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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice R. V. Raveendran**	Chief Justice & Patron
2.	**Hon'ble Shri Justice Dipak Misra**	Chairman
3.	**Hon'ble Shri Justice S. K. Kulshrestha**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
5.	**Hon'ble Shri Justice K. K. Lahoti**	Member
6.	**Hon'ble Shri Justice Sugandhi Lal Jain**	Member

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Ved Prakash Sharma — Director

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Shailendra Shukla — Addl. Director

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PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

Note : Articles of Bimonthly Training programme which are not being included in this issue due to paucity of space shall be published in the next issue.

We are thankful to the publishers of SCC, MPLJ, JLJ, MPJR & RN for using some of their material in this Journal. -

Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

Esteemed Readers, with the second issue (2005) of this Journal, I again have the opportunity of this monologue.

As we are aware, law is a tool of attaining social equilibrium, the end product of which is justice to all. Law is a dynamic phenomenon and it continues to develop with the developing social mores and related social needs. The task of imparting true justice, which is a divine attribute, can be performed effectively only when the Judge is well aware about this dynamics of development. Otherwise the law may lose all its charm and efficacy. In this connection following observations made by Hon'ble Justice P.N. Bhagwati in one of the judgments of the Apex Court are quite apposite:

> "It must be remembered that law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the self. It is rather like an old but vigorous tree, having its roots in history, yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead wood. It is essentially a social process, the end product of which is justice and hence it must keep on growing and developing with changing social concepts and values. Otherwise, there will be estrangement between law and justice and law will cease to have legitimacy".

This Journal happens to be an aid to the judicial officers in the process, and the Institute through this journal is trying to put forth before its esteemed readers the developments which are gradually taking place in the field of law either through legislation or through judicial pronouncements. The efforts of the Institute may ultimately prove fruitful only when the judicial officers spare some of their valuable time to go through the pages of this journal so as to prepare themselves for attitutidinal changes in the context of developments which are taking place in the field of law as well as on social front.

Again the idea is gradually gaining ground that Judiciary must come out of its orthodox mould and prepare itself to shoulder the responsibility as a 'Social Service Institution'. This can be attained by developing an understanding about the needs of justice seekers for whom ultimately the system of administration of

justice exists. It again requires attitudinal changes on the part of the judicial officers.

The Institute is in the process of diversifying its activities with the ultimate objective that all agencies involved in the process of justice delivery may properly discharge their obligations so as to help the Courts in dispensation of quick and qualitative justice. In past few months the Institute has organized various workshops, refresher courses and training sessions not only for judicial officers but also for officers of Forest and Police Departments. The Institute plans to organize many more such type of specialized workshops and refresher courses for the officers of Excise Department, Food Department, Electricity Department, Narcotics Department and Prosecution.

ADR Mechanism is yet to pick up requisite momentum. An article by Hon'ble the Chief Justice dealing with various difficulties/problems in conducting Lok Adalats and organizing Legal Literacy Programmes finds place in Part I of the Journal along with two other articles relating to Court Management at Trial Court level and Judicial Ethics.

The issue whether material filed by the accused in defence can be considered at the stage of charge ultimately stands resolved with the latest pronouncement of the Apex Court in *State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 586* which finds place in Part II of this journal (Note No. 100).

In Part III of the Journal, some important notifications including one issued by the State Government extending protection of 197 Cr.P.C. to the Forest Officers is there.

The problem of disposal of bio-non- degradable waste has assumed dangerous proportions. To deal with the situation the State of Madhya Pradesh has ultimately come out with a legislation, which is being included in Part IV of the Journal.

The Institute will continue to make all out efforts to bring all up-dated relevant material through this Journal before the readers. As the field of law is quite vast, therefore, the Journal can be only a door to enter into this vast field and the ultimate exploration has to be carried out by you.

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APPOINTMENT OF HON'BLE SHRI JUSTICE RAJEEV GUPTA AS CHIEF JUSTICE OF KERALA HIGH COURT

Hon'ble Shri Justice Rajeev Gupta, who occupied the august office of the Judge of the High Court of Madhya Pradesh for more than ten years, has been appointed as the Chief Justice of the Kerala High Court. Born on October 10, 1950, His Lordship got enrolled as an Advocate on November 14, 1973. Practised at Gwalior Bench of High Court of Madhya Pradesh in Civil, Criminal and Constitutional matters. Was appointed as Permanent Judge of the High Court of Madhya Pradesh on September 27, 1994. Was appointed as Chairman, High Court Legal Services Committee in 1999. Was appointed as Chairman of the Advisory Board constituted under National Security Act and other allied Acts in 2000. Was Administrative Judge, Principal Seat of High Court of Madhya Pradesh at Jabalpur since 2001.

His Lordship was accorded farewell ovation on April 21, 2005 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.

APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice R.V. Raveendran, Chief Justice, High Court of Madhya Pradesh administrated the oath of office to Hon'ble Shri Justice Abhay Naik, Hon'ble Shri Justice Wajahat Ali Shah and Hon'ble Shri Justice Aryendra Kumar Saxena as Additional Judges of High Court of Madhya Pradesh on 13th April, 2005 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Shri Justice Abhay Naik has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 03-09-1949. Obtained law degree from M.L.B. Arts and Commerce College, Gwalior. Was enrolled as an Advocate in 1972. Practised in High Court of Madhya Pradesh Bench Gwalior. Appeared for a number of State Authorities such as Gwalior Development Authority, M.P.

Pollution Control Board, Madhya Pradesh Housing Board and Municipal Corporation, Gwalior as well as on behalf of various Banks. Was the Member of Editorial Board of Law Journal 'Madhya Pradesh High Court Today'. Was also President of Disciplinary Committee of State Bar Council. Was designated as Senior Advocate on 27-04-2002. Took oath as Additional Judge of the High Court of Madhya Pradesh on 13th April, 2005.

Hon'ble Shri Justice Wajahat Ali Shah has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 31-12-1946. Joined State Judicial Service as Civil Judge, Class-II, on 06-04-1970, promoted as Civil Judge Class-I on 14-06-1982, as C.J.M. on 01-02-1982 and promoted as Additional District Judge on 29-04-1987. Worked as District and Sessions Judge at Gwalior, Chhatarpur and Bhind. Also worked as Additional Registrar, High Court of M.P. at Gwalior Bench from June, 1994 to October, 1994 and as Legal Advisor to Lokauykt from April, 1998 to June, 2003. Took oath as Additional Judge of High Court of Madhya Pradesh on 13th April 2005.

Hon'ble Shri Justice Aryendra Kumar Saxena has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 30-06-1947. Joined Judicial Service as Civil Judge Class-II on 06-07-1970, promoted as Civil Judge Class-I on 14-06-1982, as C.J.M. on 12-03-1984 and as Additional District Judge on 13-04-1987. Worked as Deputy Secretary (Law) from November 1991 to May 1993, Additional Welfare Commissioner, Bhopal Gas Commission from June 1993 to May 1996, was District & Sessions Judge at Shahdol and Jabalpur, worked as Director, Judicial Officers' Training & Research Institute from 01-06-2002 to 06-08-2004. Also worked as Member-Secretary, M.P. State Legal Services Authority from 07-08-2004 till elevation. Took oath as Additional Judge of High Court of Madhya Pradesh on 13th April, 2005.

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Justice R.V. Raveendran
CHIEF JUSTICE
High Court of Madhya Pradesh
JABALPUR

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Dated : 24.3.205

Dear District Judge,

Work relating to Computerization of subordinate Courts will commence shortly. This involves laying a Local Area Network (cables & other components connecting computers at various places in the court permises). Ideally if the courts are situated in one building and the building is in a sound condition, the work will be easy. It will be difficult where:

(a) The courts are situated in different buildings scattered in a large area;

(b) The Court buildings are very old or in a dilapidated condition;

(c) The courts are situated in a rented or other temporary accommodation and there is likelihood of the shifting to a new place.

Though we have some details, it is necessary for each District Judge to assess the position regarding the Building in his respective District Headquarters and submit a report along which sketch/plan of the property.

The District Courts have also been provided with computer systems in the year 1997-98. Please send a report as to whether they are in use and whether you have trained personnel to handle the same.

2. The High Court had issued certain guidelines for rendering speedy justice and for providing easy access to justice in 2005 declared as year of excellence for judiciary. The High Court has not received any feed-back or status report in this behalf. But, I have been receiving complaints that some Judges are showing great haste and are disposing of matters without proper or adequate hearing. Speedy justice is not hasty justice. While the need for expeditious disposal is reiterated, please ensure that disposal of cases are only after due and proper hearing and consideration. Neither the hearing should be curtailed nor the quality of judgments be compromised, while endeavouring to render speedy justice. Please impress this aspect upon all the Judicial Officers in your district.

3. In regard to construction of Nyaya Seva Sadan Buildings, there has been good response from some districts. Though we have proposed three size standard plans, the smaller version (plan No. 3) may be avoided, unless there is dearth of space and funds. Please endeavour to adopt one of the two bigger models. Please ensure that the construction of such Seva Sadan Buildings does not obstruct the frontal view of the court building and that they will not come in the way of future extension/expansion of the existing court building. The construction of Sava Sadans should preferably be on a side, but with easy access to the road.

4. Attention may be bestowed upon (i) filling up vacancies particularly those of Stenographers/Clerks/typists, (ii) organizing the Library, and (iii) maintenance, upkeep and cleanliness of the court building, Apart from being good Judges, District Judges are also required to be good administrators. It is found time and again that the communciations from High Court are not promptly attended. District Judges are responsible to ensure that all correspondence from the High Court is brought to their notice by their staff immediately and attended to by him.

5. I also learn that inspite of repeated communications from the Registry, in several districts, the binding of Jurnals (Library work), repairing of furniture (maintenance work), verification of stocks, repairing and writing off old and unusable typerwriters, elimination of old records as per Rules, are not being attended. These require special attention. The Summer Vacation can best be utilizaed for completing such work.

6. In several places there is disproportionate distribution of cases. I find that some Additional District Judges have as many as 1000 cases, while some have hardly a few hundreds. (Same is the position regarding Civil Judges (Class-I) and Civil Judges (Class-II). Please take steps to distribute the cases evently for better Board management.

7. If there are complaints against Judicial Officers of staff, please take appropriate action firmly and promptly so that the fair name and reputation of judiciary is not affected. The trust and confidence of the people alone is the true strength of Judiciary.

With best wishes,

Yours sincerely,

(R.V. RAVEENDRAN)

PART - I

DIFFICULTIES FACED BY LEGAL SERVICES AUTHORITIES IN EXTENDING LEGAL AID, ORGANIZING LEGAL LITERACY PROGRAMMES AND CONDUCTING LOK ADALATS

JUSTICE R.V. RAVEENDRAN
Chief Justice,
High Court of Madhya Pradesh

The Legal Services Authorities Act, 1987 has been enacted with the twin object of extending legal services to the weaker sections and settling disputes by organizing *Lok-Adalats*. As a corollary, it is also necessary to spread legal awareness among the weaker sections, to achieve the objects of the Act, and ensure that access to justice is not denied merely by reason of social and economic disabilities. The State Legal Services Authorities have been striving hard to achieve these objects. But the efforts have yielded results only in limited areas. This necessitates a frank introspection.

I may refer to some of the difficulties in implementation and practical problems.

DIFFICULTIES IN EXTENDING LEGAL SERVICES :

2. Legal Services includes giving legal aid for prosecuting or defending any legal action, providing the service of counsel for conduct of cases and giving legal advice. Both at city and mofussil levels, it is found that seekers of legal aid and services are few, in spite of the large concentration of socially and economically weaker sections.

3. One reason for the low number of applications for legal aid from weaker sections, is their ignorance – both of their rights and about the availability of legal aid. This is being remedied by conducting legal awareness programmes, distributing pamphlets, books, cassettes, erecting Information Hoardings in Court Premises, Panchayat Offices and Government Offices, and by use of print and electronic media. It is however necessary to find ways and means for more effectively and widely informing the needy sections of public about the legal service facilities available under the Act.

4. Another reason for the poor response in availing legal aid appears to be the litigants' lack of confidence in the skill and capability of Legal Aid Panel Advocates. The general impression among the public is that the fee paid to the Legal Aid Panel Advocates by the Legal Services Authorities being low, the panel attracts only the young, or the inexperienced or those wanting in talent. Even a poor litigant likes to choose a counsel of his own, by paying a regular fee, rather than entrusting his case to a Legal Services Panel Advocate. The

Legal Services Authorities should, committed to the cause of weaker sections and social service. Simultaneously steps should be taken to impress upon the public that Legal Aid Panel Advocates are good, efficient and committed to the cause of social justice.

DIFFICULTIES IN CONDUCTING *LOK ADALATS* :

5. A Litigation ending in a contested decision invariably leads to bitterness, hostility and enmity between the parties to the lis, as the losing party continues to nurture a grievance against the successful party. In a civilized society, parties are expected to accept the decisions of Court with grace, but in reality it seldom happens, particularly in suits relating to partition among family members, disputes between neighbours, disputes between partners and disputes between spouses. On the other hand, if there is a settlement by conciliation, there are no winners or losers, as the result is acceptable to all. It is said that decision on contest creates enemies and a decision on consent creates friends. Settlement of a good percentage of cases by a continuous process of conciliation through *Lok-Adalats,* has other beneficial fall-outs also. They are : (i) The pressure on Courts and Legal Practitioners on account of heavy pendency is eased with the result that the Court's Board comes to manageable limits and Courts can deal with contested cases, more effectively, thoroughly and expeditiously. (ii) The cost of litigation is reduced considerably. Part of Court fee is refunded if the settlement is before trial. The expenses of a long litigation is avoided. There is enormous saving of time and energy for litigants and witnesses. (iii) The average period of pendency of cases will come down drastically and it will be possible to have decisions in any litigation within a short and reasonable period.

6. The Bar and the Bench should therefore co-operate in identifying cases which deserve a negotiated settlement. Now there is a statutory compulsion to do so, having regard to Section 89 of Civil Procedure Code. Till now, notable success has been achieved by *Lok-Adalats,* only in settling motor accident claim cases and to some extent compoundable criminal cases. *Lok-Adalats* are yet to make a mark in areas of serious litigation. Family disputes (matrimonial cases and partition cases) cry out for negotiated settlement as what is at stake is human relationship and happiness. Suits for specific performance, suits for eviction, suits relating to partnership, commercial litigation and Bank suits on the civil side, as also labour disputes are also ideally suited for negotiated settlements.

7. Experience however discloses several impediments coming in the way of negotiated settlements, which can broadly be classified as *(a) Reluctance of Litigants; (b) Reluctance of Advocates; (c) Lack of interest on the part of the Judges/Conciliators; and (d) Reluctance of Officers of the Government.* Let me refer to each of them briefly.

(a) Reluctance of Litigants :

8. Every litigant usually believes that he has a very strong case. Such impression may either be on account of his own perception of the legal or factual position or based on the opinion expressed by his counsel. He, therefore, feels that any settlement involves giving up a part of his right or claim and showing a concession to the other side. As a consequence, when a litigant comes to the negotiating table before the *Lok-Adalats,* he starts with an initial resistance. He feels that when he is likely to get a larger relief by prosecuting or contesting a litigation, there is no need to settle the matter by agreeing for a lesser relief before a *Lok-Adalat.*

8.1) Yet another reason is the absence of TINA (There Is No Alternative) factor and the very reasonable cost of litigation in India. Contrary to popular belief, the litigation is not costly in India, after the initial stage. The major part of the expenditure occurs when the litigation is initiated, involving court fee and lawyer's fee. After the litigation is commenced, the subsequent cost of litigation in India is cheap when compared to western countries. Even the court fee payable is usually a nominal fixed amount (except in a few categories of cases, where the court fee is payable *ad volorem* on the claim or market value). Even where ad *volorem court* fee is payable, in the case of agricultural lands (which constitutes the subject matter of majority litigation in mofussil areas) fee is calculated not with reference to the actual market value of the property, but with reference to a nominal value based on the revenue assessment of the land. Therefore, when a litigation reaches the trial stage, there is no compelling reason to settle a case. Unlike in developed countries, a litigant in India, on losing a litigation does not pay the actual cost of the other side, but only pays nominal costs. There is no fear of being mulched with heavy costs in the event of the case going to trial. In countries like USA or UK, once a civil dispute goes to trial, the cost will be enormous and therefore litigants in those countries think not twice, but many times before proceeding to trial and try their best to settle the dispute at pre-trial stage. It is said that in Western Countries 90% of cases get settled at pre-trial stage, whereas in India it is hardly about 10% to 20%.

8.2) Therefore ways and means to educate and persuade litigants to settle cases, that too before commencement of trial requires to be identified. Once the litigants realise that a negotiated settlement saves time, energy and money for him and also gives more flexibility in relief, the response to *Lok-Adalats* will be better.

(b) Reluctance of Advocates :

9. The reluctance on the part of some sections of Advocates, to settle cases before *Lok-Adalats*, stems from their fear that they may not receive the full fee, if the case is settled. The fee received for a case involving a full-fledged trial

with possibilities of one or more appeals, it is felt, is several times more than the fee that can legitimately be claimed if a matter is settled without trial.

9.1 In mofussil areas where the number of lawyers is high in proportion to pending litigation, there is a feeling of insecurity associated with *Lok-Adalats*. At many places, the members of the Bar are of the view that encouraging settlements and early disposal of cases will affect their livelihood. At Taluk level places, say where the number of lawyers is 30 to 40 and the pendency of cases is about 600 to 800, the members of the Bar point out that with an average of about 10 to 20 briefs per Advocate, they can ill-afford to settle cases by participating in *Lok-Adalats*. Such insecurity is prevalent among sections of City Lawyers also.

9.2) Legal Practitioners have also expressed reluctance to persuade their client to arrive at a negotiated settlement for another reason. It is stated that when a Lawyer suggests a settlement, many a client (litigant) doubts the capacity or integrity of his Counsel. Therefore a section of the Bar feels that when they have been engaged to conduct cases, they should conduct cases rather than actively assist in settling them.

9.3) Some lawyers, at the slightest opportunity, withdraw from the settlement process or fail to attend the settlements process at all. There are of course exceptions. But unless the Bar as a whole recognizes and accepts negotiated settlement as part of an effective alternative dispute resolution process. no significant success can be achieved in *Lok-Adalats*.

9.4) There is therefore an urgent need to educate the lawyers and litigants about the advantages of the alternative dispute resolution methods in general and *Lok-Adalats* in particular. There is also a need to assure the members of Bar that the purpose of *Lok-Adalats* is not to reduce litigation, but to reduce the period of pendency of litigation. Once the Bar realises that prompt and speedy disposals through conciliation will make litigants to flock back to courts, they will have more confidence in *Lok-Adalats*.

(c) Lack of Interest of Judges/Conciliators :

10. Experience shows that when retired Judges or social workers sit as conciliators in *Lok-Adalats*, their persuasive capacity is limited. Neither the counsel nor the litigant feels bound or obliged to heed to the advice/suggestions made by such conciliators. The success rate before the *Lok-Adalats* is markedly better if the Serving Judges participate in *Lok-Adalats*. The reason is obvious. The litigant and the Lawyer feel that that if they act unreasonably in the negotiation process before a *Lok-Adalat*, the Judge is likely to keep such conduct of the Advocate or litigant in mind and that may adversely affect the outcome of the case. It is another matter that Judges do not, in fact, carry any such prejudices. Be that as it may.

10.1) Having regard to the heavy judicial work load, many Judges do not find the time to sit in *Lok-Adalats*. Some lack the zeal and dedication required to make *Lok-Adalats* a success. For example, when a continuous *Lok-Adalats* for cases under Section 138 of Negotiable Instruments Act was proposed several Magistrates were hesitant and reluctant. They pointed out that normally the accused in such cases come round for settlement only when the evidence is concluded and the matter is ripe for disposal; and when such cases which are ripe for disposal are settled before the *Lok-Adalats,* the time spent by them in recording evidence goes waste and they have difficulties in reaching the necessary disposal quota. One solution for this problem is to recognize the work done in *Lok-Adalats* by providing points that can be counted against the disposal quota. Here again what is required is educating of the Judges to bring about an attitudinal change.

(d) Reluctance of Government Officers :

11. There is a tendency on the part of Governmental and Statutory Authorities to shift the responsibility for dispute resolution to an adjudicatory forum. Wherever the Government or a Statutory Authority is a party to a litigation, the chances of a negotiated settlement before *Lok-Adalats* is rather dim. The reluctance is not on the part of the Government or the Statutory Authority, but on the part of the officers in charge of the litigation. The Officer concerned always has an apprehension that ulterior motives may be attributed to him, if he agrees to a settlement, or that he may be found fault with, by his Official Superiors, or by Audit or by the public. This leads to 'pass the buck' syndrome on the part of Government Officers in reaching a negotiated settlement. I have come across cases where an officer who is reluctant to settle a matter by accepting liability for Rupees One Lakh, accepting without protest, a decision of the Arbitrator or the Court for payment of Rupees Ten Lakhs. Officers of Insurance Companies are, of course, exceptions.

12. Realizing that the *Lok-Adalats* do not have teeth to force settlements, particularly where public utility services are concerned, provision has been made for constitution of permanent *Lok-Adalats* in regard to disputes relating to Public Utility Services by deploying CON-ARB procedure, which enables the conciliators to mutate into Arbitrators if the conciliation fails.

DIFFICULTIES IN ORGANISING LEGAL LITERACY PROGRAMMES:

13. Last, but not least, is conducting of legal literacy/awareness programmes. Legal literacy and awareness is the only effective answer for implementing social justice. It also cuts down unnecessary and wasteful litigations arising out of ignorance. At the same time weaker sections whose rights are trampled and violated constantly, and who do not seek relief either on account of ignorance of financial incapacity, can seek legal remedy and protect their rights.

13.1) At present organizing legal literacy programmes is entrusted to Judicial Officers whose first priority is judicial work. The constraints relating to time and funds have been a hampering factor for widening scope of legal literacy programmes. Suitable steps should be devised to spread legal awareness by a continuous process of legal literacy programmes.

13.2) There is also a view that Judges should stay aloof and avoid mixing with lawyers and litigants; and if Judges are to organise Legal Literacy Programmes on a regular basis, they will have to constantly mix with Advocates, Public and Government Officers, outside the court, which may erode their dignity, independence and impartiality. The other view is that organising and participation in such literacy programmes, makes the Judges more tuned to social problems and sensitise them to Human Rights and needs of the society, in particular Socially and Economically weaker sections of the society. A balancing of the two views may ultimately be the solution.

DIFFICULTIES IN SETTING UP PERMANENT LOK-ADALATS :

14. Chapter VI–A has been introduced by Amendment Act of 37 of 2002, providing for establishment of Permanent *Lok-Adalats* by every State Legal Services Authority, in respect of one or more public utility services (that is (i) transport services; (ii) postal, telegraph or telephone services; (iii) supply of power and water to the public; (iv) public conservancy or sanitation; (v) service in hospitals and dispensaries; (vi) insurance services and (vii) other services declared as public utility services). Every Permanent *Lok-Adalat* is required to have a chairman and two members. Permanent *Lok-Adalats* are required to act as conciliators to start with and if the parties are not able reach an amicable settlement, then, proceed to decide the dispute. In other words, Permanent *Lok-Adalats* function as Conciliators-cum – Arbitrators. They are intended to act as prelitigation mechanisms involving conciliation and settlement. Having regard to the nature and scope of the jurisdiction of Permanent *Lok-Adalats*, a broad infrastructure is required. Regular staff, similar to special Tribunals, are required. Adequate and suitable accommodation has to be provided. Unless the State Governments evince interest and provide adequate infrastructure and facilities and make appropriate budgetary provisions, pre-litigation conciliation and settlement through Permanent *Lok-Adalats* contemplated under Chapter VI-A will remain only a paper provision. While some States have shown keen interest in setting up Permanent *Lok-Adalats*, unfortunately other States are yet to discharge their statutory obligations. The state governments should be persuaded to extend necessary support, financial and otherwise, to establish and continue the Permanent *Lok-Adalats*.

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2005 - YEAR OF EXCELLENCE IN JUDICIARY - THE TASK OF THE DISTRICT JUDGE

JUSTICE R.V. RAVEENDRAN
Chief Justice,
High Court of Madhya Pradesh

To provide access to speedy, inexpensive and impartial justice and to regain the trust and confidence of the public is the urgent need of the hour. A Judicial Officer is only required to discharge adjudicatory functions. But once a Judicial Officer is appointed as a District Judge, he is required not only to be an able and honest Judge, but also be an able Administrator, which requires expertise in the following five areas :

1. Managing the Judges (in the District)
2. Managing the Office Staff (in the District)
3. Managing the members of the Bar
4. Time/Case management
5. Self management

If the District Judges perform their functions/duties effectively and properly, administration of the entire subordinate judiciary becomes easy. The administrative duties/ functions expected of a District Judge are:

MANAGING THE JUDGES:

a. Encourage and persuade the Judicial Officers in the District to perform better. Identify deficiencies and suggest methods for improvement.

b. Pull up or warn erring and/or slack judicial Officers.

c. Act as a Guide and mentor to younger Judicial Officers.

d. Organize periodical meetings of the District Judicial Officers to discuss problems and find solutions as also to discuss the latest trends in law.

c. Write the ACRs in a responsible manner that truly reflects the working of the subordinate Judges (keeping in mind that remarks entered by the District Judges are invariably accepted by the High Court).

f. Ensure that all Judges sit in Court on time and work fully during the Court hours.

g. Ensure that the Judicial Officers stay at Headquarters. (If any Judicial Officer, on account of being posted near to his native place or otherwise, travels daily or frequently outside the headquarters, bring such fact to the notice of the High Court).

