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मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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3.	**Hon'ble Shri Justice S.P. Khare**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
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6.	**Hon'ble Shri Justice Sugandhi Lal Jain**	Member
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JOTI JOURNAL APRIL, 2004

SUBJECT- INDEX

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

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

We are thankful to publishers of AIR, SCC, MPLJ, JLJ, MPHT, ANJ, Vidhi Bhasvar, MPJR, RN and MPLT for using some of their material in this Journal

- Editor

FROM THE PEN OF THE EDITOR

A. K. SAXENA
Director

Our Judicial Officers' Training & Research Institute has been imparting training to judicial officers of State of Madhya Pradesh through various modes. The Institute has diversified its activities. A new training scheme has been adopted for Civil Judges Class II and Additional District Judges at the induction level and the scheme includes workshops for District Judges also. We try to cover almost all the relevant aspects during training so that our judicial officers may not face any difficulty while deciding the cases. The Institute also intends to start training programmes for officers of other departments. Publishing of JOTI Journal is equally important. A significant function by itself. Considering the above activities, the number of judicial officers in Madhya Pradesh, one year training programme of Civil Judges Class II at induction level with very limited staff and infrastructure of J.O.T.R.I., it is not possible to call all the judicial officers for training and refresher courses frequently. Inspite of our best efforts, the judicial officers of various cadre could not attend the training or refresher programme in last few years but we are going to have them with us at the earliest. The Institute has been vigilant about this problem and, therefore, a new bi-monthly training programme at district level has been approved by Hon'ble the High Court under the new training scheme.

The bi-monthly training programme at district level started in the month of August, 2003 and since then the Institute has received number of articles on various problems/topics from almost all the districts. The District Judges have to play the key role for the success of this training programme for which I have already laid stress in my earlier editorial. No doubt, our judicial officers are burdened with judicial work and the District Judges have to perform their administrative duties apart from their regular judicial work but this state of affair is not new. The judicial officers are doing judicial and administrative work since inception of the Courts. So, this cannot be any excuse for not performing well in the bi-monthly training programme. Apart from that, the bi-monthly training scheme is the programme of our High Court and we are duty-bound to take it seriously and sincerely. Some of the districts are doing fairly well and their articles are of good standard but most of the districts are not performing as per standard of Madhya Pradesh District Judiciary. The only cause of poor performance appears to me is that the District Judges of most of the districts do not take this programme with real seriousness.

I have already intimated that the answer to the problem must be in article form but to my surprise some of the District Judges are sending the answers in memo form or the articles are too short without proper discussion or without referring to any case laws to substantiate their conclusion. These articles, in no way, are fruitful to judicial officers of the State. Some of the District Judges also tried to shift their burden on their subordinates and thereafter, they did not care to check the articles, resultantly, the articles are replete with full of mistakes. Apart from numerous grammatical mistakes in the articles, (no matter whether the article is written in Hindi or in English) we found several mistakes of spelling and punctuations, and needless to say about other typing mistakes. We have

also found the same mistakes in those portions of the articles which were reproduced from the various Acts or case laws, which is unacceptable. It appears that the writers of the articles do not care to read it out on its completion and the District Judges also send it without going through the articles. Whenever we find a particular article is of good standard but with full of small errors, we have to carry out necessary corrections and after informing the concerned District Judges about these corrections and taking their permission, we publish it in the Journal. I and my officers have to devote our time in this process because we cannot publish any article with such type of errors. Whenever we find that an article is not complete in itself, we try to add necessary and relevant matter on that problem/topic and publish it separately for the guidance of judicial officers. If the Institute does not find an article of good standard on any problem/ topic, either the Institute publishes its own article or sends the problem/topic to other group of districts in place of earlier group so that the Institute may get a better article on the subject in question.

Recently, a Consulation Meeting with all the State Judicial Academies and Training Directorates was convened to structure future courses of Judicial Education and Training at National Judicial Academy, Bhopal and the Additional Director of our Institute attended the meeting. He appraised our training programmes during formal and informal discussions to all the participants and he informed us that probably no other Institute of the country is conducting bi-monthly training programme at district level. He also informed that our bi-monthly training programme was highly praised by Hon'ble Judges of various High Courts and Director, National Judicial Academy. This shows how important and qualitative bi-monthly training programme at district level we have and how much time the judicial officers should devote for the success of this programme. Apart from this, the Institute has also started sending JOTI Journal to all the Training Institutes/Academies of the country regularly and the articles prepared by the judicial officers of various districts come in sight of Hon'ble Judges and high officials of all the High Courts/Institutes. Therefore, it is our foremost duty to prepare articles of excellent standard so that the true picture of Madhya Pradesh District Judiciary may emerge before other High Courts of the country.

The bi-monthly training programme at district level was inducted in training scheme with a view to provide better opportunities to judicial officers to take active participation during discussion. Active participation in bi-monthly training programme will not only help the judicial officers to enrich their knowledge on a given topic but they will also be benefited immensely by publication of good articles on various complex problems of day-to-day working. The district Judges have to take the responsibility in this regard. To deliver our knowledge or to guide judicial officers is a matter of exultation and it is expected from all the District Judges and senior judicial officers that they will not miss the opportunity. If the head of the District Judiciary is sincere for implementation of the programme, the subordinates cannot dare to remain non-co-operative. So, the Institute expects a lot from District Judiciary to run bi-monthly training programme successfully and I am sure that the judicial officers of Madhya Pradesh will perform as per our expectations.

Rest in next issue.

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FAREWELL TO HON'BLE THE CHIEF JUSTICE
SHRI KUMAR RAJARATNAM

Hon'ble Shri Justice Kumar Rajaratnam, who adorned the office of Chief Justice of High Court of Madhya Pradesh for about 6 months, demitted the office on March 12, 2004 after the age of superannuation.

Born on March 13, 1942 in Bangalore, His Lordship graduated from Loyola College, Madras and thereafter went to England for higher studies. His Lordship was called to bar by the Hon'ble Society of Gray's Inn Hilary Term, 1970.

Enrolled in India as an Advocate in the year 1971, His Lordship started practice under able guidance of Shri R. Pandian, a Senior Lawyer of Madras Bar, who later became a Judge of the Supreme Court of India. Appeared in the Original Side of the High Court having a good practice in Criminal Side and Writ Petitions. Was Senior Standing Counsel to the Central Government for sometime. Was elected twice as President of the Madras Bar Association from 1992-1994.

Elevated on January 10, 1994 as Judge of Madras High Court, His Lordship was transferred to Karnataka High Court in the same capacity. Appointed Chief Justice of High Court of Madhya Pradesh and took oath of the office at Raj Bhawan, Bhopal on September 6, 2003. His Lordship was accorded farewell ovation on March 12, 2004 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

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

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PART - I

ADDRESS BY
HON'BLE SHRI JUSTICE RAJEEV GUPTA, ADMINISTRATIVE JUDGE, AT THE FAREWELL OVATION OF HON'BLE THE CHIEF JUSTICE HELD ON MARCH 12, 2004 AT JABALPUR

We have assembled here today to bid farewell to our Hon'ble Chief Justice Shri Kumar Rajaratnamji.

Born on 13th of March, 1942 in Bangalore, Your Lordship had your schooling at the Lawrence School, Lovedale, Ooty and Madras Christian College High School, Madras. Your Lordship graduated from Loyola College, Madras and went to England for Higher Studies. Your Lordship was then called to the Bar by the Hon'ble Society of Gray's Inn Hilary Term 1970.

Your Lordship joined the profession as an Advocate in the year 1971, under the able guidance of Shri R. Pandian, a Senior Lawyer of Madras Bar, who later became a Judge of the Supreme Court of India. Your Lordship appeared in many important cases in the High Court of Madras and also before the Supreme Court.

Your Lordship was elected as president of the Madras Bar Association for two consecutive terms during 1992-1993 and 1993-1994.

Your Lordship was elevated as a Judge of Madras High Court on 10th of January, 1994 and later assumed the office of Judge of Karnataka High Court on 24th of January, 1994.

Your Lordship took over as the 21st Chief Justice of Madhya Pradesh High Court on 6th September 2003.

Your Lordship took keen interest in the disposal of those criminal appeals in which the accused persons were in custody. It was on the initiative of My Lord the Chief Justice that all the Judges of this High Court heard these appeals even on Saturdays and it is with great satisfaction that I am informing you that only few appeals of the Single Bench are now pending wherein the accused persons are in custody.

Under the dynamic leadership of My Lord the Chief Justice as many as fifty thousand cases were disposed of during the period between September 2003 to March 2004.

Your Lordship pursued the matter concerning Lok Adalat at the High Court level with keen interest, and in these Lok Adalats more than 800 cases were disposed of during My Lord's tenure.

During my Lord's tenure the number of Judges of our High Court was increased from 29 to 42. It was on account of the efforts of My Lord the Chief Justice that the Judges have been provided with Personal Computers and Lap Tops with SCC online.

My Lord the Chief Justice has been very generous to the members of the Bar. During My Lord's tenure the chambers were made available to the Bar Association; a reading room for the lawyers on the first floor was provided; and, a personal computer with SCC online in the High Court Library was made available for use by the members of the Bar.

Your Lordship delivered several landmark Judgments as Chief Justice of Madhya Pradesh High Court and as Judge of Karnataka High Court which adorn the Law Journals, and would guide the legal fraternity for all times to come.

Under the guidance of My Lord the Chief Justice a grand function was arranged on 2nd of March 2004 to felicitate Former Chief Justice of India, Hon'ble Shri Justice J.S. Verma, and Senior Counsel, Dr. Rajendra Singh. Hon'ble the Chief Justice of India Shri V.N. Khare, Hon'ble Shri Justice R.C. Lahoti and Hon'ble Shri Justice D.M. Dharmadhikari, Judges of the Supreme Court, participated in the function. In the same week Hon'ble Shri Justice Rajendra Babu, Judge, Supreme Court of India, also visited the Bar Association.

Your Lordship would soon assume the office of Chairman, SEBI, Appellate Tribual.

I, on my behalf, and on behalf of the brother Judges extend best wishes to Your Lordship and Madam Heera K Rajaratnamji, who has always been kind to all, and wish you long life, good health and best of everything in life.

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REPLY BY
HON'BLE SHRI JUSTICE KUMAR RAJARATNAM,
TO THE FAREWELL OVATION

My wife and I are deeply sensible of the honour bestowed on us in acocrding me this ovation.

The nobal Bar at Jabalpur has presented me with accolades, showered me with flowers, crowned me with glory, gave me respect love and affection. How can I repay this spontaneous affection shown to me by the Bar except with tears of gratitude and eternal joy.

I have spent many years in the United Kingdom, United States and Karnataka but I shall say without hesitation that it was those six lovely months which I spent in Madhya Pradesh particularly in Jabalpur which was the most beautiful period of my life.

The future of this noble Institution is in the hands of the Bar. Bar is the mirror of the Bench. Indeed the bar is the mother of the Bench.

We leave you for a short time while we are on the Bench and after that we come back to you when we retire.

The Jabalpur Bar with its noble traditions and culture, has earned the respect of this Country. I salute the Jabalpur Bar.

The younger Members of the Bar have impressed me enormously and I have special place for them in my heart. There is a great future for them in this profession, and I wish them God speed in the profession.

On this occasion, I would like to pay tribute to my esteemed colleagues at the Jabalpur Bench, Indore Bench and the Gwalior Bench. But for their guidance, cooperation and healthy suggestions, I would have been a silent spectator.

I am deeply indebted to Hon'ble Justice R.C. Lahoti and Hon'ble Justice D.M. Dharmadhikari, Judges of the Supreme Court for their guidance in determining the destiny of this Court and for their warmth and affection shown to me and my family.

I salute my predecessors Justice G.P. Singh, Justice J.S. Verma, Justice U.L. Bhat, Justice A.K. Mathur and Justice Bhawani Singh who have led this Court with great distinction.

I would like to thank the Advocate General, Mr. R.N. Singh and his wife for all the kindness and affection showered on us.

My wife and I are grateful for all the affection and hospitality showered on our family by the Judges at the Jabalpur Bench. We will never forget their kindness.

I for my part have tried to do justice with compassion skipping aside hyper technicalities.

Both in my personal life and in my judicial work, I was constantly reminded of these words in Bhagavad Geetha and I quote:

"He, who is satisfied with gain which comes of its own accord, who is free from duality and does not envy, who is steady in both success and failure, is never entangled, although performing his duty."

Unquote

My Judicial work has been in consonance with the principles of compassion, equity and good conscience having regard to the present conditions of the Indian Society. There have been an occasion when the concept of compassion may have been over stretched. Some of my judgments may not make good law, but make good sense.

The tool of judicial pronouncement must always be in conformity with the principles of justice, equity and good conscience particularly in a proverty ridden country like ours.

It would be erroneous to think that I have tinge of sadness when I demit my office. It cannot be so. Of course I will miss you all. A lawyer never retires, but a Judge, the day he enters in service, knows exactly when he demits office. So there can be no regrets, only gratitude and pleasant memories.

Like all dreamers, I too have a dream for the State.

For a sufficiently long time, I presided over Criminal Benches at Karnataka. We did nothing, but either to convict the accused or to acquit them. There was hardly any scope to worry about the plight of the family of the deceased because the law does not permit any payment of compensation except out of the pocket of the accused. The accused invariably languishes in jail without any means himself to pay for the upkeep of his own family while he is in custody.

Some time later, I had been assigned judicial work to deal with appeals under the provisions of the Motor Vehicles Act and the Workmen's Compensation Act. While dealing with this branch of law, we did just the opposite, awarded huge sums of money as compensation, but never had any power to send any driver of a vehicle, who caused the accident, to Jail. No victim in an

accident case ever thought of retributive justice. He was only concerned about the quantum of compensation.

It broke my heart. I asked myself, if the State can have a statute of no fault liability, why is it not possible for the State to have a concept of no fault compensation to the vitims of crime?

The legal heirs of the deceased in a murder case have no succor. They suffer silently and the bread winner has been snuffed out by a cruel act of murder. Take for example the case of a dowry death where the husband is sent to jail, rightly so and the wife dies in a gruesome manner, but who cares for the children of the victim. Sending the accused to jail by itself cannot appease the conscience of the State unless victims of crime are also taken care of. Justice Babu, as he then was, and myself sitting in a Division Bench at Karnataka extended the concept of strict liablity of the sovereign republic State to custodial death (ILR 1995 KAR 2424- Rylands vs. Fletchre) principle.

I ask myself this question, why is it not possible for the State to create a fund for compensating the victims of crime? Chief Justice of India- Dr. A.S. Anand, as he then was, in his lecture on 'Victims of Crime - the unseen side' said, which I quote :

> "Emotional assistance or charity has its own limitations. A permanent mode of compensation has to be worked out. It may be worth considering as to whether the State which fails to protect the life and property of the citizen should not be made to pay compensation to the victim of the crime because provisions for payment of compensation, out of the fine imposed, with all its limitations, are rather illusory, of course, reserving the right of the State to reimbursement from the guilty."

To my knowledge, a fund for payment of compensation to victims of crime is in practice in Canada, Australia, New Zealand, the United Kingdom and a separate Board is constituted for awarding compensation to them.

I have always cried for the victims of crime.

I would like to see a fund created by the State for this purpose. If such a fund is created, it would be for the first time any where in India. It can be looked after by an autonomus body headed by a retired Judge. Donation can come from corporates and other institutions. The fund will go a long way in giving succour and solace to the victims of crime who suffer endlessly. It is the soverign responsibility of the State to care those people in a civilised society.

I would like to pay tribute to the Subordinate Judiciary for the commendable work done. They work under difficult conditions. They are back bone of our judicial system.

I thank the Registrar General and the Registry Officers and I am particularly grateful to my Principal Private Secretary, Mr. A.M. Yeolekar.

The Protocal work has increased many fold and Mr. S.K. Saha and his colleagues are doing a wonderful job. I congratulate them.

I would like to thank my Private Secretaries- Mr. U.S. Dubey, Mr. Kishor Pithawe, Mr. Yogesh Shrivastava.

I would also like to thank my Court Reader Mr. K.P. Pudke.

The Court Reader Mr. Pudke and others, in the last two weeks have been over burdened and they have done a commendable job.

The Chauffeurs Mr. Om Prakash and Mr. Papa Das have served me well. Mr. Harish Yadav and Mr. S. Patel were kind to me. The staff attached to my bungalow deserves special mention.

The Doctor A.C. Sonkar attached to the High Court has been of great assistance in times of need not only to the Judges, but also to the Advocates, staff and public. I wish to thank him.

I would like to conclude my reply with the words of a great Tamil Saint Vallalar who said that God is justice and justice is compassion. I would like to quote one of his cuplet in Tamil with your permission. This cuplet was composed by the Saint after seeing crops wither because of drought-

"Wherever I saw the crops withering away, it broke my heart.

Wherever I saw people starving without any succour, I trempled.

Wherever I saw infirm people, sick and ill, I shivered with agony.

Wherever I found noble and innocent souls suffering under proverty, I cried for them."

I have requested Justice Rajeev Gupta, Acting Chief Justice to translate this in Hindi.

If only I can have a modicum of that compassion, I would not have lived in a vain.

God bless this High Court and all those who serve this institution.

My deepest regards to the members of the Jabalpur Bar. I shall always remain grateful to them as their loyal servant.

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ROLE OF STATE AND NATIONAL JUDICIAL ACADEMIES

DIPAK MISRA
Judge
High Court of M.P.
JABALPUR

Training in its own connotative expanse has been in vogue from the inception of human civilization. The training, to put it in a different manner, has always conveyed imparting of knowledge, both in the theoretical field and in the practical arena. Judicial training encapsules in its basic concept acquisition of knowledge in the sphere of law, and applied law and in its conceptual eventuality engulfs skill, craftsmanship and management of many an affair pertaining to the system of adjudication. The adjudication also includes alternative disputes resolution system. The training is necessitous, in a way, imperative to handle the complex situations that have emerged with the passage of time. The training cannot be individualistic. It has to have an institutional orientation. Hence, the State Judicial Academies and ergo, the National Judicial Academy. Be it noted, both function and are required to function as complimentary institutions and fundamentally there cannot be a total watertight compartment and it would be a travesty of training in its denotative sense not to accept or permit the doctrine of complimentarity in this sphere.

The National Judicial Academy has a role to play as the Apex body and the State Judicial Academies are to get guidance from it. In certain areas the National Judicial Academy has the expertise to impart training and that role has already been carved out. The State Judicial Academies are to compliment and supplement in those areas. In other areas they have to be guided by uniform principles and guidelines to be framed for collaboration and co-operation between the two bodies. The perspectives become luminous when one ostracizes dichotomy and does not perceive any kind of paradox, as there is fundamentally none. The areas are specific, exact and precise. Sometimes, if overlapping, it is for the better.

To upgrade the judicial training for better competence, efficiency and productivity of the justice system there has to be training at all levels namely, training at the initial stage of induction, training at the stage of promotion and requisite training from time to time which one may call the *refresher course for excellence*. The training has to be systematic synthesization of theory and practical applicability to realize the goal and the values. The need of the hour is the applicability of the law, acquisition of ideas with regard to court management and development of an uncompromising sphere of ethics. Values of honesty, impartiality, patience and perseverance are to be taught, less by lecture and more by practical wisdom. The academies must lay emphasis on quantitative output as

well as qualitative gain. Both can be encapsuled in a singular compartment which one may call justice dispensation system. The role of academies for achieving the target has to be emphasized. Sharpening of intellect, polishing of analytical faculty, studied scrutiny of logical acumen and real introspection are to be the main pillars of the training. The academies are to see that the trainees are not only to be lectured but the endeavour should be to make them practically able to deliver the goods. The training should be principle oriented. Fundamental and first principles of law should be made clearer to the trainees so that they do not grapple in darkness having an unnecessary vacillating mind. The vividities and conceptions have to undergo perceptual shift so that they are equipped to serve the collective as it is expected of them by the institutions and the society at large. The orientation should be work-based having ethical foundation. In the process of training the judicial academies are required to teach them the skill which is a combination of art and science and make embedded in them the motto that they must adhere to the conception of the serviceability of the institution i.e. the *judiciary*. Apart from imparting training of this nature, to make them ideal judges in the hierarchical system, they are also to be taught to abandon *'Judges disease'* and abdicate perpendicular *'I ism'*. The academies have a role to implant humility in the marrows of the trainee judges so that they would be in a position to serve the collective interest without thinking that they are doing any kind of job or task. The role of the institution should be to train them to perform their duties as a moral responsibility and non-performance of which would become unforgiveable and unpardonable. The academies should see that the trainee judges while able to shoulder the real responsibility, do not suffer from any kind of phobia. They must be taught to ostracise the flight, fright and fight. To elaborate: they should not run away from deciding any lis because of its complexity and subtlety. They should not be scared to decide any kind of controversy and they should not pick up a fight with anyone, a judge's job is not to argue but to decide.

The trainers or the teachers, whatever nomenclature we give, at every moment should appear to be a role model, idealism incarnate and professionalism personified. In that case, the trainee would be in a position to imitate the trainers. The academies should improvise the technique to galvanize the moderate abilities of the trainee judges to the maximum. The role of the academy should be to inspire and instill the confidence in the judges at the time of induction and they must learn to have self-trust. Once these are done the efficiency increases and there shall be enhancement in the ultimate productivity. The concept gets concretized. I may also add, while imparting training there must be personal touch as in the tradition of teaching or making a man able, the personal touch is a *sine qua non*. Trainer should not only adopt the teaching methodology but should take recourse to teaching technology. Apart from making a trainee computer literate they should be made literate in human psychology and other social sciences so that they become complete judges if not perfect. The trainers should

strive to pledge the trainees to immerse to acquire encyclopaedic knowledge as a consequence of which their faculty for discernment, comprehension and perception improves. Their mind must be ennobled so that they can yearn to do justice. They must be taught that rules of game have to be followed without any deviation and there should be fairness in delivery of justice. In this context one may quote Lawrence H. Cooke:

> "The fair and speedy delivery of justice is undoubtedly the noblest of human aspirations. It must remain our constant Goal."

The goal can be achieved if the trainee Judge is taught to remain calm, cool and composed. He should always keep in mind that calmness of a Judge is compared to the calmness of the Pacific Ocean. He should recall the advice of Woodrow Wilson:

> "One cool judgment is worth a thousand hasty counsels. The things to be supplied is light, not heat."

The purpose of stating so is that working atmosphere should emanate enlightening brightness and not heat and that is the primary duty of any Judge or adjudicator.

The academies must teach for some time language orientation course. English, being the link language *in praesenti,* should be emphasized upon. Let it be noted that we cannot adopt globalization without proper training in English language. Learning a link language has its own advantages. One cannot abandon the idea of respect of one's own language as it is equivalent in a way to *'Janani'* and *'Janmabhumi'.* There can be no cavil over the factum that *'Janmabhumi', 'Matrabhasha'* and *'Rashtrabhasha'* are higher than heaven. Love and respect should be paramount for the same, but, simultaneously there should be a global and universal thinking process so that one does not remain a person lying like a frog in a well. Endeavour should be to achieve the status of a real protagonist, a complete personality at the centre state of human affairs as well as law.

The academies must give priority and attention on physical health as it is an essentiality of the judges' personality. It has been said long ago *'there is something called physical morality'.* Hence, there should be *'Yoga'*- laying stress on *'Pranayam'* as *'Pranayam'* changes the thinking pattern. It is to be borne in mind that thought controls the breath and breath has its effect and impact on thought. Therefore, the concept of *'yoga'* in every sublime life is the requisite. In addition such training enables a personality to have a proper harmony between the body and mind which is the central requirement for anyone who sits in the temple of justice.

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IMPORTANCE OF ISSUANCE/SERVICE/PUBLICATION OF SUMMONSES, NOTICES AND WARRANTS

A.K. SAXENA
DIRECTOR

The subordinate Courts are burdened with heavy load of work. Everybody is trying to off load the burden so that the litigant public may get justice as early as possible. Regular Lok Adalats are being organized to minimize the burden. Pilot Project is being implemented in some districts every year by our High Court. Some major changes have been incorporated in the Code of Civil Procedure to achieve the target of early disposal of civil cases. Some other measures are also being taken by the different Authorities to curtail the time. The members of District Judiciary are also serious to solve this problem. They are trying very hard to dispose of the cases expeditiously, but large number of cases are still pending in subordinate Courts for various reasons.

When a case comes to the trial Court, it passes through several procedural stages and hindrances before ultimate stage of passing the judgment or order comes. Out of several important stages of trial, one of the most important stage and neglected too, is the issuance or publication of summonses, notices, warrants, etc. Some of us think that issuance or publication of summons, notice, etc. is a ministerial work and we do not pay proper attention to it. This is not a correct notion. For early disposal of cases, a judicial officer should have full control over the work of issuance of processes. If the process is wrongly issued or there is any mistake with regard to name of the person against whom it was issued or dates are not correctly mentioned or proper name or designation of the Court is not written on the process or signature of judicial officer is missing or the real intention of legal provision does not appear from the process, it is bound to cause hindrances in the early disposal of cases. Whenever any process or warrant is issued against a person with a direction to do certain things within certain time, normally the Court fixes sufficiently long date for its compliance. If any glaring mistake occurs in the process or warrant, the defendant/judgment-debtor or accused always takes the liberty of it, resultantly, more often, it hampers the progress of the cases. The services of so many process servers and police personnel are used in the whole process and due to some defect in issuance of process or warrant either by clerical mistake or negligence, the outcome of their services remains fruitless. Various processes and warrants are issued at different stages of the case and even a minor negligence or defect can cause undue hindrance in its speedy disposal.

First of all it has to be ascertained whether proper order-sheet has been written in respect of issuance of summons, notice or warrant? Thereafter, the order of the Court should be strictly complied with so that due process may be issued in time. Before signing various processes or warrants, the judicial officer must check that the name of the Court, date of hearing, all the essential factors as per legal provisions, etc. are clearly, correctly and legibly written. It should also be ensured that the copies of the process are legible so that the person

against whom the process is issued may know that he has to attend a particular Court on a particular date and for a specific purpose. The processes which bear the signature of the clerk should also be checked by judicial officer from time to time and proper guidance should be given to the clerk concerned so that he may perform his duty efficiently and effectively. It is also to be ascertained that summonses, notices, warrants, etc. have actually been issued in due course.

Many times the Courts have to issue summonses and notices against the persons through publication in newspapers. These processes not only come to the notice of relevant person but several other persons who do not have any interest in that litigation casually also come to know about it. If anybody finds any glaring mistake or nasty language in these processes, it creates a bad impression about the working of the Courts. In this respect so many instances can be quoted but here the intention is not to highlight the fault of one or two judicial officers. What I intend to say is that the manner of issuance of different processes should be unambiguous and faultless in every respect and for that the judicial officers must have full control over the work as well as on the staff.

