा कि न्यायदृष्टांत आर.व्ही.देव. उर्फ आर. वासुदेवन नायर विरूद्ध चीफ सेक्रेटरी, गवर्नमेंट ऑफ केरल व अन्य, ए.आई.आर. 2007 सु.को. 2698 में भी माननीय उच्चतम न्यायालय द्वारा बताया गया हैं।

इस तरह अधिनियम की धारा 35 के अधीन जारी अधिसूचना के तहत न्यायशुल्क से छूट का लाभ अपील पर प्रयोज्य नहीं है जबकि संहिता के आदेश 33 के अधीन दी गई छूट अपील में भी प्रयोज्य है।

विधिक प्रतिनिधियों के बारे में छूट बाबत स्थिति –

न्यायशुल्क से छूट किसी व्यक्ति का व्यक्तिगत अधिकार है अतः आदेश 33 के तहत एवं अधिनियम की धारा 35 के अधीन जारी अधिसूचना के तहत न्यायशुल्क के संदाय से निर्मुक्ति वादी की मृत्यु हो जाने की दशा में उसके स्थान पर प्रतिस्थापित विधिक प्रतिनिधियों को तभी प्राप्त होगी जबकि वे भी आदेश 33 नियम 1 के अधीन 'निर्धन' व्यक्ति या संबंधित अधिसूचना की परिधि में, जैसी भी यथास्थिति हो, आते हों। अधिसूचना के तहत ऐसी छूट के बिन्दु पर न्यायदृष्टांत मांगीलाल विरूद्ध रमेशचन्द्र, 2003 (1) एम.पी.एल.जे. 290 में विस्तृत विमर्श करते हुए एकलपीठ द्वारा यह अभिनिर्धारित किया गया है कि ऐसी छूट 'वाद' के लिए न होकर 'व्यक्ति' के लिए है अतः मृत वादी के विधिक प्रतिनिधि छूट तभी पा सकेंगे जब वे ऐसी पात्रता हेतु विहित शर्तों को पूरा करते हों। न्यायदृष्टांत मु. जानकीबाई व अन्य विरूद्ध मु. भिकाई व एक अन्य, ए.आई.आर. 1933 नागपुर 334 में यह धारित किया गया है कि अकिंचन वादी की मृत्यु की दशा में उसका विधिक प्रतिनिधि अकिंचन के रूप में वाद की कार्यवाही केवल तभी आगे चला सकता है जब उसके द्वारा नवीन आवेदन इस संबंध में दिया जाए कि वह अकिंचन है या उसके द्वारा न्यायशुल्क अदा कर दिया जाए। न्यायदृष्टांत विजय प्रताप सिंह व एक अन्य विरूद्ध दुखहरन नाथ सिंह व अन्य, ए.आई.आर. 1962 सु.को. 941 एवं सरस्वतेत्वा व अन्य विरूद्ध शिवरूद्रप्पा चनप्पा किन्नाला व अन्य, ए.आई.आर. 1981 कर्नाटक 8 भी आदेश 33 के अधीन विधिक प्रतिनिधि को पात्रता होने पर उक्त जैसी छूट प्राप्त होने के बारे में अवलोकनीय हैं।

उक्त समग्र विधिक स्थिति के आलोक में यह निष्कर्ष निकलता है कि म.प्र. शासन के नोटिफिकेशन दिनांक 1.4.83 में कुछ विशेष वर्गों के व्यक्तियों को न्यायशुल्क से स्थाई रूप से मुक्ति प्रदान की गयी है तथा यह प्रतिदावा पर लागू नहीं होती है। ऐसी छूट दिए जाने के संबंध में प्रक्रिया वह अपनायी जाना चाहिए जो नैसर्गिक न्याय के सिद्धांतों के अनुरूप व मामले के द्रुत निराकरण में सहायक हो। जबकि आदेश 33 व्य.प्र.सं. के प्रावधान वर्ग विशेष के व्यक्तियों के लिए न होकर ऐसे समस्त व्यक्तियों के लिए है जो निर्धन व्यक्ति की श्रेणी में आते हैं एवं यह छूट प्रतिदावा और मुजरा की दशाओं में भी प्रयोज्य है। आदेश 33 के तहत न्यायशुल्क मुक्ति की छूट मात्र दावा प्रस्तुति के संदर्भ में दी गयी है जिसके लिए प्रक्रिया आदेश 33 के नियम 2 से 7 में विहित की गयी है। आदेश 33 के तहत दी गयी छूट स्थायी प्रकृति की नहीं है और दावे के निराकरण के पश्चात डिक्री के अनुसार शासन को वह न्यायशुल्क संबंधित व्यक्ति से वसूलने का अधिकार है। म.प्र. शासन के नोटिफिकेशन में इस प्रकार की कोई स्थिति नहीं है अर्थात न्यायालय द्वारा एक बार नोटिफिकेशन के तहत न्यायशुल्क से मुक्ति प्रदान कर दिये जाने की दशा में पुनः न्यायशुल्क अदा किये जाने हेतु कोई आदेश दिये जाने की स्थिति नहीं होगी। इसके अलावा आदेश 33 नियम 10 के तहत निर्धन व्यक्ति के वाद में सफल हो जाने की दशा में शासन को डिक्री के मान से न्यायशुल्क वसूलने का अधिकार होगा और यह न्यायशुल्क वाद की विषय वस्तु पर प्रथम भार होगा। इसी प्रकार आदेश 33 नियम 11 के तहत निर्धन व्यक्ति के वाद में असफल हो जाने या प्रत्याहरित करने की दशा में न्यायालय वादी या सह वादी के रूप में जोड़े गए किसी व्यक्ति को न्याय शुल्क अदा करने का आदेश देगा।

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SCOPE AND LIMITATIONS OF REMAND OF THE CASE BY FIRST APPELLATE COURT UNDER THE CODE OF CIVIL PROCEDURE, 1908

Judicial Officers
District Betul

There is always a possibility of some error in any order or judgment in respect of fact, law and procedure. In order to remove such error concerned with fact, law and procedure, provision for appeal has been made by the Statute. So, appeal is a statutory right as imparting justice is the main duty of the Court and it is not possible unless and until the Court has enough power to regulate the procedure of impartiality of justice.

Section 96 of CPC contains provision of an appeal from original decree. Section 107 of CPC describes powers of the Appellate Court. According to this Section, an Appellate Court shall have power (a) to determine a case finally (b) to remand a case (c) to frame issues and refer them for trial (d) to take additional evidence or to require such evidence to be taken. Subject to aforesaid powers, the Appellate Court shall have the same powers and perform nearly the same duties as are conferred and imposed by this Code and Courts of original jurisdiction in respect of suits instituted therein. But the powers of Appellate Court to remand the case u/s 107 of CPC is regulated by Order 41 Rules 23 to 27 of CPC.

According to Order 41 Rule 23 CPC where the Court, from whose decree, an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal or where the Appellate Court is reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, the Appellate Court may by order remand the case and further direct what issue or issues shall be tried in the case so remanded, and whether any further evidence shall or shall not be taken after remand. But the term "preliminary point" used under Rule 23 CPC does not mean the same thing as "preliminary issue." A "preliminary point" means a point, the determination of which enables the trial Court to pass a decree and relieves it from the necessity of determining other points involved in the suit. This expression is not confined to point of law or mixed question of law and fact.

According Order 41 Rule 23-A CPC where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23 CPC. This provision was inserted by Amendment Act, 1976. Rule 23-A CPC extends the ambit of powers of remand and enables the Appellate Court to order re-trial

of a suit disposed of otherwise than on a preliminary point. After this amendment, the Appellate Court is authorised to remand a suit on these three grounds: (i) if the preliminary issue on which the suit is decided fails; (ii) if some important issue, left undecided, calls for a proper decision; (iii) interest of justice requires the entire suit to be tried again. The Appellate Court cannot make order of remand without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to reverse or set aside the judgement and decree. It has to consider the evidence on record and then arrive at a conclusion whether the finding recorded by trial Court cannot be supported on evidence on record. The Appellate Court ought not to have reversed the judgment of the Court merely for the purpose of remanding the case. Remand should be ordered when the case falls within the four corners of Order 41 Rule 23 or Rule 23-A of CPC and final judgment cannot be rendered by resorting to the provisions of Order 41 Rules 24 & 25 CPC. Necessity of remanding a case arises if a party was not given proper opportunity to adduce evidence. It is well settled that where a suit has been disposed of by a trial Court on all issues, the Appellate Court cannot remand the case for fresh disposal of suit, unless it reverses the decree of the trial Court.

The Apex Court in the case of *Nedunuri Kameshwaramma v. Sampati Subba Rao, AIR 1963 SC 884* held that when issues are framed on certain questions and parties going to trial fully knowing rival contentions and also leading evidence, remand for enabling plaintiff to amend the plaint is not justified.

In the case of *K. Krishna Reddy and others v. The Special Dy. Collector, Land Acquisition Unit, II, CMD Karim Nagar, A.P., AIR 1988 SC 2123,* the Apex Court held that the appellate power of remand ought not to be exercised lightly. It shall not be resorted to unless the award is wholly unintelligible. It shall not be exercised unless there is total lack of evidence.

In the case of *Ashwinikumar K. Patel v. Upendra J. Patel, AIR 1999 SC 1125,* the Apex Court held that case ordinarily should not be remanded by Appellate Court because in its view, the reasoning put forth by the lower Court in some aspects was wrong. Such remand orders lead to unnecessary delay and cause prejudice to the parties to the case.

In another case P. *Purushottam Reddy and another v. M/s Pratap Steels Ltd., AIR 2002 SC 771,* the Apex Court held that, it is only in exceptional cases where the Court may now exercise the power of remand *de hors* Rule 23 and 23-A CPC. To wit the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 21 CPC, it may set aside the same ad send the matter back for re-writing the judgment so as to protect the valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25CPC. An unwarranted

order of remand gives the litigation an underserved lease of life, and therefore, must be avoided.

In the case of *Sunder Singh v. Rajaram and another, AIR 1991 MP 59,* Hon'ble High Court laid down that where relevant evidence is on record, the case should not be remanded after allowing amendment.

Where the evidence on record is sufficient to dispose of the appeal, procedure under Rule 24 CPC is to be followed and endeavour should be made to dispose of appeal on the basis of existing material on record, even though new issue may be framed. Order 41 Rule 25 CPC contemplates that the Appellate Court need not set aside the entire judgment and while remanding the matter to trial Court, it may refer certain issues to the trial Court, so that appropriate findings can be submitted by trial Court and thereafter, the entire matter can be disposed of by the Appellate Court. The spirit behind Rule 25 is that if something has gone wrong due to procedural error on the part of trial Court, the affected party should not be prejudiced for that.

The power of remand should be exercised sparingly. Endeavour of Appellate Court should be to dispose of the case itself. Remanding the case leads to delay in adjudication. To order re-trial of case is a serious matter and may mean considerable waste of public time. Such an order can be passed only in exceptional cases as, for example, where there had been no real trial of the dispute and no complete or effectual adjudication of the proceeding and the party complaining has suffered material prejudice on that count. Remand is not meant to a party to litigate. The order of remand was also unwarranted as the decision of the issue in question one way or the other would not have made any difference to the substance of the matter or the nature of controversy.

When all evidence was taken but certain issues were not decided, the proper order is to call for finding under Rule 25 CPC. In the case of *Peria Nachi Muthu Gounder and others v. Raju Thevar, AIR 1985 SC 821,* the Apex Court declined to remand the case at such stage to give opportunity to appellants to produce material specially when there was no specific plea raised by the appellants in written statement.

In the case of *Jagdish Ram v. Tirath Ram, AIR 1983 Punjab & Haryana 426,* Hon'ble High Court has held that objection regarding valuation and court fee should be decided by the Appellate Court and order of remand for correct valuation for the purposes of court fee and jurisdiction is illegal.

A combined reading of Order 41 Rules 23-A, 24 and 25 CPC makes it clear that when an Appellate Court after setting aside judgment, considers a re-trial to be necessary, it may follow the procedure under Order 41 Rule 23-A CPC. Where, however, the evidence on record is sufficient to dispose of the appeal, procedure under Order 41 Rule 24 CPC is to be followed and endeavour

is to be made by the Appellate Court to dispose of the appeal on the basis of existing material on record even though new issue may be framed. On the other hand, Order 41 Rule 25 CPC contemplates that the Appellate Court need not set aside the entire judgment and while remanding the matter to the trial Court, it may refer certain issues to the trial Court so that appropriate finding can be submitted by the trial Court and thereafter, the entire matter can be disposed of by the Appellate Court.

In view of the aforesaid discussion, the matter may be summarised as expressed by Hon'ble High Court of Madhya Pradesh in the case of *Shri Deo Raghunathji Bada Mandir, Bina v. Prahlad Singh and another, 2003 MPLJ SN 27* that the power of remand should not be ordinarily exercised merely because in the view of the Appellate Court reasoning of the trial Court in some aspect is wrong where all evidence has been duly placed before the trial Court and it has decided the suit on merits on several issues which were framed, the Appellate Court has no power to remand. The order of remand retards the progress of the case and puts it in a reverse gear. If the Appellate Court is of the view that the finding of the trial Court is erroneous or faulty, it has the power to give its own findings.

INSTITUTIONAL SUPPLEMENT

On the aforesaid subject, observations made in the following cases are also important to understand the subject comprehensively and to exercise the powers under the provision as per the spirit of law:

(1) In proper case, a suitable direction may be made by the Appellate Court. (*V.R. Subramanyam v. B. Thayappa, AIR 1966 SC 1034*)

But It has been cautioned that the Appellate Court should give no extra direction while the case is remanded for retrial. After remand the authority should decide the case in accordance with law and law must take its own course. (*Kanchusthambam Satyanarayana v. Namuduri Achyutaramayya, AIR 2005 SC 2010*).

(2) When the Appellate Court remands a case with a direction that the findings of the lower Court are set aside, the direction refer to the findings considered by it and on which it differed from the lower Court. Hence it cannot be presumed that all the finding of the lower Court are necessarily set aside. The findings which the Appellate Court was not called upon to consider cannot be deemed to be set aside. (*Mohan Lal v. Anandibai, AIR 1971 SC 2177 & Paper Products Limited v. Commissioner of Central Excise, Mumbai, 2007 AIR SCW 4775*)

(3) The remittal of the whole appeal, where finding on specific point is required, is illegal. (*P. Venkateswarulu v. The Motor & General Traders, AIR 1975 SC 1409* and *Bhuwan Singh v. Kallu Singh, 1982 MPWN 156*)

(4) Where appointment of Commissioner was held necessary for measurement of plot, the whole case was not found proper to be remanded. [*Saraswati Bai v. Shushila Devi, 1982 (2) MPWN 28*]

(5) When an amendment is allowed, the case should be remanded for finding on additional issue. Whole remand is wrong. [*Onkarlal v.Rambhajmal, 1982 MPWN 184 and Ramesh Singh v. Vaijanti Bai, 2004 (1) JLJ 391.*]

(6) If a party could not produce the evidence due to wrong order or procedure adopted by the Court, an order of remand can be made. Similarly, if no proper opportunity was given to lead evidence and suit was illegally dismissed, a remand for trial is legally justified. (*Jaijai Bai v. Purushottam Das, 1984 MPWN 142*]

(7) Where a party deliberately did not produce any evidence, remand should not be allowed. (*Praago v. Vajanti, 1985 MPWN 316*)

(8) If relevant evidence is already on record, a remand for incorporating new plea is not necessary, *albeit* amendment is allowed in appeal. (*Sunder Singh v. Rajaram, AIR 1991 MP 59*)

(9) A case cannot be remanded and that too without going into merit, on the basis of two interlocutory applications (one for amendment and another for issuance of commission) were wrongly disallowed. *[Harishankar v. Shrilal, 1993 (2) MPWN 144]*

(10) The power of remand cannot be exercised to fill up the lacuna of one or the other party. It can be exercised for curing radical defect resulting in miscarriage of justice in trial. (*Smt. Umrao Bai and others v. Sardarilal Khatri, AIR 1997 MP 62*)

(11) Where documents are admitted as additional evidence, the Appellate Court either can take evidence itself or may remand the case under Order 41 Rule 23-A for full trial. [*Sheikh Bappu v. Radhey Krishan Dubey, 1997 (2) MPWN 229*]

At the time of passing remand order under Order 41 Rule 23 of CPC, the Appellate Court is under an obligation to pass an order about refund of court fee in terms of Section 13 of Court Fees Act, 1870 but when remand order is passed under Order 41 Rule 25, no question of refund of court fee arises as the appeal is still pending.

When an appeal is disposed of under Order 41 Rule 23-A, the refund of court fee is ordinarily not to be ordered. [*Ramlal v. State of M.P., 2002 (3) MPHT 400 (DB)*]

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विधिक समस्याएँ एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ 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)

Whether 'Trade Mark' and 'Goodwill' are distinct things or former is a part of the latter?

This question relates to Intellectual Property Rights and can be answered according to practice and provisions of Merkantile Law, especially Trade Marks Act, 1958 or Trade Marks Act, 1999.

Recently, the aforesaid question was dealt with by the Division Bench of Madhya Pradesh High Court in the case of *Kale Khan Mohd. Hanif & Ors. v. Mohd. Iqbal, AIR 2009 MP 84* and the question is answered as that the concept of 'trade mark' is different from that of 'good will'. There is a marked distinction between 'trade mark' and 'goodwill' and can be valued and assigned separately. Answering the question Hon'ble the High Court has referred the law laid down in *Sohan Lal v. Amin Chand and Sons, AIR 1973 SC 2572, Sumant Prasad Jain v. Sheojanan Prasad, AIR 1972 SC 2488, Laxmikant V. Patel v. Chetanbhai Shah, AIR 2002 SC 275, Ramnik Vallabhdas Madhvani v. Taraben Pravinlal Madhvani, AIR 2004 SC 1084, Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, AIR 2006 SC 3304, State of Rajasthan v. M/s Bundi Electric Supply Co. Ltd., Bundi, AIR 1970 Raj 36,* inter alia.

In order to understand the concept of 'goodwill' and 'trade mark' reference of the Apex Court Judgments in the cases of *Ramnik Vallabhdas Madhvani* (supra) and *Ramdev Food Products (P) Ltd.*(supra) will be sufficient. The Apex Court in the case of *Ramnik Vallabhdas Madhvani* (supra) in paragraphs 67, 68 and 69 explained the concept of 'goodwill' as under:

> "67. 'Goodwill', as Lord Mac Naghten described is "a thing very easy to describe, very difficult to decline", in *IRC v. Muller & Co.* (All ER p. 416 G).
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> 68. The term "goodwill" signifies the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than a mere chance or probability of old

customers maintaining their connection, though this is a material part of the practical fruits. "Goodwill" may be the whole advantage belonging to the firm, its reputation as also connection thereof. It thus, means that every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business whether connected with the premises of business or its name or style, everything connected with or carrying the benefit of the business.

69. In *Halsbury's Laws of England,* 4th Edn. Vol. 35, at pp.114-15, the law is stated in the following terms:

"201. Goodwill generally, right to use name; sale to a partner.....The goodwill of the business carried on by a partnership forms part of the assets to be realized on distribution, if the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners as still being partners with him. If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the firm name; and where a business is carried on under name, solely or with any addition, of an outgoing partner who is still living and not banking, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned. On dissolution, a partner may advertise that he is no longer connected with a periodical that the firm publishes.

Where the goodwill becomes on dissolution the property of one of the partners (either by purchase in the ordinary way or pursuant to a provision in the articles), the outgoing partner or partners may not carry on a similar business in the name of the old firm, and may not solicit old customers."

Similarly, the concept of 'trademark' can be understood from judgment of the Apex Court in *Ramdev Food Products (P) Ltd.* (supra), in which their Lordships have expressed thus:

"51. In *Laxmikant V. Patel* (supra), it was stated:

"10. A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by Courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit anyone to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in fusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

52. A trade mark is the property of the manufacturer. The purpose of a trade mark is to establish a connection between the goods and the source thereof which would suggest the quality of goods. If the trade mark in registered, indisputably the user thereof by a person who is not otherwise authorized to do so would constitute infringement. Section 21 of the 1958 Act provides that where an application for registration is filed, the same can be opposed. Ordinarily under the law and, as noticed hereinbefore, there can only be one mark, one source or one proprietor. Ordinarily, again the right to user of a trade mark cannot have two origins. The first respondent herein is a rival trader of the appellant company. It did not in law have any right to use the said trade mark, save and except to reason of the terms contained in the MOU or continuous user. It is well settled that when defences in regard to right of user are set up, the onus would be on the person who has taken the said plea. It is equally well settled that a person cannot use a mark which would be deceptively similar to

that of the registered trade mark. Registration of trade marks is envisaged to remove any confusion in the minds of the consumers."

To understand the concept of 'trade mark and 'goodwill', it would also be appropriate to refer the provisions of Section 37 and 38 of Trade Marks Act, 1958 which are similar to the provisions of Sections 38 and 39 of the Trade Marks Act, 1999.

> *"37. Assignability and transmissibility of registered trade marks* – Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assigned and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods in respect of which the trade mark is registered or of some only of those goods.
>
> *38. Assignability and transmissibility of unregistered trade marks* – (1) An unregistered trade mark shall not be assignable or transmissible except along with the goodwill of the business concerned.

(2) Notwithstanding anything contained in sub-section (1), an unregistered trade mark may be assigned or transmitted otherwise than along with the goodwill of the business concerned if –

(a) at the time of assignment or transmission of the unregistered trade mark, it is used in the same business as a registered trade mark; and

(b) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark; and

(c) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted."

In view of the aforesaid discussion, the question can be answered as that there is a marked distinction between 'trade mark' and 'goodwill'.

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नोट :– स्तंभ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे – **संचालक**

PART - II

NOTES ON IMPORTANT JUDGMENTS

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

Default in depositing rent, consequences of – On the date of institution of the suit, tenants/defendants were in arrears of rent – Even thereafter they were inconsistent in depositing rent – Although the Trial Court recorded a finding that the tenants/defendants were in arrears of rent, yet it rejected the suit on the ground mentioned under Section 12 (1) (a) of the Act – The First Appellate Court found that tenants/appellants have committed several defaults in depositing the rent even before itself (i.e. before the First Appellate Court) – Tenants/Appellants did not file any application for condonation of delay as required by Section 13 (1) of the Act – The First Appellate Court allowed the suit on the ground mentioned in Section 12 (1) (a) of the Act – In second appeal, the tenants/appellants filed application for condonation of delay before the High Court – Held, apellants have been defaulter in depositing rent repeatedly and did not file any application for condonation before the First Appellate Court – Even they did not file any such application along with the memo of appeal before the High Court – Therefore, the First Appellate Court rightly recorded a finding that tenants/appellants were liable to be evicted on the ground mentioned under Section 12 (1) (a) of the Act – Further held, as far as the application for condonation of delay filed by tenants/appellants is concerned, it cannot be entertained after lapse of a long period of time of committing the default.

Rajendra Kumar and others v. Kasturi Bai and others

Judgment dated 06.01.2009 passed by the High Court in S.A No. 313 of 2002, reported in 2009 (1) MPLJ 413

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77. **ACCOMODATION CONTROL ACT 1961 (M.P.) – Sections 12(1) (e) (h) and 12 (7) and 18**

Whether in view of Section 18 of the M.P. Accommodation Control Act, 1961, the decree under Section 12 (1) (e) and (h) can be passed and if passed, whether both can co-exist? Held, Yes – Further held – When a suit is filed by a landlord under Section 12(1) (e) and (h) that he required the accommodation for his own use and also states that he wants to demolish and reconstruct the building – If he establishes case for eviction under Section 12(1)(e), then he will be entitled to an order under Section 12(1)(e) and averments relating to demolition and reconstruction will be constructed as a part of the ground under Section 12 (1) (e) – In such event, it will be immaterial whether he

demolishes the building or not – When a court grants an eviction under clause (e), it shall dispose of the claim under Clause (h) as having become infructuous or rendered redundant – When granting a decree under Section 12(1)(e), the question of applying section 12(7) or section 18 does not arise – On the other hand, if the ground under section 12(1)(e) is rejected, then the Court may consider the ground under Section 12(1)(h) independently subject to section 12(7) and section 18 of the Act.

Taradevi Gupta (Smt.) & Ors. v. Dr. Deepak Jain

Judgment dated 10.07.2008 passed by the High Court in S.A No. 808 of 2006, reported in 2009 (I) MPJR 209

Held:

Learned counsel for appellants submitted that the Court below erred in granting a decree under Section 12 (1) (e) and (h) of the Act. Section 18 of the Act specifically provides re-entry of the tenant in the premises after repairs and rebuilding. The trial Court granted a decree under Section 12 (1) (h) of the Act which specifically provides re-entry in the premises after the reconstruction while under Section 12 (1) (e) of the Act, there is no such provision. Aforesaid both grounds are conflicting to each other and such decree could not have been passed by the Court below. It is further submitted that in case, premises are required for reconstruction then a decree under Section12 (1) (e) of the Act is redundant, as such premises cannot be used for residential purposes because the plaintiff/respondent sought eviction for reconstruction of the premises. It is submitted that judgment and decree passed by the Court below may be set aside and the suit of the plaintiff/respondent may be dismissed.

