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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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CORRIGENDUM

Please insert **"G. Srinivas Goud v. State of A.P."** in Note No. 30 (JOTI February, 2006 in Part II at page 30) in last line of head note after 'Held, No' and before 'Judgment dated'.

We are thankful to the Publishers of SCC, MPLJ, MPHT, MPWN, MPJR, & Vidhi Bhaswar for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director, JOTRI

With this issue, I again have the opportunity to share my view with the esteemed readers of the Journal. The advent of 21st century has been with a revolution in the filed of information and communication technology. Free flow of information, no doubt, has always been considered a *sine qua non* for existence of a healthy democratic system, however what we find today is the overflow of information which has gripped the individuals and institutions alike, Judiciary not being an exception.

One of the basic principles of criminal jurisprudence, which we find as a Constitutional guarantee embodied in Article 20, is that no person can be tried twice for the same cause. However, at least in sensational cases, trial by media followed by a judicial trial has become the order of the day. In past few years we have seen how in sensitive cases, media trial was conducted without considering its implications. The question arises whether all this can be justified in the name of freedom of expression or common men's right to information? Whether it is not a blatant interference with the right of an accused to free, fair and unbiased trial? Whether media reports are not having potentiality of influencing the psyche of a Judge dealing with the case?

Not long back, the Apex Court, while dealing with a bail petition, took strong exception to this phenomenon of media trial when it came across with an article entitled "Doomed by Dowry" published in a Kolkata based magazine. This article was based on an interview with the family of the deceased. The Court noted with resentment that the article was one sided version of the case which may be used in the trial and this is bound to interfere with the administration of justice. The Apex Court characterized it as a trial by the media and deprecated this practice. The publisher, editor and journalist, who were responsible for publishing the said article, were cautioned. The Apex Court declared that other concerned in journalism would take note of this displeasure of interfering with the administration of justice.

In Bofor's pay off case, the Delhi High Court very aptly commented in this respect that fairness of trial is of paramount importance as without such a protection, there would be trial by media which no civilized society can and would tolerate. There is nothing more important for Courts of Justice than to preserve their proceedings from being misrepresented to prejudice the minds of the public against persons concerned before a case is finally heard.

Indeed, it is ripe time to ensure that the malaise of media trial is not allowed to grow and spread its tentacles over judicial process in a manner so as to weaken it by overshadowing the real trial.

In Part - I of the current issue, apart from the regular features, which have been started from the issue of February, 2006, we are putting an illuminating

article touching the applicability of CPC Amendment Acts, 1999 & 2002 in the light of decision rendered by the Apex Court in *Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344.* Various latest pronouncements of the Apex Court and of our own High Court find place in Judicial Pronouncements Section, i.e. Part II of the Journal. The pronouncement in *Unit Trust of India v. Ravinder Kumar Shukla and others, 2006 (1) MPLJ 20 (SC)* (Note No. 104) to the effect that negligence on the part of the Postal Department in delivery of the postal envelope containing cheque shall be treated as negligence of the agent of the sender, gives a new dimension to the developing consumer jurisprudence. Again the increasing tendency to seek recall of a witness on the ground of a subsequent statement will definitely get discouraged because of the pronouncement of the Apex Court in *Mishrilal and others v. State of M.P. and others, (2005) 10 SCC 701.* (Note No. 83) to the effect that a witness can be contradicted under law only by his previous statement and not the subsequent statement. A pronouncement of our own High Court in *Rekha and others v. Smt. Ratnashree, 2006 (1) MPLJ 103* (Note No. 109) explains in lucid manner the legal position as to whether a copy of a registered sale deed should be treated as a copy of a public document or a private document.

The law is required to keep pace with the changes in the society otherwise it may find itself inadequate in resolving the problems of the society. The Criminal Law (Amendment) Act, 2005 (included in Part - IV), which aims at introducing the concept of plea-bargaining in the criminal justice system of our country, indeed is a welcome step in this direction. It may go a long way in resolving criminal matters expeditiously and to the satisfaction of both the parties. Some other provisions, which aim at curbing the tendency of hostility among witnesses, are also noticeable and may help in strengthening the criminal justice system.

The institutional activities do continue as per our training calender. In past couple of months, apart from regular refresher courses, we have organized three important workshops - first one relating to *'Offences arising under Section 138 of the Negotiable Instruments Act'* (on 14th March, 2006) for judicial officers dealing with these cases; second one relating to *'The Prevention of Corruption Act, 1988'* (on 3rd & 4th April, 2006) for Special Judges dealing with cases arising under the Act and the third one on *'The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989'* (on 12th & 13th April, 2006) for Special Judges dealing with cases under the Act. Hon'ble the Chief Justice, while addressing the participants in second and third workshop clearly impressed about the need to expedite the disposal of the cases without compromising with the quality of justice. This message has to be taken seriously by the judicial officers of the State and all our efforts should be made to see that it is put into action. Let the justice triumph.

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Hon'ble the Chief Justice Shri A.K. Patnaik delivering Inaugural Address in the Workshop on - "Judicial Ethics, Norms of Behaviour & Temperamental Moderation" held from 06.01.2006 to 10.01.2006 at JOTRI.

Hon'ble the Chief Justice Shri A.K. Patnaik delivering Inaugural Address in the Workshop on - "Offences Relating to Dishonour of Cheques under Negotiable Instruments Act, 1991" held on 14.03.2006 at JOTRI.

Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee delivering Inaugural Address in the Workshop on - " The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 held on 12th & 13th April, 2006 at JOTRI

Prof. (Dr.) N.R. Madhav Menon, the then Director, National Judicial Academy, Bhopal speaking in the Workshop on - " The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 held on 12th & 13 April, 2006 at JOTRI

PART - I

APPLICABILITY OF C.P.C. AMENDMENT ACTS, 1999 & 2002 IN THE LIGHT OF SALEM ADVOCATES BAR ASSOCIATION JUDGMENT (IIND) BY THE APEX COURT

Justice S.S.Jha,
Judge, High Court of M.P.

Code of Civil Procedure (hereinafter, referred to as the "Code") has been amended with an intention to decide the cases expeditiously keeping in mind the right of citizens for speedy justice provided under Article 21 of the Constitution of India. Amendments in the Code have been challenged before the Apex Court in the case of *Salem Advocates Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344.* Enlightening directions have been given by the Apex Court keeping in mind the intention of legislature to provide speedy justice to the litigants and improvement in the justice delivery system. While considering the constitutional validity of the amendments, the Apex Court has considered each amendment and it was in the first judgment of Salem Bar Association, the Apex Court directed modality is required to be formulated for the amendment in Section 89 of the Code and other provisions which have been introduced by way of amendment may be operated. Chairman of the Law Commission, Mr. Justice M. Jagannath Rao was appointed as a Member. He has submitted his report. Report was submitted in three parts. First it considered the insertion of Section 26 sub-section (2) and Rule 15 (4) after Order VI Rule 15 C.P.C. Before insertion of the said provision, there was no requirement of filing an affidavit with the pleadings. The provision now requires that the plaint to be accompanied by an affidavit as provided under Section 26 (2) of the Code and the person verifying the pleading is required to furnish an affidavit in support of the pleading. The reason for filing the affidavit is with an intention to fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. Necessary consequence of this amendment will be that the application for amendment will also require to be supported by an affidavit and pleadings and verification are required to be supported by an affidavit. However, as and when pleadings are amended, fresh affidavit is required to be filed by the party in support of the pleadings sought to be brought by way of amendment.

Order XVIII Rule 4 C.P.C. is also inserted by way of amendment where evidence can be led by producing an affidavit of the party in the examination-in-chief and cross-examination before the commissioner. It is clarified that there is no question of allowing inadmissible documents in evidence, merely on the ground that the said documents are being inserted in the evidence by way of examination-in-chief. In the light of Order XVIII Rule 4 (1) proviso there is no

question of inadmissible evidence being read into evidence merely on account of such documents were exhibited in affidavit filed by way of examination-in-chief. If the Court feels may permit examination-in-chief to be recorded in the court and after examining all aspects and application of mind pass orders. Court shall exercise judicial discretion as to whether to record the evidence in court or to appoint commissioner for cross examination of witnesses under Order XVII Rule 4 (2) C.P.C.

Order XVIII Rule 19 C.P.C. is inserted by amendment Act of 1999. It empowers the Court to direct the statement of witnesses to be recorded on commission under Rule 4-A of Order XXVI. The provision contains a non-obstante clause and it overrides Order XVIII Rule 5 C.P.C. which provides the Court to record evidence in all appealable cases. The Apex Court has, therefore, held that the Court is competent to appoint a commissioner for recording evidence. Importance has been given to the words occurring in Rule 19 of Order XVIII "notwithstanding anything contained in these rules". Therefore, in the light of non-obstante clause, the provision of Rule 19 will override the other provisions of the Code in the matter of recording evidence.

Now the question is how to declare a witness hostile if evidence is recorded before Commissioner.

Order XVIII Rule 4 (8) provides that the provisions of Rules 16, 16-A, 17 and 18 of Order XXVI insofar they are applicable shall apply to the issue, execution and return of such commission thereunder. Discretion to declare a witness hostile has not been conferred on the commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person to call witness to put any question to that witness which might be put in the cross examination by adverse party and the power is not conferred upon the commissioner. It is held in this case that in such circumstances, party concerned shall have to obtain permission under Section 154 of the Evidence Act from the Court and only after grant of such permission, commissioner will allow a party to cross-examine his own witness. In the circumstances and facts of each case, the court may grant permission or even consider to withdraw the commission system and itself record remaining evidence or if the court finds that permission was sought to delay the progress of the suit or harass the opposite party, it may impose heavy costs. As a caution, it is directed that rules be framed for protection of original documents so as to ensure safe and proper custody of the documents when they are before the commissioner. It is the duty and obligation of the commissioner to keep the documents in safe custody and not to give access of the record to one party in the absence of opposite party or his counsel. Commissioner can be required to re-deposit the documents with the records in case long adjournments are granted and for taking back the documents before the adjourned date.