MANAGING THE JUDICIAL STAFF AND OFFICE:

a. As the appointing authority, be diligent and careful in selecting Clerical Staff, Stenographers, Typists, Process Servers and Peons etc. (Selections should be purely on merit and not on the basis of any recommendations or for

extraneous considerations. A good selection is an asset to the Judiciary, whereas a bad selection, a liability).

b. Enforce discipline and supervise the working of the Office Staff to ensure that they discharge their duties promptly and efficiently, maintain the Malkhanas, records and registers properly and safely and list the cases for hearing promptly.

c. Weed out the deadwood and corrupt employees.

d. Take prompt action on complaints against staff and conduct the disciplinary proceedings without delay.

e. Give regular training to the Clerical and other Staff so as to increase their efficiency.

f. Provide necessary infrastructure, furniture, stationery, etc., and implement computerization and other office management systems to improve the working.

g. Introduce cost effective methods in administration and provide proper budgeting.

h. Send periodical reports and statements to the High Court and the State Legal Services Authority.

i. Discharge the functions of Chairman of District Legal Services Authority with commitment and zeal to encourage legal services.

MANAGING THE MEMBERS OF THE BAR:

a. Maintain a cordial relationship with the Bar.

b. Ensure that no conflict develops between the Bar and the Bench (in all the Courts within his jurisdiction).

c.. Encourage the Bar and litigants to participate in Lok Adalats and Legal Literacy Programmes (But avoid social Mixing with the Bar and litigant public).

d. Not to seek or accept favours or gifts from the advocates.

TIME/COURT MANAGEMENT:

a. Streamline the case flow management and proceedings in all Courts in the district so that only the minimum time is spent in calling work (or Preliminary Hearing work) and maximum time is available for recording evidence and hearing arguments.

b. Take stock of pendency, fresh filings, disposals in the various Courts under his control and device procedures for speedy disposal of cases (like bunching of similar cases, classification and distribution of cases, weeding out infructuous matters, etc.)

c. Give priority to old cases, matters relating to senior citizens, or cases where the accused are in custody, etc.

d. Ensure that provisions of amended CPC are applied effectively, by refusing unnecessary adjournments, record evidence through affidavits and commission wherever necessary, limiting oral arguments, etc.

e. Using Alternative Dispute Resolution methods (Lok Adalats, Conciliation, Arbitration, Court Mediation) for settlement of cases.

SELF MANAGEMENT:

a. Develop impartiality, courtesy, judicial temperament.

b. Realize that honesty and integrity is not a special virtue, but the minimum requirement for a Judicial Officer; and that corruption and bias are the antithesis of justice and fair play. Above all, that a Judge is not a mere employee working to earn his livelihood, but a crusader in the cause of justice.

c. Maintain dignity and decorum in Court and in dealing with other Judicial Officers, Members of the Bar, office staff and litigant public.

d. To avoid stress and tension and maintain a healthy way of life.

e. Develop leadership qualities to lead the Judicial Officers and office staff for better performance.

f. Maintain administrative relationship with the Collector, Superintendent of Police, PWD Engineers, etc., only to ensure that the infrastructure requirements of the Courts in the District are met.

The District Judge should lead the other Judges in his/her district by being a Role model. He should do everything which he expect the Judges in his district should do.

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Excellence is achieved only when the performer takes pride in doing his best. Every job is a self-portrait of the person who does it, regardless of what the job is, small or big. Autograph your work with excellence! Be forever in pursuit of excellence!

From Speech delivered by Hon'ble Shri Justice
R.C. Lahoti, Chief Justice of India
on "Law Day"

JUDICIAL ETHICS, NORMS & BEHAVIOUR

(Text of the Address delivered by Hon'ble Shri Justice Deepak Varma in the Refresher Course for Civil Judges Class I held at Indore on 13.3.2005).

I am, indeed, extremely happy to be with all of you this evening to address you on the concluding session of this four days' training programme imparted to you.

Before I begin on the topic entrusted to me, I would like to know your views? If such training, has really been beneficial to you? What are the advantages or shortcomings of such training? Please elaborate so that we can work it out in future to include your suggestions too.

I would also like to emphasize upon that though English is not our mother tongue but proficiency in English language is rather required. There are various reasons for this. You will find that most of the text-books on the subject of law are in English. Many of the important journals containing various articles of various authors, newly enacted Acts, Judgments of Supreme Court and the judgments of the High Courts are only in English. Proficiency in English does not mean that you have to be an expert in it. Learn to read English as a Language and try to understand the law as pronounced in various judgments. If you find any difficulty, consult the dictionary. As far as writing is concerned, you should always make it a habit to write short and small sentences otherwise one is likely to commit many mistakes, including grammatical. I feel that there would not be any harm even if you are required to take a Rapid Course for learning English speaking and writing. Such courses are being run by many Institutes in different cities. This is my sincere advice to you.

The topic given to me for today's discussion is **Judicial Ethics, Norms & Behaviour.**

To start with, according to me, first and foremost important is to maintain punctuality of time in Court. One should always avoid sitting late in Court and an attempt should always be made to be on time so much so that lawyers should be able to match their watches with your timings. With the observance of principle of time management, it is not a difficult task to be achieved. Everyone has his/her own difficulties in his/her house but that will not give you any leverage to be late. Whenever you are late then you must ask a question to yourself as to why it has happened and also if the same situation could have been avoided. Most of the time you will find that such a situation could have been comfortably and conveniently avoided. Maintaining punctuality to time has many hidden advantages also. First of all, you will be able to know how day's work is required to be completed by you during Court working hours and even the lawyers appearing before you would be in a position to know as to when his particular case is likely to come up for hearing. Board diary should be maintained properly and it should be followed strictly in accordance with seriatim of the cases listed in it. It is desirable that for each working day, Cause List be prepared and should be

displayed on the notice board atleast one day in advance. Lawyers and litigants should be informed that the cases listed for next day have been shown in the Cause List which is available on the notice-board. This shall facilitate not only the advocates, litigants but the judges also to allocate the time which is likely to be consumed by each case.

All of you are aware that as a judge, one is required to sit in the Court for long hours, and further at home in the office in morning and evening both times. The job of a judge, thus, becomes sedentary, making a judge prone for many physical disabilities. To avoid it, especially for young judges, it is desirable that they should exercise on regular basis. If you exercise regularly, it is not going to consume more than 30 minutes but you will feel fresh and glowing for whole day. Yog & Pranayam are supposed to be good exercise especially for those who are required to do mental as well as physical work.

Though judges are pronouncing judgments almost everyday, you are not supposed to give explanation with regard to propriety, correctness or legality of the same. That is required to be judged by the higher court. Even if judgment has been pronounced in any sensitive or in a sensational matter, as far as possible, cheap popularity should be avoided. If the judge is in the habit of pronouncing good judgments based on appreciation of facts and proper application of law, he does not need the help of media to give him the required popularity. It would come automatically to you.

It is well known that relations between Bench & Bar should always be cordial. But cordiality should not be extended to such an extent to be close to a particular section of advocates. A reasonable distance has always to be maintained between Bench and the Bar. This is desirable for both, to achieve the required results. This can be observed without being uncourteous or rude to the advocates. You have to be diplomatic in acquiring this art, which is bound to pay you good dividends in long run.

Now the question that arises for consideration is with regard to decision making process. After appreciation of evidence and considering the probabilities, facts should be ascertained. After this ascertainment, the judge should close his eyes for a moment or two and should think which way the justice lies. There would be no difficulty for conscientious judge in arriving at the right conclusion. Thereafter, the judge should proceed to write his judgment and should assign the reasons in support of that conclusion. Exceptionally, there may be a case, where justice lies one way, but, there is an insurmountable difficulty placed by clear statutory provision and or a binding and undistinguishable precedent. In that situation alone, the judgment should be in conformity with the provisions of law, or precedent irrespective of justice of the case.

In the matter of procedure, in many situations, a judge has ample discretion to soften procedural rigours. For e.g., there are many offences of petty nature, where, prosecution is brought before the Court. In case of such petty offences, attendance of accused persons can be ensured only by execution of

his personal bond and the Courts should liberally exercise its discretion in not insisting upon execution of bail bonds. This would substantially reduce corruption or palm greasing at clerical level. The fear of issuance of warrant of arrest in the event of absence is enough in such cases to secure attendance of the accused.

The judgment should be promptly delivered by the end of the week or at the most within a fortnight. Only in exceptional case where one is required to do a lot of research before coming to the conclusion, by the end of the month in which hearing was closed. This duty should not be avoided by entertaining or inviting unnecessary applications. The judgment must be delivered on the date fixed for it. That would avoid gossip in verandah and unnecessary suspicion in the minds of the litigants. In case of convictions where accused is on bail and is required to go to jail, the provisions of Rule 245 of Rules & Orders [Criminal] must be followed without exception or default.

For your ready reference, Rule 245, reads as under:-

> **" In every case resulting in conviction, in which a sentence of imprisonment is passed, judgment should, as far as possible, be pronounced in the forenoon and at the headquarters of the court, care being taken to see that the next day is not a holiday. The time and the place of the pronouncement of the judgment, and in case the rule could not be observed the reasons for non-observance, should be specified in the order-sheet. This rule must invariably be observed if the accused in on bail during the trial and on conviction is sentenced to under go a term of imprisonment."**

Bare reading of the said provision would make it amply clear the purpose for which it has been enacted. This shall enable the accused to file appeal/revision in the higher court and to pray for suspension of sentence. This shall facilitate him to enjoy the liberty if he is entitled to do so under the law.

It is always to be remembered that judgment should be brief and to the point. Verbosity and use of high sounding words should be avoided. Judgments should be written in simple chaste language and must be intelligible to the reader. Your judgment is meant for the litigants whose cause you are deciding and the litigants are not necessarily a learned man.

You learn and pick up the art of brevity and precision and style or articulating judgment. Judgment of the Privy Council, Nagpur High Court and that of Late Hon'ble Mr. Justice Vishambhar Dayal, Hon'ble Mr. Justice G.P. Singh, our former Chief Justices should be read to learn this art.

All of you, though have crossed the threshold of your carrier but are yet to reach the zenith, but it is desirable to read, as often as possible, Evidence Act, Provisions of Code of Criminal Procedure and Civil Procedure Code so as to equip yourself for effective control over the trial and recording of evidence. This would facilitate curtailment of unnecessary cross-examination.

Disposal of Interlocutory applications must be very prompt. This should be attended too promptly. As far as possible, other Interlocutory application should be disposed of within fortnight from the date of filing of the same, so that progress of the case is not hampered. If you are well equipped with the provisions of the Evidence Act, Civil Procedure Code and the Code of Criminal Procedure, you would never find any difficulty in immediate/prompt disposal of Interlocutory application. Make it a rule to read the provisions under which the Interlocutory application concerned is made before proceeding to hear and decide that application.

It is further desirable that the cases which are listed for next day for hearing should be brought home a day before. Records of the cases should be read at home so that you will be able to have a bird's eye-view of each case which you would be required to deal with next day. This is going to save lot of your time as well as a lot of time of the lawyer. He shall then be short and concise in his arguments. Make it a habit. Once you have started doing it, you will yourself find a marked change in the time that you will be saving in the court working hours everyday.

Apart from the above, develop a habit of reading literature in law. It may consist of jurisprudential literature consisting of basics, fundamental and development of theories in the field of law, Law Reports, Judgments delivered by the Supreme Court of India and our High Court and biographies and autobiographies of stalwarts in legal profession. By reading all this, you will get inspired and it shall generate confidence in you that one day you may also be called a stalwart.

You are well aware that judiciary is being targeted by many sections of the society. It has, therefore, become necessary and essential for all of us to remain within the self-defined boundaries and to observe judicial ethics strictly.

Great amount of restrain is required to be observed by judges not only in court rooms but even outside also. Your conduct and behaviour at both the places should be such that no-one should be able to point a finger at you with regard to any incident. From outside, your reputation alone is sufficient to ward off someone to approach you for any favour in any pending matter.

We do keep hearing all sorts of stories with regard to many untoward incidents concerning judiciary, which is manned by judges. Ask a question to yourself, if such a situation could have been avoided ? Many a times, your answer would be in the affirmative. This would only show that there is still scope for further improvement.

In my own personal assessment and judgment, a judge should be acceptable to the society. If a litigant and his arguing counsel feel that he shall get justice and only justice in his court, in that situation that judge can be termed as acceptable to the society. Judicial ethics is something which should be in accordance with your own conscience. Any thing which a judge feels would be for the advancement of the cause of justice, with due observance of law, would be in accordance with his conscience.

Here I would like to quote what Thomas Fuller said about a judge:-

> **"When a judge puts on his judicial robes, he puts off his relationship to everyone and becomes a person without a relation, friend, acquaintance, in short, a man who is impartial."**

To be an ethical judge one has to be an ethical person not only in the court but outside also then it would be easier for him to follow the judicial ethics, which has variety of parameters. Only with experience we learn the boundaries of these judicial ethics, beyond which we are not supposed to go.

Behaviour and conduct of a judge should be such; that a common man should feel proud to refer to him as a judge. He ought to be a good man and thought to be so, by all who come across with him. Good human being would naturally make him a good judge.

To be a good judge, he should be humble, polite, courteous, and patient but yet firm in his views. If one follows this simple age old traditions, he is bound to be known as a perfect judge. It is more difficult to be a judge and to observe the self-imposed restrictions rather than to be a Sanyasi.

A judge should have only one yard-stick and everyone should be measured by the same. No different and partial attitude should be adopted by him. If this is observed there would not be any scope for criticism.

Litigants and lawyers who appear before you are human beings first, thus, they should be treated with honour and dignity. They should not be subjected to humiliation at any time, even if they had been rude or uncourteous to a judge.

You should become a role model for the society so that the younger generation should follow you in all respects. Always maintain the decency and decorum which a judge is supposed to observe.

Generally, public functions should be avoided where you may be required to mix with persons who may be having their cases in your court. Here it is necessary that you also maintain a reasonable distance with the members of the society. However, it should not give an impression that you are never available for them at all. Even after meeting, members of the society; you can still control your court functions very well without showing any favour to any one. You must have sufficient amount of self-determination then only you can function freely and fearlessly.

At the end, I would also request you that while deciding cases utmost honesty is required to be observed by all of us. Nothing should be done by us which may give suspicion to anyone to doubt our integrity. After all, judiciary is the only hope, for the common man, for whom there is no other support from the society. If we also fail in discharging this duty properly and efficiently, on account of some extraneous consideration, then according to me, we would be failing in our duties. I hope and trust that all of us would continue to observe it as before, at all times.

Thanking you,

Jai Hind !

COURT MANAGEMENT WITH SPECIFIC REFERENCE TO TRIAL COURTS IN M.P.

(Text of the Address delivered by Hon'ble Shri Justice Chandresh Bhushan in the Refresher Course for Civil Judges Class I held at Gwalior on 20.2.2005)

Court Management means conducting or supervising of courts. It includes the practices designed to improve performance of courts and to ensure its smooth and efficient functioning in order to enable it to dispense with justice speedily and in the best way. Considering the nature of the work involved in managing the affairs of the Courts, it may be divided into three heads. One The Functional Behaviour, second General Administration and the third, Case Management. I shall be dealing here with their brief outlines only considering the time available to us.

I. FUNCTIONAL BEHAVIOUR AND RELATIONS

A judge or Court's Administrator has to deal with his Superiors, seniors, juniors, subordinates, litigants and members of Bar and at times with other officials and persons. As far as seniors and superiors are concerned, his conduct, work and dealings have to be such that he is considered by them as a honest, submissive, industrious, capable, and a willing worker. For his juniors he has to be a role model. To his subordinates he has to be a real leader who can lead them in discharging their duties in the improved and best way. For litigants and members of bar it has to be such that builds confidence in him for getting justice at his hands. Towards all these and also others his behaviour has to be polite and soft but firm. Firmness never means rudeness. He has also to be punctual, should know his job very well. He has to maintain high standards of morality and integrity. He has to remember that there is no alternative for hard work.

II. GENERAL ADMINISTRATION

It again considering the nature of the work involved may be divided into two heads. One is personnel management and the other is ancillary management.

PERSONNEL ADMINISTRATION

While talking about personnel management I mean Personnel other than the presiding officers of the court. Court is a unit created under statute to dispense with Justice in accordance with the law of the land, to individuals within a particular territory. This job of dispensation of justice is the primary responsibility of its Presiding Officer. But as he alone cannot perform all required functions, he requires assistance from persons who need not be trained in law like him. What work has to be so taken considering this it has to be decided as to

who these person should be, what should be their numbers, whether they should be of one or more classes and cadres and what should be those classes and cadres, how should be they divided ? All such questions are covered under the head of creation and classification of posts and form part of the main subject of personnel administration, but as in our State this all is worked out centrally and at the level of the Registry of the High Court and the Department of Law of the State Government, it need not be dealt there in this session.

The different cadres and numbers in each cadre, their scales etc. are all provided under various rules made by the State Govt. After taking over as a Presiding Officer of a Court one should gather information about the staff attached to that court and in case there any vacancies, suitable request has to be made. The relevant rules framed by the State Govt. provides as to who shall be the appointing authority. Normally it is the District Judge. Guide lines may also be provided by the High Court.

Any vacancy in any of these classes and cadres has to be filled by recruitment. This recruitment is governed by relevant rules and even statutory laws. Considering our restraint of time we cannot discuss these rules and laws. In case any one here is associated with the job of recruitment, he must gather knowledge about them. Recruitment is followed with posting of the person recruited. If there is a choice then it has to be so exercised that the person who can deliver the best results at a particular post must be posted to it. In case there is no choice for example where there is only one post and only one person is available then he has to be posted against it. **Training:-** While deciding what kind of work is to be taken by an individual together with what should be his class and cadre we in other words identifies a post at which one has to work. Thus, anyone posted against a post has to perform certain specific functions. These functions do not form part of any specific curriculum of any institute. Therefore the person who for the first time joins any such post requires proper training to be able to perform his required work. This training could be imparted by telling his duties and the ways and manner in which they are to be discharged. Thereafter it would be better to put him with some experienced senior performing similar functions to that he can get practical experience also. **Supervision :-** To maintain the level of efficiency constant supervision of the working of the subordinate staff is a necessity. Besides proper knowledge of his work, maintenance of efficiency level also demands punctuality, prevention of any wastage of time and labour, and devotion towards work. Supervision should be such that all these standards are properly maintained. Best way to achieve this end is to constantly monitor the work of subordinates. Best way for it is not only to maintain constant daily supervision but it is also necessary to periodically and regularly inspect their work.

Inspections :- Our M.P. High Court Rules and Orders provides that every presiding officer should inspect his own court once in a month and if he is an officer in charge of any section then once in three months of the concerning section. I

would like to stress that these instructions are carried out in letter and spirit. Besides occasionally as and the time permits, it should be ascertained whether any papers like applications from office requisitioning the records for copying or otherwise, regarding compliance of orders of superior courts etc., are pending with the staff and in case any papers are found pending they should be got disposed off immediately.

Service Rules :- As far as government organization and its agencies are concerned there are Rules governing most to the service matters like, conditions of service, leave, disciplinary proceedings against erring employees, pension and other retiral benefits etc. One should have knowledge of these, sufficient, at least to find out the relevant one as and when the need occurs.

To sum up, as far officer of your cadre are concerned they should first of all master the High Court Rules and Orders as mentioned before, should ensure that every staff member working under him knows his job and if there is any deficiency then he should fulfil it by training the concerning employee and should maintain a constant supervision and should carry out regular parodical inspections.

ANCILLARY MANAGEMENT

Under this head of Ancillary management we shall consider all those topics of General Administration which are not covered under the head of Personnel Administration. These are Finance Management, Conveyance and Material Management and Management of allied sections like Copying, Record-Room and in the case of District Judiciary also the Nazarat. For smooth and efficient functioning, considering the difference in the nature of the job to be performed, the administrative set up should also consists of following different sections, besides the other set up.

1.Finance and Account :- As we all know in our Country the Judiciary though known for its independence in dispensing justice has not been given financial independence. For meeting its financial requirements it depends on the executive wing. It receives money only as is allocated to it under the budget prepared by the executive wing after receiving proposals from Judiciary through law/Justice Department. Therefore the concerning officials in Judiciary should have sufficient expertise for preparing demands after carefully ascertaining their requirements and needs. Money is accordingly granted under various heads in the budget. Expenditure is therefore limited to the sums provided under the concerned heads and therefore requires knowledge of Budgetary provisions, study of relevant financial rules under financial codes and a careful planning. The expenditure is incurred by withdrawals in accordance with the rules framed by the executive in exercise of powers conferred under the Constitution. It need not be pointed out that proper book for keeping the records of receipts and expenditure under different heads has to be maintained in this section.

2. Conveyance Management :- It is almost obligatory for the Govt. to provide conveyance to all judges. Accordingly vehicles of different types are provided at each establishment. The centre as well as every state has various rules for such cars, except with respect to cars provided to Judges of the High Courts and Apex court as they are provided with staff cars under statutory provisions and the rules by executive are not applicable to those institutions. Officers of District Judiciary therefore should have knowledge of those rules and accordingly use them and plan for proposing replacements and for budgetary provisions relating to its use and maintenance .

3. Buildings :- Courts not only require manpower as already discussed, but for housing them also requires buildings which are provided by the government. Presently the Central government is having a scheme for constructing new buildings and also provides for necessary funds on condition of equal contribution by the concerning States. A good court administrator is therefore required to properly assess whether the available accommodations are proper and sufficient and if not then to take necessary steps is accordance with the system applicable necessary alternations and additions.

4. Materials Management :- Beside accommodation every court also requires furniture; stationery and machinery like type writers and computers, as well as dress for its class four employees. An administrator has to assess his requirements well in advance so that the work in courts is not held up and they run more efficiently and smoothly. Considering the recent advancements more and more use of computers is recommended. Procurement of these materials is either from other government agencies or by purchase from market and normally there exists rules for such procurements which have to be adhered to. An inventory of the goods available and received should be maintained with separate entries of quantity issued and thus there should be an up-to-date record of all the stocks which should also be periodically verified.

5. Copying section :- All the Judicial proceedings are recorded. The pleadings are normally in writing and part of the evidence is documentary. Even the oral evidence is reduced to writing. Naturally copies of the same are required and applied for by party. Therefore there is a need of a copying section in every establishment of Courts. Who and how he can ask for these copies and what should be the method of their preparation and authentication has to be governed by framing of necessary rules in that respect. In our state of M.P. these rules are also contained in High Court Rules and Orders. With the availability of Photocopiers, computers and printers the system of preparation of copies by hand or by typing is fading away. Use of these Machines not only saves on manpower and time but also ensures correctness. With more use of computers there can be even more improvement in this respect. Use of computers by each court and recording of all proceedings and orders through computer and after saving the same If the copying section is permitted to have access to

them, then it could without calling for the record and thereafter making its copy can directly take out prints and give it to parties. Only before permitting the same it has to be ensured that any kind of interpolation in the record is not possible and this can be ensured by proper programming.

6. Nazarat Section :- The section of the Court which deals with, execution of all kinds of processes issued from time to time by civil Courts, receives the fines collected by different court and the various amounts deposited by the parties with the civil courts and deposits the same with Govt.. treasury or banks, upkeeps and guards the court building and receives and keeps all the articles deposited with the Courts is normally called as Nazarat. Considering its functions this is one of the important sections and requires strict supervision. Its proper functioning requires detailed rules to govern ever aspect of its functioning and every High Court provides them under its Rules and Orders for the guidance of Subordinate Courts that is District Judiciary. Considering the quantity of criminal cases a lot of articles are deposited with these Courts, and are therefore kept in part known as Malkhana of this section. The Rules must and normally do provide that large amounts of cash, valuable property and firearms are not kept in this section for security reasons. The officer in charge of this section must not only ensure strict compliance of these rules to prevent any misappropriation but should also ensure that every article received is duly entered in record on the same day, that record in the shape of property memo or otherwise is also included in the concerning record of the concerning case, that necessary orders are passed at the earliest and at least with the final orders in the concerning court and that they are timely complied with so that there is no overcrowding.

7. Record Rooms :- This is another important section which houses all the records normally of disposed of cases. Records of disposed of cases should and normally are, kept here in iron racks, Court wise as well as month and year wise as that makes the retrieval and weeding both more easy. These records should be regularly weeded out to avoid unnecessary collection. It should also be ensured that the records are timely deposited here by the concerning Courts.

III. CASE MANAGEMENT

Case management is the systematical handing of the case from the very beginning of litigation and till it ends. It includes conduction of trial.

Case : A case means an individual litigation.

Considering the restraint of time, we shall be dealing here with only those techniques in brief which are applicable in general to cases and not to specific stages of trial of individual cases.

1. Statistical Study :- This is one of the most important techniques. It requires maintenance of complete data of all the, pending cases as well as the institution

duly categorized and classified. Not only it is necessary; for assessing the number of courts required but it also would provide clue about the capacity of individual judge and thus in turn would help in determining the number of cases together with their classes to be listed before the individual judge. It also helps in grouping and clubbing of cases. It is very important for Improving the efficiency and disposal. The figures should be verified and studied periodically.

2. Categorization :- The total litigation to be dealt in a Court should be categorized according to the type of court where it is to be dealt with, like Civil or Criminal in case of District Judiciary and also according to the basic nature of the proceedings. If it is civil case then it is to further categorized into suits, appeals, revisions or other miscellaneous proceeding. Similarly Criminal cases are further categorized into cases of magistracy or Sessions. This categorization is to be normally provided under rules as has been done in M.P. High Court Rules and Orders.