It is submitted by the appellants that though there is a decree under section 12(1)(e) and (h), but both cannot co-exist as under Section 12(1)(e), the suit accommodation was required for the residence of the family while under Section 12(1)(h) of the Act, the suit house was required for re-building and thereafter the appellants were entitled for re-entry under Section 18 of the Act. But this controversy was considered by the Division Bench of this Court in *T.R.Sah v.Smt. Kundan Kaur & Ors. 2006 (1) JLJ 20* wherein the Division Bench considering the question held that such a decree can be passed. When a suit is filed by a landlord under Section 12(1) (e) and (h) that he required the accommodation for his own use and also states that he wants to demolish and reconstruct the building. If he establishes case for eviction under Section 12(1)(e), then he will be entitled to an order under Section 12(1)(e) and averments relating to demolition and reconstruction will be constructed as a part of the ground under Section 12 (1) (e). In such event, it will be immaterial whether he demolishes the building or not. When a court grants an eviction under clause (e), it shall dispose of the claim under Clause (h) as having become infructuous or rendered redundant. When granting a decree under Section 12(1)(e), the question of applying section 12(7) or section 18 does not arise. On the other hand, if the ground under

section 12(1)(e) is rejected, then the Court may consider the ground under Section 12(1)(h) independently subject to section 12(7) and section 18 of the Act.

In view of settled position in *T.R. Sah* (supra), in the opinion of this Court, the question of law as framed in the case does not arise and the Court below have rightly decreed the suit of plaintiff/respondent under Section 12(1) (e) of the Act. So far as section 12(1)(h) is concerned., in view of law laid down by the Division bench, it has rendered redundant.

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***78. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f)**

(i) Suit for eviction on ground of bonafide need for starting business – Availability of alternative suitable accommodation, determination of – Mere availability of another accommodation does not disqualify landlord from claiming eviction when that accommodation is not suitable for starting business.

(ii) The lower Appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility unless satisfactory reasons for doing so have been given by the Court.

Namamal v. Prakashchand Jain

Judgment dated 06.01.2009 passed by the High Court in S.A. No. 425 of 2005, reported in 2009 (1) MPLJ 313

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79. ACCOMMODATION CONTROL ACT, 1961 – Section 12 (1) (f)

Suit for eviction on ground of bonafide requirement – Plaintiff is not only required to establish bonafide need but he must also show that he has no other reasonably suitable non-residential accommodation of his own in his occupation – In absence of pleadings and evidence to that effect, no decree for eviction can be passed on ground of bonafide requirement.

Raj Kumar Jain v. Smt. Usha Mukhariya

Judgment dated 11.11.2008 passed by the High Court in S.A No. 973 of 2005, reported in 2009 (1) MPLJ 343

Held:

It is clearly apparent from the record that plaintiff has failed to plead and prove that she had no other alternative suitable accommodation or that the vacant accommodation available with her.

I am of the considered opinion that in the total absence of any pleading and proof that there was no other reasonably suitable accommodation for non-residential purposes, which is an essential requirement of section 12(1) (f) of the Act, passed by the Courts below, are not sustainable.

The aforesaid conclusion, recorded by me, is based on the judgment of the Supreme Court in the case of *Hasmat Rai and another v. Raghunath Prasad, 1981 MPLJ (SC) 610 = AIR 1981 SC 1711.* The Supreme Court, while dealing with

somewhat similar case in which the landlord seeking eviction under section 12(1)(f) of the Act, had acquired possession of part of the same premises, has observed as follows in paras 6, 15 and 16 :-

"6. Section 12(1)(f) under which eviction of the tenant is sought, by the landlord reads as under :-

"that the accommodation let for non-residential purposes is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned."

In order to be able to seek eviction of a tenant under section 12(1)(f) the landlord has not only to establish that he bona fide requires the accommodation let to the tenant for non-residential purposes for the purpose of continuing or starting his business but he must further show that the landlord has no other reasonable suitably non-residential accommodation of his own in his occupation in the city or the town concerned.

15. The landlord wants to start his business as Chemists and Druggists. On his own admission he has in his possession a shop admeasuring 18'x 90' plus 7'x68' forming part of the same building the remaining small portion of 7'x22' is occupied by tenant. The landlord has not stated that so much space with 18' frontage is not reasonably suitable for starting his business as Chemists and Druggist. In that view of the matter the plaintiff's suit for eviction on the ground mentioned in section 12(1)(f) must fail and this is being done by not disturbing any finding of fact but relying upon the admission of the plaintiff himself.

16. Section 12(1)(e) specifically provides for a landlord obtaining possession of a building let for residential purposes if he bona fide requires the same for his own use and occupation. But there is an additional condition he must fulfil namely he must further show that he has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned. Utter silence of the landlord on this point would be a compelling circumstance for the Court not to go in search for some imaginary requirement of the landlord of accommodation for his residence. In the context of these facts the trial Court

and the first Appellate Court committed a manifest error apparent on the record by upholding the plaintiff's case by awarding possession also on the ground neither pleaded nor suggested the landlord must have been quite aware that he cannot obtain possession of any accommodation for his residence. Therefore, the finding of the High Court and the Courts subordinate to it that the respondent-landlord requires possession of the whole of the building including the one occupied by the tenant for starting his business as Chemists & Druggists as also for his residence is vitiated beyond repair. Once impermissible approach to the facts of the case on hand is avoided although facts found by the Courts are accepted as sacrosanct yet in view of the incontrovertible position that emerges from the evidence itself that the landlord has acquired major portion of the building in which he can start his business as Chemists and Druggists he is not entitled to an inch of an extra space under section 12(1)(f) of the Act."

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*80. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7 & 8**
When Sections 7 and 8 of the Act refer to the existence of an arbitration agreement between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject-matter of the suit – It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of Sections 7 and 8 of the Act, should satisfy two conditions – Firstly, it should be between the parties to the dispute – Secondly, it should relate to or be applicable to the dispute.
When a defendant invokes Section 8 of the Act by alleging existence of an arbitration agreement, he should establish that such arbitration agreement related to, or is applicable to, the suit transaction/contract – The existence of an arbitration agreement with reference to some other transaction/contract to which the plaintiff was or is a party, unconnected with the transactions or contracts to which a suit relates, cannot be considered as existence of an "arbitration agreement" in regard to the suit transactions/contracts.
Yogi Agarwal v. Inspiration Clothes & U and others
Judgment dated 01.12.2008 passed by the Supreme Court in SLP (C) No. 29333 of 2008, reported in (2009) 1 SCC 372

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81. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7 & 45**
Existence of Charter Party Agreement – Can be inferred from exchange of letters and information through fax, e-mail, etc.

Application for appointment of arbitrator u/s 45 of the Act – Original agreement need not be filed – Objection as to non-existence of Charter Party Agreement can be raised before Arbitral Tribunal.

M/s Shakti Bhog Foods Limited v. Kola Shipping Limited

Judgment dated 23.09.2008 passed by the Supreme Court in Civil Appeal No. 5796 of 2008, reported in AIR 2009 SC 12

Held:

An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and furthermore an arbitration is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. So from the provisions of Section 7, it is clear that a Charter Party Agreement need not be in writing signed by both parties and this could as well be made out from the acts of the parties to the agreement by way of their exchange of letters and information through fax, e-mails etc. The letter/faxes or mails or any other communications need not contain the arbitration clause in the absence of any agreement. The expressions of Section 7 do no specify any requirement to this effect.

In the instant case, the first page of the Charter party Agreement containing arbitration clause was signed by the concerned party and the subsequent correspondence between the parties also led to the conclusion that there was indeed a Charter Party Agreement, it was held that there existed a valid arbitration agreement between the parties.

The appellant has also contended that under Section 8 of the Act it is necessary for the party making an application to refer the matter to arbitration, to provide the original arbitration agreement or a duly certified copy of the same. But this contention has no legs to stand upon in the context of the present appeal. The present appeal has been filed against the impugned judgment of the Andhra Pradesh High Court affirming the order of the trial court allowing the application filed by the respondent herein under Section 45 of the Act. We may note that Section 45 of the Act deals with matters relating to international commercial arbitrations and Section 8 of the same does not have any relevance in the present appeal. Section 45 of the Act does not require the respondent to file the original of the Charter Party Agreement. In any event, the appellant had not questioned the authenticity of the Charter Party Agreement filed by the respondent and had in fact admitted the signature appearing on the first page of the same to have been made on its behalf. The Courts below had thoroughly examined the said Charter Party Agreement and had passed their orders after considering the clauses thereof.

As per the provisions of the Section 45 of the Act, it is clear that at the request of one of the parties or any person claiming through or under him the court shall refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed. In the present case, there appears to be no such thing to say that the so called agreement entered into by the parties is in any way to be termed as null and void or inoperative or incapable of being performed. It is further observed by us that the claims raised by the appellant before us about the non-existence of the charter party agreement can also be raised by the same before the arbitral tribunal at London. Under the English Arbitration Act 1996, as per Sections 30 and 31 of the said Act, the arbitral tribunal may rule on its own jurisdiction and also can decide on the existence of a valid arbitration agreement. This is similar to the provisions under Section 16 of the Act, whereby the arbitral tribunal can decide on its jurisdiction as also on the existence or validity of the arbitration agreement.

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82. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 11 & 16 CONTRACT ACT, 1872 – Sections 15 to 19 & 37 and 39

(i) Meaning of 'termination of contract by agreement' and 'Discharge of contract by accord and satisfaction' explained:

(ii) When a contract stood discharged as a result of settlement by performance or by accord and satisfaction, the arbitration clause will cease to have effect when dispute as to discharge of a contract and survival – Survival/operation of arbitration agreement, when dispute as to discharge of contract in which it is centered arises.

(iii) General principles as to determination of preliminary issues when matter is referred to arbitration with or without intervention of the Court reiterated – Principles clarified about thereof.

National Insurance Company Limited v. Boghara Polyfab Private Limited

Judgment dated 18.09.2008 passed by the Supreme Court in Civil Appeal No. 5733 of 2008, reported in (2009) 1 SCC 267

Held:

In *Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362* this Court considered the question whether the arbitration clause in the contract will cease to have effect, when the contract stood discharged as a result of settlement. While answering the question in the affirmative, a three Judge Bench of this Court culled out the following general principles as to when arbitration agreements operate and when they do not operate:

(i) An arbitration clause is a collateral term of a contract distinguished from its substantive terms; but none the less it is an integral part of it.

(ii) Howsoever comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; and the arbitration clause perishes with the contract.

(iii) A contract may be non est in the sense that it never came legally into existence or it was void ab initio. In that event, as the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void.

(iv) Though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it, solely governing their rights and liabilities. In such an event, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.

(v) Between the two extremes referred to in paras (iii) and (iv), are the cases where the contract may come to an end, on account of repudiation, frustration, breach etc. In these cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain limited purposes, in respect of disputes arising under it or in connection with it. When the contracts subsist for certain purposes, the arbitration clauses in those contracts operate in respect of those purposes.

The principle stated in para (i) is now given statutory recognition in section 16(1)(a) of the Act. The principle in para (iii) has to be now read subject to section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to contracts discharged by performance or accord and satisfaction.

The decision in *Kishorilal Gupta was followed and reiterated in several decisions including Naithani Jute Mills Ltd. vs. Khyaliram Jagannath (AIR 1968 SC 522), Damodar Valley Corporation vs. K. K. Kar [1974 (1) SCC 141] and Indian Drugs & Pharmaceuticals Ltd. vs. Indo Swiss Synthetic Gem Manufacturing Co. Ltd. (1996 (1) SCC 54).* In *Damodar Valley Corporation* (supra) this Court observed:

> "A contract is the creature of an agreement between the parties and where the parties under the terms of the contract agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under that contract, as it has been incorporated with the object of providing a machinery for the settlement of disputes arising in relation to or in connection with that contract. The questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the

> contract. Far from putting an end to the arbitration clause, they fall within the purview of it. A repudiation by one party alone does not terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives. This is not a case where the plea is that the contract is void, illegal or fraudulent etc., in which case, the entire contract along with the arbitration clause is non est, or voidable. As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it us if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to the arbitration clause, which is a part of it, also perishes along with it.

Section 16 of the Act bestows upon the arbitral tribunal, the competence to rule on its own jurisdiction.

In *SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618,* a 7-Judge Bench of this Court also examined the 'competence' of the arbitral tribunal to rule upon its own jurisdiction and about the existence of the arbitration clause, when the Chief Justice or his designate had appointed the Arbitral Tribunal under section 11 of the Act, after deciding upon such jurisdictional issue. This Court held:

> "We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal".
>
> "Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute

that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal."

It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also. It follows therefore that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion, the arbitral tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the arbitral tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the arbitral tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits.

Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co* (supra). This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

17.1) The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

It is clear from the scheme of the Act as explained by this Court in *SBP & Co.,* (supra) that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/ his designate decides the issue.

What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or under influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under section 11 of the Act or by the arbitral Tribunal as directed by the order under section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.

While discharge of contract by performance refers to fulfillment of the contract by performance of all the obligations in terms of the original contract, discharge by 'accord and satisfaction' refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original obligation is discharged is the accord, and the discharge of the substituted obligation is the satisfaction. A contract can be discharged by the same process which created it, that is by mutual agreement. A contract may be discharged by the parties to the original contract either by entering into a new contract in substitution of the original contract; or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the

contract. The classic definition of the term 'accord and satisfaction' given by the *Privy Council in Payana Reena Saminathan vs. Pana Lana Palaniappa - 41 IA 142* (reiterated in Kishorilal Gupta) is as under:

> "The 'receipt' given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well known as common law pleading as 'accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."

When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains - neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no due certificate as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim. Nor can he seek reference to arbitration in respect of any claim.

When we refer to a discharge of contract by an agreement signed by both parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party who has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practiced by the other party and is able to establish the same, then obviously the discharge of the

contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both parties or by the party seeking arbitration) :

(a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract.

(b) Where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations.

(c) Where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there is no outstanding claims or disputes.

Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration. The Chief Justice/his designate exercising jurisdiction under section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/ his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently refer the dispute to arbitration.

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*83. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 31 (5), 3(1) & (2) and 34**
EVIDENCE ACT, 1872 – Section 114
GENERAL CLAUSES ACT, 1897 – Section 27
Copy of award sent by registered post to the party concerned at its business address – He refused to receive the registered envelop although the name of arbitrator was written thereon – Postman returned the envelop to the sender (arbitrator) – In such circumstances document presumed to be delivered and for calculating the limitation for application under Section 34, the Court computed the limitation period from the date of postman's visit to the addressee's place – upheld.
Kailash Rani Dang v. Rakesh Bala Aneja and another
Judgment dated 12.12.2008 passed by the Supreme Court in Civil Appeal No. 7257 of 2008, reported in (2009) 1 SCC 732

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84. **CIVIL PROCEDURE CODE, 1908 – Sections 10 and 151**
Stay of civil suit during the pendency of criminal proceedings, in respect of subject matter of the suit – Plaintiff filed a civil suit seeking declaration of title, perpetual injunction and possession in respect of suit land – Defendants set up their title on the basis of will in respect of which plaintiff made allegation that the will is a forged and fabricated document – Criminal case relating to alleged forged will was pending against defendants – During trial of the civil suit, defendants filed an application securing stay of suit on ground of pendency of criminal proceedings – Trial Court rejected the application holding that both the proceedings are not based on same facts – Held, in view of specific mandate of the Apex Court given in the case of M.S. Sheriff v. State of Madras reported in AIR 1954 SC 397, the proceedings in the civil suit deserves to be stayed – Direction issued that till the decision of criminal case, the proceedings in the civil suit shall remain stayed.
Vedprakash & Ors. v. Guru Granth Saheb Sthan Meerghat Town Vanaras Sarvrahi & Anr.
Judgment dated 24.11.2008 passed by the High Court in Writ Petition No. 5836 of 2008, reported in 2009 (I) MPJR 131 (D.B.)

Held:

The plaintiff/respondent filed a civil suit against the petitioners and some other persons seeking declaration of title perpetual injuction and possession in respect of the disputed lands of which details were furnished in para 2 of the plaint, In para 6 of the plaint the plaintiff stated that the defendants 1 to 7 in collusion fabricated a will in the name of Devki Nandan, which was un-registered will.

The petitioners contested the suit and set up their title on the basis of will. Thereafter, the plaintiff commenced its evidence and when the evidence was going on, the petitioners filed an application for staying proceedings of the civil suit because of pendency of criminal case. The trial Court by the impugned order dated 21.4.2008 found that the proceedings of Civil Suit and Criminal case are not based on same facts and because of proceedings of the civil suit, there is no possibility of causing any prejudice to the defendants. The defendants have filed written statement and the case is at the stage of evidence. On these grounds, the trial Court dismissed the application filed by the petitioners. Reliance was placed by the trial Court to the Apex Court judgment in *State of Rajasthan v. Kalyan Sundaram Cement Industries, (1996) 3 SCC 87.*

This order is under challenge in this petition. In this case, the factual position is not in dispute that the defendants were claiming their title on the basis of will dated 2.7.1997 in respect of which a mutation order dated 24.11.1999 was passed by the Tehsildar. The plaintiff in para 6 of the plaint specifically challenged the order and sought relief for declaring that the mutation order be declared null and void. The defendants though have filed written statement may be required to appear in the witness box to prove their contentions, stated in the written statement.

In *Kalyan sundaram Cement's case* (supra), two Judges bench of the Apex Court, considering the question, held that the pendency of criminal proceedings relating to the same matter, there is no impediment to proceed with the civil suit. The Criminal Court would deal with the offence punishable under the relevant Act. On the other hand, the courts rarely stay the criminal cases, only when the compelling circumstances require the exercise of their power. The Apex Court further observed that " we have never come across stay of any civil suits by the Courts so far". The aforesaid judgment is applicable in the set up of the present facts. But the learned counsel appearing for the petitioners placed reliance to a judgment of the Apex Court in *M.S. sheriff v. State of Madras AIR 1954 SC 397,* which is a judgment of five Judges of the Apex Court. The Apex Court in paras 15 and 16 of the judgment held thus :

> "15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decision in the civil and criminal Courts is a relevant consideration. The law envisages such and eventuality when it expressly refrains from making the decision of the Court binding on the other, or ever relevant except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476.But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

The aforesaid legal position was not brought into the notice of the Apex Court in the case of *Kalyan Sundaram Cement* (supra). In these circumstances when five judge bench of the Apex Court held that in these circumstances, the civil suit should be stayed till the criminal proceedings, in our considered opinion, the larger bench judgment is to be followed by the Courts. In the case of Kalyan Sundaram Cement, the judgment of thw M.S. Sheriff was not placed for consideration and being a larger bencn judgment of the Apex Court, it is having a binding effect. A five judges bench of this Court in *Jablapur Bus Operators Association and Ors. v. State of M.P. and Anr. 2003 (I) MPJR 158* held thus :

In case of conflict between two decisions of the Apex Court Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench is decisions and Large Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and the Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India, but also militate hierarchical supremacy of Courts. The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached

to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decision of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *State of M.P. vs. Balbir Singh, AIR 2001 MP 268* which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over ruled on this point."

In view of the settled position, we are bound to the decision of the Apex Court in M.S. Sheriff, which is a judgment of five judges of the Apex Court.

The judgment of M.S Sheriff is fully applicable in the present case. The petitioners', who have set up their case on the basis of will in respect of which the plaintiff has made allegation that it is a forged and fabricated and in that regard criminal proceedings are pending against the petitioners, in our considered opinion, the proceedings in Civil Suit deserve to be stayed . At this stage, Shri Ojha,, the learned counsel appearing for the respondent submitted that the plaintiffs evidence has already commenced and if at this stage, the proceedings in civil suit are stayed, it shall cause serious prejudice to the plaintiff. It is submitted by him that even if the proceedings are to be stayed, then the plaintiff should be permitted to conclude its evidence and thereafter, after the decision in criminal case, the defendants may commence their evidence. Though the aforesaid contention appears to be just and proper, but in view of the specific mandate in the case of *M.S.Sheriff* (supra), we are unable to accept the aforesaid contention. The apex Court has very specifically held that in such situation, the proceedings of civil suit should be stayed.

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***85. CIVIL PROCEDURE CODE, 1908 – Section 11**

Principle of *res judicata*, applicability of – The matter in issue, if it is purely one of fact decided in the earlier proceedings by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided – A mixed question of law and fact also cannot be considered a new in subsequent proceedings – There would be no difference where the decision is on a question of law either, if the conditions for the application of Section 11 of the Code are satisfied, except in cases where the question decided in the previous case is a question of law and relates to the jurisdiction of the court or the lack of it or the law has been subsequently altered by the Legislature – However, the exception to application of the rule of *res judicata* that if there is alteration of the law since the earlier judgment, the rule would not apply, would not be attracted if Supreme

Court expresses any view on a particular point of law because the interpretation given by the Supreme Court cannot be equated with the enactment of new or altered law by the Legislature.

S.B. Singh v. State of M.P. and others

Judgment dated 19.12.2008 passed by the High Court in Writ Petition No. 3886 of 2008, reported in 2009 (1) MPLJ 326

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*86. **CIVIL PROCEDURE CODE, 1908 – Section 11**
ARBITRATION AND CONCILIATION ACT, 1996 – Section 11
Application for appointment of arbitrator – Res judicata, applicability of – The earlier application under Section 11 of the Act for appointment of an Arbitrator was dismissed on merits by ADJ who was having jurisdiction at the relevant time – Then an application was filed again before High Court – Held, there is no iota of doubt that in respect of subsequent proceedings the principle of res judicata would apply if the earlier proceedings were heard and decided by a Court having jurisdiction – Further held, once the applicant invoked the jurisdiction of a competent Court and the application was heard and rejected, a subsequent application cannot be entertained merely on the ground that now the jurisdiction lies with the High Court and not with the District Judge.

Chandreshwar Jha v. Northern Coalfields Ltd. and another

Judgment dated 26.06.2008 passed by the High Court in M.C.C No. 298 of 2005, reported in reported in 2009 (1) MPLJ 214

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87. **CIVIL PROCEDURE CODE, 1908 – Sections 23, 25 & 151**
Transfer of cases – Power of High Court not extended to transfer a case from one of its subordinate courts to another subordinate court of another High Court – Even inherent powers cannot be invoked. Such power can be exercised only by the Supreme Court u.s 25 of CPC. Note: *Lakshmi Nagdev v. Jitendra Kumar Nagdev, 2004 (4) MPLJ 310* overruled.

Durgesh Sharma v. Jayshree

Judgment dated 26.09.2008 passed by the Supreme Court in Civil Appeal No. 5857 of 2008, reported in AIR 2009 SC 285

Held:

After the commencement of the Constitution and establishment of the Supreme Court (this Court), Parliament thought it proper to amend Section 25 of the Code and accordingly, it was substituted by empowering this Court to order transfer from one High Court to another High Court or to one Civil Court in one State to another Civil Court in any other State. It is, no doubt, true that even when Section 25 in the present form was substituted by the Amendment

Act of 1976, sub-section (3) of Section 23 of the Code has neither been deleted nor amended. That, however, is not relevant. Since in our considered view, Section 23 is merely a procedural provision, no order of transfer can be made under the said provision. If the case is covered by Section 25 of the Code, it is only that section which will apply for both the purposes, namely, for the purpose of making application and also for the purpose of effecting transfer. On the contrary, reading of sub-section (3) of Section 23 of the Code in the manner suggested by the learned counsel for the respondent-wife would result in allowing inroad and encroachment on the power of this Court not intended by Parliament. Section 23, therefore, in our considered view, must be read subject to Section 25 of the Code. The decisions taking a contrary view do not lay down correct law. We, therefore, overrule them. Even if such power was with a High Court earlier, it stood withdrawn with effect from January 01, 1977 in view of Section 25 of the Code as amended by Code of Civil Procedure (Amendment) Act, 1976.

We are unable to agree with the view that in such cases, inherent powers may be exercised under Section 151 of the Code as held by the High Court of Punjab & Haryana in State Bank of India. It is settled law that inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in the Code. The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provision of law. Since the law relating to transfer is contained in Sections 22 to 25 of the Code, and they are exhaustive in nature, Section 151 has no application. Even that contention, therefore, cannot take the case of respondent-wife further.

For all these reasons, in our opinion, the order passed by the High Court is not sustainable and deserves to be set aside. We hold that a High Court has no power, authority or jurisdiction to transfer a case, appeal or other proceeding pending in a Court subordinate to it to any Court subordinate to another High Court in purported exercise of power under sub- section (3) of Section 23 of the Code and it is only this Court which can exercise the said authority under Section 25 of the Code. The order passed by the High Court, therefore, deserves to be set aside and is accordingly set aside.

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***88. CIVIL PROCEDURE CODE, 1908 – Sections 34 & 47 and Order 21 & Order 23 Rule 3**
CONTRACT ACT, 1872 – Section 74

(i) As per the consent decree, the plaintiffs were entitled to claim the interest on the decreed amount @ 18% p.a. in case the defendant failed to pay that amount to them within the stipulated time – The Executing Court is bound by the terms of the valid decree passed by the competent Court of law and has no jurisdiction to modify the same – It must execute the decree as it is – The decree remains valid unless set aside.

(ii) **A default clause in a valid consent decree stipulating payment of interest @ 18% p.a. in the event entire decreed amount was not paid within the period mentioned therein – Held, would not be considered to be penal in nature so as to attract the provisions of Section 74 of Contract Act.**

(iii) **Even assuming that the term stipulating payment of interest in the event the entire amount was not paid within a period of six months is penal in nature, the executing court was bound by the terms of the decree – Interest becomes leviable either under a statute or under a contract – The stipulation to pay interest at the rate of 18% per annum cannot, by itself, be said to be unreasonable.**

Deepa Bhargava and another v. Mahesh Bhargava and others
Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7310 of 2008, reported in (2009) 2 SCC 294

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89. **CIVIL PROCEDURE CODE, 1908 – Section 60 (1) Proviso (g) and Section 115 & Order 21**

Gratuity and pensionary benefits received by a person continued to be covered by Proviso (g) of Section 60 (1) and does not lose the character merely because of the fact that these benefits were received by the person concerned, in cash – They could not cease to retain their original character and therefore, the gratuity payable would not be liable to attachment for satisfaction of a court decree.