Order XVIII Rule 17-A provides for leading additional evidence. Said remedy was also earlier for permitting a party to lead additional evidence after satisfying the Court that after exercising due diligence evidence was not within his knowledge or could not be produced at the time when the party was leading evidence. The court, if satisfied, may permit leading of such evidence at later stage on such terms as may be just and proper.

Order VIII Rule 1 C.P.C. is amended by Act of 1999 which requires that the defendant shall within thirty days from the date of service of summons on him present a written statement of his defence. Said rigour of the provision has been reduced by amending Act No. 22 of 2002 whereby the Court is empowered to extend the time for filing written statement after recording sufficient reasons for a maximum period of 90 days. However, the Court keeping in mind the legislative intent shall reluctantly grant permission beyond 90 days. But period beyond 90 days shall be extended only in exceptional and hard cases and not in a routine manner. It appears that the rigour of the amendment is to ensure speedy trial and to give relief to the litigants as early as possible.

Section 39 (1) C.P.C. empowers the Court which passed a decree on the application of the decree holder to send it for execution to another court of competent jurisdiction. Under Section 39 (4) the Court has no power to execute the decree beyond the local limits of its jurisdiction. Considering the scope of Order XXI Rule 3 C.P.C. and Order XXI Rule 48 C.P.C. the Apex Court held that under Order XXI Rule 48 C.P.C. the Court can attach salary of a Government servant, railway servant or servant of local authority when the judgment debtor or disbursing officer is or is not within the local limits of the Court jurisdiction. But it does not dilute the other provisions giving such powers on complying with the conditions stipulated in those provisions. These provisions such as Order XXI Rule 3 and Order XXI Rule 48 C.P.C. which provide differently should not be affected by sub-section 4 of Section 39 of the Code.

Section 64 (2) has been inserted by amending Act of 2002 which has been renumbered as Section 64 (1) and sub-section (2) is introduced pertaining to attachment of property. Sub-section (1) prohibits any sale or alienation or parting of the property after its attachment. But sub-section (2) protects the acts if made in pursuance of any contract for such transfer or delivery entered into and registered before attachment. The concept of registration is introduced to prevent false and frivolous cases of contract being set-up with a view to defeat the attachment. If the contract is registered and there is subsequent attachment, the sale deed executed after attachment will be valid. If the document is unregistered then subsequent sale after attachment would not be valid and said sale would not be protected under sub-section (2) of Section 64. By this judgment doubts in the mind by insertion of sub-section (2) of Section 64 are clarified.

As regards power of amendment under Order VI Rule 17 C.P.C. is concerned, party must satisfy the Court that inspite of due diligence party couldn't raise the matter before commencement of the trial. Proviso curtails the absolute discretion to allow the amendment to some extent at any stage. However, it is clarified that if the application is filed after commencement of the trial, party must see that inspite of due diligence the amendment could not have been stated earlier. Object of the amendment is to prevent frivolous application filed to delay the trial and it is held that there is no illegality in the provision.

Rule 9 of Order V permits service of summons by the party or through courier. Rule 9 (3) of Order V and Rule 9-A of Order V permits summons by courier or by plaintiff. The Court is required to declare the service of summons upon the defence under Order V Rule (5) on the contingency mentioned in the provisions. It is in the nature of deemed service.

Doubt is raised that refusal or acceptance service may lead to serious malpractices and abuse. It is ensured that it may be kept in mind that the problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. It is suggested that the High Court should make appropriate rules and regulations or issue practice directions to ensure that such provision and services are not abused so as to obtain incorrect endorsement. High Court can consider making the provision of filing affidavit setting out the details of the events and time of refusal of Service Guidelines which are relevant can be issued by the High Court and High Courts are expected to frame appropriate rules, orders, regulations or practice directions.

As regards Order XVII, it relates to grant of adjournment. Two amendments have been made in Order XVII; one that the party shall not be given more than three times during hearing of the suit and second relates to costs for adjournments. Awarding of costs is mandatory. Costs is also of two types (i) costs imposed upon adjournments and (ii) such higher costs as the Court deems fit.

While examining Order XIX Rule 1 (1) and Order XVII Rule 1 (2) C.PC. it is clear that Order XVII does not forbid grant of adjournment where circumstances are beyond the control of a party. If the Court is satisfied where the circumstances are beyond the control of the party, even after adjournment the Court may grant adjournments. For instance a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or by act of God. These circumstances can be said to be beyond the control of a party. But further adjournments cannot be granted because of restriction of three adjournments as provided in the provisions of Order XVII Rule 1 C.P.C.

other than special reasons narrated thereunder. In some extreme cases it will be necessary to grant adjournment despite the fact that three adjournments have already been granted like the cases of earthquake, devastation by tsunami or the incidents like Bhopal Gas Tragedy. Provision of costs and higher costs are provided to avoid seeking of adjournment. However, it will depend upon the facts and circumstances of each case on the basis whereof the court would decide to grant or refuse adjournment. But it is clarified that grant of any adjournment first, second or third is not the right of party. If the Court is shown special and extraordinary circumstances then only adjournment can be granted. However, it cannot be granted in a routine manner. While considering the prayer for adjournment, legislative intent restricting grant of adjournment must be kept in mind.

Permission to examine any party or any witness at any stage was permissible under Order XVIII Rule 17 (a). But after its deletion the provision has been inserted under Order XVIII Rule 2 (4) and such permission can be granted by the Court in its discretion. Said amendment of the year 1999 does not take away the inherent powers of the Court to call for any witness at any stage either *suo motu* or on the prayer of party invoking inherent powers of the Court.

Order XVIII Rule 2 (3-A) to (3-D) have been inserted by the Act of 2002 for the purpose of written arguments or fixing time limit for oral arguments with intention to save the time of the Court. Adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

Order VII Rule 14 (4) has been considered. This provision was earlier under Order XIII Rule 2 C.P.C. which has been deleted and brought here. However, the Apex Court has found that there is a typographical error in the words "plaintiff's witnesses" and it should be read as "defendant's witnesses", considering the specific provisions under Order VIII Rule 1-A (4) which applies to the defendant. Order VII relates to production of documents by plaintiffs whereas Order VIII relates to production of documents by the defendant. Therefore the words "defendant's witnesses" is typed by mistake which should have been read as "plaintiff's witnesses" under Order VII Rule 4 C.P.C.

Section 35-B of the Code was amended vide Amendment Act, 1976 and Section 95 of the Code is amended by the Act, 1999 which came into force w.e.f. 01.07.2002. Section 35 relates to costs of the litigation. Section 35-A relates to compensatory costs when false or vexatious claim or defence by the party to the suit whereas Section 35-B provides for cost for causing delay. Section 95 permits awarding of compensation in any suit in which an arrest or attachment has been effected or an order of temporary injunction is passed under Section 94 of the Code if it appears to the Court that such arrest, attachment or injunction was applied for insufficient grounds or the suit of the plaintiff fails and it appears

to the Court that there was no reasonable or probable ground for instituting the suit on the application of the defendant to the Court, the Court may on such application award costs to the plaintiff by its order such amount not exceeding fifty thousand rupees, as it deems a reasonable compensation.

The Apex Court has emphasized upon the notice under Section 80 C.P.C. Two months sufficient time is given to the Government to send suitable reply. The object of issuing notice is to curtail litigation and curtail the area of litigation and controversy. Similar provision also exists in various legislations. Object underlying Section 80 of the Code and similar provisions is that the Government, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the country. If reply is not filed by them or vague or evasive reply is filed, the purpose of Section 80 is defeated and it give rise to unavoidable litigation and also result in heavy expenses and costs to the exchequer. Prior reply can result in reduction of litigation between the State and citizens. In case proper reply is sent either the claim in the notice may be admitted or the area of controversy curtailed or the citizens may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State of the statutory authorities in violating the spirit and object of Section 80. These provisions cast an implied duty on all Governments and States and statutory authorities concerned to send appropriate reply to such notices and direction is given to all Governments, Central or State or other authority concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. Reply shall be sent after due application of mind. In case despite such nomination, if the court finds that either the notice has not been replied to or the reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and direct it to take appropriate action against the officer concerned including recovery of costs from him.

Section 115 of the Code curtails power of revision in case where the suit is pending and the decision or the interlocutory order is not likely to dispose of the suit. However, if some material irregularity or some omission is committed, the High Court is empowered to exercise the powers of superintendence under Article 227 of the Constitution of India and the constitutional jurisdiction of the Court cannot be withdrawn and is available to be exercised subject to rule of self discipline and practice which are well settled.

The amendment in Section 148 of the Code affects the power of the court to enlarge time that may have been fixed or granted by the Court for the doing

of any act prescribed or allowed by the Code. But the period shall not exceed 30 days in total, whereas before amendment there was no restriction of time. Whether the court has inherent power to extend the time beyond 30 days is a question. The Court has inherent powers to extend the time under Section 151 of the Code and the extension can be permitted if the act could not be performed within thirty days for the reasons beyond the control of the authority. However, the cases where the limitation is prescribed under the provisions of Limitation Act, then period of limitation cannot be extended under Sections 148 or 151 C.P.C.

The provisions of Order IX Rule 5 are directory. Provision under Order XI Rule 15 C.P.C. relates to inspection of documents "at or before the settlement of issues" instead of "at any time" and is directory and it will not mean that inspection cannot be allowed after settlement of the issues.

Question of alternative dispute redressal is covered by Section 89 of the Code and Order X Rule 1-A, 1-B, and 1-C, Section 89 provides that where it appears to the court that there exists element of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties, for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for arbitration, or conciliation or judicial settlement including settlement through Lok Adalat or meditation.