All the orders of issuance of processes should have been complied with at the earliest. The cases should not be adjourned for non-issuance or wrong issuance of summonses, notices and warrants. Then comes the matter of service of summons, warrant which is very important for the progress of cases. It should be checked regularly that the summonses, warrants and notices are coming back after proper service and if not, the judicial officer must take some action against the defaulter. The judicial officers should be well versed with the working of Nazarat Section. They must know the various provisions of procedural law and Chapter III, IV & XII of Rules & Orders (Civil) and Chapter 3 & 27 of Rules & Orders (Criminal) for the effective working. In criminal cases, the problem of absconding of accused is very serious which hampers the progress of the cases. This can only be diluted by adopting strict measures against those officials who are not serious towards their duties. Non-service of summons on witnesses is another factor which creates obstacles in smooth progress of the cases and this part of the whole process must be checked regularly so that all concerned authorities and officials may remain vigilant towards proper performance of their duties. If a judicial officer has full control over his work and correct processes or warrants are being issued and these are coming back well before the date of hearing in due course, there is no reason why the cases could not be disposed of as early as possible? The duration of trial of any case can be curtailed at least by 40% to 50% by scrupulously observing of the various precautions as contained hereinabove than the duration of trial of a case of that Court where the work of issuance/service of different processes and warrants is not being taken care of.

Though importance of issuance, service or publication of various processes and warrants is in the knowledge of every judicial officer but effective control over this work is a big question at present. It should not be neglected at any cost otherwise there would be every possibility of dislocation of speedy disposal of cases which ultimately effects on the whole process.

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LAW OF ESTOPPEL

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Principle and scope

Section 115 of the Law of Evidence deals with 'Estoppel'. This section is based on equity and good conscience, the object being to prevent fraud and secure justice between the parties by promoting honesty and good faith. (R.S. Madanappa (deceased) by his Lrs. v. Chandramma and others, A.I.R. 1965 S.C. 1812) This section is based on the decision in Pikard Vs. Sears (1832) Ad & El 469 in which it was stated :-

"Where a person by his words or conduct willfully causes another to believe in the existence of a certain state of thing and induces him to act on that believe so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."

Estoppel is a rule of civil action. It has no application in criminal proceedings, though in such proceedings it would be prejudicial to set up a different story. It would amount to material contradiction making the testimony doubtful.

To bring the case within the scope of estoppel following elements must be there :

1. There must be representation by a person or his authorised agent to another in any form, declaration, act or omission.
2. The representation must have been of the existence a fact and not, of promises de futuro or intention which might or might not be enforceable in contract.
3. The representation must have been meant to be relied upon.
4. There must have been belief on the part of the other party in its truth.
5. The declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment.
6. The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice.
7. The person claiming the benefit of estoppel must show that he was not aware of the true state of things.
8. The benefit of estoppel can be claimed only by the person to whom the representation was made or for whom it was designed.

Various forms of estoppel

1. **Ostensible owner and estoppel :-** Section 41 of the Transfer of Property Act and section 115 of the Indian Evidence Act are similar in principle.

Where a person transfers property with apparent ownership and right of disposition thereof, he would be stopped from claiming title against a person to whom his original transferee disposed of the property and who took it in good faith and for consideration.

2. **Feeding the estoppel :-** Feeding the estoppel is an expression which is part of English Law of Estoppel. It means that where a grantor has purported to grant interest in land which he did not at the time possess but subsequently acquires, the benefit of subsequent acquisition goes automatically to the earlier grantee. The equitable, principle of Feeding the Estoppel has been recognized to some extent in section 43 of the Transfer of Property Act.

3. **Estoppel by silence or acquiescence:-** There is a duty on one person towards another to speak or act which he has failed to perform and the other party has been led by such silence to change his position, such silence would operate as estoppel against the former. But where there is no duty to speak no estoppel can arise. The ostensible owner sold certain land, and his son, the real owner, remained silent. The acquiescence resulted in an estoppel. (Syed Abdul Khader v. Rami Reddy and others, A.I.R. 1979 S.C. 553).

   A party who acquiesces to arbitration proceedings by participating in it for a long time, cannot be permitted to contend that the matter is legally incapable of being referred to arbitration.

4. **Acquiescence in illegal or irregular procedure :-** Question of mode of proof is a question of procedure and is capable of being waived and, therefore, evidence taken in previous judicial proceeding can be made admissible in subsequent proceedings by consent of parties. Relevant evidence can be brought on record for consideration of the Court or the Tribunal without following the regular mode, if parties agree. The Court can adopt a procedure to settle the disputes "extra curus curaie" provided the parties either consent or acquiesce in the said procedure. When once they consented they cannot turn round and question the proceeding adopted by the Court.

5. **Standby :-** To found a plea of estoppel on the doctrine of standby, it must be affirmatively established that the parties against whom that estoppel is sought to be pleaded were aware of what was being done and consciously stoodby (Ede China Gurunedham and others v. Palakurti Venkata Rao and others, A.I.R. 1959 A.P. 523). The limitations on the rule of standby are that, first, the stranger building on the land must do so supposing it to be his own and secondly, the owner of the land perceiving his mistake, abstains from setting him right and leaves him to persevere in his error. (Kalle Gaji Bahna v. Rishabh Kumar, A.I.R. 1951 Nagpur 347)

6. **Election- Approbate and reprobate :-** The principle of approbate and reprobate is based on the maxim "allegance contraria non est audiendus" meaning thereby that a person who says things contrary to each other, shall not be heard. (B.S. Lail v. Sardar Mal Lalwani, A.I.R. 1964 M.P. 124) The prin-

ciple of estoppel by election applies both to civil and criminal proceedings.

Where a party succeeded on the plea that the Revenue Court or Rent Control Court alone had jurisdiction, later cannot turn round in the civil court and say that the civil court had no jurisdiction.

7. **Estoppel by record :-** Estoppel by record results from the judgment of a competent Court. This is provided for in section 11 of Civil Procedure Code i.e. the principle of res judicata. A decree is an order of the court and the judgment debtor must, when it has once been completed, obey it unless and until he can get it set aside in proceedings duly constituted for that purpose.

8. **Promissory estoppel :-** When on the representation of the promisor, a promisee alters his position then the former must keep his words and is not allowed to recede from his promise. This is known as promissory estoppel. The doctrine of promissory estoppel has the effect of creating substantive rights against the represented and can be viewed as a substantive law.

   The oil corporation offered distribution of L.P.G. gas by a letter of intent and the petitioner made substanmtive financial investments under the letter of intent. Subsequently the letter of intent was cancelled on the recommendation of Oil Selection Board. It was held that the principle of promissory estoppel applied and the cancellation of letter of intent was not correct.

9. **Attestation and estoppel :-** Attestation proves no more than that the signature of the executing party has been attached to a document in the presence of a witness. But an attesting witness can be shown by an independent evidence to have fully understood the particular transaction so that his attestation may support the inference that he was a consenting party and, therefore, estopped from questioning the effectiveness of the transaction attested by him.

10. **Estoppel by consent decree :-** An estoppel by consent decree can arise only when the question raised in the subsequent suit was present to the minds of parties and was actually dealt with by the consent decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been in issue.

Proof, practice and procedure

Estoppel is a mixed question of law and fact and without definite pleading to this effect the party should not be permitted to resort to the plea of estoppel. Estoppel is also an inference of law. Where all the necessary facts have been pleaded, it is for the court to draw inference of estoppel.

No estoppel

There is no estoppel on point of law, or settled position of law. Where a transaction is void ab initio there is no question of estoppel against the transferror. Where prior proceedings are void the decision thereon cannot operate as estoppel.

AN INTRODUCTION TO THE ELECTRICITY ACT, 2003

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Addl. Director

The law relating to various matters concerning generation, storage, transmission and consumption of electricity found place in almost a century old enactment, the Indian Electricity Act, 1910. This enactment was found lacking in many respects. In order to make the law more effective, two other enactments - The Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 were brought on the statute book. However, these enactments also failed to deliver the desired effect. Ultimately, the Parliament, with the object of consolidating various laws relating to generation, transmission, distribution, trading and use of electricity as well as for taking measures conductive to the development of electricity industry and for promoting competition therein by pursuing environmentally benign policies, enacted the Electricity Act, 2003 (hereinafter referred to as the Act).

The Act received presidential assent on 26th May 2003 and was published in the Gazette of India. Ext. Pt.II, S.1 dated 2nd June 2003. In exercise of the power conferred by Section 1(3) of the Act, the Central Government by its notification dated 10th June 2003 brought it into force with effect from 10th June 2003. The State Governments by virtue of Section 172 (d) of the Act were given option to postpone the applicability of Act for a period of not more than 6 months. In exercise of this power the M.P. Government deferred the application of the Act for six months, thereafter the Act has come into force in Madhya Pradesh.

The Act being a new piece of legislation, having the character of a special law in the field, has given rise to various debatable legal issues regarding its scope and applicability with reference to various offences enumerated in it, including issues relating to bail, remand and forum of trial for cases concerning such offences. This article attempts to address such and other related problems in the light of the provisions of the Act.

Before proceeding further it shall be in the fitness of the things to have a brief overview of the Act. The Act, which consists of 18 parts and a schedule, has, by virtue of Section 185, the effect of repealing the Indian Electricity Act, 1910, The Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. Eight State enactments including the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 as shown in the Schedule have been saved. Section 174 of the Act provides in respect of overriding effect of the Act subject to other provisions of the Act.

In order to deal with various matters, the Act contemplates creation of various instrumentalities/forums including Central, State and Joint Regulatory Commission, (Section 76, 82 and 83), Central Electricity Authority (Section 70), Ap-

pellate Tribunal for Electricity (Section 110), Appellate Authority (Section 127) and Special Courts (Section 153).

Part XIV of the Act, consisting of Section 135 to 152, makes elaborate provisions in respect of 'Offences & Penalties'. Following are the various offences provided under the Act:

(I) Theft of electricity (Section 135)

(II) Theft of electric line and materials (Section 136)

(III) Receiving stolen electric line or material (Section 137)

(IV) Interference with meters and work of licensee (Section 138)

(V) Negligently wasting electricity or injuring works (Section 139)

(VI) Maliciously wasting electricity or injuring works (Section 140)

(VII) Extinguishing public lines (Section 141)

(VIII) Non-compliance of directions issued by appropriate commission (Section 142)

(IX) Non-compliance of other orders or directions given under the Act (Section 146)

(X) Abatement of the aforesaid offences, etc. (Section 150)

Offences under Section 135, 136, 137 and 138 have been made punishable with imprisonment up to 3 years or fine or both. Subsequent conviction in specified conditions has been made punishable with imprisonment up to 5 years. Offence under Section 146 is punishable with imprisonment up to 3 months. Remaining offences are punishable with fine only subject to the limit prescribed in respective Sections. As per the provisions of Section 150 of the Act, abatement of an offence is punishable with the sentence prescribed for the main offence. Acquiescence to any act by any Officer or employee of the Board or the Licensee, relating to theft of electricity by any person, has been made punishable under Section 150 (2) of the Act with imprisonment up to 3 years or fine or both.

The framers of the Act have taken serious note of the issue relating to unauthorized use of electricity, therefore, apart from making theft of electricity an offence under Section 135, the Act also provides for the assessment of electricity charges payable by a person indulging in unauthorized use of electricity. For this purpose, Assessing Officer, as prescribed in Explanation-(a) of Section 126 has been conferred with the authority to inspect any place where electricity is being used. The Assessing Officer shall provisionally assess the charges so payable regarding unauthorized use of electricity and such assessment, subject

to determination by Appellate Authority, as prescribed in Section 127, shall be final. Again Section 145 of the Act, in very explicit terms, bars the jurisdiction of Civil Court from entertaining any suit in respect of assessment made by Assessing Officer under Section 126 of the Act or an order passed by the Appellate Authority under Section 127 of the Act. Bar also relates to grant of an injunction in respect of any action taken or to be taken under the Act.

NATURE OF THE OFFENCES:

This aspect requires to be examined from two angles. Firstly, whether various offences contemplated under the Act are cognizable or non-cognizable and secondly, whether such offences are bailable or non-bailable.

The general rule as contained in Section 4 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Code) is that offences under Indian Penal Code shall be investigated inquired into and otherwise dealt with according to the provisions of the Code. All offences under other laws shall also be investigated, inquired into, tried and otherwise dealt with according to the same provisions (provision of the Code), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

When a Special Act provides for an offence under it, more often then not it also provides whether such offence is cognizable/non-cognizable and bailable/ non-bailable. Section 37 (1)(a) of the NDPS Act, 1985 and Section 10-A of the Essential Commodities Act, 1985 may be cited as examples in this respect. However, the Act nowhere expressly provides anything in this respect. Therefore, to find a clue one is required to look back to the provisions of the Code. Schedule II of the Code is relevant for the purpose because it lays down the basis for classification of offences under a law other than I.P.C, regarding their nature etc. Therefore, these provisions have to be applied herein to determine the nature of offences under the Act.

A bare reading of the provisions contained in Schedule II of the Code makes it clear that if a particular offence is punishable with imprisonment for 3 years or upwards then it shall be categorized as cognizable and non-bailable, but if the offence is punishable with imprisonment for less than 3 years then it shall be non-cognizable and bailable. Offences under Section 135 to 138 and Section 150 (2) are punishable with imprisonment up to 3/5 years or fine or both, while remaining offences are punishable with lesser punishments. Therefore, the offences provided in Section 135 to 138 and Section 150 (2) can be classified as cognizable and non-bailable while remaining offences, which are punishable with imprisonment up to a term of less than 3 years, are to be classified as non-cognizable and bailable.

SPECIAL COURTS:

As per Section 154 (1) of the Act, cases relating to offences provided in Section 135 to 139 are triable only by the Special Court, to be constituted by the State Government under Section 153 of the Act. This indicates that while the offences provided in Section 135 to 139 can be tried only by a Special Court, the offences provided in remaining Sections of the Act shall be triable by the Court of Competent Jurisdiction under the Code, i.e. Judicial Magistrate First Class or Second Class as the case may be. This dichotomy of jurisdiction, as reflected from Section 153, appears to be there for the reason that legislature wanted that cases relating to the offences provided in Section 135 to 139 of the Act should be decided expeditiously. For this purpose, Section 154 (3) of the Act further provides that the Special Court, notwithstanding anything contained in Section 260 or Section 262 of the Code, may try the offences in a summary manner in accordance with the provisions of Section 263 to 265 of the Code and it shall be lawful for the Special Court while convicting a person in a summary trial to impose sentence of imprisonment for a term not exceeding five years. The Special Court so constituted shall have all the powers of Court of Session because, as per the provisions of Section 155 of the Act, it shall be deemed to be a Court of Session and all the provisions of the Code, in so far as they are not inconsistent with the provision of the Act, shall be applicable.

CIVIL JURISDICTION OF THE SPECIAL COURT:

The Special Court, apart from having jurisdiction on criminal side, has also been clothed with Civil Jurisdiction. Section 154 (5) of the Act in this respect provides that the Special Court may determine the civil liability against a consumer or a person in terms of money for theft of energy, which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft, if determined, whichever is less, and the amount of civil liability so determined shall be recovered as if it were a decree of Civil Court. This provision indicates towards the thrust of the legislature for making good such financial loss or damage, which may have been occasioned to the Board or the power supplier due to theft of electricity.

POWER OF REVIEW :

Another significant feature of the Act is that Section 157 of it clothes the Special Court with the power to review its own judgment or order either on a petition or otherwise in order to prevent miscarriage of justice. Such review can be made on the ground that such order or judgment was passed under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record.

COGNIZANCE BY SPECIAL COURT:

No doubt the Special Court has been conferred with the exclusive jurisdiction for trial of cases concerning offences punishable under Section 135 to 139 of the Act but, unlike Section 36 (1) (d) of the N.D.P.S. Act, 1985 and Section 5 (1) of the Prevention of Corruption Act, 1955, which provide that the Special Court/Special Judge may take cognizance of the offences without the accused being committed to it for trial, it does not provide that the Special Court may take cognizance of the matter directly. Almost similar was the position under the SC and ST (Prevention of Atrocities) Act, 1989; therefore, controversy arose as to whether a Special Court constituted under that Act may take cognizance without committal. Resolving this controversy, the Apex Court in *Gangula Ashok Vs. State of A.P., JT 2000 (1) SC 375 = AIR 2000 SC 740* laid down that the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. Unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate. In this legal background, it cannot be said that under the Act, the Special Court has jurisdiction to take cognizance of the matter directly without committal of the case, therefore, cognizance can be taken by the Special Court under Section 193 of the Code, only after committal of the case by the Competent Magistrate. Here it would not be out of place to mention that as provided in Section 151 of the Act cognizance of an offence punishable under the Act cannot be taken by any Court unless a complaint in writing has been made by Appropriate Government or Appropriate Commission or any of the Officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or the Generating Company as the case may be.

NON-CONSTITUTION OF SPECIAL COURT - EFFECT:

The phrase "shall be triable only by the Special Court", as used in Section 154 (1) of the Act, leaves no manner of doubt in ones mind that in respect of cases relating to offences punishable under Section 135 to 139 of the Act, the jurisdiction of the Special Court is exclusive and no other Court may try such cases. Under Section 153, the State Government was required to constitute Special Courts but by now not a single Special Court has been constituted. Therefore, the question arises as to what course should be adopted respecting cases exclusively triable by Special Court in absence of a duly constituted Special Court. N.D.P.S. Act, 1985, which also provided for constitution of Special Courts, had a transitory provision in shape of Section 36 (d) to the effect that until a Special Court is constituted under the Act, a Court of Session shall try the cases. No such provision is there in the Act. Therefore, any other Court may not try these

cases. Taking a cumulative view of the matter, it may be said that after submission of the case to the Magistrate, the Magistrate is bound to stay his hands and is required to wait for the Constitution of the Special Court and then to pass a committal order. This view stands fortified with the pronouncement of *Patna High Court in State Vs. C.P. Singh and* others, *AIR 1955, Pat. 88* wherein the Division Bench, while dealing with a similar question relating to interpretation of Section 7 of Criminal Law Amendment Act, 1952, which is in *peri materia* with the provisions of Section 153 of the Act, laid down that non-constitution of the Special Court by the Government may not give jurisdiction to the Magistrate to proceed in the matter and he should wait for the constitution of Special Court.

PRE-TRIAL REMAND:

Next question in this connection is about the procedure of pre-trial remand in cases triable exclusively by Special Court. Again it may be taken note of that unlike Section 36 (A) (1) (c) of the NDPS Act, which empowered the Special Court to authorize detention of an accused in custody under Section 167 of the Code, there is nothing in the Act to clothe the Special Judge with such power. Therefore, in the natural course of the things, such a power cannot be said to be there with Special Court, hence, jurisdiction in this respect shall have to be exercised by the concerning Magistrate under Section 167 of the Code.

COMPOUNDING OF OFFENCE :

Section 152 of the Act empowers Appropriate Government or any officer authorized by such Government in this behalf to compound the offence with a person, who has committed or is reasonable suspected of having committed an offence of theft of electricity, by accepting from such person, a specified sum of money ranging between Rs. 4,000/- to 20,000/-. If the composition has been made before the institution of the case, then no proceedings shall be instituted against such person and if it has been made after the institution of the case, then the proceedings shall be stopped forthwith and such person, if in custody, shall be set at liberty. The composition shall have the effect of acquittal within the meaning of Section 300 of the Code, however, such a composition shall be allowed only once to a person/consumer.

ARBITRATION:

Taking due notice of the continued trend, towards resolving disputes through arbitration, Section 158 of the Act provides that when any matter is directed to be determined by arbitration, then it shall be so determined by person/persons nominated by the Appropriate Commission otherwise the provisions of Arbitration & Conciliation Act, 1996 shall apply.

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FRAMING OF CHARGES WITH THE AID OF SECTION 149 OF INDIAN PENAL CODE AT THE JUNCTURE OF AMBIVALENT LAW

R.K. SHRIVASTAVA
O.S.D.

Statutes should be construed not as theorems of Euclid but with some imagination of the purposes which lie behind them and to be too literal in the meaning of the words is to see the skin and miss the soul. The method suggested for adoption, in cases of doubt as to the meaning of the words used is to explore the intention of the legislature through the words, the context which gives the colour, the context, the subject- matter, the effects and consequences or the spirit and reason of the law. The General words and collocation or phrases, how so ever wide or comprehensive in their literal since are interpreted from the context and scheme underlying in the text of act. *Tata Engg. And Locomotive Co. Ltd. Vs. State of Bihar, (2000) 5 SCC 346.*

Whenever two interpretations are possible, the interpretation which sub serves to the intent of the legislature should be accepted. Hayden's principle is now well recognized in interpreting any enactment. It lays down that Courts must see- a) What was the law before making of the Act; b) What was the mischief or defect for which the law did not provide; c) what is the remedy that the Act has provided; d) what is the reason of the remedy. It states that Courts must adopt that construction which suppresses the mischief and advances the remedy. When the language used by Parliament is ambiguous the Court may look into the Preamble for construing the provisions of an Act. The Preamble is a key to unlock the legislative intent. If the words employed in an enactment may spell a doubt as to their meaning it would be useful to so interpret the enactment as to harmonies it with the intent which the legislature had in its view.

Court may consider these three factors in determining the legislative intent. First, the context and the object of the statute, second, the nature and precise scope of the relevant provisions and third the damage suffered not of the kind to be guarded against. The rule of interpretation requires that while interpreting two inconsistent, or obviously repugnant provisions of an Act, the Court should make an effort to so interpret the provisions so as to harmonies them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose. The statute should be read as a whole to find out the real intention of the legislature. It is the duty of the Courts to avoid a head - on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonies them. The provision of one Section of a statute cannot be used to defeat the other provisions unless the Court, inspite of its efforts finds it

impossible to effect reconciliation between them. It has to be borne in mind that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "Harmonious construction". The Courts have also to keep in mind that an interpretation, which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction. To harmonies is not to destroy any statutory provision or to render it otiose.

Hon'ble the Apex Court has held in the case of *Bhatia International Vs. Bulk Trading S.A., (2002) 4 SCC 105* - Judicial art of interpretation and appraisal - Held is imbued with creativity as well as realism because interpretation implies a degree of discretion and choice, regardless of the conventional principle that judges are to expound, not legislate.

Every provision and every word in a statute must be looked at generally and in the context in which it is used. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. Every provision and every word must be looked at generally and in the context in which it is used and not in isolation. It is not an inviolable rule of law but is only a preferable inference in the absence of any indication to the contrary. The rule of ejusdem generic has to be applied with care and caution. This is not an inviolable rule of law but it is only permissible inference, in the absence of any indication to the contrary. The rule of *ejusdem generis* cannot be applied unless there is genus constituted or a category disclosed. If the preceding words do not constitute mere specifications of a genus but constitute description of a complete genus, the rule has no application. Where the context and the object of the enhancement does not require restricted meaning to be attached to words of general import it becomes the duty of the Courts to give those words their plain and ordinary meaning.

Chapter VIII of Indian Penal Code deals with public tranquility. Offences under this chapter are against peace and order in the society.

Unlawful assembly is defined in *Halsbury's "Laws of England"* as follows: "An Unlawful Assembly is an assembly of 3 or more persons, with intent to commit a crime by open force or to carry out any common purpose, whether lawful, or unlawful in such a manner as to cause in people, fear for breach of peace, to establish that an assembly is unlawful it is not necessary to show that it occurred in a public place. The essential requirement is the presence or likely presence of innocent third parties not participating in the illegal activities in question; it is the danger to their security, which constitutes the threat to public peace and the public element necessary to the commission of this offence. An Assembly which

was originally lawful may become unlawful, the moment when person in a crowd however peaceful their original intention might be, start to act for some shared common purpose, supporting each other and in such a way that reasonable citizen fears a breach of peace if the assembly becomes unlawful. This is particularly the case where those concerned attempt to trespass or to interrupt or disrupt an occasion where others are peaceable and lawfully enjoying themselves, or show preparedness to use force, to achieve the common purpose. Where persons are assembled for an innocent purpose the assembly is not rendered unlawful by the fact that they have good reason to believe that their proceeding will be opposed and a breach of peace committed by those opposing them, If however, people are assembled for an innocent purpose but with determination to carry out their purpose, if necessary by force, the assembly is unlawful. A person is entitled to assemble his friends and employees to defend his house against those threatening to enter it unlawfully but not to assemble his friends for the defence of his person against those threatening to attach him away from his home.

Section 141 of Indian Penal Code reads as Unlawful Assembly - An assembly of five or more persons is designated in " unlawful assembly", if the common object of the persons comprising that assembly is -

First: To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second: To resist the execution of any law, or of any legal process; or

Third: To commit any mischief or criminal trespass, or other offence; or

Fourth: By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth: By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Now it has to be seen whether the phrase "other offence" of clause third of section 141 of IPC encompasses the offences of Indian Penal Code and offences under other Acts? Section 40 of Indian Penal Code defines the word "Offence". It says "Except" in the [chapters] and section mentioned in clauses 2 & 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In chapter IV [Chapter V-A] and in the following sections, namely section 64, 65, 66, 67, 71, 109,110, 112, 114, 115,116, 117,187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445 the word "offence" denotes a thing, punishable under this code, or under any special or local law as hereinafter defined.

And in Sections 141, 176,177, 201, 212, 216 and 441, the word "offence" has the same meaning, when the thing punishable under the special or local law is punishable under such law, with imprisonment for a term of six months or upwards, whether with or without fine.

In citation *Thomas Dana Vs. State of Punjab, AIR 1959 SC 375* it is held the word "Offence", is defined in Section 3 (38) of the General Clauses Act, 1897, to mean any act or omission made punishable by any law for the time being in force. Under Section 2 of the Code of Criminal Procedure, it means any act or omission made punishable by any law for the time being in force. An Offence is, therefore, an act committed against law or omitted where the law requires it.

On the basis of above, it is clear that in Clause 3rd of Section 141 of Indian Penal Code words "mischief" and "criminal trespass" which are placed before the word "other offence", do not constitute a genus or a category, means the preceding words do not constitute description of a complete genus. So the rule of ejusdem generis will not apply. It is the duty of the Courts to explore the intention of the legislature through the words. It is to be kept in mind that Courts must adopt that construction which suppresses the mischief and advances the remedy. Courts must consider the context and the object of the statute, the nature and precise scope of relevant provisions and the damage suffered. Courts should make an effort to so interpret the provisions as to harmonies them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose. It is the settled principle that every provision and every word must be looked at generally and in the context in which it is used and not in isolation. Under Section 141 of Indian Penal Code, the context and the object of the enhancement does not require restricted meaning. The restricted meaning of the word " other offence" in the context of the provisions, may not serve useful purpose. Therefore, the words used in Clause 3rd of the Section 141 of Indian Penal Code should be given its ordinary literal connotation and offences punishable under Sections 323 to 326, 302 and 304 of Indian Penal Code are included in it. Hence a charge relating to these offences may be framed with the aid of Section 149 of Indian Penal Code and charges of Section 147, 148 of Indian Penal Code may also be framed, if other conditions are fulfilled.