Radhey Shyam Gupta v. Punjab National Bank and another
Judgment dated 04.11.2008 passed by the Supreme Court in Civil Appeal No. 6440 of 2008, reported in (2009) 1 SCC 376

Held :

Having regard to proviso (g) to Section 60 (1) of the Code, the High Court committed a jurisdictional error in directing that a portion of the decretal amount be satisfied from the fixed deposit receipts of the appellant held by the Bank. The High Court also erred in placing the onus on the appellant to produce the Matador in question for being auctioned for recovery of the decretal dues. In other words, the High Court erred in altering the decree of the Trial Court in its revisional jurisdiction, particularly when the pension and gratuity of the appellant, which had been converted into Fixed Deposits, could not be attached under the provisions of the Code of Civil Procedure.The decision in the *Union of India v. Jyoti Chit Fundand Finance, (1976) 3 SCC 607* has been considerably watered down by the later decisions in *Calcutta Dock Labour Board v. Sandhya Mitra, (1985) 2 SCC 1, Union of India v. Wing Commander R.R. Hingorani, (1987) 1 SCC 551 and Gorakhpur University v. Dr. Shitla Prasad Nagendra, (2001) 6 SCC 591* and it has been held that gratuity payable would not be liable to attachment for satisfaction of a Court decree in view of proviso (g) to Section 60 (1) of the Code.

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***90. CIVIL PROCEDURE CODE, 1908 – Section 80**
LIMITATION ACT, 1963 – Section 15 (2)
Period of 60 days required for statutory notice under Section 80 of CPC must be excluded for the purpose of computation of the period of limitation.
ShaktiTubes Limited through Director v. State of Bihar and others
Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7315 of 2008, reported in (2009) 1 SCC 786

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91. CIVIL PROCEDURE CODE, 1908 – Sections 96 & 105 and Order 37 Rules 3(6) (b) & 5
First appeal against decree granted on non-compliance of conditions of leave to defend suit under Order 37 – Defendant can raise contention in appeal regarding refusal of leave to defend by the Trial Court as it affected the decision of the case and it may be set forth as a ground of that objection in the memorandum of appeal as envisaged under Section 105 CPC – Even revision maintainable was not availed of.
Wada Arun Asbestos Private Limited v. Gujarat Water Supply and Sewerage Board
Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7314 of 2008, reported in (2009) 2 SCC 432

Held:

Indisputably, an appeal was preferred against the decree and not against the order dated 3.3.2004 granting conditional leave in favour of the respondent. Indisputably again, the said condition was not complied with. The question which, therefore, arises for consideration is as to whether in the aforementioned situation, the respondent could raise a contention that it was a fit case where unconditional leave should have been granted.

Order XXXVII of the Code of Civil Procedure provides for a summary procedure. It is not in dispute that having regard to the prayer made in the suit, Order XXXVII of the Code was attracted. Rule 3 of Order XXXVII provides for the procedure for appearance of the defendant. Rule 5 reads as under:

> **"5. Power to order bill, etc. to be deposited with officer of Court–** In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith depositing with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof."

Whether leave is granted unconditionally or upon terms, in view of the aforementioned provision in a case of this nature for all intent and purport, stand on the same footing. However, it is well settled that the defence in the suit

should not be considered to be a mere 'moonshine' ruse or sham. Ordinarily, the court shall grant leave to defend the suit in favour of the defendant in terms of the first proviso appended thereto. Rule 3 of Order XXXVII provides for a judgment at the hearing of such summons; clause 6(b) whereof reads as under:

"3. (6) At the hearing of such summons for judgment–

(a) ★ ★ ★

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith."

Where a conditional leave is granted and the conditions therefor are not complied with, a judgment in favour of the plaintiff can be passed. It is not in dispute that the first appeal was maintainable. Where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal as envisaged under Section 105 of the Code of Civil Procedure.

A statutory right conferred on a litigant cannot ordinarily be taken away. Even a civil revision application might have been maintainable as against the order dated 27.11.2002 granting conditional leave.

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***92. CIVIL PROCEDURE CODE, 1908 – Sections 144 & 145 and Order 21 & Order 34 Rule 5**

Where any person has furnished any property as security for the payment of any money (or for the fulfillment of any condition imposed on any person) under an order of a Court in any suit or in any proceedings consequent thereon, such order may be executed in the manner provided in the Code for the execution of decrees, by sale of such property – Consequently, the recovery of the amount due to the defendants was governed by Sections 144 and 145 read with provisions of Order 21 CPC – The provisions of Order 34 CPC were inapplicable and there was no question of invoking Rule 5 of Order 34 to fix a date for depositing the amount due.

Chinnakarupathal and others v. A.D. Sundarabai (Dead by LRs.) and others

Judgment dated 24.10.2008 passed by the Supreme Court in Civil Appeal No. 5267 of 2002, reported in (2009) 1 SCC 86

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*93. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10

(i) Application for impleading parties in appeal – Persons proposed to be impleaded were parties in the suit before the trial Court – Held, provisions of Order 1 Rule 10 CPC cannot be made applicable – Only recourse to Order 41 Rule 20 CPC can be taken by applicant.

(ii) Non joinder of necessary party – Principle of representing the estate, applicability of – In case of non-joinder of necessary party, the effect of non-joinder cannot be avoided on the ground that persons who ought to have been impleaded, are being represented by existing parties.

(iii) Parties contesting the suit or appeal or those who were impleaded in the suit or appeal are necessary parties – In case of non joinder of necessary parties, appeal cannot proceed and is liable to be dismissed.

Shanti (Smt.) & Anr. v. Lakshman & Ors.

Judgment dated 04.09.2008 passed by the High Court in S.A No. 129 of 1993, reported in 2009 (I) MPJR 122

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*94. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 4

Executing court held that the eviction decree is tainted with fraud and is unexecutable – Alleging fraud has grave consequences and when relied upon as a cause of action or defence, fraud must be specifically alleged with all material particulars – Objectors knew about the execution and registration of the sale deed but they did not take any steps to challenge the sale deed – There is no foundation in the pleadings or evidence to sustain the charge of fraud – Executing court acted beyond jurisdiction – Revision allowed – *Chengalvaraya Naidu's case AIR 1994 SC 853* distinguished.

Ratan Kumar Banjara v. Kantabai & ors.

Judgment dated 23.09.2008 passed by the High Court in Civil Revision No. 407 of 2007, reported in I.L.R. (2009) M.P. 251

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*95. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Application under Order 6 Rule 17 of the Code, binding principles for exercising discretion to allow amendment –

(i) Amendments are to be allowed liberally

(ii) While exercising discretion, the Court must think of avoiding multiplicity of proceedings.

(iii) Amendments which do not totally alter the character of an action, should be allowed.

However care should be taken to see that injustice and prejudice of an irremediable character are not caused to the opposite party unless

a party takes prompt steps after commencement of trial and unless establishes that inspite of due diligence it could not have raised the matter earlier, the application for amendment cannot be allowed.

Shree 1008 Parshwanath Digambar Jain,Terapanthi Panchayati Dharamshala, Gwalior v. Darshanlal Hablani (Dr.)

Judgment dated 13.08.2008 passed by the High Court in Writ Petition No. 2716 of 2008, reported in 2009 (1) MPLJ 204

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96. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 Proviso

Amendment of written statement after commencement of trial – Issues framed, affidavit regarding evidence filed and case fixed for cross examination – Amount to commencement of trial – Proviso applicable.

Vidyabai and others v. Padmalatha and another

Judgment dated 12.12.2008 passed by the Supreme Court in Civil Appeal No. 7251 of 2008, reported in (2009) 2 SCC 409

Held:

By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

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

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

Although in a different context, a Three-Judge Bench of this Court in *Union of India v. Major General Madan Lal Yadav, (1996) 4 SCC 127* took note of the dictionary meaning of the terms "trial" and "commence" to opine: (SCC p. 136, para 19)

"19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial."

In *Kailash v. Nanhku (2005) 4 SCC 480* this Court held:

"In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trail. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word 'trial'."

This view has also been followed in the case of *Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N., (2006) 12 SCC 1*

The opinion of the High Court, that filing of an affidavit would not mean that the trial has commenced, is apparently contrary to the aforesaid law pronounced by this Court.

It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

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***97. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 and Order 1 Rule 8 Plaintiffs claiming themselves to be journalist filed suit in their individual capacity as they did not stated that the suit is being filed for on behalf of the M.P. Shram Jivi Patrakar Sangh – Neither personal interest of the plaintiffs appeared to be involved in the suit nor the plaint disclosed any cause of action arising within the territorial jurisdiction of District Court, Harda – The defendants/petitioners filed an application under Order 7 Rule 11 of the Code of Civil Procedure assailing the maintainability of the suit on the ground that the respondents had no cause of action to file the suit and also on the**

ground that the suit is not maintainable in view of the provisions of Order 1 Rule 8 and Order 7 Rule 4 of the Code –The Trial Court rejected the suit application on the ground that the suit has been filed in a representative capacity – Held, for a person to be entitled to file a suit in a representative capacity, he must have some common personal interest in the suit along with several other persons – Respondents/plaintiffs No. 1 & 2 are neither employees of Respondent No.3 (UNI) nor are they in any manner connected with respondent No.3 and they also have no personal common interest with the alleged employees of respondent No. 3 –Therefore they could not have been permitted to file a suit in a representative capacity under Order 1 Rule 8 of the Code – Cause of action also did not arise within the territorial jurisdiction of the District Court, Harda – Further held, the Trial Court committed material irregularity and has exercised its jurisdiction illegally in dismissing the application under Order 7 Rule 11 of the Code.

Mediavest India Pvt. Ltd., Mumbai v. Sayed Mahmood Ali Chishti and others

Judgment dated 02.12.2008 passed by the High Court in Civil Revision No. 406 of 2007 reported in 2009 (1) MPLJ 423

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98. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13 & Section 115

(i) Decree on the basis of compromise not binding on those defendants who have not signed the compromise nor represented by their advocates.

(ii) Remedies available to defendant against *ex parte* decree laid down.

Mahesh Yadav and another v. Rajeshwar Singh and others

Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7316 of 2008, reported in (2009) 2 SCC 205

Held:

When an ex parte decree is passed, the defendant may have more than one remedies. He may file a suit contending that the decree was obtained fraudulently. He may file an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. He may prefer an appeal from the ex parte judgment and decree. In a given case, he may also file a review application.

Indisputably, two of the defendants (No. 2 and 5) had entered into a compromise with the plaintiff. They have accepted the title of the plaintiff. Whereas no compromise was filed on behalf of the appellants (defendant No. 1 & 6).

There is nothing on record to show that the appellants herein were being represented by the same learned advocate. If they were represented by different advocates, it is not known as to whether the order of transfer of the case was

brought to the notice of the learned advocate for the appellants. The High Court, in our opinion, therefore, may not be correct in holding that only because a joint written statement was filed, an application for (sic setting aside the) ex parte decree was not maintainable.

In *Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787,* this Court held: (SCC p. 797, para 26)

> "26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

It was, however, observed: (SCC p. 797, para 28)

> "28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions."

An order setting aside the ex parte decree being a judicial order should have been supported by reasons. The learned Judge could not have allowed the said application without following the legal principles on the basis whereof such an order could be passed.

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99. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13 Explanation
Explanation to Order 9 Rule 13 of CPC, applicability of – It is attracted if an appeal is preferred against an ex parte decree and the same is disposed of on any ground other than the ground that the appellant has withdrawn the appeal.

Shaikh Khalil v. Shaikh Jamil and others

Judgment dated 19.12.2008 passed by the High Court in Misc Appeal No. 396 of 2001, reported in 2009 (1) MPLJ 305

Held:

A bare perusal of this explanation goes to show that it will get attracted if an appeal is preferred against an ex parte decree and the same is disposed of on any ground other than the ground that the appellant has withdrawn the appeal. In such a situation, an application for setting aside ex parte decree under Order 9 Rule 13 of the Code of Civil Procedure would not lie after disposal of the appeal in the aforesaid manner. Effect of the explanation has been discussed and explained by the Supreme Court in *Rani Choudhary v. Lt. Col. Suraj Jit Choudhary, AIR 1982 SC 1397* in the following words:-

> "The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under R.13 of O.9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the Appellate Court on the merits of the decree or have the decree set aside by the trial Court under R.13 of O.9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under R.13 of O.9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation."

Thus, the confinement of the defendant to a single course of action by virtue of the said explanation would be applicable only when he tries to approach the trial Court under Order 9, Rule 13 of Code of Civil Procedure for setting aside ex parte decree after disposal of his regular Civil Appeal on any ground except on that of withdrawal of appeal. Vice versa meaning cannot be given to the Apex Court decision because the explanation itself would be applicable, when the defendant after disposal of his regular Appeal tries to approach the trial Court for setting aside ex parte decree under Order 9, Rule 13 of the Code of Civil Procedure. This is presumably because in case if, an appeal is preferred on merits against the ex parte decree, such a decree gets merged in the decision of the Appellate Court. Thus, the explanation may be invoked only when the appeal and its decision on any ground other than on the ground of withdrawal precede the application for setting aside ex parte decree under Order 9, Rule 13 of Code of Civil Procedure and decision thereon.

Rani Choudhary's decision (supra) came up for consideration before the Apex Court in the case of *Shyam Sunder Sarma v. Pannalal Jaiswal and others, 2005(1) MPLJ (SC) 6* wherein *Rani Choudhary's* decision was approved in the following passage:

We are not impressed by the argument of learned counsel for the appellant that the decision in Rani Choudhary's case (supra) requires reconsideration. On going through the said decision in the light of the objects and reasons for the introduction of the explanation to Order IX, Rule 13 and the concept of an appeal as indicated by the Privy Council and this Court in the decisions already cited, the argument that an appeal which is dismissed for default or as barred by limitation because of the dismissal of the application for condoning the delay in filing the same, should be treated on a par with the non filing of an appeal or the withdrawal of an appeal, cannot be accepted. The argument that since there is no merger of the decree of the trial Court in that of the Appellate Court in a case of this nature and consequently the explanation should not be applied cannot also be accepted in the context of what this Court has earlier stated and what we have noticed above."

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100. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 101, 103 & 104

Applicability of Order 21 Rule 104 – The Rule provides that orders under Rule 101 or 103 of Order 21 to be subject to result of pending suit on the date of commencement of execution proceeding.

If suit is filed later on and an order under Rule 101 or 103 of CPC is passed during pendency of such suit, the provision of Order 21 Rule 104 will not attract

Vaniyankandy Bhaskaran v. Mooliyil Padinhjarekandy Sheela

Judgment dated 14.10.2008 passed by the Supreme Court in Civil Appeal No. 6103 of 2008, reported in AIR 2009 SC 250.

Held:

Since we shall be considering the effect of the Rule 104, the same is set out hereinbelow:-

> ***"Order XXI. Rule 104.– Order under Rule 101 or Rule 103 to be subject to the result of pending suit.–*** Every order made in Rule 101 or Rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under Rule 101 or Rule 103 is made has sought to establish a right which he claims to the present possession of the property."

Mr. Menon submitted that the said provision was not there in the Code of Civil Procedure in its original form and was included by amendment with effect from 1st February, 1997 together with Rules 98 to 103, 105 and 106 of Order XXI.

Mr. Menon submitted that in order to curtail the delay in executing the decree for possession of immovable property, the amended Rules were brought on the Statute book to enable the Executing Court itself to decide claims of title which might be raised in execution proceedings without filing of a separate suit for the said purpose.

Mr. Menon submitted that the amended provisions of Order 21 of the Code provided for a scheme by which any obstruction to the execution of a decree giving rise to questions relating to right, title or interest in the suit property, arising between the parties to a proceeding, on an application under Rule 97 or Rule 99 or their representative and relevant to the adjudication of the application, is to be determined by the Court dealing with the application and not by a separate suit. The said provision contained in Rule 101 has been referred to in Rule 104 which indicates that any order made under Rule 101 or Rule 103 would be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made. According to Mr. Menon, although the execution proceedings were commenced on 3rd November, 2004, and the suit for specific performance was filed by the appellant on 27th August, 2005, the actual order was passed on the application under Rule 97 by the Executing Court on 19th December, 2005, after the suit had been filed by the appellant. In other words, according to Mr. Menon, the suit filed by the appellant was pending on the date when the order under Rule 97 and Rule 98 was made and would, therefore, be subject to the provisions of Rule 104 and would have to await the outcome of the suit for specific performance filed by the appellant. Mr. Menon urged that the High Court had erred in relying on the provisions of Rule 2 of Order 21 of the Code in setting aside the order of injunction passed by the learned Subordinate Judge on the application for injunction filed by the appellant in OS No. 181 of 2005.

Appearing for the respondent, Mr. Vishwanathan, on the other hand, submitted that the submission regarding the applicability of Rule 104 of Order 21 of the Code of Civil Procedure to the facts of this case was wholly misconceived since the execution proceedings had been commenced long before the appellant's suit for specific performance was filed. While the respondent's suit for recovery of possession was decreed in 1990, the execution proceedings for executing the decree was commenced on 3rd November, 2004, and the appellant filed his suit for specific performance about ten months later on 27th August, 2005.

Mr. Viswanathan submitted that since the eviction proceedings against the appellant's wife had reached its final stages, the appellant raised a new claim based on an unregistered document to stall the execution of the decree for possession made as far back as in 1990.

The submissions made on behalf of the appellant regarding the applicability of Rule 104 of Order 21 of the Code has substance and merits consideration in an appropriate case, but they do not justify interference with the order of the High Court in the facts of this case. The suit filed by the appellant for specific

performance of contract was considerably later in point of time than the commencement of the execution proceedings and, in any event, the language of Rule 104 is clear and unambiguous that any order made under Rule 101 or Rule 103 would be subject to the result of a suit pending on the date of commencement of the proceeding in which orders were made under Rule 101 or 103. Since the appellant's suit was filed long after the commencement of the execution proceedings, the provisions of Rule 104 of Order 21 of the Code will not apply to this case.

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***101. CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 4 & 9 and Order 30 Rule 4**

LIMITATION ACT, 1963 – Section 5

Original plaintiff/respondent No. 1Baluram filed an eviction suit against original defendant No. 1 Motilal and original defendant No. 2 M/s Ramdhan Kishanlal (partnership firm) in alleging that defendant No. 1 was inducted as a tenant but he sublet part of the suit property to defendant No. 2 – In January 1997, it was submitted before Trial Court that Ramdhan one of the partners of the defendant partnership firm had expired long back – In the year 2003 the applications for substitution of the legal representatives under Order 22 Rule 4, Order 22 Rule 9 of CPC r/w/s 5 of the Limitation Act moved by the plaintiff were allowed – The said order challenged alleging that application were not to be allowed as suit had abated – held, it is settled law that a sub-tenant would not be a necessary party in a suit for eviction against the original tenant and as the sub-tenant is a partnership firm, on the death of one or all of the partners, the suit would not abate against the firm – Further held, according to Rule 4 of Order 30 CPC, it is clear that where two or more persons may sue or be sued in the name of a firm and any such person die, during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit – It was further observed that as per Order 30 Rule 4 (1) of the Code, the legal representatives of the deceased partner may also make an application for their substitution as legal representative

Suresh Kumar Agrawal and others v. Baluram (deceased) through L.Rs and another

Judgment dated 03.11.2008 passed by the High Court in Writ Petition No. 4536 of 2007, reported in 2009 (1) MPHT 212 (DB)

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***102. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 1**

Commission for examination of witness, issuance of – In a suit for specific performance of contract an application under Order 26 Rule 1 of the Code was filed before the trial court praying that the plaintiff

aged 80 is unable to move and is patient of heart and arthritis diseases – Application was supported by an affidavit of plaintiff as well as a certificate of doctor to the effect that plaintiff is a patient of arthritis and is unable to walk – Neither reply to the application filed nor the counter affidavit was submitted by the defendant – The Trial Court rejected the said application on the ground that it cannot be inferred that plaintiff is seriously ill – Held, under Order 26 Rule 1 of the Code, Court may in a suit permit any party to be examined on commission if he is sick or infirm and is unable to attend the Court and explanation to Rule 1 empowers a Court to accept a certificate purporting to be signed by a registered medical practitioner as evidence of sickness or infirmity of any person without calling the medical practitioner as a witness – Further held, looking to the facts and circumstances as mentioned in the said application particularly when no reply or counter affidavit was filed by the defendant, the Trial Court appears to have dismissed the application arbitrarily and without any cogent reason – While allowing the appeal and the application under order 26 Rule 1 of the Code, the matter remanded to the trial court to decide the suit afresh after allowing the plaintiff to examine herself on commission.

Smt. Annapurna Dubey v. Champalal @ Chaua and another

Judgment dated 24.09.2008 passed by the High Court in First Appeal No. 394 of 2007, reported in 2009 (1) MPHT 144

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*103. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 9

Commission for local (spot) inspection, issuance of – The plaintiff filed the Civil Suit with a submission that he is owner of Survey No. 282 admeasuring 1 Bigha and 2 Biswa and two constructions in dispute have been made upon Survey No. 282 on part thereof and as defendant is creating problems declaration and appropriate injunction be granted against the defendants – The defendants pleaded that the suit construction is in Survey No. 307 and that the plaintiff is not the owner of Survey No. 282 or at least of the part whereon construction has been raised – Before commencement of the evidence, the plaintiff moved an application under Rule 9 of Order 26 of CPC with a submission to the Court that appropriate spot inspection be directed under the hands of the Revenue Officer so that the correct position of the spot comes before the Court –The Court rejected the said application.

Rule 9 of Order 26 of CPC does not mean to say that an application for appointment of the commissioner is to be made before casting the issues or at any earlier point of time – The language of Rule 9 clearly provides that when a Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in

dispute, the Court may issue a commission to such person, as it thinks fit, directing him to make such investigation and to report thereon to the Court.

In a given case where one of the party feels that to help and assist the Court and to elucidate any matter in dispute, it is necessary to issue a warrant of commission then an application by such party can always be filed – In the present matter, by issuing the commission the Court was not to create evidence in favour of the plaintiff but in fact could seek assistance of the Commissioner in elucidating the matter in dispute.

So far as question of demarcation by a Revenue Officer before filing of the suit is concerned, the same, in our considered opinion, shall not provide any solace to the defendants – Rule 9 of Order 26 relates to the directions by a Court – Any report by Revenue Officer which could be collected before filing of the suit would have been evidence in favour of the plaintiff but the commission report in the present set of circumstances would not be evidence in favour of the plaintiff but would be an actual report of the spot.

Keshav Singh v. Dhantobai & Ors.

Judgment dated 13.01.2009 passed by the High Court in Writ Petition No. 5325 of 2008, reported in 2009 (1) MPJR 162 (D.B.)

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104. CIVIL PROCEDURE CODE, 1908 – Order 33 Rule 1 and Order 44 Rule 1 Whether a Co-operative Society can be permitted to apply for grant of leave to sue as an indigent person? Held, Yes – A body Corporate, can maintain an application under O.33 R.1 of the Code of Civil Procedure.

The Bhopal Wholesale Consumer Cooperative Store Limited v. Madan Lal Gandhi

Judgment dated 12.11.2008 passed by the High Court in Misc. Civil Case No. 2741 of 2007, reported in 2009 (1) MPHT 54 (D.B.)

Held:

The question that emerges for consideration is whether a Cooperative Society can be permitted to present an application for grant of leave to sue as an indigent person.

In *Perumal Koudan Vs. Tirumalrayuapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd., AIR 1918 Mad. 362,* the Division Bench repelled the contention that the company cannot file a suit in forma pauperis. Their Lordships expressed the opinion as under :-

> "We are unable to accept this contention. The word 'person' is not defined in the Code of Civil Procedure and consequently the definition of the word 'person' as including any Company or Association or Body of individuals whether

> incorporated or not, in the General Clauses Act (X of 1897) would apply unless there is something repugnant to the subject or context."

In *Gendalal Cotton Mills Vs. Basant Kumaribai, AIR 1961 Bombay 1,* it has been held that the word 'person' in Explanation to Order 33 Rule I of the Code includes natural as well as juristic person.

In *Chimanlal Bhogilal Panchani Vs. Chandanben Manchand Shah, AIR 1965 Gujarat 207,* a Division Bench of Gujarat High Court held that a trustee can apply for leave to sue in forma pauperis if he has no sufficient trust money.

In *East Indian Coal Co. Ltd. Vs. East Indian Coal Co. Ltd. Workers' Union, AIR 1961* Patna 15, it was ruled that the definition of the term person under the General Clauses Act can be applied to the person occurring in the Explanation to Rule 1 of Order 33 of the Code and, therefore, a body corporate can be permitted to sue as forma pauperis.

In *R.P. Oil Mills Vs. Chunni Devi, AIR 1969 Allahabad 1,* the Full Bench has expressed the view as under :-

> "A Limited Company falls within the meaning of the expression 'person' as used in Rule 10, Order 30 of the Code of Civil Procedure. This would be so even though the Limited Company may have been carrying on business in a name or style other than its own without any attempt to conceal its own corporate name and this fact was known to the party suing."

In *Union Bank of India Vs. Khader International Construction and others, AIR 2001 SC 2277, the Apex Court affirmed the view of the High Court of Kerala rendered in Union of India and others Vs. M/s. Khaders International Constructions Ltd. And others, AIR 1993 Kerala 31,* and expressed the view that the word 'person' has to be given the meaning in the context in which it has been used and it is a benevolent provision and, therefore, it has to be given the extended meaning and, therefore, a Public Limited Company, which is otherwise entitled to maintain a suit as a legal person, can very well maintain an application under Order 33 Rule 1 of the Code. The word 'person' mentioned in Order 33 includes not only a natural person but other juridical person also.