Alternative Dispute Resolution (ADR) Rules when enforced shall avoid delay. It is considered that in a democratic society, delay in trial is not a healthy practice. In a democracy, citizens have right of speedy trial under Article 21 of the Constitution. To achieve this goal and to avoid unnecessary litigation, Section 89 has been inserted in the Code, whereby the Legislature has brought a mechanism by which instead of involving in serious dispute in a litigation, litigants can be permitted to settle the dispute amicably and avoid wastage of time in the litigation. Order X Rule 1-A of the Code provides that after recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89 and on option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties. Rule 1-B empowers the Courts to direct the parties to appear before such forum or authority for conciliation of the suit and the appearance before the Court consequent to the failure of efforts of conciliation is provided under Rule 1-C.

Endeavour of the Legislature is to avoid wastage of time of litigants, an alternate dispute redressal mechanism has been provided and three modes have been given for settlement. High Courts have been directed to frame Rules and Procedures for alternate dispute resolution and mediation and Draft Rules

have been proposed in paragraph 65 of the Judgment. High Courts of all the States have been directed to frame the Rules by 31st March. Similarly for appeals, guidelines have been issued for model case flow management in para 68 of the judgment.

Thus, on going through the judgment of *Salem Advocate Bar Association v. Union of India* (supra), it is clear that the Apex Court has considered and taken all the measures to ensure expeditious decisions of appeals and petitions in the High Court as well as to ensure that the citizens get speedy trial and the judgment at the earliest stage. It has been ensured that the citizens are not required to waste their time in litigation or running around the Courts and disputes are settled as early as possible and also to avoid consequential action on account of disappointment amongst citizens due to delay in trial.

It is expected that after the rules are framed as per the suggestions in the model rules, the Courts will endeavour to fix a time frame for settlement of civil and criminal cases. In the proposed rules for the High Court and Subordinate Courts, it is suggested that whenever notice is issued in a suit, the notice should indicate that the Court prescribes a maximum of thirty days for filing of written statement, which for special reasons may be extended to ninety days, and therefore, the defendants may prepare the written statement expeditiously and the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice. After the written statement is filed, the replication (if any, proposed and permitted) should be filed within six weeks of receipt of the written statement. If there are more than one defendants, each one of the defendants should comply with this requirement within the time-limit. After the service of summons/notice and completion of pleadings, endeavor should be made for referring the dispute to alternate dispute resolution considering the facts of each case and steps should be taken for speedy trial and for quick decision of the case. Similar provisions have been made for appeals filed before district courts as well as High Court. As per guidelines, any party wishing to file appeal shall supply copy of memo of appeal to the counsel for the opposite side, so that, if the counsel for the opposite side wishes to oppose the appeal, he may appear in the Court and oppose the appeal or application for stay. This will avoid delay in service of notice. The intention of the legislative amendment is clarified by the Apex Court by the said judgment. Model Rules framed therein clearly lay down that cases must be decided as early as possible and litigants must get speedy justice and the litigants enjoy the right of speedy trial given under Article 21 of the Constitution of India.

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EXAMINATION OF WITNESSES AND WITNESS PROTECTION - PART II*

VED PRAKASH
Director, JOTRI

EXAMINATION-IN-CHIEF AND RE-EXAMINATION:

The overall scope of examination-in-chief is well outlined by Sections 138, 142, 154 of the Indian Evidence Act, 1872 (for short 'the Act'). Section 138 in terms provides that examination-in-chief must relate to relevant facts. Section 142 makes it clear that leading questions must not be asked in examination-in-chief if objected by the adverse party except with the permission of the Court. Section 142 simultaneously mandates that Court shall permit leading questions being put in examination-in-chief in respect of matters which are introductory, undisputed or which have been sufficiently proved.

The ordinary rule that leading questions must not on material points be put by a party to his own witness, has its basis in the circumstance that as the party chooses what witness he will call, a witness is very often anxious to assist the party on whose behalf he is called. The rule is to guard against the bias of the witness in favour of the side in support of which his evidence is sought.

Explaining about the applicability of Section 142 the Apex Court has observed in *Varkey Joseph v. State of Kerala, AIR 1993 SC 1892* that leading questions may be used to prepare a witness to give the answers to the questions about to be put to him or to lead him to the main evidence or fact-in-dispute. However, the questions shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor can be allowed to put into the witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. Rather the witness should be left to tell the unvarnished tale on his own account. The Court further observed that leading a witness through questions regarding material part of the prosecution case is illegal and violate of the right to fair trial enshrined under Article 21 of the Constitution.

Propriety demands that when a witness is being examined the other witnesses who are to be examined afterwards should not be allowed to remain present inside the Court, else they may get a number of clues to depose in a particular manner. In *State v. Sohansingh, AIR 1955 MB 78,* it has been held that if a witness is present in Court he should be asked to go out when the evidence of other witness is being recorded. If this could not be done because his presence was not noticed, the Court should examine him and record his statement with a note that he was present in Court when other witnesses were being examined. If necessary the Court should ask the explanation of the witness on

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Note : Part I has been published in JOTI - Feb 2006 at page 50.

this point. But there is in law no justification for cancellation of his evidence. The Court should also consider when the whole prosecution evidence is recorded what value should be attached to the testimony of this witness because he happened to be present in Court when the other witnesses were being examined. But the weight to be attached to the evidence is different from its admissibility.

Section 138 of the Act indicates the scope of re-examination. It provides that re-examination should either be for explaining matters referred to in cross-examination or with the permission of the Court regarding any new matter. Obviously the latter clause will apply where certain important questions could not be put to a witness in examination-in-chief and the party calling such witness seeks permission of the Court to put such question.

HOSTILE WITNESS:

Expression "hostile witness," which is commonly used in relation to examination of witnesses, has not been used as such anywhere in the Evidence Act. However, Section 154 of the Act has a direct bearing on this issue. Section 154 says that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. This phraseology, however, does not give any clue about scope and applicability of Section 154. The provision is basically intended at exploration of truth or at least discrediting the witness who has turned adverse to the party calling him.

Considering the scope and applicability of Section 154, the Apex Court observed in *Satpaul v. Delhi Administration, AIR 1976 SC 294* that the discretion conferred by S. 154 on the Court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The Apex Court remarked that grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, while granting such permission, it is preferable to avoid the use of expressions, such as "declared hostile", "declared unfavorable".

Here the question arises as to at which stage of examination Section 154 will apply? Dealing with this issue and disapproving the plea that a Court can permit a party calling a witness to put questions u/s 154 of the Evidence Act, only in the examination-in-chief, the Apex Court observed in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563* as under:

> "Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To con-

fine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, (sic-re-examination) permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party."

From the aforesaid it is clear that Court can permit a party calling a witness to put questions in the nature of cross-examination at the stage of re-examination also. This may be, particularly, in the situation where witness has supported the case of the party calling him in examination-in-chief but has exhibited a totally hostile attitude in cross-examination.

CROSS-EXAMINATION & SEARCH OF TRUTH:

Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the correctness, accuracy and completeness of version or story put forth by him in examination-in-chief. Its effectiveness basically depends upon the skill of the wielder of this weapon.

Section 138, to which the right of cross-examination is referable, indeed incorporates one of the principles of natural justice that the evidence may not be read against a party if the same has not been subjected to cross-examination by him or at least an opportunity has not been given for cross-examination. Section 138 impliedly lays down that statement of a witness would be read as evidence against a party only if it is tested on the anvil of cross-examination or opportunity was afforded for that purpose.

Pointing out the importance of cross-examination and the extent of discretion enjoyed by a court to control the same, Lord Wright, J. observed in *Vassiliades v.Vassiliades & another, AIR 1945 PC 3.* that cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed, but the judge has always a discretion as to how far it may go and how long it may continue. A fair and reasonable exercise of the discretion by the Judge will not generally be questioned by an appellate Court.

Sometimes arraying a person as co-defendant is used as a device to damage the case of a real co-defendant. However, as pointed in *Hussens Hasanali Pulavwala v.Sabbirbhai Hasanali, AIR 1981 Guj. 190* a party claiming to cross-examine a witness must show that it is an 'adverse party'. Merely because a party is shown as defendant in the title of the plaint, that party cannot be styled as an 'adverse party' unless it is further shown that it is a contesting party in the sense that it disputes the plaintiff's claim. (Also See - *M/s Ennen Castings (P) Ltd. v. M.M. Sundaresh and others, AIR 2003 Karnataka 293*). But a witness

summoned by the Court u/s 311 of Cr.P.C. cannot be termed as witness of either party, therefore, the Court should give the right of cross-examination to the complainant as well. (See - *Jamatraj Kewalji Govani v. The State of Maharashtra, AIR 1968 SC 178*)

The three basic rules regarding cross-examination may be stated as under:

(i) Unless the testimony has been examined on the anvil of cross-examination, it may not have any real evidential value.

(ii) Cross-examination need not be confined to the facts stated in examination-in-chief and it can extend to other relevant facts which are within the knowledge of a witness. (See Section 138)

(iii) Though examination-in-chief has basically to be confined to relevant facts but in cross-examination the barrier of relevancy can be crossed and questions though not relevant as such may be put u/s 146 to test the veracity and shake the credit of a witness.

Section 155 of the Act is another pillar of the scheme which aims at exploration of truth by impeaching the credit of a witness. Sub-section (3) of Section 155 is noteworthy in this respect which provides that credit of a witness may be impeached by the adverse party by proof of a former statement inconsistent with any part of his evidence which is liable to be contradicted. If such a statement is in writing then its use for the purpose of contradiction can be made only in accordance with the procedure laid down in Section 145 which requires that the attention of the witness be called to those parts of such statements which are being used for the purpose of contradicting him.

RIGHTS OF A WITNESS AND WITNESS PROTECTION:

The major problem before the justice dispensation system, particularly on the criminal side, is the reluctance of witnesses to come forward to depose before a Court regarding an incident. On being compelled such witnesses take the easy course of turning hostile. This results in miscarriage of justice. Here comes the issue of witness protection. It is not that witnesses are averse to quality justice but the fact is that they are more concerned about their own safety and honour. Deposing against hardened criminals may result in irreparable loss of life and property to a witness. It is also found that repeated visits to Courts and a volley of questions, which are sometimes insulting, cause embarrassment to a witness. The problem has to be seen in proper perspective and some solution has to be worked out so that the system may remain effective.