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INTELLECTUAL PROPERTY RIGHTS - NEW HORIZONS

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Intellectual property is any product of human intellect that is unique and unobvious with some value in the market place. Intellectual property right means the legal right which results from intellectual activity in the industrial, scientific, literary and artistic fields. Intellectual property is traditionally divided into two branches, -

(1) Industrial property, which includes inventions (patents), trademark, industrial designs;

(2) Copyright which includes literary and artistic works such as novels, films etc.

In addition, there is an emerging area of new rights, not always considered as IPR but directly analogous. These include inventions on Biological Diversity, farmer's Rts' and traditional resource rights of indigenous peoples. The statute law relating to intellectual property in India is undergoing changes so as to bring it to harmonise with the corresponding laws in the developed countries. This has become necessary after India signed the GATT on becoming a member of the WTO.

BASIC CONCEPTS OF INTELLECTUAL PROPERTY LAW

The law relating to intellectual property is based on certain basic concepts. Patents relate to novel products or processes of manufacturing a product. Design relates to the non-functional appearance of a product with appeals solely to the eye. Trademark consists of name, word, device or get-up used in relation to particular goods to indicate the source of manufacture or trade origin of the goods. Copyright relates to original literary, dramatic, musical and artistic works, cinematograph films and sound recordings.

NATURE OF INTELLECTUAL PROPERTY

Intellectual property of whatever species is in the nature of intangible incorporate property. In each case it consists of a bundle of rights in relation to certain material object created by the owner. In the case of patent the property consists of the exclusive right to use the invention patented, to grant license to others to exercise that right or to sell that right to a third person. Patent rights are created by statute and are governed by the Patents Act, 1970 (India). The invention may relate to a new product or an improvement of an existing product or a new process of manufacturing an existing or a new product. After the expiry of the term of the patent (which is 14 years for all products, except in the case of drug and food patents where the term is seven years), it becomes the public property and anybody can use the patented invention.

In the case of industrial designs the property consists in the exclusive right

to apply the design registered under the Designs Act, 2000 in relation to the class of goods for which it is registered for a maximum period of 15 years subject to payment of renewal fees prescribed under the rules. This right can also be licensed for use by third parties or assigned to any person. On expiry of the term of registration anybody can use the design.

In the case of trademark there are two types of rights:-

(1) Conferred by registration under the Trade and Merchandise Marks Act, 1958 (now the Act of 1999);

(2) Acquired in relation to a trade mark, trade name or get-up by actual use in relation to some product or service.

The exclusive rights granted by registration enables the proprietor of the registered mark to prevent others not only from using the mark as registered but also marks which are deceptively similar to the registered mark. Unlike patents, designs or copyright the rights conferred by registration of a trademark can be availed of for an indefinite period by periodic renewal of registration.

In the case of an unregistered trade mark the right to protection of the good will continues indefinitely provided the owner of the good will uses the mark lawfully and prevents other persons infringing those rights by appropriate timely action (passing off) in Courts of law against the infringement.

Copy right, like patents and industrial design, is purely a creation of the statute, the Copyright Act, 1957. However, there is no formality required for the acquisition of the right. Copyright subsists in any original work specified in the Act from the moment of its publication during the lifetime of the author plus 60 years. The works specified in the Act are:-

1. A literary, dramatic, musical or artistic work
2. A cinematographic film
3. A sound recording.

Literary work includes computer programmes, tables and compilations including computer databases. Know how and confidential information can be protected only so long as the owner is able to keep them secret. The law of patents, designs, and trademarks are territorial in its operation. In the light of the Bern Convention and the Universal Copyright Convention, copyright acquired in one country extends to other countries which are members of these conventions.

COMMERCIAL EXPLOITATION

A patent, registered design or copyright may be exploited by assigning or licensing the rights to others capable of exploiting it on a royalty or lump sum basis. Commercial exploitation of a registered trademark by licensing others to use it on a royalty basis is not permissible except by registration of the licensee as a registered user. Licensing of an unregistered trademark under suitable conditions is recognized by Courts and such licensing is called common law licensing.

ENFORCEMENT OF RIGHTS

Intellectual property rights are enforced by an action for infringement of those rights before a District Court or High Court. Criminal prosecution is also possible in respect of trade mark and copyright. In case of infringement of a patent, the patentee may obtain an injunction restraining the infringer from using the patent and may ask either for damages or for an account of profits. For infringement of a registered design the remedies are similar i.e. an injunction and either damages or an account of profits. There is no criminal remedy available for infringement of a patent or of a registered design. In respect of trademarks the civil remedies are an injunction, damages or an account of profits and the delivery - up of the infringing articles for erasure or destruction. Besides there is a criminal remedy against an infringer under which the person may be punished with imprisonment and fine. Substantial damages may also be claimed for conversion. Criminal remedies include imprisonment and heavy fine and seizure of infringing copies of the work which will be delivered to the copyright owner.

ECONOMIC BENEFITS

Strong intellectual property protection produces long run economic benefits, which may be as follows :-

1. It stimulates innovation by providing an environment in which innovation is rewarded.
2. Creating jobs both in primary industries and supporting industries throughout the economy.
3. Creating new, safer and more effective products, processes and services through adoption and improvement of existing products and technology.
4. Creating a higher and technically prepared labour force through the job training associated with authorized transfer of technology.
5. Creating advances which will contribute to the level of technology throughout the world and in the process gain revenues from others who would benefit from their use.

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Dying is nothing. So start by living.
It's less fun and it lasts longer.
-Jean Anouilh

DOCTRINE OF MENS REA-APPLICATION & EXCEPTION

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Penal liability in a broad spectrum arises when the following two conditions exist-(1) Guilty mind & (2) A wrongful act based upon a fundamental principle that act alone does not amount to crime but must be accompanied by a guilty mind. Finding its roots in the maxim "actus non facet reum nisi mens sit rea." Jurists opine critically that at a stage of criminal law where every offence has been well defined, general doctrine of mens rea is misleading and unnecessary. J.D. Mayne the learned author of criminal law in India pointed out, "every offence is defined and definition states not only what the accused must have done, but state of mind with regard to the act when he was doing it." Thus there is no room for general doctrine of mens rea in the Indian Penal Code.

The existence of doctrine of mens rea cannot be negated by a straight forward dismissal instead it can be stated that the doctrine has been embodied in the Code in two ways. Under the chapter relating to general exceptions it is the absence of mens rea that discharges a person from criminal liability under the various heads discussed there in. Thus mens rea here registers its presence in the guise of remaining absent. Besides this it flows in the body of Code through the capillaries of the words knowingly, intentionally, dishonestly, fraudulently, voluntarily, wantonly etc. & because the doctrine was so embodied a separate provision for its enforcement was not necessary.

The only exception to the doctrine of mens rea is that there are special circumstances under which the law imposes strict liability. Modern statutes passed in the interest of public safety, social welfare and in matters concerning public health such strict liability is imposed. In *Nathulal vs. State of M.P. (AIR 1966 SC 43)* it was held that though mens rea is an essential ingredient of criminal offence a statute may exclude the element of mens rea by imposing a strict liability by which the presence or absence of a guilty mind becomes irrelevant. It was further held that it is only in those cases where mens rea, if considered an essential ingredient, the actual aim or objective of a statute would stand defeated, that its presence as an essential ingredient can be denied. The Motor Vehicles Act, Essential Commodities Act, Prevention of Food Adulteration Act, etc. are only a few examples of statutes, which impose strict liability.

Conclusively, it could be said that mens rea is a necessary factor for commission of an offence unless its presence has been done away with either expressly or by a necessary implications by the Statute. In these cases too Court must bear in mind the view of Privy Council in (Srinivas Mall vs. Emperor 1947) that "Courts are expected as for as possible to protect the liberty of subject and satisfy themselves that a particular statute clearly imposes absolute liability. Thus in all cases where liability is imposed by the Court without or in absence of a guilty mind it must be dealt with 'CAUTION'.

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REVISION OF PAY SCALES - FIXATION OF PAY UNDER FUNDAMENTAL RULES AND SUPPLEMENTARY RULES

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Revision of pay scales is generally done on the basis of recommendations of Pay Commissions set up from time to time and the rules made thereunder. These rules are special rules and fixation of pay is required to be done under the Special Revision of Pay Rules made by the Government for that purpose. During the operation of these rules, Fundamental Rules become dormant.

However, sometimes Government do revise pay scales in isolated cases for some cadres. In such cases, the fixation of pay is to be done under the fundamental Rules. FR-23 is the relevant rule which governs the pay fixation.

F.R. 23 READS AS UNDER:

"The holder of a post, the pay of which is changed, shall be treated as if he were transferred to a new post on the new pay:

Provided that he may at his option retain his old pay until the date on which he has earned his next or any subsequent increment on the old scale, or until he vacates his post or ceases to draw pay on that time-scale. The option once exercised is final."

Since the revised scale does not involve promotion, pay is fixed under FR 22 (a) (ii), i.e. if there is a common stage (please see example 2) at that stage itself. But if there is no such stage in revised scale then at stage next below. This rule first of all envisages giving of option by the incumbent concerned and fixation proceeds accordingly. The incumbent may opt the new scales right from the day of effect of the Revised Pay Scales or from any subsequent date of increment in existing pre-revised scale whichever gives him much advantage.

Option once exercised is final, so the incumbent has to opt it carefully. The pay fixation is thus done according to Audit instructions below FR 23 & FR 22. The following examples illustrate the regulations:-

(1) Pay scale of an officer drawing pay at Rs. 6250/- in the scale of 5500-175-9000 from 01-12-2002 is revised as 6500-200-10,500/- from 01-2-2003. Which date should he opt for the revised scale?

Since pay in existing scale on 01.02.2003 is Rs. 6250/- whereas if he opts this revised scale from 01.02.2003, his pay in revised scale would become 6500/-, he should opt for the revised scale from 01.02.2003.

DATE	EXISTING SCALE & PAY	REVISED SCALE & PAY
	5500-175-9000	6500-200-10500
1-12-02	6250	
1-02-03	(6250)	6500 Should opt
1-12-03	(6425)	6500
1-02-04	(6425)	6700 FR 26

(2) In the above pay scale of 5500-175-9000 an officer is drawing pay Rs. 6900/- from 01.12.02. Which date should he opt the revised scale of 6500-200-10500 coming into force from 01.02.03.

DATE	EXISTING SCALE	REVISED SCALE
	5500-175-9000	6500-200-10500
01-12-02	6900	—
01-02-03	(6900)	6900 Should opt
01-12-03	(7075)	7100 Audit Instru- ctions below FR 22

Since in both the scales, stages of Rs. 6900/- is common, he should opt for the revised scale from 01-02-2003. He shall get his next increment in the revised scale from 01-12-03 raising pay to Rs. 7100/-.

(3) In the above illustrations, if he is drawing pay at Rs. 7075/- in the existing scale from 01-12-02 from which date should he opt for the revised scale?

DATE	EXISTING SCALE	REVISED SCALE	GAIN ORLOSS	REMARKS
	5500-175-9000	6500-200-10500		
01-12-02	7075	—	—	—
01-02-03	7075	6900	Loss 175	Not suitable
01-12-03	7250	7100	Loss 150	Not suitable
01-12-04	7425	7300	Loss 125	Not suitable
01-12-05	7600	7500	Loss 100	Not suitable
01-12-06	7775	7700	Loss 75	Not suitable
01-12-07	7950	7900	Loss 50	Not suitable
01-12-08	8125	8100	Loss 25	Not suitable
01-12-09	(8300)	8300	No loss	should opt
01-12-10	(8475)	8500	Audit instructions below FR 22 & FR 26	

He should opt from 01-12-09 when stage in both scales becomes common and next increment in Revised scale shall fall on 01-12-2010 raising pay to Rs. 8500/- giving gain of Rs. 25/-.

(4) Can the incumbent opt for the revised scale in above scale on reaching the pay of Rs. 9000/- i.e. the maximum of the existing scale?

No, he cannot because it will mean that he has retained the existing scale.

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BI-MONTHLY TRAINING PROGRAMME

Following are the five topics which were sent to groups of districts for discussion in the bi-monthly training meeting of December, 2003. The institute has received articles relating to these topics from most of the districts. Out of all the articles, the articles on topic no. 2, 4 and 5 have not been found of requisite standard. The Institute is publishing its own article on topic no. 2. Topic no. 4 and 5 will be allotted to other districts in future. The articles on rest of the topics are being included in this issue of JOTI Journal:

Q.1 Nature of complainant's right to recover damages from either of the joint tortfeasors in motor accident claim cases?

मोटर दुर्घटना दावा प्रकरणों में संयुक्त दुष्कृतिकर्ताओं में से किसी एक से प्रतिकर प्राप्त करने के दावाकर्ता के अधिकार का स्वरूप क्या है ?

Q.2 Legal position relating to bail and trial of various cases arising under the Essential Commodities Act, 1955?

आवश्यक वस्तु अधिनियम, 1955 के अन्तर्गत उद्भूत विभिन्न प्रकरणों में जमानत एवं विचारण के संबंध में विधिक स्थिति क्या है?

Q.3 Legal position regarding stay of civil suit when criminal case relating to the same matter is pending in Criminal Court?

जहां किसी विवाद के बारे में दांडिक मामला लंबित है, वहां ऐसे विवाद से संबंधित व्यवहार वाद को स्थगित किये जाने विषयक विधिक स्थिति क्या है ?

Q.4 Whether the Court of Sessions can summon a person not already arrayed as an accused in a case, to stand trial as an accused, apart from the provisions of Sec. 319 Cr.P.C.?

क्या सत्र न्यायालय किसी व्यक्ति को, जो पूर्व से प्रकरण में अभियुक्त नहीं है, धारा 319 द.प्र.सं. की अधिकारिता के परे, विचारण हेतु आहूत कर सकता है ?

Q.5 Consequences of non-payment of arrears of rent/monthly rent by tenant in eviction suit when rate of rent/period of arrears is disputed?

निष्कासन प्रकरणों में किरायेदार द्वारा बकाया किराया/मासिक किराया की अदायगी में व्यतिक्रम का प्रभाव, जबकि किराये की दर/बकाया किराये की अवधि विवादित है ?

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मोटर दुर्घटना दावा प्रकरणों में संयुक्त दुष्कृतिकर्ताओं में से किसी एक से प्रतिकर प्राप्त करने संबंधी दावाकर्ता के अधिकार का स्वरूप

न्यायिक अधिकारीगण
जिला छिंदवाड़ा

जब दो या दो से अधिक व्यक्ति एक ही व्यक्ति के विरुद्ध कोई अपकृत्य करते हैं तो उन्हें संयुक्त अपकृत्यकर्ता (joint tortfeasors) कहते हैं। शब्दांश "संयुक्त उपेक्षा" को परिभाषित और स्पष्ट नहीं किया गया है, किन्तु इसे सामान्यतः इस प्रकार परिभाषित किया जा सकता है कि :-

> "जब उपेक्षा के दो कृत्य एक ही समय पर इस प्रकार से घटित हों कि वे घटना का एक ही संव्यवहार हों, वे इस प्रकार से मिश्रित हों कि उन्हें पृथक करके यह न जाना जा सके कि किसकी त्रुटि है तथा जिसके साथ अपकृत्य हुआ है, उस व्यक्ति का उस अपकृत्य अथवा घटना में अंशमात्र भी योगदान न हो।"

संयुक्त उपेक्षा के सिद्धान्त का अर्थ है कि जब एक से अधिक व्यक्ति अपकृत्य के लिए उत्तरदायी हैं, तो जिस व्यक्ति के साथ अपकृत्य किया गया है, उसकी इच्छा पर उनमें से किसी एक व्यक्ति अथवा एक से अधिक अथवा सभी अपकृत्यकर्ताओं के विरुद्ध कार्यवाही संस्थित की जा सकती है, ऐसी स्थिति में प्रत्येक अपकृत्यकर्ता संपूर्ण क्षतिपूर्ति के लिए उत्तरदायी है, यदि वह प्रमाणित होती है।

संयुक्त उपेक्षा के मामले में दोनों अपकृत्यकर्ता अथवा सभी अपकृत्यकर्ता, अपकृत्य के शिकार व्यक्ति को क्षतिपूर्ति देने के लिए उत्तरदायी होते हैं और यदि किसी एक अपकृत्यकर्ता ने संपूर्ण क्षतिपूर्ति का भुगतान किया है, तो वह अपकृत्यकर्ता, शेष अपकृत्यकर्ताओं से आनुपातिक रूप से क्षतिपूर्ति की मांग कर सकता है, तब ऐसी स्थिति में न्यायालय को उनके बीच में किसी एक अपकृत्यकर्ता द्वारा भुगतान की गई क्षतिपूर्ति की राशि का विभाजन करना होगा।

जहाँ एक व्यक्ति स्वयं की उपेक्षा के बिना अपितु दो अन्य व्यक्तियों की संयुक्त उपेक्षा के परिणामस्वरूप घायल होता है, वहाँ यह मामला अंशदायी उपेक्षा का नहीं है, अपितु इस मामले को पोलक ने Torts by Pollock 15वाँ संस्करण पेज-361 में संयुक्त उपेक्षा निरूपित किया है।

'अंशदायी उपेक्षा' तथा 'संयुक्त उपेक्षा' में महत्वपूर्ण अंतर है। अंशदायी उपेक्षा, आहत अथवा मृत व्यक्ति के आचरण पर निर्भर करती है। जहाँ कोई व्यक्ति अपनी उपेक्षा के बिना अपितु दो भिन्न व्यक्तियों की उपेक्षा के संयुक्त प्रभाव के कारण घायल हुआ है अथवा उसकी मृत्यु हुई है तो यह मामला अंशदायी उपेक्षा का नहीं, बल्कि संयुक्त उपेक्षा का होगा।

नसीब कौर तथा अन्य विरुद्ध गुरूचरणसिंह तथा अन्य, 1999 ए.सी.जे., 1073 (पैरा-6) के मामले में माननीय दिल्ली उच्च न्यायालय ने यह प्रतिपादित किया है कि :-

> Insofar as the question of composite negligence is concerned, seeing the evidence it is true that the deceased cannot be blamed for any contributory negligence on his part. Here it is also true that the tortfeasors, the drivers, etc., of the two vehicles are independent or separate. As such, in view of what Salmond and Heuston observed in their Law of Torts, 21st Edn. at P. 421 "the person damnified might

sue them one by one and recover from one alone or from such other as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him."

विद्वान लेखक द्वय रतनलाल, धीरजलाल ने अपनी पुस्तक 'लॉ ऑफ टार्ट' (23वां संस्करण) के अध्याय 9 में उक्त नियमों की प्रयोज्यता के विषय में विश्लेषण करते हुए पृष्ठ क्रमांक 211 पर निम्नानुसार प्रकट किया है :

"The joint tortfeasors are jointly and severally liable for the whole damage resulting from the tort. They may be sued jointly or severally. If sued jointly, the damages may be levied on all or either. Each is responsible for the injury sustained by his common act."

इस क्रम में न्याय दृष्टांत नेशनल इंश्योरेन्स कम्पनी लिमिटेड विरुद्ध ललिता प्रभाकर एवं अन्य, 1998 ए.सी.जे. 1124 के पैरा 32 एवं 33 में की गयी प्रतिपादना का संदर्भ भी उपयोगी होगा, जो निम्नानुसार है :-

"It is well settled that where the accident has taken place as a result of the composite negligence of the drivers of two or more vehicles and without any negligence on the part of the injured or the deceased person, the drivers of such two or more vehicles are joint tortfeaors and they are liable to pay compensation jointly and severally."

It is equally well settled that where there is a joint and several liability, it is always open to the claimant to sue any of the person so liable without making the other a party. The claimant can sue the joint tortfeasors, either jointly or severally, and can have a complete redress for the loss suffered by him from either of them.

"भानूवेन पी. जोशी तथा अन्य विरुद्ध कांतिलाल बी. परमार तथा अन्य" (1994 ए.सी.जे. 714) के मामले मे मोटर सायकिल पर पीछे बैठे व्यक्ति की मृत्यु मोटर सायकिल तथा ट्रक ड्रायवर की संयुक्त उपेक्षा के कारण हो गई। ट्रक ड्रायवर, ट्रक लेकर भाग गया। ट्रक ड्रायवर तथा ट्रक की पहचान नहीं हो सकी। प्रश्न यह था कि क्या दावेदार संपूर्ण क्षतिपूर्ति मोटरसायकिल के स्वामी और उसकी बीमा कंपनी से प्राप्त कर सकते हैं? माननीय गुजरात उच्च न्यायालय ने यह प्रतिपादित किया कि सड़क दुर्घटना के शिकार व्यक्ति किसी एक अथवा सभी संयुक्त अपकृत्यकर्ताओं से क्षतिपूर्ति प्राप्त करने के अधिकारी हैं। इस मामले में मोटर सायकिल तथा ट्रक ड्रायवर की अंशदायी उपेक्षा के आधार पर क्षतिपूर्ति की राशि के विभाजन की आवश्यकता नहीं है, क्योंकि ट्रक ड्रायवर घटना के तुरंत पश्चात भाग गया तथा ट्रक एवं उसके ड्रायवर की पहचान नहीं की जा सकी। अतः मोटर सायकिल के चालक तथा उसकी बीमा कंपनी को सम्पूर्ण क्षतिपूर्ति के लिए उत्तरदायी ठहराया गया।

मोटर यान अधिनियम, 1988 की धारा -168 (1) के प्रावधान के अनुसार, अधिकरण अधिनिर्णय पारित करते समय वह राशि विनिर्दिष्ट करेगा, कि जो यथास्थिति बीमाकर्ता द्वारा या उस यान के, जो दुर्घटना में अंतर्ग्रस्त था, स्वामी या ड्रायवर द्वारा अथवा उन सब या उनमें से किसके द्वारा दी जायेगी। इस संदर्भ में न्याय दृष्टांत न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड विरुद्ध अशोक कुमार आचार्य तथा अन्य, 1995 ए.सी.जे. 189 (पैरा-5) अवलोकनीय है, जिसमें माननीय उड़ीसा उच्च न्यायालय ने यह प्रतिपादित किया है कि :-

"It is clear that while awarding the amount in a case of composite negligence, the Tribunal can direct the payment of the entire compen-

sation jointly and severally, but at the same time would apportion the liability between the two owners for their facility and if both the owners or two insurance companies, as the case may be, pay the amount to the claimant in proportion as awarded by the Tribunal, there is no problem for the claimant. But if one of the parties liable does not want to honour the award of the Tribunal, it will be open to the claimant to recover the entire amount from the other, leaving such party to claim rateable distribution from the other."

इसी संदर्भ में विभिन्न न्याय दृष्टांत जैसे कि विमला गंगोढिया तथा अन्य विरुद्ध नेशनल इंश्योरेंस कं. लिमिटेड तथा अन्य, 1995 ए.सी.जे. 53, सईद उज्जमा वि. अथर अयूब तथा अन्य, 1998 ए.सी.जे. 689, नेशनल इंश्योरेंस कं. लिमिटेड वि. संतोष व अन्य, 1999 ए.सी.जे. 1262 तथा एम. पद्मनाथ वि. भारत संघ तथा अन्य, 1999 ए.सी.जे. 1355 अवलोकनीय है।

जब अन्य संयुक्त अपकृत्यकर्ता को पक्षकार के रूप में जोड़े जाने की प्रार्थना की जाती है, तब अधिकरण के लिए यह उचित होता है कि वह सभी अपकृत्यकर्ताओं को अभिलेख पर लाने के लिए दावाकर्ता को आदेशित करे। अभिलेख पर विद्यमान किसी अपकृत्यकर्ता द्वारा किसी संबंधित अन्य व्यक्ति को पक्षकार के रूप में जोड़े जाने की प्रार्थना की जाती है तो प्रार्थना को एक नियम तथा व्यवहार की भांति स्वीकार कर अन्य व्यक्ति को अपकृत्यकर्ता / अनावेदक के रूप में जोड़ा जाना चाहिये। इस संदर्भ में न्याय दृष्टांत गुजरात राज्य परि. निगम वि. गुरूनाथ साहू, 1989 ए.सी.जे. 1314 (पेज-316) अवलोकनीय है, किन्तु तमिलनाडू राज्य वि. पी.के. आनंदन, 1982 ए.सी.जे. 358 के मामले में दुर्घटना में दो यान अंतर्ग्रस्त थे, दावेदार द्वारा प्रकरण में एक यान के स्वामी को पक्षकार बनाया गया और अन्य यान के स्वामी को पक्षकार के रूप में नहीं जोड़ा गया। माननीय मद्रास उच्च न्यायालय ने यह अभिनिर्धारित किया कि अन्य यान के स्वामी को पक्षकार के रूप में न जोड़ना घातक नहीं होगा।

न्यायिक दृष्टांत शंकरभाई वि. अब्दुल अजीज, 1991 ए.सी.जे. 704 के मामले में माननीय मध्यप्रदेश उच्च न्यायालय ने यह प्रतिपादित किया कि दो यानों के अंतर्ग्रस्त होने की दशा में, दोनों यान के स्वामी व चालकगण संयुक्त व पृथक हैसियत से दायी होते हैं, अतः दावेदार उनमें से किसी एक से प्रतिकर का दावा कर सकता है।

इस प्रकार मोटर दुर्घटना दावा प्रकरणों में संयुक्त दुष्कृतिकर्ताओं में से किसी एक से प्रतिकर प्राप्त करने के दावाकर्ता के अधिकार के स्वरूप का वर्णन संक्षेप में निम्नानुसार किया जा सकता है :-

(1) संयुक्त दृष्कृतिकर्ताओं में से, दावाकर्ता किसी एक से संपूर्ण प्रतिकर प्राप्त करने का अधिकार है।

(2) संयुक्त दृष्कृतिकर्ता की स्थिति में यह भी माना गया है कि उतने वाद कारण हो सकते है, जितने कि दृष्कृतिकर्ता होते हैं। अतः ऐसे किसी एक दृष्कृतिकर्ता के विरुद्ध की गई कार्यवाही, अन्य दृष्कृतिकर्ताओं के विरुद्ध कार्यवाही करने के लिए बाधा नहीं बन सकती है।

(3) संयुक्त दृष्कृतिकर्ताओं में से यदि कोई दृष्कृतिकर्ता अधिकरण के अधिनिर्णय का पालन नहीं करता है, तो दावेदार को अन्य शेष दृष्कृतिकर्ताओं से अधिनिर्णय की शेष संपूर्ण राशि वसूलने का अधिकार होगा।

(4) यदि दावाकर्ता ने सभी संयुक्त दृष्कृतिकर्ताओं के विरुद्ध दावा संस्थित नहीं किया है, तो इससे दावाकर्ता के दावे पर कोई विपरीत प्रभाव नहीं पड़ेगा, परन्तु यदि अन्य संयुक्त दृष्कृतिकर्ताओं द्वारा किसी दूसरे दृष्कृतिकर्ता को पक्षकार बनाये जाने की प्रार्थना की जाती है, तो उसे भी उस प्रकरण में पक्षकार बनाया जाना चाहिए।