In the case at hand the petitioner is a Cooperative Society. In *Daman Singh Vs. State of Punjab, AIR 1985 SC 973,* it has been held that a Registered Society is a body corporate. A body corporate is indubitably a juridical person.

In view of the pronouncement of law, as stated hereinabove, we have no iota of doubt that the petitioner, a body corporate, can maintain an application under Order 33 Rule 1 of the Code and thereby an application under Order 44 Rule 1. At this juncture, it is apposite to state that Mr. Kumaresh Pathak, learned Deputy Advocate General had fairly stated that at the time of hearing that if the application is held to be maintainable as the accounts are audited and the society

has suffered a loss, the State would not have any objection if permission is granted to it to sue as an indigent person.

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105. CIVIL PROCEDURE CODE, 1908 – Order 37 Rule 3, Order 41 Rules 1 (3) & Rule 5 (5) & Sections 151 & 96

Appeal against decree for payment of money passed under Order 37 – Appellate Court stayed the operation and execution of the decree entirely – The Appellate Court failed to take notice of statutory bar.

Malwa Strips Private Limited v. Jyoti Limited

Judgment dated 18.12.2008 passed by the Supreme Court in Civil Appeal No. 7410 of 2008, reported in (2009) 2 SCC 426

Held:

The appellant Company (plaintiff) filed a money suit for non-payment on account of supplies made to respondent Company (defendant). Trial court decreed the money suit as the respondent-defendant failed to deposit the conditional money imposed by Court for defending the suit. By reason of the impugned judgment, the High Court stayed the operation and execution of the decree in its entirety.

For stay of execution of a money decree in its entirety, the facts and circumstances of the case must be considered and an exceptional/strong case has to be made out which means that the materials on record are required to be perused and reasons are to be assigned. Such reasons should be cogent and adequate. The appellate court is not to act arbitrarily either way. Even assuming that the suit under Order 37 was not maintainable, the question which should have been posed by the High Court was as to whether sufficient cause had been made out to reverse the decree passed in favour of the appellant. High Court did not make out any exceptional case. High Court did not arrive at the conclusion that it would cause undue hardship to the respondent if the ordinary rule to direct payment of the decretal amount or a part of it and/or directly through the judgment-debtor to secure the payment of the decretal amount is granted.

The High Court failed to notice the provisions of Order 41 Rule 1 (3) CPC. The appellate court, indisputably, has the discretion to direct deposit of such amount, as it may think fit, although the decretal amount has not been deposited in its entirety by the judgment-debtor at the time of filing of the appeal. Although the word "shall" has been used in Order 41 Rule 1 (3) CPC, the same is not mandatory in character and, thus, may be read as directory. In terms of Order 41 Rule 5 (5) CPC, the court shall not make an order staying the execution of the decree notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in Order 41 Rule 1 (3).

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106. CIVIL PROCEDURE CODE, 1908 – Order 37 Rule 3 (5)

Summary suit – Grant of leave, when triable issue raised, is subject to deposit of admitted amount.

Southern Sales & Services & Ors. v. Sauermilch Design & Handles Gmbh

Judgment dated 03.10.2008 passed by the Supreme Court in Civil Appeal No. 6046 of 2008, reported in AIR 2009 SC 320

Held:

Having considered the submissions made on behalf of the respective parties and the decisions cited, there appears to be force in Mr. Sharma's submissions regarding the object intended to be achieved by the introduction of Sub-rules (4), (5) and (6) in Rule 3 of Order 37 of the Code. Whereas in the unamended provisions of Rule 3, there was no compulsion for making any deposit as a condition precedent to grant of leave to defend a suit by virtue of the second proviso to Sub-rule (5), the said provision was altered to the extent that the deposit of any admitted amount is now a condition precedent for grant of leave to defend a suit filed under Order 37 of the Code. A distinction has been made in respect of any part of the claim, which is admitted. The second proviso to Sub-rule (5) of Rule 3 makes it very clear that leave to defend a suit shall not be granted unless the amount as admitted to be due by the defendant is deposited in Court.

The High Court has come to a finding that a certain portion of the plaint has been duly admitted by the appellant herein and accordingly directed 55% thereof to be deposited as a pre- condition for grant of leave to defend the suit.

As has been pointed out by Mr. Sharma, it is now well established as a principle of law that even if a wrong order is passed by a Court having jurisdiction to pass an order in such cases, the revisional Court will not interfere with such an order unless a jurisdictional error is pointed out and established by the person who questions such order.

In the instant case, the High Court did not lack jurisdiction to pass an order with regard to the subject matter of dispute, though the order itself may be incorrect. There is, therefore, little scope for this Court to interfere with the directions given to the appellant herein to deposit in Court 55% of the admitted dues as a pre-condition to grant of leave to defend a suit. The judgment of the High Court impugned in this appeal does not warrant any interference since the trial Court had exercised its jurisdiction under the second proviso to Sub-rule (5) of Rule 3 of Order 37 of the Code. The earlier concept of granting unconditional leave when a triable issue is raised on behalf of the defendant, has been supplemented by the addition of a mandate, which has been imposed on the defendant, to deposit any amount as admitted before leave to defend the suit can be granted. The question as to whether leave to defend a suit can be granted or not is within the discretionary powers of the High Court and it does not appear to us that such discretion has been exercised erroneously or with any irregularity which warrants interference by this Court.

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*107. **CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2**

Issuance of temporary Injunction- Prima facie case, requirement of- the plaintiff is not required to make out a clear legal title – It is only expected from him to satisfy the Court that he has a fair question to raise as to the existence of legal right claimed by him.

Nagar Palika Parishad, Malajkhand v. Hindustan Copper Limited

Judgment dated 22.09.2008 passed by the High Court in Misc. Appeal No. 2315 of 2007, reported in 2009 (1) MPHT 48

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108. **CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27**

Application under Order 41 R. 27 for adducing additional evidence in appeal proceedings filed – Appellate Court is duty bound to deal with the same on merits.

Jatinder Singh & Anr. (Minor through Mother) v. Mehar Singh & Ors.

Judgment dated 19.09.2008 passed by the Surpeme Court in Civil Appeal No. 5781 of 2008, reported in AIR 2009 SC 354

Held:

While deciding the second appeal, however, the High Court had failed to take notice of the application under Order 41 Rule 27 of the Code of Civil Procedure and decide whether additional evidence could be permitted to be admitted into evidence. In our view, when an application for acceptance of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure was filed by the appellants, it was the duty of the High Court to deal with the same on merits. That being the admitted position, we have no other alternative but to set aside the judgment of the High Court and remit the appeal back to it for a decision afresh in the second appeal along with the application for acceptance of additional evidence in accordance with law.

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109. **CONSTITUTION OF INDIA – Articles 14 & 16**

Equality clause – Benefit of – No equity can be claimed by senior employee on the ground that junior employee got it though illegally.

Kerala State Electricity Board v. Saratchandran, P & anr.

Judgment dated 18.09.2008 passed by the Supreme Court in Civil Appeal No. 5813 of 2008, reported in AIR 2009 SC 191

Held:

It is now a well settled principle of law that only because by reason of 'fortuitous' circumstances an employee who is junior to another obtains some benefit to which he is ultimately not found to be entitled to, the same by itself may not be a ground to confer the same benefit upon the senior employee. We have noticed hereinbefore that a separate service known as 'Board Secretariat

Service' was formed on 1.4.1964. The said S.G. Rajappan and L.Radhadevi joined the said services. A separate seniority list was being maintained in respect of the said wing which was different and distinct from the wing of the Ministerial Service. The said S.G. Rajappan and L. Radhadevi were promoted on the basis of clause 5(c) of the Rules which was amended with effect from 7.1.1985. The validity of said Rule came to be questioned which was determined by this Court by reason of judgment dated 23.7.1996 in C.A.No. 3967/1990.

In implementation of the same, although, the first respondent would rank as senior to them but, in our opinion, the same would not mean that he would be entitled to promotion with retrospective effect.

We agree with the contention of Mr. George, learned counsel appearing on behalf of the appellant that the said S.G. Rajappan and L. Radhadevi obtained out of turn promotion and if the length of service was to be treated as the basis on which the inter-se seniority of the employees were to be reckoned, first respondent indisputably would have been senior but as noticed hereinbefore they obtained out of turn promotion which ultimately was found to be illegal. It is not the case of first respondent that he was unjustly denied promotion. It is also not his case that he had suffered any pecuniary loss or any other prejudice. The High Court, therefore, in our opinion was not correct in holding that the first respondent was entitled to the relief of promotion with retrospective effect and/ or to get any monetary benefit therefor.

Article 14 as is well known is a positive concept. Provisions of Article 14 cannot be invoked only because some illegality has been committed by an employer as a result whereof some employee has obtained benefit. The Constitutional Scheme of equality clause would apply only in a case where the parties are similarly situated. No equity can be claimed on the basis of an illegality.

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110. CONSTITUTION OF INDIA – Article 226

Interference in contractual matter, scope of – In matter relating to contract judicial review is permissible only if the statutory provision are shown to be violated, otherwise the remedy lies under the common law.

Kailash Chand Munyar and others v. M.P. State Road Transport Corporation and others

Judgment dated 04.11.2008 passed by the High Court in Writ Petition No. 11824 of 2008, reported in 2009 (1) MPHT 39

Held:

In catena of cases decided by the Supreme Court in the matter of contract when no statutory violation is established, the aggrieved party should refer to the remedy available under the common law and interference in the writ petition is not permissible. To note few :-

In the case of *World Tel Net and another V. Union of India and others, (2001) 10 SCC 513,* Their Lordships of the Supreme Court were pleased to observe in Paragraph 2 :-

> "2. The petitioner made a claim for refund of a sum of eighty-three and odd lakhs of rupees together with interest at the rate of 21% p.a. payable by Doordarshan. The writ petition filed by the petitioner under Article 226 was dismissed by a Division Bench of the High Court of Delhi by entering into the merits of the rival contentions. In our view the High Court ought not to have entered upon findings on the Contentious issues in a proceeding under Article 226 of the Constitution. Instead the parties should have been resolved in a civil litigation. The claim made is basically one arising from contractual obligations. Time and again this Court has said that such disputes should not be resolved through the summary proceeding conducted under Article 226 of the Constitution. We therefore, vacate all such findings made against the appellant in the impugned judgment."

Similarly in the case of *State of Bihar and others Vs. Jain Plastics and Chemicals Ltd., (2002)1 SCC 216,* Their Lordships were pleased to observe in Paragraph 3 in following terms :-

> "3. Settled law-writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the Court of competent jurisdiction for alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not to invoke the writ jurisdiction of the High Court, Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."

In the case of *Hindustan Steel Works Construction Ltd. And another Vs. Hindustan Steel Works Construction Ltd. Employees Union, (2005) 6 SCC 725,* Their Lordships of the Apex Court were pleased to observe in Paragraph 8 in the following terms :-

> " 8. *In U.P .State Bridge Corpn. Ltd. Vs. U.P. Rajya Setu Nigam Sangh,* it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong

case is made out for making a departute. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in *Premier Automobiles Ltd. Kamlekar Shantaram wadke, Rajasthan SRTC Vs. Krishna Kant, Chandrakant Tukaram Nikam Vs. Municipal Corpn. Of Ahmedabad and in Scooters India Vs. Vijai E.V.Eldred."*

In the case of *State of U.P.Vs. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515,* it has been held by the Supreme Court that the dispute regarding enforcement of a private contract has to be adjudicated by resorting to the remedy of arbitration, if available or by filing a suit and not by resorting to a remedy under Article 226 of the Constitution of India.

The principle of law laid down in the aforesaid judgments thus indicates that judicial review in cases of contract is permissible only if the statutory provisions are shown to be violated in the matter of implementing the contract.

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111. CRIMINAL PROCEDURE CODE. 1973 – Sections 2 (y) and 200 (a) NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142

Mandatory requirement of Section 200 CrPC is that a Magistrate taking cognizance of an offence on complaint shall examine upon whether the complainant of a Company or a statutory organization is capable of being examined in a complaint under Section 138 of N.I. Act – Where Company is a 'complainant' it can be represented by an employee or other persons authorized and employee to report the Company either by a resolution or by a power of attorney.

A harmonious and purposive interpretation of Section 200 of CrPC and Section 142 of NI Act is necessary – As a result Company became a *de jure* complainant and its authorized signatory became *de facto* complainant.

Government company or Statutory Corporation is not a public servant – If the complainant is a Government Company or Statutory Corporation and its authorized signatory is 'a public servant' will have the same meaning assigned to them under Section 21 of the Penal Code, 1860, that he being called a *de facto* complainant, Clause (a) of first Proviso of Section 200 CrPC will be attracted and consequently, the Magistrate had exempted the complainant and the witnesses from being examines – Rationale behind such exemption explained.

National Small Industries Corporation Limited v. State (NCT of Delhi) and others

Judgment dated 17.11.2008 passed by the Supreme Court in Criminal Appeal No. 1802 of 2008, reported in (2009) 1 SCC 407

Held:

The procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses.

Section 200 of the Code contemplates only a corporeal person being a complainant. It mandatorily requires the examination of the complainant and the sworn statement being signed by the complainant.

The object of Section 200 of the Code requiring the complainant and witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. [See: *Nirmaljit Singh Hoon v. The State of West Bengal, (1973) 3 SCC 753*]. Where the complainant is a public servant or court, clause (a) of proviso to section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process.

The term 'complainant' is not defined under the Code. Section 142 NI Act requires a complaint under section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under Section 138 of that Act.

The requirement of Section 142 of NI Act that payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. 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.

Section 138 of the NI Act mandates that payee alone, whether a corporeal person or incorporeal person, shall be the complainant.

When an employee of a Government company or statutory corporation, who is a public servant, acts or purports to act in the discharge of his official duties, it necessarily refers to doing acts done or duties discharged by such public servant, for and on behalf of his employer, namely, the government company/statutory corporation. Any complaint by a public servant (if he happens to be an employee of a government company) acting or purporting to act in the

discharge of his official duties, can only be in regard to the transactions or affairs of the employer company. When an offence is committed in regard to a transaction of the Government company, it will be illogical to say that a complaint regarding such offence, if made by an employee acting for and on behalf of the company will have the benefit of exemption under clause(a) of the proviso to section 200 of the Code, but a complaint in regard to very same offence, if made in the name of the company represented by the said employee, will not have the benefit of such exemption. The contention of the second respondent, if accepted, would mean that a complaint by 'The Development Officer, NSIC' as the complainant can avail the benefit of exemption, the same complaint by 'NSIC represented by its Development Officer' as complainant will not have the benefit of exemption. Such an absurd distinction is clearly to be avoided.

If Section 142 of NI Act and Section 200 of the Code are read literally, the result will be : (a) the complainant should be the payee of the cheque; and (b) the complainant should be examined before issuing process and the complainant's signature should be obtained on the deposition. Therefore, if the payee is a company, an incorporeal body, the said incorporeal body can alone be the complainant. The mandatory requirement of Section 200 of the Code is that a Magistrate taking cognizance of an offence on complaint, shall examine upon oath the complainant, and that the substance of such examination reduced to writing shall be signed by the complainant. An incorporeal body can obviously neither give evidence nor sign the deposition. If literal interpretation is applied, it would lead to an impossibility as an incorporeal body is incapable of being examined. In the circumstances, a harmonious and purposive interpretation of Section 142 of NI Act and Section 200 of the Code becomes necessary.

Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a *de jure* complainant and its employee or other representative, representing it in the criminal proceedings, becomes the *de facto* complainant. Thus in every complaint, where the complainant is an incorporeal body, there is a complainant – *de jure*, and a complainant – *de facto*. Clause (a) of the proviso to section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the *de facto* complainant and in signing and presenting the complaint, he acts in the discharge of his official duties. Therefore, it follows that in such cases, the exemption under clause (a) of the first proviso to Section 200 of the Code will be available.

We are fortified in our view by two decisions of this Court i.e. *Associated Cement Co. Ltd. v. Keshvanand, (1998) 1 SCC 687* and *MCD v. Jagdish Lal, (1969) 3 SCC 389.*

Resultantly, when in a complaint in regard to dishonour of a cheque issued in favour of a company or corporation, for the purpose of section 142 NI Act, the company will be the complainant, and for purposes of section 200 of the Code, its employee who represents the company or corporation, will be the *de facto* complainant. In such a complaint, the de jure complainant, namely, the company or corporation will remain the same but the de facto complainant (employee) representing such de jure complainant can change, from time to time. And if the de facto complainant is a public servant, the benefit of exemption under clause (a) of proviso to section 200 of the Code will be available, even though the complaint is made in the name of a company or corporation. Consequently the Magistrate is not required to examine the complainant and the witnesses.

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112. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Recording of F.I.R. on the basis of statement of eye witness instead of injured is not illegal, as no law prohibits police officer from doing it.

Murugan & Anr. v. State & Anr.

Judgment dated 30.09.2008 passed by the Supreme Court in Criminal Appeal No. 1278 of 2001, reported in AIR 2009 SC 72

Held:

It is true that P.W.7 stated that he obtained Ex.P-1 complaint from P.W.1, when P.W.2 was unconscious. P.W.1 stated that when P.W.2 victim was taken to the hospital, he was in unconscious state and after admitting the victim in the hospital, P.W. 3 Doctor gave treatment to him. So, when treatment was being given by P.W.3 Doctor, P.W.7 came and at that time, he was informed by P.W. 1 that P.W. 2 was not in a position to give statement, since he was unconscious.

Even assuming that P.W.2 was conscious at that time, the nine serious injuries found on various parts of the body of the victim would clearly show that he could not have been able to give full details to P.W.7. Under those circumstances, obtaining of Ex. P-1 complaint from P.W. 1 is quite proper.

Merely because P.W.2 was conscious at that time, it cannot be said that the statement should not have been recorded from P.W.1 and the same is doubtful. No law prohibits the police officer from recording complaint relating to the occurrence, that too, from an eye witness. The ground of acquittal as recorded by trial Court is not at all a proper ground.

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***113. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) & 179**

Exercise of power under Section 156(3) of Code, requirement of –

(i) The alleged offence for which investigation is directed must fall within the territorial Jurisdiction of the Magistrate directing the investigation.

(ii) The Magistrate is required to apply his mind as to whether a cognizable offence is disclosed in the complaint.

(iii) The direction for investigation can only be given to officer in charge of concerning police station and not to any other or higher police Officer.

Vivek Aggarwal and another v. Premchand Guddu

Judgment dated 18.11.2008 passed by the High Court in Criminal Revision No. 906 of 2008, reported in 2009 (1) MPHT 251

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114. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 200, 397 & 401

Revision by complainant against the order of Metropolitan Magistrate refusing to direct investigation on terms of Section 156 (3) and asked him to lead pre-summoning evidence – High Court in revision without hearing accused set aside the said order and directed to examine the matter afresh after calling report from police authorities – Held, even at this stage, opportunity of hearing of the accused or other person as per Section 401 (2) is mandatory, if he is prejudiced – This case is of such nature – The order of High Court set aside.

Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited and another

Judgment dated 17.12.2008 passed by the Supreme Court in Criminal Appeal No. 2054 of 2008, reported in (2009) 2 SCC 363

Held:

Respondent No. 1 (complainant) filed a complaint petition in the Court of Metropolitan Magistrate under Section 200 of the Code in respect of an offence purported to have been committed and punishable under Sections 323, 382, 420, 465, 468, 471, 120-B, 506 and 34 of the Penal Code, 1860 accompanied by an application under Section 156 (3) of the Code. But Metropolitan Magistrate refused to direct investigation in the matter by the Station House Officer in terms of Section 156 (3) of the Code and the complainant was asked to plead pre-summoning evidence. Complainant filed a revision before the High Court impleading the State only as a party in which High Court ordered to the Metropolitan Magistrate to examine the matter,afresh after calling for a report from the police authorities. Against this order, appellant (accused) filed this SLP.

A person intending to set the criminal law in motion inter alia may file an application under Section 156(3) of the Code. When a First Information Report is lodged, a police officer has the requisite jurisdiction to investigate into the

cognizable offence in terms of Section 156(1) of the Code. Where, however, a Magistrate is entitled to take cognizance of the offence under Section 190 of the Code, he may also direct that such investigation be carried out in terms thereof.

When a complaint petition is filed under Chapter XV of the Code, the Magistrate has a few options in regard to exercise of his jurisdiction. He may take cognizance of the offence and issue summons. He may also postpone the issue of process so as to satisfy himself that the allegations made in the complaint petition are prima facie correct and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding as to whether or not there is sufficient ground for proceeding. The learned Magistrate intended to inquire into the case himself. It is for the said purpose, he directed examination of the complainant and his witnesses.

One of the questions which arises for consideration is as to whether the learned Magistrate has taken cognizance of the offence. Indisputably, if he had taken cognizance of the offence and merely issuance of summons upon the accused persons had been postponed; in a criminal revision filed on behalf of the complainant, the accused was entitled to be heard before the High Court.

Section 397 of the Code empowers the High Court to call for records of the case to exercise its power of revision in order to satisfy itself as regards correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Sub-section (2) of Section 397 of the Code, however, prohibits exercise of such power in relation to any interlocutory order passed in any proceeding.

Whereas Section 399 of the Code deals with the Sessions Judge's power of revision; Section 401 thereof deals with the High Court's power of revision. Sub-section (2) of Section 401 of the Code reads, thus:

> "(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

Sub-section (2) of Section 401 of the Code refers not only to an accused but also to any person and if he is prejudiced, he is required to be heard. An order was passed partially in his favour. The learned Metropolitan Magistrate has refused to exercise its jurisdiction under Section 156(3) of the Code.

Had an opportunity of hearing been given to the appellant, he could have shown that no revision application was maintainable and/ or even otherwise, no case has been made out for interference with the impugned judgment.

In this way the appellant was prejudiced by the order of the High Court. Therefore it was set aside and further ordered that the High Court should implead the appellant (alleged Doctor) as a party in the criminal revision, hear the matter afresh and pass an appropriate order.

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115. CRIMINAL PROCEDURE CODE, 1973 – Sections 161 & 162
EVIDENCE ACT, 1872 – Section 25
Section 162 of Cr.P.C. and S.25 of the Evidence Act, scope and applicability of – Merely because a witness happens to be an accused in another case or a counter-case, the accused cannot be deprived of his right in the case against him to cross-examine such witness with respect to his confessional statement made by him u/s. 161 of the Code even if whole or some part of it is confessional in nature – However a part of statement amounting to confession cannot be proved in the case in which such a witness is facing trial was an accused a part of statement amounting to confession cannot be proved in the case in which such a witness is facing trial as an accused.

Rakesh Yadav v. State of M.P.

Judgment dated 16.09.2008 passed by the High Court in Criminal Revision No. 229 of 2008, reported in 2009 (1) MPHT 43

Held:

It has been provided in Section 162 of the Code of Criminal Procedure that no such statement or any record thereof, whether in police diary or otherwise, or any such part of such statement or record, shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872.

On close examination of the aforesaid provisions, it would be clear that the bar imposed under sub-section (1) of Section 162 of the Code of Criminal Procedure with respect to statement recorded under Section 161 of the Code of Criminal Procedure relates only to offence under investigation. The words "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made" engrafted in the provision means that the bar imposed by Section 162(1) of the Code of Criminal Procedure applies only when the statement is given by a person as a witness and not as an accused.

Section 25 of the Indian Evidence Act safeguards the interest of a person in respect of the confession made by him to a Police Officer where he is accused of any offence.

Merely because a witness happens to be an accused in another case or a counter-case, the accused cannot be deprived of his right in the case against him to cross-examine him with respect to his confessional statement made by him under Section 161 of the Code of Criminal Procedure even if whole or some part of it is confessional in nature. It is true that the part of statement amounting

to confession cannot be proved in which he himself is facing trial as an accused. Since Shri Ram Janam Rai is appearing as a witness (and not as accused) in Sessions Trial No. 85/2007, he cannot be exempted in that case from giving answer to the question put by defence Counsel, even in respect to the confessional part of the statement.

There is absolutely no conflict between the provisions of Section 162 of the Code of Criminal Procedure and Section 25 of the Indian Evidence Act. Both the provisions act in different fields. Provisions of Section 25 of the Indian Evidence Act creates safeguard for an accused in police custody, whereas provision of Section 162(1) of the Code of Criminal Procedure creates an important right in favour of accused to cross-examine a witness by confronting him with his previous statement reduced into writing by the police during investigation. The pith and substance of the provisions of Section 162 of the Code of Criminal Procedure and Sections 25 and 27 of the Evidence Act, taken together, is that the law provides protection to a person, in a criminal trial against him, from his confessional statement or any part thereof to the police, excepting the exceptions ingrained in the provision of Section 27 of the Evidence Act.