3. Classification:- According to the subject matter of the dispute involved in the cases they may be further classified into different classes. For example civil suits involving title disputes over agricultural lands and claiming the relief of injunction alone may be grouped in one class and the cases wherein relief of declaration may be classified in different class and eviction suits in respect of urban property where rent control laws in force may be classified under another class. Similarly criminal cases which are triable summarily may be classified a class separate from cases triable as warrant cases or summon cases by the Magistrates. Warrant cases and summons cases forming separate classes by themselves. Summary cases may again be further classes like those under Excise Act may form a separate class. Such classification helps in curtailing trial period. For example all cases under Excise Act and triable summarily if classified as one class and are fixed on one day then if some witnesses are common in more than one cases then they can be examined though may not have been served and they would also be willing to spend some more time on one date then to come again and again on different dates. This in turn would also prevent adjournments and save time on such accounts.

4. Grouping :- Cases involving similar question or issues in a class may also be grouped together as in case they are heard together time on repeated same arguments can be saved. This is very beneficial especially in appeals.

5. Clubbing of cases :- Two or more cases when not only involves similar question but also the same questions should be clubbed together and this would save a lot of time because together they would take almost the same time that might be taken by each case individually. This is possible in all such cases which have same cause of action, like claim cases arising out of same accident or appeals from same judgment or from judgments in cross cases.

6. Computerization :- As it has already been pointed out earlier coping with modern technology and to have its benefit we should resort to latest techniques and developments. One called for as most useful for courts is the use of Computers. For transcription work, computers are better than the Typewriter. Similarly statistical study becomes easier and wider if complete details of registration of individual cases are fed in the computer. For that software has to be so programmed that maximum details are fed in and can be retrieved. This in turn would also assist in classification, clubbing and Grouping of cases as well as in listing.

7. Listing :- By listing is meant fixing of cases for hearing in a court, by preparing a list. When the list is for any particular day it is known as the daily cause list, when it is for a week it is called weekly cause list and so on. The cause list is normally not prepared; by the trial Court especially when they maintain a Board diary and cases are mentioned therein date wise. Only such number of cases should be listed on a day as a judge can hear in one day. This can be calculated by statistical study as already pointed out before. All cases that are clubbed together should be listed together on the same date. As far as possible the listing should be in order of registration, i.e., earliest registered case should be listed first and then next and so on. As far as possible cases of same class and if they are not sufficient for the day then on another class or classes, should be fixed on a particular day. This increases efficiency. The Trial Courts may so arrange their board diary that particular class or classes of cases are only fixed on predetermined days like every Friday or every first or first two Fridays of a month.

8. Filing :- A litigation or a case commences with presentation or filing of a plaint in civil suits, of appeal memo in appeals, an application in misc. cases, executions and revisions etc., and a private complaint or a charge sheet in criminal cases. Thus filing is first stage in litigation. The filing may be centralized or left to individual courts. A centralized one is better and recommended as that saves on manpower and time and also increases efficiency. The employee, who receives these plaints etc., has to scrutinize them to ensure compliance of necessary provisions like relating to format, court fee etc. Registration of all the matters could also be done there. Necessary details while registering should include all details required for classification , grouping, clubbing and listing. A necessary format useful for computerization also, may be developed and provided to bar and be fixed on the notice board for information of all those who have to submit the plaint, applications etc. In centralized system all the related work can be entrusted to one or few person as per total workload instead of one person in every court. This in turn would help in specialization in the field by that one or few only instead of many as lesser are always more and better trained.

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CONSUMER PROTECTION: AT A GLANCE

- **SUSHIL KUMAR PALO**
Registrar, M. P. State Consumer
Disputes Redressal Commission, Bhopal.

INTRODUCTION :

In order to provide for better protection of the interests of the consumers, the Consumer Protection Act, 1986 was enacted which came into force on 24th December 1986. The Prime object of the Consumer Protection Act, 1986 is - to provide for better protection of the interests of the consumers and to make provision for the establishment of Consumer Protection Councils and other authorities for the settlement of consumer disputes and for matters connected therewith. It also promotes and protects the rights of consumers such as -

(a) the right to be protected against marketing of goods which are hazardous to life and property ;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices ;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums ;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers ; and

(f) right to consumer education.

Besides to provide speedy and simple redressal to consumer disputes a quasi-judicial machinery has been set-up at the district, state and national levels. These quasi-judicial bodies observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by these quasi-judicial bodies have also been provided.

CONSUMER :

Before proceeding to the next point, it would be very pertinent to know who is a "CONSUMER". By a very simple common use every person, right from the birth, (even before birth, when the child is in the mother's womb) till the last step for the grave yard, a person remains consumer. An unborn baby while in the mother's womb is a consumer. The mother takes tonics, medicines etc. for the development of the unborn baby. If the baby is born with some abnormalities due to the malnutrition of tonics etc, then the child can seek redressal. People use so many things every day in their day to day life like clothes, utensils, furniture, house, vehicles etc. They pay consideration for these things. When

a person travels in a train or a bus or airways, he hires services. Likewise he also pays for services of Electricity Department, Telecom Department, Railway Department etc. These departments are service providers. In the simple sense, a consumer is a person who buys any goods for consideration or hires or avails of any services for a consideration.

CONSUMER RIGHTS :

1. **Right to satisfaction of basic needs** : To have access to basic essential goods and services ; adequate food, clothing, shelter, health care, education and sanitation.
2. **Right of Safety** : To be protected against products, production processes and services which are hazardous to health or life.
3. **Right to be informed** : To be given the facts needed to make an informed choice, to be protected against dishonest, misleading advertisements and labelling.
4. **Right to choose :** To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
5. **Right to be heard :** To have consumer interests represented in the making and execution of government policies and in the development of products and services.
6. **Right to redress :** To receive a fair settlement of just claims including compensation for mis-representation, shoddy goods, or unsatisfactory services.
7. **Right to Consumer Education :** To acquire knowledge and skills needed to make information, confident choices about goods and services while being aware of basic consumer rights and responsibilities and how to act on them.
8. **Right to a healthy environment :** To live and work in an environment which is non-threatening to well-being of present and future generations.

WHO CAN FILE A COMPLAINT IN A CONSUMER COURT :

The Consumer Protection Act, 1986 provides filing of complaint before the quasi-judicial bodies for redressal. The Consumer himself /herself can file a complaint. Any registered voluntary organization can also file a complaint on behalf of a consumer or a number of consumers. The State Government or the Union Territories can also file complaints. The Government of M.P. has recently designated, District Food Officers as the District Consumer Protection Officers who after obtaining sanction for filing complaint from the Collector can file complaints on behalf of the State Government. The Central Government may also file complaints before the quasi-judicial bodies.

WHERE TO FILE A COMPLAINT :

If the cost of the goods or services and compensation asked for is valued up to Rs.20 lakhs, then the complaint can be filed before the District Forum. If the cost of goods or services and compensation asked for is more than Rs.20 lakhs but not exceeding Rs. 1 crore then the complaint can be filed before the State Commission functioning in the state capital of the State. If the cost of goods or services and compensation asked for exceeds Rs.1 crore, then the complaint can be filed before the National Commission at New Delhi.

Complaint can be filed before these quasi-judicial bodies subject to their local limits of their jurisdiction in which the opposite party or each of the opposite parties where there are more than one, at the time of institution of complaint actually and voluntarily resides or carries on his business or has a branch office or personally work for gain or where the cause of action wholly or partly arises.

WHAT INFORMATION SHOULD A COMPLAINT CONTAIN :

The complaint should have detailed description of the name and complete address of the complainant as well as name and complete address of the party/ parties against whom the complaint is being made, the details relating to complaint, the brief of complaint or deficiency or defect, the relief sought and the documents such as bill etc. relating to the complaint be also mentioned and enclosed. The complaint should also be signed by the complainant or his agent as the case may be. The complaint is generally supported by an affidavit of the complainant.

RELIEF AVAILABLE TO THE CONSUMER :

The quasi-judicial authorities are the machineries for providing remedies. The prime object of these bodies is to provide redressal. Consumer can pray for removal of defect or defects from the goods. If it is not possible to do so the complainant may seek redressal for replacement of these goods. If that is also not possible in the ordinary course then the complainant may request for refund of the price paid. In other suitable cases, the complainant can also seek compensation for the loss or injury suffered.

ADVANTAGES IN SEEKING REDRESS IN CONSUMER COURTS :

(a) **Fees** : As regards fees, the consumer has to pay a nominal fees while filing a complaint . In cases before District Forum the fee ranges from Rs. 100/- to Rs. 500/- depending upon the valuation of the claim. Before the State Commission the fee ranges from Rs. 2000/- to Rs. 4000/- while before National Commission the fees is Rs. 5,000/-

Engaging a counsel : For petty consumer cases, hiring services of a counsel is not feasible, especially if a consumer is a poor man. In that case he can very well file his own complaint and he himself can participate in the proceedings. He can also approach a registered voluntary consumer organization who can file the complaint on behalf of the consumer and prosecute the case. He can also approach the District Food Officer (now designated as District Consumer Protection Officer) and request for redressal.

Time frame : The normal requirement is that the complaint should be decided within three months from the date of service of notice to the other party. Where the complaint requires testing of commodities, the complaint should be decided within five months. Even the appeals are to be decided within a period of three months from the date of their admission.

Free copies of final orders : After pronouncement of the final order both the parties are entitled to supply of certified copies of final order free of cost. If the parties or their representatives do not appear to collect the certified copies of orders within seven days from the date of its preparation, then the certified copies are sent to the parties by post.

Mode of execution : The Consumer Redressal Agencies are empowered with the powers of Magistrate First Class for executing their orders. Where any amount is due from any person under an order made by the quasi-judicial bodies the person entitled to that amount makes an application to the quasi-judicial body. The Forum or the State Commission or the National Commission, as the case may be, can make an order to attach the property of the person against whom such order is made. The attached property may be sold and the complainant may be compensated. Likewise these quasi-judicial bodies may also issue a certificate for the said amount to the Collector of the District where the property of the defaulter is situated to recover the amount in the same manner as arrears of land revenue. And the third option is to impose punishment to a term which shall not be less than one month and may extend to three years or fine which shall not be less than two thousand rupees which may extend to ten thousand rupees or both, if the person against whom award is made fails to comply with such order.

Protection of decree holders from harassment by filing appeal : For protecting the interest of consumers a mandatory provision under Section 15 of the Act has been incorporated by the amendment in the Consumer Protection Act, 1986 whereby a person who is required to pay any amount in terms of any order of the District Forum, has to deposit 50% of the awarded amount or Rs.25,000/- whichever is less before filing any appeal to the State Commission.

Likewise a person who requires to pay any amount in terms of the order of the State Commission is required to deposit 50% of the awarded amount or Rs.35,000/- whichever is less before filing an appeal to the National Commission. Similarly a person who is required to pay any amount in terms of the order of the National Commission has to deposit 50% of the awarded amount or Rs.50,000/- whichever is less before filing an appeal to the Supreme Court. This makes the other party to think twice before filing any appeal. Secondly, when the appeal is decided the person in whose favour order is made is only entitled to withdraw the money whereby the consumer in whose favour award is made gets his money conveniently without wasting much of his time in execution. This also brings down a tendency to file appeals just for prolonging the matter.

CONCLUSION :

People in general and especially people of rural background are not much aware of their rights which need to be attended. No doubt, urban middle class community have started taking interest in their health and safety more seriously but there is yet to be lot more done in remote village areas. In this regard the media can play an important role. The print media, the electronic media can give publicity to the important judgments/orders made in favour of the consumers. "The smallest deed is greater than the grandest intention."

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पक्षपाताधिरोपस्य कारणानि च पञ्च वै ।
रागलोभभयद्वेषा वादिनोश्च रहश्रुतिः ॥

"There are five causes which give rise to the charge of partiality (against the judges). They are (i) Raga (affection in favour of a party); (ii) Lobha (greed); (iii) Bhaya (fear); (iv) Dwesha (ill will against a party); and (v) Vadinoscha Rashashruthi (the judge meeting and hearing a party to a case secretly)."

SHUKRANITI (CH-V--14-15)

PART - II

NOTES ON IMPORTANT JUDGMENTS

61. CIVIL PROCEDURE CODE, 1908 – O.7 R.10 (2)
Return of plaint under O.7 R.10 – Requirement of Sub-Rule 2 of Rule 10 mandatory – Plaintiff entitled to exclusion of time till endorsement of return is made under Rule 10 (2) C.P.C.
Dashrath Singh v. Managing Director, M.P. State Co-op. Oilseed Growers' Federation Ltd. and others
Reported in 2004 RN 131

Held :

Order 7 Rule 10 (2) CPC provides that on returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. Though this provision of the Civil Procedure Code may not apply *protanto* the principle engrafted therein would apply. It is only after such endorsement the statement of claim could be returned for presentation to the proper Court. It has been held by Madras High Court in *Moneys Transports v. Tanjore, AIR 1979 Madras 196* that the requirements of sub-rule (2) of rule 10 of Order 7 are mandatory and without the endorsement required by the sub-rule the plaint cannot be returned and cannot be presented to the proper Court. The Allahabad High Court has also held in *Islam Shah v. Wali Mohammad, AIR 1971 All. 473* that on return of plaint the plaintiff is entitled to the exclusion of time till an endorsement of return is made under Order 7 Rule 10 (2) CPC.

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62. LAND REVENUE CODE, 1959 (M.P.) – Section 117
Khasra entries in remarks column, evidentiary value of – Such entries have no evidentiary value – Law explained.
Bhanwarlal and another v. State of M.P. and others
Reported in 2004 RN 229

Held :

The reliance placed on the entries in the remarks column of Ex. P-7 and Ex. P-8 is also of no avail to the plaintiffs in view of the Division Bench decision of this Court reported in *1991 RN 61= 1991 MPLJ 311 (Churamani & another v. Ramadhar)*. It was held by the Division Bench that presumptions as regards continuity of possession over the suit land could not be drawn in favour of the plaintiff on the basis of remarks recorded in the remarks column. No presumption of correctness can be attached to an entry made by Patwari in the remarks column of Khasra or field book showing therein some third party or the trespasser to be in possession of the land held by a Bhumiswami and recorded as such in his name in the said records. Presumption under S. 117 of the Code applies to

the entries which are required to be made in Chapter IX and in respect of entries in other land records prepared under the Code. The provisions of Code or the Rules made there under do not require Patwari to make any entry in the remarks column and if such an entry is made, the same cannot have any presumptive value as regards its correctness under S.117 of the Code.

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63. LAND REVENUE CODE, 1959 (M.P.) – Section 164
Mutation, effect of – Mutation is only for fiscal purpose – It does not effect rights of the true owner.
Subhash Chandra and others v. Smt. Manjula and another
Reported in 2004 RN 233

Held :

Learned Counsel for the appellant submitted that the Courts below have erred in dismissing the plaintiff's suit on the ground that the land is not recorded in the name of plaintiff. Kunwarbai is the mother of the plaintiff and after her death the property has devolved on the plaintiff as per the provisions of section 164 of the M.P. Land Revenue Code (hereinafter referred to as the 'Code') and, therefore, even in absence of mutation in the name of plaintiff, it cannot be said that the plaintiff has no right to sale the property. For this purpose Shri Agarwal, relied on the judgment of Apex Court in the case of *Smt. Sawarni v. Smt. Inder Kaur and others, (1996) 6 SCC 223,* in which the Apex Court has held that the mutation does not create or extinguish the title nor has any presumptive value on title. The mutation of property is only for the purpose of paying the land revenue. Shri Agarwal also relied on the judgment of this Court in the case of *Asha Lamba (Smt.) and others v. Board of Revenue and others, 1999 RN 401,* in which it is held that mutation in favour of a person does not affect the rights of the true owner. The mutation is only for a fiscal purpose.

Thus, according to him the absence of mutation in the name of plaintiff is not sufficient to hold that the plaintiff has no right to sale the property. In reply to these arguments, Shri B.A. Nigam, learned counsel for the respondents has invited my attention to various provisions of M.P. Land Revenue Code including sections 2 (i), 2 (z) section 57, sections 110, 157, 158, 159 and 165 of the Code. According to him as the plaintiff has not acquired the status of Bhumiswami he is not competent to execute any sale deed. According to him the defendants were always ready and willing to perform their part of the contract but in absence of mutation in the name of plaintiff no registered sale deed can be executed. According to him section 165 of the Act creates a bar on execution of a registered document. According to him under the said section only a Bhumiswami is competent to execute the sale deed.

In view of the judgments referred above I find that the arguments advanced by Shri Nigam have no force. Plaintiff has acquired title to the suit property under section 164 of the Code and mere absence of mutation will not extinguish

his rights accrued to him under section 164 of the Code as the property has devolved in the plaintiff after the death of Kunwarbai who was the Bhumiswami.

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64. CIVIL PROCEDURE CODE, 1908 – O.41 R.27
Additional evidence – O.41 R.27 is meant for production of evidence and not for requisition of records.
Bhagga v. Dulesingh and another
Reported in 2004 RN 346

Held :

During the first appeal, an application under Order 41 Rule 27 of the CPC was filed on behalf of the appellant seeking the requisition of the revenue record from the office of the Collector, Shajapur. Learned lower appellate Court found the application to be devoid of any substance and rejected the same while dismissing the appeal, hence this second appeal as has been mentioned herein above.

The application filed under Order 41 Rule 27 of the CPC, in the considered opinion of this Court, was rightly rejected by the lower appellate Court. The lower appellate Court rightly refused to exercise the discretion in favour of the applicant by assigning valid and cogent reasons. The rejection of the application under Order 41 Rule 27 CPC cannot be a substantial question of law. It is also pertinent to note that order 41 Rule 27 CPC is meant for production of additional evidence and not for requisitioning of the revenue record as was sought to be done by the appellant before the lower appellate Court.

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65. MADHYA BHARAT ZAMINDARI ABOLITION ACT, 1951 – Ss 4 (2) and 41
Expression "Khudkasht land", meaning of – It includes land in unauthorized occupation of other person as tenant at sufferance – Law explained.
Gora Bai (Smt.) & Ors. v. Ummed Singh (Dead) through LRs. & Ors.
Reported in 2004 (II) MPJR 243 (S.C.)

Held :

The High Court referred to the definition of *Khudkasht* lands given in clause (c) of Section 2 of the Act for coming to the conclusion that unless on the date of vesting, the proprietor is in actual cultivating possession, the benefit of sub-section (2) of Section 4 of the Act to allow him to retain the *Khudkasht* lands cannot be granted. We find no good reason to give such a restricted meaning and effect to the provisions of sub-section (2) of Section 4 of the Act. The expression *"Khudkasht"* has been defined to describe the category of land forming part of proprietary. Such land under sub-section (2) of Section 4 of the Act has to be allowed to be retained by the proprietor. The benefit of sub-section (2) of Section 4 cannot be denied to an ex-proprietor who has been illegally

deprived of his right to possess and cultivate his *Khudkasht* lands. In the instant case, the proprietor could not regain possession of *Khudkasht* lands for personal cultivation as the tenants, despite expiry of their period of lease, illegally continued in possession and the eviction proceedings in the Revenue Court abated for want of substitution of legal representatives of one of the tenants and due to the intervening legislation that is the present Act which came into force w.e.f. 2.10.1951. It may be made clear that the provisions of Gwalior Mal Qanoon did not bar filing of a civil suit within the prescribed period under the Limitation Act by the proprietor for seeking eviction and obtaining possession of his Khudasht lands from his tenants. On the facts found in this case, on the date of vesting the term of lease granted to the defendants as tenant had expired and their possession thereafter had been rendered as unauthorised. The ex-proprietor should be deemed to be legally in possession and cultivation of his *Khudkasht* land on the date of vesting. In accordance with Section 41, the ex-proprietor in respect of his *Khudkasht* land is deemed to be tenant of the Government from the date of vesting. He had right to retain possession of his *Khudkasht* land under Section 4 (2) of the Act. He had also acquired status of tenant under Section 41 of the Act. His right to sue for possession of the lands which are in unauthorised occupation of the defendants as tenants at sufference has, therefore, to be recognised and granted by passing a suitable decree in his favour.

The following observations of this Court in the case of *Choudhary Udai Singh v. Narayanibai* (SCC at pp. 544-45, para 7) supports our conclusion.

> "In *Harishchandra Behra v. Garbhoo Singh* the expression 'personal cultivation', is explained as not mere bodily cultivating the land but constructively also and also the right to possess against a trespasser. If a wrongdoer takes possession, steps to exclude him can certainly be taken and cultivation of trespassers in such circumstance cannot clothe him with any right and his cultivation has to be deemed to be on behalf of the rightful owner. Thus the appellants are entitled to claim right to possess in respect of the land in question. We are further fortified by the decision in *Himmatrao v. Jaikisandas* where a distinction has been drawn between a suit brought by a proprietor in his character as proprietor for possession of property and in his individual right to possess in respect of the said property against the trespasser. The High Court lost sight of the provisions of Section 41 of the Act which enables even a proprietor holding land khudkasht or *sir*, to be deemed to be a tenant from the date of vesting. If the appellants were entitled to be put in possession of the land and the same had been deprived of by a trespasser, that possession has to be recognised as that of the person who is entitled lawfully to cultivate the land in question."

66. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Ss 7 and 16 PREVENTION OF FOOD ADULTERATION RULES, 1955 – RULE 32 (e) Mis-branded article – Rule 32 (e) declared to be *ultra vires* hence prosecution for infraction of that rule not maintainable – Law explained.

Hiraram & Ors. v. State

Reported in 2004 (II) MPJR 284

Held :

Public Analyst, vide its report dated 6-7-1995 found the sample to be mis-branded as defined in Section 2 (ix) (k) of the Act. Copy of report of Public Annalist has been filed with the revision petition as Annexure-B. The reason for finding the sample as mis-branded is that the label on the container was not in accordance with Rule 32 (e) of the Rules which reads thus:-

> "32. *Package of food to carry a label* -. Every package of food shall carry a label and unless otherwise provided in these rules, there shall be specified on every label :-
>
> X X X X X X
>
> (e) A distinctive batch number or lot number or code number, either in numericals or alphabets or in combination, the numericals or alphabets or their combination, representing the batch number or lot number or code number being preceeded by the words 'Batch No., or Batch, or Lot No., or Lot or any distinguishing prefix:
>
> Provided that in case of canned food, the batch number may be given at the bottom or on the lid of the container, but the words 'Batch No.' given at the bottom or on the lid, shall appear on the body of the container'.

The petitioners moved an application before the Magistrate trying the case contending that Rule 32 (e) of the Rules has been declared to be *ultra vires* as it is beyond rule making power under Section 23 (1) (d) of the Act, therefore, no offence is committed and the complaint filed by the Food Inspector deserves to be quashed.

Learned trial Magistrate by the impugned order rejected the application on the ground that this aspect of the matter shall be decided on merits after evidence is recorded. It is against this order that the petitioners have filed this revision petition.

I have heard Shri Surendra Singh, learned Senior Counsel with Shri A.K. Dubey, appearing for the petitioners and Ku. Alka Pandya, learned Government Advocate for the State, and gone through the documents filed with the petition.

The contention of Shri Surendra Singh, learned counsel for the petitioners is that no prosecution could be launched against the petitioners for the alleged violation of Rule 32 (e) of the Rules framed under the Act inasmuch as the said rule has been declared by the Supreme Court as *ultra vires* in the case of

Dwarka Nath vs. M.C.D., 1972 FAC 1. In my opinion this statement of learned counsel for the petitioners merits acceptance.

Following the decision of the Supreme Court in the case of *Dwarka Nath* (Supra), in *M/s. Lipton India Ltd. v. The State of Himachal Pradesh, FAC 1991 (1), Bharat Arora and others v. The State, 2000 (1) FAC 41, Ajit Singh v. The State of Punjab and others, 2001 (1) FAC 12 and Babulal v. State of M.P., 1992 FAJ 139,* it has been held that Rule 32 (e) of the Rules is *ultra vires* being beyond rule making powers under Section 23 of the Act.

In my opinion, the case in hand is squarely covered by the decision of Supreme Court in *Dwarka Nath* (supra) and the judgments of other High Courts including Madhya Pradesh High Court. As Rule 32 (e) of the Rules has been declared to be *ultra vires*, its violation cannot be said to be an offence and the finding of the Public Analyist that the article was mis-branded cannot be allowed to stand. Hence, the learned Magistrate committed an error in rejecting the application for discharge of the petitioners.

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67. SERVICE LAW :

Seniority – Period of service pursuant to adhoc appointment not to be considered for seniority – Regular appointment – Seniority to be maintained from the date of appointment and not from the date of confirmation – Law explained.

Smt. Saroja Saxena v. State of M.P. & Anr.

Reported in 2004 (II) MPJR 401

Held :

In the case of *The Direct Recruit Class II Engineering Officers' Association and others* (supra), Supreme Court after considering the various judgments on the point has laid down the law in para 44 of the aforesaid judgment and 44 (A) and (B) reads as under :-

> "(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. **The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.**
>
> (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till **the regularisation of his service in accordance with the rules,** the period of officiating service will be counted."