आवश्यक वस्तु अधिनियम, 1955– जमानत एवं विचारण प्रक्रिया

आवश्यक वस्तु अधिनियम, 1955 (अत्रपश्चात् अधिनियम, 1955), जो कि एक विशेष अधिनियम है, के अन्तर्गत उद्भूत प्रकरणों के विषय में जमानत एवं विचारण संबंधी विधिक स्थिति की तह तक पहुंचने की उत्कंठा एवं आवश्यकता का मूल कारण यह है कि इस अधिनियम में समय-समय पर समाविष्ट किये गये सारभूत संशोधनों के कारण उसमें वर्णित विभिन्न अपराधों की प्रकृति तथा उनकी विचारण प्रक्रिया में परिवर्तन होता रहा है। इस क्रम में प्रथमतः अधिनियम, 1955 में समय-समय पर किये गये प्रमुख संशोधनों का सन्दर्भ यहां समीचीन है, जो निम्नवत् है :-

I संशोधन अधिनियम क्रमांक 47 वर्ष 1964 (अत्रपश्चात् 'अधिनियम' 1964)

II संशोधन अधिनियम क्रमांक 36 वर्ष 1967 (अत्रपश्चात् 'अधिनियम', 1967)

III संशोधन अधिनियम क्रमांक 30 वर्ष 1974 (अत्रपश्चात् 'अधिनियम', 1974)

IV संशोधन अधिनियम क्रमांक 18 वर्ष 1981 (अत्रपश्चात् 'अधिनियम', 1981)

V अध्यादेश क्रमांक 21 वर्ष 1997 (अत्रपश्चात् 'अध्यादेश', 1997)

VI अध्यादेश क्रमांक 1 वर्ष 1998 (अत्रपश्चात् 'अध्यादेश I', 1998)

VII अध्यादेश क्रमांक 13 वर्ष 1998 (अत्रपश्चात् 'अंतिम अध्यादेश II', 1998)

अधिनियम, 1981 मूलतः 5 वर्ष की अवधि के लिए दिनांक 01.09.1982 को प्रवृत्त हुआ। संशोधन अधिनियम क्रमांक 25 वर्ष 1987 तथा संशोधन अधिनियम क्रमांक 34 वर्ष 1993 द्वारा इस अवधि को क्रमशः 5-5 वर्ष बढ़ाकर कुल 15 वर्ष कर दिया गया। (संदर्भ-धारा 1 उपधारा 3 अधिनियम, 1981)। इस प्रकार अधिनियम, 1981, कुल मिलाकर दिनांक 31.08.97 तक प्रवर्तनशील रहा। अन्य प्रावधानों के साथ-साथ इस अधिनियम में यह प्रावधान भी था कि आपराधिक मामलों के विचारण की अनन्य अधिकारिता इस हेतु राज्य शासन द्वारा गठित विशेष न्यायालय में वेष्ठित रहेगी। अध्यादेश, 1997, जो दिनांक 03.10.1997 से प्रवृत्त हुआ, द्वारा अधिनियम, 1981 के लगभग समरूप प्रावधान अधिनियम, 1955 में जोड़े गये तथा इस अध्यादेश द्वारा धारा 15-AA इस आशय की भी जोड़ी गई कि दिनांक 01.09.97 से इस अध्यादेश के प्रवृत्त दिनांक (03.10.1997) के बीच की अवधि में अधिनियम, 1955 के अन्तर्गत उद्भूत मामलों का विचारण विशेष न्यायालय द्वारा ही किया जाएगा। अध्यादेश, 1997 की प्रभावशीलता अवधि के अवसान से पूर्व ही अध्यादेश, I, 1998 द्वारा उसे निरसित कर अधिनियम, 1955 में पुनः संशोधन किया गया तथा इस अध्यादेश को भूतलक्षी प्रभाव (दिनांक 03.10.1997) से प्रवृत्त किया गया, यद्यपि यह अध्यादेश दिनांक 02.01.98 को केन्द्रीय राजपत्र में अधिसूचित किया गया था। इस अध्यादेश द्वारा भी अध्यादेश, 1997 की धारा 15-AA के समरूप धारा 15-AA अधिनियम, 1955 में जोड़ी गई। इस अध्यादेश के व्यपगत होने से पूर्व ही अध्यादेश II, 1998, दिनांक 25.04.98 से प्रवृत्त हुआ, जिसके द्वारा अध्यादेश I,1998 निरसित कर दिया गया। अध्यादेश II, 1998 संसद से अनुमोदन प्राप्त किए बिना दिनांक 24.10.1998 को 6 माह की अवधि पूर्ण होने पर व्यपगत हो गया। इस अध्यादेश में भी अधिनियम, 1981 के समरूप प्रावधानों को कुछ परिवर्तनों के साथ रखा गया।

उक्त विभिन्न संशोधनों के प्रभाव पर यथास्थान आवश्यकतानुसार विचार किया जाएगा। अधिनियम, 1981 की प्रभावशीलता अवधि (01.09.1982 से 31.08.1997) पूर्ण होने तथा पश्चातवर्ती उक्त 3 अध्यादेशों में से अंतिम अध्यादेश, 1998 के दिनांक 24.10.1998 को व्यपगत (लैप्स) होने के पश्चात् अधिनियम, 1981 के प्रवृत्त होने के पूर्व

की स्थिति पुनः प्रभावी हो गई अर्थात् अधिनियम, 1955 वर्ष 1981 के अधिनियम से पूर्व के स्वरूप में आ गया तथा वर्तमान में उसी स्वरूप में प्रभावी है।

अधिनियम, 1955 के अन्तर्गत विभिन्न अपराधों के संज्ञेय या असंज्ञेय होने के विषय में मूलतः कोई प्रावधान नहीं था। सर्वप्रथम अधिनियम, 1967 द्वारा अधिनियम, 1955 में धारा 10-A जोड़कर यह प्रावधित किया गया कि अधिनियम के अन्तर्गत आने वाला प्रत्येक अपराध 'संज्ञेय और जमानतीय' होगा। अधिनियम, 1974 द्वारा 'और जमानतीय' शब्दों को विलोपित कर दिया गया। अधिनियम, 1981 द्वारा इस धारा में 'संज्ञेय' शब्द के बाद 'और अजमानतीय' शब्द जोड़े गये। इस अधिनियम के काल कवलित होने के बाद अध्यादेश, 1997 द्वारा मूल अधिनियम, 1955 की धारा 10-A में संशोधन कर धारा 7 (1) (a) (i) के अन्तर्गत दण्डनीय अपराध को छोड़कर शेष अपराधों को 'अजमानतीय' प्रावधित किया गया। धारा 7 (1) (a) (i) में प्रावधित अपराध के पुनरावृत्त अपराध को भी अजमानतीय स्वरूप का प्रावधित किया गया। अध्यादेश I, 1998 तथा अध्यादेश II,1998 में इस स्थिति को यथावत रखा गया।

उक्त विभिन्न प्रावधानों के प्रभाव का विश्लेषण करने पर यह प्रगट होता है कि अधिनियम, 1967 के प्रवृत्त होने के पश्चात् धारा 10A के प्रभाव से अधिनियम, 1955 के अपराध 'संज्ञेय' एवं 'जमानतीय' स्वरूप के हो गये लेकिन अधिनियम, 1981 की प्रभावशीलता अवधि में धारा 10-A में किये गये संशोधन के कारण यह अपराध 'संज्ञेय' होने के साथ-साथ 'अजमानतीय' रहे। तत्पश्चात् प्रोद्भूत 3 अध्यादेशों के अन्तर्गत अधिनियम, 1955 की धारा 7 (1) (a) (i) के प्रथम अपराध को छोड़कर शेष सभी अपराध 'अजमानतीय' स्वरूप के रहे लेकिन यह स्थिति अध्यादेश II,1998 के व्यपगत होने के बाद समाप्त हो गई तथा अधिनियम, 1955 विशेषतः उसकी धारा 10-A में अपराधों के जमानतीय/अजमानतीय होने के विषय में कोई प्रावधान नहीं रहा।

उक्त परिप्रेक्ष्य में वर्तमान में अधिनियम, 1955 के अन्तर्गत उद्भूत अपराधों की जमानतीय अथवा अजमानतीय प्रकृति का निर्धारण दंड प्रक्रिया संहिता, 1973 (अत्रपश्चात् 'संहिता') की अनुसूची II के प्रावधानों के प्रकाश में करना होगा, जो अन्य विधियों में प्रावधित अपराधों के स्वरूप, प्रकृति एवं विचारण फोरम के विषय में प्रावधित करते हैं तथा जो उस दशा में प्रयोज्य होंगे, जबकि इस हेतु ऐसी विशिष्ट विधि में कोई विनिर्दिष्ट प्रावधान नहीं है। इस क्रम में संहिता की धारा 4 के उपबंध सुसंगत एवं अवलोकनीय हैं, जो निम्नवत् है :-

> **4. भारतीय दंड संहिता और अन्य विधियों के अधीन अपराधों का विचारण– 1. भारतीय दंड संहिता (1860 का 45) के अधीन सब अपराधों का अन्वेषण, जांच, विचारण और उनके संबंध में अन्य कार्यवाही इसमें इसके पश्चात् अन्तर्विष्ट उपबंधों के अनुसार की जाएगी।**
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> **2. किसी अन्य विधि के अधीन सब अपराधों का अन्वेषण, जांच, विचारण और उसके संबंध में अन्य कार्यवाही इन्हीं उपबंधों के अनुसार, किन्तु ऐसे अपराधों के अन्वेषण, जांच, विचारण या अन्य कार्यवाही की रीति या स्थान का विनियमन करने वाली तत्समय प्रवृत्त किसी अधिनियमिति के अधीन रहते हुए की जाएगी।**

उक्त क्रम में यहां इस बात का उल्लेख आवश्यक है कि संहिता की अनुसूची II के अन्तर्गत 3 वर्ष या अधिक के कारावासीय दंड से दंडनीय सभी अपराध 'अजमानतीय' स्वरूप के प्रावधित किए गए हैं। अधिनियम, 1955 (जैसा कि वर्तमान में प्रभावशील है) में धारा 7 (1) (a) (i) में वर्णित अपराध को छोड़कर, जो इसी अधिनियम की धारा 3 (2) (h) एवं 3 (2) (i) के अन्तर्गत जारी आदेश के उल्लंघन के विषय में एक वर्ष तक के कारवास एवं

अर्थदंड का प्रावधान करती है, शेष सभी अपराधों (अन्तर्गत धारा 7 (1) (a) (ii) - धारा 3 के किसी अन्य आदेश का उल्लंघन, धारा 7 (2) धारा 3 (4) के निर्देश का उल्लंघन) के लिए 7 वर्ष तक के कारावासीय दंड एवं अर्थदंड का प्रावधान है। यहां यह बात भी उल्लेखनीय है कि अधिनियम, 1955 में मूलतः धारा 7 (1) (a) (i), 7 (1) (a) (ii) तथा 7 (2) के अन्तर्गत दंडनीय अपराध क्रमशः 1 वर्ष, 3 वर्ष एवं 3 वर्ष तक के कारावास तथा अर्थदंड से दंडनीय थे लेकिन अधिनियम, 1974 द्वारा धारा 7 (1) (a) (i) के अपराध को छोड़कर शेष अपराधों के लिए कारावसीय दंड की अधिकतम अवधि 3 वर्ष के स्थान पर 7 वर्ष कर दी गई। (नोट :- अध्यादेश II, 1998 के प्रवर्तनकाल में धारा 7 (1) (a) (i) में वर्णित अपराध 1 वर्ष तक के कारावास व 10,000/- रु. तक के अर्थदंड, धारा 7 (1) (a) (ii) में वर्णित अपराध 2 वर्ष तक के कारावास व अर्थदंड जो रु. 25,000/- से कम न हो, तथा धारा 7 (2) में वर्णित अपराध दो वर्ष तक के कारावास व अर्थदंड एवं जो रु. 25,000/- से कम न हो, से दंडनीय थे।

विभिन्न अपराधों के लिए उक्त प्रावधित कारावासीय दंड की अवधि के परिप्रेक्ष्य में यह स्पष्ट है कि संहिता की धारा 4 (2) व अनुसूची II तथा अधिनियम, 1955 की धारा 10-A के प्रकाश में वर्तमान में धारा 7 (1) (a) (i) का अपराध 'जमानतीय' एवं शेष अपराध 'अजमानतीय' स्वरूप के हैं। इस विषय में सुसंगत विधिक स्थिति का विषद् विश्लेषण न्याय दृष्टांत बलवंत विरूद्ध मध्यप्रदेश राज्य, मिसलेनियस क्रिमिनल केस नं. 814/2001, आदेश दिनांक 05.03.2001 (जबलपुर) में किया गया है, जो अवलोकनीय है।

जहां तक अधिनियम, 1981 की प्रभावशीलता अवधि के अन्तर्गत उद्भूत मामलों की प्रकृति का संबंध है, धारा 10-A में किए गए संशोधन (पूर्वोक्त) के परिप्रेक्ष्य में अधिनियम की धारा 7 के अन्तर्गत समस्त अपराध 'अजमानतीय' माने जाएंगे। इसका अर्थ यह है कि उक्त अवधि में धारा 7 (1) (a) (i) के अन्तर्गत प्रावधित अपराध भी 'अजमानतीय' स्वरूप का होगा।

पश्चात्वर्ती तीन आध्यादेशों (अध्यादेश, 1997, अध्यादेश I, 1998 व अध्यादेश II, 1998) के द्वारा धारा 10-A में किये गये संशोधन के कारण धारा 7 (1) (a) (i) के अपराध को छोड़कर शेष अपराध अजमानतीय प्रावधित किए गए हैं। अतः अधिनियम, 1981 के बाद लेकिन उक्त अध्यादेशों की प्रवर्तन अवधि तक धारा 7 (1) (a) (i) का अपराध, जब तक कि वह द्वितीय अपराध नहीं है, जमानतीय तथा शेष अपराध अजमानतीय हैं।

विचारण :-

विचारण के संबंध में फोरम एवं प्रक्रिया के बिन्दुओं पर दृष्टिपात आवश्यक है। अधिनियम, 1955 में मूलतः कोई भी अपराध 3 वर्ष से अधिक के कारावासीय दंड से दंडनीय नहीं था, साथ ही किसी विशिष्ट फोरम द्वारा विचारण किये जाने पर प्रावधान भी नहीं था, अतः विभिन्न मामलों का विचारण तद्समय प्रवृत्त दंड प्रक्रिया संहिता के प्रावधानों के अनुसार किया जाना था। अधिनियम, 1964 के द्वारा जोड़ी गई धारा 12- A के अनुसार अधिनियम की धारा 12-A (2) (a) में वर्णित अपराधों के विचारण की अधिकारिता इस हेतु राज्य शासन द्वारा विशेष रूप से अधिकृत न्यायिक मजिस्ट्रेट प्रथम श्रेणी में वेष्ठित की गई तथा उसके द्वारा संहिता की धारा 262-264 के अनुसार संक्षिप्त विचारण किया जाना प्रावधित था, जिसमें अधिकतम 1 वर्ष तक का कारावासीय दंड अधिरोपित किया जा सकता था। अधिनियम, 1974 द्वारा धारा 7 (1) (a) (ii) एवं 7 (2) में प्रावधित अपराध के लिए 7 वर्ष तक के कारावासीय दंड का उपबंध किया गया लेकिन विचारण फोरम एवं प्रक्रिया के विषय में संशोधन अधिनियम, 1964 द्वारा जोड़ी गई धारा 12-A यथावत रखी गई।

अधिनियम, 1981 के द्वारा धारा 12-A के स्थान पर नवीन धाराएं 12-A, 12-AA, 12-AB, 12-AC जोड़ी गई। इन नबीन प्रावधानों के अन्तर्गत समस्त अपराधों का विचारण राज्य शासन द्वारा इस हेतु गठित अनन्य अधिकारिता वाले विशेष न्यायालय द्वारा किया जाना प्रावधित था। अध्यादेश, 1997, अध्यादेश I, 1998 व अध्यादेश II, 1998 में उक्त स्थिति यथावत रखी गई। अध्यादेश, 1997 के द्वारा धारा 15-AA मूल अधिनियम में निरन्तरता बनाए रखने हेतु इस आशय की जोड़ी गई कि 01.09.1997 से अध्यादेश प्रवृत्त होने तक की अवधि के बीच उद्भूत समस्त अपराधों का विचारण भी विशेष न्यायालय द्वारा किया जाएगा। अध्यादेश II, 1998 की धारा 10 (2) द्वारा यह भी स्पष्ट किया गया कि विशेष अध्यादेश I, 1998 के अन्तर्गत की गई कोई भी कार्यवाही (विचारण, जांच, अनुसंधान आदि) अध्यादेश I, 1998 द्वारा किये गये संशोधन के अनुसार की जा सकेगी।

अधिनियम, 1981 के काल कवलित हो जाने तथा पश्चातवर्ती तीन अध्यादेशों में से दो के निरसित हो जाने व तृतीय के व्यपगत हो जाने के पश्चात् अधिनियम, 1981 के पूर्व की स्थिति, जो अधिनियम, 1964 एवं 1974 के अन्तर्गत उत्पन्न हुई थी, तथा जिसका उल्लेख पूर्व में किया गया है, पुनः प्रभावशील हो गई है। अतः वर्तमान में अधिनियम, 1955 के अन्तर्गत उद्भूत होने वाले उन अपराधों का विचारण, जिनका उल्लेख धारा 12-A (2) (a) में किया गया है, पूर्व धारा 12-A के प्रावधानों के अन्तर्गत विशेष रूप से सशक्त न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा संक्षिप्त प्रक्रिया अपनाते हुए किया जाना चाहिए, जिसमें एक वर्ष तक का कारावासीय दंड अधिरोपित किया जा सकता है। लेकिन यदि ऐसे मजिस्ट्रेट को यह प्रतीत हो कि एक वर्ष का कारावासीय दंड पर्याप्त नहीं होगा अथवा किसी अन्य कारणवश संक्षिप्त प्रक्रिया अपनाना उचित नहीं है तो वह साक्षियों को पुनः आहूत कर संहिता के अनुसार यथास्थिति सम्मन्स/वारंट प्रक्रिया अपना सकता है। ऐसे अपराध, जो धारा 12 A (2) (a) की परिधि में नहीं आते हैं, का विचारण संहिता के प्रावधानों के अन्तर्गत सक्षम न्यायिक मजिस्ट्रेट द्वारा किया जायेगा।

अधिनियम, 1981 तथा पश्चातकर्मी प्रोदभूत तीन अध्यादेशों की प्रर्वतनशीलता समाप्त हो जाने के पश्चात तथा अधिनियम, 1981 के प्रवृत्त होने के पूर्व की स्थिति प्रभावशील हो जाने के बाद भी यह प्रश्न शेष रह जाता है कि उक्त अधिनियम/अध्यादेशों की कालावधि में उद्भूत आपराधिक मामलों तथा लम्बित अनुसंधान मामलों के विषय में वर्तमान में उचित फोरम क्या होगा ? इस प्रश्न का त्वरित समाधान अधिनियम, 1981 की धारा 1 (3) में निहित है जो प्रावधित करती है कि अधिनियम, 1981 के पर्यावसान पर सामान्य खंड अधिनियम, 1887 की धारा 6 के प्रावधान प्रभावी होंगे।

उक्त धारा 6, जो किसी केन्द्रीय अधिनियम के निरसन के प्रभाव को बताती है, के प्रावधानों के अनुसार जब तक अन्यथा आशय प्रकट न हो, किसी केन्द्रीय अधिनियम के द्वारा किसी अधिनियम के निरसन से कोई लंबित अनुसंधान, विधिक कार्यवाही एवं उपचार आदि प्रभावित नहीं होंगे तथा ऐसी कार्यवाहियां इस प्रकार जारी रहेंगी जैसे कि निरसन अधिनियम पारित न हुआ हो।

उक्त प्रावधानों से स्पष्ट है कि अधिनियम, 1981 तथा पश्चातवर्ती अध्यादेशों के पर्यावसान के पश्चात भी उनके प्रवर्तन अवधि के अनुसंधान, विचारण आदि के विषय में अधिनियम, 1981 व पश्चात्वर्ती अध्यादेशों में प्रावधित प्रक्रिया का अनुसरण करना होगा अर्थात् ऐसे मामलों का विचारण विशेष न्यायालय की अधिकारिता में ही रहेगा।

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दाण्डिक प्रकरण लंबित होने की दशा में व्यवहार वाद का स्थगन– विधिक स्थिति

न्यायिक अधिकारीगण
जिला दतिया

दंड प्रक्रिया संहिता तथा व्यवहार प्रक्रिया संहिता क्रमशः दांडिक तथा सिविल मामलों में प्रक्रिया का निर्धारण करती है। जैसा कि इनका नाम है, ये अपने-अपने विषय से संबंधित मामलों की प्रक्रिया तय करती है। ऐसी अवस्था में दंड प्रक्रिया संहिता में सिविल मामलों के स्थगन के लिए कोई प्रावधान होने का प्रश्न ही नहीं है। इसी प्रकार व्यवहार प्रक्रिया संहिता में दांडिक मामले के स्थगन का कोई प्रावधान होना संभव नहीं है। व्यवहार प्रक्रिया संहिता जिस प्रकार से निर्मित है उसमें यहां तक व्यवस्था की गई है कि प्रत्येक न्यायालय यह स्वयं तय करेगा कि उसे सुनवाई का क्षेत्राधिकार है या नहीं, तब किसी सिविल न्यायालय को इस संहिता के तहत यह अधिकार प्राप्त है कि वह अपने सामने चल रहे सिविल मामले को स्थगित कर सके या सुन सके। धारा 10 व्यवहार प्रक्रिया संहिता समान पक्षकारों में समान संपत्ति के लिये विभिन्न सिविल न्यायालयों में चल रहे मामलों में से नये वाले मामले को रोकने के संबंध में प्रावधान करती है। परन्तु यह प्रावधान दांडिक मामले के आधार पर सिविल मामले को रोकने का नहीं है। इसके अपवाद अवश्य पाये जाते हैं कि आवश्यक होने पर नये मामले का विचारण यथावत रखते हुये पुराने मामले को स्थगित किया जा सकता है। परन्तु इन अपवादों का आधार यह प्रावधान नहीं है बल्कि धारा 151 व्य.प्र.सं. के अन्तर्गत जो अन्तर्भूत शक्तियाँ सिविल न्यायालय को मिली हैं उसका उपयोग उसे करना होता है। इसी धारा 151 व्य.प्र.सं. की शक्ति के आधार पर आवश्यक होने पर उसी तथ्य पर चल रहे दांडिक मामले के प्रकाश में सिविल मामले को रोका जाता है।

इस संबंध में क्षेत्रीय प्रबंधक म.प्र. राज्य मत्स्य विकास निगम विरुद्ध दिनेश कुमार अग्रवाल, 1994 एम.पी.जे.आर. शॉर्ट नोट 10, किशोरीलाल विरुद्ध हरप्रसाद, 1993 (2) एम.पी. डब्लू.एन. नोट 28, न्यू बैंक ऑफ इंडिया विरुद्ध फर्म मेसर्स नारमदेव ब्रदर्स, 1990 (1) एम.पी. डब्लू.एन. नोट 133, उषा रानी विरुद्ध एम.पी. फ्लाईंग क्लब लिमिटेड, 1990 (1) एम.पी. डब्लू.एन. नोट 41 तथा राधारमन विरुद्ध देना बैंक, 1989 (2) एम.पी.डब्लू.एन. नोट 173 के न्यायदृष्टांत अवलोकनीय हैं जो इस बात का उदाहरण हैं कि यदि समान तथ्यों पर दांडिक और सिविल मामले चल रहे हैं तो सिविल मामले को किस हद तक और कब रोका जा सकता है। इस संबंध में अब्दुलरसीद व अन्य विरुद्ध शैल प्रभा व अन्य, 1991 एम.पी. एल.जे. पृष्ठ 876 भी अवलोकनीय है, जिसमें यह कहा गया था कि मोटर यान दुर्घटना दावा अधिकरण के समक्ष चल रहा क्लेम मामला धारा 304-ए भा.दं.वि. के दांडिक मामले के विचारण तक स्थगित नहीं होगा।

उपरोक्त सभी मामलों को देखा जाये तो इनका आधार माननीय सर्वोच्च न्यायालय का निर्णय एस. शेरिफ व अन्य विरुद्ध मद्रास राज्य व अन्य, ए.आई.आर. 1954 एस.सी. पृष्ठ 397 था। उक्त निर्णय में माननीय सर्वोच्च न्यायालय ने यह अवधारित किया है कि यदि किसी सिविल मामले में और दांडिक मामले में समान तथ्यों पर आधारित कार्यवाही चल रही है तो सिविल मामला रोक ही दिया जायेगा, ऐसा कोई सुनिश्चित नियम नहीं बनाया जा सकता है। उन्होंने यह माना कि यदि ऐसे किसी मामले में जहां दोनों के विषय सारतः समान हैं, यदि वादोत्तर के रूप में प्रतिवादी अपना बचाव पेश कर देता है तो निश्चित ही उसे दांडिक मामले में प्रेज्युडिस उत्पन्न होगा। ऐसे मामलों में उन्होंने अभियुक्त कथन होने तक दांडिक मामले के आरोपी को वादोत्तर देने से बचे रहने के लिये सिविल मामले

को स्थगित करने की राय दी। इस निर्णय के प्रकाश में यह तो स्पष्ट था कि ऐसा स्थगन तभी किया जाना था जबकि सिविल मामले के चलने से आरोपी को उसके दांडिक मामले में उसका बचाव समय से पूर्व प्रकट होकर उसे प्रेज्युडिस हो रहा हो। हर प्रकरण में सिविल मामले का स्थगन किया जायेगा, ऐसा उन्होंने सुनिश्चित नियम नहीं बनाया था। यही कारण है कि उपरोक्त निर्णय के चरणों में जो तथ्य उल्लेखित किये गये हैं, उनमें सिविल मामले को स्थगित करने के लिए विभिन्न कारण दिये गये हैं।

हाल ही में माननीय सर्वोच्च न्यायालय का राजस्थान राज्य विरुद्ध मेसर्स कल्याण सुन्दरम् सीमेन्ट इंडस्ट्रीज लिमिटेड, 1996 (2) एम.पी. डब्लू.एन. नोट 61 का मामला प्रकाश में आया है, जिसमें धारा 138 पराक्रम्य लिखत अधिनियम, 1881 के दांडिक मामले के तारतम्य में चैक की रकम की वसूली के लिये सिविल वाद को स्थगित नहीं करने का अवधारण किया गया है। इस निर्णय के परिणामस्वरूप नेमीचन्द्र गंगवाल तथा एक अन्य विरुद्ध हरीशकुमार झंवर, 2000 (2) विधि भास्वर पृष्ठ 238, शीतल के. बण्डी विरुद्ध ऋषी, 1998 (2) एम.पी.एल. जे. शॉर्ट नोट 6, पुरुषोत्तम विरुद्ध मनोकामना सिद्ध हनुमान मंदिर, 1997 (2) एम.पी.जे.आर. शॉर्ट नोट 40 तथा साईं उद्योग प्रा.लि. रायपुर व अन्य विरुद्ध सेन्ट्रल बैंक आफ इंडिया, ए.आई.आर. 1998 एम.पी. पृष्ठ 191 के न्याय दृष्टांत देखने को मिलते हैं, जिनमें यह कहा गया है कि दांडिक मामले के कारण सिविल मामले को स्थगित किया जाना आवश्यक नहीं है।