Taking stock of the situation the Apex Court commented in *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others, (2004) 4 SCC 158* that the process of fair trial which is condition precedent for dispensation of justice is being seriously affected because in most of the cases witnesses stand inca-

pacitated from acting as eyes and ears of justice. In such a situation, the Apex Court observed, the trial gets putrefied and paralyzed and it no longer can constitute a fair trial. This incapacitation may be due to variety of factors including lack of adequate protection to witnesses inside and outside Court. In this case it has been impressed that time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery.

While protection of a witness outside the Court is predominantly a problem to be addressed by the law and order enforcing agencies, protection of witness during his examination is basically a responsibility of Courts. It is true that the purpose of cross-examination is to bring out the truth on record and to help the Court in knowing the truth of the case, but if the cross-examination is aimed at harassing the witness by putting irrelevant questions, the purpose is defeated and frustrated. (See - *Govind v. State of M.P., 2005 (1) MPLJ 549*). A close look at the provisions of the Act reveals that a full flagged scheme has been envisaged in the Act to protect a witness from harassment during his examination. The scheme can be viewed and examined from following four angles:

> *Firstly,* the provisions which provide that a witness cannot be compelled to answer a question, which is intended to shake his credit by injuring his character, if the question is not reasonable; (Sections 148, 149 and 150)
>
> *Secondly,* protection against questions which are indecent or scandalous, which is subject to the discretion of the Court; (Section 151)
>
> *Thirdly,* bar against putting questions which though proper are insulting, annoying or needlessly offensive in form; (Section 152) and
>
> *Lastly,* right of a witness to refresh memory from earlier writing. (Sections 159 and 160)

Considering about the issue of protecting a witness from harassment during examination and outlining the duty of a Court in this respect the Apex court ordained in *Makhan Lal Bangal v. Manas Bhunia and others AIR 2001 SC 490* that - 'A Judge presiding over a trial needs to effectively control examination, cross-examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. Power to disallow questions should be effectively exercised by reference to Sections 146, 148, 150, 151 and 152 of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross-examiner must not be allowed to bully or take unfair advantage of the witness. ....Witnesses attend the court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the judge who has to see that they feel confident in the court.

As far as right to refresh memory by referring to earlier document is concerned a conjoint reading of Sections 159 and 160 reveals that these two sections do cover following five situations:

(i) Refreshing memory by referring to a writing made by the witness at the time of transaction.

(ii) Refreshing memory by referring to any writing made by the witness soon after the transaction.

(iii) Right to refresh memory by referring to any writing made by any other person and read by the witness at the time of transaction or soon afterwards, provided the witness knew it to be correct.

(iv) Refreshing memory by referring to a copy of the aforesaid document but with the permission of the Court.

(v) Testifying the facts from the documents referred to in above when witness has no specific recollection of the facts mentioned in the document but it is shown that the facts were correctly recorded.

The fifth and the last provision which is there in Section 160 is intended to cover a situation where the witness has totally forgotten about the facts mentioned in the document which can be testified from the document itself. In this respect following observations made by the Apex Court in *The State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another, AIR 1963 SC 1850* are quite apposite:

> "Where a witness has to depose to a large number of transactions and those transactions are referred to or mentioned either in the account books or in other documents there is nothing wrong in allowing the witness to refer to the account books and the documents while answering the questions put to him in his examination. He cannot be expected to remember every transaction in all its details and S.160 specifically permits a witness to testify the facts mentioned in the documents referred to in S. 159 although he has no recollection of the facts themselves if he is sure that the facts were correctly recorded in the document."

One fundamental distinction between the provisions of Sections 159 and 160 appears to be is that for using a document or its copy u/s 159 it is not necessary that the document itself has been put on record or made part of the evidence or be admissible while it will be so in the case u/s 160. This is clearly borne out from the observation made in *Emperor v. Mahadeo Dewoo, AIR 1946 Bom. 189,* to the effect that for refreshing memory from a writing or memorandum it is not necessary that the writing of a memorandum should be one which is admissible in evidence. However, a statement recorded u/s 161 cannot be used for refreshing memory of the witness. (See - *1963 (2) Cr.L.J. 198)*

One of the modes to protect a witness deposing before the Court in a serious case may be to keep his identity undisclosed, provided there is an enabling statutory provision to that effect [like Section 30 in POTA Act (since repealed)]. As observed by the Apex Court in *People's Union for Civil Liberties v. Union of India, AIR 2004 SC 456* need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognized.

Here comes the role of a Judge or the powers of the Court to ensure effective examination.

POWERS OF THE COURT:

Pointing out the duty of a Judge while examining a witness the Apex court has expressed in *Makhan Lal Bangal's case (supra)* that an alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way as to gain success for their respective clients is understandable but the obligation of the presiding judge to hold the proceedings so as to achieve the dual objective - *search for truth and delivering justice expeditiously* - cannot be subdued. Howsoever sensitive the subject matter of trial may be; the court room is no place of play for passions, emotions and surcharged enthusiasm.

Section 136 of the Act is the repository of power of a Judge to decide about relevancy and admissibility of a question. It also imposes a duty to admit only that evidence which is relevant. The role of a judge in backdrop of the provisions of Section 136 is quite important. Prolix and lengthy examination can well be controlled by resorting to these provisions. An approach not to object upon any question for first few hours may, apart from making the record bulky, cause a lot of embarrassment to a witness. A judge has the power to call upon the party to explain how the question is relevant.

Here the question arises whether a Judge can reserve its decision on the admissibility of a document or admissibility of a question or admissibility of a particular piece of oral evidence. The prevailing practice has been to decide the issue which in many cases leads to filing of revision petition before the Superior Court. This practice has been perceived as a major cause of delay in progress of the case.

Taking cognizance of this situation, the Apex Court ordained in *Bipin Shantilal Panchal v. State of Gujarat, AIR 2001 SC 1158* that whenever objection is raised during evidence taking stage regarding admissibility of any material item or oral evidence, the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case or record the objected part of the oral evidence to such objection to be decided at the last stage in the final judgment. If at the final stage the Court finds the objection so

raised as "not maintainable", the Court can keep such evidence excluded from consideration. This procedure can be followed in all cases except where objection relates to deficiency of stamp duty on a document.

Leaving apart Sections 148, 149, 151 and 152, which we have already discussed, the most extra-ordinary power enjoyed by the Court during examination of a witness has to be found, in Section 165 of the Act which empowers the Court to put any question to any witness or any party at any time in any form relevant or irrelevant. The power ought to be exercised to discover or to obtain proper proof of relevant acts. Power extends to ordering production of any document or article. The most important feature of this provision is that neither the parties nor their agents are entitled to raise any objection regarding exercise of this power by the Court. Even cross-examination in respect of answers given regarding questions put under this section can be there only with the permission of the court. However, it has to be kept in mind that the judgment should be based only on relevant evidence.

Explaining the scope of Section 165 the Apex Court has observed in *Ram chander v. State of Haryana, 1981 SC 1036* that in the adversary system of trial the presiding officer of the Criminal Court, instead of being a mere spectator and a recording machine, must become a participant in the trial by evincing intelligent and active interest by putting questions to witnesses in order to ascertain the truth. Section 165 of the Evidence Act has invested wide powers in this regard. But the Judge must exercise his powers without trespassing upon the functions of the Public Prosecutor and the Defence Counsel, without any hint of partisanship and without appearing to frighten, coerce, confuse or intimidate the witnesses.

In *Zahira Habibullah's case* (supra) the Apex Court has observed that power of the Court u/s 165 is complementary to the power stipulated u/s 311 of Cr.P.C. Object of Section 165 Evidence Act r/w/s 311 Cr.P.C. is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the witness is examined neither to help the prosecution nor the defence but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth. The Apex Court further observed that Section 165 of Evidence Act and Section 311 Cr.P.C. confer vast and wide powers on presiding officers of court to elecit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the Court can control the proceedings effectively so that the ultimate objective i.e truth is arrived at. Here provisions contained in Order 18 Rule 17 CPC are also noteworthy, which clothe a civil Court with the discretion to recall a witness.

Sometimes objection is raised that the initiative of the Court to proceed u/s 311 of the Cr.P.C. r/w/s 165 Evidence Act is in order to fill the lalcuna in the prosecution case. But as explained by the Apex Court in *Rajendra Prasad v. Narcotics Cell, (1999) 6 SCC 110* an oversight in the management of the prosecution cannot be treated as irreparable lacuna. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistake to be rectified. After all, function of the criminal court is administration of criminal justice system and not to count errors committed by the parties or to find out and declare who among the parties performed better.

Apart that, the Apex Court in *Raghunandan v. State of U.P., AIR 1974 SC 463* has clearly propounded that in exercise of its powers u/s 165 of the Evidence Act, the Court in order to secure the ends of justice can use statement of a witness recorded u/s 161 Cr.P.C. during examination of a witness, who is being examined as a witness of defence, irrespective of the prohibition imposed by Section 162 of the Code.

DEMEANOUR OF WITNESS.

Provisions contained in Section 280 Cr.P.C. and Order 18 Rule 12 CPC provide that material remarks respecting the demeanour of a witness should also be recorded during examination of a witness. The reaction of a witness to a particular question, his hesitation or evasiveness to answer a question and the degree of confidence or doubt while answering a question are all matters concerning his demeanour which can be helpful in appreciating the evidence of such witness at a later stage.