It is, therefore, clear from the aforesaid judgment that if the initial appointment is only on adhoc basis and not in accordance with the rules, the said period cannot be taken into count for considering the seniority. Supreme

Court in the case *Masood Akhtar Khan and others Vs. State of Madhya Pradesh and others, (1990) 4 SCC 24* after considering the judgment in the case of *The Direct Recruit Class II Engineering Officers' Association and others* (supra) has laid down that if initial appointment is not made according to the rules, subsequent regularisation of service of an employee dis-entitles him to benefit of intervening service for the purpose of seniority. Similarly, in the case of *Excise Commissioner, Karnataka and another vs. V. Sreekanta, AIR 1993 SC 1564* after considering the judgment of the Constitution Bench in the case of *The Direct Recruit Class II Engineering Officers Association and others (supra)*, it has been held that seniority of a adhoc employee has to be counted from the date of regularisation and not from the date of adhoc appointment. The aforesaid view is further affirmed by the Supreme Court in the case of *Y.H. Pawar Vs. State of Karnataka and another, 1996 (2) LLJ 625.*

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68. INDIAN PENAL CODE, 1860 – Section 365
Kidnapping of a girl – Love affair between the accused and the girl - Effect of – Such an affair gives no right to accused to forcibly take away the girl from lawful guardianship.
Deo Narain Mandal v. State of U.P.
Judgment dt. 25.08.2004 by the Supreme Court in Criminal Appeal No. 937 of 2004, reported in (2004) 7 SCC 257

Held :

We have perused the evidence adduced by the prosecution in this case and we notice that though it is true that there was a love affair between Kamla and the appellant, on the date of incident the appellant along with 5 other persons did come in a tempo and tried to kidnap Kamla at about 10 p.m. and it is because of the intervention of the mother and maternal uncle of the victim along with the neighbours, the appellant and another accused by name Kamlesh were apprehended and were produced before the police promptly. The fact that the said Kamla had an affair with the appellant would not, in any manner, give any right to the appellant to forcibly take her away from her lawful guardianship. In this background the trial court correctly came to the conclusion that the appellant was guilty of the offences for which he is convicted and the said conviction, in our opinion, deserves to be sustained.

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69. CIVIL PROCEDURE CODE, 1908 – Section 10
Scope and applicability of Section 10 – Mere filing of an application u/s 10 does not put an embargo on the power of the Court to proceed with the case – Section 10 merely enacts a rule of procedure – Decree passed in contravention of Section 10 not a nullity.
Pukhraj D. Jain and others v. G. Gopalakrishna
Judgment dt. 16.04.2004 by the Supreme Court in Civil Appeal No. 2082 of 1998, reported in (2004) 7 SCC 251

Held :

The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed. However, mere filing of an application under Section 10 CPC does not in any manner put an embargo on the power of the court to examine the merits of the matter. The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the court as to how the proceedings should be conducted, it is for the court to decide what will be the best course to be adopted for expeditions disposal of the case. In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where a subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other. Article 54 of the Limitation Act provides a limitation of three years for instituting a suit for specific performance of a contract. This period of 3 years has to be reckoned from the date fixed for the performance, or if no such date is fixed, when the plaintiff has noticed that performance is refused.

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70. WORDS AND PHRASES :
'Public purpose' – Meaning and connotation of.
Pratibha Nema and others v. State of M.P. and others
Reported in 2004 (2) JLJ 284 (SC)

Held :

The concept of public purpose (*sans* inclusive definition) was succinctly set out by Batchelor, J. in a vintage decision of Bombay High Court. In *Hamabai Framjee Petit v. Secretary of State for India* [AIR 1914 PC 20], the Privy Council quoted with approval the following passage from the judgment of Batchelor, J.:

> "General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purpose" in the lease; it is enough to say that in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim in which the general interest of the

community, as opposed to the particular interest of individuals, is directly and vitally concerned."

The Privy Council then proceeded to observe that *prima facie* the Government are good judges to determine the purpose of acquisition i.e., whether the purpose is such that the general interest of the community is served. At the same time, it was aptly said that they are not absolute judges. This decision of the Privy Council and the words of Batchelor, J. were referred to with approval by a constitution bench in *Somavati v. State of Punjab [AIR 1963 SC 151]* and various other decisions of this Court.

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71. EDUCATION :

Admission to Postgraduate Medical course – Allocation of 20% for in-service candidates not a reservation – Women candidates constitute a class by themselves – Eligibility criteria by reference to services rendered in rural areas by women candidates not discriminatory

State of M.P. and others v. Gopal D. Tirthani and others

Reported in 2004 (2) JLJ 344

Held :

We sum up our conclusions as under :

1. In the State of Madhya Pradesh allocation of 20% seats in postgraduation in the universities of Madhya Pradesh for in-service candidates is not a reservation; it is a separate and exclusive channel of entry or source of admission, the validity whereof cannot be determined on the constitutional principles applicable to communal reservations. Such two channels of entry or two sources of admission is a valid provision.

2. There can be only one common entrance test for determining eligibility for postgraduation for in-service candidates and those not in service. The requirement of minimum qualifying marks cannot be lowered or relaxed contrary to the Medical Council of India Regulations framed in this behalf.

3. In the State of Madhya Pradesh there are five universities i.e. there are universities more than one. Regulation 9(2) (iii) cannot be made use of in the State of Madhya Pradesh either singly or in combination with clause (i) for determining the eligibility for entrance into PG courses.

4. It is permissible to assign a reasonable weightage to services rendered in rural/tribal areas by the in-service candidates for the purpose of determining *inter se* merit within the class of in-service candidates who have qualified in the pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India.

5. Women candidates constitute a class by themselves and the provision of relaxed or reduced eligibility criteria by reference to continuous service

rendered in rural areas for the purpose of sponsorship by the State Government in specified disciplines which have utility for serving womenfolk in village does not suffer from the vice of invidious discrimination.

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72. ELECTRICITY ACT, 1910 – Section 24

Reconnection of electricity sought by subsequent owner of premises - Board cannot insist on him for payment of dues against previous owner.

Veen Enn Enterprises (M/s.) and another v. State of M.P. and others Reported in 2004 (2) JLJ 377

Held :

The previous unit owner had the benefit of electricity supply, it borrowed from the Madhya Pradesh Electricity Board. The electricity arrears in relation to these premises had fallen due since it had neglected to pay. The respondents Nos. 3, 4 and 5 because of non-payment of dues disconnected the electricity supply of respondent No. 7. The respondent No. 6 M.P. Financial Corporation also took steps under section 29 of the Act and transferred the property in favour of respondent No. 8. Thereafter, with the concurrence of respondent No. 6 the property was transferred by respondent No. 8 in favour of petitioners and now the premises is owned and occupied by petitioners after purchase from auction purchaser respondent No. 8 and from respondent No. 2. When the petitioner sought supply of electric energy from respondents Nos. 3, 4 and 5, they insisted to recover the dues on the premises. Infact the recovery of charges is a matter of contract between respondents No. 3, 4 and 5 and respondent No. 7. This will be covered by the contract entered into by respondent No. 7 and electricity Board. The Board cannot seek enforcement of contractual liability of third party. The petitioners cannot be held liable, though it was the same premises to which connection is sought. The Apex Court considering the similar situation held that it is impossible to impose on the purchasers the liability which was not incurred by them. Though the property was purchased by respondent No. 8 after disconnection, but they cannot be "consumer or occupier". The Electricity is public property. Law in its majesty, benignly protects public property and behoves everyone to respect public property. But, the law, as it stands, is inadequate to enforce the liability of previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state that if it is held as above, then it would permit dishonest consumers transferring their units from one hand to another, from time to time, *infinitum* without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness.

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73. INTERPRETATION OF STATUTES :

Retrospectivity of an enactment – General presumption is against retrospectivity – Factors to be considered to find out whether provision is retrospective or not.

Zile Singh v. State of Haryana and others

Judgment dt. 07.10.2004 by the Supreme Court in Civil Appeal No. 6638 of 2004, reported in (2004) 8 SCC 1

Held :

The constitutional validity of "two-child norm" as legislatively prescribed, and a departure therefrom resulting in attracting applicability of disqualification for holding an elective office, has been upheld by this Court as *intra vires* the Constitution repelling all possible objections founded on very many grounds in *Javed v. State of Haryana, (2003) 8 SCC 369.* This Court has also held that the disqualification is attracted no sooner a third child is born and is living after two living children and merely because the couple has parted with one child by giving it away in adoption, the disqualification does not come to an end.

Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity according to Craies (*Statute Law,* 7th Edn.) it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p.388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p.392)

Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislation as are explanatory and declaratory in nature.

In a recent decision of this Court in *National Agricularal Coop. Marketing Federation of India Ltd. v. Union of India, (2003) 5 SCC 23* it has been held that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation; (ii)

the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

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74. CRIMINAL PROCEDURE CODE, 1973 – Section 197
Sanction for prosecution against Government servant – Ambit and scope of Section 197 – Sanction necessary for prosecution of retired public servant.
State of Orissa through Kumar Raghvendra Singh and others v. Ganesh Chandra Jew
Judgment dt. 24.3.2004 by the Supreme Court in Criminal Appeal No. 35 of 1998, reported in (2004) 8 SCC 40

Held :

Section 197 (1) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government, and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

We may mention that the Law Commission in its 41st Report in paragraph 15.123 while dealing with Section 197, as it then stood, observed:

> "It appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecution. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant."

It was in pursuance of this observation that the expression "was" came to be employed after the expression "is" to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted.

The above position was highlighted in *R. Balakrishna Pillai v. State of Kerala,(2004) 2 SCC 349* and in *State of H.P. v. M.P. Gupta, (1996) 1 SCC 478.*

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75. CONSUMER PROTECTION ACT, 1986 – Section 22
Medical negligence – Action for medical negligence against hospital/clinic – Non-joinder of treating doctor or nursing staff, effect - Held, non-joinder not fatal to the maintainability of complaint – Law explained.
Savita Garg (Smt.) v. Director, National Heart Institute
Judgment dt. 12.10.2004 by the Supreme Court in Civil Appeal No. 4024 of 2003, reported in (2004) 8 SCC 56

Held :

The Consumer Forum is primarily meant to provide better protection in the interest of the consumers and not to short-circuit the matter or to defeat the claim on technical grounds. Reverting back to the facts of the present case, whether non-joinder of the treating doctor and nursing staff can result in dismissal of the claim petition. As a matter of fact, when a patient is admitted to a highly commercial hospital like the present Institute, a thorough check-up of the patient is done by the hospital authorities, it is the Institute which selects, after the examination of the patient that he suffers from what malady, and who is the best doctor who can attend, except when the patient or the family members desire to be treated by a particular doctor or surgeon as the case may be. Normally, private hospitals have a panel of doctors in various specialities and it is they who choose who is to be called. It is very difficult for the patient to give any detail of which doctor treated the patient and whether the doctor was negligent or the nursing staff was negligent. It is very difficult for such patient or his relatives to implead them as parties in the claim petition. It will be an impossible task and if the claim is to be defeated on that ground it will virtually be frustrating the provisions of the Act, leaving the claimant high and dry. We cannot place such a heavy burden on the patient or the family members/relatives to implead all those doctors who have treated the patient or the nursing staff to be impleaded as party. It will be a difficult task for the patient or his relatives to undertake this searching enquiry from the hospital and sometimes the hospital may not cooperate. It may give such details and sometimes may not give the details. Therefore, the expression used in Rule 14(1) (b) "so far as they can be ascertained", makes it clear that the framers of the Rules realised that it will be very difficult, especially in the case of medical profession to pinpoint who is responsible for not providing proper and efficient service which gives rise to the cause for filing a complaint and especially in a case like the one in hand. The patients once they are admitted to such hospitals, it is the responsibility of the

said hospital or the medical institutions to satisfy that all possible care was taken and no negligence was involved in attending the patient. The burden cannot be placed on the patient to implead all those treating doctors or the attending staff of the hospital as a party so as to substantiate his claim. Once a patient is admitted in a hospital it is the responsibility of the hospital to provide the best service and if it does not, then the hospital cannot take shelter under the technical ground that the surgeon concerned or the nursing staff, as the case may be, was not impleaded, and therefore, the claim should be rejected on the basis of non-joinder of necessary parties. In fact, once a claim petition is filed and the claimant has successfully discharged the initial burden that the hospital was negligent, and that as a result of such negligence the patient died, then in that case the burden lies on the hospital and the doctor concerned who treated that patient, that there was no negligence involved in the treatment. Since the burden is on the hospital, they can discharge the same by producing that doctor who treated the patient in defence to substantiate their allegation that there was no negligence. In fact it is the hospital which engages the treating doctor thereafter it is their responsibility. The burden is greater on the institution/hospital than that on the claimant. The institution is a private body and they are responsible to provide efficient service and if in discharge of their efficient service there are a couple of weak links which have caused damage to the patient then it is the hospital which is to justify the same and it is not possible for the claimant to implead all of them as parties. The hospital as the controlling authority, is responsible and it cannot take shelter under the plea that as the treating physician is not impleaded as a party the claim petition should be dismissed. In this connection, a reference may be made to a decision of this Court in the case of Indian Medical Assn. v. V.P. Shantha. There the question had come up before this Court with regard to the provisions of the Consumer Protection Act, 1986 vis-a-vis the medical profession. This Court had dealt with all aspects of the medical profession from every angle and has come to the conclusion that the doctors or the institutes owe a duty to the patients and they cannot get away in case of lack of care to the patients. Their Lordships have gone to the extent that even if the doctors are rendering services free of charge to the patients in government hospitals, the provisions of the Consumer Protection Act will apply since the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from taxes paid by the taxpayers.

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76. INDIAN PENAL CODE, 1860 – Section 364-A
Kidnapping for ransom – "Ransom", meaning of – Proof of an offence under Section 364-A, requirements for – Law explained.
Malleshi v. State of Karnataka
Judgment dt. 15.9.2004 by the Supreme Court in Criminal Appeal No. 1343 of 2002, reported in (2004) 8 SCC 95

Held :

Section 364-A deals with "kidnapping for ransom, etc." This section reads as follows :

> "364-A. Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

The section refers to both "kidnapping" and "abduction". Section 359 defines kidnapping. As per the said provision there are two types of kidnapping i.e.: (1) kidnapping from India; and (2) kidnapping from lawful guardianship.

Abduction is defined in Section 362. The provision envisages two types of abduction i.e.: (1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the going of the victim from any place. The case at hand falls in the second category.

To "induce" means "to lead into". Deceit according to its plain dictionary meaning signifies anything intended to mislead another. It is a matter of intention and even if promise held out by accused was fulfilled by him, the question is: whether he was acting in a bona fide manner.

The offence of abduction is a continuing offence. This section was amended in 1992 by Act 42 of 1993 with effect from 22-5-1993 and it was subsequently amended in 1995 by Act 24 of 1995 with effect from 26-5-1995. The section provides punishment for kidnapping, abduction or detaining for ransom.

To attract the provisions of Section 364-A what is required to be proved is: (1) that the accused kidnapped or abducted the person; (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom. Strong reliance was placed on a decision of the Delhi High Court in *Netra Pal v. State (NCT of Delhi), 2000 CriLJ 1669 (Del)* to contend that since the ransom demand was not conveyed to the father of PW2, the intention to demand was not fulfilled.

To pay a ransom as *per Black's Law Dictionary* means "to pay price or demand for ransom". The word "demand" means "to claim as one's due"; "to require"; "to ask relief"; "to summon"; "to call in court"; "an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act"; "an asking with authority, claiming or challenging as due". The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made.

Netra Pal case (supra) was one where a child was kidnapped. The Court found as a fact that since the victim was a child, demand for ransom could not have been made to him and only the demand to pay the ransom could have been made to his guardians. In that factual background it was held that the offence was not under Section 364-A but was under Section 362 IPC. Accordingly, conviction of the accused was altered to offences relatable to Sections 363 and 365 IPC.

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77. WORDS AND PHRASES :

Expression "cause of action", meaning and connotation of.

Y. Abraham Ajith and others v. Inspector of Police, Chennai and another

Judgment dt. 17.08.2004 by the Supreme Court in Criminal Appeal No. 904 of 2004, reported in (2004) 8 SCC 100

Held :

It is settled law that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously, the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action".

The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. In *Black's Law Dictionary* a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact,

which, if traversed, the plaintiff must prove in order to obtain judgment. In *Words and Phrases* (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.

In *Halsbury's Laws of England* (4th Edn.) it has been stated as follows :

> " 'Cause of action' has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

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78. CRIMINAL TRIAL :

Appreciation of evidence - Relative witness – Relationship not a factor to affect the credibility of witness – Incident taking place in a dwelling house – Inmates of the house are most natural witnesses – Law explained.

Hari Ram v. State of U.P.

Judgment dt. 09.8.2004 by the Supreme Court in Criminal Appeal No. 827 of 2004, reported in (2004) 8 SCC 146

Held :

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

In *Dalip Singh v. State of Punjab, AIR 1953 SC 364* it has been laid down as under : (AIR p. 366, para 26)

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere

fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in *Guli Chand v. State of Rajasthan, (1974) 3 SCC 698* in which *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614* was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh case* (supra) in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

> "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *'Rameshwar v. State of Rajasthan, AIR 1952 SC 54'*, (AIR at p. 59). We find, however that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

Again in *Masalti v. State of U.P., AIR 1965 SC 202* this Court observed : (pp. 209-10, para 14)

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

As observed by this Court in *State of Rajasthan v. Teja Ram, (1999) 3 SCC 507* the overinsistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house or nearby the most natural witnesses would be the inmates of that house.

It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate the prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also. [See *Sucha Singh v. State of Punjab, (2003) 7 SCC 643.*

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79. INDIAN PENAL CODE, 1860 - Sections 228-A and 376
Victim of sexual violence, identity of – The name of the victim need not be indicated in judgments, etc. – Sexual violence – It is a crime against basic human rights as well as violation of fundamental right to life contained in Art. 21 of the Constitution.
State of H.P. v. Shree Kant Shekari
Judgment dt. 13.9.2004 by the Supreme Court in Criminal Appeal No. 589 of 1999, reported in (2004) 8 SCC 153

Held :

Sexual violence apart from being a dehumanising act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a women i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in *Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490* the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

Section 228-A IPC makes disclosure of the identity of a victim of certain offences punishable. Printing or publishing 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 a High Court or the Supreme Court. But keeping in view the social object of preventing social victimisation 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 this Court, High Court or lower court, the name of the victim should not be indicated. We have chosen to describe her as the "victim" in the judgment. [See *State of Karnataka v. Puttaraja, (2004) 1 SCC 475*]

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80. JUDICIARY :

Judicial discipline – Judicial discipline is the bedrock of judicial system – No Court can tell a Superior Court how a matter should be decided.

Sompal Singh v. Sunil Rathi and another
Judgment dt. 03.11.2004 by the Supreme Court in Criminal Appeal No. 1269 of 2004, reported in (2005) 1 SCC 1

Held :

In a recent decision rendered in *Tirupati Balaji Developers (P) Ltd. v. State of Bihar, (2004) 5 SCC 1* it was pointed out that under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Court, both are courts of record and the High Court is not a court subordinate to the Supreme Court, but there are a few provisions which give an edge and assign a superior place in the hierarchy to the Supreme Court over the High Court and insofar as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. This position is highlighted in para 9 of the Report which reads as under: (SCC p. 14)

> "9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Court. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of latter to carry out such directions or show disrespect to or to question the propriety of such directions would – it is obvious – be de-

structive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both."

In the hierarchical judicial system, it is not for any court to tell a superior court as to how a matter should be decided when an appeal is taken against its decision to that superior court. Such a course would be subversive of judicial discipline on the bedrock of which the judicial system is founded and finality is attached and orders are obeyed. We do not consider it proper to say anything further and would like the matter to rest there.

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81. RENT CONTROL AND EVICTION:
Sub-letting, what amounts to – Proof of sub-tenancy – Law explained.
Joginder Singh Sodhi v. Amar Kaur
Judgment dt. 08.10.2004 by the Supreme Court in Civil Appeal No. 5199 of 2003, reported in (2005) 1 SCC 31

Held :

Regarding sub-letting, in our opinion, the law is well settled. It is observed in the leading case of *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh, AIR 1968 SC 933* that in a suit by the landlord for eviction of tenant on the ground of sub-letting, the landlord has to prove by leading evidence that (i) a third party was found to be in exclusive possession of the rented property, and (ii) parting of possession thereof was for monetary consideration.

The above principle was reiterated by this Court from time to time. In *Shama Prashant Raje v. Ganpatrao, (2000) 7 SCC 522* the Court stated that on sub-letting, there is no dispute with the proposition that the two ingredients, namely, parting with possession and monetary consideration therefor have to be established.

As observed by this Court in *Bharat Sales Ltd. v. LIC of India, (1998) 3 SCC 1* sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person in possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property

had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

In *Rajbir Kaur v. S. Chokesiri & Co., (1989) 1 SCC 19* this Court, speaking through Venkatachaliah, J. (as His Lordship then was) stated: (SCC p. 43, para 59)

> "If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licences are, in their very nature, clandestine arrangements between the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate interence. The burden of making good a case of sub-letting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstance of the case, we think, that, appellants having been forced by the courts below to have established exclusive possession of the ice cream vendor of a part of the demisted premises and the explanation of the transaction offered by the respondent having been found by the courts below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found."

Again in *Kala v. Madho Parshad Vaidya, (1998) 6 SCC 573* this Court reiterated the same principle. It was observed that the burden of proof of subletting is on the landlord but once he establishes parting of possession by the

tenant to a third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge that onus, it is permissible for the court to raise an inference that such possession was for monetary consideration.

We are in agreement with the observations in the above cases. In our considered opinion, proof of monetary consideration by the sub-tenant to the tenant is not a *sine qua non* to establish sub-letting.

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82. EVIDENCE ACT, 1872 – Section 68
Proof of will, requirements for – Suspicious circumstances – Propounder must remove suspicion by leading appropriate evidence – Law Explained.
Daulat Ram and others v. Sodha and others
Judgment dt. 16.11.2004 by the Supreme Court in Civil Appeal No. 5032 of 2002, reported in (2005) 1 SCC 40

Held :

Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested. as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.

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83. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 8
Sale of immovable property of minor by natural guardian, nature of such transaction – Held, such transaction is voidable and not void.
Nangali Amma Bhavani Amma v. Gopal Krishnan Nair and others
Judgment dt. 7.10.2004 by the Supreme Court in Civil Appeal No. 2286 of 2000, reported in (2004) 8 SCC 785

Held :

The learned counsel for the appellant is right in contending that the High Court had misconstrued the provisions of Section 8 of the Act. Section 8 (1) empowers the natural guardian of a Hindu minor to do all acts which are necessary or reasonable and proper for the benefit of a minor or for the realisation, protection or benefit of the minor's estate subject to two exceptions of which we may only note the exception carved out in sub-section (2) of Section 8. Section 8 (2) provides that the natural guardian shall not without the previous permission of the Court, inter alia, transfer by way of a sale any part of the immovable property of a minor. The effect of violation of this provision has been provided for in the section itself under sub-section (3). This sub-section reads:

> "8. (3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him".

In view of the express language used, it is clear that the transaction entered into by the natural guardian in contravention of sub-section (2) was not void but merely voidable at the instance of the minor. To hold that the transaction in violation of Section 8(2) is void would not only be contrary to the plain words of the statute but would also deprive the minor of the right to affirm or ratify the transaction upon attaining majority. This Court in *Vishvambhar v. Laxminarayan, (2001) 6 SCC 163* has also held that such transactions are not void but merely voidable. It was also held that a suit must be filed by a minor in order to avoid the transaction within the period prescribed under Article 60 of the Limitation Act.

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84. INDIAN PENAL CODE, 1860 – Section 376
Sentence, adequacy of – Background of the accused being villager or illiterate not material for reducing sentence – Sentence must have deterrent effect for commission of like offence by others – Law explained.
State of M.P. v. Balu
Judgment dt. 05.11.2004 by the Supreme Court in Criminal Appeal No. 1273 of 2004, reported in (2005) 1 SCC 108

Held :

By the impugned judgment the High Court assigned the following reasons for reducing the sentence imposed by the Sessions Court from 7 years to 10 months:

> "Then, at the time of commission of offence the appellant is stated to be aged 19 years whereas in the estimation of the trial court, he was 17 years of age. The appellant is illiterate villager coming from rural area, therefore, it appears a fit case to reduce the sentence of imprisonment to the period already undergone."

None of the reasons mentioned therein can be construed as either adequate or special reasons to reduce the minimum mandatory period of sentence for an offence punishable under Section 376 IPC. The High Court does not seem to have applied its mind to the gravity of the offence. Having found that the appellant has committed rape of a minor, to reduce the sentence on the ground that the accused was either 17 years or 19 years of age or that the accused is an illiterate villager coming from a rural area is neither adequate nor special reason contemplated under Section 376 IPC. We think the sentence of 10 months' imprisonment for an offence punishable under Section 376 is ridiculously low and is not commensurate with the gravity of the crime. The sympathy shown by the High Court is wholly misplaced and is likely to send wrong signals. In these circumstances, we think the High Court has grossly erred in reducing the sentence imposed by the Sessions Court to a period of 10 months which the respondent had already undergone.

A three-Judge Bench of this Court in the case of *State of Karnataka v. Krishnappa, (2000) 4 SCC 75* while considering the question of reduction of sentence in rape case observed thus : (SCC p. 82, para 13)

> "13. The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence, let alone 'special or adequate reasons'. The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. *The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others".*

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85. CRIMINAL TRIAL :

Retrial and recalling of witnesses – Retrial not to be directed unless extra-ordinary circumstances present – Judgment on retrial be passed on evidence already on record and recorded in retrial – Law explained.
Satyajit Banerjee and others v. State of W.B. and others
Judgment dt. 23.11.2004 by the Supreme Court in Criminal Appeal No. 1331 of 2004, reported in (2005) 1 SCC 115

Held :

Since strong reliance has been placed on *Best Bakery case, (2004) 4 SCC 158* (Gujarat riots case) it is necessary to *record a note of caution.* That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a *de novo* trial of the whole case but made

further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

The law laid down in *Best Bakery case* (supra) in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In *Best Bakery case* (supra) the first trial was found to be a farce and is described is "mock trial". Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in *Best Bakery case* (supra).

So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.

With the above clarification, we decline to interfere in the order of remand. To put the matter beyond any shadow of doubt we further clarify and reiterate that the trial Judge, after retrial, shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or this Court.

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86. PRACTICE AND PROCEDURE:

Inherent powers – All Courts, whether civil or criminal, possess inherent powers.