माननीय सर्वोच्च न्यायालय के निर्णयाधार कौन से लागू होंगे, इस बिन्दु पर वैधानिक स्थिति वर्तमान में पूर्णतः स्पष्ट है। वास्तव में वर्ष 1996 के उपरोक्त "कल्याण सुन्दरम्" वाले मामले में माननीय सर्वोच्च न्यायालय ने अपने ही "एस.शेरिफ" उपरोक्त के मामले एवं निर्णय पर विचार नहीं किया। उक्त प्रथम निर्णय में सिविल मामला हर हालत में रोका जायेगा, ऐसा कोई कठोर नियम नहीं बनाया गया था बल्कि सिविल न्यायालय को यह विवेकाधिकार दिया गया था कि वह विवेक के अनुसार चाहे तो सिविल मामला उचित कारण होने पर रोक सकता है। तब उपरोक्त "कल्याण सुन्दरम्" वाले मामले के निर्णय से उक्त "एस.शेरिफ" वाले मामले के निर्णयाधार परास्त नहीं होते हैं। इन दोनों प्रकरणों के संबंध में विचार माननीय म.प्र. उच्च न्यायालय की एकल पीठ ने उपरोक्त "सांई उद्योग" वाले मामले में किया है। माननीय सर्वोच्च न्यायालय के दोनों प्रकरण तथा अन्य विभिन्न मामलों पर विचार करके इस निर्णय में कुशेश्वर दुबे विरुद्ध मेसर्स भारत कोकिंग कोल लिमि. तथा अन्य, ए.आई.आर. 1988 एस.सी. पृष्ठ 2118 के न्यायदृष्टांत का उद्धरण माननीय न्यायालय ने अंकित किया है जिसकी अनुवादित अंशिका निम्न प्रकार है :-

> "सभी मामलों के लिये कोई सीधा सपाट सुनिश्चित सूत्र दिया जाना न तो संभव है न ही ऐसा सूत्र देने की राय दी जाती है, जिससे कि हर मामले के तथ्यों का विचार किये बिना सिविल मामले के स्थगन के संबंध में आदेश किया जा सके।"

उपरोक्त "सांई उद्योग" वाले निर्णय से स्पष्ट है कि जो निर्णयाधार माननीय सर्वोच्च न्यायालय ने "एस.शेरिफ" वाले मामले में दिया था, वह पूरी तरह समाप्त नहीं हुआ है, बल्कि सिविल मामले का स्थगत उचित आधारों पर उस प्रकरण के तथ्यों, परिस्थितियों आदि को देखते हुए किसी युक्तियुक्त मामले में सावधानी से करना चाहिये। माननीय सर्वोच्च न्यायालय की मंशा यह है कि दांडिक मामले के कारण सिविल मामले को रूटिन में स्थगित नहीं करना चाहिये, अन्यथा ऐसा करने से सिविल मामले बिना कार्यवाही के वर्षों पड़े रहते हैं, जो कि उचित नहीं है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

53. CRIMINAL PROCEDURE CODE, 1973- Section 41
Arrest of female- While arresting a female, effort should be to keep a lady constable present- Arrest may be made without such presence for reasons to be recorded by arresting authority.
State of Maharashtra Vs. Christian Community Welfare Council of India and another
Reported in AIR 2004 SC 7 = (2003) 8 SCC 546

Held :

While it is necessary to protect the female sought to be arrested by the Police from Police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the Arresting Authority that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the Arresting Officers is reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation such Arresting Officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.

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54. EVIDENCE ACT, 1872- Section 118
Child witness- If found competent to depose and reliable, conviction may be based on the testimony of child witness.
Ratansingh Dalsukhbhai Nayak Vs. State of Gujarat
Reported in AIR 2004 SC 23

Held :

Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, S. 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by *Brewer, J. in Wheeler v.*

United States (159 US 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

In *Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)* it was held as follows :

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under S. 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored".

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shake and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

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55. TRANSFER OF PROPERTY ACT, 1882- Section 105
Lease- Lease may be in perpetuity- Renewal and extension of lease, distinction- Renewal under covenant of lease is a unilateral act of the lessee.
State of U.P. and others Vs. Lalji Tandon (Dead)
Reported in AIR 2004 SC 32

Held :

In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on the Transfer of Property Act, Ninth Edition, 1999, p. 1011). Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. *(Baker v. Merckel (1960) 1 All ER 668, also Mulla, ibid, p. 1204).* Where the principal lease executed between the parties containing a covenant

for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed; as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month as the case may be.

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56. CONSTITUTION OF INDIA- Article 136
EVIDENCE ACT, 1872- Section 3

(i) Private party can challenge acquittal by way of appeal under Article 136.

(ii) Appreciation of evidence- Ocular evidence vis-a-vis medical evidence- Ocular evidence if credible and trustworthy, should get primacy over medical evidence.

Ramakant Rai Vs. Madan Rai and others
Reported in AIR 2004 SC 77

Held :

A doubt has been raised about the competence of a private party as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution of India, 1950 (In short the 'Constitution') against a judgment of acquittal by the High Court. We do not see any substance in the doubt. Appellate power vested in this Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate Courts and appellate tribunals under specific statutes. It is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (See *Durga Shankar Mehta v. Thakur Raghuraj Singh (AIR 1954 SC 520)*. Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of this Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in this Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of this Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice this Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the

State has invoked the Court's jurisdiction. We do not have slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of interested private parties also. The circumstances that the Criminal Procedure Code, 1973 (-in short the "Code") does not provide for an appeal to the High Court against an order of acquittal by a subordinate Court, at the instance of a private party, has no relevance to the question of the power of this Court under Article 136. We may mention that in *Mohan Lal v. Ajit Singh (1978 (3) SCC 279)* this Court interfered with Judgment of acquittal by the High Court at the instance of a private party.

It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process, eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

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57. CRIMINAL PROCEDURE CODE, 1973- Section 14
Effect of the order of Magistrate on subsequent legal proceedings before a competent Court- Law explained.
Shanti Kumar Panda Vs. Shakuntala Devi
Reported in AIR 2004 SC 115

Held :

For the purpose of legal proceedings initiated before a competent Court subsequent to the order of an Executive Magistrate under Ss. 145/146 of the Code of Criminal Procedure, the law as to the effect of the order of the Magistrate may be summarized as under :-

(1) The words 'competent Court' as used in sub-section (1) of S. 146 of the Code do not necessarily mean a Civil Court only. A competent Court is one which has the jurisdictional competence to determine the question of title or the rights of the parties with regard to the entitlement as to possession over the property forming subject-matter of proceedings before the Executive Magistrate;

(2) A party unsuccessful in an order under S. 145 (1) would initiate proceedings in a competent Court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily, a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent Court consequent upon attachment under S. 146 (1) of the

Code it is not necessary to seek relief of recovery of possession. As the property is held custodia legis by the Magistrate for and on behalf of the party who would ultimately succeed from the Court it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession.

(3) A decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court. An order passed by the Executive Magistrate in proceedings under Ss. 145/146 of the Code is an order by a Criminal Court and that too based on a summary enquiry. The order is entitled to respect and weight before the competent Court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the Court, the order of the Magistrate is only one out of several pieces of evidence.

(4) The Court will be loath to issue an order of interim injunction or to order an interim arrangement inconsistent with the one made by the Executive Magistrate. However, to say so is merely stating a rule of caution or restraint, on exercise of discretion by Court, dictated by prudence and regard for the urgent/ emergent executive orders made within jurisdiction by their makers; and certainly not a tab on power of Court. The Court does have jurisdiction to make an interim order including an order of ad interim injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an exception. Even at the stage of passing an interim order the party unsuccessful before the Executive Magistrate may on material placed before the Court succeed in making out a strong prima facie case demonstrating the findings of the Executive Magistrate to be without jurisdiction, palpably wrong or self-inconsistent in which or the like cases the Court may, after recording its reasons and satisfaction, make an order inconsistent with, or in departure, from, the one made by the Executive Magistrate. The order of the Court- final or interlocutory, would have the effect of declaring one of the parties entitled to possession and evicting therefrom the party successful before the Executive Magistrate within the meaning of sub-section (6) of S. 145.

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58. INDIAN PENAL CODE, 1860- Section 34
"Common intention" u/s 34- Participation in some manner necessary- Law explained
Parasa Raja Manikyala Rao and another Vs. State of A.P.
Reported in AIR 2004 SC 132

Held :

The section really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognised canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common pur-

pose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In combination of this kind a mortal stroke, though given by one of the party, is deemed in the eye of law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. Leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. (See *Ramaswami Ayyanagar and others v. State of Tamil Nadu (AIR 1976 SC 2027)*. The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scence of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different time and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this section, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

'Common intention' implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Under this section a pre-concert in the sense of a distinct previous plan is not 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, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert. [See *Krishna Govind Patil v. State of Maharashtra (AIR 1963 SC 1413)*. In *Amrik Singh and others v. State of Punjab (1972 Cri LJ 465 (SC)*] it has been held that common intention presupposes prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

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59. CIVIL PROCEDURE CODE, 1908- O.1, R. 10
TRANSFER OF PROPERTY ACT, 1882- Section 52
Transferee pendente lite cannot as of right seek impleadement as a party in the suit.

Bibi Zubaida Khatoon Vs. Nabi Hassan Sahab and another
Reported in AIR 2004 SC 173

Held :

It is not disputed that the present petitioner purchased the property during pendency of the suit and without seeking leave of the Court as required by S. 52 of the Transfer of Property Act. The petitioner being a transferee pendente lite without leave of the Court cannot, as of right, seek impleadment as a party in the suits which are long pending since 1983. It is true that when the application for joinder based on transfer pendente lite is made, the transferee should ordinarily be joined as party to enable him to protect his interest. But in instant case, the trial Court has assigned cogent reasons for rejecting such joinder stating that the suit is long pending since 1983 and prima facie the action of the alienation does not appear to be bona fide. The trial Court saw an attempt on the part of the petitioner to complicate and delay the pending suits.

The decisions cited and relied on behalf of the appellant turned on the facts of each of those cases. They are distinguishable. There is no absolute rule that the tranferee pendente lite without leave of the Court should in all cases be allowed to join and contest the pending suits. The decision relied on behalf of the contesting respondents of this Court in the case of Savinder Singh (supra) fully supports them in their contentions. After quoting S. 52 of the Transfer of Property Act, the relevant observations are thus :-

"Section 52 of the Transfer of Property Act envisages that :-

'During the pendency in any Court having authority within the limits of India..... of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose'.

It would, therefore, be clear that the defendants in the suit were prohibited by operation of S. 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of S.52. Under these circumstances, the respondents "cannot be considered to be either necessary or proper parties to the suit".

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60. EVIDENCE ACT, 1872- Section 67
Documents, proof of- Mere production and marking of a document as exhibit, no proof of its content.

Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and another
Reported in AIR 2004 SC 175 = (2003) 8 SCC 745

Held :

The legal position is not in dispute that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence that is by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'. The situation is, however, different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the Court. We find no force in the argument advanced on behalf of the appellant that as the mark of exhibits has been put on the back portions of the rent receipts near the place where the admitted signatures of the plaintiff appear, the rent receipts as a whole cannot be treated as have been exhibited as an admitted documents.

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61. INDIAN PENAL CODE, 1860- Section 361
Kidnapping from lawful guardianship- Phrase 'whoever takes or entices any minor', meaning and connotaion of- Law explained.
Parkash Vs. State of Haryana
Reported in AIR 2004 SC 227

Held :

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor..... out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "Keeping" in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuation by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section.

The position was again reiterated in *Thakorlal D. Vadgama v. The State of Gujarat (AIR 1973 SC 2313)* wherein it was, inter alia, observed as follows :

"The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it

is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achiveing its ultimate purposes of successful indecument. The two words "takes" and "entices", as used in Section 361, I.P.C. are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C.

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62. SUCCESSION ACT, 1925- Sections 63 and 68
Will, proof of- Suspicious circumstances- Natural heirs excluded or lesser share given to them, not a suspicious circumstance.
Ramabai Padmakar Patil (Dead) through LRs. and others Vs. Rukminibai Vishnu Vekhande and others
Reported in 2004 (1) MPLJ 1 = (2003) 8 SCC 537

Held :

A will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring. In *P.P.K. Gopalan Nambiar vs. P.P.K. Balakrishnan Nambiar, 1995 Supp (2) SCC 664* it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed. In *Pushpavathi vs. Chandraraja Kadamba, (1973) 3 SCC 291* it has been held that if the propounder succeeds in removing the suspicious circumstance, the Court would have to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part the near relations. In *Rabindra*

Nath Mukherjee vs. Panchaman Banerjee, (1995) 4 SCC 459 it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

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63. ENVIRONMENT (PROTECTION) ACT, 1986 - Sections 3 (2) (viii), 25 & RECYCLED PLASTICS MANUFACTURE AND USAGE RULES, 1999- Rule 4
Recycled plastic, manufacture and use of- Guidelines issued by the Court to ensure the compliance of relevant legal provisions.
Sarita Agnihotri Vs. State of M.P. and others
Reported in 2004 (1) MPLJ 71

Held :

Regard being had to the facts that have been brought on record, the data given and the apprehension expressed by the petitioner we are inclined to issue certain guidelines which we enumerate as under :

(a) the State Government shall constitute the Prescribed Authority as provided under Rules 3 of the Rules within a period of three months from today;

(b) till the said authority is constituted by the State Government in enforcement of provisions of the rule in question District Collector/Deputy Commissioner of the district shall function as the Prescribed Authority and do the needful so that there is due compliance of the requirement of the Rules and there is no deviancy;

(c) the State Pollution Control Board being the Prescribed Authority under Rule 3 (a) shall see that no manufacturing take place in violation of the Rules and conditions of manufacture of carry bags, containers made of plastics are strictly adhered to. The Board shall also scrutinise the minimum thickness of carry bags made of virgin plastics or recycled plastics as provided under Rule 8. If there would be any deviation consent shall be withdrawn immediately and appropriate legal action should be taken against the manufactures;

(d) the prohibitions contained in Rule 4 shall be strictly supervised by the Prescribed Authority under the Rules and if any vendor violates the said Rule, he should be proceeded against as per the prevalent law;

(e) no carry bags made of virgin plastics or recycled plastics with a manimum thickness of 20 micron should be allowed to be imported or sold within the State;

(f) the Collector of each district or the Prescribed Authority after it is constituted under Rule 3(b) shall constitute a 'checking squad' at the district level comprising of two officers from the office of the concerned Collector and

one officer from the office of the Municipal Corporation, Municipality, or Panchayat as the case may be, to check that there is adherence to the use and sale of polythene bags;

(g) the Municipal Corporation/Municipal Council, Nagar Panchayat and such other public bodies shall be directed by the State Government to make adequate arrangement for collection and disposal of carry bags made of polythene, plastics or recycled plastics and dispose them off after obtaining the technical advice/know-how from the M.P. State Pollution Control Board;

(h) the State Government shall instruct the district administration to distribute pamphlets and exhibit/display posters at public places such as railway platforms, bus stands, market places, hospitals indicating the menace of carry bags or small bags;

(i) there should be advertisement in the cinema halls and other electronic media to create awareness amongst people so that they become eco-sensitive;

(j) the district administration shall publish in the newspapers giving wide publicity emphasizing on the ban on manufacture, sale, use and disposal of such polythene carrying bags keeping in view the rule in question;

(k) the local bodies shall install such garbage disposal containers in each street so that the bags and other materials made of polythene are thrown after use and the said garbage is cleaned each day and destroyed in consultation with the M.P. Pollution Control Board;

(l) the transport authority of the area concern shall install containers for putting polythene bags and other materials near bus stands, cinema theaters and such other public places and that should be destroyed as per the guidelines given by the M.P. Pollution Control Board;

(m) the Divisional Railway Manager of every Division in consultation with the M.P. Pollution Control Board shall also put certain garbage containers for putting and use of polythene bags and other materials in the said garbage container and the same shall be destroyed as per the guidelines issued by the M.P. Pollution Control Board;

(n) as apprehension has been expressed with regard to the consumption by animals nothing contained in polythene bags should be carried and/or thrown inside the Kanha National Park and other wild life sanctuaries and if anyone violates the same he should be proceeded in accordance with law;

(o) if any person witnesses any vendor using carry bags, containers made of cyclostyled plastics for storing, dispensing or packaging of foodstuffs, he shall bring it to the notice of the district administration so that Prescribed Authority shall take immediate action on such information;

(p) if any person is found disposing of polythene bags or materials at public places, bus stands, railway stations, etc. the competent authority shall take action as per prevalent law against such person and no laxity should be shown in that regard;

(q) the State Government shall constitute a high level committee consisting of the Principal Secretary, Health and the Principal Secretary, Urban and Rural Development so that adequate measures are taken to prevent the pollution. Competent authorities shall make the people aware with regard to distinction between the virgin polythene bags and the recycled polythene and other materials;

(r) the committee shall meet once in two months. The meeting shall be convened by the Principal Secretary, Health. To each meeting the Chairman, M.P. Pollution Control Board shall be invited as a special invitee;

(s) the State Government shall issue instructions to each educational institutions viz. universities, colleges and schools for the purpose of imparting knowledge and information to the students about the dangers and use of polythene bags and how it affects the environment. This has to be done keeping in view to create a sense of awareness amongst the students;

(t) the State Government shall impart periodical training to one or two teachers in other educational institutions who can make the students aware;

(u) the head of the educational institution shall demarcate some time for the concerned teacher to impart this information. It will be in his discretion. This shall be done each year and should be modulated by the Secretary, Department of Higher Education and the authorised Incharge of School Education. There shall be imparting of education with regard to distinction between the virgin polythene carry bags and recycled polythene and other materials;

(v) the Committee which has been directed to be constituted shall submit the progress report to this Court with regard to all the facets as has been indicated hereinabove, within a period of four months.

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64. INDIAN PENAL CODE, 1860- Sections 96 and 105
Private defence, plea of- Burden of establishing the plea on accused- Nature of burden and mode of proof explained- Number of injuries not always a safe criterion to determine who the aggressor was.
Laxman Singh Vs. Poonam Singh and others
Reported in 2004 (1) MPLJ 93 (SC)

Held :

An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of

the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderence of probabilities in favour of that plea on the basis of the meterial on record. (See *Munshi Ram and others vs. Delhi Administration, AIR 1968 SC 702; State of Gujarat vs. Bai Fatima, AIR 1975 SC 1478; State of U.P. vs. Mohd. Musheer Khan, AIR 1977 SC 2226* and *Mohinder Pal Jolly vs. State of Punjab, AIR 1979 SC 577).* Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under section 97, that right extends under section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The off quoted observation of this Court in *Salim Zia vs. State of U.P., AIR 1979 SC 391,* runs as follows:

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."
>
> The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderence of probabilities is in favour of his plea.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See *Lakshmi Singh vs. State of Bihar, AIR 1976 SC 2263).*

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65. PREVENTION OF CORRUPTION ACT, 1988- Sections 13 (1) (e) and 17, Second Proviso
Investigation into offence under Section 13 (1) (e)- Second proviso of Section 17 is an additional legal requirement to that of first proviso.

Manoj Koshta Vs. State of M.P.
Reported in 2004 (1) MPLJ 99

Held :

First of all it would be apposite to consider the submissions of the learned Deputy Advocate General, Mr. Girish Desai, regarding interpretation of second Proviso i.e. whether Second Proviso of section 17 of the Act is in addition to first Proviso or for the main section. For this purpose it would be apt to see paragraphs 123 and 124 of the decision by the Supreme Court in case of *State of Haryana vs. Bhajanlal, AIR 1992 SC 604* which reads as follows:

> "It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first Proviso can take up the investigation of an offence referred to in clause (e) of section 5 (1) only on a separate and independent order of a police officer not below the rank of a Supreintendent of Police. To say in other words, a strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (e) of section 5 (1) of the Act. This is clearly spelt out from the expression "further provided" occurring in second proviso."

In this Judgment, the Supreme Court has further ruled in paragraph 124 as follows :

> "A conjoint reading of the main Provison, 5A (1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception."

The above mentioned observations have been made by the Supreme Court on the basis of the judgment passed in the *State of Madhya Pradesh vs. Mubariq Ali, AIR 1959 SC 707 (Para 5).*

The offence referred to in clause (e) of section 5 (1) of the Act, 1947 is equivalent to section 13 (e) of the Act and section 5-A is analogous to section 17 of the Act. Therefore, in view of above mentioned observations in *Bhajanlal's* case (supra) a strict compliance of second proviso is additional legal requirement that of the first proviso, for conferring the valid authority on a police officer not below the rank of Inspector of police to investigate the offence under clause (e) of section 13 (1) of the Act.

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66. ADVERSE POSSESSION :
Adverse possession, plea of- Nature of possession as well as commencement of possession should be pleaded and proved.
Ramsingh Vs. Ramchandra and another
Reported in 2004 (1) MPLJ 112

Held :

Though the possession of the defendant was for more than 12 years it has been held by the first appellate Court which is a final Court of facts that the possession of the defendant was permissive. This finding is based on the admission of the defendent himself in evidence. Therefore, this finding cannot be said to be perverse or unreasonable. The Supreme Court has held in *Persinni vs. Sukhi (1993) 4 SCC 375* that the burden is on the person who claims title on the basis of adverse possession to establish that his possession is "adverse to the true owner". Again it has been reiterated in *Annasaheb vs. Balwant, AIR 1995 SC 895* that the burden is on the defendant to prove affirmatively that he is in possession "in hostile assertion" i.e. a possession which is expressly or impliedly in denial of the title of the true owner. The defendant raising the plea must clearly state when the adverse possession commenced and the nature of such possession. This principle has been further reiterated in *M.C. Sharma vs. Raj Kumari Sharma, AIR 1996 SC 869.*

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67. CIVIL PROCEDURE CODE 1908- O. 22, Rr. 4 and 9
Abatement of suit after the death of defendent- Application under O.22, R.4 filed- Such application can be treated under R.9.
State of M.P. Vs. Jay Singh (deceased) through LRs.
Reported in 2004 (1) MPLJ 114 = 2004 (1) MPHT 38

Held :

It is well settled that the provisions of the Civil Procedure Code are to advance the cause of justice and a party to the litigation should not be allowed to suffer on account of technicalities of the case. Therefore, in the interest of justice, the application under Order 22, Rule 4, Civil Procedure Code could be treated as an application under Order 22, Rule 9 of Civil Procedure Code for setting aside the abatement.

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68. CRIMINAL PROCEDURE CODE, 1973- Section 309
Dishonour of cheque- Civil suit for recovery and criminal complaint under Section 138 of Negotiable Instruments Act pending- Civil suit ordinarily not to be stayed.
Joginder Singh Choudhary vs. Capital Auto Service, Bhopal
Reported in 2004 (1) MPLJ 121

Held :

Once a criminal trial is instituted, it should progress expeditiously so that the guility are brought to book and the innocent exonerated. Such prosecutions cannot ordinarily be stayed pending the civil suit which are known to take years before they are taken up for hearing and final disposal. This, however, cannot be a universal rule. It would all depend upon the facts of each case and there may be cases where the stay of criminal cases would be justified.

Section 309 of the Code gives a mandate that every prosecution be held as expeditiously as possible. Therefore, it would be inappropriate to grant stay of the criminal cases especially, in view of the fact that there is no provision under the Code to grant the stay. Since the hearing of the suit is not likely to be taken up in the near future and no prejudice is likely to be caused to the applicants, both the cases may proceed simultaneously. It does not appear to be a case where the criminal proceeding in private prosecution is being used as a lever to coerce the accused into a compromise of the civil suit. As a general rule, as between civil and criminal proceedings the criminal matter should be given precedence.

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69. LAND REVENUE CODE, 1959 (M.P.)- Sections 150 and 257 (h) Recovery of any sum as arrears of land revenue- Bar enacted under Section 257 (h) regarding jurisdiction of Civil Court- Bar not applicable where proceedings relate to sum of money recoverable as arrears of land revenue.
State of M.P. and another Vs. Siyaram Verma
Reported in 2004 (1) MPLJ 130

Held :

Counsel for the State urged that the suit filed by the plaintiff is not maintainable, as the amount is recoverable as land revenue. Section 257 sub-clause (h) of M.P. Land Revenue Code, 1959 (hereinafter referred to as 'the Code') bars jurisdiction of Civil Court. Sub-clause (h) of section 257 of the Code excludes jurisdiction of Civil Court in respect of any claim against the State Government connected with or arising out of, the collection of land revenue or the recovery of any sum which is recoverable as arrears of land revenue under the Code or any other enactment. He further submits that since the amount is recoverable as arrears of land revenue,the State has issued R.R.C. after issuing demand notice under section 147 of the Code. He has also invited attention of this Court towards section 150 of the Code, which provides that if any person againt whom recovery of an arrear of land revenue, a notice for arrears is issued, he may, at any time before the property is knocked down, deposit the amount claimed under protest and deliver a protest signed by himself or by his authorised agent to the Revenue Officer taking such proceedings. On filing such application the proceeding shall be stayed. Thereafter the S.D.O. will decide his objection so raised by him. This procedure is not followed by the present plaintiff. Hence, the suit is not maintainable.

For supporting his argument Shri K.B. Chaturvedi relied on the judgment of Full Bench of this Court in the case of *Manoharlal Uttamchand Awal vs. State of M.P., 1978 MPLJ 113* and urged that present civil suit is barred in view of sections 150 and 257 (h) of the Code. After going through the said Full Bench decision we find that the said judgment does not support the appellants. On the other hand from readings of judgment, it appears that the Full Bench has taken view that

provisions of section 150 of the Code are applicable only to a proceeding for the recovery of arrear of land revenue, but not to a proceeding for the recovery of money recoverable as an arrear of land revenue. In para 16 of the judgment in reply to question No. 1, the Full Bench has laid down that section 150 of the Code applies to recovery of an arrear of land revenue, but not to a proceeding for the recovery of the sum of money which is recoverable as an arrear of land revenue within the meaning of section 155 of the Code, i.e. a civil suit cannot lay challenging the R.R.C. for recovery of actual land revenue but will lay challenging the R.R.C. for recovery of an amount which has taken colour of land revenue due to the deeming fiction.