PERJURY - DUTY OF THE COURT:

Looking to the trend of increasing hostility among witnesses, the law relating to perjury has once again to be applied with a bit more seriously. This is the message reflecting from the pronouncement made in *Zahira Habibullah Sheikh and another v. State of Gujarat and others, (2006) 3 SCC 374* wherein the Apex Court observed that conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with.In *Mishrilal and Ors. v. State of M.P., (2005) 10 SCC 701* it has been ordained that whenever the witness speaks falsehood in the Court, and it is proved satisfactorily, the Court should take a serious action against such witness. There are various legal provisions which aim at containing the evil of perjury. While on one hand Section 344 of Cr.P.C. provides for a summary procedure for dealing with the cases of giving false evidence, Chapter 11 of the Indian Penal Code (Section 191/192) is also noteworthy which provides for punishment up to seven years and fine in case where false evidence is intentionally tendered before the Court. Time has come when these provisions are required to be applied more pragmatically so that the justice delivery system can be saved from being collapsed.

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OBJECTION TO THE EXECUTION OF DECREE OF POSSESSION OF IMMOVABLE PROPERTY BY A STRANGER TO THE SUIT - AN APPRAISAL OF RELATED PROVISIONS

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Whenever the suit for possession of immovable property fructifies into a decree in plaintiff's favour, his joy knows no bounds. However the reality strikes him hard and harsh soon afterwards when he takes the final step i.e. applies for execution of his decree. It is only then he realizes that he has only won half the battle. Execution proceedings at times pose problems which the decree holder may not have envisaged earlier. Problems get compounded when objections are raised by a person who was not a party to the suit proceedings. How to tackle such objections is the subject matter of this article.

The relevant provisions under Code of Civil Procedure, 1908 which are meant to tackle objections to the execution are primarily Section 47, O. 21 R. 97 and O. 21 R. 99. Section 47 provides that all the questions arising between parties to the suit and relating to execution, discharge or substitution of decree shall be determined by the Court executing the decree and not by separate suit. This Section provides for a situation when the dispute is between parties to the suit and does not cater to dispute between decree holder and stranger to the suit proceedings.

The next provision is O. 21 R. 97 CPC which is reproduced as under :

> R. 97.- Resistance or obstruction to possession of immovable property .- (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.
>
> (2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Difference between Section 47 and O. 21 and R. 97 CPC is that whereas Section 47 deals with execution of all kinds of decree, O. 21 R. 97 only deals with the execution of the decree for possession of immovable property.

Second difference is that whereas Section 47 only pertains to resolution of disputes arising between the parties to the suit, O.21 R.97 CPC envisages "any person" which includes stranger to the suit proceedings.

The question whether the word "any person" also includes a person other than judgment debtor i.e. stranger to the suit proceedings, first came up before the Apex Court in the celebrated case of *Brahmdev Choudhary v. Rishikesh Prasad Jaiswal and another, (1997) 3 SCC 694.* In this case, it was argued that a stranger to suit proceedings has no *locus standi* prior to execution of decree in view of O. 21 R. 99 which categorically provides for remedy to such person when he is dispossessed of immovable property. The counter argument was that the word "any person" as occurring in O.21 R.97 CPC is comprehensive enough to include a "stranger" to the suit proceedings meaning thereby that such a person had a right under O. 21 R. 97 to get adjudication as to his right, title and interest even prior to dispossession. The Apex Court held the later view to be appropriate one i.e. a stranger could agitate under O. 21 R. 97 CPC without waiting to be dispossessed and then proceed under O. 21 R. 99 CPC. As per the Apex Court a contrary view would result in blatant breach of principles of natural justice which would result in the obstructionist to be thrown off lock, stock and barrel by use of police force by the decree holder even though such a person had a valid grievance to make. This would result in irreparable injury to such an obstructionist. The Apex Court observed that when an application under O. 21 R. 97 is moved by decree holder complaining about resistance or obstruction offered by any person a *lis* arises between the decree holder on one hand and obstructor on the other. When such *lis* arises, it has to be adjudicated upon under O. 21 R. 97 (2) CPC.

The view expressed by the Apex Court in the case of *Brahmdeo Choudary (supra)* was later on concurred with and relied upon by Apex Court in its decision in *Shreenath and another v. Rajesh and others, (1998) 4 SCC 543.* The Apex Court in this case, expressed dissent with the observations made by a Full Bench of the Madhya Pradesh High Court in *Usha Jain v. Manmohan Bajaj, AIR 1980 MP 146* in which the scope of O. 21 R. 97 had been discussed. The Full Bench, in this case had categorically held that executing Court has no jurisdiction to start an enquiry either *suo motu* or at the instance of the third party other than the decree holder/auction possessor under O. 21 R. 97. Thus third party was specifically barred from agitating under O. 21 R. 97. The Court further held that the third party can either make an objection after dispossession under O. 21 R. 99 C.P.C or may institute a civil suit for declaration of title. After making a deep analysis of the relevant provisions as also the effect of amendment brought

about in 1976, at the same time taking note of *Brahmdev Choudhary's case (supra)*, Apex Court concluded that the case of *Usha Jain (supra)* cannot be held to be good law and that the third person could get an adjudication under O. 21 R. 97 C.P.C.

Thus the position stands clear that if the obstructionist is a stranger to the suit proceedings, his objections can be redressed straightaway under O.21 R.97 and he is not required to wait till dispossession under O. 21 R. 99 CPC.

Such a person has a third remedy as well. He can also file a suit against the decree holder provided the same has been instituted before initiation of proceedings under O.21 R. 97 or O. 21 R. 99 CPC. and in that case the result of such suit shall prevail (O.21 R.104 C.P.C.). However, once the proceedings under O. 21 R. 97 or O. 21 R. 99 CPC have been initiated, then a separate suit cannot be filed (O.21 R. 101 C.P.C.). Thus a separate suit can be filed by the stranger only prior to initiation of proceedings under O. 21 R. 97 or O. 21 R. 99 and if that is the position then the result of the suit shall prevail as per O. 21 R. 104 CPC. The right to file a suit however, does not accrue to a judgment debtor in view of the prohibition contained in Section 47 C.P.C. This prohibition does not apply in case of stranger to suit proceedings.

NEED FOR ADJUDICATION :

O. 21 R. 97 (2) provides that when any application is filed under sub-rule (1), the Court shall proceed to adjudicate upon the application and in accordance with the provisions herein contained. The word "adjudication" replaces the word "investigation" by the amendment of 1976. This substitution now gives immense powers to the Court in deciding the rights, title or interest in the property of the object.

Adjudication need not necessarily involves a detailed enquiry or collection of evidence. Court can make adjudication on admitted facts or even on the averments made by resistor. Of course the Court can direct the parties to adduce evidence for such determination as the Court deems necessary. This has been so held in the case of *Silver Line Forum Pvt. Ltd. v. Rajiv Trust, AIR 1998 SC 1754.*

QUESTIONS THAT CAN BE ADJUDICATED BY THE EXECUTING COURT :

In the case of *Silver Line Forum (supra)*, it has been held that only those questions can be adjudicated which would legally arise for determination between the parties. The Court is not obliged to determine the question merely because the resistor raised them. Two pre-requisites are necessary for the executing Court to adjudicate. First is that such question should have legally arisen

between the parties and the second is that, such question must be relevant for consideration and determination between the parties. This is also clear from the reading of O. 21 R. 101 CPC. For example if the obstructor states that he is a transferee *pendente lite* then it is not necessary to determine the question raised by him that he was unaware of the litigation when he purchased that property, as a transferee *pendente lite* has not legal right to obstruct the execution. (See O.21 R. 102 CPC).

PROVIDING POLICE HELP AGAINST THE OBSTRUCTOR :

Many a times it is seen that when a decree holder is obstructed in the execution of the decree, the decree holder files an application for providing police help by making an application under O. 21 R. 35 CPC and the Executing Court also goes on to allow the application for police help after recording the statements of *Machkuri*. The question is whether such type of an order is proper or not. The Apex Court was confronted with the same question in *Brahmdev Choudhary's case* (supra). It was held that when the resistance is offered by the purported stranger to a decree and which comes to be noted by the Executing Court as well as by the decree holder, the remedy available to the decree holder is only under O. 21 R. 97 (1) CPC and he cannot bypass such obstruction and insist on re-issuance of warrant for possession under O. 21 R. 35 with the help of police force as that would amount to bypassing and circumventing the procedure laid down under O. 21 R. 97 in connection with removal of obstruction to purported strangers to the decree. It was observed by the Apex Court that when the decree holder is obstructed by the stranger to the decree from possession of immovable property, the stranger cannot be forcibly evicted with police help under O. 21 R. 35 CPC. Application of the decree holder for police help under O. 21 R. 35 CPC would in fact be deemed as an application under O.21 R. 97 CPC and the Court will be required to adjudicate the matter. It is only after such adjudication that the Court may provide police help if such a stranger still refuses to vacate the premises.

ASPECT OF LIMITATION :

As per Article 129 of Limitation Act an application under O. 21 R. 97 C.P.C. can be presented within thirty days from the date of resistance or obstruction and if this period expires then there is no scope for condonation of delay i.e. application under Section 5 of Limitation Act is untenable as Section 5 excludes from its purview an application made under any of the provisions of O. 21 R. 97 CPC. The only remedy for a decree holder in such a situation would be to pray to the Court for issuance of fresh warrant of possession.

Similarly when the obstructor has been dispossessed then he can move an application under O. 21 R. 99 CPC within a period of thirty days from dispossession as per Article 12 8 Limitation Act. After the expiry of this statutory period, no application for condonation of delay will be entertainable. Thus one may see that an obstructor has to be very careful and must promptly file application under O.21 R. 97 C.P.C. or O. 21 R. 99 C.P.C. as the case may be since there is no scope for condonation of delay.

Further, O. 21 Rr. 105 and 106 CPC envisages dismissal of proceedings or declaring *ex parte* on non-appearance and R. 106 provides for setting aside an order made under R. 105 on showing sufficient cause respectively. An application under R.106 is required to be made within thirty days' period from the date of order made under R.105.

The order which has been passed after adjudication is an appealable order and is required to be treated as a decree (O. 21 R. 103 CPC).