Zandu Pharmaceutical Works Ltd. and others v. Mohd. Sharaful Haque and another

Judgment dt. 01.11.2004 by the Supreme Court in Criminal Appeal No. 1241 of 2004, reported in (2005) 1 SCC 122

Held :

No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *"quando lex aliquid alicui concedit, concedere videtur etid sine quo res ipsae esse non potest"* (when the law gives a person anything, it gives him that without which it cannot exist).

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87. JUDICIARY :

(i) Expiry of probation period, effect of – No automatic or deemed confirmation on expiry of probation period – Law explained.

(ii) Honest judicial officers, protection of – Course to be adopted.

Registrar, High Court of Gujarat and another v.C.G. Sharma Judgment dt. 17.11.2004 by the Supreme Court in Civil Appeal No. 4019 of 2002, reported in (2005) 1 SCC 132

Held :

(i) A large number of authorities were cited before us by both the parties. However, it is not necessary to go into the details of all those cases for the simple reason that sub-rule (4) of Rule 5 of the Rules is in pari materia with the Rule which was under consideration in the case of *State of Maharashtra v. Veerappa R. Saboji, (1979) 4 SCC 466* and we find that even if the period of two years expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, work has to be satisfactory which is a prerequisite or precondition for confirmation and, therefore, even if the probationer is allowed to continue beyond the period of two years as mentioned in the Rule, there is no question of deemed confirmation. The language of the Rule itself excludes any chance of giving deemed or automatic confirmation because the confirmation is to be ordered if there is a vacancy and if the work is found to be satisfactory. There is no question of confirmation and, therefore, deemed confirmation, in the light of the language of this Rule, is ruled out. We are, therefore, of the opinion that the argument advanced by learned counsel for the respondent on this aspect has no merits and no leg to stand. The learned Single Judge and the learned Judges of the Division Bench have rightly come to the conclusion that there is no automatic confirmation on the expiry of the period of two years and on the expiry of the said period of two years, the confirmation order can be passed only if there is vacancy and the work is found to be satisfactory. The Rule also does not say that the two years period of probation, as mentioned in the Rule, is the maximum period of probation and the probation cannot be extended beyond the period of two years. We are, therefore, of the opinion that there is no question of automatic or deemed confirmation, as contended by the learned counsel for the respondent. We, therefore, answer this issue in the negative and against the respondent.

This Court in the case of *H.F. Sangati v. Registrar General, High Court of Karnataka , (2001) 3 SCC 117* held as under: (SCC p. 121, para 8)

> "8. It is well settled by a series of decisions of this Court including the Constitution Bench decision in *Parshotam Lal Dhingra v. Union of In-*

dia, AIR 1958 SC 36 and seven-Judge Bench decision in *Samsher Singh v. State of Punjab, (1974) 2 SCC 831* that services of an appointee to a permanent post on probation can be terminated or dispensed with during or at the end of the period of probation because the appointee does not acquire any right to hold or continue to hold such a post during the period of probation. In *Samsher Singh case* (supra). it was observed that the period of probation is intended to assess the work of the probationer whether it is satisfactory and whether the appointee is suitable for the post; the competent authority may come to the conclusion that the probationer is unsuitable for the job and hence must be discharged on account of inadequacy for the job or for any temperamental or other similar grounds not involving moral turpitude. No punishment is involved in such a situation. Recently, in *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60* having reviewed the entire available case-law on the issue, this Court has held that termination of a probationer's services, if motivated by certain allegations tantamounting to misconduct but not forming foundation of a simple order of termination cannot be termed punitive and hence would be valid. In *Satya Narayan Athya v. High Court of M.P. , (1996) 1 SCC 560* the petitioner appointed on probation as a Civil Judge and not confirmed was discharged from service in view of the non-satisfactory nature of his service. This Court held that the High Court was justified in discharging the petitioner from service during the period of probation and it was not necessary that there should have been a charge and an inquiry on his conduct since the petitioner was only on probation and it was open to the High Court to consider whether he was suitable for confirmation or should be discharged from service."

(ii) It is true that an honest judicial officer is likely to have adversaries in the mofussil courts and if complaints are entertained on trifling matters relating to judicial orders, which may have been upheld by the High Court on the judicial side, no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. It is also true that if judicial officers are under constant threat of complaint and enquiry on trailing matter and if the High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is, therefore, imperative that the High Court should also take steps to protect its honest officer by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants. It is also true that the judicial officers have also to face sometimes quarrelsome, unscrupulous and cantankerous litigants but they have to face them boldly without deviating from the right path and that they are not expected to be overawed by such litigants or fall to their evil designs. This ratio was laid down in several judgments of this Court.

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88. SPECIFIC RELIEF ACT, 1963 – Section 19 (b)
Constructive notice, what amounts to – Law explained.
Sargunam (Dead) by LR. v. Chidambaram and another
Judgment dt. 07.10.2004 by the Supreme Court in Civil Appeal No. 7601 of 1999, reported in (2005) 1 SCC 162

Held :

In the case of *Jagan Nath v. Jagdish Rai, (1998) 5 SCC 537* it has been held that where a transferee has knowledge of facts which would put him on enquiry which if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract within the meaning of exception in Section 19 (b) of the Specific Relief Act, 1963.

Similarly, in the case of *Baburam Bag v. Madhab Chandra Pallay, AIR 1914 Cal 333* it has been held that possession of a property by a tenant affects subsequent purchaser with notice of the tenant's rights, and if the purchaser fails to make enquiry into the nature of that possession, he cannot claim to be a transferee without notice under Section 27 (b) of the Specific Relief Act, 1877.

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89. GENERAL CLAUSES ACT, 1897 – Section 10
Principle enshrined in Section 10, applicability of – Law does not compel a man to do the impossible – The principle may be applied in cases of impossibility of performance due to closure of Court, office, etc.
HUDA and another v. Dr. Babeswar Kanhar and another
Judgment dt. 22.11.2004 by the Supreme Court in Civil Appeal No. 7522 of 2004, reported in (2005) 1 SCC 191

Held :

The application was for allotment of a residential plot measuring 250 square yards, and deposit of Rs. 46,625 was made on 26-12-2000. HUDA intimated Respondent 1 by letter dated 30.10.2001 that Plot No. 2205 in Sector 65, Faridabad had been allotted to him. Respondent 1 purportedly, on the basis of clause 4 of the letter, sent a registered letter on 28.11.2001, intimating HUDA that he was not interested in accepting the allotment. The letter was received on 3.12.2001 by HUDA. Referring to clause 4 of the letter, HUDA directed forfeiture of the earnest money deposited.

Respondent 1, who appears in person, submitted that the non-acceptance was conveyed by letter dated 28.11.2001. The HUDA office was closed on 1-12-2001 and 2-12-2001. 30.11.2001 was a postal holiday and, therefore, on the next day after the closure period i.e. 3-12-2001, the letter was served on HUDA and therefore the orders of the forums below do not suffer from any infirmity.

What is stipulated in clause 4 of the letter dated 30.10.2001 is a communication regarding refusal to accept the allotment. This was done on 28.11.2001. Respondent 1 cannot be put be put to loss for the closure of the

office of HUDA on 1.12.2001 and 2.12.2001 and the postal holiday on 30.11.2001. In fact he had no control over these matters. Even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service. Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see *Sambasiva Chari v. Ramasami Reddi, (1898) 8 MLJ 265*). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that law does not compel the performance of an impossibility. (See *Hossein Ally v. Donzelle, ILR (1880) 5 Cal 906*) Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are *lex non cogit ad impossibilia* (the law does not compel a man to do the impossible) and *actus curiae neminem gravabit* (the act of court shall prejudice no man).

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90. INDIAN PENAL CODE, 1860 – Sections 120-B, and 28

(i) Criminal conspiracy, elements and proof of – Law explained.

(ii) Indian Penal Code, Section 28 – Expression "counterfeit", meaning and scope of.

K. Hashim v. State of T.N.

Judgment dt. 17.11.2004 by the Supreme Court in Criminal Appeal No. 185 of 2004, reported in (2005) 1 SCC 237

Held :

(i) It would be appropriate to deal with the question of conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of "criminal conspiracy" given in Section 120-A reads as follows :

"120-A. When two or more persons agree to do, or cause to be done, –

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

The elements of a criminal conspiracy have been stated to be (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished in order to constitute an indictable offence. Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See *American Jurisprudence*, Vol. II, Section 23, p. 559.) For an offence punishable under Section 120-B the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implicaton. Offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

(ii) Section 28 defines the word "counterfeiting" in very wide terms. The main ingredients of counterfeiting as laid down in Section 28 are:

(1) causing one thing to resemble another thing;

(2) intending by means of that resemblance to practise deception; or

(3) knowing it to be likely that deception will thereby be practised.

Thus, if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised, there is counterfeiting. (See *State of U.P. v. Hafiz Mohd. Ismail, AIR 1960 SC 669.*)

In the said case it was observed that there is no necessity of importing words like "colourable imitation" therein. In order to apply Section 28, what the court has to see is whether one thing is made to resemble another thing and if that is so and if the resemblance is such that a person might be deceived by it, there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved.

"Counterfeit" in Section 28 does not connote an exact reproduction of the original counterfeited. Explanation 2 of Section 28 is of great significance. It lays down a rebuttable presumption where resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.

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91. EVIDENCE ACT, 1872 – Section 68
Proof of will, requirements of – Law explained.
Meenakshiammal (Dead) through LRs. v. Chandrasekaran and another
Judgment dt. 03.11.2004 by the Supreme Court in Civil Appeal No. 1387 of 1999, reported in (2005) 1 SCC 280

Held:

In the case of *Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85* it has been held as follows : (SCC pp. 91-92, paras 8-9)

> "8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in *R.v. Hodge, (1838) 2 Lewis CC 227* may be apposite to some extent:
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> > 'The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete'.
>
> The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural

circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict – positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

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92. INTERPRETATION OF STATUTES:
Provison of law, whether mandatory, determination of – Law explained. State of Jharkhand and others v. Ambay Cements and another Judgment dt. 17.11.2004 by the Supreme Court in Civil appeal No. 7994 of 2003, reported in (2005) 1 SCC 368

Held :

Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein.

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93. CONSTITUTION OF INDIA – Article 366 (24)
Scheduled Caste – Effect of conversion to another religion – A person does not cease to be a Scheduled Caste on such conversion.
E.V. Chinnaiah v. State of A.P. and others
Judgment dt. 05.11.2004 by the Supreme Court in Civil Appeal No. 6758 of 2000, reported in (2005) 1 SCC 394

Held :

Scheduled Caste, however, is not a caste in terms of its definition as contained in Article 366 (24) of the Constitution. They are brought within the purview of the said category be reason of their abysmal backwardness. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of or groups within castes, races or tribes. They are not merely backward but the backward most. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. (See *Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204* and *State of Kerala v. Chandramohanan, (2004) 3 SCC 429.*)

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94. CIVIL PROCEDURE CODE, 1908 – O.9 R.13 and O.41 R.21
Bar created by Exception to O.9 R.13 CPC regarding application, scope and applicability – Dismissal of appeal as time barred in effect is a confirmation of a decree – Explanation to Order 9 Rule 13 applicable in such a case – Law explained.
Shyam Sunder Sarma v. Pannalal Jaiswal and others
Judgment dt. 4.11.2004 by the Supreme Court in Civil Appeal No. 5550 of 2004, reported in (2005) 1 SCC 436

Held :

On the facts, it is thus clear, that the first defendant filed a petition for setting aside the ex prate decree under Order 9 Rule 13 of the Code accompanied by an application for condoning the delay in filing that petition, and subsequently he also filed an appeal against that ex parte decree, again accompanied by an application for condoning the delay in filing that appeal. That application for condoning the delay in filing the appeal against the ex parte decree and the appeal against ex parte decree were both dismissed for default. The petition for setting aside the ex parte decree under Order 9 Rule 13 of the Code was filed first and the appeal was filed while that petition was pending. But before the petition under Order 9 Rule 13 of the Code could be disposed of, the appeal had been dismissed for default. Thus, on the day the petition under Order 9 Rule 13 of the Code was taken up for disposal, no appeal against the decree was pending.

The Explanation to Order 9 Rule 13 of the Code added by the Code of Civil Procedure (Amendment) Act (Act 104 of 1976), which came into force with effect from 1-2-1977, reads as under :

"Explanation. – Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

In the context of the Explanation to Order 9 Rule 13 of the Code, the question was squarely considered by this Court in *Rani Choudhury v. Lt.-Col. Suraj Jit Choudhury, (1982) 2 SCC 596.*

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95. CIVIL PROCEDURE CODE, 1908 – Section 11
Principle of res judicata, applicability of – Principle also applicable between two stages in the same litigation.
U.P. State Road Transport Corporation v. State of U.P. and another Judgment dt. 29.11.2004 of the Supreme Court in Civil Appeal No. 6341 of 2002, reported in (2005) 1 SCC 444

Held :

The principle of res judicata is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of the Code of Civil Procedure in this respect. Res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings. (See *Satyadhyan Ghosal v. Deorajin Debi, AIR 1960 SC 941*)

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96. EASEMENTS ACT, 1882 – Section 15
Acquisition of right by way of prescription – Plaintiff must plead and prove such acquisition – Law explained.
Justiniano Antao and others v. Bernadette B. Pereira (Smt) Judgment dt. 22.11.2004 by the Supreme Court in Civil Appeal No. 901 of 1999, reported in (2005) 1 SCC 471

Held:

But in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly as of right for the last 20 years.

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97. STAMP ACT, 1899 – Sections 33 and 35
Impounding – Power to impound a document, exercise of – Unless document voluntarily produced in evidence, it cannot be impounded. District Registrar and Collector, Hyderabad and another v. Canara Bank and others
Judgment dt. 1.11.2004 by the Supreme Court in Civil Appeal No. 6350 of 1997, reported in (2005) 1 SCC 496

Held :

Section 33 confers power of impounding a document not duly stamped subject to the document being produced before an authority competent to receive evidence or a person in charge of a public office. It is necessary that the document must have been produced or come before such authority or person in-charge in performance of its functions. The document should have been voluntarily produced.

Power to impound a document and to recover duty with or without penalty thereon has to be construed strictly and would be sustained only when falling within the four corners and letter of the law. This has been the consistent view of the courts. Illustratively, three decisions may be referred. In *Jai Devi v. Gokal Chand, (1906) 7 Punj LR 428 (FB)* a document not duly stamped was produced in the court by the plaintiff along with the plaint but the suit came to be dismissed for non-prosecution. It was held by the Full Bench that the document annexed with the plaint cannot be said to have been produced in the court in evidence and the court had no jurisdiction to call for the same and impound it. In *Munshi Ram v. Harnam Singh, AIR 1934 Lah 637 (1)* the suit was compromised on the date of first hearing and decree was passed based on the compromise. The original entry in a *bahi* was not put in evidence and, therefore, the Special Bench held it was not liable to be impounded. In *L. Puran Chand v. Emperor, AIR 1942 Lah 257* the power to impound was sought to be exercised after the decision in the suit and when the document alleged to be not duly stamped had already been directed to be returned as not proved though it was not physically returned. The Special Bench held that the document was not available for being impounded.

Though an instrument not duly stamped may attract criminal prosecution under Section 62 of the Act but Parliament and the legislature have both treated it to be a minor offence punishable with fine only and not cognizable. Here again it is well settled that such offence is liable to be condoned by payment of duty and penalty on the document and no prosecution can be launched except in the case of a criminal intention to evade the stamp law or in case of a fraud and that too after giving the person liable to be proceeded against, an opportunity of being heard.

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98. LAND ACQUISITION ACT, 1894 – Sections 3 (b), 18 and 30
Expression "person interested" as defined in Section 3 (b), meaning of – State acquiring the land is not a person interested – Reference Court cannot decide question of title of the State regarding the acquired land – Law explained.
Ahad Brothers v. State of M.P. and another
Judgment dt. 19.11.2004 by the Supreme Court in Civil Appeal No. 6276 of 1999, reported in (2005) 1 SCC 545

Held :

If the State was owner of the land in question, there was no reason for it to acquire its own land. The State cannot be said to be a person interested to agitate any claim either under Section 18 or under Section 30 of the Act. The Court exercising jurisdiction under Section 18 could not decide the question of the title of the State over the acquired land. The position of law is clear in this regard by recent judgment of this Court in *Sharda Devi v. State of Bihar, (2003) 3 SCC 128.* The sole question that arose for consideration in that case was – when the State proceeds to acquire land on an assumption that it belongs to a particular person, can the award be called into question by the State seeking a reference under Section 30 of the Act on the premise that the land did not belong to the person from whom it was purportedly acquired and was a land owned by the State having vested in it ? In para 36 of the said judgment, having considered various aspects and the scheme of the Act, this Court has concluded thus: (SCC p. 147)

> "36. To sum up, the State is not a 'person interested' as defined in Section 3(b) of the Act. It is not a party to the proceedings before the Collector in the sense, which the expression 'parties to the litigation' carries. The Collector holds the proceedings and makes an award as a representative of the State Government. Land or an interest in land pre-owned by the State cannot be the subject-matter of acquisition by the State. The question of deciding the ownership of the State or holding of any interest by the State Government in proceedings before the Collector cannot arise in the proceedings before the Collector [as defined in Section 3 (c) of the Act]. If is was government land there was no question of initiating the proceedings for acquisition at

all. The Government would not acquire the land, which already vests in it. A dispute as to the pre-existing right or interest of the State Government in the property sought to be acquired is not a dispute capable of being adjudicated upon or referred to the civil court for determination either under Section 18 or Section 30 of the Act. The reference made by the Collector to the court was wholly without jurisdiction and the civil court ought to have refused to entertain the reference and ought to have rejected the same. All the proceedings under Section 30 of the Act beginning from the reference and adjudication thereon by the civil court suffer from lack of inherent jurisdiction and are therefore a nullity liable to be declared so".

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99. LAND ACQUISITION ACT, 1894 – Section 16
Acquisition of land – Consequences thereof.
Govt. of A.P. and another v. Syed Akbar
Judgment dt. 19.11.2004 by the Supreme Court in Civil Appeal No. 6546 of 1999, reported in (2005) 1 SCC 558

Held :

From the position of law made clear in the aforementioned decisions, it follows that (1) under Section 16 of the Land Acquisition Act, the land acquired vests in the Government absolutely free from all encumbrances; (2) the land acquired for a public purpose could be utilised for any other public purpose; and (3) the acquired land which is vested in the Government free from all encumbrances cannot be reassigned or reconveyed to the original owner merely on the basis of an executive order.

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100. CRIMINAL PROCEDURE CODE, 1973 – Sections 91, 227, 228, 239 and 240

(i) Framing of charge – Whether material filed by accused can be considered at the stage of charge – Held, no – Contra view expressed in Satish Mehra's case, (1996) 9 SCC 766 expressly overruled – Law explained.

(ii) Production of documents, etc. under Section 91 – Such right cannot be exercised by accused at the stage of framing of charge – Law explained.

State of Orissa v. Debendra Nath Padhi
Judgment dt. 29.11.2004 by the Supreme Court in Criminal Appeal No. 497 of 2001, reported in (2005) 1 SCC 568

Held :

(i) Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a

mini-trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well-settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. *Satish Mehra v. Delhi Admn., (1996) 9 SCC 766* holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided.

(ii) On behalf of the accused a contention about production of documents relying upon Section 91 of the Code has also been made. Section 91 of the Code reads as under :

> "91. *Summons to produce document or other thing.* - (1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document

being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

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101. CRIMINAL TRIAL :

Question of embarrassment of lady judicial officer while trying case relating to pornographic material – The Presiding Officer may make such adjustments/arrangements for viewing CDs as it deems fit.
Fatima Riswana v. State Represented by ACP, Chennai and others Judgment dt. 11.01.2005 by the Supreme Court in Criminal Appeal No. 61 of 2005, reported in (2005) 1 SCC 582

Held :

As noted above, the sole ground on which the High Court directed the transfer of the case at the instance of the accused on 13-2-2004 was that the proceedings in the trial being one involving pornographic acts and the evidence in the case is such that it would embarrass a lady Presiding Officer. It is to be noticed herein that the lady Presiding Officer concerned has not sought for or directed the transfer of the case. This is an inference drawn by the High Court merely based on the fact that the Presiding Officer is a lady. It is also to be noticed at this stage that at an earlier stage the High Court had given the choice of the transfer to the Presiding Officer herself but she did not direct or seek the transfer of the trial. In this background, we are unable to accept the correctness of the presumption drawn by the High Court.

As contended by the learned counsel for the appellant, embarrassment is a state of mind which is more individual-related than related to the sex of a person. It is but natural that any decent person would be embarrassed while considering the evidence in a case like this but this embarrassment cannot be attributed to a lady officer only. A judicial officer be it a female or male is expected to face this challenge when the call of duty requires it. It is expected of a judicial officer to get over all prejudices and predilections when the situation requires, hence in our considered opinion the High Court was not justified in presuming embarrassment to the judicial officer solely on the ground that she is a lady officer even when the officer concerned had not expressed any reservation in this regard. If the situation requires the Presiding Officer may make such adjustments/arrangements so as to avoid viewing the CDs in the presence of male persons. This is a matter of procedure to be adopted by the Presiding Officer.

It was next contended on behalf of the respondent that even the prosecution counsel and the defence counsel would feel embarrassed to appear before the court presided over by a lady officer in a trial like this. But we think this cannot be a ground for transfer of the case. So far as the lawyers are concerned they have accepted the brief knowing very well the facts of the case, it is left to them to decide whether to continue in it or not. Their embarrassment cannot be a ground for transfer of the case in a situation like this.

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102. PUBLIC INTEREST LITIGATION (PIL) :

PIL – Weapon of PIL be used with great care and circumspection and should not be allowed to be misused by vested interests – Law explained.

Dattraj Nathuji Thaware v. State of Maharashtra and others
Judgment dt. 14.12.2004 by the Supreme Court in SLP (c)
No. 26269 of 2004, reported in (2005) 1 SCC 590

Held :

Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing the gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters – government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detanus expecting their release from detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope

of getting into the courts and having their grievances redressed, busybodies, meddlesome interlopers, wayfarers or officious intervenes having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffling their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queque standing outside the doors of the courts never moves, which piquant situation creates frustration in the minds of genuine litigants and resultantly they lose faith in the administration of our judicial system.

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity- seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well as to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

The court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interests : (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to act ruthlessly while dealing with impostors and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *pro bono publico*, though they have no interest of the public or even of their own to protect.

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103. WORDS AND PHRASES

"Per incuriam", meaning and connotation of.

Sunita Devi v. State of Bihar and another

Judgment dt. 06.12.2004 by the Supreme Court in Criminal Appeal No. 1424 of 2004, reported in (2005) 1 SCC 608

Held :

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in *Young v. Bristol Aeroplane Co. Ltd., (1944) 2 ALL ER 293* is avoided and ignored if it is rendered "*in ignoratium* of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of procedents as a matter of law. The above position was highlighted in *State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139.* To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience.

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104. CRIMINAL PROCEDURE CODE, 1973 – Sections 207 and 208

Supervision notes – Expression "police report and other documents" as used in Section 207 does not include supervision notes of Supervising Officer – Accused not entitled to get copies of such reports – Directions issued by the Apex Court to preserve confidentiality of such reports – Law Explained.

Sunita Devi v. State of Bihar and another

Judgment dt. 06.12.2004 by the Supreme Court in Criminal Appeal No. 1424 of 2004, reported in (2005) 1 SCC 608

Held :

Sections 207 and 208 of the Code deal with documents which are commonly known as police papers, which are to be supplied to the accused. The said sections read as follows :

> "207. *Supply to the accused of copy of police report and other documents.* - In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following –
>
> (i) the police report;
>
> (ii) the first information report recorded under Section 154;
>
> (iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court.

208. *Supply of copies of statements and documents to accused in other cases triable by Court of Session.* – Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under Section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the statements recorded under Section 200 or Section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under Section 161 or Section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely :

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect in either personally or through pleader in court."

The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan, AIR 1964 SC 286* and *Shakila Abdual Gafar Khan v. Vasant Raghunath Dhoble, (2003) 7 SCC 749.* It was held that non-supply is not necessarily prejudicial to the accused. The court has to give a

definite finding about the prejudice or otherwise. The supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has been noted above, they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the Director Generals of Police concerned to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same, appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given.

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105. CIVIL PROCEDURE CODE, 1908 – O.41 R.5
RENT CONTROL AND EVICTION :

(i) Stay of the decree – Preferring of appeal does not operate as automatic stay – Discretion to grant stay or not lies with the Court – Guiding factors for grant of stay – Law explained.

(ii) Date of termination of tenancy under Rent Control Law/General Law – Law explained.

Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.
Judgment dt. 10.12.2004 by the Supreme Court in Civil Appeal No. 7988 of 2004, reported in (2005) 1 SCC 705

Held :

It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has direction to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principle consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior

forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/ or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

(ii) The learned Senior Counsel for the respondent, submitted that during the pendency of the appeal the appellant tenant cannot be directed to pay any amount over and above the amount of contractual rent unless and until the decree or order of eviction has achieved a finality because, in view of the protection of rent control legislation enjoyed by the tenant, he shall continue to remain a tenant and would not become a person in unlawful possession of the property until the decree has achieved a finality from the highest forum up to which the litigation is pursued. Reliance was placed on the decision of this Court in *Chander Kali Bai v. Jagdish Singh Thakur, (1977) 4 SCC 402* followed in *Vashu Deo v. Balkishan, (2002) 2 SCC 50.* This submission raises the following two issues: (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord?