Clause (b) of section 155 provides that all moneys falling due to the State Government under any grant, lease or contract which provides that they shall be recoverable in the same manner as an arrear of land revenue. By reading the said provisions, it is clear that the amount claimed by the respondent/plaintiff is an amount recoverable as arrears of land revenue under section 155 of the Code i.e. by deeming fiction. Hence the civil suit challenging the said recovery is maintainable in the Civil Court and the remedy under section 150 of the Code is not aviable to the plaintiff.

In reply to question No. 4, the Full Bench has clearly mentioned that the Full Bench does not want to express any opinion on the question whether a Civil Suit under the General Law is barred challenging recovery of an amount recoverable as a land revenue. However, the Division Bench of this Court in the case of *State of M.P. vs. Sunderlal, 1976 MPLJ 254* has laid down that a Civil Suit is maintainable challenging the recovery of an amount payable as land revenue by issuing a R.R.C. on the ground that the said amount is not at all recoverable. In view of this, we hold that the present suit is maintainable.

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70. INDIAN PENAL CODE, 1860- Sections 304- B & 498-A
Term "soon before" as used in Section 304-B- Meaning and connotation of- The term indicates idea of a proximity- Even if accusations under Section 304-B fail, case under Section 498-A may be made out.
Hira Lal and others Vs. State (Govt. of NCT), Delhi
Judgment dt. 25-7-2003 by the Supreme Court in Criminal Appeal No. 825 of 2002, reported in (2003) 8 SCC 80

Held :

A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or, harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that

case presumption operates. Evidence in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods "soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession". The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned , it would be of no consequence.

Further question is whether a case under Section 498-A has been made out, even if accusations under Section 304-B fail. Section 498-A reads as follows :

> "498-A. *Husband or relative of husband of a woman subjecting her to cruelty.*- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> *Explanation.*- For the purposes of this section, 'cruelty' means-
>
> (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical

of the woman are required to be established in order to bring home the application of Section 498-A IPC. Cruelty has been defined in the Explanation for the purpose of Section 498-A. Substantive Section 498-A IPC and presumptive Section 113-B of the Evidence Act have been inserted in the respective statutes by the Criminal Law (Second Amendment) Act, 1983. It is to be noted tat Sections 304-B and 498-A IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved. The Explanation to Section 498-A gives the meaning of "cruelty". In Section 304-B there is no such explanation about the meaning of "cruelty". But having regard to the common background of these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Section 498-A under which "cruelty" by itself amounts to an offence. Under Section 304-B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498-A. A person charged and acquitted under Section 304-B can be convicted under Section 498-A without that charge being there, if such a case is made out. If the case is established, there can be a conviction under both the sections (See *Akula Ravinder v. State of A.P. 1991 Supp (2) SCC 99*). Section 498-A IPC and Section 113-A of the Evidence Act include in their amplitude past events of cruelty. Period of operation of Section 113-A of the Evidence Act is seven years; presumption arises as to dowry death when a woman committed suicide within a period of seven years from the date of marriage.

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71. CRIMINAL TRIAL :
Last seen, circumstance of- Accused should explain how victim suffered death or should own liability for homicide.
Amit Vs. State of Maharashtra
Judgment dt. 6-8-2003 by the Supreme Court in Criminal Appeal No. 376 of 2003, reported in (2003) 8 SCC 93

Held :

The learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in *Mohibur Rahman v. State of Assam, (2002) 6 SCC 715* for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and

the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction.

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72. JUDICIARY :

Judicial service, nature of- It involves exercise of sovereign judicial power of the State- Honesty and integrity expected from persons holding the office- Stream of justice be kept unpolluted- Object of compulsory retirement stated.

Nawal Singh Vs. State of U.P. and another

Judgment dt. 23.9.2003 by the Supreme Court in Civil Appeal No. 2898 of 2001, reported in (2003) 8 SCC 117

Held :

At the outset, it is to be reiterated that the judicial service is not a service in the sense of an employment. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. Further, the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. If such evaluation is done by the Committee of the High Court Judges and is affirmed in the writ petition, except in very exceptional circumstances, this Court would not interfere with the same, particularly because the order of compulsory retirement is based on the subjective satisfaction of the authority.

Further, it is to be reiterated that the object of compulsory retirement is to weed out the dead wood in order to maintain a high standard of efficiency and honesty to keep the judicial service unpolluted. It empowers the authority to retire officers of doubtful integrity which depends upon an overall impression gathered by the higher officers as it is impossible to prove by positive evidence that a particular officer is dishonest. This aspect is dealt with in *Union of India v. M.E. Reddy (1980) 2 SCC 15* wherein the Court (in para 17) held thus:

> "17. Mr Krishnamurty Iyer appearing for Reddy submitted that the order impugned is passed on materials which are non-existent inasmuch as there are no adverse remarks against Reddy who had a spotless career throughout and if such remarks would have been made in his confidential reports they should have been communicated to him under the rules. *This argument, in our opinion, appears to be based on a serious misconception.* In the first place, under the various rules on the subject it is not every adverse entry or remark that has to be communicated to the officer concerned. The superior officer may make certain remarks while assessing the work and conduct of the subordinate officer based on his personal supervision or contact. Some of these remarks may be purely innocuous, or may be connected with general reputation of honesty or integrity that a particular officer enjoys. *It will indeed be difficult if not impossible to prove by positive evidence that a*

particular officer is dishonest but those who have had the opportunity to watch the performance of the said officer from close quarters are in a position to know the nature and character not only of his performance but also of the reputation that he enjoys."

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73. ARBITRATION ACT, 1940- Section 13
Jurisdiction of arbitrator- Distinction between error within jurisdiction and error in excess of jurisdiction.
Bharat Coking Coal Ltd. Vs. Annapurna Construction
Judgment dt. 29-8-2003 by the Supreme Court in Civil Appeal No. 5647 of 1997, reported in (2003) 8 SCC 154

Held :

It is now well settled that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract.

In *Associated Engg. Co. v. Govt. of A.P., (1991) 4 SCC 93* this Court clearly held that the arbitrators cannot travel beyond the parameters of the contract. In *Sudarsan Trading Co. V. Govt. of Kerala, (1989) 2 SCC 38* this Court has observed that an award may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has been determined outside the award, whatever might be said about it in the award by the arbitrator. This Court further observed that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.

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74. EVIDENCE ACT, 1872- Section 24
Extra judicial confession- If found voluntary and credible can be the sole basis of the conviction- Law explained.
State of Rajasthan Vs. Raja Ram
Judgment dt. 13-8-2003 by the Supreme Court in Criminal Appeal No. 815 of 1996, reported in (2003) 8 SCC 180

Held :

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.

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, 168 ER 234*). 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 undersirability 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 undersirability 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 accued. 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 suppos-

ing 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.

If the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely from the basis of conviction. The requirement of corroboration as rightly submitted by the learned counsel for the respondent- accused, is a matter of prudence and not an invariable rule of law.

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75. CRIMINAL TRIAL :
Circumstantial evidence - Conviction can be based on circumstantial evidence- Law explained.
State of Rajasthan Vs. Kheraj Ram
Judgment dt. 22.8.2003 by the Supreme Court in Criminal Appeal No. 830 of 1996, reported in (2003) 8 SCC 224

Held :

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan, (1976) 2 SCC 99, Eradu v. State of Hyderabad ; AIR 1956 SC 316, Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330, State of U.P. v. Sukhbasi, AIR 1985 SC 1224, Balwinder Singh v. State of Punjab, (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P., AIR 1989 SC 1890*) The circum-

stances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab, AIR 1954 SC 62* it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offences home beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P., (1960) 10 SCC 193* wherein it has been observed thus: (SCC *pp. 206-07, para 21*)

> "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In *Padala Veera Reddy v. State of A.P., AIR 1990 SC 79* it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

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76. ARBITRATION ACT, 1940 :
Jurisdiction of arbitrator, objection regarding- Acceptance of awarded amount by a party- Effect.
Pooran Chand Nangia Vs. National Fertilizers Ltd.
Judgment dt. 8.10.2003 by the Supreme Court in Civil Appeal No. 1996 of 1998, reported in (2003) 8 SCC 245

Held :

We have heard the learned counsel for the parties. Only two questions which arise for our consideration are: (1) whether once the appellant having accepted the award, it is open to him to challenge the same on the ground that the arbitrator had no jurisdiction, and (2) whether the Deputy General Manager (Materials) was competent or has jurisdiction to enter into an arbitration.

So far as the first question is concerned, it is not disputed that the appellant had received the money which was due to him under the award and once the appellant had submitted to the award unequivocally and without reservation, it is not open to him to challenge the award. We have looked into the record and find that the appellant had submitted unequivocally to the jurisdiction of the arbitrator. He also accepted the awarded amount without any reservation. Had the appellant desired to challenge the award, he could have reserved his right to do so, but no such reservation was made in the letters sent by him. In this view of the matter, there remains no manner of doubt about the fact that the appellant had submitted to the award and it does not lie in the mouth of the appellant to challenge the award.

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77. INDIAN PENAL CODE, 1860- Section 201
Section 201, ambit, scope and applicability- Law explained.
Sou. Vijaya alias Baby Vs. State of Maharashtra
Judgment dt. 3.9.2003 by the Supreme Court in Criminal Appeal No. 901 of 1996, reported in (2003) 8 SCC 296 = 2004 (1) ANJ (SC) 43

Held :

Section 201 IPC presents a case of accusations after the fact. "An accessory after the fact" said Lord Hale, "may be, where a person knowing a felony to have been committed, receives, comforts, or assists the felon". (See 1 Dale 618.) Therefore, to make an accessory expost facto it is in the first place requisite that he should know of the felony committed. In the next place, he must receive, relieve, comfort, or assist him. And, generally any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment, makes the assister an accessory. What Section 201 requires is that the accused must have had the intention of screening the offender. To put it differently, the intention to screen the offender, must be the primary and sole object of the accused. The fact that the concealment was likely to have that effect is not sufficient, for Section 201 speaks of intention as distinct from a mere likelihood.

Section 201 punishes any person, who knowing that any offence has been committed, destroys the evidence of that offence or gives false information in order to screen the offender from legal punishment. Section 201 is designed to penalize "attempts to frustrate the course of justice".

Section 201 deals with the following two types of offences:

(1) Where the offender causes the evidence of the commission of the offence to disappear.

(2) Where the offender gives any information respecting the offence which he knows or believes to be false.

The ingredients of offence under Section 201 are:

(i) that an offence has been committed,

(ii) that the accused knew or had reason to believe the commission of such an offence,

(iii) that with such knowledge or belief he-

(a) caused any evidence of the commission of that offence to disappear, or

(b) gave any information relating to that offence which he then knew or believed to be false,

(iv) that he did so as aforesaid with the intention of screening the offender from legal punishment.

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78. CIVIL PROCEDURE CODE, 1908- Sections 11 and 151
Inherent power of Court when judgment or order obtained by fraud- Law explained.
Ram Chandra Singh Vs. Savitri Devi and others
Judgment dt. 9.10.2003 by the Supreme Court in Civil Appeal No. 8216 of 2003, reported in (2003) 8 SCC 319

Held :

In *S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1* this Court in no uncertain terms obseved: (SCC p. 5, paras 5-6)

> "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.
>
> * * *
>
> A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an

advantage. ... A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he witholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

In *Indian Bank v. Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550* this Court after referring to *Lazarus Estates* and other cases observed that since fraud affects the solemnity, regularity and orderliness of the proceedings of the court it also amounts to an abuse of the process of the court, that the courts have inherent power to set aside an order obtained by practising fraud upon the court, and that where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order (SCC p. 563, para 23). It was further held: (SCC pp. 562-63, para 22)

> "22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business."

Once it is held that a judgment and decree has been obtained by practising fraud on the court, it is trite that the principles of res judicata shall not apply.

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79. CIVIL PRACTICE :
Term "first hearing", meaning of- Ordinarily it means date when issues are determined- Law explained.
Mangat Singh Trilochan Singh and others Vs. Satpal
Judgment dt. 26.9.2003 by the Supreme Court in Civil Appeal No. 6605 of 2002, reported in (2003) 8 SCC 357

Held :

The contention advanced on behalf of the tenants that the arrears of rent were duly deposited within the specified period from the first effective "date of hearing" also gets support from the decision of this Court in the case of *Sham Lal.* In that case, the words "first hearing of the application", as used in Section 13 (2) (i) of the *East Punjab Urban Rent Restriction Act,* came up for interpretation. It was held that to promote the object of the legislation contained in the provisions, the expression used therein has to be construed reasonably. The use of the expression "first hearing" is held not to mean "the date fixed for return of

summons or the returnable date which is the day of appearance" of the parties before the court. See the following observations of this Court in above respect: (SCC p. 226, para 11)

> "11. It appears that there is consensus in regard to the interpretation of the expression 'first day' in the context of the rent legislations of several other States, for instance, the Gujarat High Court in *Shah Ambalal Chhotalal v. Shah Babaldas Dayabhai, AIR 1964 Guj 9* dealing with the identical question as to the meaning of the words 'the first day of the hearing of the suit' as provided in sub-section (3) (b) of Section 12 of Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 has observed after considering several decisions that, *'the words "the first day of hearing" as meaning not the day for the return of the summons or the returnable day, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence taken'."*

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80. N.D.P.S. ACT, 1985- Sections 42(2) and 41(2)
Section 42(2), nature of- Provisions of this Section are mandatory- Search and seizure by Gazetted Officer under Section 41 (2)- In such case Section 42(2) not applicable- Law explained.
M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence Judgment dt. 19-9-2003 by the Supreme Court in Criminal Appeal No. 486 of 2003, reported in (2003) 8 SCC 449

Held :

Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41 (2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-Section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open any door; remove obstruction, seize contraband, detain, search and arrest any person

between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of an emergent situation, these powers can also be exercised even between sunset and surise without obtaining a search warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under the proviso thereto, is required to be sent by the officer to his immediate superior official. It is clear from Section 41 (2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such a Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in a public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with an more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in *State of Punjab v. Balbir Singh, (1994) 3 SCC 299, Abdual Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513 and Beckodan Abdul Rahiman v. State of Kerala, (2002) 4 SCC 229* on the aspects under consideration are neither relevant nor applicable.

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81. SERVICE LAW :

Unauthorized absence from duty amounts to misconduct-Treating period of absence as leave without pay is not condonation of misconduct- Suspended employee is required not to leave station without headquarter permission.

State of Punjab and others Vs. Charanjit Singh
Judgment dt. 17-9-2003 by the Supreme Court in Civil Appeal No. 1768 of 2002, reported in (2003) 8 SCC 458

Held :

The learned counsel appearing for the appellants, inter ilia, urged that the view taken by the courts below that since the disciplinary authority has treated the period of absence as leave without pay, therefore, the misconduct stood condoned, is patently erroneous. The learned counsel also relied upon a decision of this Court in *Mann Singh v. Union of India, (2003) 3 SCC 464* . Having heard the learned counsel for the respondent, we find that the argument raised by the learned counsel for the appellants has merit.

In *State of Punjab v. Bakshish Singh, (1998) 8 SCC 222* which was relied upon by the courts below in holding that the misconduct stood condoned, was explained in *Mann Singh.* No law has been laid down in Bakshish Singh to the effect that only in the event, leave without pay is directed to be granted while passing an order of punishment, the leave having been regularised the order of punishment also becomes bad in law and void ab initio. While deciding *Bakshish Singh* this Court had not taken into consideration an earlier binding precedent in *State of M.P. v. Harihar Gopal, 1969 SLR 274 (SC)* wherein it has clearly been stated that such an order is passed only for the purpose of regularising the leave and thereby the effect of punishment is not wiped out. In Maan Singh it was held that the period of absence when treated as leave without pay, was with a view to regularise the leave and not for condonation of misconduct.

The submission of the learned counsel appearing for the respondent that since the respondent was under suspension, therefore, there was no occasion for him to seek permission for leave, is also erroneous. The order of suspension dated 24-11-1984 stipulated that the respondent shall remain present in police lines and will attend all the roll-calls and parades and he was further ordered not to leave station without prior permission.

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82. INDIAN PENAL CODE, 1860- Section 120-B
Criminal conspiracy, what amounts to- Proof of an overt act not necessary- Criminal conspiracy can be proved by circumstantial evidence.
Nazir Khan and others Vs. State of Delhi
Judgment dt. 22-8-2003 by the Supreme Court in Criminal Appeal No. 734 of 2003, reported in (2003) 8 SCC 461

Held :

As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution

because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120-B. *(See: Suresh Chandra Bahri v. State of Bihar, 1995 Supp. (1) Sec. 80.)*

Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. *(See : E.K. Chandrasenan v. State of Kerala, (1995) 2 SCC 99.)*

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83. WORDS AND PHRASES:

"Shall" or "may", use of words- Whether directory or mandatory depends upon purpose and object of the provision.

P.T. Rajan Vs. T.P.M. Sahir and others

Judgment dt. 26-9-2003 by the Supreme Court in Civil Appeal No. 3602 of 2002, reported in (2003) 8 SCC 498

Held:

A statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not dependent on the user of the words "shall" or "may". Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.

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84. INDIAN PENAL CODE, 1860- Sections 228-A, 375 and 376 to 376-D

(i) Rape- Victim's identity, disclosure of- Held, not to be disclosed in judgment or order.

(ii) Rape- To constitute rape, the slightest degree of penetration sufficient.

(iii) Appreciation of evidence in rape cases-Victim's testimony- Corroboration not to be insisted upon- Law explained.

(iv) Sentence, in cases of gang rape- Phrase "adequate and special reasons", meaning of- Mode of exercise of discretion- Law explained.

Bhupinder Sharma Vs. State of Himachal Pradesh
Judgment dt. 16-10-2003 by the Supreme Court in Criminal Appeal No. 1265 of 2002, reported in (2003) 8 SCC 551

Held :

(i) We do not propose to mention the name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short "IPC") makes disclosure of the identify of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment.

(ii) The offence of rape its simplest term is "the ravishment of a woman, without her consent, by force, fear or fraud", or as "the carnal knowledge of a woman by force against her will". "Rape" or "raptus" is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-B); or as expressed more fully, "rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will" (Hale PC 628). The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit;* but *carnaliter cognovit,* nor any other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape; [1 Hon. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628)]. In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation *(Stephen's Criminal Law, 9th Edn., p. 262).* In *Encyclopaedia of Crime and Justice* (Vol. 4, p.1356) it is stated "..... even slight penetration is sufficient and emission is unnecessary". In *Halsbury's Statutes of England and Wales* (4th Edn.) Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman- an outrage by all means. By the very nature of the offence it is an obnoxious of the highest order.

(iii) to insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. *(See State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550.)* Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

(iv) In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation 1 in relation to Section 376 (2) (g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC. *(See Pramod Mahto v. State of Bihar, 1989 Supp (2) SCC 672.)*

Both, in cases of sub-sections (1) and (2) the court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for "adequate and special reasons". If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum.

In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but special. What is adequate and special would depend upon several factors and no straitjacket formula can be imposed.

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85. CRIMINAL PROCEDURE CODE, 1973- Section 468
Limitation, computation of- Limitation is not for taking cognizance but for filing of complaint or initiation of prosecution.
Bharat Damodar Kale and another Vs. State of A.P.
Judgment dt. 8.10.2003 by the Supreme Court in Criminal Appeal No. 1251 of 2003, reported in (2003) 8 SCC 559

Held :

On facts of this case and based on the arguments advanced before us, we consider it appropriate to decide the question whether the provisions of Chapter XXXVI of the Code apply to the delay in instituting the prosecution or to the delay in taking cognizance. As noted above, according to the learned counsel for the appellants, the limitation prescribed under the above Chapter applies to taking of cognizance by the court concerned, therefore even if a complaint is filed within the period of limitation mentioned in the said Chapter of the Code, if the cognizance is not taken within the period of limitation the same gets barred by limitation. This argument seems to be inspired by the chapter heading of Chapter XXXVI of the Code which reads thus: "Limitation for taking cognizance of certain offences". It is primarily based on the above language of the heading of the Chapter, the argument is addressed on behalf of the appellants that the limitation prescribed by the said Chapter applies to taking of cognizance and not filing of complaint or initiation of the prosecu-

tion. We cannot accept such argument because a cumulative reading of various provisions of the said Chapter clearly indicates that the limitation prescribed therein is only for the filing of the complaint or initiation of the prosecution and not for taking cognizance. It of course prohibits the court from taking cognizance of an offence where the complaint is filed before the court after the expiry of the period mentioned in the said Chapter. This is clear from Section 469 of the Code found in the said Chapter which specifically says that the period of limitation in relation to an offence shall commence either from the date of the offence or from the date when the offence is detected. Section 470 indicates that while computing the period of limitation, time taken during which the case was being diligently prosecuted in another court or in appeal or in revision against the offender should be excluded. The said section also provides in the Explanation that in computing the time required for obtaining the consent or sanction of the Government or any other authority should be excluded. Similarly, the period during which the court was closed will also have to be excluded. All these provisions indicate that the court taking cognizance can take cognizance of an offence the complaint of which is filed before it within the period of limitation prescribed and if need be after excluding such time which is legally excludable. This in our opinion clearly indicates that the limitation prescribed is not for taking cognizance within the period of limitation, but for taking cognizance of an offence in regard to which a complaint is filed or prosecution is initiated beyond the period of limitation prescribed under the Code. Apart from the statutory indication of this view of ours, we find support for this view from the fact that taking of cognizance is an act of the court over which the prosecuting agency or the complainant has no control. Therefore, a complaint filed within the period of limitation under the Code cannot be made infructuous by an act of court. The legal phrase *"actus curiae neminem gravabit"* which means an act of the court shall prejudice no man, or by a delay on the part of the court neither party should suffer, also supports the view that the legislature could not have intended to put a period of limitation on the act of the court of taking cognizance of an offence so as to defeat the case of the complainant. This view of ours is also in conformity with the earlier decision of this Court in the case of *Rashmi Kumar.*

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86. ARBITRATION AND CONCILIATION ACT, 1996- Section 34
Arbitral award, setting aside of- Question regarding deficiency in stamping and registration not covered by Section 34- Such questions may be raised under Section 47 C.P.C.
M. Anasuya Devi and another Vs. M. Manik Reddy and others
Judgment dt. 16-10-2003 by the Supreme Court in Civil Appeal No. 7940 of 2001, reported in (2003) 8 SCC 565

Held :

Section 34 of the Act provides for setting aside of the award on the grounds enumerated therein. It is not in dispute that an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Act. The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act. In that view of the matter, the exercise undertaken to decide the said issue by the civil court as also by the High Court was entirely an exercise in futility. The question whether an award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act.

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87. INDIAN PENAL CODE, 1860- Section 376
Rape- Consent and submission, difference between- Submission always not indicative of consent.
Tulshidas Kanolkar Vs. State of Goa
Judgment dt. 27.10.2003 by the Supreme Court in Criminal Appeal No. 298 of 2003, reported in (2003) 8 SCC 590

Held :

A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving-in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, cannot be said in law, to have suffered sexual intercourses with consent.

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88. CRIMINAL PROCEDURE CODE, 1973- Section 397
Complainant's revision against reduction of sentence- Maintainability- Revision is maintainable.
K. Pandurangan Vs. S.S.R. Velusamy and another
Judgment dt. 18.9.2003 by the Supreme Court in Criminal Appeal No. 1682 of 1996, reported in (2003) 8 SCC 625

Held :

So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of the Code of Criminal Procedure, 1973, the court has suo motu power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judgment of this Court in the case of Nadir Khan v. State (Delhi Admn., (1975) 2 SCC 406).

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89. PREVENTION OF CORRUPTION ACT, 1988- Section 3
CRIMINAL PROCEDURE CODE, 1973- Section 223
Special Judge, jurisdiction of- Co-accused though not charged under the Act may be tried by Special Judge if offence committed in course of same transaction.
Vivek Gupta Vs. Central Bureau of Investigation and another
Judgment dt. 25-9-2003 by the Supreme Court in Criminal Appeal No. 1249 of 2002, reported in (2003) 8 SCC 628

Held :

The only narrow question which remains to be answered in whether any other person who is also charged of the same offence with which the co-accused is charged, but which is not an offence specified in Section 3 of the Act, can be tried with the co-accused at the same trial by the Special Judge. We are of the view that since sub-section (3) of Section 4 of the Act authorizes a Special Judge to try any offence other than an offence specified in Section 3 of the Act to which the provisions of Section 220 apply, there is no reason why the provisions of Section 223 of the Code should not apply to such a case. Section 223 in clear terms provides that persons accused of the same offence committed in the course of the same transaction, or persons accused of different offences committed in the course of the same transaction may be charged and tried together. Applying the provisions of Sections 3 and 4 of the Act and Sections 220 and 223 of the Code of Criminal Procedure, it must be held that the appellant and his co-accused may be tried by the special Judge in the same trial.

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90. N.D.P.S. ACT, 1985- Sections 35 and 54
"Possession", meaning of under the Act- Possession may be constructive- Possession whether conscious or not, determination of- Law explained.

Megh Singh Vs. State of Punjab
Judgment dt. 15-9-2003 by the Supreme Court in Criminal Appeal No. 452 of 2003, reported in (2003) 8 SCC 666

Held :

The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja (1979) 4 SCC 274* to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.

The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in *Gunwantlal v. State of M.P., (1972) 2 SCC 194* possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

The word "possession" means the legal right to possession (see *Heath v. Drown, (1972) 2 All ER 561*). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness, (1976) 1 All ER 844.*)

Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he come to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in *Madan Lal v. State of H.P., (2003) 7 SCC 465.*

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91. N.D.P.S. ACT, 1985- Section 21
Sentence- Offence and conviction prior to the date of the notification dt. 19-10-2001- Contraband 750 mg. of brown sugar- Accused sentenced to 10 years imprisonment and fine of Rs. 1 lakh- Conviction and sentence upheld- Held, benefit of the notification not available to the appellant/accused.
P.P. Fathima Vs. State of Kerala
Judgment dt. 4-11-2003 by the Supreme Court in Criminal Appeal No. 1012 of 2002, reported in (2003) 8 SCC 726

Held :

A perusal of the definition section clearly shows that brown sugar contains heroin which is a prohibited drug, possession of which is punishable under Section 21 of the Act. The argument that the quantity of brown sugar possessed by

the appellant did not amount to an offence, is based on a notification issued on 19-10-2001 which made a distinction between small quantity and commercial quantity in its Schedule. That notification will also not apply to the facts of the case because that notification came much later than the date offence which was on 3-8-1999, nearly 2 years before the issuance of that notification. At the relevant point of time this distinction between small quantity and commercial quantity not being there, the benefit of a subsequent notification would not be available to the appellant because she was convicted by the Special Judge of the offence as constituted before the notification in question came into force.