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***116. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 & 210**
INDIAN PENAL CODE 1860 – Section 394
DAKAITI AUR VYAPHARAN PRABHAVIT KSHETRA ADHINIYAM, 1981 (M.P.) – Section 11/13
Conditions for invoking powers u/s 210 of Code – Held – (1) There must be complaint pending for inquiry or trial ; (2) Investigation by the police must be in progress in relation to the some offence; (3) A report must have been made by the police officer u/s 173 of Code; and (4) The Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case – Petition allowed with the direction to consider the application and on being satisfied that above conditions are fulfilled then pass a reasoned order.
Vinod Dixit v. Satish Mishra & ors.
Judgment dated 25.09.2008 passed by the High Court in M.Cr.C. No. 4992 of 2008, reported in I.L.R. (2009) M.P. 317

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***117.CRIMINAL PROCED2URE CODE, 1973 – Section 197**
INDIAN PENAL CODE, 1860 – Section 420
Sanction for prosecution – Applicant availed the money of LTC without travelling – No sanction for prosecution necessary as act of applicant was not in discharge of his official duties.
Ramesh Chandra v. State of M.P.
Judgment dated 15.07.2008 passed by the High Court in Criminal Revision No. 910 of 2004, reported in I.L.R. (2009) M.P. 255

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***118. CRIMINAL PROCEDURE CODE, 1973 – Section 311**

Examination of accused – Witness examined and cross-examined – Thereafter gave inconsistent evidence in other occasion – Application for further cross-examination on the basis of aforesaid ground can be allowed – Also see Mishrilal and ors. V. State of M.P., 2005 AIR SCW 2770.

Hanuman Ram v. State of Rajasthan & Ors.

Judgment dated 13.10.2008 passed by the Supreme Court in Criminal Appeal No. 1597 of 2008, reported in AIR 2009 SC 69

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119. CRIMINAL PROCEDURE CODE, 1973 – Section 391

Further evidence – Power under Section 391 CrPC, exercise of – Though an Appellate Court has power to take additional evidence in a suitable case, yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution case.

Babulal and others v. State of Madhya Pradesh

Judgment dated 11.11.2008 passed by the High Court in Criminal Revision No. 758 of 2008, reported in 2009 (1) MPHT 439

Held:

In the matter of *Rambhau Vs. State of Maharashtra, reported in AIR 2001 Supreme Court 2120,* Hon'ble Apex Court has observed that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a *de novo* trial. It is not to fill up the lacunae but to sub-serve the ends of justice. Needless to record that on an analysis of the Criminal Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the CPC.

From Perusal of the record, it is evident that the sole ground for which the case was remanded was that the prosecution failed to produce the material evidence for proving the offence. It is well settled that though an Appellate Court has power to take additional evidence in a suitable case, but the discretion should not be exercised to fill up gaps or lacunae in the prosecution case. If prosecution was serious about the matter, there was no reason why the relevant documents were not exhibited during course of trial. In the circumstances, the learned Appellate Court was not correct in exercising its discretion in remanding the case with a direction to allow the parties to adduce further evidence as Section 391 of Cr.P.C. avoids a *de novo* trial. It is not to fill up the lacunae but to sub-serve the ends of justice.

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120. CRIMINAL PROCEDURE CODE, 1973 – Section 397

Issuance of summons is not an interlocutory order within the meaning of Section 397.

Dhariwal Tobacco Products Limited and others v. State of Maharashtra and another

Judgment dated 17.12.2008 passed by the Supreme Court in Criminal Appeal No. 2055 of 2007, reported in (2009) 2 SCC 370

Held:

Indisputably issuance of summons is not an interlocutory order within the meaning of Section 397 of the Code. In *Amar Nath v. State of Haryana, AIR 1977 SC 2185* it was opined:-

> "....It was only with the passing of the impugned order that the proceedings started and the question of the appellants being put up for trial arose for the first time. This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that the appellants were not at all prejudiced, or that any right of their's was not involved by the impugned order. It is difficult to hold that the impugned order summoning the appellants straightaway was merely an interlocutory order which could not be revised by the High Court under sub-sections (1) and (2) of Section 397 of the 1973 Code. The order of the Judicial Magistrate summoning the appellants in the circumstances of the present case, particularly having regard to what had preceded, was undoubtedly a matter of moment, and a valuable right of the appellants had been taken away by the Magistrate in passing an order prima facie in sheer mechanical fashion without applying his mind. We are, therefore, satisfied that the order impugned was one which was a matter of moment and which did involve a decision regarding the rights of the appellants. If the appellants were not summoned, then they could not have faced the trial at all, but by compelling the appellants to face a trial without proper application of mind cannot be held to be an interlocutory matter but one which decided a serious question as to the rights of the appellants to be put on trial."

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121. CRIMINAL PROCEDURE CODE, 1973 – Sections 436, 437 & 439

(i) Meaning, connotation and jurisdiction of 'bail' reiterated.

(ii) For making an application under Section 439, a person has to be in custody – What amounts to 'custody' ? explained.

Vaman Narain Ghiya v. State of Rajasthan

Judgment dated 12.12.2008 passed by the Supreme Court in Criminal Appeal No. 406 of 2008, reported in (2009) 2 SCC 281

Held:

"Bail" remains an undefined term in the CrPC. Nowhere else the term has been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints since the U.N. Declaration of Human Rights of 1948, to which Indian is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb `bailer' which means to 'give' or 'to deliver', although another view is that its derivation is from the Latin term baiulare, meaning `to bear a burden'. Bail is a conditional liberty.

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the mis-adventures of a person alleged to have committed a crime; and on the other, the fundamental cannon of criminal jurisprudence, viz, the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restrain, the more restraint on others to keep off from us, the more liberty we have (See *A.K. Gopalan v. State of Madras 27, AIR 1950 SC 1000*).

The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.

Chapter XXXIII consists of Sections 436 to 450. Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. For the purposes of bail, offences are classified into two categories, that is, (i) bailable, (ii) non-bailable. Section 436 provides for granting bail in bailable cases and Section 437 in non bailable cases. A person accused of a bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting bail. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. Persons contemplated by this Section cannot be taken in custody unless they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties. (See *State of Maharashtra v. Anand Chintaman Dighe, AIR 1990 SC 625 and State v. Surendranath Mohanty, (1990) 3 OCR 462*)

It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest".

In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh v. Prabhakar Rajaram Kharote, AIR 1980 SC 785,* there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in. *Nirmal Jeet Kaur v. State of M.P, (2004) 7 SCC 558* and *Sunita Devi v. State of Bihar, (2005) 1 SCC 608*and it was held that making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin Abdul Samat Sheikh v. State of Maharashtra, (1996) 1 SCC 667* the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail, The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not 'belief' for which reason it is not enough for the applicant to show that he has

some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out of for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

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122. CRIMINAL PROCEDURE CODE, 1973 – Section 437

Bail order – It should indicate reasons – Conclusive findings on the point raised by the parties is not expected – Bail order cannot be granted with the observation that the evidence is not reliable.

Lokesh Singh v. State of U.P. & Anr.

Judgment dated 21.10.2008 passed by the Supreme Court in Criminal Appeal No. 1649 of 2008, reported in AIR 2009 SC 94

Held:

While dealing with an application for bail, there is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
3. Prima facie satisfaction of the Court in support of the charge.

Any order de hors such reasons suffers from non-application of mind as was noted by this Court, in *Ram Govind Upadhyay v. Sudarshan Singh and Ors. [(2002) 3 SCC 598], Puran etc. v. Rambilas and Anr. Etc. [(2001) 6 SCC 338)] and in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr. [JT 2004 (3) SC 442].*

Though a conclusive finding in regard to the points urged by the parties is not expected of the Court considering the bail application, yet giving reasons is different from discussing merits or demerits. As noted above, at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. But that does not mean that while granting bail some reasons for prima facie concluding why bail was being granted is not required to be indicated.

In *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr., (2004 (7) SCC 528)* In para 11 it was noted as follows:

> "11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
>
> (c) Prima facie satisfaction of the court in support of the charge. [See *Ram Govind Upadhyay v. Sudarshan Singh (2002 (3) SCC 598) and Puran v. Rambilas, (2001) 6 SCC 338*]."

It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are *sine qua* non for granting bail even under Section 439 of the Code.

In *Puran v. Rambilas and Anr. (2001) 6 SCC 338* it was noted as follows:

> "11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn., AIR 1978 SC 179)*. In that case the Court observed as under:

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

Above being the position, we are of the view that the High Court was not justified in granting bail to respondent No. 2. The order granting bail is set aside. The respondent No. 2 who was released on bail shall surrender to custody forthwith.

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***123. CRIMINAL PROCEDURE CODE, 1973 – Section 457**

Seizure – Procedure – Applicant's vehicle seized by the financer for default of non-payment of instalments – Court releasing the vehicle with one of the conditions for payment of loan amount – Action challenged – Held – While deciding application u/s 457 of Code with respect to interim custody of vehicle, the court has to pass appropriate orders and custody is to be given to the registered owner of the vehicle on furnishing requisite security or bond/Supurdginama – While dealing with such application, it is not necessary at all to impose any condition for payment of insalments alleged to be due from the applicant as it is purely a civil matter – If the instalments are due, then the financer can take civil recourse for recovery of same.

Rampal Singh v. State of M.P. & anr.

Judgment dated 26.11.2008 passed by the High Court in M.Cr.C. No. 6793 of 2008, reported in I.L.R. (2009) M.P. 321

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124. ELECTION PETITION:

Election petition on the allegation of adoption of corrupt practice – It should be proved almost like the criminal charge as it is quasi-criminal in character – Mere preponderance of probabilities is not enough as in a civil dispute.

Baldev Singh Mann v. Surjit Singh Dhiman

Judgment dated 21.11.2008 passed by the Supreme Court in Civil Appeal No. 3700 of 2007, reported in (2009) 1 SCC 633

Held:

The law is now well-settled that charge of a corrupt practice in an election petition should be proved almost like the criminal charge. The standard of proof is high and the burden of proof is on the election petitioner. Mere preponderance of probabilities are not enough, as may be the case in a civil dispute. Allegations of corrupt practices should be clear and precise and the charge should be proved to the hilt as in a criminal trial by clear, cogent and credible evidence.

A three-Judge Bench of this court in *Jeet Mohinder Singh v. Harminder Singh Jassi (1999) 9 SCC 386* has held that the success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves an enormous load on the public funds and administration. The court further observed as under:-

> "Charge of corrupt practice is quasi-criminal in character. If substantiated it leads not only to the setting aside of the election of the successful candidate, but also of his being disqualified to contest an election for a certain period. It may entail extinction of a person's public life and political career. A trial of an election petition though within the realm of civil law is akin to trial on a criminal charge. Two consequences follow. Firstly, the allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly, the charges when put to issue should be proved by clear, cogent and credible evidence. To prove charge of corrupt practice a mere preponderance of probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to the hilt, the standard of proof being the same as in a criminal trial."

Similar opinion has been expressed in *Jagan Nath v. Jaswant Singh, AIR 1954 SC 210* and *Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe, (1995) 5 SCC 347.* The will of the people who have exercised their franchise in an election in favour of a returned candidate must be respected to protect the interest of the returned candidate. The charge of corrupt practice is a quasi-criminal in character and it has to be proved as a criminal charge and proved in the court.

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125. ELECTRICITY SUPPLY CODE – Clauses 4.3 (g) and (h)

(i) Electricity dues – Caution to be exercised by the purchaser/ lessee of the premises, emphasized.

(ii) The supply of electricity by distributor to a consumer is 'sale of goods' and they are parties to the contract thereof – As the supplier has no privity of contract that subsequent purchaser/ lessee of such premises, cannot be asked to pay the dues of his predecessor-in-title or possession, as the amount payable towards supply of electricity does not constitute a 'charge' on the premises – But when such purchaser/lessee (subsequent occupant) of the premises approaches the distributor seeking for a fresh electricity connection for supply of electricity, the distributor can stipulate apart from others, the condition to clear arrears due in regard to the supply of electricity made to the premises before the electricity supply is restored or fresh connection is provided to the premises – Such condition is neither arbitrary nor unreasonable.

Paschimanchal Vidyut Vitran Nigam Limited and others v. DVS Steels and Alloys Private Limited and others

Judgment dated 07.11.2008 passed by the Supreme Court in Civil Appeal No. 6565 of 2008, reported in (2009) 1 SCC 210

Held:

The supply of electricity by a distributor to a consumer is 'sale of goods'. The distributor as the supplier, and the owner/occupier of a premises with whom it enters into a contract for supply of electricity are the parties to the contract. A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a 'charge' on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. The supplier can therefore neither file a suit nor initiate revenue recovery proceedings against a purchaser of a premises for the outstanding electricity dues of the vendor of the premises, in the absence of any contract to the contrary.

But the above legal position is not of any practical help to a purchaser of a premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of

electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them.

A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Having regard to the very large number of consumers of electricity and the frequent moving or translocating of industrial, commercial and residential establishments, provisions similar to clause 4.3(g) and (h) of Electricity Supply Code are necessary to safeguard the interests of the distributor.

We do not find anything unreasonable in a provision enabling the distributor/ supplier, to disconnect electricity supply if dues are not paid, or where the electricity supply has already been disconnected for non-payment, insist upon clearance of arrears before a fresh electricity connection is given to the premises. It is obviously the duty of the purchasers/occupants of premises to satisfy themselves that there are no electricity dues before purchasing/occupying a premises. They can also incorporate in the deed of sale or lease, appropriate clauses making the vendor/ lessor responsible for clearing the electricity dues up to the date of sale/lease and for indemnity in the event they are made liable. Be that as it may.

In this case, when the first respondent, who was the purchaser of a sub-divided plot, wanted a new electricity connection for its premises, the appellant informed the first respondent that such connection will be provided only if the electricity dues are paid pro-rata. They were justified in making the demand. Therefore, it cannot be said that the collection of Rs.8,63,451/- from first respondent was illegal or unauthorized. It is relevant to note that when the said amount was demanded and paid, there was no injunction or stay restraining the appellant from demanding or receiving the dues.

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126. ENVIRONMENT PROTECTION AND POLLUTION CONTROL: WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974 – Sections 2 (k), 25, 26, 44, 47 & 49

(i) Specific and detailed averments, regarding commission of offence for violation of Sections 25 and 26 of the Act were made in complaint filed by Pollution Board (through its Officers) – At stage of issuing process, Magistrate is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused persons.

(ii) Approach of Court – For offenders causing air and water pollution – Stated – Offenders who discharge noxious polluting effluents into the streams, river or any other water bodies which detrimentally affect public health at large should be dealt with strictly – *De hors* technical objection.

U.P. Pollution Control Board v. Dr. Bhupendra Kumar Modi and another

Judgment dated 12.12.2008 passed by the Supreme Court in Criminal Appeal No. 2019 of 2008, reported in (2009) 2 SCC 147

Held:

It is not in dispute that the first respondent before letting out trade effluent into a stream or a river has to satisfy certain conditions in terms of the provisions of the Act and the order of the authorities concerned. It is also not in dispute that without a consent order by the Board the Company cannot let out untreated effluent into a land or stream or river. Though a consent order was issued by the Board it has been specifically stated in the complaint that those conditions have not been fulfilled by the Company. In those circumstances, in the interest of the public health, the appellant-Board through its officers laid a complaint against the persons, who are in charge of the day-to-day affairs and in the decision making process. There is no need to place all the materials at the threshold. However, on perusal of the complaint and the relevant materials in the form of documents, the learned Special Judicial Magistrate (Pollution) entertained the same and issued summons to the named persons in the complaint.

It is settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused.

In *Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736,* this Court has held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that: (SCC p. 741, para 5)

> "5. ..... Once the Magistrate has exercised his discretion, it is not for the High Court or even this Court to substitute its own discretion for that of the Magistrate or to examine their case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused."

In *U.P. Pollution Control Board v. Mohan Meakins Ltd., (2000) 3 SCC 745* where an offence under the Act has been committed by a company every person who was in charge of and was responsible to the company for the conduct of the business of the company is also made guilty of the offence by the statutory creation. Any director, manager or other officer of the company, who has consented to or connived in the commission of the said offence, is made liable for the punishment of the offence. In the above context what is to be looked at during the stage of issuing process is whether there are allegations in the complaint by which the Managers or Directors of the Company can also be proceeded against, when the Company is alleged to be guilty of the offence.

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127. ESSENTIAL COMMODITIES ACT, 1955 – Sections 3 & 7
M.P. FOOD STUFFS (DISTRIBUTION CONTROL) ORDER, 1960 – Clauses 2 (d) & 4
M.P. FOOD STUFFS (CIVIL SUPPLY AND DISTRIBUTION) SCHEME, 1991
Essential Commodities Act (10 of 1955), offence under Section 7 r/w/ Sections 3 and 5 of M.P. Food Stuffs (Civil Supply and Distribution) Scheme, 1991 prepared under Clause 4 of M.P. Food Stuffs (Distribution Control) Order, 1960, violation of – By insertion of independent Clause 4 in Order, 1960, the power has been given to the State Government to make scheme and under this provision Scheme, 1991 was formulated and is in operation – Scheme of 1991, being part of order 1960 and made under Section 3 r/w/s 5 of the Act, therefore, breach of any provision of the Scheme is punishable under Section 7 of the Act. [The case of *Jeevanlal and others v. State of M.P. and others, (2001) 1 MPJR SN 32* relied on, while cases of *Shripatti Garg v. State of M.P., Misc. Cr. Case No. 7611/2005,* decided on *04.10.2005 alongwith cases of Prakash Babu v. State of M.P., 2005 (1) MPLJ 430, Shiv Kumar v. State of M.P., 2005 (4) MPLJ 117* and *Arvind Kumar v. State of M.P., 2008 (2) MPHT 38 held* per incuriam]

Kishore Kumar Dixit and another v. State of Madhya Pradesh

Judgment dated 25.11.2008 passed by the High Court in Miscellaneous Criminal Case No. 10154 of 2005, reported in 2009 (1) MPHT 186

Held:

It is crystal clear that by insertion of independent Clause 4 in Order 1960 of Madhya Pradesh Food Stuffs (Distrbution Control) Order, 1960 the power has been given to the State Government to make Scheme and under this provision, Scheme 1991 was formulated and is in operation. The earlier Scheme of 1981 was made on the basis of definition Clause 2 (d) in M.P. Food Stuffs (Distribution Control) Order, 1960 and according to Division Bench judgment rendered in case of *M.P. Ration Vikreta Sangh Jabalpur and Ors vs. State of M.P. and Ors., AIR 1981 MP 203* on the basis of Clause 2 (d) Scheme could not be formulated but same could be followed and was made under executive power

of the State as per Article 162 of the Constitution. Such is not the position after amendment in Order, 1960 authorising State Government to make Scheme as per independent Clause 4 and Scheme of 1991 has been formulated and applied by the State Government and in the considered view of this Court Scheme of 1991 is the part of order 1960 made under Section 3 read with Section 5 of the Act, therefore breach of any condition of the Scheme would be punishable under Section 7 of the Act.

Now it is to be seen whether in *judgments of Prakash Babu, Shiv Kumar and Arvind Kumar* (supra), amended Clause 4 in the Order 1960 has been considered or not. This Court has gone through all the three judgments entirely and does not find even a whisper about amendment in 1960 Order vide Clause 4 providing specific power to State Government to formulate the Scheme and in pursuance there of Scheme 1991 has been formulated. After amendment of Clause 4 in Order 1960 and formation of Scheme 1991 in pursuance thereof, there can be no application of judgment rendered by Division Bench in *M.P. Ration Vikreta Sangh* (supra), and affirmed by the Supreme Court.

In case of *Jeevanlal and others Vs. State of M.P. and others (2001)1 MPJR SN 32,* the learned Single Judge of M.P.High Court, Indore Bench has considered above mentioned Amendment and held as under:-

"Obviously, the basis for holding that the Scheme, 1981 is merely an executive exercise of the State, was that the M.P.Order, 1960 did not then authorise the State Government for making such a Scheme but merely defined it. Now, that the Order 1960 after Amendment of 1991, expression "The Government Scheme" in Clause 2 (d) having been accordingly amended, there can be no manner of doubt that the Scheme, 1991 made in pursuance of these amended clauses, is not a mere executive order of the State Government, but it is a statutory "Order" within the meaning of Section 3 of the EC Act, the contravention of which would be an offence under Section 7 of the Act.

Lastly, it was contended by the learned Counsel for the applicant that no prior concurrence of the Central Government in terms of Section 5 of the EC Act was obtained before amending the M.P. Order, 1960 and, therefore, the notification dated 21-2-91, Order, 1960 is illegal. I am not persuaded by the argument. The controversy stands resolved by the decision of Division Bench of this Court in the case of *M.P. Ration Vikreta Sangh* (Supra).

In the instant case also, as is evident from the Notification amending the M.P. Order, 1960, prior concurrence of the Central Government was obtained for the amendment although it was not required.

I, thus hold that the Scheme, 1991 is an Order within the meaning of Section 3 of the EC Act, the violation of which would be an offence under Section 7 of the Act. This revision should, therefore, fail and is dismissed."

I am in full agreement with above mentioned judgment of learned Single Judge. None of the Counsel for the parties herein this case has brought into the

notice of this Court the aforesaid legal position and the judgment rendered by learned Single Judge in case of *Jeevanlal* (supra).

In all aforementioned three cases *Prakash Babu (Supra) Shiv Kumar (Supra),* and *Arvind Kumar (Supra),* the Clause 4 of 1960 Order and formation of fresh Scheme 1991 in pursuance thereof the above referred judgment passed in case of *Jeevanlal (Supra)*, have not been considered at all, therefore, all the three judgments cannot be considered as precedent and are rendered per in curiam. Apex Court in case of *Government of Andhra Pradesh and another Vs. B.Satyanarayanrao (dead by L.Rs.), AIR 2000 SC 1729* held as under in Para eight :-

> "Per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue."

In the aforesaid three cases, there is absolutely no consideration and discussion about Amended Clause 4 in Order 1960 authorising or empowering the State Government to make the Scheme as defined under Section 2 (d) of the Order and Scheme 1991 has been framed under this provision. In case of *Mayuram Subramanyam Vs. CBI AIR 2006 SC 2449,* the Supreme Court has discussed about the judgment rendered per incuriam and observed in Paras 12,13 as under :-

> 12. In *State through S.P.New Delhi Ratan Lal Arora,(2004) 4 SCC 590* , it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.
>
> 13. "incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignotatium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in *Young Vs. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293,* is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short 'the Constitution') which embodies the doctrine of precedents as matter of law. The above position was highlighted in *State of U.P. and another Vs. Synthetics and Chemicals Ltd. And another, (1991) 4 SCC 139.* To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. The position was highlighted in Nirmal Jeet Kaur Vs. State of M.P., (2004)7 SCC 558. The question was again

examined in N.Bhargavan Pillai (dead) by L.Rs. and another Vs. State of Kerala, AIR 2004 SC 2317. It was observed in para 14 as follows :-

> '14. Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5 (2) of the Act. Therefore, there is no substance in the accused/ appellant's plea relating to grant of benefit under the Probation Act. The decision in *Bore Gowda' vs. State of Karnataka (2000) 10 SCC 260,* does not even indiate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analyzing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct.

The learned Counsel for petitioners has filed Annexure A-2 Order passed in *M.Cr.C. No. 7611/2005 Shripatti Garg Vs. State of M.P., dated 4-10-2005,* passed by learned Single Judge of Principal Bench. The FIR against Shripatti Garg, the co-accused in case of the petitioners, was quashed. This order also suffers with same deficiency as discussed herein above, therefore, cannot be considered as precedent having binding effect.

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128. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – The axe can cause lacerated injuries because villagers generally use it for cutting trees and branches and are not so sharp like knife or sword.

Injured eye witnesses sharing house with deceased are natural witnesses – Their evidence cannot be rejected merely for non-examination of doctor, who examined them.

Mukul Mahto & Ors. v. State of Jharkhand & Ors.

Judgment dated 15.10.2008 passed by the Supreme Court in Criminal Appeal No. 862 of 2001, reported in AIR 2009 SC 335

Held:

It is also to be noted that, as done by the High Court that axes which are generally used in villages for cutting trees and branches are not so sharp like sword or knife and when used on the head, can also cause lacerated injuries. (See *Ch. Madhusudhana Reddy v. State of A.P., 1994 SCC (Crl.) 275*)

The matter can be looked from another angle. Even if they had not suffered any injuries yet their version as eye witnesses if credible and cogent can be accepted and acted upon and there is no reason to discard their evidence on

the ground that a doctor who examined their injuries was not examined. The High Court has concluded that the evidence of PWs regarding the presence and participation of the accused in the occurrence is reliable and truthful. The victims of assault would not normally spare the real culprits and falsely implicate innocent accused persons. Their evidence clearly shows that the deceased was lying injured at the spot where the accused persons were present and they assaulted PWs 3, 7 and 8 when they went to rescue him. With reference to the evidence it has been noticed by the High Court that the common house of the deceased and PWs 3, 7 and 8, the eye witnesses is at a very short distance and it is quite natural that on hearing alarm they had rushed to the place of occurrence.

Apart from that the evidence of PW-10 the informant is of considerable significance. The High Court has noted that there were some exaggeration in his statement though reading the same carefully alongwith the evidence of PWs 3, 7 and 8 lends support to the prosecution case.

The High Court found the present appellants guilty. But considering the manner of assault and the surrounding factors convicted them for offence punishable under Section 326 read with Section 34 IPC. The judgment of the High Court does not suffer from any infirmity to warrant interference.

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***129. EVIDENCE ACT, 1872 – Sections 3 & 45**
INDIAN PENAL CODE, 1860 – Section 302/34
Conflict between oral testimony and medical evidence, appreciation of – The conflict between oral and medical evidence can be of varied dimensions and shapes – There may be a case where there is total absence of injuries which are normally caused by a particular weapon – There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon – The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on the portion of the body where they are deposed to have been caused by the eye-witnesses – The same kind of inference can not be drawn in such three categories of apparent conflict in oral and medical evidence – In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful – However in the second and third categories, no such inference can straightaway be drawn – The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witness to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.

Bhavanraj Singh and others v. State of Madhya Pradesh
Judgment dated 26.09.2008 passed by the High Court in Criminal Appeal No. 24 of 1999, reported in 2009 (1) MPHT 370 (D.B.)