Under the general law, and in cases where the tenancy is governed only by the provisions of the Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under Section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes, liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. In the case of *Chander Kali Bai* (supra) the tenancy premises were situated in the State of Madhya Pradesh and the provisions of the M.P. Accommodation Control Act, 1961 applied. The suit for eviction was filed on 8-3-1973 after serving a notice on the tenant terminating the contractual tenancy w.e.f. 31.12.1972. The suit came to be dismissed by the trial court but decreed in first appeal decided on 11-8-1975. One of the submissions made in this Court on behalf of the appellant tenant was that no damages from the date of termination of the contractual tenancy could be awarded; the damages could be awarded only from the date when an eviction decree was passed. This Court took into consideration the definition of tenant as contained in Section 2 (i) of the M.P. Act which included "any person continuing in possession after the termination of his tenancy" but did not include "any person against whom any order or decree for eviction has been made". The Court, persuaded by the said definition, held that a person continuing in possession of the accommodation even after the termination of his contractual tenant is a tenant within the meaning of the M.P. Act and on such termination his possession does not become wrongful until and unless a decree for eviction is passed. However, the Court specifically ruled

that the tenant continuing in possession even after the passing of the decree became a wrongful occupant of the accommodation. In conclusion the Court held that the tenant was not liable to pay any damages or mesne profits for the period commencing from 1-1-1973 and ending on 10-8-1975 but the remained liable to pay damages or mesne profits from 11-8-1975 until the delivery of the vacant possession of the accommodation. During the course of its decision this Court referred to a decision of the Madhya Pradesh High Court in *Kikabhai Abdul Hussain v. Kamlakar, 1974 MPLJ 485* wherein the High Court had held that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. This Court opined that what was held by the Madhya Pradesh High Court seemed to be a theory akin to the theory of "relation back" on the reasoning that on the passing of a decree for eviction, the tenant's possession would become unlawful not from the date of the decree but from the date of the termination of the contractual tenancy itself. It is noteworthy that this Court has not disapproved the decision of the Madhya Pradesh High Court in *Kikabhai Abdul Hussain case* (supra) but distinguished it by observing that the law laid down in *Kikabhai Abdul Hussain case* (supra) was not applicable to the case before it in view of the definition of "tenant" as contained in the M.P. Act and the provisions which came up for consideration of the High Court in *Kakabhai Abdul Hussain case* (supra) were different.

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106. CRIMINAL PROCEDURE CODE, 1973 – Section 31

Power of the Court to pass several sentences – Imprisonment not rendered illegal or beyond power of the Court merely because when added it exceeded the limit of punishment the Court may impose – Sentence, whether to run concurrently or consecutively, criteria for – If the convict is habitual offender, then direction for consecutive running of sentence should be given.

K. Parabhakaran v. P. Jayarajan

Judgment dt. 11.01.2005 by the Supreme Court in Civil Appeal No. 8213 of 2001, reported in (2005) 1 SCC 754

Held :

It is competent for a criminal court to pass several punishments for the several offences of which the accused has been held guilty. The several terms of imprisonment to which the accused has been sentenced commence one after the other and in such order as the court may direct, unless the court directs that such punishments shall run concurrently. Each of the terms of imprisonment to which the accused has been sentenced for the several offences has to be within the power of the court and the term of imprisonment is not rendered illegal or beyond the power of the court merely because the total term of imprisonment in the case of consecutive sentences is in excess of the punishment

within the competency of the Court. For the purpose of appeal by a convicted person it is the aggregate of the consecutive sentences passed against him which shall be deemed to be a single sentence.

The direction for the sentence to run concurrently or consecutively is a direction as to the mode in which the sentence is to be executed. That does not affect the nature of the sentence. It is also important to note that in the Code of Criminal Procedure, there are no guidelines or specific provisions to suggest under what circumstances the various sentences of imprisonment shall be directed to run concurrently or consecutively. There are no judicial decisions, to my knowledge, by superior courts laying down the guidelines as to what should be the criteria for directing the convict to undergo imprisonment on various counts concurrently or consecutively. In certain cases, if the person convicted is a habitual offender and he had been found guilty of offences on various counts and it is suspected that he would be a menace if he is let loose on the society, then the court would direct that such person shall undergo the imprisonment consecutively.

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107. CIVIL PROCEDURE CODE, 1908 – Section 90 and O.9 R.13

WORDS & PHRASES :

(i) Ambit and scope of Expln. appended to O.9 R.13 regarding maintainability of application and appeal simultaneously – Defendant can take recourse to both the proceedings but if appeal is dismissed, application under O.9 R.13 would not remain maintainable – Converse is not true – Law explained.

(ii) "Issue estoppel" and "res judicata", distinction between – Law explained.

Bhanu Kumar Jain v. Archana Kumar and another
Judgment dt. 17.12.2004 by the Supreme Court in Civil Appeal No. 8246 of 2004, reported in (2005) 1 SCC 787

Held :

(i) The question which now arises for consideration is as to whether the first appeal was maintainable despite the fact that an application under Order 9 Rule 13 of the Code was dismissed.

An appeal against an ex parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) the materials on record brought on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) the suit could not have been posted for ex parte hearing.

In an application under Order 9 Rule 13 of the Code, however, apart from

questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

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

In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness of otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein.

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

* * *

(ii) There is a distinction between "issue estoppel" and "res judicata". (See *Thoday v. Thoday, (1964) 1 All ER 341*).

Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise. In *Thoday* (supra) Lord Diplock held: (All ER p. 352 B-D)

> "... 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment... If it was determined not to exist, the

unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

The said dicta was followed in *Barber v. Staffordshire Country Council, (1996) 2 ALL ER 748 (CA)*. A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See *C. (A Minor) v. Hackney Londan Borough Council, (1996) 1 ALL ER. 973*).

We have, however, no doubt in our mind that when an application under Order 9 Rule 13 of the Code is dismissed the defendant can only avail a remedy available thereagainst viz. to prefer an appeal in terms of Order 43 Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.

The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the dependent before it, it would be open to him to argue in the first appeal filed by him under section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in *Rani Choudhary v. Lt.- Col. Suraj Jit Chudhary, (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar, (2002) 5 SCC 161* and *Shyam Sundar Sarma v. Pannalal Jaiswal, (2005) 1 SCC 436.*

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108. CRIMINAL TRIAL :

Appreciation of Evidence – Criminal background of witness, effect of – Criminal background not a ground to reject the evidence of a witness – Such evidence be examined with caution.

State of Uttar Pradesh v. Farid Khan and others

Reported in 2005 (1) MPLJ 241

Held :

Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting

such evidence. Whether this witness was really an eye-witness or not is the crucial question. If his presence could not be doubted and if he deposed that he had seen the incident, the Court shall not feel shy of accepting his evidence. The High Court must have kept in mind that the Sessions Court, which had the opportunity to see the witness, relied on the evidence of such a witness and such an evidence should not have been lightly discarded on these grounds.

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109. CRIMINAL PROCEDURE CODE, 1973 – Sections 204, 239 and 362 Recall of the process issued under Section 204 – Magistrate has no jurisdiction to recall the process – The only remedy with the aggrieved accused is under Section 482 Cr.P.C. – View expressed in *Adalat Prasad v. Roop Lal Jindal, 2004 (4) MPLJ 1* endorsed.
Subramanium Sethuraman v. State of Maharashtra
Reported in 2005 (1) MPLJ 241 (SC) (Three Judge Bench)

Held :

Having considered the argument of the learned counsel for the parties, we are of the opinion that the argument of the learned counsel for the appellant that the decision of this Court in *Adalat Prasad's* case requires reconsideration cannot be accepted. It is true that the case of *Adalat Prasad* pertained to a warrant case whereas in *K.M. Mathew v. State of Kerala and anr., (1992) 1 SCC 217* case the same pertained to a summons case. To this extent, there is some difference in the two cases, but that does not, in any manner, make the law laid down by this Court in *Adalat Prasad's* case a bad law.

In *Mathew's* case this Court held that consequent to a process issued under section 204 by the concerned Magistrate it is open to the accused to enter appearance and satisfy the Court that there is no allegation in the complaint involving the accused in the commission of the crime. In such situation, this Court held that it is open to the Magistrate to recall the process issued against the accused. This Court also noticed the fact that the Code did not provide for any such procedure for recalling the process. But supported its reasoning by holding for such an act of judicial discretion no specific provision is required.

In *Adalat Prasad's* case, this Court considered the said view of the Court in *K.M. Mathew's* case and held that the issuance of process under section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in *Adalat Prasad's* case held :

> "Therefore, we are of the opinion that the view of this Court in *Mathew's* case (supra) that no specific provision is required for recalling and

issuance order amounting to one without jurisdiction, does not laid down the correct law."

From the above, it is clear that the larger Bench of this Court in *Adalat Prasad's* case did not accept the correctness of the law laid down by this Court in *K.M. Mathew's* case. Therefore, reliance on *K.M. Mathew's* case by the learned counsel appearing for the appellant cannot be accepted nor can the argument that *Adalat Prasad's* case requires reconsideration be accepted.

The next challenge of the learned counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplates a stage of discharge like section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded under section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion.

As observed by us in *Adalat Prasad's* case the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case.

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110. ACCOMMODATION CONTROL ACT (M.P.), 1961 – Section 12 (1) (c) Disclaimer of title – Disclaimer pleaded in reply notice or written statement can be a basis for plea of disclaimer of title.
Ranjit Narayan Haksar v. Laxmanbhai Jethabhai
Reported in 2005 (1) MPLJ 297

Held :

It is true that in the plaint as originally filed no ground under section 12 (1) (c) of the Act had been taken directly. Though, of course basic facts for the plea had been there. The plaint as it existed could on proper construction be held to include such a ground, *Sardar Soorata Singh vs. Sharad Chand Chitlangya, 1991 MPRCJ NOC 80.* It is well settled that even if the title of landlord is disclaimed in reply notice in view of *Shantilal vs. Gauswami, 1984 MPWN 494, Vidya Devi vs. Satpal, 1981 MPRCJ NOC 53,* or in the written statement, in view of *M. Subbarao vs. P.V.K. Krishna Rao, AIR 1989 SC 2187 = 1990 (1) AIRCJ 97* and *Bhagwati Prasad vs. Rameshchand, 1994 MPLJ 619,* the grounds as made out once either the relationship of landlord and tenant is admitted or proved tenant is stopped from denying the title of the landlord under section 116 of the Evidence Act. *S. Thangappan vs. P. Padmavathy, (1999) 7 SCC 474.*

●

111. ACCOMMODATION CONTROL ACT (M.P.), 1961 – Section 13 (1)
Time to deposit rent, extension of – Court on application can extend the time – Law explained.
Rohit Maheshwari v. Dhruv Kumar
Reported in 2005 (1) MPLJ 331

Held :

Having heard learned counsel for the parties and on perusal of the records it is seen that under Section 13(1) of the M.P. Accommodation Control Act, 1961 it is provided that a suit or other proceedings being instituted by a landlord the tenant has to deposit the rent due within one month of service of summons or notice or within such further time as the Court may on an application made to it allow in this behalf. It is, therefore, clear that the Court is empowered to extend time limit for deposit of amount of rent on an application moved in this behalf.

Reading of the aforesaid provision does not indicate that the Court is not empowered to condone or extend the time limit for deposit of rent. The question does not require to be gone into in much detail in view of enunciation of law in this regard made by the Supreme Court in the case of *Nasiruddin and others.* The Supreme Court in the aforesaid case while considering the provisions of Rajasthan Premises (Control of Rent and Eviction) Act, 1950 in para 40 of the judgment has considered the question with regard to extension of time and condonation of delay. While dealing with the said question special reference is made to the Madhya Pradesh Accommodation Control Act and the provisions of section 13(1) and (6) of the M.P. Act in paras 23 and 24 of the aforesaid decision. In para 26 after considering the provisions of section 13(1) of the M.P. Act it has been emphasised by the Supreme Court as under :-

> "The M.P. Act provides for the power of the Court to extend the time in the event sufficient cause therefor is shown which is absent in the Rajasthan Act".

It is clear from the aforesaid observation that the provisions of section 13(1) of the M.P. Act clearly provides for extension of time.

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112. HINDU MARRIAGE ACT, 1955 – Section 24
Interim maintenance u/s 24, grant of – Liability of husband regarding wife and minor child – Maintenance for minor child may be allowed u/s 24 – Law explained.
Krishnakant s/o Kaluram Malviya v. Durgeshnandini w/o Krishnakant
Reported in 2005 (1) MPLJ 339

Held :

Petitioner filed an application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Petitioner married with the respondent on 15-12-2001 as per the Hindu rites. Out of the wedlock, one son was born on 12-7-2002. In the proceedings, respondent, wife filed an application under Sec-

tion 24 of the Hindu Marriage Act claiming maintenance from the petitioner, husband. Learned trial Court, by the order impugned has allowed the application and has fixed the interim maintenance, as mentioned hereinabove, in favour of the respondent, wife and minor son. Learned counsel for petitioner submitted that under section 24 of the Hindu Marriage Act, no maintenance can be granted to the minor son. In this connection, he has placed reliance on *Short Note 68* reported in *1995 MPLJ, Rajendra Kumar Mishra vs. Sushiladevi.*

I have learned counsel for the petitioner at length. In the considered opinion of this Court, the reliance placed on the aforesaid Short Note does not come to the rescue of the petitioner in view of the law laid down by the Supreme Court in the case reported in *AIR 1997 SC 3397.* It was held by the Supreme Court that section 24 of the Act cannot be read in isolation and cannot be given restricted meaning to hold that section 24 provides for maintenance of wife alone. If the wife is maintaining the child born out of the wedlock, then in accordance with the provisions of Hindu Adoptions and Maintenance Act, 1956, the husband has to maintain not only the wife, but the child also.

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113. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)
Period for filing Challan for an offence u/s 304-B IPC – Period is 90 days and not 60 days – Law explained.
Pradeep@ Piddi v. State of M.P.
Reported in 2005 (1) MPLJ 346

Held :

Present applicant filed an application on 29-10-2004 alleging that as Challan is not filed against him within 60 days from the date of arrest hence he is entitled to bail in terms of section 167 (2), Criminal Procedure Code. Counsel for the applicant relied upon sub-clause (i) of sub-section (2) (a) of section 167, Criminal Procedure Code which provides that "where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years" then the applicant is entitled to be released on bail if the Challan is not filed within 90 days. According to him sub-clause (ii) of the said sub-section deals with other cases in which period of filing Challan is 60 days. According to counsel for the applicant the case of the applicant is not covered by sub clause (i) as punishment for offence under section 304-B, Indian Penal Code "is not less than 7 years but which may extend to imprisonment of life". Counsel for the applicant submits that as in the said offence minimum punishment is 7 years though it may extend to imprisonment of life Challan should be filed within 60 days as the punishment in case he relied upon the judgment of Delhi High Court in the case of *State v. B.B. Singh and ors., 2004(2) Crimes 562.* In that case the Delhi High Court has laid down that if the punishment could extend to imprisonment for life would not make it an offence where punishment is "not less than 10 years". For offence under section 304-B, Indian Penal Code the court has option to award sentence of less than 10 years such

case did not fall in the category of case for which sentence could be imprisonment for a period not less than 10 years. In that case the Delhi High Court has laid down that the period of filing Challan for committing offence under section 304-B, Indian Penal Code is 60 days and if the Challan is not filed within 60 days then the accused is entitled to bail.

From perusal of the judgment of the Delhi High Court it appears that the Delhi High Court has relied upon the judgment of Apex Court in the case of *Rajeev Choudhary vs. State (NCT) of Delhi, (2001)5 SCC 34.* After reading the judgment in the case of *Rajeev Choudhary* (supra) I find that in that case the offence was under section 386, Indian Penal Code and the sentence prescribed for committing offence under section 386, Indian Penal Code is "term which may extend to 10 years". Thus, in that case the Apex Court was dealing with a case in which the maximum punishment was for a period of 10 years. Hence, that case was definitely covered by sub-clause (ii) of sub-section (2) (a) of section 167. Criminal Procedure Code. Thus, the Apex Court was not dealing with a case in which the imprisonment was more than 10 years.

For proper disposal of this case it is necessary to refer to language of sub-clause (i) and (ii) of sub-section (2) (a) of section 167, Criminal Procedure Code which reads as under :

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

From bare reading of sub-clause (i) is clear that 90 days period for filing challan is applicable to an offence punishable with death, imprisonment of life or imprisonment of term not less than 10 years, It appears that Delhi High Court has lost sight of the words "imprisonment of life or imprisonment of a term not less than 10 years".

The word "or" is used as disjunctive and cannot be read as "and" which is conjunctive. Hence, the judgment of the Delhi High Court which is passed by ignoring the word "or" is per incurium. Word "or" used in sub-section itself makes it clear that the period of 90 days will be applicable to an offence where a punishment of imprisonment of life may be passed by the Court. For commission of offence under section 304-B, Indian Penal Code Court is competent to pass a sentence of life imprisonment. Hence, the period of filing challan for committing offence under section 304-B, Indian Penal Code will be 90 days and not 60 days.

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114. MOTOR VEHICLES ACT, 1988 – Section 166

Composite negligence – Necessary parties – Complainant can file claim against driver/owner and Insurance Company of either of the vehicle – Apportionment of liability – Unless clear evidence is available, apportionment not necessary.

Sushila Bhadoriya and others v. M.P. State Road Transport Corporation and another

Reported in 2005 (1) MPLJ 372 (FB)

Held :

In our opinion, in the cases of joint tort–feasors when the liability is joint and several, it is the choice of the claimant to impaled either driver, owner and insurer of both the vehicles, or of one vehicle and recover, the whole amount of compensation from one of the tort-feasors. It is not necessary for him to impaled both the tort-feasors. He can implead only one of them as per his choice. Claim petition cannot be defeated on the ground of non-impleading the owner, driver and insurance company of other vehicle, partly because the intention of the Legislature is that the Claims Tribunal should issue notice to the owner, driver and insurer of the offending vehicle/vehicles.

Next question involved in the case is whether there can be apportionment? In the cases of joint tort-feasors, it is difficult to determine the extent of liability of each tort-feasor and it will not be possible to apportion the ratio of negligence of the joint tort-feasors. In the case of composite negligence or in the cases of joint tort-feasors arising out of the use of motor vehicle, award can be passed against both or any one of them for the entire amount because the injured is not in a position to quantify or qualify the apportionment of each vehicle. Since he has suffered injury on account of use of motor vehicles, both the motor vehicles will be jointly and severally liable to pay the compensation. It is the choice of the claimant to sue both or may claim compensation from one of the joint tort-feasors as their liability is joint and several. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two, as it is difficult to determine the apportionment in the absence of the drivers of the vehicles appearing in the witness box. Therefore, there cannot be any apportionment of the claim between the joint tort-feasors.

When injury is caused as a result of negligence of two joint tort-feasors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint tort-feasor, liability can be fastened on both the tort-feasors jointly and in case only one of the joint tort-feasors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feasors. If both the joint tort-feasors are before the Court and there is sufficient evidence regarding the act of each tort-feasors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-feasors, it may apportion the claim. However, it is not necessary to apportion

the claim when it is not possible to determine the ratio of negligence of joint tort-feasors. In such cases, joint tort-feasors will be jointly and severally liable to pay the compensation.

On the same principle, in the case of joint tort-feasors where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There cannot be apportionment of claim of each tort-feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.

To sum up, we hold as under:

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles. Claimant may implead the owner, driver and insurer of both the vehicles or anyone of them.

(ii) There cannot be apportionment of the liability of joint tort-feasors. In case both the joint tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of law, there is no necessity to apportion the *inter se* liability of joint tort-feasors.

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115. MOTOR VEHICLES ACT, 1988 – Section 149

Insurance Company, exoneration of for breach of terms of policy – Necessary conditions – Even if exonerated, 3rd party can recover the amount from insurance company – In such case owner be directed to pay such amount to the company – Law explained.

Phulwarilal Mishra and others v. Awadesh Kumar and others

Reported in 2005 (1) MPLJ 392

Held :

Recently in the case of *National Insurance Co. Ltd. vs. Swaran Singh and others, 2004 ACJ 1,* a three judges constitution Bench of the Supreme Court has settled the controversy about the liability of the Insurance Company in third party risk cases and it is held that the liability of the Insurance Company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time. Therefore the doctrine of stare decisis persuades us not to deviate from the said principle as it is well settled rule. It would useful to repeat the summary of findings of the said judgment as under :–

"(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legis-

lation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under section 163-A or section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of section 149(2) (a)(ii) of the said Act.

(iii) The breach of policy conditions e.g., disqualification of driver of invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149 have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle, the burden of proof therefore would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under section 165 read with section 168 is empowered to adjudicate all claims in respect of the accidents involving death or bodily injury or damage to property of third party arising from use of motor vehicle. The said power of the tribunal is not restricted to decide the claims, inter se, between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and the insured in the course of adjudication of claim for compensation by the claimants and the Award made thereon is enforceable and executable in the same manner as provided in section 174 of the Act for enforcement and execution of the Award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the Award of the tribunal. Such determination of the claim by the tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the Award by the Tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

116. SERVICE LAW :

Deputation, requirements for – Deputation requires consent of employee as well as lending and borrowing departments – Recall from deputation, consent of employee not required – Parent department always has a right to recall its employee – Law explained.

S.M.P. Sharma v. State of M.P. and another

Reported in 2005 (1) MPLJ 398

Held :

While deputation requires the consent of the employee, in addition to the consent of the lending and borrowing departments, recalling the service of the employee by the parent department does not require the consent of the employee. The parent department has always the right to recall the services of its employees sent on deputation, in the absence of any specific contract assuring the employee of a particular tenure in respect of the deputation post. The Supreme Court in *Kunal Nandu vs. Union of India, AIR 2000 SC 2076* held thus :

> "The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation...."

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117. MOTOR VEHICLES ACT, 1988 – Sections 2(21) and 2(47)

Motor vehicle having unladen weight not more than 7,500 kg. – Use of such vehicle as transport vehicle – Driving license for light motor vehicle sufficient – Law explained.

Vijay Kumar Bansal and another v. Vinod Kumar Rai and another

Reported in 2005 (1) MPLJ 404

Held :

A perusal of the definition of light motor vehicle makes it clear that even a transport vehicle of which unladen weight does not exceed 7500 kg., would be a light motor vehicle. The transport vehicle as defined under section 2(47) includes public service vehicle. Public service vehicle as defined under section 2(35) includes any motor vehicle used for the carriage of passengers for hire or reward. A bare reading of the aforesaid definitions makes it clear that the offending vehicle which was used as public service vehicle was a transport vehicle and since its unladen weight was not exceeding 7500 kg. it comes under the definition of light motor vehicle, of which the appellant No. 1 was having valid driving licence.

In this view of the matter, question of having any endorsement on the licence authorizing to drive a transport vehicle would not arise in the present case. The vehicle would certainly cover under the definition of light motor vehi-

cle which includes transport vehicle (public service vehicle) of unladen weight not exceeding 7500 kg.

In the case of *Ashok Gangadhar Maratha vs. Oriental Insurance Company Limited, 2001(1)ACJ 319* the Supreme Court held that if the driver is possessing a licence to drive a light motor vehicle, the licence would be a valid driving licence for driving a transport vehicle not exceeding the unladen weight prescribed under the definition of light motor vehicle. In the case of *United India Insurance Company Limited vs. Yovardhan, 2001(2) MPLJ 208* the Division Bench of this Court while dealing with a case pertaining to goods vehicle has observed in para 9 as under :—

> "9. From the definition of 'transport vehicle' extracted, hereinabove, it is apparent that the goods carriage is included in the transport vehicle and such transport vehicle if its unladen weight is below 7500 kg., shall be a light motor vehicle as defined in section 2 of sub-section (21) of the Motor Vehicles Act, 1988. Unladen weight of Matador in question undisputedly was less than 7500k.g. Thus, in spite of it being goods vehicle, it was a light motor vehicle and the driver was possessing the licence Ex. D/1 for driving light motor-vehicle. Thus, the driver was having a valid driving licence to drive the vehicle."

In yet another case *United India Insurance Company Limited vs. Smt. Vimlabai and others* *दुर्घटना मुआवजा प्रकाशिका, 2001 (1) 278* the Division Bench of this Court has held that the public service vehicle carrying passengers is a transport vehicle and the unladen weight of tempo being less than 7500 kg., it would be a light motor vehicle.

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118. PREVENTION OF CORRUPTION ACT, 1947 – Section 5-A

Investigation, commencement of – SDM on receiving complaint about demand of illegal gratification laying trap and recovering money received as bribe – Subsequent complaint by SDM to S.P. regarding incident – Laying of trap and recovery of notes not part of investigation – Law explained.

State of Rajasthan v. Shambhoogiri

Judgment dt. 12.10.2004 by the Supreme Court in Criminal Appeal No. 955 of 2003, reported in (2004) 8 SCC 169

Held :

Learned counsel for the appellant State contended that the High Court seriously erred in holding that there was no compliance with Section 5-A of the PC Act. It was contended that the SDM who laid the trap and caught the accused red-handed was not conducting any investigation and the High Court wrongly assumed that the investigation by the SDM was without jurisdiction and the entire proceedings were vitiated by such illegality. The learned counsel for the respondent, on the other hand, contended that Section 5-A of the PC Act

authorises only a specified person to conduct the investigation and action conducted by any authority other than the specified authority is illegal and the accused has been rightly acquitted by the High Court. Section 5-A of the PC Act reads as follows :

> *"5-A. Investigation into cases under this Act.* – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank,–
>
> (a) in the case of the Delhi Special Police Establishment, of an Inspector of Police,
>
> (b) in the Presidency Towns of Calcutta and Madras, of an Assistant Commissioner of Police;
>
> (c) in the Presidency Town of Bombay, of a Superintendent of Police; and
>
> (d) elsewhere, of a Deputy Superintendent of Police,
>
> Shall investigate any offence punishable under Section 161, Section 165 or Section 165-A of the Indian Penal code or under Section 5 of this Act without the order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be, or make any arrest therefor without a warrant:
>
> Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be, or make arrest therefor without a warrant:
>
> Provided further that an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police office not below the rank of a Superintendent of Police."