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92. CIVIL PROCEDURE CODE, 1908-O.6 R.1
Pleadings-Variance between pleadings and evidence, effect- Held, evidence cannot be looked into or relied upon.
Kashi Nath (Dead) Through L.Rs. Vs. Jaganath
Judgment dt. 5-11-2003 by the Supreme Court in Civil Appeal No. 6974 of 1996, reported in (2003) 8 SCC 740

Held :

From the judgments of the trial court, first appellate court and the High Court it is clear that there was no consistency so far as the claim regarding the adoption is concerned, particularly as to who and at what point of time it was made. The High Court has taken great pains to extract the relevant variations to indicate as to how it cut at the very root of the plaintiff's claim. As noted by the Privy Council in *Siddik Mohd. Shah v. Saran, AIR 1930 PC 57 (1)* and *Trojan and Co. v. Rm. N.N. Nagappa Chetiar, AIR 1953 SC 235* when the evidence is not in line with the pleadings and is it variance with it and as in this case, in virtual self-contradiction, adverse inference has to be drawn and the evidence cannot be looked into or relied upon.

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93. CIVIL PROCEDURE CODE, 1908- O.13 R.4
EVIDENCE ACT, 1872-Section 3

(i) Document, objection regarding admissibility and proof- Objection when and how to be taken- Law explained.

(ii) Expression "proved", "disproved" and "not proved"- Applicability in civil and criminal cases- Difference.

R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another.
Judgment dt. 8-10-2003 by the Supreme Court in Civil Appeal No. 10585 of 1996, reported in (2003) 8 SCC 752

Held :

(i) Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An

objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the court to the person from whose custody it was produced.

The learned counsel for the defendant-respondent has relied on *Roman Catholic Mission v. State of Madras, AIR 1966 SC 1457* in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

(ii) Whether a civil or a criminal case, the anvil for testing of "proved", "disproved" and "not proved", as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be "proved" when, if considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by the applicability of the rule, which makes the difference.

> "The probative effects of evidence in civil and criminal cases are not, however, always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. Best says: 'There is a strong and marked difference as to *effect* of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required.' (Best, § 95) While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See *Sarkar on Evidence, 15th Edn., pp. 58-59.*)

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94. CRIMINAL TRIAL :
Production of evidence - Duty of trial Court and prosecutor- The Court should not function as a spectator or mere recording machine.
Rameshchandra Agrawal Vs. State of M.P. and others
Reported in 2004 (1) ANJ (M.P.) 1=2003 (2) Vidhi Bhasvar 223

Held :

Now the crucial and important question before this Court is whether the A.G.P. has properly, effectively and consciously discharged his duty to bring all material and important evidence before the Court which is necessary for just decision of the case and whether the learned trial Court, after knowing these facts and the fact that witness Komalbai is an important and material witness in the fact and circumstances of the case, being mother of deceased daughter and letters written by the deceased prior to her death were seized by the police and also sent for handwriting expert examination but all those original letters and expert report was not field, right in rejecting the application filed by the applicant and allowing the prayer of A.G.P. to close the prosecution case.

Before dealing and answering both these questions, this Court would like to refer two important judgments. One is rendered by Division Bench of this Court in case of *Imran Khan vs. State of Madhya Pradesh (1994-MPLJ- 862)* and second one is rendered by Single Bench of this Court in case of *Raju @ Rajendra Prasad v. State of M.P. (2002-CRI. L.J.-2367).* In both these judgments, this Court has in detail dealt with sacrosanct duty of Prosecutor, who is incharge of the case and

power of the trial Court U/s. 311 Cr.P.C. and U/S. 165 Evidence Act. Copies of both these judgments were also directed to circulate in pursuance of the Administrative Order passed by the Hon'ble The Chief Justice to all Sessions Judges of this State.

In the case of *Imran Khan* (supra), in paragraph 14, Division Bench of this Court has considered and reproduced the observation made by Supreme Court in case of *Ramchander vs. The State of Haryana* (AIR-1981-SC-1036), as follows:

> "The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. But this he must do without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses".

In the case of *Raju @ Rajendra Prasad* (supra), this Court has in detail with the power of trial Court U/S. 311 Cr. P.C. and U/S. 165 of Evidence Act. Under these provisions, the learned trial Court has ample power and discretion to interfere and control the conduct of trial properly effectively and in the manner as prescribed by law. But it appears that the learned trial Court has not made proper use of both these judgments which were circulated for their future guidance.

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95. NEGOTIABLE INSTRUMENTS ACT, 1881- Section 142
Premature complaint- Cognizance can be taken on completion of prescribed period.
Bapulal Vs. Kripal Chand Jain
Reported in 2004 (1) ANJ (M.P.) 12

Held:

The Supreme Court in the case of *Narshinghdas Tapadia* (supra) has held that Section 142 of the Act prescribes a period within which the complaint can be filed from the date of cause of action arising under clause (c) of the proviso to Section 138 of the Act. But, no period is prescribed before which, the complaint cannot be filed and if filed, not disclosing the cause of action in terms of Clause (c) of the Proviso to Section 138 of the Act. The Court may not take cognizance till the time cause of action arises to the complainant. In this case, the Supreme Court has held that without having cause of action, premature complaint can be

filed but, cognizance cannot be taken by the concerned Court. If cognizance has been taken after arising of cause of action, there is no illegality committed by the trial Court and the complaint cannot be dismissed only on this score that the same was filed before arising of cause of action.

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96. CRIMINAL PROCEDURE CODE, 1973- Section 256
Complaint, dismissal of due to non-appearance of complainant- Discretion should be exercised judicially- Law explained.
Right Services, Ratlam Vs. Chhotu Bhaiya Road Lines, Ratlam and another
Reported in 2004 (1) ANJ (M.P.) 66

Held :

It has been held by the Supreme Court in relation to section 256 of the Code in the case of *Mohd. Azeem vs. A. Venkatesh and another, reported in (2002) 7 SCC 726,* that on one singular default in appearance on the part of the complainant, the dismissal of the complaint under Section 138 of the Negotiable Instruments Act is not proper. The cause shown by the complainant of his absence that he had wrongly noted the date should not have been disbelieved and it should have been held to be a valid ground for restoration of the complaint. The Supreme Court has further held that the learned Magistrate and the High Court had adopted a very strict and unjust attitude resulting in failure of justice and the Supreme Court has set aside the orders and restored the complaint and directed the Magistrate to proceed with the trial of the case after issuance of formal notices to both the parties.

Again in the case of *Associated Cement Co. Ltd. vs. Keshvanand, reported in AIR 1998 SC 596,* the Supreme Court has considered the scope of Section 256 of the Code in relation to the complaint filed under Section 138 of the Negotiable Instruments Act and has held as under :-

> "Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint

may not be a proper exercise of the power envisaged in the section, the discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

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97. HINDU MARRIAGE ACT, 1955 - Section 25
Permanent alimony, grant of- Dismissal of application does not amount to passing of decree within the meaning of this Section.
Prakash Chandra Vs. Rajkumari @ Jyoti
Reported in 2004 (1) ANJ (M.P.) 84

Held :

The object of Section 24 of the Act is to provide maintenance pendente lite to a party. Under section 24 of the Act the Court can grant maintenance and expenses of the proceedings to the wife or the husband during pendente lite of proceedings/petition, but Section 25 of the Act makes provision for grant of permanent alimony and maintenance for future after decree. The word appearing in Section 25 of the Act "at any time of passing any decree", have been interpreted by the various High Courts to the extent where decree, either for divorce or for restitution of conjugal rights or judicial separation if passed, then application for permanent alimony can be allowed and a decree for dismissal of the petition has not been regarded as passing of a decree within the meaning of this section. The expression "any decree" does not include an order of dismissal.

The Supreme Court in the case of *Chand Dhawan vs. Jawaharlal Dhawan, 1994 MPLJ 1* has held as under :-

> "Under the Hindu Marriage Act, 1955 the claim of a Hindu wife to permanent alimony or maintenance is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. When her marital status is to be affected or disrupted, the Court does so by passing a decree for or against her. On or at the time of the happening of that event, the Court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. The Court also retains the jurisdiction as subsequent stages to fulfil its incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The Court further retains the power to change or alter the order in view of the changed circumstances. The whole exercise is within the ambit of a diseased or a broken marriage. In order to avoid conflict of perceptions the Legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. Without the marital status being affected or disrupted by the matrimonial Court under

the Hindu Marriage Act, the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time then the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus."

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98. LAND REVENUE CODE, 1959 (M.P.)- Section 158
Pujari's interest in temple property, nature of- Property never vested in Pujari.
Jamana Prasad Vs. State of M.P.
Reported in 2004 RN 22 (HC)

Held :

There lies a difference between a Pujari of a temple and owner of temple. In former case a person is only there to take care of worship part of the deity having no power over the property itself. In other words, the property is never vested in the Pujari because he simply holds the office of Pujari. It goes with him. Here is a case where the dedication of the property is to a deity which is a perpetual minor and such dedication is permissible in law.

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99. MADHYA PRADESH MUNICIPALITY (DETERMINATION OF ANNUAL LETTING VALUE OF BUILDING/LAND) RULES, 1997- Rules 4, 5, 6, 10 and 11
Annual letting value, determination of, under Municipal Corporation Act, 1956 and Municipalities Act, 1961- The dictum laid down in Ratnaprabha's case no more effective and binding- Law explained.
Sakhi Gopal Agrawal and others Vs. State of M.P. and others
Reported in 2004 (1) JLJ 26

Held :

The combined rules which have been framed for determination of the annual letting value of building/land are required to be referred to at this stage. The rules which have been referred to by the learned Counsel for the petitioners to show that they are basically irrational and sensitively pregnable are Rules 4, 5, 6, 10 and 11.

In view of the aforesaid, we cannot accede to the submission of the learned Counsel for the petitioners that once there is provision of fixation of standard rent under the M.P. Accommodation Control Act, that must be the sole criterion as laid down in *Ratnaprabha* (supra). By virtue of the amendment that has come into existence in both the statutes a complete code has come into being. In view of the aforesaid, we are of the considered opinion that the classification made, the guidelines given, the guidance provided create an inbuilt mechanism for the assessment of the property tax and we do not perceive any kind of unreasona-

bleness or arbitrariness or irrationality which would be defiant of Article 14 of the Constitution. In view of the aforesaid we find that the provisions being a complete code accentuating on the conception of reasonableness it itself, the said reasonableness is not to be controlled or governed by the provisions of M.P. Accommodation Control Act. The Municipal Corporation is not bound under the obtaining legislative provisions of the M.P. Accommodation Control Act. The concept of standard rent does not play the centripodal or the pivotal role. However, we may hasten to add, it would be a factor to be taken note of while passing the resolution as the statute has engrafted the words 'other relevant factors' which have an inseparable and insegregable nexus with fixation of the annual letting value of the building per square foot. However, it is imperative to clarify that the standard rent fixed in respect of a singular house in a zone would not persuade the Municipality in the matter of determination. There has to be fixation of standard rent in respect of cluster of houses to have the impact and effect on resolution. The singular fixation should succumb to the cluster quotient which have a role in the zonal system. As we have held that sections 126 (1) and 138 (2) are totally reasonable and do not offend Article 14 of the Constitution, we irresistibly come to the conclusion that the effect and import of *Ratnaprabha* (supra) which has been followed in *Indian Oil Corporation Ltd.* (supra) have lost their effectiveness and binding nature inasmuch as the base of the aforesaid decisions have been removed by the legislative amendment which has fundamentally altered the situation.

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100. LAND REVENUE CODE, 1959 (M.P.)- Section 116
Revenue entries- Entries made by Settlement Officer during revenue survey cannot be corrected by Tahsildar under Section 116.
Shivnath Prasad Shrivastava & Ors. Vs. Board of Revenue & Ors.
Reported in 2004 (1) MPJR SN 1

Held :

Obviously Section 115 and 116 are closely related to Section 114 and thus the Tahsildar under Section 116 has power to correct only those wrong or incorrect entires in the land records which are prepared by an officer subordinate to him. However, it is note worthy that field map has to be prepared or revised by the settlement officer at the time of revenue survey and by the Collector at all other times and in all other circumstances. Obviously neither the settlement officer nor the Collector is a subordinate to a Tahsildar and thus, the Tahsildar can have no power to correct any entry made in preparation or revision of the field map.

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101. Civil Procedure Code, 1908- O.41 R. 23 and 23-A
Remand, power of- The power should be exercised sparingly.
Shri Deo Raghunathji Bada Mandir Vs. Prahlad Singh and another
Reported in 2003 (4) MPLJ Note 27

Held :

The power of remand should be exercised sparingly. Endeavour of the appellate Court should be to dispose of the case itself. 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 aspects 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 reverse gear. If the appellate Court finds the findings of the trial Court erroneous or faulty it has the power to give its own findings. In the present case remand was not called for either under Rule 23 or 23-A of Order 41, Civil Procedure Code. The appellate Court has not said that the re-trial is considered necessary. AIR 1999 SC 1125, Rel.

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102. Criminal Procedure Code, 1973- Sections 353, 354 and 374
Judgment includes punishment- Right of appeal against conviction not available unless consequential sentence is passed.
Santosh Vs. State of M.P.
Reported in 2003 (4) MPLJ 412

Held :

Conjoint reading of both the sections in substance mean that the judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. While doing so, either the whole judgment is delivered or read or operative part thereof may be read out and substance of the judgment explained in the language understandable by the accused or his pleader. The whole judgment is to be made available to the accused in case of conviction with a view to enable him to challenge the same. Under section 354, judgment includes punishment. The trial is concluded by the pronouncement of the judgment and not by mere recording of conviction, judgment being part of the trial. With this background, section 374 of Chapter XXIX is to be understood. This view finds support from the Apex Court decision in *Ram Narang v. Ramesh Narang and others, 1995 (2) SCC 513.* In paragraph 15, Ahmadi, learned Chief Justice said :

> "P.15.... An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation, which are capable of execution and which, if not suspended, would be required to be executed by the authorities. Since the order of conviction does not on the mere filing of an appeal disappear it is difficult to accept the sub-

mission that section 267 of the Companies Act must be read to apply only to a "final order of conviction.' Such an interpretation may defeat the very object and purpose for which it came to be enacted....."

Another decision with similar view is reported in *Nanda Chhittar vs. State of Rajasthan, 1982 RLR 223.* It is held that expression 'conviction' or 'convicted' in section 374, Code of Criminal Procedure, means a finding of guilt of a person of an offence and some consequential order. Hence, the accused cannot get right of appeal against the conviction merely on finding of guilt and before any consequential sentence is passed. Consequently, we hold that this appeal is not maintainable, therefore, dismissed.

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103. Evidence Act, 1872- Section 108

Presumption of death under Section 108-When such presumption available.

M.P. State Co-operative Marketing Federation Ltd. Vs. Aruna Pyasi Reported in 2003 (4) MPLJ 463

Held :

Learned Senior Advocate, submits that under section 108 of the Evidence Act, there is no presumption with respect to date/time of death, though there may be presumption of death. The presumption will arise on the date the question is raised by initiating proceedings, meaning thereby, raising of claim. Reliance was placed on some decisions, namely : *Appula Vadhyar Narayana Vadhyar vs. Venkateswara Vadhyar and others, AIR 1971 Kerala 85, Kottapalli Venkateswarlu vs. Kottapalli Bapayya and others, AIR 1957 A.P. 380, Mst Rajula Bai vs. Suka, 1971 MPLJ 1014 and Union of India vs. Joginder Sharma, (2002) 8 SCC 65,* we find no force in these submissions. In our casidered opinion, section 108 of the Evidence Act raises a presumption of death and continuous absence for 7 years and not the time the question is raised or suit instituted. The party on whom the burden is placed to prove the absentee, cannot get rid of that burden. A person may be treated as dead after the expiry of 7 years from the date he was last heard of and the party relying on the presumption is entitled to succeed if no evidence is offered by the opponents to the death. (See *Narayan Nayak vs. SBI, 2002 (III) LLJ 181*). Even otherwise, Court may, in the circumstances of each case, make a presumption even regarding time of death.

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104. Motor Vehicles Act, 1988- Section 166

Dependency of Parents- Dependency will be 1/3rd of income of the deceased- Law explained.

Halkibai and anothar Vs. Managing Director, Rajasthan State Road Transport Corporation and another

Reported in 2003 (4) MPLJ 466 (DB)

Held :

As regards determining the dependency of the mother of the deceased is concerned, this question has already been settled by the Apex Court in the case of *Donat Louis Machado (supra)*. This judgment was considered by this Court in a recent decision in the case of *Parathsingh Vs. Sanjay Sharma, 2003 (1) TAC 103 (M.P.) and in Misc. Appeal No. 291/03, Rajesh and others vs. Rajesh alias Pappu and others decided on 18-8-2003* and ratio has been laid down that in the case of parents of the deceased, dependency will be 1/3rd of the income of the deceased at the time of his death. The judgment of the Apex Court is binding upon this Court and there is no reason to differ from the said judgment. Therefore, we hold that the dependency of the parents of the deceased shall be 1/3rd of the income of the deceased. This view has been taken by various Division Benches and this being consistent view, we do not wish to differ from it.

Claimants have referred to judgment of the Apex Court in the case of *Ashar Hussain Khan vs. New India Assurance Co. Ltd., JT 2001* (Suppl. 2) SC 129 and submitted that at the time of death, deceased was unmarried and the Apex Court has held that the Tribunal ought not to have considered as if he was married and it ought to have determined his contribution towards family would be at least Rs. 16,000/- per annum whereas income of the deceased was Rs. 2000/- per month i.e. Rs. 24,000/- per annum. But in this judgment, earlier judgment of the Apex Court in the case of *Donat Louis Machado* (supra) was not considered. Therefore, the law laid down earlier will prevail.

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105. Negotiable Instruments Act, 1881- Section 138 Proviso (b) Notice, requirement of under Section 138 Proviso (b)- More than one cheque dishonoured- Consolidated notice not bad, however, demand of cheque amount should be specific.
K.R. Indira Vs. Dr. G. Adinarayana
Reported in 2003 (4) MPLJ 480 (SC) = (2003) 8 SCC 300

Held :

Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In *Suman Sethi* case (supra) on considering the contents of the notice, it was observed that there was specific demand in respect of the amount covered by the cheque and the fact that certain additional demands incidental to it, in the form of expenses incurred for clearance and notice charges were also made, did not vitiate the notice. In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishon-

oured mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand were also found to have been made may not invalidate the same. This position could not be disputed by the learned counsel for the respondent. However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount, not could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case.

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106. Criminal Procedure Code, 1973- Sections 107 and 111
Preliminary order under Sections 111 and 107- Order passed in cyclostyled form- Lack of application of mind manifest- Held, order bad in law.
Jagandeep Singh Anand and others Vs. Director General of Police, Bhopal and others
Reported in 2003 (4) MPLJ 495

Held :

Section 107, Criminal Procedure Code requires formation of an opinion of existence of sufficient ground for proceeding under the section which requires application of mind. Section 111 of Criminal Procedure Code also requires an order to be passed in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force. The order in writing means due application of mind has to be made on the material on record. Substance of the information has to be mentioned. I find in the preliminary order drawn on 15-11-2002 under sections 111 and 107 of Criminal Procedure Code that substance of the information has not been mentioned, name has been mentioned and thereafter only the words "वाद विवाद" have been mentioned. What is the nature of dispute has not been mentioned. It cannot be said to be a recording of substance of information received. Remaining form is a cyclostyled one.

This Court has considered the question in W.P. No. 5095/2002 decided on 24.1.2003 of passing such cyclostyled orders. In para 4 it was held, thus:-

> "4. After hearing learned counsel for the parties and perusing the various documents, it is clear that notice R-1 is issued in cyclostyled proforma and proforma was meant to be used in a case under section

107/116, Criminal Procedure Code by scoring out that section 110 has been mentioned. There is no application of mind made by the SDM before issuing the notice R-1 as to activity of petitioner. The preliminary order P-6 is also in cyclostyled form. No reasons have been mentioned with respect to petitioner. Mind has not been applied to the facts of the case. Even in the police report R-3, no immediate conduct was mentioned which may have occasioned apprehension to breach of peace. Thus, in my opinion the slipshod and mechanical method and manner has been adopted by SDM to initiate proceedings and the kind of report which is vague on which the proceedings have been initiated against the petitioner is wholly unsatisfactory method and on the basis of such vague report section 110, Criminal Procedure Code cannot be resorted to until unless there is eminent apprehension of breach of peace."

In the instant case, it has been found that mind has not been applied, preliminary order has not been drawn as required under section 111, Criminal Procedure Code, mind has also not been applied to the complaint, thus, I find that initiation of proceedings is bad in law.

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107. Motor Vehicles Act, 1939- Section 110

Compensation, determination of- Compensation is relatable to the loss of contribution- Claimant's father and mother of 47 and 43 years respectively- Deceased unmarried- Parents having separate earnings- Held, multiplier cannot exceed 10 even by the most liberal standards. The Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and another

Reported in 2003 L.T. (SC) 114

Held :

So far as the quantum of compensation is concerned we find that at the time of accident, as revealed from the claim petition, the claimants were 47 years and 43 years respectively. It is not the age of the deceased alone but the age of the claimants as well which are to be the relevant factors, in case parents or other dependents are claimants.

In *Lata Wadhwa and Ors. v. State of Bihar & Ors, and M.S. Grewal and Anr. v. Deep Chand Sood and Ors.,* law on the principles of assessment of compensation was elaborated. In *Lata Wadhwa's case* (supra) this Court while dealing with the issue in relation to the compensation to be paid in relation to the death of children, placing reliance upon the decision of Lord Atkinson in *Taff Vale Railway Company v. Jenkins,* has ruled that "In cases of death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parents claim

and propective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefits if the child had lived."

This Court in *M.S. Grewal's case* (supra) has clearly observed that the decision in *Lata Wadhwa's case* (supra) is definitely a guiding factor in the matter of award of compensation wherein children died under an unfortunate accident. The said observation was made after taking into consideration the conclusions arrived in *Lata Wadhwa's case* (supra) regarding the compensation which was to be paid and the multiplier which was to be applied in relation to the death of a child. This Court in *General Manager, Kerala State Road Transport Corporation v. Susamma Thomas and Ors.,* held that the proper method of compensation is the multiplier method, and the same view was reiterated in *M.S. Grewal's case* (supra) observing that "needless to say that the multiplier method stands accepted by this Court in the said decision".

Keeping in view the observations made by this Court in various cases, several other factors need to be taken note of. The deceased was unmarried. The contribution to the parents who had their separate earnings being employed and educated have relevance. The possibility of reduction in contribution once a person gets married is a reality. The compensation is relatable to the loss of contribution or the pecuniary benefits. The multiplier adopted by the Tribunal and confirmed by the High Court is certainly on the higher side. Considering the age of the claimants it can never exceed 10 even by the most liberal standards.

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108. CIVIL PROCEDURE CODE, 1908- O. 27 R. 5-B

Government/Public Officer acting in his officiating capacity is a party to the suit or proceeding- Court's suo motu duty to make every effort, and to assist the parties for amicable settlement-No obligation on the parties to pray for it-Law explained.

Parvatsingh Chouhan & Ors. Vs. Union of India & Ors.

Order dated 27.1.2004 by High Court of Madhya Pradesh Bench at Indore in W.P. No. 9675 of 2003

Held :

Perusal of aforequoted rule would clearly indicate the legislative intent that lies behind the rule. It casts a duty on the court to make, in the first instance every endeavour to assist the parties to the suit to arrive at a settlement in respect of the subject matter of the suit, if the court finds that one of the party to the suit is Government or a public officer acting in his official capacity. In other words the rigour of order 27 Rule 5-B is attracted the moment, the courts finds that claim of Government is involved in the suit. The Rule therefore cast an obligation on the court as its duty to see or/and make

sincere endeavour to find out or/and assist the parties to settle the dispute involved in the suit rather than to allow the parties to fight it like two private parties does in every litigation.

In fact it is not even necessary as the rule suggest that court should wait or call upon the parties to invoke the provisions of Rule 5-B and then initiate the efforts to settle the dispute. The power conferred by this rule is required to be invoked suo motu by the court and without waiting for the parties to take its recourse. In other words, the power conferred by Rule is required to be issued by the court of its own notwithstanding the fact as to whether parties, to the suit take recourse to this provision or not? Indeed the use or the expression **"It shall be the duty of the court to make, in the first instance"** clearly indicate and makes it obligatory upon the court that no sooner the suit is filed by or against the Government or any public officer in his official capacity there the court should embark upon the task to find out whether it is possible and if so on what terms and conditions, the parties to the suit can be asked to come to terms depending upon the nature and circumstances of the case which will result in disposal of suit amicably. In tact, the further use of the word **"assist the parties in arriving at a settlement"** also indicate that it must appear that the court really assisted the parties to settle the matter. It is thus not a provision meant to be invoked by the parties as such nor it is a provision enabling the parties to claim any relief against each other pending suit. But it is a provision meant for the court to examine the issue involved in the suit and then call upon the parties to arrive at a settlement if it is so permissible in the facts and circumstances of the case and consistent with the nature and circumstances of the case. Indeed sub-rule 2 and 3 makes this intention clear when it further empowers the court to adjourn the case if it finds that there is some possibility for settlement so that they are able to settle their dispute involved in the suit.

In my considered opinion, the sole object behind enacting this rule is to avoid litigation as far as possible where the state or government is involved. It being a settled rule of interpretation that when the language of rule is clear and unambigious the effect must be given to the words to accomplish the object of the Rule. This principle, in my view, must be applied while exercising the power under this Rule.

It is only when the court finds that despite several opportunities granted by the court, the parties are not able to come to term or that the nature of dispute is such that it does not enable the parties to settle or that if allowed, it will amend some provision of law which is in force, then only, the efforts for settlement should be given up and matter be decided on merits.

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PART - III

CIRCULARS/NOTIFICATIONS

Published in the Gazette of India Extraordinary, Part II, Section 3 (i), No. 268, dated 9th June, 2003.

MINISTRY OF LAW AND JUSTICE

No. G.S.R. 467 (E), dated 9th June, 2003.— In exercise of the powers conferred by section 15 of the Notaries Act, 1952 (53 of 1952), the Central Government hereby makes the following rules further to amend the Notaries Rules, 1956, namely :—

1. (1) These rules may be called the Notaries (Amendment) Rules, 2003.

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

2. In the Notaries Rules, 1956, in Form IIB appended thereto, for the words and brackets "Secretary to the Government of India/Government of.... (Name of the State)", the words and brackets" Joint Secretary to the Government of India/ Secretary to the Government of.... (Name of the State)" shall be substituted.

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Published in the Gazette of India, Extraordinary, Part II, Section 3 (ii), No. 280, dated 28th March, 2003

MINISTRY OF ENVIRONMENT AND FORESTS

No. S.O. 332 (E), dated 28th March, 2003.— In exercise of the powers conferred by sub-section (2) of Section 1 of the Wild Life (Protection) Amendment Act, 2002 (16 of 2003), the Central Government hereby appoints the 1st day of April, 2003 as the date on which all the provisions except Section 6 of the said Act shall come into force.

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Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 471, dated 29th September, 2003.