PRE-AMENDMENT SCENARIO AND THE APPLICABILITY OF AMENDMENT :

Prior to 1976 amendment in CPC, the third party, if found objecting to execution proceedings, was required to be issued summons by the executing Court and if it was found that the third party was claiming in good faith to be in possession of the property on its own account or on account of some other person than the judgment debtor, the decree holder's application was required to be dismissed. If however the third party's claim was not found to be substantiated, such party was required to institute a separate suit (as per O. 21 Rr. 97 to 103 as these provisions stood prior to the amendment). Thus the decree holder was required to fight another battle against the third person if proved unsuccessful in the investigation. Similarly objector also was required to reagitate through a separate suit. Such multiplicity of proceedings tended to drain both the warring parties in every respect. The amendment of 1976 has done away with this multifariousness of proceedings and provides for clearance of all disputes through one window only i.e. through the same executing Court.

Thus the Executing Courts are now expected to speedily dispose of execution application by way of adjudication so that the long drawn battles may reach their logical conclusions without much delay.

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न्यायालय प्रशासन के वित्तीय पहलू

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(गतांक से आगे)

पूर्व प्रकाशित अंक (फरवरी 2006) में आपको आहरण संवितरण अधिकारी द्वारा आहरण हेतु संधारित अभिलेखों के विषय में अवगत कराया गया। अन्य महत्वपूर्ण बिन्दु निम्नानुसार हैं:–

3. प्राधिकृत कोषालय वाहक

कोषालय में देयक प्रस्तुत करने एवं चैक प्राप्त करने हेतु प्रत्येक आहरण अधिकारी को एक "वाहक" (मैसेंजर) नियुक्त करना होगा। इस हेतु प्राधिकृत वाहक की जानकारी दर्शाते हुए एक प्राधिकार पत्र कोषालय को भेजना होगा। प्राधिकार में कर्मचारी का नाम पद दर्शाते हुए उसका छायाचित्र एवं नमूना हस्ताक्षर संलग्न किये जावेंगे। छाया–चित्र तथा हस्ताक्षर आहरण अधिकारी द्वारा अभिप्रमाणित किया जाना चाहिए।

स्मरण रहे कि प्राधिकृत वाहक ही कोषालय में देयक प्रस्तुत कर चैक प्राप्त कर सकेगा। उसकी अनुपस्थिति में किसी अन्य कर्मचारी को आहरण अधिकारी अस्थायी रुप से प्राधिकृत कर सकता है। जब भी अस्थायी प्राधिकार जारी किया जावे, उसकी सूचना कोषालय अधिकारी को अनिवार्यतः दी जाये। यह अस्थायी प्राधिकार जारी होने के दिनांक से 7 दिवस तक वैध रहेगा।

आहरण उपरान्त संधारित किए जाने वाले अभिलेख

प्रत्येक आहरण अधिकारी, द्वारा कोषालय में देयक प्रस्तुत कर चैक प्राप्त किया जाता है एवं चैक प्राप्त होने के बाद संवितरण की कार्यवाही की जाती है। भुगतान होने के बाद आहरण अधिकारी द्वारा निम्नांकित अभिलेख संधारित किए जाने चाहिए।

(1) ट्रेजरी चैक सिस्टम (टी.सी.एस.) प्रपत्र 14 (कोषालय से प्राप्त हर चैक की पंजी)

प्रत्येक आहरण अधिकारी, जो कोषालय से आहरण हेतु प्राधिकृत है, को टी.सी.एस. प्रपत्र 14 पर पंजी तैयार करना होगा। इस पंजी में कोषालय से प्राप्त होने वाले प्रत्येक धनादेश (चैक) की प्रविष्टि की जावेगी। इस रजिस्टर में सं.क्र. 1 से 9 तक के कालम होते हैं। सबसे पहला कालम दिनांक का है जिसमें प्रविष्टि किए जाने की तिथि दर्ज की जाती है। दूसरे कालम में कोषालय का चैक क्रमांक और दिनांक दर्ज किया जाता है तीसरे कालम में चैक की राशि लिखी जाती है। चौथे कालम में चैक की राशि किस बिल क्रमांक की है उसका विवरण लिखा जाता है। पांचवे कालम में आहरण अधिकारी के हस्ताक्षर होते हैं। कालम क्र.–06 महत्वपूर्ण होता है, इसमें उस प्राधिकृत अभिकर्ता (कर्मचारी) के हस्ताक्षर होंगे जो चैक भुनाने/जमा करने के लिए ले जा रहा है।

कालम क्र.–7 में चैक भुनाने का दिनांक दर्ज होगा जबकि कालम 8 में आहरण अधिकारी के हस्ताक्षर होंगे तथा कालम 9 अभ्युक्तियों से संबंधित है।

(2) **रोकड़ बही (Cash Book)**

मध्यप्रदेश कोषालय संहिता भाग–1 के सहायक नियम 53 में वर्णित प्रावधानानुसार ऐसे शासकीय सेवक जो शासन की ओर से धन प्राप्त करते हैं, तथा लेनदेन करते हैं, को निम्नांकित नियमों का पालन करना होगा :–

(i) **प्रपत्र–5 पर रोकड़ बही** :– प्रत्येक आहरण संवितरण अधिकारी को जो शासकीय धन का लेन–देन करने के लिए प्राधिकृत है उन्हें मध्य प्रदेश कोषालय संहिता भाग–2 प्रपत्र 05 पर रोकड़ बही संधारण करना अनिवार्य होगा।

(ii) **प्रयोग पूर्व प्रमाण पत्र** :– इस रोकड़ बही का उपयोग करने के पूर्व इसमें एक प्रमाण पत्र दर्ज किया जावेगा कि इसमें कितने पृष्ठ उपयोग हेतु उपलब्ध हैं एवं यह प्रमाण पत्र आहरण अधिकारी द्वारा हस्ताक्षरित किया जावेगा। सुविधा की दृष्टि से इस रोकड़ बही के आवरण पृष्ठ पर इसका वाल्यूम क्रमांक एवं प्रारंभ करने की तिथि दर्ज की जावे एवं जब इसका पूर्ण उपयोग हो जावे तब उपयोग की अंतिम तिथि दर्ज की जावे।

स्मरण रहे कि इस प्रमाण पत्र के अंकन के समय रोकड़ बही के पृष्ठों का सत्यापन सजगता से कर लिया जावे। चूंकि इसके पृष्ठ क्रमांक मशीन से अंकित होते हैं अतः त्रुटिपूर्ण नम्बरों में कोई संशोधन अधिकृत नहीं है। यदि कोई पृष्ठ बिना क्रमांक या त्रुटिपूर्ण क्रमांक का हो तो उसका विवरण प्रमाण पत्र में स्पष्ट कर दिया जाये।

(iii) **प्रत्येक लेन–देन की तत्काल प्रविष्टि** :– रोकड़ पुस्तक में जैसे ही कोई मौद्रिक लेन–देन सम्पन्न हो उसकी तत्काल प्रविष्टि रोकड़ बही में की जानी चाहिए। जहाँ रोकड़ लेन देनों का विवरण अन्य किसी राजस्व पंजी में रखा जाता है, ऐसी पंजियों की प्रविष्टियों का मिलान रोकड़ बही में की गई प्रविष्टियों से किसी जिम्मेदार कर्मचारी/अधिकारी से कराया जाना चाहिए।

(iv) **प्रतिदिन संवरण (Closing)** :– प्रत्येक दिवस के संव्यवहार के उपरान्त रोकड़ बही को संवरित (Close) करना चाहिए। इसमें लिखे गए संव्यवहारों एवं योगों की जाँच स्वयं करना चाहिए अथवा किसी जिम्मेदार अधीनस्थ, जो रोकड़ बही लिखने वाले से भिन्न हो, से कराना चाहिए एवं योगों की जाँच सही पाए जाने की पुष्टि में उसके संक्षिप्त हस्ताक्षर भी कराए जावें।

(v) **माह में रोकड़ शेष का भौतिक सत्यापन** :– प्रत्येक माह के अंत में रोकड़ पुस्तक प्रभारी को चाहिए कि वह व्यक्तिगत रूप से रोकड़ बही में अंकित रोकड़ शेष की जाँच करे एवं इस बावत् अपने दिनांकित हस्ताक्षरों से प्रमाण–पत्र अंकित करना चाहिए। प्राप्त रोकड़ शेष का विस्तृत विवरण निम्नांकित बिन्दुओं में दिया जाना चाहिए।

(अ) शेष राशि किस मद से संबंधित है जैसे वेतन, अस्थाई अग्रिम, यात्रा भत्ता, आकस्मिक, विविध राजस्व प्राप्तियां आदि,

(ब) वह राशि किस दिनांक से बकाया है,

(स) किसे–किसे भुगतान की जानी है एवं कितनी–कितनी राशि दी जानी है,

(द) भुगतान अभी तक लंबित रहने का कारण अथवा कोषालय में जमा न करने का कारण।

(vi) कोषालय/बैंक में राशि जमा किए जाने की पुष्टि :– रोकड़ पुस्तिका में यदि कोई राशि कोषालय अथवा बैंक में जमा किया जाना दर्शाया गया है तो कार्यालय प्रमुख को चाहिए कि वह चालान द्वारा जमा किए जाने की स्थिति में संबंधित कोषालय अधिकारी से तथा बैंक में जमा किए जाने की स्थिति में बैंक पास बुक से राशि जमा किए जाने की पुष्टि तथा रोकड़ बही में दर्ज प्रविष्टि का मिलान कर पूर्ण संतुष्टी कर लें कि रकम वास्तव में कोषालय/बैंक में जमा की जा चुकी है।

विशेषत: जहाँ माह में भुगतान की गई रकमों की संख्या, अर्थात ऐसे चालान के माध्यम से कोषालय में जमा की गई राशियों की संख्या दस से अधिक है, तथा उसमें 1000/– से अधिक की राशि शामिल है, जहाँ तक संभव हो सके शीघ्रातिशीघ्र माह की समाप्ति पश्चात् माह के दौरान भेजे गए सभी प्रेषणों की समेकित पावती (सी.टी.आर. Consolidated Treasury Receipt) कोषालय से प्राप्त करना चाहिए, जिसका मिलान रोकड़ बही में की गई प्रविष्टियों से करना चाहिए।