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130. EVIDENCE ACT, 1872 – Section 24
Confession – If voluntary and true and is made in a fit state of mind can be relied upon – Its value depends on the nature of circumstances and time and veracity of witness to whom it has been made.
Chattar Singh & Anr. v. State of Haryana
Judgment dated 26.08.2008 passed by the Supreme Court in Criminal Appeal No. 180 of 2001, reported in AIR 2009 SC 378

Held:

Confessions may be divided into two classes i.e. judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the 'Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). The law is clear that a confession cannot be used against an accused person unless the

court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See *R. v. Warickshall*) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See *Woodroffe's Evidence,* 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra- judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

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***131. EVIDENCE ACT 1872 – Section 106**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 141
Dishonour of cheque – Partmership – firm Incharge of and were responsible to the firm – Burden of proving fact especially within khowledge – Partner of the firm who signed the cheque died – No notice issued to other partners – Compalint filed against the other partners – Mintaiability – Held – Other partners were in charge of and were responsible to the firm for the conduct of it's business in the context of Sec. 141 of the Act of 1881 could be decided only during the trial – On perusal of Sections 138 & 141 of the Act of 1881 it is revealed that it other elements of the offence u/s 138 are satisfied – The burden would be on the partners of the firm to show that they were not liable to be convicted – Any restriction on their power or existence of any special circumstance exoneration them would be the fact exclusively within their knowledge, therefore, it would be for them to establish during the trial that at the relevant time they were not in charge of the affairs of the firm.
Mahaveer Traders (M/s) v. M/s Gangadhar Sharma & Sons & ors.
Judgment dated 14.10.2008 passed by the High Court in Criminal Revision No. 1641 of 2007, reported in I.L.R. (2009) M.P. 286

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132. FAMILY AND PERSONAL LAWS:

SPECIAL MARRIAGE ACT, 1954 – Section 36, 37 & 27

CIVIL PROCEDURE CODE, 1908 – Section 151

The two expressions 'maintenance' and 'support' are comprehensive in nature and are of wide aptitude and they would take within their sweep medical expenses also – Such relief can be claimed by the wife by filing application under Section 151 of the CPC – Such application is maintainable as provisions of Civil Procedure Code would apply to the Court exercising power under the Special Marriage Act, 1954.

Rajesh Burman v. Mitul Chatterjee (Burman)

Judgment dated 04.11.2008 passed by the Supreme Court in Civil Appeal No. 6443 of 2008, reported in (2009) 1 SCC 398

Held:

The Special Marriage Act, 1954, as stated in the Preamble, provides a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce. The Act provides for solemnization of special marriages, registration thereof, consequences of marriage under the Act, restitution of conjugal rights, judicial separation and nullity of marriage and divorce. It also provides for jurisdiction of Courts and procedure to be followed.

Section 36 of this Act deals with 'alimony pendente lite' and states:

> *36. Alimony pendente lite.*– Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband.

Section 37 of the Act provides for 'permanent alimony and maintenance' and reads thus:

> *"37. Permanent alimony and maintenance.*– (1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's

property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has re-married or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just."

Reading the scheme of the Act, it is clear that a wife is entitled to 'maintenance and support'. In our considered opinion, the learned counsel for the respondent-wife is right in submitting that the two terms 'maintenance' and 'support' are comprehensive in nature and of wide amplitude.

The term 'maintenance' is defined in Black's Law Dictionary, (6th Edn., pp.953-54) thus:

> "The furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife".

'Likewise, the word 'support' as defined in the said Dictionary (p. 1439) reads as under:

> "That which furnishes a livelihood; a source or means of living; subsistence, sustenance, maintenance, or living. In a broad sense the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his station of life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes; also proper care, nursing and medical attendance in sickness and suitable burial at death".

In this case the Apex Court also considered some of the decisions rendered in *Pradeep Kumar Kapoor v. Ms. Shailja Kapoor, AIR 1989 Delhi 10, Atul Sashikant Mude v. Niranjana Atul Mude, AIR 1998 Bombay 234, R. Suresh v. Smt. Chandra, AIR 2003 Karnataka 183, Ajay Saxena v. Smt. Rachna Saxena, AIR 2007 Delhi 39* and *Mangat Mal v. Puni Devi (Smt.), (1995) 6 SCC 88.*

In our considered opinion the two expressions 'maintenance' and 'support' under the Act of 1954 are comprehensive in nature and are of wide amplitude and they would take in their sweep medical expenses also. In our view it was open to the applicant wife, who had initiated the proceedings for dissolution of marriage in a competent Court to institute such an application. Even otherwise, looking to the Scheme of the Act, it is clear that the provisions of Civil Procedure Code would apply to the Courts exercising power under the Special Marriage Act, 1954. Therefore, the objection raised as to jurisdiction of trial Court to entertain the application has no substance and must be rejected.

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133. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)

Divorce on the ground of mental cruelty – Continuous cessation of marital intercourse or total indifference on the part of wife towards marital obligation will lead to legal cruelty – No mens rea or deliberate or willful ill treatment is an essential ingredient of cruelty – It can be established by proving such conduct or by admission of such conduct which can otherwise be related as cruelty by ordinary sense of human affairs, concept, degree, types and ingredients of cruelty explained.

Suman Kapur v. Sudhir Kapur

Judgment dated 07.11.2008 passed by the Supreme Court in Civil Appeal No. 6582 of 2008, reported in (2009) 1 SCC 422

Held:

Section 13 of the Hindu Marriage Act provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub- section (1) of Section 13 declares that a decree of divorce may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty.

Now, it is well-settled that the expression 'cruelty' includes both (i) physical cruelty; and (ii) mental cruelty.

The concept of cruelty has been dealt with in Halsbury's Laws of England (Vol.13, 4th Edition Para 1269) as under:

> "1269. ..... The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them

capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse".

The concept of cruelty has also been discussed by the Apex Court in *Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337, Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Parveen Mehta v. Inderjit Mehta, (2002) 5 SCC 706, A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22* and *Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778.*

Recently, in *Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511,* this Court held:

"No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental Cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that

tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty".

In this case it was proved that the wife was interested in her career only and she had neglected towards matrimonial obligation and exercise of conjugal rights by the husband. Termination of pregnancy by wife was without consent or even knowledge of the husband which was in the nature of mental cruelty. Wife was constantly and continuously avoiding staying with the husband and preventing him to have matrimonial relations. From the letters of the wife also it was found that she had completely lost interest in the marriage and she was willing to get divorce. The appellant wife wanted to pursue her career. In her written statement itself it was admitted that she was very much interested in her career and was keen to lead independent life. In such circumstances, mental cruelty held proved.

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***134. HINDU MARRIAGE ACT, 1955 – Sections 13 (1-A) (ii), 13 (1) (ia) & 10**
Civil Matrimonial proceedings – Decision therein, basis of – Petitioner/ husband filed petition under Sections 13 (1) (ia) and 13 (1A) (ii) of the Hindu Marriage Act for decree of divorce on grounds of cruelty and of non-compliance of the decree for restitution of conjugal rights – The Trial Court, contrary to the prayer made, passed the decree for judicial separation under Section 10 of the Act – Held, neither of the party has prayed for judicial separation under Section 10 of the Act – The Trial Court was bound to decide the case only within the four corners of the case pleaded by the parties and the prayer made by them and not beyond that – The Trial Court did not have any occasion to pass the decree under Section 10 of the Act for Judicial separation – While Setting aside the judgment and decree, the decree of divorce is ordered between the parties

Rakesh Dharamadas Rai v. Smt. Lata @ Shakuntala Rai

Judgment dated 13.08.2008 passed by the High Court in First Appeal No. 325 of 2005, reported in 2009 (1) MPHT 196

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***135. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 4, 6 & 13**
GUARDIANS AND WARDS ACT, 1890 – Sections 7 & 17
Custody of minor child – Paramount consideration is the welfare of the child and not the statutory rights of the parties (parents) – Mature and human approach of the Court is required – The Court has to give due weightage to the child – Ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted – Proper balance between rights of the respective parents and the welfare of the child including choice of minor is important consideration – Court can exercise its parens patriae jurisdiction in such cases.

Gaurav Nagpal v. Sumedha Nagpal

Judgment dated 19.11.2008 passed by the Supreme Court in Civil Appeal No. 5099 of 2007, reported in (2009) 1 SCC 42

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136. HINDU SUCCESSION ACT, 1956 – Sections 6 & 23

(i) Repealing a statute or deleting a provision, effect of – In absence of any saving clause, the normal effect of such repeal is to obliterate it from the statute book as completely as if it had never been passed – And the statute must be considered as a law that never existed.

(ii) Omission of Section 23 from Hindu Succession Act, effect on pending proceedings – From the date of enforcement of amended provision to the Act, the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act, her status is also that of a coparcener.

Prabhudayal (dead) through his L.Rs. v. Smt. Ramsiya and another

Judgment dated 23.10.2008 passed by the High Court in First Appeal No. 45 of 2002, reported in 2009 (1) MPHT 139

Held:

The question which is required to be adjudged is whether plaintiff being a female heir can ask for partition of the dwelling house of a joint family. No doubt, before coming into force of Amended Act of 2005 certainly plaintiff being female heir of Hindu coparcener was not entitled to ask for partition of the dwelling house occupied by Joint Hindu Family until the male heirs choose to divide their respective shares therein but Section 23 of the Act has been omitted by Section 4 of the Amendment Act of 2005, which would mean that from the date of enforcement of amended provision to the Act, the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act, her status is also that of a coparcener. The Supreme Court in *Kolhapur Canesugar Works Ltd. and another v. Union of India and others, AIR 2000 SC 811,* in Paras 35 and 38 while considering the scope of omission of a provision in a particular Statute vis-a-vis Section 6 of the General Clauses Act has laid down the law of land that it is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the law after the said provision was omitted the Court is not to look for a provision in the newly added statute for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the said statute to the effect that pending proceedings will lapse on omission of the particular provision. According to the Apex Court in such a case the Court is to look to the amended provision in the statute which has been newly introduced after the omission of the previous provisions in order to determine whether a pending proceeding will continue or lapse. If, there is a provision in the amended statute that pending proceedings shall continue and be disposed of in accordance to

the old provision as if the said provision has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari materia provision in the statute under which the newly amended provision has been framed in that case also, the pending proceeding will not be affected by omission of that particular provision or Section. However, in absence of any such provision in the statute the pending proceedings would lapse on account of the omission of that particular provision or Section.

In Para 38 of the said decision, the Supreme Court further held that the position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. The only exception is engrafted by the provisions of Section 6 (1) of the General Clauses Act. If a provision of a statute is unconditionally omitted without a saving clause, in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Saving of the nature contained in Section 6 or in Special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the saving applicable.

On going through the amended Section 6 as well as omitted Section 23 of the Act, there is no provision that pending proceedings shall continue under the old provision which has been omitted. On going through the Amendment Act of 2005, it is revealed that it does not contain the saving clause which would mean that omitted Section 23 of the Act is not saved for pending cases. Since there is no saving provision in favour of the pending proceedings, in view of the decision of Supreme Court in *Kolhapur Canesugar Works Ltd. (supra),* Section 6 of the General Clauses Act has no application and, therefore, I am of the view that plaintiff/respondent No. 1- Smt. Ramsiya is having 1/4th share in the dwelling house of Udaipura and village Rehma and is entitled to get those houses partitioned up to the extent of her share.

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***137. INDIAN FOREST ACT, 1927 – Sections 52, 52-A & 52-B**

The Authorised Forest Officer passed an order of confiscation of a vehicle in an offence under Indian Forest Act – The Appellate Authority (Conservator of Forest) set aside the order of confiscation and remitted the matter for fresh decision on merit – In revision the Additional Sessions Judge while continuing the order of remand, directed the vehicle to be released on furnishing of bank guarantee of Rs. 50,000/- on the ground that the vehicle was wearing away and the offence was compoundable – In writ petition, the order passed in revision was assailed contending firstly, that the order of the Appellate authority was not final and revision was not maintainable against it and secondly, that the release of vehicle involved in a forest

offence should be in the rarest case and not as a matter of course – Held, reversal of order of confiscation had brought finality to the proceedings before the Appellate Authority – Therefore it was a final order from which revision was maintainable – Further held, the Revisional Court did not exceed its jurisdiction while passing an order of releasing the vehicle.

State of M.P. v. Shri Bhanu Pratap Singh

Judgment dated 23.10.2008 passed by the High Court in Writ Petition No. 9342 of 2008, reported in 2009 (1) MPHT 33

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138. INDIAN PENAL CODE, 1860 – Sections 84 & 300

(i) Murder – Plea of unsoundness of mind – When Section 84 will attract? Explained – Behaviour of the accused was queer or was getting epileptic fits – Not sufficient to attract the provision.

(ii) The onus of proving unsoundness of mind is on the accused u/s 105 of the Evidence Act – However, if history of insanity is revealed during investigation, accused to be medically examined – Otherwise it creates a serious infirmity in the prosecution case.

Hari Singh Gond v. State of M.P.

Judgment dated 29.08.2008 passed by the Supreme Court in Criminal Appeal No. 321of 2007, reported in AIR 2009 SC 31

Held:

Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There, is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See *Dahyabhai v. State of Gujarat AIR 1964 SC 1563*). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

> "Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections, whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case:
>
> 'Would the prisoner have committed the act if there had been a policeman at his elbow ? It is to be remembered that these tests are good for cases in which previous insanity is more or less established. These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

There are four kinds of persons who may be said to be non compos mentis (not of sound mind), i.e., (1) an idiot; (2) one made non compos by illness (3) a lunatic or a mad man and (4.) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hale's Pleas of the Crown 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder, (See 1 Hale PC 30).

A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

Section 84 embodies the fundamental maxim of criminal law, i.e., actus non reum facit nisi mens sit rea" (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (furios is nulla voluntas est).

The Section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in 'History of the Criminal Law of England, Vo. II, page 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in *Sherall Walli Mohammed v. State of Maharashtra, 1972 Cr.LJ 1523 (SC),* held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in M. Naughton's case (1843) 4 St. Tr. (NS) 847. Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while

committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this Section. (Also see *Siddhpal Kamala Yadav v. State of Maharashtra, in AIR 2009 SC 97*)

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139. INDIAN PENAL CODE, 1860 – Sections 366 & 376

(i) Accused (respondent) took away the prosecutrix who was a minor but married woman from the lawful custody of her father without his consent with the intention of forcing her to have sexual intercourse with him and committed the offence against her will and without her consent – Medical evidence corroborated the prosecution case and her age assessed between 11 to 13 years.

(ii) Affidavit without knowing the contents thereof and at the instance of accused stating therein her age to be 18 years and living with the accused as wife shows the mental trauma which she was undergoing.

(iii) It was not a case where the proviso to Section 376 (i) could be invoked as there was no adequate and special reasons to impose a sentence of imprisonment for a term of less than minimum prescribed i.e. 7 years.

(iv) Sentence in rape case – One of the principle that the judiciary has all along kept in its mind that rape being a violation with violence of the private person of a woman causes mental scar, thus, not only physical injury but a deep sense of some deathless shame is also inflicted. – An offence which affects the morale of the society should be severely dealt with.

State of Madhya Pradesh v. Bablu Natt

Judgment dated 18.12.2008 passed by the Supreme Court in Criminal Appeal No. 2060 of 2008, reported in (2009) 2 SCC 272

Held:

The prosecutrix was minor but a married woman. The prosecutrix and the respondent were unknown to each other. They came to know each other only on the night of 26.3.2000. A finding of fact had been arrived at that she was minor. The fact that she was subjected to sexual intercourse was supported by the medical evidence. Medical opinion was rendered that rape was committed on her and she was not habituated to sexual intercourse. On medical examination, her age was assessed between 11 and 13 years. By way of abundant precaution, the learned Sessions Judge held that the age to be less than 13 years.

The imposition of minimum sentence having been brought about by an amendment in the statute, the court should always bear in mind the effect thereof. The power conferred on the court to impose a sentence less than the minimum prescribed must not only be supported by any reason but adequate and special reasons ought to be mentioned therefor.

Admittedly, an offence with which respondent was charged had been proved to have been committed. He also got an affidavit affirmed by the prosecutrix showing her age to be 18 years, which was found to be false. He, therefore, knew the intricacies of law.

It was a case where the minimum sentence, to say the least, could be imposed. While saying so, we may notice that this Court in *State of A.P. v. Bodem Sundara Rao, (1995) 6 SCC 230* stated the law thus: (SCC pp. 231-32, paras 6-7 and 9)

> "6. After its amendment, Section 376(1) provides for a minimum sentence of seven years which may extend to life or for a term which may extend to 10 years besides fine for the offence of rape. The proviso to Sub-Section (1) lays that the Court may for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than seven years.
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> 7. Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.
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> 9. In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime

in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

The affidavit affirmed by her was found to have been obtained without her knowing the contents thereof and at the instance of respondent. The very fact that she was made to state that her age was 18 years and she was living with the respondent as a wife clearly goes to show the mental trauma which she was undergoing. We are, therefore, of the opinion that the contents of the said affidavit were wrongly used for imposing a sentence less than minimum prescribed sentence considering the same to be mitigating factor.

The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. Socio-economic status, religion, race, caste or creed of the accused and the victim although may not be wholly irrelevant, should be eschewed in a case of this nature, particularly when Parliament itself had laid down minimum sentence.

Apart from that the judiciary had all along kept in its mind that rape being a violation with violence of the private person of a woman causes mental scar, thus, not only a physical injury but a deep sense of some deathless shame is also inflicted. [See *Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC 561 and Bantu v. The State of U.P., (2008) 11 SCC 113*].

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***140. INDIAN PENAL CODE, 1860 – Sections 376 (2) (g) & 376 (2) Explanation & Section 34**

The essence of liability in terms of Section 376 (2) (g) is the existence of common intention – In animating the accused to do the criminal act in furtherance of such intention, the principles of Section 34 IPC have clear application – In order to bring in the concept of common intention it is to be established that there was simultaneously consensus of the minds of the persons participating in the act to

bring about a particular result – Common intention is not the same or similar intention – It presupposes a prior meeting and prearranged plan – In other words, there must be a prior meeting of minds – It is not necessary that preconcert in the sense of a distinct previous plan is necessary to be proved – The common intention to bring about a particular result may well develop on the spot as between a number of persons which has to be gauged on the facts and circumstances of each case.

Hanuman Prasad and others v. State of Rajasthan

Judgment dated 18.11.2008 passed by the Supreme Court in Criminal Appeal No. 1186 of 2001, reported in (2009) 1 SCC 507

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***141. INDIAN PENAL CODE, 1860 – Sections 394 & 397**

Section 397 IPC is not substantive offence – It only regulates the punishment – Accused could not have been convicted under Section 397 IPC only but could have been convicted under Section 394 r/w/s 395 IPC if in case of robbery though causing injury by use of deadly weapon is established otherwise in a case of robbery for causing injury, conviction could be under Section 394 IPC.

Held – In this case use of deadly weapon has not been established – Hence accused was convicted under Section 394 IPC and sentenced to undergo rigorous imprisonment for 5 years

State of Uttar Pradesh v. Ilyas

Judgment dated 12.11.2008 passed by the Supreme Court in Criminal Appeal No. 168 of 2001, reported in (2009) 1 SCC 365

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142. MOTOR VEHICLES ACT, 1988 – Sections 4, 5 & 149

Vehicle driven by minor when accident occurred – Insurance company not liable – No need to consider that whether the policy condition was breached deliberately or not

United India Insurance Company Ltd. v. Rakesh Kumar Arora & Ors.

Judgment dated 24.09.2008 passed by the Supreme Court in Civil Appeal No. 5876 of 2008, reported in AIR 2009 SC 24

Held:

The vehicle in question admittedly was being driven by Karan Arora who was aged about fifteen years. The Tribunal, as noticed hereinbefore, in our opinion, rightly held that Karan Arora did not hold any valid licence on the date of accident, namely 5.2.1997.

The High Court did not advert to itself the provisions of Sections 4 and 5 of the Motor Vehicles Act and thus misdirected itself in law.

This aspect of the matter has been considered by this Court in *Oriental Insurance Co.Ltd. v. Prithvi Raj (2008 (1) SCALE 727)* wherein upon taking into consideration a large number of decisions, it was held that the Insurance Company was not liable, stating:

> "In the instant case, the State Commission has categorically found that the evidence on record clearly established that the licensing authority had not issued any license, as was claimed by the Driver and the respondent. The evidence of Shri A.V.V.Rajan, Junior Assistant of the Office of the Jt. Commissioner & Secretary, RTA, Hyderabad who produced the official records clearly established that no driving license was issued to Shri Ravinder Kumar or Ravinder Singh in order to enable and legally permit him to drive a motor vehicle. There was no cross examination of the said witness. The National Commission also found that there was no defect in the finding recorded by the State Commission in this regard."

[Note: *Also see National Insurance Co. Ltd. v. Kaushalya Devi & Ors., 2008 AIR SCW 4025*]

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143. MOTOR VEHICLES ACT, 1988 – Sections 146, 147 & 149

(i) Provisions of compulsory insurance have been framed to advance a social object – Contract of insurance must fulfill the statutory requirements of formulation of valid contract – But in a case of third party risk, the matter has to be considered from a different angle.

(ii) Owner of a vehicle died but registration and insurance certificate were not transferred in the name of his heirs – The insurance policy also not transferred and continued to be renewed in the name of deceased inspite of such knowledge, Insurance Company is bound to satisfy the claim of a third party – In absence of fraud – Even in a case of this nature, the doctrine of "acceptance sub silentio" shall be applicable.

United India Insurance Company Limited v. Santro Devi and others Judgment dated 02.12.2008 passed by the Supreme Court in Civil Appeal No. 7009 of 2008, reported in (2009) 1 SCC 558

Held:

(i) Section 146 provides for statutory insurance. An insurance is mandatorily required to be obtained by the person in charge of or in possession of the vehicle. There is no provision in the Motor Vehicles Act that unless the name(s) of the heirs of the owner of a vehicle is/are substituted on the certificate of insurance or in the certificate of registration in place of the original owner (since deceased),

the motor vehicle cannot be allowed to be used in a public place. Thus, in a case where the owner of a motor vehicle has expired, although there does not exist any statutory interdict for the person in possession of the vehicle to ply the same on road; but there being a statutory injunction that the same cannot be plied unless a policy of insurance is obtained, we are of the opinion that the contract of insurance would be enforceable. It would be so in a case of this nature as for the purpose of renewal of insurance policy only the premium is to be paid.

The provisions of compulsory insurance have been framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner. There cannot be any doubt whatsoever that a contract of insurance must fulfill the statutory requirements of formation of a valid contract but in case of a third party risk, the question has to be considered from a different angle.

The insurer could deny its liability on limited grounds as envisaged under sub-section (2) of Section 149 of the Act. One of the grounds which is available to the insurance company for denying its statutory liability is that the policy is void having been obtained by reason of non-disclosure of a material fact or by a representation of fact which was false in some material particular.

If the appellant had been renewing the insurance policy on year to year basis on receipt of a heavy amount of premium with the knowledge that the owner of the vehicle has expired and the name of his legal heirs and representatives had not been transferred in the registration book maintained by the authorities under the Motor Vehicles Act, in our opinion, the appellant cannot be heard to say that it was not bound to satisfy the claim of a third party.

If despite knowledge of the fact that Atma Ram Sharma had died in the year 1991, the insurance company, with its eyes wide open, had been accepting the amount of premium every year from the widow of the said late Atma Ram Sharma or from the Bank, in our opinion, a contract by necessary implication, had come into being. Even in a case of this nature, the doctrine of 'acceptance sub silentio' shall be applicable.

In this case, the statute itself takes care of validity of the contract. It is mandatory. Once a valid contract is entered into, only because of a mistake or otherwise, the name of the original owner has not been mentioned in the certificate of registration and/or the documents of hypothecation of the vehicle with the bank had still been continuing in his name, it cannot be said that the contract itself is void unless it was shown that in obtaining the said contract a fraud had been practised. Not only the particulars of fraud had not been pleaded, but even no witness was examined on behalf of the appellant.

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144. MOTOR VEHICLES ACT, 1988 – Section 147
EVIDENCE ACT, 1872 – Sections 52 & 58 and 101 & 102

(i) Members of marriage party traveling in truck allegedly transporting gifts received from bride party cannot fall into the category of representative owner of goods under Section 147 of Motor Vehicles Act – Such victims are gratuitous passengers – Insurance Company is not liable to pay the amount of compensation to the claimants.

(ii) Ordinarily an allegation made in the First Information Report would not be admissible in evidence per se but as the allegation made in the FIR had been made a part of claim petition, there is no doubt whatsoever that the Tribunal would be entitled to look into the same – These are admitted facts for the claimants, so there is no need to produce direct evidence in this regard by the Insurance Company.

National Insurance Company Limited v. Rattani and others
Judgment dated 18.12.2008 passed by the Supreme Court in Civil Appeal No. 7399 of 2008, reported in (2009) 2 SCC 75

Held:

The first information report which was brought on record, clearly proceeded on the basis that the deceased and the other injured persons were members of the marriage party.

Even if the submission of the learned counsel that in the truck the goods offered by way of gift by the bride party were being transported is correct, the deceased and others could not have become the representatives of the owner of the goods. Even otherwise in view of the averments made in the claim petition and the first information report the said contention cannot be accepted.

Furthermore in their depositions the witnesses examined on behalf of the claimants themselves stated that about 30-40 persons were travelling in the tempo truck. All 30-40 persons by no stretch of imagination could have been the representatives of the owners of goods, meaning thereby, the articles of gift.

The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

The First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.