The above provision shows that only the authorities specified in clauses (a) to (d) of Section 5-A (1) alone are authorised to conduct the investigation and no police officer below the rank of those categories of officers is competent to conduct the investigation unless there is an order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be, and the State can authorise any officer for the purpose of investigation of such crimes under the PC Act but not below the rank of any Inspector of Police.

In the instant case, the High Court took the view that SDM conducted the investigation of the case and that he was not competent to do so. This view of the High Court is incorrect. The SDM got information from PW 1 that the accused had been demanding illegal gratification. The SDM wanted to ascertain whether this allegaiton was true or not. He asked PW 1 to give a written complaint with Rs. 200 currency notes. The SDM noted the numbers of the currency notes in his diary and these notes were given to PW1 who, in turn, gave these currency notes to the accused as illegal gratification. The SDM called the accused who was working under him and asked him to produce the 200 rupees

given by PW 1. The accused produced the notes before the SDM and the numbers of the currency notes were verified with the entries noted earlier by him in the diary. The SDM himself prepared a recovery memo and sent it to the Superintendent of Police with a complaint alleging that the accused had received a bribe. He also sent a note to his superior officer. Here, the SDM was not doing any investigation. The High Court was of the view that he laid a trap and recovered the notes and thus conducted an investigation of the crime. The investigation of the crime would start only after the compliant is given by the SDM to the Superintendent of Police (Anti-Corruption) and investigation as such is defined under the Code of Criminal Procedure and under Section 2(h) which is to the following effect:

> "2. (h) 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

Every citizen is competent and entitled to detect crimes and report, and if any information regarding the commission of any crime is known to any person, such information can be passed on to the police or any other competent authority for taking appropriate action, for example, under the Food Adulteration Act, an ordinary citizen is competent to collect samples and send them to the public analyst, and based on the report of the public analyst, the complaint can be filed before the appropriate authority. The collection of the samples and the analysis by the public analyst do not amount to investigation. If a crime is committed in the presence of any citizen, he can very well ascertain the truth of the fact and make all efforts to bring home the guilt of the accused. The Sub-Divisional Magistrate had only discharged his duties as a law-abiding citizen and the allegation that the SDM had conducted investigation of the case is incorrect and the High Court seriously erred in holding that the trial was vitiated owing to the investigation having been conducted by the SDM.

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119. LAND ACQUISITION ACT, 1894 – Section 51-A

Acceptance of certified copy of sale deed in evidence u/s 51-A, ambit, scope and applicability of Section 51-A – Law explained.

Cement Corpn. of India v. Purya and others

Judgment dt. 7.10.2004 by the Supreme Court in Civil Appeal No. 6986 of 1999, reported in (2004) 8 SCC 270

Held :

From the above, it is seen that till the judgment of the three-Judge Bench in *Land Acquisition officer & Mandal Revenue Officer v. Narasaiah, (2001) 3 SCC 530,* the consensus of judicial opinion was that Section 51-A was enacted for the limited purpose of enabling a party to produce a certified copy of a registered sale transaction in evidence only and for proving the contents of the

said document the parities had to lead oral evidence as contemplated in the Evidence Act.

A careful perusal of the judgment in *Dy. Collector v. Kurra Sambasiva Rao, (1997) 6 SCC 41* and other cases which fall in line with the said view discloses that they proceeded on the basis that prior to the insertion of Section 51-A in the LA Act, the Evidence Act did not permit the production of a certified copy of the registered sale transaction in evidence. Therefore, by the insertion of Section 51-A the legislature merely enabled a party to get over that problem. Thereafter, according to the said judgments, the party concerned had to prove the contents of the document by adducing oral evidence separately to prove the contents of the document.

The above view of the Court in *Kurra Sambasiva Rao,* in our opinion, is not the correct position in law. Even prior to the insertion of Section 51-A of the Act the provisions of the Evidence Act and the Registration Act did permit the production of a certified copy in evidence. The has been clearly noticed in the judgment in *Narasaiah case* (supra) wherein the Court relying on Sections 64 and 65 (f) of the Evidence Act read with Section 57 (5) of the Registration Act held that production of a certified copy of a registered sale document in evidence was permissible in law even prior to insertion of Section 51-A in the LA Act. We are in agreement with the said view expressed by this Court in *Narasaiah case* (supra).

In the above background the question for our consideration would be, what then is the real object of inserting Section 51-A in the LA Act?

Section 51-A of the LA Act may be read literally and having regard to the ordinary meaning which can be attributed to the term "acceptance of evidence" relating to transaction evidenced by a sale deed, its admissibility in evidence would be beyond any question. We are not oblivious of the fact that only by bringing a documentary evidence in the record it is not automatically brought on the record. For bringing a documentary evidence on the record, the same must not only be admissible but the contents thereof must be proved in accordance with law. But when the statute enables a court to accept a sale deed on the records evidencing a transaction, nothing further is required to be done. The admissibility of a certified copy of sale deed by itself could not be held to be inadmissible as thereby a secondary evidence has been brought on record without proving the absence of primary evidence. Even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that the contents of the transaction as evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word "may". A discretion, therefore, has been conferred upon a court to be exercised judicially i.e. upon taking into consideration the relevant factors.

A registered document in terms of Section 51-A of the Act may carry therewith a presumption of genuineness. Such a presumption, therefore, is rebuttable. Raising a presumption, therefore, does not amount to proof; it only shifts the burden of proof against whom the presumption operates for disproving it. Only if the presumption is not rebutted by discharging the burden, the court may act on the basis of such presumption. Even when in terms of the Evidence Act, a provision has been made that the court shall presume a fact, the same by itself would not be irrebuttable or conclusive. The genuineness of a transaction can always fall for adjudication, if any question is raised in this behalf.

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120. PROBATION OF OFFENDERS ACT, 1958 – Section 11 (2)
Right to file appeal u/s 11 (2) – Held, apart from accused and State, complainant can also file appeal.
Prithviraj and others v. Kamlesh Kumar and another
Judgment dt. 20.9.2004 by the Supreme Court in Criminal Appeal No. 609 of 1999, reported in (2004) 8 SCC 303

Held :

It is to be noted that sub-section (2) of Section 11 Commences with the expression "notwithstanding anything contained in the Code" and provides in unqualified terms that "an appeal shall lie to the court". Under the Code the appeal proceedings are concerned only with orders of acquittal or conviction. While the provisions in Section 11 (2) of the Act deal with something distinct from the fact of conviction or acquittal. The appeal under Section 11 (2) of the Act is not against acquittal or conviction but the propriety of the order passed under Section 3 or Section 4 of the Act. The intention of the legislature apparently is to confer such a right both on the prosecution and the accused. The interest of the complainant is not totally lost sight of by the legislature. It is statutorily provided that revision application can be filed by the complainant against an order of acquittal. That being so, the complainant can prefer an appeal under Section 11 (2) of the Act questioning propriety of the order passed under Section 3 or 4 of the Act. The view expressed by the Patna and the Orissa High Courts is the correct view and that of the Calcutta High Court is not correct. The said view is nullified.

That brings us to the pivotal issue as to the scope and limit of interference in an appeal under Section 11 (2) of the Act. Section 11 (4) makes the position clear that only the propriety of the order passed under Section 3 or 4 in respect of offenders can be dealt with the appellate court or the High Court, as the case may be. The appellate court or the High Court exercising revisional power may set aside such order, meaning passed either under Section 3 or Section 4 and in lieu thereof pass sentence on such offender. Obviously, the sentence can be imposed only in respect of the offence relating to which the order under Section

3 or Section 4 of the Act has been passed. There is no scope of altering nature of offence and for directing that the accused shall be convicted for another offence.

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121. WORDS AND PHRASES :

"Judicial discretion", meaning and connotation of.

Aero Traders (P) Ltd. v. Ravinder Kumar Suri

Judgment dt. 27.10.2004 by the Supreme Court in Civil Appeal No. 6973 of 2004, reported in (2004) 8 SCC 307

Held :

According to *Black's Law Dictionary* "Judicial discretion" means the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 *Corpus Juries Secundum*, p. 289). When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice and not according to private opinion; according to law not and not humour. It only gives certain latitude or liberty accorded by statute or rules, to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him.

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122. CIVIL PROCEDURE CODE, 1908 – O.39 Rr. 1 and 2

Interim injunction, grant of – Unless case of irreparable loss or damage is made out, Court should not permit the nature of property to be changed.

Maharwal Khewaji Trust (Regd.), Faridkot v. Baldev Dass

Judgment dt. 15.10.2004 by the Supreme Court in Civil Appeal No. 6792 of 2004, reported in (2004) 8 SCC 488

Held :

Be that as it may, Mr Sachar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long

time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard.

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123. RENT CONTROL AND EVICTION :

Suit for eviction based on bonafide need of landlord – Subsequent events, effect of – Law explained.

Pratap Rai Tanwani and another v. Uttam Chand and another Judgment dt. 8.9.2004 by the Supreme Court in Civil Appeal No. 7608 of 2002, reported in (2004) 8 SCC 490

Held :

We cannot forget that while considering the bona fides of the need of the landlord the crucial date is the date of the petition. In *Ramesh Kumar v. Kesho Ram 1992 Supp (2) SCC 623* a two-Judge Bench of this Court (M.N. Venkatachalia, J., as he then was and N.M. Kasliwal, J.) pointed out that the normal rule is that rights and obligations of the parties are to be determined as they were when the lis commenced and the only exception is that the court is not precluded from moulding the reliefs appropriately in consideration of subsequent events provided such events had an impact on those rights and obligations. What the learned Chief Justice observed therein is this : (SCC pp. 626-27, para 6).

> "6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Whether subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a cautious cognizance' of the subsequent changes of fact and law to mould the relief".

The next three-Judge Bench of this Court which approved and followed the above decision in *Hasmat Rai v. Raghunath Prasad, (1981) 3 SCC 103* has taken care to emphasise that the subsequent events should have "wholly satisfied" the requirement of the party who petitioned for eviction on the ground of personal requirement. The relevant passage is extracted below : (SCC pp. 113-14, para 14)

> "Therefore, it is now incontrovertible that where possession is sought for personal requirement it would be correct to say that the require-

ment pleaded by the landlord must not only exist on the date of the action but must subsist till the final decree or an order for eviction is made. If in the meantime events have cropped up which would show that the landlord's requirement is wholly satisfied then in that case his action must fail and in such a situation it is incorrect to say that as decree or order for eviction is passed against the tenant he cannot invite the court to take into consideration subsequent events."

The judicial tardiness, for which unfortunately our system has acquired notoriety, causes the lis to creep through the line for long long years from the start to the ultimate termini, is a malady afflicting the system. During this long interval many many events are bound to take place which might happen in relation to the parties as well as the subject-matter of the lis. If the cause of action is to be submerged in such subsequent events on account of the malady of the system, it shatters the confidence of the litigant, despite the impairment already caused.

The above position in law was highlighted in *Gaya Prasad v. Pradeep Srivastava, (2001) 2 SCC 604.*

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124. BANKING :

Joint account with "either or survivor" clause, nature of – Bank cannot bilaterally modify such tripartite agreement.

Anumati v. Punjab National Bank

Judgment dt. 25.10.2004 by the Supreme Court in Civil Appeal No. 6945 of 2004, reported in (2004) 8 SCC 498

Held :

A fixed deposit in the joint names of two persons is nothing but a joint account which, as the name itself suggests, is repayable on the expiration of the agreed period. The fixed deposit receipt is merely a written acknowledgement by the bank that it holds a certain sum to the use of its customers. The bank is thus a debtor to the account-holders in respect of the amount deposited – a debt which is repayable by the bank to the account-holders with interest on the expiry of an agreed period. An "either or survivor" clause in such an account means that the amount payable by the bank on maturity of the fixed deposit may be paid to either of the account-holders by the bank in order to obtain a valid discharge. In other words, under a tripartite agreement between the joint account-holders inter se and the bank, the bank may, on maturity, make payment only to either of them. This tripartite agreement cannot be bilaterally modified by one of the joint account-holders for example by pledging the account with any third party including the bank itself in its capacity of creditor, so that the amount becomes payable to such third party, without the consent of the joint account holder.

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125. MOTOR VEHICLES ACT, 1988 – Section 149 (2)

(i) Plying of a vehicle without permit – Such a plying amounts to infraction of Section 149 (2), therefore, amounts to a defence available to the insurer.

(ii) Insurer exonerated due to breach of condition of licence – Satisfaction of award – Insurance Company and subsequent recovery of award amount from the owner of the vehicle – Procedure to be adopted – Law explained.

National Insurance Co. Ltd. v. Challa Bharathamma and others
Judgment dt. 21.9.2004 by the Supreme Court in Civil Appeal No. 6178 of 2004, reported in (2004) 8 SCC 517

Held :

(i) The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. The High Court was, therefore, not justified in holding the insurer liable.

(ii) The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured.

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126. MOTOR VEHICLES ACT, 1988 – Section 147

Third party insurance – Section 147 does not contemplate liability of insurer for death or bodily injury of the owner of the insured vehicle – Law explained.

Dhanraj v. New India Insurance Co. Ltd. and others

Judgment dt. 24.10.2004 by the Supreme Court in Civil Appeal No. 6270 of 2004, reported in (2004) 8 SCC 553

Held :

Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an power of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

In the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365* it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the insurance company has no liability also.

In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is no such insurance.

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127. SPECIFIC RELIEF ACT, 1963 – Section 21

Award of compensation in substitution or in lieu of specific performance – Ambit and scope of Section 21 – Law explained.

Shamshu Suhara Beevi v. G. Alex and another

Judgment dt. 20.8.2004 by the Supreme Court in Civil Appeal No. 3729 of 2000, reported in (2004) 8 SCC 569

Held :

Section 21 of the Act reads :

> "21. *Power to award compensation in certain cases.*- (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) in determining the amount of any compensation awarded this section, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such conpensation in his plaint.

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation. – The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section".

This section corresponds to Section 19 of the Specific Relief Act, 1877, Sub-section (1) re-enacts the law as contained in clause (1) of the repealed Section 19 with suitable variations. The words "any person suing" have been substituted by the words "in a suit". The word "claim" has been substituted for the words "ask for" and the word "plaintiff" has been inserted before the words "performance of a contract". Sub-section (2) reproduces verbatim the language of clause (2) of the repealed Section 19 with the alteration that the word "such" has been prefixed before the word "compensation". Sub-section (3) corresponds to clause (3) of Section 19 of the repealed Act. There is no modification in this sub-section. Clause (4) of Section 19 of the repealed Act has been substituted by the new sub-section (4) of Section 21. It provides the mode and manner of determining the amount of compensation under this section. It lays down the principle which would govern the determination of the award of compensation and provides that the court shall be guided by the principles specified in Section 73 of the Contract Act, 1872 while determining the amount of compensation. Sub-section (5) of this section is new. It provides that the compensation under this section shall not be awarded unless the plaintiff has claimed it in the plaint. An important rider has been attached to this sub-section which is to the effect that the court shall, at any stage of the proceedings, permit the amendment of the plaint to enable the plaintiff to include his claim for compensation on such

terms, as the court may deem fit. Explanation to this sub-section re-enacts the language of the old explanation without any change. Illustrations under Section 19 have been deleted.

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128. TRANSFER OF PROPERTY ACT, 1882 – Sections 53-A & 54

(i) Nature and scope of protection available u/s 53-A – Protection not available against third person where there is no privity of contract – Requirements for attracting applicability of Section 53-A – Law explained.

(ii) Agreement to sell immovable property, nature of – It does not create an interest or charge in favour of proposed vendee – Law explained.

Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead) through L.Rs.

Judgment dt. 25.8.2004 by the Supreme Court in Civil Appeal No. 4610 of 2000, reported in (2004) 8 SCC 614

Held :

It is seen that many a times a transferee takes possession of the property in part-performance of the contract and he is willing to perform his part of the contract. However, the transferor somehow or the other does not complete the transaction by executing a registered deed in favour of the transferee, which is required under the law. At times, he tries to get back the possession of the property. In equity, the courts in England held that it would be unfair to allow the transferor to take advantage of his own fault and evict the transferee from the property. The doctrine of part-performance aims at protecting the possession of such transferee provided certain conditions contemplated by Section 53-A are fulfilled. The essential conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act that have been culled out by this Court in *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi, (2002) 3 SCC 676 are : (SCC p. 682, para 16)*

> "16. (1) there must be a contract to transfer for consideration of any immovable property;
>
> (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
>
> (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
>
> (5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract".

If these conditions are fulfilled then in a given case there is an equity in favour of the proposed transferee who can protect his possession against the proposed transferor even though a registered deed conveying the title is not executed by the proposed transferor. In such a situation equitable doctrine of part-performance provided under Section 53-A comes into play and provides that :

> "the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor, It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance of such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party:

The agreement to sell does not create in interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100 can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed is of the value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of Pishorrilal (the proposed transferee) the title of the suit land continued to vest in Narayan Bapuji Dhotra (orignial plaintiff) and remain in his ownership. This point was examined in detail by this Court in *State of U.P. v. District Judge, (1997) 1 SCC 496 and it was held thus: (SCC pp. 499-500, para 7)*

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129. PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rule 44-A

"Kesari dal" – Rule 44-A brought into force in M.P. w.e.f. 6.4.2000 – Samples collected prior to that date of notification – Accused cannot be held guilty under Rule 44-A for sale of *besan* made from Kesari dal.

Dinesh Kumar v. State of M.P.

Judgment dt. 27.10.2004 by the Supreme Court in Criminal Appeal No. 1096 of 1999, reported in (2004) 8 SCC 770

Held :

On 29-3-1988 at about 3.00 p.m. the said Food Inspector went to his shop and inspected the articles and suspecting adulteration took a sample of *besan.* He prepared Form 6 and thereafter 750 gm of *besan* was taken before the witnesses and Rs. 4.50 being the price was given to the accused and receipt was obtrained. The sample was divided into threee equal parts and he sealed it in separate containers. Panchnama (Ext. P-4) was prepared on the spot. One sample was sent to the Public Analyst, Bhopal and the remaining two were deposited in the office of Local Health Officer. A report (Ext. P-8) was received and it was found that *besan* was adulterated, on the basis of which a complaint was filed. The accused was charged under Section 7(1) read with Section 16(1)(a)(i) of the Act.

The trial court had held that though the ingredients were within the permissible limit but because of the mixture of *kesari dal,* the article could not be said to be adulterated. It noted that there was no finding recorded by the Public Analyst that the percentage of powder of *kesari* as had been found in the sample, affected injuriously the nature. substance and quality of the food article analysed. Accordingly, it was held that the sample collected was not adulterated. The High Court only referred to Rule 44-A and held that adulteration was established.

Rule 44-A reads as follows :

> "44-A. No person in any State shall, with effect from such date as the State Government concerned may by notification in the Official Gazette specify in this behalf, sell or offer or expose for sale, or have in his possession for the purpose of sale, under any description or for use as an ingredient in the preparation of any article of food intended for sale –
>
> (a) kesari gram *(Lathyrus sativus)* and its products,
>
> (b) kesari dal *(Lathyrus sativus)* and its products,
>
> (c) kesari dal flour *(Lathyrus sativus)* and its products.
>
> (d) a mixture of kesari gram *(Lathyrus sativus)* and Bengal gram *(Cicer arietinum)* or any other gram,
>
> (e) a mixture of kesari dal *(Lathyrus sativus)* and Bengal gram dal *(Cicer arietinum)* or any other dal,
>
> (f) a mixture of kesari dal *(Lathyrus sativus)* flour and Bengal gram *(Cicer arietinum)* flour or any other flour."

A bare reading of the Rule makes the position clear that the State Government concerned has to notify in the Official Gazette the date with effect from which Rule 44-A becomes applicable in the State.

We find that so far as the State of M.P. is concerned, Notification No. F-3/62/98/M-2/17 was issued for application of Rule 44-A with effect from 6-4-2000. Admittedly the samples were collected much prior to that date i.e. 29.3.1988. Since Rule 44-A was not applicable and was not in operation in the State of M.P. on the date of alleged collection of samples Rule 44-A could not have been applied to find the accused guilty.

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130. CRIMINAL PROCEDURE CODE, 1973 – Sections 408 and 409

Ambit, scope and applicability of Sections 408 and 409 – Power conferred u/s 408 being judicial power, should be exercised after hearing the interested parties – Power u/s 409 (1) being of administrative nature, may be exercised even after trial has begun, if the judge has retired, resigned, died or stands transferred outside the sessions division – Contra view expressed in *Deepchand vs. State of M.P., 1998 (2) MPLJ 670* overruled – Law explained.

In Re District & Sessions Judge, Risen

Misc. Cr. Case No. 7155 of 2004 by the High Court of Madhya Pradesh, Main Seat, judgment dated 24.9.2004 (D.B.)

Held :

Sections 406, 407 and 408 respectively relate to the power of supreme Court, High Court and Sessions Judge to transfer cases and appeals. On the other hand, Section 409, 410 (1) and (2) and 411 relate to withdrawal of cases or recalling of cases which had been made over by the Sessions Judge, Chief Judicial Magistrate, Judicial Magistrate and the Executive Magistrate, for being thereafter tried either by himself or being made over to another Court for trial. The clear contrast in the language employed by the Legislature in the two sets of section is indicative of the difference in the nature of the power conferred thereunder. We note below the differences:

(i) Sections 406, 407 and 408 use the words "whenever it is made to appear" while referring to the power of the Supreme Court, High Court or the Sessions Judge to transfer cases. Sections 409, 410, and 411 significantly do not use these words.

(ii) The captions of Sections 406, 407 and 408 speak of exercise of 'power' to transfer, whereas Sections 409, 410 and 411 do not speak of 'power' but merely refer to 'withdrawal' or 'recalling'.

(iii) Sections 406, 407 and 408 contemplate the 'power to transfer' being exercised on an application by a 'party interested' (Sections 407 and 408 also contemplate the 'power to transfer' being used on a report of the lower Court or suo motu; and Section 406 contemplate the power of transfer being used on an application by the Attorney General). These Sections clearly imply a need for hearing before transfer. On the other hand, Sections 409, 410 and 411 contem-

plate exercise of the power of withdrawal/recalling cases in a routine manner in the day to day administration. They do not contemplate any hearing to the parties interested.

It is clear from the above that the power to be exercised under Sections 406, 407 and 408 is judicial power to be invoked and exercised in the manner stated therein. On the other hand, the power of withdrawing or recalling of cases under Sections 409, 410 and 411 is an administrative power, complementary to the administrative power of making over cases vested in the Chief Judicial Magistrate/Magistrate and the Sessions Judge under Sections 192 and 194 of the Code.

It is also clear that the power conferred in the Sessions Judge under Section 408 is on the same level as the power conferred in the High Court under Section 407 and the power under the two sections is indentical (except for two matters which are not relevant for our purposes - the first is while the power of the High Court extends over all Criminal Courts subordinate to its authority, the power of Sessions Judge is confined to Courts within its own Sessions Division; and the second is in regard to the limit of compensation awardable for frivolous applications). Therefore, if High Court has the power to transfer 'part-heard' cases under Section 407, the Sessions Court also will have the power to transfer 'part heard case', as the wording of the two sections are the same. In fact, sub-section (2) of Section 407 places an embargo on an application for transfer being filed before the High Court unless an application for such transfer has been made to the Sessions Judge under Section 408 and rejected by him.

The view taken in *Deepchand* is that Section 409 deals with withdrawal/recalling of those matters originally instituted in the Court of Sessions and made over by the Session Judge to Additional Session Judge, Assistant Sessions Judge or Chief Judicial Magistrate, whereas Section 408 deals with transfer of other cases (which were not instituted in the Court of Sessions) from one Criminal Court to another. This would have the effect of restricting the term 'Criminal Court' used in Section 408 to only Criminal Courts other than Additional Sessions Judges and Assistant Sessions Judges. Such an interpretation is unwarranted. Section 6 of the Code classifies Criminal Courts as Courts of Sessions, Judicial Magistrates of the First Class/Metropolitan Magistrates, Judicial Magistrates of the second class and Executive Magistrates. When Section 408 states that a Sessions Judge may transfer a case from one Criminal Court to another Criminal Court in his Sessions Division, it would certainly include the Additional Sessions Judges and Assistant Sessions Judges also, as they fall under 'Courts of Sessions'. Therefore, there is no impediment for a Sessions Judge to transfer any case from the Court of any Additional Sessions Judge in his Sessions Division. For exercise of power under Sections 408, the question whether the trial has commenced in the case or not is irrelevant.