(vii) काँट छाँट/उपरिलेखन :– रोकड़ बही में एक बार की गई प्रविष्टि पर काँट/छाँट अथवा उपरिलेखन किया जाना अत्यन्त आपत्ति जनक है । यदि कोई त्रुटि हो जाती है तो ऐसी अशुद्ध प्रविष्टी पर पेन से लाइन खींचकर काट दिया जाना चाहिए तथा लाल स्याही से लाइनों के मध्य सही प्रविष्टि लिखना चाहिए। कार्यालय प्रमुख को ऐसे प्रत्येक परिवर्तन पर अपने दिनांकित संक्षिप्त हस्ताक्षर करना चाहिए।

(viii) अशासकीय धन का लेनदेन :– कार्यालय प्रमुख की अनुमति के बिना अशासकीय धन का लेनदेन नहीं करना चाहिए। यदि कोई कर्मचारी अशासकीय धन एवं शासकीय धन कार्यालयीन हैसियत से संव्यवहारित करने हेतु अधिकृत है एवं कर रहा है तो अशासकीय एवं शासकीय धन को अलग–अलग कैश बाक्स में रखा जाना चाहिए तथा इससे संबंधित लेखा भी अलग–अलग रखना चाहिए।

(ix) धन को लाने हेतु भृत्यों उपयोग :– कोषालय संहिता के प्रावधान के अनुसार शासकीय धन को लाने के लिए भृत्यों की नियुक्ति को निरुत्साहित किया जाना चाहिए। नियमानुसार भृत्य अथवा

संदेशवाहक को सौंपी गई राशि की जिम्मेदारी आहरण एवं संवितरण अधिकारी की होगी और वह इन नियमों के उल्लंघन पर होने वाली शासकीय धन की हानि के लिए व्यक्तिगत रूप से उत्तरदायी होगा।

नियमानुसार :

(अ) यदि राशि 500/– या कम है तो भृत्य का उपयोग किया जाना चाहिए।

(ब) यदि राशि 500/– से अधिक हो तो नाजिर, लेखापाल अथवा रोकड़िया यथा प्रसंग, भृत्य के साथ बैंक/कोषालय/पोस्ट आफिस भेजे जाना चाहिए।

(स) यदि राशि 10,000/– से अधिक है तो नाजिर अथवा लेखापाल या रोकड़िया यथा प्रसंग गृह (पुलिस) विभाग की अधि सूचना क्रमांक 190–4703/II/B (3) दिनांक 17.1.1974 में दिए अनुसार पुलिस सुरक्षा गार्ड के साथ बैंक कोषालय/पोस्ट ऑफिस इत्यादि में भेजा जाना चाहिए।

(3) रोकड़ बही संधारण की विशिष्ट बातें –

(a) रोकड़ बही की प्रविष्टियों के सत्यापन, योगों के सत्यापन हेतु विज्ञप्त (राजपत्रित) अधिकारी ही अधिकृत किए जावें ।

(b) जब किसी कर्मचारी को अस्थाई अग्रिम दिया जावे तो ऐसे अग्रिम को अंतिम भुगतान के रूप में दर्ज न करते हुए रोकड़ बही के भुगतान पक्ष में रकम के कालम में बिना राशि लिखे, लाल स्याही से लिखा जाना चाहिए। इस तरह अस्थायी अग्रिम को उसके प्रमाणक प्राप्त होने तक रोकड़ शेष (Cash Balance) का हिस्सा माना जावेगा।

(c) इसी तरह स्थायी अग्रिम (P.A.) से दिए गए अग्रिम की प्रविष्टी भी भुगतान पक्ष के विवरण कालम में दिखाई जावे और राशि रकम के कालम में नहीं लिखी जावे।

(d) कोषालय में जमा किए गए चालानों का मिलान कोषालय से प्राप्त सी.टी.आर. (consolidated Treasury Receipt) से कर लिया जावे।

(e) आहरित की गई राशियों का मिलान प्रतिमाह कोषालय से प्राप्त भुगतान विवरण से कर लिया जाना चाहिए। (म.प्र. शासन वित्त विभाग ज्ञापन क्रं. 2570/3359/2000/ सी./ चार–दिनांक 12–12–2000)

(f) आय पक्ष में प्राप्त राशि जो रसीद बुक के माध्यम से प्राप्त हुई है, की प्रविष्टि का सत्यापन रसीद बुक के प्रतिपर्ण (Counter folio) से कर लेना चाहिए।

(g) वित्तीय वर्ष की समाप्ति पर रोकड़ बही अंतिम शेष का भौतिक सत्यापन करना चाहिए एवं पाई गई नगद राशि का पूर्ण विवरण कैश बुक में दर्ज किया जाना चाहिए।

(h) प्रत्येक लेन–देन बिना कोई विलम्ब के तत्काल कैशबुक में प्रविष्टि किया जावे एवं उसे हस्ताक्षरित होना चाहिए।

(i) रोकड़ बही के भुगतान पास की प्रविष्टियों का सत्यापन उपलब्ध प्रमाणक (Voucher) से किया जाना चाहिए। साथ ही ऐसे भुगतान बावत जहाँ रसीदी पावतियाँ (राजस्व टिकिट लगाकर) प्राप्त करना आवश्यक है, वहाँ उसका सत्यापन कर लिया जावे।

4. **मनी रिसीट बुक (M.P.T.C. Form-6)** –

शासकीय धन सीधे प्राप्त करने के लिए आहरण संवितरण अधिकारियों को मध्यप्रदेश कोषालय संहिता भाग–II के प्रपत्र–6 पर मुद्रित रसीद बुक का प्रयोग करना चाहिए। यह रसीद बुक शासकीय मुद्रणालयों/स्टेशनरी डिपो अथवा कोषालय से प्रदाय की जावेगी।

रसीद बुक को आहरण अधिकारी की अभिरक्षा में सुरक्षित रखा जाना चाहिए। रसीद बुक की प्राप्ति एवं प्रदाय हेतु एक पंजी संधारित की जावे जिसमें कार्यालय के लिए प्राप्त की गई रसीद बुक का लेखा रखा जावे। इस पंजी में यह भी उल्लेख किया जावे कि रसीद बुक किस अधिकारी–कर्मचारी को राशि संग्रहण हेतु प्रदाय की गई है उसका बुक क्रमांक क्या है। जब तक पूर्व में प्रदाय किए गए रसीद बुक का पूरा हिसाब प्राप्त न हो तब तक नई रसीद बुक प्रदाय न की जावे।

उपयोग के बाद रसीद बुक के प्रतिपर्ण को सुरक्षित रखा जावे एवं रसीद बुक के प्राप्त/प्रदाय पंजी में वापस प्राप्त होने की प्रविष्टी की जावे। जारी की जाने वाली रसीद में राशि अंकों एवं शब्दों में दर्ज की जावे। यदि कभी किसी जारी की गई रसीद की मूल प्रति खो जाती है तो किन्हीं भी परिस्थितियों में उसकी द्वितीय प्रति (Duplicate) जारी नहीं की जावेगी। यदि जमाकर्ता द्वारा द्वितीय प्रति की मांग की गई है तो उसे राशि जमा किये जाने का केवल प्रमाण पत्र प्रदाय किया जा सकता है।

(5) **मासिक व्यय प्रतिवेदन (M.E.R.)** :–

प्रत्येक माह समाप्ति के उपरान्त माह में सम्पादित किए गए व्ययों (कोषालय से आहरित) का एक प्रतिवेदन (विवरण) बजट नियंत्रण अधिकारी को प्रेषित किया जाता है जिसमें प्राप्त आवंटन अब तक कुल किया गया व्यय एवं शेष बचत राशि का विवरण होता है। यह विवरण प्रत्येक माह की समाप्ति पर आगामी 5 तारीख तक भेजा जाना है।

स्मरण रहे कि प्रतिवेदन में किए गए व्ययों के संबंध में कोषालय का व्हाउचर क्रमांक/दिनांक का विवरण भी दर्ज किया जावे।

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of October, 2005. The Institute has received articles from various districts. Articles regarding topic no. 3 received from Sagar and topic no. 4 received from Guna, respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 1, 2 & 5 , Institutional Articles are being published on topic no. 2 and 5 Topic no. 1 shall be repeated in future to the other group of districts for discussion:

Q.1 What is the legal position regarding acquisition of ownership over agricultural land by adverse possession?

कृषि भूमि पर विरोधी आधिपत्य के आधार पर स्वत्व अर्जन विषयक विधिक स्थिति का स्वरूप क्या है?

Q.2 Explain the ambit and scope of explanation to R.13 of O.9 CPC?

आदेश 9 नियम 1 3 व्यवहार प्रक्रिया संहिता के स्पष्टीकरण की परिधि एवं विस्तार क्या है?

Q.3 What is the extent of right of complainant to challenge the legality of acquittal/ quantum of sentence by way of revision?

दोषमुक्ति/दण्ड के परिमाण के विषय में परिवादी द्वारा पुनःरीक्षण में चुनौती दिये जाने के अधिकार का विस्तार क्या है?

Q.4. What is the legal position relating to the question of granting permanent/ temporary injunction in favour of a tresspasser?

अतिक्रामक के पक्ष में व्यादेश/अंतरिम व्यादेश प्रदान किए जाने विषयक विधिक स्थिति का स्वरूप क्या है?

Q.5 Whether a case can be committed in absence of accused person?

क्या अभियुक्त की अनुपस्थिति में उपार्पण कार्यवाही की जा सकती है?

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LEGAL POSITION REGARDING GRANT OF INJUNCTION IN FAVOUR OF A TRESPASSER

Judicial Officers
District Guna

"Few relationships are as vital to man as that of possession, and we may expect any system of law, howsoever primitive, to provide rules for its protection ....." said Salmond in Jurisprudence (12th Edn.)