An admission made in the pleadings, as is well-known, is admissible in evidence proprio vigore (by its own force).

We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants.

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145. MOTOR VEHICLES ACT, 1988 – Sections 166 & 168

(i) Nature of injury and accident are important factors to determine the issue of contributory negligence.

(ii) Opinion of Government doctor, a specialist surgeon and not an orthopedician should not be disbelieved without any reason.

(iii) Degradation of working ability as a loss of earning power to be considered for awarding just compensation.

G. Gnanam alias Gnanamoorthy v. Metropolitan Transport Corporation

Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7320 of 2008, reported in (2009) 2 SCC 71

Held:

The High Court, furthermore, without considering the relevant facts, could not have arrived at a conclusion that the appellant in any way was responsible for the injury. The fact that the bus had hit with a lamp post stands admitted. The nature of the injury, as noticed hereinbefore, suggests that the upper arm of his body had hit the body of the bus. If he had put his hand out, his upper arm would not have broken into two pieces by way of crush injury. The injury would have been confined to the wrist or the arm upto the elbow. We are, therefore, of the opinion that the appellant was not guilty of any contributory negligence.

The High Court, with utmost respect, should not have disbelieved the evidence of a Doctor of a government hospital on the supposition that he had been issuing certificates fixing 'permanent disability which was not proportionate to the injury'. Even no such suggestion had been given to him. That was never the case of the respondent. In his cross-examination, he categorically stated that he is a specialist surgeon and not Orthopaedician and he had assessed the disability correctly. Except putting a suggestion to him that there was a possibility of 5% error in assessing the disability between doctor to doctor; no other question was put to him.

In terms of Section 166 of the Motor Vehicles Act, 1988, a person who has suffered injury in an accident is entitled to just compensation. What would be a just compensation, however, would depend upon the facts and circumstances of each case. [See *Karnataka SRTC v. Mahadeva Shetty, (2003) 7 SCC 197*]

The learned Tribunal did not accept the quantum of compensation by loss of earning power as claimed by the appellant. It has not been denied or disputed

that in view of his aforementioned injury, he is not in a position to work as a fitter. He has merely been working as a helper. The fact that the appellant has suffered a functional disability is not in dispute. In a situation of this nature and keeping in view the age of the appellant, which on the date of accident was 29 years, if only a sum of Rs. 500/- per month was considered just for the purpose of awarding compensation totaling a sum of Rs. 1,50,000/- only held justified.

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146. MOTOR VEHICLES ACT, 1988 – Sections 166 & 168

(i) Generally, there are no fixed rules and no formula for measuring human lives – However, just compensation has to be determined on the basis of certain authentic and cogent data having reasonable nexus between loss incurred and compensation – Tribunal's power is wide but not arbitrary – The compensation can neither be a windfall for the claimants nor be punitive for those liable to pay – Compensation should place claimant(s) in almost the same financial position as they were before the accident.

(ii) Multiplier method and structure formula is a guiding factor for determination of compensation in a claim petition under Section 166 but it cannot be used as a ready reckoner.

(iii) General rule to deduct towards personal expenses of the deceased is one-half if bachelor and one-third if married.

Syed Basheer Ahamed and others v. Mohammed Jameel and another

Judgment dated 06.01.2009 passed by the Supreme Court in Civil Appeal No. 10 of 2009, reported in (2009) 2 SCC 225

Held:

(i) Section 168 of the Act enjoins the Tribunal to make an award determining "the amount of compensation which appears to be just." However, the objective factors, which may constitute the basis of compensation appearing as just, have not been indicated in the Act. Thus, the expression "which appears to the just" vests a wide discretion in the Tribunal in the matter of determination of compensation. Nevertheless, the wide amplitude of such power does not empower the Tribunal to determine the compensation arbitrarily, or to ignore settled principles relating to determination of compensation.

Similarly, although the Act is a beneficial legislation, it can neither be allowed to be used as a source of profit, nor as a windfall to the persons affected nor should it be punitive to the person(s) liable to pay compensation. The determination of compensation must be based on certain data, establishing reasonable nexus between the loss incurred by the dependents of the deceased and the compensation to be awarded to them. In nutshell, the amount of compensation determined to be payable to the claimant(s) has to be fair and reasonable by accepted legal standards.

In *Kerala State Road Transport Corporation v. Susamma Thomas, (1994) 2 SCC 176,* M.N. Venkatachaliah, J. (as His Lordship then was) had observed that: (SCC p. 181, para5)

> "5. .....the determination of the quantum must answer what contemporary society "would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbours and say with their approval that he has done the fair thing". The amount awarded must not be niggardly since the "law values life and limb in a free society in generous scales".

At the same time, a misplaced sympathy, generosity and benevolence cannot be the guiding factor for determining the compensation. The object of providing compensation is to place the claimant(s), to the extent possible, in almost the same financial position, as they were in before the accident and not to make a fortune out of misfortune that has befallen them.

In a catena of decisions of this Court, certain broad principles which could be applied for assessing just compensation have been highlighted. It has been observed that in a fatal accident action, the accepted measure of damages awarded to the dependents is the pecuniary loss suffered and likely to be suffered by them as a result of abrupt termination of life.

For arriving at just compensation, it is necessary to ascertain the net income of the deceased available for the support of himself and his dependents at the time of his death and the amount, which he was accustomed to spend upon himself. This exercise has to be on the basis of the data, brought on record by the claimant, which again cannot be accurately ascertained and necessarily involves an element of estimate or it may partly be even a conjecture. The figure arrived at by deducting from the net income of the deceased such part of income as he was spending upon himself, provides a datum, to convert it into a lump sum, by capitalising it by an appropriate multiplier (when multiplier method is adopted). An appropriate multiplier is again determined by taking into consideration several imponderable factors.

Insofar as the question of earnings of the deceased is concerned, the onus lies on the claimants to prove this fact by leading reliable and cogent evidence before the Tribunal. A bare assertion in the claim petition in that behalf is not sufficient to discharge that onus.

(ii) In the matter of computation of compensation, there is no uniform rule or formula for measuring the value of a human life. Though a special provision for assessment of compensation on structured formula basis for the purpose of a claim petition under Section 163A of the Act has been inserted in the Act with effect from 14th November, 1994, but no such formula has been laid down for determination of compensation in a claim petition under Section 166 of the Act, though there is no bar in taking the said schedule as a guiding factor while

determining the just compensation by applying multiplier method. In fact, in *TNSTC Ltd. v. K.I. Bindu, (2005) 8 SCC 473,* it has been observed that the Second Schedule to the Act may serve as a guide but cannot be used as an invariable ready reckoner.

(iii) On the question of deduction on account of personal expenses by the deceased, there is no set formula which could be applied in every case to determine as to what should be the deduction on this account. The contention that deduction on that count cannot exceed one-third on the ground that there is some statutory recognition in the Second Schedule to the Act for such deduction, is untenable. The said deduction would depend upon the facts and circumstances of each case.

In the present case, no evidence was led on this point as well. In the absence of any evidence to the contrary, the practice is to deduct towards personal and living expenses of the deceased, one- third of the income in case he was married and one-half (50%) if he was a bachelor. Thus, there is no material on record warranting interference with the consistent view of both the courts below on the point.

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***147. MOTOR VEHICLES ACT, 1988 – Section 166 (2)**
CIVIL PROCEDURE CODE, 1908 – Section 21 (1)

(i) The jurisdiction of the MACT having regard to the terminologies used under Section 166 (2) under the Motor Vehicles Act, 1988 which is a special statute must be held to be wider than the Civil Court as the residence of the claimants also determines jurisdiction of Tribunals but the residence of a person would depend upon the fact situation obtaining in each case.

(ii) A decision rendered without jurisdiction would be coram non judice – Distinction must be made between a jurisdiction with regard to the subject matter of the suit and that of territorial and pecuniary jurisdiction – A case falling within the former category, the judgment would be a nullity, in the latter, it would not be unless sufferance of any prejudice shown or failure of justice on accused on those grounds. (See also *Chief Engineer, Hyder Project v. Ravinder Nath, (2008) 2 SCC 350*)

Mantoo Sarkar v. Oriental Insurance Company Limited and others
Judgment dated 16.12.2008 passed by the Supreme Court in Civil Appeal No. 7318 of 2008, reported in (2009) 2 SCC 244

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148. MOTOR VEHICLES ACT, 1988 – Chapters XI & XII

Motor Vehicles Act provides for two types of insurance; statutory and contractual – Where third party risk is involved, insurance policy is required to be mandatorily taken out – If it is contractual – Liability of insurer extends to the risk covered by the policy of insurance – To cover additional risk, addition premium is to be paid.

New India Assurance Company Limited v. Sadanand Mukhi and others

Judgment dated 18.12.2008 passed by the Supreme Court in Civil Appeal No. 7402 of 2008, reported in (2009) 2 SCC 417

Held:

Provisions relating to grant of compensation occurring in Chapter XI and XII of the Act have been enacted by the Parliament in order to achieve the purpose and object stated therein. Section 146 of the Act lays down the requirements for insurance against third party risk. Where a third party risk is involved, an insurance policy is required to be mandatorily taken out. The requirements of policies and the limits of liability, however, have been stated in Section 147 of the Act.

The provisions of the Act, therefore, provide for two types of insurance - one statutory in nature and the other contractual in nature. Whereas the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident; in case involving owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property.

Contract of insurance of a motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of the premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an 'act policy', the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual, its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned counsel is to be accepted, then to a large extent, the provisions of the Insurance Act become otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say that the life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act appear to be wholly rational.

Only because driving of a motor vehicle may cause accident involving loss of life and property not only of a third party but also the owner of the vehicle and the insured vehicle itself, different provisions have been made in the Insurance Act as also the Act laying down different types of insurance policies. The amount of premium required to be paid for each of the policy is governed by the Insurance Act. A statutory regulatory authority fixes the norms and the guidelines.

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***149. MUNICIPAL CORPORATION (TRANSFER OF IMMOVABLE PROPERTY) RULES, 1994 (M.P.) – Rule 3**
MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Section 80
Plaintiff/respondent filed a civil suit for mandatory injunction for grant of 75 sq. ft. plot on permanent lease of Re. 1/- per annum and against dispossession of occupation of him over an area of 15 x15 sq. ft. land situated at municipal area of Bhopal – The suit was decreed with certain modifications and directions – In execution proceeding an application under Section 47 r/w/s 151 of CPC was preferred by defendant/petitioner submitting that the plot for which the suit was decreed was belonging to the Revenue Department and that no plot is available at a place where for the suit was decreed and that the decree is non-executable – The Trial Court after holding inquiry found the objections baseless and rejected the same – Held, there is no statutory embargo for Municipal Corporation to convey any immovable property belonging to it and for that no prior sanction is required from the State Government – Even the Corporation is empowered under Rule 3 of Rules 1994 to effect transfer without public auction or inviting offers in sealed covers – Hence the decree is executable.
Municipal Corporation, Bhopal v. Mohd. Yunus
Judgment dated 24.09.2008 passed by the High Court in Writ Petition No. 12549 of 2007, reported in 2009 (I) MPJR 107

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***150. MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 3**
CRIMINAL PROCEDURE CODE, 1973 – Section 421
Amount of maintenance of *Mahr* or *dower,* recovery of – Whether a person is liable to serve further imprisonment for the same default if amount due is not paid or not recovered in the execution proceedings? Held, no, a person who has already undergone imprisonment cannot be sent to Jail again for the same default - However, such a defaulter is not absolved from his liability to pay the amount which is still recoverable notwithstanding the fact that he has undergone the imprisonment for such failure – Such amount may be recovered in the same manner as provided for levy of fine under the Code of Criminal Procedure except by imposing sentence of imprisonment.

Mohd. Hasib v. Rubina

Judgment dated 05.11.2008 passed by the High Court in Misc. Criminal Appeal No. 3148 of 2008, reported in 2009 (1) MPHT 58

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151. MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Sections 3 (1) (a) & 4
CRIMINAL PROCEDURE CODE, 1973 – Section 125
FAMILY COURTS ACT, 1984 – Sections 7 & 8
Application under Sections 3(i) (a) of the Act, scope of –

(i) Liability of a Muslim husband to his divorced wife arising under Section 3 (i) (a) of the Muslim Women (Protection of Rights on Divorce) Act to pay maintenance is not confined to Iddat period only – He has to make reasonable and fair provision for future of the divorced wife within the period of Iddat.

(ii) Application under Section 4 of the Act, scope of – A divorced Muslim woman who has not remarried and who is unable to maintain herself after Iddat period can proceed under Section 4 of the Act against her relatives who are liable to maintain her in proportion to properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents.

(iii) Application under Sections 3 and 4 of the Act – Jurisdiction – Although it is a family dispute and relates with the maintenance and in principle such dispute is to be heard and decided by the Family Courts, yet unless the law provides, it cannot be heard and decided by Family Courts – Such applications are required to be decided by a Magistrate alone.

Shabana Bano v. Imran Khan

Judgment dated 26.09.2008 passed by the High Court in Criminal Revision No. 285 of 2008, reported in 2009 (1) MPLJ 376

Held:

A Constitution Bench of the Apex Court in *Danial Latif and another Vs. Union of India, (2001) 7 SCC 740,* while hearing the petition challenging the vires of the Act and observing that it is not ultra vires, has interpreted the scope of section 3 of the Act. Upon considering in detail the Hon'ble Court in para 36 has summed up its conclusion as under :-

"36. While upholding the validity of the Act, we may sum up our conclusions :

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

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

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

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

Sub-paragraphs 1 and 2 give interpretation of section 3(i)(a) of the Act while sub-para 3 gives interpretation of section 4 of the Act. It is observed that even after divorce and the period of Iddat, the former husband is not exonerated from his liability of making reasonable and fair provision for the future of the divorced wife and also for her maintenance. But these provisions are to be made by husband within the period of Iddat. This liability of former husband has been considered under the Act itself and not beyond that including under section 125 of Criminal Procedure Code. This view of the Apex Court has further been followed in another pronouncement in *Sabra Shamin Vs. Maqsood Ansari, (2004) 9 SCC 616.*

Thus, now it is settled that the liability of a Muslim husband to his divorced wife arising under section 3(i)(a) of the Act to pay maintenance is not confined to Iddat period only. He has to make reasonable and fair provision for future of the divorced wife, which obviously includes her maintenance as well. It is obligatory for the husband to make these provisions within the period of Iddat. After divorce that liability of the Muslim husband is under section 3 of the Act and not under section 125 of the Criminal Procedure Code.

In the case of *Iqbal Bano v. State of U.P. and another, 2007 (6) SCC 785,* an application under Section 125 was fileld by the appellant wife on 21st February, 1992. On 28th May, 1992, written statement was filed by the respondent husband stating therein that long back he has divorced his wife by addressing "Talaq" "Talaq" "Talaq". It was further stated that there was severance of marital fies between then for years as the diverce was over by the ulterrance of the ward "Talaq" thrice and he had also paid *mehr* and as the *iddat* period was over the claim was not acceptable. Learned Magistrate negated the factum of divorce and allowed application for maintenance. In revision, the learned Additional Sessions Judge accepted the plea of divorce and held that after coming into force of the Act, petition under Section125 of Criminal Procedure Code, filed by the Muslim wife is not maintainable. The High Court upheld the order of learned

A.S.J. When the matter went before the Apex Court in paras 7 and 10, following has been observed: –

> "7. The view expressed by the First Revisional Court that no Muslim woman can maintain petition under section 125, Criminal Procedure Code is clearly unsustainable. The Act only applies to divorced women and not to a women who is not divorced....
>
> 10. Proceedings under Section 125, Criminal Procedure Code are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Criminal Procedure Code and claims made under the Act are tried by the same Court...."

Thus, it appears that Muslim wife can file an application under Section 125 of Criminal Procedure Code for maintenance against the husband.

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152. N.D.P.S. ACT, 1985 – Section 20 (b) (ii) (c) (as amended in 2001) & Section 8
CONSTITUTION OF INDIA – Article 20
By amendment in 2001 punishment under Section 20 of NDPS Act was enhanced – Ingredients of offence under Section 8 of the Act not changed – Means no new offence is created.
Superintendent, Narcotic Control Bureau v. Parash Singh
Judgment dated 15.10.2008 passed by the Supreme Court in Criminal Appeal No. 972 of 2003, reported in AIR 2009 SC 244

Held:

Challenge in this appeal is to the judgment of the Calcutta High Court quashing charges framed under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the 'NDPS Act') as amended by Act 9 of 2001. The High Court directed the trial court to frame charges under Section 20(b) (i) of the Act.

The High Court was of the view that a new offence was made out because a higher punishment was imposed. Stand of the appellant is that no new offence was created but what was provided for related to more stringent sentence. It is, therefore, submitted that the High Court was not justified in holding that the new offence was committed.

It is manifest from Article 20(1) that it prohibits (1) making an Act for the first time and then making that law retrospective. In other words it is not permissible to create an offence retrospectively (2) the infraction of the penalty may not be higher than what is prescribed in law which was in force at the time

of the commission of the offence. It needs to be noted that the validity of Amendment Act was challenged before this Court in *Basheer @ N.P. Basheer v. State of Kerala, (2004) 3 SCC 609.* The validity of the act was upheld. This Court held that (a) all cases pending before the Court on 2.10.2001; (b) all cases under investigation as on that date shall be disposed of in accordance with the provisions of the Act as amended by the Amending Act. *In State through CBI Delhi v. Gian Singh, (1999) 9 SCC 312* it was held with reference to Article 20(1) of the Constitution that it is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes and no ex-post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation down grades the harshness of the sentence for the same offence, it would be salutary principal for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence. The view expressed in *Gyan Singh's case* (supra) finds support from the case of *T. Barai v. Henry Ah Hoe & Anr., 1983 (1) SCR 905.* The High Court was not justified in holding that new offence was created. Before the amendment as well as after the amendment the ingredients of Section 8 remain same and there was no amendment in this provision. Only punishment for contravention in relation to cannabis plant and cannabis i.e. Section 20 of the Act has been amended by the Amendment Act.

The appeal is, therefore, dismissed with clarification that no new offence was created by the Amendment Act. But at the same time no punishment higher than what was originally provided for can be imposed on the accused.

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***153. N.D.P.S. ACT, 1985 – Sections 27-A & 37**
CRIMINAL PROCEDURE CODE, 1973 – Section 389
In *Dadu v. State of Maharashtra, (2000) 8 SCC 437* it was held that Section 32-A was ultra vires to the extent it took away the powers relatable to Section 389 of the Code of Criminal Procedure, 1973 (in short "the Code") – In *Dadu's case* (supra) it was held as follows:
"29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.
(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.
(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment."

In the said case it was clearly observed that a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions as spelt out in Section 37 of the Act.

To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that the accused is not guilty of such offence and that he is not likely to commit any offence which on bail are satisfied – So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted – Suspension of sentence not granted by High Court – Held, justified.

Ratan Kumar Vishwas v. State of Uttar Pradeśh and another

Judgment dated 07.11.2008 passed by the Supreme Court in Criminal Appeal No. 1754 of 2008, reported in (2009) 1 SCC 482

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154. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Dishonour of cheque – Notice sent to current address of the drawer but returned with the endorsement must be presumed to be served.

M/s Indo Automobiles v. M/s Jai Durga Enterprises & ors.

Judgment dated 15.07.2008 passed by the Supreme Court in Criminal Appeal No. 1101 of 2008, reported in AIR 2009 SC 386

Held:

Admittedly, notice under Proviso (b) of Section 138 of the Negotiable Instruments Act was sent to the respondents through registered post and under a certificate of posting on their correct address of the respondents. The High Court had quashed proceeding on the ground that although notice through registered post and also under certificate of posting were sent by the appellant/ complainant to the respondents but because of the endorsement of the postal peon, the service could not be said to have been effected. In our view, the High Court was not justified in holding that service of notice could not be found to be valid. In *K. Bhaskaran v. Sankaran Vaidhyan Balan & Anr., (1999) 7 SCC 510*, it has been held that the context of Proviso (b) of section 138 of the Negotiable Instruments Act invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction and provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. It is also well settled that once notice has been sent by registered post with acknowledgment due in a correct address, it must be presumed that the service has been made effective. We do not find from the endorsement of the postal peon that the postal peon was at all examined. In *V. Raja Kumari vs. P. Subbarama Naidu & Anr., (2004) 8 SCC 774*, again this Court reiterated the same principle and held that the statutory notice under Sections 138 and 142 of the Negotiable Instruments Act, 1881 sent to the correct address of the drawer but returning with the endorsement must be presumed to be served

to the drawer and the burden to show that the accused drawee had managed to get an incorrect postal endorsement letter on the complainant and affixed thereof have to be considered during trial on the background facts of the case.

That being the position, we are unable to sustain the order of the High Court and the impugned order is set aside and the proceeding started under Section 138 of the Negotiable Instruments Act is restored to its original file. The appeal is, therefore, allowed to the extent indicated above. We, however, make it clear that at the trial stage on the question of interpretation, postal endorsement affixed thereof shall be considered on the background facts of the present case.

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***155. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

There can be no bar to the simultaneous continuance of criminal proceeding as against the dishonour of cheque and a civil proceeding, which also includes arbitration proceedings, if the two arise from separate causes of action. [See *Trisuns Chemical Industry v. Rajesh Agrawal, (1999) 8 SCC 686*]

Sri Krishna Agencies v. State of Andhra Pradesh and another

Judgment dated 11.11.2008 passed by the Supreme Court in Criminal Appeal No. 1792 of 2008, reported in (2009) 1 SCC 69

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156. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CRIMINAL PROCEDURE CODE, 1973 – Section 397

(i) Offence under Section 138 of the Act – Dishonour of cheque, defence in respect of – Cheques found to have been issued in security of B.C. and not in discharge of debt as alleged –Held, it would not come within the purview of S.138 of the Act

(ii) Revisional jurisdiction, exercise of – Revisional jurisdiction should not be refused to exercise on the ground that no question of law had arisen therein inasmuch as in terms of Section 397, CrPC, the correctness, legality or propriety of any findings sentence or order may fall for consideration of the Revisional Court.

Mujeeb Husain @ Sonu v. Ismail and another

Judgment dated 12.08.2008 passed by the High Court in Criminal Revision No. 1284 of 2006, reported in 2009 (1) MPHT 434

Held:

In the matter of *State of Karnataka Vs. M. Devendrappa, reported in 2002 Criminal Law Journal 998,* wherein in a case where the cheques were issued to a share broker complainant in dealing and the defence of the accused was that the cheques were in question was issued by way of security and not towards any amount due to the complainant in share transactions, the Hon'ble Apex Court has held that the said cheques could not be said to have been issued in discharge of debt. Hence same would not come within the purview of Section 138 of the Act.

From perusal of record, it is evident that petitioner has filed certified copies of number of complaints, filed by the respondent No. 1 against various persons. In all the cases the prosecution has been lodged by respondent No. 1, under Section 138 of Negotiable Instruments Act on the ground the cheques issued in favour of respondent No.1 were dishonoured. All the cheques on the basis of which prosecution has been filed are between years 2003 and 2004 and the prosecution was also filed in the year 2003-04. In the present case also, the prosecution was filed by respondent No. 1 on 10-10-03.

Respondent No. 1 in his cross-examination has denied that he has filed number of cases under Section 138 of Negotiable Instruments Act, which is against the record as, number of complaints filed by the respondent No.1 has been filed by the petitioner. No accounts has been filed by the respondent No. 1, while the respondent No.1 is lending money to number of persons, against the security of cheques. The financial status of respondent No.1 is also not very high.

Petitioner has examined D.W. 1 to D.W.5, who have categorically stated that cheques were issued in security of B.C. this material evidence was not appreciated by the learned Courts below in its proper perspective. Keeping in view the evidence on record, this Court is of the view that the petitioner has proved beyond doubt that the cheques were issued by the petitioner by way of security of B.C. along with number of other persons. Defence of accused/ petitioner is that petitioner issued the cheques in question by way of security and not towards any amount due to the respondent No.1. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

In view of this, the said cheques cannot be said to have been issued in discharge of debt, hence the same would not come within the purview of Section 138 of Negotiable Instruments Act.

In the matter of *Pandurang Sitaram Bhagwat Vs. State of Maharashtra, reported in 2005 SCC (Criminal) 1198,* the Hon'ble Apex Court has observed that the High Court in our considered opinion, should not have refused to exercise its revisional jurisdiction on the ground that no question of law has arises therein inasmuch as in terms of Section 397 of the Code of Criminal Procedure, the correctness, legality or propriety of any findings, sentence or order may fall for consideration of the Revisional Court.

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157. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142

(i) There is no prohibition on the number of times the cheque is presented within 6 months (its validity period) of its drawal.

(ii) Cheque presented in bank for three times – Dishonoured every time and notice also issued thrice but first sent on the wrong address – Second was withdrawn on an objection raised by drawer itself and third notice received by drawer but payment not made within 15 days – Held, cause of action arises with reference to third notice.

S.L. Constructions and another v. Alapati Srinivasa Rao and another

Judgment dated 23.10.2008 passed by the Supreme Court in Criminal Appeal No. 1761 of 2008, reported in (2009) 1 SCC 500

Held:

Indisputably, by reason of Section 138 of the Act a penal provision has been laid down that the issuer of any cheque would commit an offence if the cheque when presented is dishonoured. For the said purpose a legal fiction was created. The proviso appended to the said provision, however, restricts the application of the main provision by laying down the conditions which are required to be complied with before any order taking cognizance can be passed which are: (i) that the cheque must be presented within a period of six months from the date on which it is drawn; (ii) on the cheque being returned un-paid by the banker, a notice has to be issued within thirty days from the date of receipt of information by him from the bank regarding the cheque being unpaid; (iii) in the event, the drawer of the cheque fails to make payment of the said amount of money to be paid within 15 days from the receipt thereof, a complaint petition can be filed within the period prescribed in terms of Section 142 thereof.