We are, therefore, in respectful agreement with the view expressed by the Delhi High Court in *Avinash Chander, (1983) Criminal Law Journal 595* and the Allahabad High Court in *Radhey Shyam (1984 Allahabad Law Journal 666)* and consequently overrule the decision of the learned Single Judge of this Court in *Deepchand.*

We will now consider the scope of the administrative power under Section 409 (2) of the Code, which confers the power to recall any case or appeal which he had made over to an Additional Sessions Judge, at any time before the trial of the case or the hearing of the appeal has commenced before such Additional Sessions Judge. By implication, it is clear that a Sessions Judge, in exercise of the administrative power under Section 409 (2) recall any case or appeal made over by him to an Additional Sessions Judge, once the trial of the case or hearing of the appeal has commenced. It is well settled that 'trial' of a Sessions case commences with the framing of the charge. But what is the position if the Additional Sessions Judge to whom the case has been made over and before whom the trial of the case or hearing of the appeal has commenced, is transferred to another sessions division or has retired from service before the completion of the trial.

x x x x x

Legislative intent behind Section 409 (2) is that where the trial of the case has commenced or hearing of an appeal has commenced (for convenience 'becomes part-heard'), the case or the appeal should be contained to be tried or heard by the same Judge before whom the trial of the case or hearing of the appeal has commenced and there should be no interference with the progress of the case or appeal and, therefore, the administrative power of recalling should not be exercised. This salutary principle is to ensure speedy trial and hearing. But when the Additional Sessions Judge trying the case retires or resigns or dies or is transferred out of the Sessions Division and the Court becomes vacant, the case or appeal ceases to be a part-heard case. A case or appeal can be said to be part-heard only when the trial of the case or hearing of the appeal is capable of being continued by the Judge before whom the trial or hearing has commenced. Where the Judge before whom the matter is part-heard, ceases to be a Judge or the Court falls vacant, the matter ceases to be a part-heard matter before that Judge, and the bar relating to recalling of part-heard matters, ceases to apply. It is clear from the context in which sub-section (2) has been enacted, that it applies only to cases where trial of the case or hearing of the appeal has commenced before a particular Additional Sessions Judge and such Judge continues to preside over the same Court or continues in the same Sessions Divisions. If the Additional Sessions Judge is transferred to some other Sessions Division or ceases to be a Judge on account of resignation, retirement or death resulting in the Court becoming vacant, the restriction placed on the power under sub-section (2) of Section 409 will cease to apply and as a consequence the Sessions Judge can recall the case or appeal under Section 409 (2). But where the Additional Sessions Judge is transferred within the Sessions

Division or is on leave or under suspension, the restriction over the administrative power under Section 409 (2) may continue to exist.

We are, therefore, of the view that the decision rendered by *Dixit, J. in M. Cr. C. No. 3417 of 2002 dated 29.10.2002* states the correct position of law. Consequently, we over-rule the decision of *Narain Singh Azad, J. rendered in M.Cr.C. No. 1242 of 2002* and the decision in *Raja (1994 II M.P.W.N. 18)*

In view of the above discussion, the position may be summarised thus:

(a) A sessions Judge in exercise of judicial power under Section 408 of the Code may transfer any case pending before any criminal court in his Sessions Division to any other Criminal Court in his Sessions Divisions. That would mean that he can transfer even those cases where the trial has commenced from one Additional Sessions Judge in his Sessions Division to another Additional Sessions Judge in his Sessions Division. The transfer of a case under Section 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further, the reason or reasons why it is expedient for the ends of justice to transfer the case, has to be recorded.

(b) The judicial power under Section 408 (1) and the administrative power under Section 409 (1) and (2) are distinct and different and Section 408 is not controlled by Section 409 (2). A Sessions Judge in exercise of his administrative power under Section 409 may:

(i) withdraw any case or appeal from any Assistant Sessions Judge or Chief Judicial Magistrate sub-ordinate to him.

(ii) recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate sub-ordinate to him;

(iii) recall any case or appeal which he has made over to any Additional Sessions Judge, before trial of such case or hearing of such appeal has commenced before such Judge, and try the case or hear the appeal himself or make it over to another Court for trial or hearing in accordance with the provisions of the Code. No hearing need be granted to any one before exercising such power. But the reason therefore shall have to be recorded having regard to Section 412.

(c) A Sessions Judge in exercise of his administrative power under Section 409, may also recall any case where trial of the case or hearing of an appeal has commenced before an Additional Sessions Judge (for the purpose of trying/hearing it himself or for being made over to another Additional Sessions Judge), if such Judge before whom it became part-heard has retired, resigned. died or is transferred outside the Sessions Divisions. No hearing need be given for such recalling though the reason should be recorded. It is not necessary to refer such matter to the High Court for transferring them by exercise of power under Section 407 of the Code.

PART III

CIRCULARS/NOTIFICATIONS

THE MADHYA PRADESH FOREST PRODUCE (CONSERVATION OF BIODIVERSITY AND SUSTAINABLE HARVESTING) RULES, 2005

(Published in the State Gazette Part 4 page 26 dated 18.2.2005)

Bhopal, the 3rd February 2005

No. F-25-135-2004-X-3.– In exercise of the powers conferred by clause (d) of Section 76 of the Indian Forest Act, 1927 (No. 16 of 1927), the State Government hereby makes the following rules for the conservation of biodiversity (flora and fauna) and sustainable harvesting of forest produce from Government Forests, namely :–

RULES

1. Short title and commencement.– (1) These Rules may be called Madhya Pradesh Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, 2005.

(2) They shall come into force from the date of their publication in the "Madhya Pradesh Gazette".

2. Definitions.– In these rules, unless the context otherwise requires,–

(a) "Act" means the Indian Forest Act, 1927 (No. 16 of 1927);

(b) "Authorised Officer" means an officer authorised under these rules by the State Government who shall not below the rank of a Deputy Conservator of Forest for exercising the powers specified in these rules;

(c) "Closed Area" means an area declared as such by the authorised officer in which the collection or extraction of particular forest produce is prohibited for a specified period under rule 5 of these rules;

(d) "Closed Season" means the certain period or periods of a year in which the collection or extraction of a particular forest produce from the forests of the State is prohibited by the authorised officer under rule 4 of these rules;

(e) "Forest Area" means a compartment, block or any other administrative or management unit of reserved or protected forest area specified by the State Government or by the authorised officer for the purpose of these rules;

(f) "Havesting/Collection/Extraction" means an Act or process of removal, manipulation possession or transportaion of a forest produce in or from the reserved or protected forests;

(g) "State" means the State of Madhya Pradesh;

(h) "Sustainable Harvesting Limit" means the maximum quantity of a forest produce that may be collected or extracted, annually or periodically, from a specified forest, without adversely affecting the future yield of the said produce and without any threat to the regeneration of the source organism or its population;

(i) "Sustainable Harvesting Practices" means the non-destructive techniques and technology that may be used for the collection or extraction of a forest produce from a forest without adversely affecting the future yield of the said produce and without any threat to the regeneration of the source organism or its population;

(j) Words and expression used but not defined in these rules shall have the same meanings as assigned to them in the Act.

3. Power to take steps to ensure sustainable collection or extraction of forest produce from Government Forests.– The State Government may take such steps regarding the collection or extraction of forest produce from Government Forests as it may think necessary to ensure the conservation of biodiversity and sustainable harvesting of forest produce.

4. Power to declare Closed Season.– The State Government or the authorised officer may declare certain period or periods of a year as closed season for the collection or extraction of any forest produce from Government Forests to ensure the sustainability of the harvest, based on the life cycle of different species of flora and fauna.

5. Power to declare Closed Area.– The State Government or the authorised officer may declare certain forest areas as closed areas for a specified period, for the collection or extraction or any forest produce, in order ensure the sustainable harvesting of such forest produce in future.

6. Power to prescribe sustainable harvesting limits.– The State Government or the authorised officer may prescribe limits on quantities of any forest produce that can be collected or extracted from a specified forest area in a particular year in order to ensure sutstainable harvesting in future.

7. Power to prescribe sustainable harvesting practices. – The State Government or the authorised officer may prescribe sustainable harvesting practices for any forest produce in order to ensure sustainable harvesting in future.

8. Report by beneficiaries regarding harvesting. – Any person collecting or extracting any forest produce from Government forests shall be bound to submit the details of the forest produce by him to the authority that may be specified and in the manner and at intervals that may be prescribed.

9. Proclamation. – The Divisional Forest Officer shall proclaim the provisions of rules 4 to 8 above by the beat of drum or by any other reasonable means, as far as practicable, in all the villages within 5 kiiometers from the forest boundary.

10. Penalties for breach of rules.– Whosoever contravenes any of the provision of these rules shall be punishable under Section 77 of the Act.

By order and in the name of the Government of Madhya Pradesh,

RATAN PURWAR, SECY.

THE MADHYA PRADESH PROTECTED FOREST RULES, 2005

(Published in the State Gazette Part 4 page 26 dated 18.2.2005)
Bhopal, the 2nd February 2005

No. F-25-1-X-3-04.– In exercise of the powers conferred by Section 32 and clause (d) of Section 76 of the Indian Forest Act, 1927 (16 of 1927) and in supersession of this Department's Notification No. 8476-8414-X-60, dated 11th August 1960, the State Government hereby makes the following Rules, namely :-

RULES

1. Short Title, Extent and Commencement.– (1) These rules may be called the Madhya Pradesh Protected Forest Rules, 2005.

(2) These rules shall be applicable to the whole State of Madhya Pradesh.

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

2. Definitions.– In these rules, unless the context otherwise requires,–

(a) "Protected Forest" means a forest so declared under Section 29 of Indian Forest Act, 1927 (16 of 1927) or any other Protected Forest declared under any other orders, rules or Act prior to the coming into force of the Indian Forest Act, 1927;

(b) The words and expressions used herein but not defined in these rules, shall have the same meaning as assigned to them in the India Forest Act, 1927 (16 of 1927), as applicable to the State of Madhya Prades.

3. Reserved Tree.– The State Government declares all trees standing in Protected Forest as reserved trees and trees from these forests can only be cut or removed according to the provisions of approved working plans.

4. All protected forests, except the areas declared open for grazing as per the working plan or according to the grazing scheme prepared by Divisional Forest Officer of the area of the State, are declared closed for grazing.

5. The following activities are prohibited in all protected forests, of the State, unless permitted by the State Government by a specific order :–

(a) Quarrying and collection of stones, lime, sand or any other mineral;

(b) Manufacturing of charcoal;

(c) Clearing or breaking of forestland for agriculature, construction of houses, grazing of cattle or for any other purpose; and

(d) Collection of forest produce in violation of the provisions of the approved working plans.

6. The management of all protected forests of the State shall be as per the approved working plans only.

By order and in the name of the Governor of Madhya Pradesh,
RATAN PURWAR, SECY.

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ऊर्जा विभाग

मंत्रालय वल्लभ भवन, भोपाल

भोपाल, दिनांक 21 फरवरी 2005

क्र. 1342– तेरह– 2005.– विद्युत अधिनियम, 2003 (2003 का 36) की धारा 151 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा, उप निरीक्षक से अनिम्न पद श्रेणी के पुलिस अधिकारियों को, अधिकारिता रखने वाले सक्षम न्यायालय के समक्ष उक्त अधिनियम की धारा 136, 137, 139, 140 और 141 के अधीन अपराधों का परिवाद दाखिल करने हेतु प्राधिकृत करती है ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
राकेश साहनी, प्रमुख सचिव,

●

GOVERNMENT OF MADHYA PRADESH DEPARTMENT OF FOREST SECRETARIATE, BHOPAL

NOTIFICATION

N-3-92/2001/10-1, In exercise of the powers conferred by sub-section (3) of section 197 of the Code of Criminal Procedure 1973 (No. 2 of 1974), the State Government hereby directs that the provisions of sub-section (2) of the said section shall apply to the Forest Guards, Foresters and Deputy Rangers of the Madhya Pradesh Forest Department who are posted in the Forest Divisions for Maintenance of Public Order relating to forest protection.

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

(B.R. THAKRE)
Dy. Secy.
Government of Madhya Pradesh
Department of Forest

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MADHYA PRADESH ACT

No. 22 of 2004

THE INDIAN STAMP (MADHYA PRADESH SECOND AMENDMENT) ACT 2004

[Received the assent of the Governor on the 24th December, 2004; assent first published in the "Madhya Pradesh Gazette (Extraordinary)", dated the 30th December, 2004]

An Act further to amend the Indian Stamp Act, 1989 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fifth year of the Republic of India as follows:–

1. Short title. – This Act may be called the Indian Stamp (Madhya Pradesh Second Amendment) Act, 2004.

2. Amendment of Central Act No. II of 1899 in its application to the State of Madhya Pradesh. – The Indian Stamp Act, 1899 (No. II of 1899) hereinafter referred to as the Principal Act, shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Schedule I-A. – In Schedule I-A to the Principal Act, –

(i) in Article 5, after clause (f), the following clause shall be inserted, namely :–

"(fa)	If relating to secure repayment of a loan or debt?	0.5 per cent. of the amount of loan or debt subject to a maximum of fifty thousand rupees."

(ii) in Article 22, in column (2), in the proviso, for clause (g) the following clause shall be substituted, namely :–

"(g) where by an instrument, the property is conveyed fully or partially to a female transferee or transferees, the rate of stamp duty applicable shall be two per cent. less than the rate of stamp duty payable under this article on the share of property transferred and described clearly in the instrument in favour of the female transferee or the transferees, as the case may be."

4. Repeal and Savings.– (1) The Indian Stamp (Madhya Pradesh Amendment) Ordinance, 2004 (No. 2 of 2004) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

[M.P. Govt. Gazette dt. 30-12-2004, Extraordinary, page 1166(1)]

THE MADHYA PRADESH JAIV ANAASHYA APASHISHTA (NIYANTRAN) ADHINIYAM, 2004

(No. 20 of 2004)

[Received the assent of the Governor on the 24th December, 2004; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 29th December, 2004.]

An Act to regulate the management and usage of the non-biodegradable products and to prevent throwing or depositing of non-biodegradable garbage in or on public drains, roads and places open to public view in the State of Madhya Pradesh, and for matter of public health and sanitation and matters connected therewith or incidental thereto.

Be it enacted by the Madhya Pradesh legislature in the fifty-fifth year of the Republic of India, as follows:-

1. **Short title, extent and commencement.**– (1) This Act may be called the **Madhya Pradesh Jaiv Anaashya Apashishta (Niyantran) Adhiniyam, 2004.**

(2) It extends to the whole of the State of Madhya Pradesh.

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

2. **Definitions**. – In this Act, unless the context otherwise requires,—

(a) "*biodegradable garbage*" means the garbage or waste material capable of being degraded by an action of living organisms;

(b) "*Board*" means the Madhya Pradesh Pollution Control Board established under Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 (No. 6 of 1974);

(c) "*local authority*" means any body of persons for the time being invested by law with the control and administration of matters within a specified local area and includes,—

(i) a Municipal Corporation constituted by or under the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956);

(ii) a Municipal Council or a Nagar Panchayat constituted by or under the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961);

(iii) a Gram Panchayat constituted under the Madhya Pradesh Panchayat Raj Evum Gram Swaraj Adhiniyam, 1993 (no. 1 of 1994);

(d) "*market*" includes any place where persons assemble for exposing for the sale of articles for human use or consumption, with or without the consent of the owner of such place, notwithstanding that there may be no common regulation for the concourse of the buyers and sellers and whether or not any control is exercised over the business of, or the persons frequenting the market by the owner of the place or by any other person;

(e) "*non-biodegradable garbage*" means the waste, garbage or material which is not bio-degradable and having the substances like polyethylene, nylon and other plastic materials such as polyvinyl chloride, polypropylene, polystyrene and variations thereof which are not capable of being degraded by an action of living organisms and are more specifically included in the Schedule to this Act;

(f) "*occupier*" includes-

(i) any person who, for the time being, is paying or is liable to pay to the owner, the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(ii) an owner in occupation of or otherwise using his land or building;

(iii) a rent free tenant or licensee of any land or building; and

(iv) any person who is liable to pay to the owner, damages or compensation for the use and occupation of any land or building;

(g) "*owner*" includes a person for the time being, is receiving or is entitled to receive the rent of any land or building whether on his own account or on behalf of or for the benefit of any other person or as a trustee, guardian, or receiver for any other person, or who would so receive the rent or be entitled to receive the rent if the land or building or part thereof were let to a tenant and includes every person not being a tenant who from time to time derives title as an owner;

(h) "*place*" means any land or building or part of a building and includes the garden, ground and outhouse, if any, pertaining to building or part of a building and also includes apartments and common areas and facilities provided in building;

(i) "*place open to public view*" includes any private place or building monument, fence or balcony, visible to a person being in or passing along any public place;

(j) "*public Analyst*" means the person appointed or recognized to be the Government Analyst in relation to any environmental laboratory established or recognized by the Board;

(k) "*public place*" means any place which is open to use and enjoyment of the public whether it is actually used or enjoyed by the public or not and includes a road, street market, park, house gully or way whether a thoroughfare or not and landing place to which public are granted access or have a right to resort or over which they have a right to pass.

3. **Prohibition on usages of carry bags**.– No person shall use carry bags or containers made of plastics for storing, carrying, packing and selling the articles for human use or consumption unless the thickness of carry bags

made of recycled plastic is not less than 25 microns and in case of virgin plastic is not less than 20 microns.

4. **Prohibition on throwing of non-biodegradable garbage in public drains, sewage etc**. – No person by himself or through another, shall knowingly or otherwise, throw or cause to be thrown in any drain, ventilation shaft, pipe and fittings connected with the private or public drainage works in any river, water course (whether flowing or for the time being dry), park, or public place or any place open to public view, any non-biodegradable garbage or any biodegradable garbage in a non-biodegradable bag or container :

Provided that any non-biodegradable garbage or any biodegradable garbage in a non-biodegradable bag or container may be placed or be permitted to be place in a garbage receptacle and be deposited in a location designated by a local authority, having jurisdiction on an area, for the disposal of the garbage.

5. **Placement of receptacles and places for depositing of non-biodegradable garbage**. – It shall be the duty of the local authority, or any officer authorized by it to,—

(a) place or provide or place in proper and convenient locations in adequate numbers public receptacles, depots or places for temporary deposit or collection of non-biodegradable garbage, other than those kept and maintained for deposit of bio-degradable garbage;

(b) provide for the removal of contents of receptacles, depots and of the accumulation at all places provided or appointed by it under clause (a) of this Section; and

(c) arrange for disposal of the non-biodegradable garbage collected under this Act in such manner as may be prescribed.

6. **Duty of owners and occupiers to collect and deposit non-biodegradable garbage etc**. – It shall be the duty of the occupiers of all lands and buildings (including the individual occupier of apartments in a building),—

(i) to collect or cause to be collected from their respective land and buildings all non-biodegradable garbage and deposit or cause it to be deposited in public receptacles, depots or places provided for temporary deposit or collection of the non-biodegradable garbage by the local authority in the area;

(ii) to provide separate receptacles or dustbins, other than those kept and maintained for deposit of biodegradable garbage, of the type and in the manner prescribed by the local authority or its officers, for collection therein of all the non-biodegradable waste from such land and building and to keep such receptacles or dustbins in good condition and repair.

7. **Power of local authority for removal of non bio-degradable garbage**. – The local authority may, by notice in writing require the owner or occu-

pier or co-owner or person claiming to be the owner or co-owner of any land or building, which has become a place of unauthorized stacking or deposit of non-biodegradable garbage and is likely to cause a nuisance, to remove or cause to be removed the said garbage stacked or collected and if in its opinion such stacking or collection of non-biodegradable waste is likely to injure the drainage and sewage system or is likely to be dangerous to life and health, it shall forthwith take such steps at the cost of such persons as it may think necessary.

8. **Assistance in implementation of the provisions of the Act.—**

(1) The owner of, and every person found in any place in respect of which a person empowered by the local authority is exercising powers and carrying out duties under the Act, shall give such person all reasonable assistance to enable him to exercise those powers and carry out those duties and shall be bound to furnish all relevant information requisitioned by such person.

(2) All officers of police shall, when required by the local authority or any person authorized by it, aid in preventing the violation of the provisions of this Act.

(3) Any officer of the local authority, failing to perform the duties imposed upon by this Act, shall be punished with fine not exceeding one thousand rupees.

9. **Penalties**. – (1) Whoever is guilty of any act of intentional omission in contravention of any of the provisions of this Act, or of any rules, notification or order made, issued or given under this Act, shall be punishable with imprisonment for a term which may extent to one month or with fine which may extend to one thousand rupees or with both.

(2) Whoever, having been convicted of an offence under the Act is again convicted of any offence under this Act, shall be punishable with imprisonment for a term which may extend to three months and with fine which may extent to five thousand rupees for the later offence.

(3) Whoever, in any manner aids, abets or is accessory to the commission of an offence under this Act shall be punishable with the penalty prescribed for the offence.

(4) Whoever willfully disobeys any directions, lawfully given by any person or authority empowered under this Act to give such directions, or obstructs any person or authority in the discharge of any function which such person or authority is required or empowered under this Act to discharge, shall, if no other penalty is provided for the offence, be punishable with fine which may extend to one thousand rupees.

(5) Whoever being required by or under this Act, to supply any information, willfully withholds such information or gives information which he knows to be or which he does not believe to be true, shall, if no other penalty is provided for the offence, be punishable with fine which may extend to five hundred rupees.

10. **Offences by companies**. – (1) If the person committing an offence under this Act is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation :— For the purposes of this Section,—

(a) "*company*" means any body corporate and includes a firm or other association of individuals;

(b) "*director*" in relation to a company, includes any person occupying the position of director, by whatever name called.

11. **Offences by Government Departments**.– (1) Where an offence under this Act has been committed by any department of Government, the head of the office shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this Section shall render such head of office liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Department of Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer other than the head of the office such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

12. **Protection for action taken in good faith**.– No suit, prosecution or other legal proceedings shall lie against the State Government or any officer or other employee of the State Government or the Board or the local authority or any member, officer or other employee of the Board or such authority in respect of anything which is done or intended to be done in good faith in pursuance of this Act or the rules made or orders or directions issued thereunder.

13. **Cognizance of offences**. – No Court shall take cognizance of any office under this Act except on a complaint made by any authority or officer including officers of local authority authorised in this behalf by the State Government.

14. **Compounding of offences**. – (1) Any offence punishable under this Act may either before or after the institution of prosecution be compounded by such officers on payment of such amount as the State Government may, by Notification, in the office Gazette specify in this behalf.

(2) Where any offence has been compunded under sub-section (1), the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of such offence.

15. **Summary disposal of cases**. – (1) The Court taking cognizance of any offence under this Act, shall state upon the summons to be served on the accused person that he.-

(a) may appear by pleader or in person; or

(b) may by a specified date, prior to the hearing of the charge, plead guilty to the charge and remit to the Court by money order, such sum (not exceeding the maximum fine that may be imposed for the offence) as the Court may specify, and the plea of guilt indicated in the money order coupon itself.

(2) Where an accused person pleads guilty and remits the sum specified, no further proceedings in respect of the offence shall be taken against him, nor shall he be liable for any other punishment by reason of his having pleaded guilty.

16. **Powers of State Government to invest officers with certain powers.** – The State Government may invest any of its officers of any officer of the local authority with all or any of the following powers :—

(a) power to enter upon any land or building;

(b) power to hold an enquiry into any offence under this Act, and in the course of such inquiry, to receive and record evidence.

17. **Directions by the State Government**.– The local authority shall carry out such directions as may be issued to, form time to time by the State Government for the efficient administration of this Act.

18. **Power to amend the Schedule** – (1) Where it is expedient to do so, the State Government may, in the public interest and in consultation with the Board by Notification in the official Gazette, add to or omit from the schedule any item and thereafter the schedule shall be deemed to be amended accordingly.

(2) Every Notification under sub-section (1) shall be laid, as soon may be after it is made, on the table of the Legislative Assembly.

19. **Power to make rules** – (1) The State Government may, by Notification in the official gazette and subject to the condition of previous publication make rules for carrying out the provisions of this Act.

(2) All rules made under this Act shall be laid on the table of the Legislative Assembly.

20. **Power to remove difficulties** – If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order, not inconsistent with the provisions of this Act remove difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act.

21. **Act not in derogation of any other law** – the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

THE SECHEDULE

[See Section 2 (e)]

SUBSTANCES OF NON-BIODEGRADABLE NATURE

1. Polyethylene
2. Poly-carbonate
3. Polypropylene
4. Polystyrene
5. Polyvinyl chloride (PVC)
6. ABC
7. Acetal
8. Acrylic
9. Cellulose Acetate
10. Cellulose Actuate Butyrate
11. Nylon.

●

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JUSTICE Y.V. CHANDRACHUD
Former Chief Justice of India

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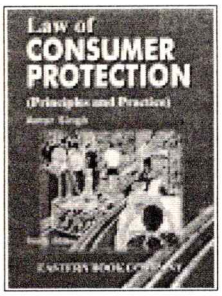

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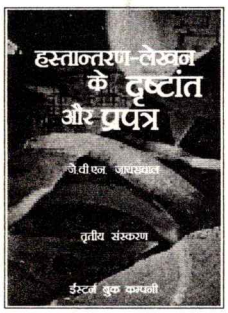

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इस पुस्तक में विभिन्न प्रकार के हस्तान्तरण-पत्र, जिनकी अक्सर ही अधिवक्ताओं को आवश्यकता पड़ती है, को हिन्दी में देने का प्रयास किया गया है। इसके साथ ही साथ नमूने के प्रारूपों को भी दिया गया है। प्रारूपों की संख्या में पहले से वृद्धि की गई है। आवश्यकतानुसार अंग्रेजी के प्रचलित शब्दों का भी प्रयोग किया गया है।

पुस्तक में जिन विषयों पर चर्चा की गई है, उनमें से कुछ प्रमुख विषय अभिस्वीकृति (Acknowledgement) दत्तक ग्रहण, शपथ-पत्र, फरार, पारिवारिक विवादों के समाधान, मध्यस्थता, बन्धनामा, विनिमय, पट्टा, परक्राम्य लिखत, मुख्तारनामा, रसीदें, इच्छा-पत्र, दिवाला, इण्डियन सक्सेशन ऐक्ट, 1925, त्यागपत्र, नियमों/अधिनियमों के अधीन प्रपत्र तथा अन्य प्रपत्र इत्यादि हैं। विषय के स्पष्टीकरण हेतु स्थान-स्थान पर उससे सम्बद्ध वाद दिए जाने के कारण विषय रोचक और सरल बन पड़ा है।

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