MINISTRY OF HEALTH AND FAMILY WELFARE

No. G.S.R. 771 (E), dated 29th September, 2003.— Whereas a draft of certain rules further to amend the Prevention of Food Adulteration Rules, 1955, was published, as required by sub-section (1) of Section 23 of the **Prevention of Food Adulteration Act, 1954)** (37 of 1954), at pages 1 to 4 in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i), dated the 9th April, 2003 under the notification of the Government of India in the Ministry of Health and Family Welfare (Department of Health), Number G.S.R. 322 (E), dated the 9th

April, 2003 inviting objections and suggestions from all persons likely to be affected thereby before the expiry of a period of sixty days from the date on which copies of the Official Gazette containing the said notification, were made available to the public;

And whereas copies of the said Gazette were made available to the public on 10th April, 2003;

And whereas objections and suggestions received from the public within the specified period on the said draft rules have been considered by the Central Government;

Now, therefore, in exercise of the powers conferred by Section 23 of the said Act, the Central Government, after consultation with the Central Committee for Food Standards, hereby makes the following rules further to amend the Prevention of Food Adulteration Rules, 1955, namely :—

1. (1) These rules may be called the **Prevention of Food Adulteration (Third Amendment) Rules, 2003.**

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

2. In the Prevention of Food Adulterlation Rules, 1955 (hereinafter referred to as the principal rules), after Part XVII- Irradiation of Food and entries relating thereto, the following shall be inserted, namely :-

"PART XVIII

ANTIBIOTIC AND OTHER PHARMACOLOGICALLY ACTIVE SUBSTANCES

79. Residues of antibiotic and Other Pharmacologically Active Substances.—

(1) The amount of antibiotic mentioned in column (2), on the sea foods including shrimps, prawns or any other variety of fish and fishery products, shall not exceed the tolerance limit prescribed in column (3) of the table given below :-

TABLE

S.No.	Name of Antibiotics	Tolerance limit mg/kg (ppm)
(1)	(2)	(3)
1.	Tetracycline	0.1
2.	Oxytetracycline	0.1
3.	Trimethoprim	0.05
4.	Oxolinic acid	0.3

(2) The use of any of the following antibiotics and other Pharmacologically Active Substances shall be prohibited in any unit processing sea foods including shrimps, prawns or any other variety of fish and fishery products:—

(i) All Nitrofurans including
  (a) Furaltadone
  (b) Furazolidone
  (c) Furylfuramide
  (d) Nifuratel
  (e) Nifuroxime
  (f) Nifurprazine
  (g) Nitrofurnation
  (h) Nitrofurazone

(ii) Chloramphenicol

(iii) Neomycin

(iv) Nalidixic acid

(v) Sulphamethoxazole

(vi) Aristolochia spp and preparations thereof

(vii) Chloroform

(viii) Chloropromazine

(ix) Colchicine

(x) Dapsone

(xi) Dimetridazole

(xii) Metronidazole

(xiii) Ronidazole

(xiv) Ipronidazole

(xv) Other nitromidazoles

(xvi) Clenbuterol

(xvii) Diethylstibestrol (DES)

(xviii) Sulfanoamide drugs (except approved Sulfadimethoxine, Sulfabromomethazine and Sulfaethoxypyridazine)

(xix) Fluoroquinolones

(xx) Glycopeptides".

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मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

क्रमांक 17- (ई) 83/93/21-ब-1 भोपाल, दिनांक 15 फरवरी 1997

प्रति,

रजिस्ट्रार जनरल,
म.प्र. उच्च न्यायालय,
जबलपुर

विषयः- चुनाव ड्यूटी से न्यायिक अधिकारियों/कर्मचारियों को छूट प्रदाय करने बाबत्।

कृपया उपरोक्त विषयक अपने अर्धशासकीय पत्र क्रमांक 2066/11-15-32/89 दिनांक 11.10.96 का अवलोकन करें।

उक्त पत्र के संदर्भ में निवेदन है कि न्यायिक अधिकारियों एवं कर्मचारियों की चुनाव ड्यूटी मा. मुख्य न्यायाधिपति महोदय की अनुमति की बगैर नहीं लगाई जाती है। उक्त निर्देश का निर्वाचन पुस्तिका 1996 में स्पष्ट उल्लेख है।

अतिरिक्त सचिव,
मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

●

कार्यालय महालेखाकार (लेखा एवं हक) द्वितीय मध्यप्रदेश, ग्वालियर

क्रमांक निधि 3/संवितरण प्रमाण पत्र/ 1194 दिनांक 10.11.2003

प्रति,

एडीशनल रजिस्ट्रार,
उच्च न्यायालय मध्यप्रदेश,
जबलपुर।

विषयः- सेवा निवृत्त अभिदाताओं को सा.भ.निधि के प्राधिकार पत्र जारी करने के उपरांत संवितरण प्रमाण पत्र भेजने बावत्।

महोदय,

इस कार्यालय द्वारा सेवा निवृत्त अभिदाताओं को सा.भ.निधि के अंतिम भुगतान हेतु आहरण एवं संवितरण अधिकारियों को प्राधिकार पत्र जारी किया जाता है। प्राधिकृत राशि के भुगतान के पश्चात् सभी आहरण एवं संवितरण अधिकारियों का संवितरण प्रमाण पत्र इस कार्यालय को प्रेषित करना चाहिए। परन्तु यह पाया गया है कि कुछ अपवाद को छोड़कर प्रायः किसी भी प्रकरण में वांछित संवितरण प्रमाण-पत्र प्राप्त नहीं हो रहे हैं।

अतः आपसे अनुरोध है कि सभी अधीनस्थ आहरण एवं संवितरण अधिकारियों को यह पुनः निर्देशित करें कि इस कार्यालय द्वारा जारी समस्त प्राधिकार पत्रों में भुगतान के उपरान्त संलग्न प्रारूप में संवितरण प्रमाण पत्र अनिवार्य रूप से प्रेषित किया जावे।

सही/-
वरिष्ठ लेखा अधिकारी/निधि-3

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CONSTITUTION (EIGHTY-NINTH AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on September 28, 2003 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 55, dated 30th September, 2003.

An Act further to amend the Constitution of India.

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

1. Short title and commencement.— (1) **These** Act may be called **the Constitution (Eighty-ninth Amendment) Act, 2003.**

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

2. Amendment of Article 338.— In Article 338 of the constitution,—

(a) for the marginal heading, the following marginal heading shall be substituted, namely :—

"National Commission for Scheduled Castes";

(b) for clauses (1) and (2), the following clauses shall be substituted, namely :—

"(1) There shall be a Commission for the Scheduled Castes to be known as the National Commission for the Scheduled Castes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine";

(c) in clauses (5), (9) and (10), the words "and Scheduled Tribes", wherever they occur, shall be omitted.

3. Insertion of new Article 338-A.— After Article 338 of the Constitution, the following article shall be inserted, namely :—

"338-A. National Commission for Scheduled Tribes.— (1) There shall be a Commission for the Scheduled Tribes to be known as the National Commission for the Scheduled Tribes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.

(3) The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.

(4) The Commission shall have the power to regulate its own procedure.

(5) It shall be the duty of the Commission—

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Tribes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause (5) have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely :—

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisition any public record or copy thereof from any court or office;

(e) issuing commission for the examination of witnesses and documents;

(f) any other matter which the President may, by rule, determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes".

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THE PREVENTION OF INSULTS TO NATIONAL HONOUR (AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on 8th May, 2003 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 34, dated 9th May, 2003.

INDIAN PARLIAMENT ACT NO. 31 OF 2003

An Act to amend the Prevention of Insults to National Honour Act, 1971.

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

1. Short title.— This Act may be called **the Prehension of Insults to National Honour (Amendment) Act, 2003.**

2. Amendment of section 2.— In section 2 of the Prevention of Insults to National Honour Act, 1971 (69 of 1971) (hereinafter referred to as the principal Act),—

(a) for the words "otherwise brings", the words "otherwise shows disrespect to or brings" shall be substituted;

(b) after Explanation 3, the following Explanation shall be inserted, namely:-

'*Explanation* 4.— The disrespect to the Indian National Flag means and includes —

(a) a gross affront or indignity offered to the Indian National Flag; or

(b) dipping the Indian National Flag in salute to any person or thing; or

(c) flying the Indian National Flag at half-mast except on occasions on which the Indian National Flag is flown at half-mast on public buildings in accordance with the instructions issued by the Government; or

(d) using the Indian National Flag as a drapery in any form whatsoever except in State funerals or armed forces or other para-military forces funerals; or

(e) using the Indian National Flag as a portion of costume or uniform of any description or embroidering or printing it on cushions, handkerchiefs, napkins or any dress material; or

(f) putting any kind of inscription upon the Indian National Flag; or

(g) using the Indian National Flag as a receptacle for receiving, delivering or carrying anything except flower petals before the Indian National Flag is unfurled as part of celebrations on special occasions including the Republic Day or the Independence day; or

(h) using the Indian National Flag as covering for a statute or a monuments or a speaker's desk or a speaker's platform; or

(i) allowing the Indian National Flag to touch the ground or the floor or trail water intentionally; or

(j) draping the Indian National Flag over the hood, top and sides or back or on a vehicle, train, boat or an aircraft or any other similar object; or

(k) using the Indian National Flag as a covering for a building; or

(l) intentionally displaying the Indian National Flag with the "saffron" down.'.

3. Insertion of new section 3A.— After section 3 of the principal Act, the following section shall be inserted, namely :—

"3A. Enhanced penalty on second and subsequent convictions.— Whoever, having already been convicted of an offence under section 2 or section 3, is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year".

BHOPAL, THE 25TH FEBRUARY 2004

No. 3 (A)-19-2003-XXI-B(1).— In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh hereby makes the following Rules, namely :-

RULES

1. Short Title and Commencement.— (1) These Rules may be called the Madhya Pradesh Judicial Service Revision of Pay Rules, 2003.

(2) They shall be deemed to have come into force on the First day of January, 1996.

2. Extent of Application.— These Rules shall apply to all the Members of Madhya Pradesh Higher Judicial Service and Lower Judicial Service.

3. Definitions.— In these Rules, unless the context otherwise requires :—

(a) "Basic Pay" means pay as defined in Rules 9 (21) (a) (i) of the Madhya Pradesh Fundamental Rules;

(b) "Cadre"means the strength of service or a part of service sanctioned as a separate unit;

(c) "Existing Post" means the post mentioned in column (2) of the Schedule;

(d) "Existing Scale" means the scale of pay mentioned in column (3) of the Schedule ;

(e) "Form" means form appended to these rules;

(f) "Government" means the Government of Madhya Pradesh;

(g) "Revised Post" in relation to any post mentioned in column (2) of the Schedule means the post specified against that post in column (5) thereof;

(h) "Revised Scale" in relation to any post mentioned in column (5) of the Schedule means the scale of pay specified against that post in column (6) thereof;

(i) "Schedule" means Schedule appended to these Rules;

(j) "Service" means Madhya Pradesh Higher Judicial Service and Lower Judicial Service.

4. Revised Scale of Pay.— From the date of commencement of these Rules, the scale of pay of every post carrying existing scale of pay shall be as specified in the corresponding entry in Column (6) of the Schedule. The Notional pay would be worked out from 1st January, 1996, without giving the actual financial benefit flowing there from. The actual benefit shall accrue w.e.f. 1st of July 1996. Monetary benefit enjoyed w.e.f. 1st January 1996 by the Judicial Officers under the existing Madhya Pradesh revision of Pay Rules, 1998 shall be accordingly adjusted against the arrears of pay as a result of revised fixation of pay under these rules.

5. Drawal of Pay in the revised Scale of Pay.— Save as otherwise provided in these rules, a Judicial Officer shall draw pay in the revised scale applicable to the post to which he is appointed:

Provided that a Judicial Officer may elect to continue to draw pay in the existing scale until the date on which he earns his next or subsequent increments in the existing scale or until he vacate his post or ceases to draw pay in that scale.

Explanation (1).—The option to retain the existing scale under the proviso to this rule shall be admissible only in respect of one existing scale.

Explanation (2).—The aforesaid option shall not be admissible to any member of Judicial service appointed to a post on or after 1st day of January, 1996, whether for the first time in Government Service or be transfer or promotion from another post and he shall be allowed pay only as admissible in the revised scale.

Explanation (3).— Where a member of Judicial Service exercises the option under the proviso to this rule to retain the existing scale in respect of a post held by him in an officiating capacity on a regular basis, for the purpose of regulation of pay in that scale under Fundamental Rules 22 or 31, his substantive pay shall be the substantive pay which he would have drawn had he retained the existing scale in respect of the permanent post on which he holds a lien or would have held a lien had his lien not be suspended.

6. Exercise of Option.— (1) the option under the proviso to rule 5 shall be exercised by a member of Judicial Service in writing in the "Form" appended to these rules within three months from the date of publication of these rules or where an existing scale has been revised by any order made subsequent to that date, within three months, from the date of such order:

Provided that—

(a) in case of a member of Judicial Service who on the date of publication of these rules or, on the date of such order, as the case may be, is on leave or on deputation outside the State or on foreign service out of India, may exercise the said option within the time limit prescribed under this rule or within three months from the date of his taking over charge under the State Government;

(b) where a member of Judicial Service is under suspension on the 1st day of January, 1996, the option may be exercised within three months from the date of his return to duty, if that date is later than the dates prescribed in this sub-rule;

(c) further, where a member of Judicial Service was on duty as on 1st January 1996 and was suspended subsequently and is still under suspension on the date of publication of these Rules, the option may be exercised in the manner as prescribed in clause (b) ;

(d) those members of Judicial Service retiring after 1st January 1996 and before publication of these rules shall also exercise option under this rule.

(2) The option shall be communicated by the member of the judicial Service to the Head of Office, (who draws his pay and allowances) with copies thereof the Head of the Department and the Administrative Department under which he may be serving at the time and if he himself is the Head of Office, to the immediate official superior with copies thereof to the Head of the Department and the Administrative Department under which he is serving at that time.

(3) On receipt of option, the date of its receipt shall be certified on the option itself by the Head of the Office or immediate official superior, as the case may be. The option shall be pasted in the Service Book of the Government servant concerned.

(4) The option once exercised shall be final and if it is not exercised within the time mentioned in sub-rule (1) and in the prescribed manner, the member of the Judicial Service shall be deemed to have elected the revised scale with effect from 1st January 1996.

Note (1).— Members of the Judicial Service whose services were terminated on or after the 1st January 1996 and who could not exercise the option within the prescribed time limit, on account of death discharge on the expiry of sanctioned posts, resignation, dismissal or discharge on disciplinary grounds, are entitled to the benefit of this rule.

Note (2).— A member of Judicial Service who may have died on or after 1st January, 1996 but before the publication of these rules or who dies after the publication of these rules but before the period prescribed for exercise of option without exercising the option shall be deemed to have opted for that scale, that may be found beneficial to him by the authority concerned and his pay may be fixed accordingly.

7. Fixation of initial pay in the revised scale of pay.— (1) The initial pay of a member of Judicial Service who elected, or is deemed to have elected under rule 6 to be governed by the revised scale on and from 1st day of January, 1996, shall unless in any case, State Government by special order otherwise direct, be fixed separate in respect of his substantive pay in the permanent post on which he holds a lien or would have held a lien if it had not been suspended, and in respect of his pay in the officiating post held by him, in the following manner, namely :—

(a) Basic pay as on 1-1-1996 in the existing scale.

(b) D.A. as on 1-1-1996 admissible on existing basic pay.

(c) First instalment of Interim Relief Rs. 100/-

(d) Second instalment of Interim Relief 10% of Basic pay.

(e) Fixation benefit of 40% of Basic pay as on 1st January 1996.

(f) Another 10% fitment (additionally) benefit on the basic pay as on 1st January 1996.

(2) After Aggregating the aforesaid sums the pay of the member of the Service in the revised scale shall be fixed as follows :—

(i) If the aggregate of present emoluments as aforesaid computed is less than the minimum of revised scale, then it should be at the minimum of revised scale;

(ii) If the aggregate of the present emoluments computed corresponding to a stage in revised scale, at that stage of the revised scale;

(iii) If the aggregate of the present emoluments so computed is intermediate between two stage in the revised scale, then at the higher of the two stage, and

(iv) If the aggregate of the present emoluments so computed is more than maximum of revised scale, then at the maximum of revised scale and the difference, if any, be treated as personal pay.

(3) In fixing the pay from the revised scale, the following factors shall be taken into consideration :—

(a) In case, an officer drawing pay in the pre-revised (existing scale), equal to or less than that of his senior/seniors in the same cadre and similarly appointed, draws his next increment in the revised scale on the date earlier than such senior/seniors whereby his pay is raised to a stage higher than that of such senior/seniors shall be advanced to the date on which the Junior Officer draws his next increment;

(b) In case, an officer promoted to a higher post before 1st January 1996 draws less pay in the revised scale than his Junior shall be advanced to an amount equal to the pay fixed for his Junior in the higher post, from the date of promotion of the Junior.

Explanation (1).— If the sum total so computed includes a part of a rupee, it shall be rounded off to the nearest rupee i.e. less than 50 praise shall be ignored, while 50 praise or more shall be rounded off to the next higher rupee.

Explanation (2).— Where increment in the existing scale of pay is payable on 1st January 1996 it will be treated as part of basic pay.

8. Date of next increment in the revised pay scale.— (a) The next increment of the member of Service in the revised scale shall be granted on the date he would have drawn the increments, had he continued in the present scale.

(b) If a member of the Judicial Service draws his next increment in the revised scale under Clause (a) above, thereby becomes eligible for higher pay than his senior whose next increment falls due at a later date, then, the pay of such senior shall be refixed equal to the pay of the junior from the date on which the junior becomes entitled to higher pay. In case the pay of member of the Judicial Service is staped up as above, the next increment shall be granted after completing requisite qualifying service i.e. one year.

9. Dearness Allowance.— The Judicial Officers shall be allowed Dearness Allowance from 1st July 1996 at the rates as applicable to the Central Government Employees.

10. Payment of Arrears of Pay.— The actual arrears of pay as a result of fixation of pay under these Rules shall be payable in cash from 1st July 2002, (i.e. pay for the month of July, 2002 payable in August, 2002) after adjusting the monetary benefits enjoyed by the Judicial Officer under Madhya Pradesh Revision of Pay Rules, 1998. The entire amount of difference of emoluments payable on the pay fixed on 1st July 1996 or from the date of next increment or subsequent increments and the emoluments received in the existing pay from 1st July, 1996 to 30th June, 2002 shall be kept in a separate account as per Rule 11 of Madhya Pradesh Revision of Pay Rules, 1998 after deducting the income tax as per Rules and on such deposited amount, an interest equal to the interest payable to the Government Provident Fund of Government Servant shall be paid. The amount shall be deposited in the respective Provident Fund Account of the Officer on 1st April 2007:

Provided that in case of retirement/termination/death of Judicial Officer, the entire amount with interest due thereon at the time will be transferred to the Provident Fund Account of such Judicial Officer:

Provided further that in case of retirement/termination/death occurs, after 1st January, 1996 and before pay fixation, under these Rules, and the final payment of Provident Fund has also been made, the arrears will be paid in cash.

11. Pay to be taken for the purpose of pensionary benefit — In respect of members of the Judicial Service who retire between the period from 1st July, 1996 to 31 July, 2002 the pay as fixed in revised scale shall be allowed to be counted for pensionary benefits.

12. Overriding effect of Rules.— In cases where the pay is regulated by these rules, the provisions of Fundamental Rules and any other rules shall not apply to the extent they are inconsistent with these rules.

13. Applicability of certain Rules or Madhya Pradesh Revision of Pay Rules, 1998.— Rules 5, 6, 7, 10 and 11 of the Madhya Pradesh Revision of Pay Rules, 1998 shall be applicable to Judicial Service to the extent they are in consistent with these Rules.

14. Power to Relax.— The State Government may relax or suspend the operation of any of the provisions of these Rules, in such a manner and to such extent as may appear to be just and equitable or necessary or expendient in the public interest:

Provided that such relaxation or suspension shall not operate to the disadvantage to the Judicial Officer contrary to the directions of the Hon'ble Supreme Court in the matter.

15. Interpretation.— If any question arises relating to the interpretation of these Rules, it shall be referred to the Finance Department of the Government, whose decision thereon shall be final.

FORM OF OPTION

(See rule 6)

I,..... hereby elect the revised scale of pay of Rs..... with effect from 1st July, 1996

OR

I,..... hereby elect to continue on the existing scale of pay of Rs..... of my Substantive/Officiating post of..... until.....

*(a) the date of my next increment.

or *(b) the date of subsequent increment raising my pay to Rs.....

or *(c) I vacate the post or cease to draw pay in the existing scale of Rs.....

I, (Name)..... agree to deposit the arrears due from 1st July, 1996 to 30th June, 2002 after deduction of Income Tax payable in a separate account and will not demand the same till 1st of April, 2007 (except retirement/termination/death).

Station.....

Date.....

Signature.....

Name.....

Designation.....

Office in which employed.....

(Strike off if inapplicable)

FOR OFFICE USE ONLY

Certified that the option submitted by Shri..... (Name), is received in the Office on.....

Signature.....

Name.....

Designation.....

SCHEDULE

(See rule 2 and 4)

No (1)	Posts (2)	Existing Pay Scale (3)	S.No. (4)	Posts (5)	Revised Pay Scale (6)
1.	Civil Judge (Junior Scale).	2200-75-2800-100-4000	1.	(i) Civil Judge (Entry level).	9000-250-10750-300-13150-350-14550.
				(ii) Civil Judge (Grade II) I ACP Grade (Non-functional, after completion of five years).	10750-300-13150-350-14900.
				(iii) Civil Judge (Grade I) II ACP Grade (Non functional, after completion of another 5 years).	12850-300-13150-350-15950-400-17550.
2.	Civil Judge (Senior Scale).	3000-100-3500-125-4500	2.	(i) Senior Civil Judge (Promotion Grade after completion of 5 years).	12850-300-13150-350-15950-400-17750.
3.	Civil Judge (Selection Grade-cum-CJ.M.)	3700-125-4700-150-5000		(ii) Senior Civil Judge (Grade II) ACJM/CJM (I ACP grade after completion of 5 years in the cadre of Senior Civil Judge).	14200-350-15950-400-18350.
				(iii) Senior Civil Judge (Grade I) CJM/ACJM (II ACP Grade after completion of another	16750-400-19150-450 20500.

				five years in the cadre of Senior Civil Judge).	
4.	District. (Senior Time Scale).	3200-100-3700-125-4700	3.	District Judge (Entry level	16750-400-19150-450 20500.
5.	District Judge (Jr. Admn. Grade Non-Functional).	3950-125-4700-150-5000			
6.	District Judge (Selection Grade)	4800-150-5700			
7.	District Judge (Supertime Scale).	5900-200-6700	4.	District Judge (In Selection Grade Scale 25% of the Cadre posts and would be given to those having not less than five years of continuous service in the Cadre).	18750-400-19150-450 21850-500-23850.
8.	District Judge (Above Supertime Scale).	7300-100-7600	5.	District Judge (In Supretime Scale 10% of the Cadre posts and would be given to those who have put in not less than three years of continuous service as Selection Grade. District Judge).	22850-500-24850

Note.— 1. conferment of benefit by way of ACP would not be automatic but shall be on the appraisal of their work and performance by a committee of Senior Judges of High Court constituted for the purpose.

2. In case where an officer in the cadre of Civil Judge or Senior Civil Judge (Senior Division) who has been provided the ACP, refuses functional promotion to the higher cadre in his turn of seniority and merit, he shall be reverted to the original pay scale.

3. Selection Grade and supertime scale shall be given to District Judges, on the basis of merit-cum-seniority.

By order and in the name of the Governor of Madhya Pradesh,
Addl. Secy.

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CORRIGENDUM

NO. 3(A) 19/2003-21-B Corrigendum..... In the Madhya Pradesh Judicial Service Revision of Pay Rules, 2003 published in the Madhya Pradesh Gazette (extra-ordinary) dated the 25th February, 2004, in the table given below, for the words, figures and brackets mentioned in column (1), occurring in pages and lines in column (2) of the table, the words, figure and brackets and entries relating thereto given in column (3) of the said table shall be read, namely :-

TABLE

Words, figures and brackets incorrectly printed	Pages and lines of Gazette in which these words, figures and brackets occurs		Cerrect words, figures and brackets to be read
(1)	(2)		(3)
	Page	Line	
6. District Judge (Selection Grade) 4800-150-5700	110 (12)	4 and 5	6. District Judge (Selection Grade) 4800-150-5700 4. District Judge (in Selection Grade Scale 25% of the Cadre posts and would be given to those having not less than five years of continous service in the cadre) 18750-400-19150-450-21850-500-23850
7. District Judge (Super time scale) 5900-200-6700 4. District Judge (In Selection Grade Scale 25% of the Cadre posts and would be given to those having not less than five years of continuous Service in the Cadre)	110 (12)	6 to 13	7. District Judge (Super time Scale) 5900-200-6700 5. District Judge (In Supre time Scale 10% of the cadre posts and would be given to those who have put in not less than three years of continuous Service as Selection Grade District Judge) 22850-500-24850

8.	District Judge (Above Super time Scale)	7300-100-7600	110 (12)	14 to 22	8	District Judge (Above Super time Scale)	7300-100-7600
	5. District Judge (In Super time Scale 10% of the Cadre posts and would be given to those who have put in not less than three years of Continuous service as Selection Grade District Judge)	22850-500-24850					

By Order and in the name of the Governor of Madhya Pradesh.

Additional Secretary,
Government of Madhya Pradesh, Law & Legislative Affairs Department

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शुद्धि पत्र

क्रमांक 3 (ए) 19/2003- इक्कीस- ब (एक) शुद्धि पत्र..... "मध्यप्रदेश राजपत्र (असाधारण), दिनांक 25 फरवरी सन् 2004 में प्रकाशित किये गये मध्यप्रदेश न्यायिक सेवा पुनरीक्षण नियम, 2003 में नीचे दिये सारणी के कॉलम (1) में वर्णित उन शब्दों के स्थान पर जो कि उक्त सारणी के कॉलम (2) में वर्णित पृष्ठों तथा पंक्तियों में आए हैं, उक्त सारणी के कॉलम (3) की तत्संबंद्ध प्रविष्टियों में दिये गये शब्द पढ़े जाएं :-

सारणी

अशुद्ध मुद्रित हुए शब्द	राजपत्र के पृष्ठ तथा पंक्तियों जिनमें वे शब्द आए हैं		शुद्ध शब्द जो कि पढ़े जाएं
(1)	(2)		(3)
	पृष्ठ	पंक्ति	
1 जुलाई, 1996, 1st July 1996	110 (4)	3	1 जनवरी 1996
1st July, 1996	110 (10)	24	1st January, 1996

सही/-
अतिरिक्त सचिव
म.प्र. शासन, विधि और विधायी कार्य विभाग

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