The question which arises for our consideration is as to whether the aforementioned legal requirements have been complied with by the respondent herein so as to enable him to maintain the complaint petition or not.

The cheque is dated 22.6.2003. In terms of the afore-mentioned provisions it could have been presented within six months thereafter, namely, by 22.12.2003. Indisputably, the cheque was presented for the third time on 11.12.2003 i.e. within the prescribed period. What is prohibited is presentation of the cheque (sic) within the afore-mentioned period and not the number of times it is presented. It is, therefore, immaterial whether for one reason or the other the complainant had to present the cheque for the third time or not.

We may now consider the submission of learned counsel as regards the issuance of successive notices. The first notice purported to have been issued by the complainant-respondent on 8.7.2003 is not on record. Admittedly appellants have not received the same. As regards notice dated 9.9.2003 which is said to be the second notice, it is evident that the same had not been served

upon the appellants having been returned. If that be so, the presentation of the cheque for the second time and issuance of the second notice in our opinion would not be invalid.

We have, however, noticed hereinbefore that the appellant No. 2 through his Advocate raised the question as regards the validity and/or legality thereof as the said notice was addressed instead and place of S.L. Constructions and was issued in the name of and served on S.L. Structures and Engineers. Appellants in our opinion having themselves raised the contention with regard to the legality and validity of the said notice and, furthermore, having called upon the complainant-respondent to withdraw the same, no exception can be taken to the step taken Abundanti Cautela by the complainant-respondent to present the cheque for the third time and issue another notice on 17.12.2003.

Sadanandan Bhadran v. Madhavan Sunil Kumar, (1998) 6 SCC 514 whereupon strong reliance has been placed by the learned counsel lays down the law in the following terms:

> "7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause(b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as *non est* so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again."

It was further held: (*Sadanandan case* (supra), SCC p. 519, para 8)

> "8. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause(c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part

thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory."

Indisputably, the term cause of action would mean each of the facts required to be proved. Successive issuance of notices having been made under Section 138 of the Act as laid down under the proviso appended thereto, the respondent merely made all attempts to comply with the legal requirements.

In this case, as indicated hereinbefeore, the first notice having not been served and the second notice having been withdrawn in terms of the reply issued by the learned advocate for the appellants themselves, the complainant cannot be said to have committed any illegality in presenting the cheque for the third time and issuing the third notice upon the defaulter.

As the issuance of cheque, non-payment thereof on presentation, issuance of a valid notice calling upon the drawer of the cheque to pay the amount in question and the appellants' failure to pay to the complainant the amount in question within a period of 15 days from the date of receipt of a copy of the said notice served upon them, a cause of action arose for filing a complaint petition.

In view of the findings aforementioned we have no hesitation to hold that the cause of action for filing a complaint arose only once after issuance of third notice.

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***158. PRACTICE AND PROCEDURE:**

CIVIL PROCEDURE CODE, 1908 – Section 114 (a) and Order 47 Rule 1 (i) (a)

While issuing of interim order without deciding the question of maintainability about the review petition, any interim order in the proceeding should not be passed – Such a course is not permissible in law.

Director General of Police, Central Reserve Police Force, New Delhi and others v. P.M. Ramalingam

Judgment dated 25.11.2008 passed by the Supreme Court in Civil Appeal No. 6755 of 2008, reported in (2009) 1 SCC 193

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***159. SERVICE LAW:**

Dismissal, ground of – Unauthorised absence for a considerable long period by itself is enough for imposing penalty of dismissal.

Krishna Kumar Pateria v. State of M.P. and others

Judgment dated 25.11.2008 passed by the High Court in Writ Appeal No. 1070 of 2008, reported in 2009 (1) MPLJ 207

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160. SERVICE LAW:

Non-appointment of Enquiry Officer, effect of – Entire enquiry proceeding is vitiated due to the defect.

B.N. Verma v. State of Madhya Pradesh and others

Judgment dated 01.09.2008 passed by the High Court in Writ Appeal No. 556 of 2006, reported in 2009 (1) MPHT 296 (DB)

Held:

The law in relation to the domestic enquiry clearly provides that after a show-cause notice is issued if the authority does not find the reply to be satisfactory it may issue a charge-sheet. Before or after issuance of the charge-sheet the delinquent can be placed under suspension. After the charge-sheet is issued the delinquent is again required to submit his reply to the charges. In case he does not admit the charges levelled against him then the concerned Disciplinary Authority has to appoint an Enquiry Officer and has also to appoint a Presenting Officer. The delinquent officer would be given a date to appear before the officer and he may submit his written statement. After such written statement is filed the Enquiry Officer shall proceed to record the statements on behalf of the department and shall also receive the documents. After the prosecution closes its case the delinquent officer/employee would be given appropriate opportunity of defence. In case the Enquiry Officer is not the Disciplinary Authority then such Enquiry Officer shall place his report before the Disciplinary Authority. The Disciplinary Authority if himself conducts the enquiry then after recording its own findings or after receiving the report from the Enquiry Officer may issue a notice to the delinquent officer against proposed punishment.

We are referring to the procedure in detail to show that an officer unless is appointed as an Enquiry Officer he cannot receive the written statement nor he can receive the evidence either documentary or oral. Appointment of a person as Enquiry Officer clothes him with the jurisdiction to conduct the enquiry. In case like present when there is total violation of the rules and the enquiry had proceeded contrary to the provision of the rules, the State would not be allowed to say that the question ought to have been raised before the Enquiry Officer or the Disciplinary Authority or the Appellate Authority. The State by raising such pleadings is in fact adding premium to its own wrong. It would be trite to say that if law provides a particular mode for doing a thing then it has to be done following the mode or procedure or not at all. In fact, the State would be obliged to convince the Court that after issuance of the charge-sheet an Enquiry Officer rather a Competent Enquiry Officer was appointed and such Enquiry Officer rather was conferred jurisdiction to receive the documents, evidence etc. In absence of an order of appointment of the Enquiry Officer some person would not have jurisdiction to conduct the enquiry. In the present case non-appointment of the Enquiry Officer has vitiated the enquiry proceedings.

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*161. SERVICE LAW:

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 – Rule 19

Order under Rule 19 of the Rules, requirement for –While passing orders under Rule 19, no opportunity need be given to the concerned employee – However proper application of mind on the part of Disciplinary Authority is necessary.

Ram Abhilash Shukla v. State of Madhya Pradesh and others

Judgment dated 11.09.2008 passed by the High Court in Writ Petition (S) No. 2361 of 2005, reported in 2009 (1) MPHT 401

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*162. SERVICE LAW:

(i) Departmental proceedings for bigamy, initiation of – There is no law that unless the status of a party is established in a civil proceeding or there is a finding by a criminal court, the departmental proceedings in respect of bigamy cannot be initiated.

(ii) Erroneous mentioning of a provision in chargesheet, effect of – In a chargesheet relating to bigamy, M.P. Civil Services Rules, 1966 was referred to but the delinquent was held guilty of misconduct of bigamy under Rule 22 of M.P. Civil Services (Conduct) Rules, 1965 – Held, erroneous reference of a provision would not vitiate proceedings, especially when the substance of the charge remained the same.

Sanjay Kumar v. State of M.P. and others

Judgment dated 04.08.2008 passed by the High Court in Writ Appeal No. 1622 of 2007, reported in 2009 (1) MPHT 181

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*163. STAMP ACT, 1899 – Section 35

REGISTRATION ACT, 1908 – Section 17

Unregistered and unstamped document, admissibility of – Held, cannot be taken on evidence in any manner – Further held – Unless a duty is paid on the instrument, it cannot be admitted in evidence for any purpose including a collateral purpose.

Narbada Prasad Agrawal v. Tarun Bhawasar

Judgment dated 04.11.2008 passed by the High Court in Writ Petition No. 5051 of 2008, reported in 2009 (1) MPLJ 176

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164. STATE FINANCIAL CORPORATIONS ACT, 1951 – Sections 31 & 32

(i) Powers made under Sections 31 & 32 of the Act are in addition to powers of realization of money under the Transfer of Property Act or any other law which is available for State Financial Corporation – It is within discretion of State Financial Corporation to choose the forum under particular Act.

(ii) The application under Section 31 (1) is to be made to the District Judge within whose jurisdiction the industrial concern is located.

Karnataka State Industrial Investment and Development Corporation Limited v. S.K.K. Kulkarni and others

Judgment dated 11.12.2008 passed by the Supreme Court in Civil Appeal No. 7288 of 2008, reported in (2009) 2 SCC 236

Held:

(i) Section 31 of the Act enables SFC, without having recourse to the provisions of Section 29 of the 1951 Act or Section 69 of the Transfer of Property Act, to have its right emanating from the agreement, enforced by initiating proceedings contemplated thereunder, namely, applying to the District Judge within the limits of whose jurisdiction the industrial concern carries on its business. Section 31 is one mode of recovery. Therefore, the power under Section 31 and Section 32 are in addition to the power of realization of money under the Transfer of Property Act or any other law. It is within the discretion of SFC to choose the forum under a particular Act. Once there is a default in the payment of loan, it is for the Corporation to decide as to whether it shall proceed under Section 29 for sale of the property mortgaged or whether it shall take any recourse under Section 31 of the 1951 Act.

Section 31 of the Act had been enacted to enable the corporation to obtain quicker remedies from the highest Court of Original Civil Jurisdiction in the locality. Where the SFC takes recourse to the provisions of Section 31 of the Act and obtains an order from the Court, it shall ordinarily seek its enforcement in the manner provided for by Section 32 of the 1951 Act, which section is aimed to act in aid of the orders passed under Section 31 of the Act.

The remedy provided for under Section 31 is not in derogation of any other mode of recovery which is available to the SFC under any other law for the enforcement of its claims. The remedy under Section 31 is not the sole or exclusive remedy available to the SFC. It is only an additional remedy which is conferred upon the SFC. The substantive relief in an application under Section 31(1) is not a plaint. This is clear from the form of the application, the nature of the relief, the compulsion to make interim order, the limited enquiry contemplated by Section 32(6), the nature of the relief that can be granted and the method of execution. The proceedings under Section 32 of the 1951 Act are, therefore, nothing but execution proceedings. A combined reading of Section 31 and Section 32 of the 1951 Act indicates that an investigation has to be made to find

out the terms and conditions on which loan was given by SFC to the industrial concern and whether SFC was entitled to the relief under Section 31(1) on account of the breech of the terms of agreement.

Having discussed the nature of the proceedings under Section 31(1) of the 1951 Act we are of the view that Section 31 read with Section 32 constitutes a Code by itself. It is a special provision. It is a mode of recovery. It does not prevent or exclude the SFC from invoking any other remedy open to it in law. However, once the SFC invokes Section 31(1), it has to proceed in accordance with the procedure prescribed in Section 32.

(ii) Under Section 31(1), which is invoked by the SFC in this case, an application to obtain quicker remedy has to be made to the District Judge within whose jurisdiction the industrial concern is located. This is the mandate of Section 31(1). It is so mandated because wide powers are given to the District Judge under Sections 31 and 32 to attach, sell and recover outstanding dues of SFCs in the shortest possible time. In fact, sub-section (aa) stood inserted in Section 31(1) for enforcing the liability of any surety. This sub-section is in addition to the power given to the District Judge to order sale of the property pledged, mortgaged, hypothecated or assigned to the SFC as security for loan or advance. An application under Section 31 can be filed even before the exercise of power under Section 29 of the 1951 Act or Section 69 of the Transfer of Property Act.

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***165. TRANSFER OF PROPERTY ACT, 1881 – Section 123**
EVIDENCE ACT, 1872 – Section 90
INTERPRETATION OF STATUTES:

(i) Gift deed relating to immovable property, attestation of – Deed not attested by two witnesses – Held, gift deed must be attested by two witnesses as provided by S.3 of the T.P. Act – Unattested gift deed though 30 yrs old, does not convey any title to the donee – Further held, S.90 of the Evidence Act does not dispense with requirement of Section 123 of the Transfer of Property Act.

(ii) Statutes – Question as to whether a statute is mandatory or directory, determination of – Depends upon the intent of the Legislature and not upon the language in which the intent is clothed.

Ram Babu Vaishya (since dead) through LRs Nisha Rani and others v. Scindia Kanya Vidyalaya and Registered Society and another

Judgment dated 17.11.2008 passed by the High Court in First Appeal No. 15 of 2006, reported in 2009 (1) MPLJ 180 (DB)

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Note : Asterisk (*) denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

मध्यप्रदेश सिविल सेवा (चिकित्सा परिचर्या) नियम, 1958 में संशोधन संबंधी अधिसूचना

क्रमांक एफ –2–39–93 सत्रह–मेडि–4– भारत के संविधान के अनुच्छेद 309 के परन्तुक द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए मध्यप्रदेश के राज्यपाल एतद् द्वारा, मध्यप्रदेश सिविल सेवा (चिकित्सा परिचर्या) नियम, 1958 में निम्नलिखित और संशोधन करते हैं, अर्थात :–

संशोधन

उक्त नियमों में, –

नियम–7 के उप नियम (1) के खण्ड (एक) के स्थान पर निम्नलिखित खण्ड स्थापित किया जाए, अर्थात :–

(एक) प्राधिकृत परिचारक द्वारा विहित की गयी औषधियों के क्रय में उपगत व्यय पूर्णतः –

(1) परन्तुक यदि कोई सरकारी कर्मचारी, जो बाह्य रोगी के रूप में एक वर्ष में चार बार या लगातार तीन माह तक रूपये 250/– (दो सौ पचास रूपये) प्रतिमाह से अधिक के चिकित्सा प्रतिपूर्ति बिल स्वयं के या उसके परिवार के किसी सदस्य के लिए प्रस्तुत करता है, तो नियंत्रण प्राधिकारी, मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी से द्वितीय अभिमत प्राप्त करेगा तथा अनुकूल सिफारिश प्राप्त होने पर ही चिकित्सा प्रतिपूर्ति बिल पास किया जाएगा। किसी भारतीय चिकित्सा पद्धति या होम्योपैथी पद्धति से उपचार के मामले में द्वितीय अभिमत मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी के बजाय यथास्थिति संभागीय अधिकारी, आयुर्वेद या भारसाधक जिला आयुर्वेद अधिकारी से लिया जाएगा।

(2) यदि किसी एक वर्ष में किसी सरकारी कर्मचारी से चिकित्सा प्रतिपूर्ति के लिये रूपये 3,000/– (तीन हजार रूपये) से अधिक के बिल प्राप्त हो तो नियंत्रण प्राधिकारी उक्त सीमा से अधिक राशि के ऐसे समस्त बिलों की जाँच एक चिकित्सा बोर्ड से करायेगा जिसमें यथास्थिति संभागीय संयुक्त संचालक, स्वास्थ्य सेवायें, मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, संबंधित बीमारी के विशेषज्ञ और जिले के भारसाधक संभागीय आयुर्वेद अधिकारी अथवा जिला आयुर्वेद अधिकारी, सम्मिलित होंगे। ऐसे बिल नियंत्रण प्राधिकारी द्वारा बोर्ड की सिफारिश पर ही पास किए जाएंगे।

(3) यदि एक वर्ष में किसी सरकारी कर्मचारी द्वारा प्रस्तुत किए गए चिकित्सा प्रतिपूर्ति बिलों की राशि रूपये 5,000/– (पाँच हजार रूपये) से अधिक हो तो उक्त सीमा से अधिक राशि के बिलों की जाँच बोर्ड द्वारा की जाएगी जिसमें यथास्थिति संचालक, चिकित्सा सेवाएँ, संचालक, चिकित्सा शिक्षा, संचालक, भारतीय चिकित्सा पद्धति एवं होम्योपैथी सम्मिलित होंगे। ऐसे बिल नियंत्रण प्राधिकारी द्वारा उक्त बोर्ड की सिफारिश पर ही पास किये जाएँगे।

उक्त परन्तुक –

(क) अन्तरंग (इनडोर) रोगियों, तथा

(ख) उन रोगियों जो ऐसे रोग से पीड़ित हों, जिनके बारे में संबंधित मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी ने विहित प्रोफार्मा (निर्देशन पत्र) में यह प्रमाण–पत्र जारी कर दिया हो कि उस रोग के लिए उपचार लंबे समय तक चलना अपेक्षित है या चलने की संभावना है, से संबंधित प्रतिपूर्ति बिलों के मामले से लागू नहीं होगा।

टिप्पणी – ऐसे प्रमाण पत्र एक समय में एक वर्ष से अधिक कालावधि के लिए जारी नहीं किए जाएँगे किन्तु उनका समय–समय पर ऐसी कालावधि के लिये जो आवश्यक हो, नवीनीकरण किया जा सकेगा जो एक समय में एक वर्ष से अधिक न होगा तथा मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी उसके द्वारा जारी किए गए प्रमाण पत्रों की विशिष्टियों से युक्त एक–एक रजिस्टर, ऐसी रीति में जैसी कि सरकार द्वारा विहित की जाए, रखेगा।

मध्य प्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

अपर सचिव

भोपाल, दिनांक 2 नवम्बर 1995

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क्र. एफ.–2–39–93– सत्रह – मेडि–4. – भारत के संविधान के अनुच्छेद 348 के खण्ड (3) के अनुसरण में, इस विभाग की अधिसूचना क्र. एफ.–2–39–93–सत्रह–मेडि–4. दिनांक 2 नवम्बर 1995 का अँग्रेजी अनुवाद राज्यपाल के प्राधिकार से एतद् द्वारा प्रकाशित किया जाता है।

मध्य प्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

अपर सचिव

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008

[No. 35 of 2008] **[31st December, 2008]**

(Received the assent of the President on the 31st December, 2008 and Act published in the Gazette of India (Extraordinary) Part II Section 1.)

An Act further to amend the Unlawful Activities (Prevention) Act 1967.

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

1. **Short title.**– This Act may be called the Unlawful Activities (Prevention) Amendment Act, 2008.

2. **Insertion of Preamble.**– In the Unlawful Activities (Prevention) Act, 1967 (37 of 1967.) (hereinafter referred to as the principal Act), after long title and before the enacting formula, the following preamble shall be inserted, namely:–

"Whereas the Security Council of the United Nations in its 4385th meeting adopted Resolution 1373 (2001) on 28th September, 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat international terrorism,

And whereas Resolutions 1267 (1999). 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1322 (2008) of the Security Council of the United Nations require the States to take action against certain terrorists and terrorist organisations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;

And whereas the Central Government, in exercise of the powers conferred by section 2 of the United Nations (Security Council) Act, 1947 (43 of 1947.) has made the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007;

And whereas it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with, terrorist activities and for matters connected therewith or incidental thereto.".

3. **Amendment of Section 2.** – In section 2 of the principal Act,–

(i) in clause (d), the words "and includes a Special Court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008;" shall be inserted at the end;

(ii) after clause (e), the following clause shall be inserted, namely:–

'(ea) "Order" means the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007, as may be amended from time to time;';

(iii) in clause (g), after the words "for the purpose of a terrorist organisation", the words "or terrorist gang" shall be inserted at the end;

(iv) for clause (h), the following clauses shall be substituted, namely: –

'(h) "property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and legal documents, deeds and instruments in any form including electronic or digital, evidencing title to, or interest in, such property or assets by means of bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, cash and bank account including fund, however acquired;

(ha) "Schedule" means the Schedule to this Act;'.

4. **Substitution of new Section for Section 15.** – For section 15 of the principal Act, the following section shall be substituted, namely:–

"15. Terrorist act. – Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,–

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological, radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause–

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

Explanation.– For the purpose of this section, public functionary means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as a public functionary.".

5. **Insertion of new Section 16A.** – After section 16 of the principal Act, the following section shall be inserted, namely:–

"16A. Punishment for making demands of radioactive substances, nuclear devices, etc. – Whoever intentionally, by use of force or threat of use of force or by any other means, demands any bomb, dynamite or other explosive substance or inflammable substances or fire arms or other lethal weapons or poisonous or noxious or other chemicals or any biological, radiological, nuclear material or device, with the intention of aiding, abetting or committing a terrorist act, shall be punishable with imprisonment for a term which may extend to ten years, and shall also be liable to fine.".

6. **Substitution of new Section for Section 17.** – For section 17 of the principal Act, the following section shall be substituted, namely:–

"17. Punishment for raising funds for terrorist act. – Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.".

7. **Amendment of Section 18.** – In section 18 of the principal Act, for the words "incites or knowingly facilitates", the words "incites, directs or knowingly facilitates" shall be substituted.

8. **Insertion of new Sections 18A and 18B.** – After section 18 of the principal Act, the following sections shall be inserted, namely:–

"18A. Punishment for organizing of terrorist camps. – Whoever organises or causes to be organised any camp or camps for imparting training in terrorism shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

18B. Punishment for recruiting of any person or persons for terrorist act. – Whoever recruits or causes to be recruited any person or persons for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.".

9. **Amendment of Section 23.** – In section 23 of the principal Act, –

(a) in sub-section (1), for the words "If any person with intent to aid any terrorist contravenes", the words "If any person with intent to aid any terrorist or a terrorist organisation or a terrorist gang contravenes" shall be substituted.

(b) in sub-section (2), for the words "Any person who, with the intent to aid any terrorist", the words "Any person who with the intent to aid any terrorist, or a terrorist organisation or a terrorist gang" shall be substituted.

10. **Amendment of Section 24.** – In section 24 of the principal Act, in sub-section (2), after the words "proceeds of terrorism whether held by a terrorist or", the words "terrorist organisation or terrorist gang or" shall be inserted.

11. **Amendment of Section 25.** – In section 25 of the principal Act, in sub-section (5), in the Explanation, after clause (c), the following clause shall be inserted, namely:–

"(ca) credit or debit cards or cards that serve a similar purpose;";

12. **Insertion of new sections 43A to 43 F.** – After section 43 of the principal Act, the following sections shall be inserted, namely:–

'43A. Power to arrest, search, etc. – Any officer of the Designated Authority empowered in this behalf, by general or special order of the Central Government or the State Government, as the case may be, knowing of a design to commit any offence under this Act or has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or from any document, article or any other thing which may furnish evidence of the commission of such offence or from any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property

which is liable for seizure or freezing or forfeiture under this Chapter is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him to arrest such a person or search such building, conveyance or place whether by day or by night or himself arrest such a person or search a such building, conveyance or place.

43B. Procedure of arrest, seizure, etc. – (1) Any officer arresting a person under section 43 A shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under section 43 A shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police station.

(3) The authority or officer to whom any person or article is forwarded under sub-section (2) shall, with all convenient dispatch, take such measures as may be necessary in accordance with the provisions of the Code.

43C. Application of provisions of Code. –The provisions of the Code shall apply, insofar as they are not inconsistent with the provisions of this Act, to all arrests, searches and seizures made under this Act.

43D. Modified application of certain provisions of the Code. – (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),–

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:–

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period*up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody".

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that–

(a) the reference in sub-section (1) thereof–

(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government.";

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and

(b) the reference in sub-section (2) thereof, to "the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be".

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.

43E. Presumption as to offence under Section 15. – In a prosecution for an offence under section 15, if it is proved –

(a) that the arms or explosives or any other substances specified in the said section were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature were used in the commission of such offence; or

(b) that by the evidence of the expert the finger-prints of the accused or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence, the Court shall presume, unless the contrary is shown, that the accused has committed such offence.

43F. Obligation to furnish information. – (1) Notwithstanding anything contained in any other law, the officer investigating any offence under this Act, with the prior approval in writing of an officer not below the rank of a Superintendent of Police, may require any officer or authority of the Central Government or a State Government or a local authority or a bank, or a company, or a firm or any other institution, establishment, organisation or any individual to furnish information in his or its possession in relation to such offence, on points or matters, where the investigating officer has reason to believe that such information will be useful for, or relevant to, the purposes of this Act.

(2) The failure to furnish the information called for under sub-section (1), or deliberately furnishing false information shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(3) Notwithstanding anything contained in the Code, an offence under sub-section (2) shall be tried as a summary case and the procedure prescribed in Chapter XXI of the said Code [except sub-section (2) of section 262] shall be applicable thereto.'.

13. Amendment of Section 45. – Section 45 of the principal Act shall be renumbered as sub-section (1) thereof and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:–

"(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation, within such time as may be prescribed, to the Central Government or, as the case may be, the State Government.".

14. **Insertion of new Section 51A.** – After section 51 of the principal Act, the following section shall be inserted, namely:–

"51A. Certain powers of the Central Government. – For the prevention of, and for coping with terrorist activities, the Central Government shall have power to–

(a) freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism;

(b) prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism;

(c) prevent the entry into or the transit through India of individuals listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism.".

15. **Amendment of Section 52.** – In section 52 of the principal Act, in sub-section (2), after clause (e), the following clause shall be inserted, namely:–

"(ee) the time within which sanction for prosecution and recommendation to the Central Government shall be given under sub-section (2) of section 45, and".

16. **Amendment of Section 53.** – Section 53 of the principal Act, shall be renumbered as sub-section (1) thereof and after sub-section as so renumbered, the following sub-section shall be inserted, namely:–

"(2) The Order referred to in entry 33 of the Schedule and every amendment made to that Order shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more successive sessions.".

17. **Amendment of Schedule.** – In the Schedule to the principal Act after entry 32, the following entry shall be inserted, namely:–

"33. Organisations listed in the Schedule to the U.N. Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007 made under section 2 of the United Nations (Security Council) Act, 1947 (43 of 1947.) and amended from time to time.".

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