The law in India, as it has developed, was summed up by Sir John Edge in *Midnapur Zomindary Co. Ltd. v. Kumar Naresh Narayan Roy, AIR 1924 P.C. 144* by stating that in India persons are not permitted to take forcible possessions; they must obtain such possession as they are entitled to through a Court.

By a catena of decisions, it is established that the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of the land may retake possession if he can do so peacefully and without the use of unreasonable force.

If the trespasser is in settled possession, as against the fugitive possession, of property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession.

Thus, it is the settled possession or effective possession of a person which would entitle him to protect his possession even as against the true owner. In this regard the chain of decisions is as follows :-

Midnapur Zomindary Co. Ltd. v. Kumar Naresh Narayan Roy, AIR 1924 P.C. 144; Yar Mohd. v. Laxmi Das, AIR 1959 All 1 (F.B.); Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165; Mushi Ram v. Delhi Administration, AIR 1968 SC 702; Lallu Yashwant Singh v. Rao Jagdeesh Singh, AIR 1968 SC 620; M.C. Chockolingam v. Manicka Vasagam,(1974) SCC 487; Puran Singh v. State of Punjab, (1975) 4 SCC 518; Ram Ratten v. State of U.P., (1977) 1 SCC 188; Krishna Ram Mahale v. Shobha Venkat Rao, (1989) 4 SCC 131; Nagar Palika Jind v. Jagar Singh, (1995) 3 SCC 426; Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350; Rama Gowda v. M. Varadappa Naidu, 2004 (2) M.P.W.N. 25 (Supreme Court) and *Sopan Sukhdeo Sable and others v. Asst. Charity Commissioner and others, (2004) 3 SCC 137.*

Now the Court has to decide whether a person is in settled possession or not. In *Puran Singh's case* (supra), the Apex Court laid down the following test which may be adopted as a working rule for determining the attributes of settled possession :-

(i) That the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) That the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of *animus possidendi.* The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) The process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) That the usual tests to determine the quality of settled possession, in the case of cultivable land, would be whether or not the trespasser, after having taken possession had grown any crop. If the crop has been grown, by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.

In *Sopan Sukhdeo Sable's case* (supra), Hon'ble the Supreme Court has laid down that there are two different sets of principles which have to be borne in mind regarding the course to be adopted in case of forcible dispossession. First aspect - it is true that where a person is in settled possession as against the fugitive possession of property, even on the assumption that he has no right to remain in property, he can't be dispossessed by the owner except by recourse to law. This principle is laid down in Section 6 of the Specific Relief Act, 1963.

Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek an injunction against the true owner? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunctions.

Judicial proceedings can't be used to protect or to perpetuate a wrong committed by a person who approaches the Court. *It is settled law that no injunction could be granted against the true owner at the instance of the person in unlawful possession.*

In a suit for declaration of title and injunction where the title is not proved, still the suit can be decided in respect of injunction and question of title may be left over. But the Court has to ensure that the plaintiff is in settled or effective possession.

Thus it can be concluded that the permanent and temporary injunction can be granted in favour of a person in settled possession but no injunction could be granted against the true owner at the instance of the person in unlawful possession/trespasser. Thus where legal proceedings have been resorted to evict a trespasser, in accordance with the procedure established by law, no injunction can be granted.

EDITOR'S NOTE:

The issue relating to grant of injunction simply on the basis of possessory title against the rightful owner has been beautifully analysed and considered by the Apex Court in *Rame Gowda (Dead) by LRs. V. M. Varadappa Naidu (Dead) by L.Rs. and another, (2004) 1 SCC 769,* which has a close bearing on the issue. It has been pointed out in this case that though settled possession can always be a ground to issue injunction but "stray or even intermittent acts of trespass" do not give such a right against the true owner.

Paragraphs 9 and 10 of the judgment, being apposite in this respect, are reproduced hereunder:

> "9.It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munishi Ram v. Delhi Administration, AIR 1968 SC 702, Puran Singh v. State of Punjab, (1975) 4 SCC 518 and Ram Rattan v. State of U.P., (1977) 1 SCC 188.* The authorities need not be multiplied. In *Munshi Ram case* (supra) it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of a trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, cannot be obstructed or removed by the true owner even by using necessary force. In *Puran Singh case (supra)* the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled possession. The "settled possession" must be (i) effective, (ii) undisturbed, and (iii)

to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula, which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession" (SCC p. 527, para 12):

> (i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;
>
> (ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of *animus possidendi.* The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;
>
> (iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and
>
> (iv) that one of the usual tests to determine the quality of settled possession, in the case of cultivable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.

10. In the case of *Munishi Ram (supra)* and *Puran Singh (supra)* the Court has approved the statement of law made in *Horan v. R., AIR 1949 All 564* wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner even by using reasonable forces the latter may be dispossessed by the true owner only by having recourse to the due process of law for reacquiring possession over his property."

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आदेश 9 नियम 13 व्यवहार प्रक्रिया संहिता की परिधि एवं विस्तार

संस्थानिक आलेख

वेद प्रकाश,
संचालक

व्यवहार प्रक्रिया संहिता,1988 जिसे अत्र पश्चात् 'संहिता' कहा जायेगा, का ओदश 9 पक्षकारों की उपसंजाति और उनकी अनुपसंजाति के परिणामों के विषय में है। आदेश 9 नियम 13 प्रतिवादी के विरूद्ध पारित एकपक्षीय आज्ञप्ति को विनिर्दिष्ट आधार पर अपास्त किये जाने का विवेकाधिकार उस न्यायालय को प्रदान करता है जिसके द्वारा एकपक्षीय आज्ञप्ति पारित की गई है। व्यवहार प्रक्रिया संहिता संशोधन अधिनियम, 1976 के द्वारा आदेश 9 नियम13 में निम्न स्पष्टीकरण, जो दिनांक 01.02.1977 से प्रभावशील हुआ, अन्त: स्थापित किया गया है–

> "**स्पष्टीकरण**.– जहां इस नियम के अधीन एकपक्षीय पारित डिक्री के विरूद्ध अपील की गई है और अपील का निपटारा इस आधार से भिन्न किसी आध ार पर कर दिया गया है कि अपीलार्थी ने अपील वापस ले ली है वहां उस एकपक्षीय डिक्री को अपास्त करने के लिए इस नियम के अधीन कोई आवेदन मान्य नहीं होगा।"

उक्त स्पष्टीकरण के परिशीलन से प्रगट है कि यदि एकपक्षीय आज्ञप्ति के विरूद्ध संस्थित अपील का निराकरण अपील के प्रत्याहरण से भिन्न किसी आधार पर कर दिया गया है तो उस दशा में आदेश 9 नियम 13 के अन्तर्गत कार्यवाही अनुज्ञेय नहीं होगी। *रानी चौधरी वि. ले. कर्नल सूरजजीत चौधरी, ए.आई.आर. 1982 एस.सी. 1397* में अपील के निराकरण की विभिन्न स्थितियों पर विचार करते हुए यह प्रगट किया गया है कि अपील का निराकरण सामान्यतया उचित सुनवाई के बाद गुण दोष के आधार पर किया जाता है लेकिन अपील को पैरवी के अभाव में अथवा कालबाधित होने के कारण अथवा अपील संस्थित किये जाने की किसी शर्त का पालन न किये जाने के कारण भी निरस्त किया जा सकता है, साथ ही अपील को वापस भी लिया जा सकता है। इन सभी स्थितियों में अपील निराकृत मानी जायेगी लेकिन केवल प्रत्याहरण की स्थिति में ही अपीलार्थी को आदेश 9 नियम 13 के प्रावधानों का लाभ उठाने की पात्रता हैं।

उक्त स्पष्टीकरण अन्त:स्थापित करने की पृष्ठभूमि में यह सोच रही है कि अपील न्यायालय के द्वारा अपील के निराकरण के साथ ही विचारण न्यायालय की आज्ञप्ति अपील न्यायालय द्वारा पारित आज्ञप्ति में विलीन हो जाती है अत: इस आज्ञप्ति के विषय में विचारण न्यायालय द्वारा किसी प्रकार का विनिश्चय आदेश 9 नियम 13 के अन्तर्गत किया जाना औचित्यसम्मत नहीं रह जाता है।

उक्त स्पष्टीकरण की प्रयोज्यता एवं विस्तार के विषय में विधिक क्षेत्रों में मतवैभिन्नयता के कारण इस बारे में विश्लेषण की आवश्यकता महसूस की जाती रही हैं। आदेश 9 नियम 13 के प्रयोज्यता के विषय में प्रधानत: निम्न प्रश्न उद्भूत होते रहे हैं:–

1. क्या आवेदन एवं अपील साथ–साथ प्रस्तुत किये जा सकते हैं?

अथवा

क्या विधि के अन्तर्गत उक्त दोनों अनुतोषों में से प्रतिवादी केवल एक प्रक्रिया का लाभ ले सकता है, दोनों का नहीं?

2. क्या आवेदन के अस्वीकृत हो जाने पर अपील संधारणीय नहीं रहेगी?

3. क्या अपील के निरस्त हो जाने की दशा में आवेदन असंधारणीय हैं?

4. क्या कालबाधित होने के आधार पर अपील का निरस्त किया जाना उक्त स्पष्टीकरण के आधार पर आवेदन की संधारणीयता के लिये बाधक है?

प्रश्नगत विषय की तह तक पहुंचने के लिये सर्वप्रथम इस बिन्दु पर माननीय म.प्र. उच्च न्यायालय के विनिश्चयों का संदर्भ समीचीन होगा। *सुमेर चन्द्र जैन वि. शरद चन्द्र नायक, 1995 (भाग 1) एम.पी.डब्ल्यू.एन. 154* के मामले में, जहां अपीलार्थी ने आदेश 9 नियम 13 का आवेदन पत्र निरस्त हो जाने के पश्चात् एकपक्षीय आज्ञप्ति को अपील के माध्यम से चुनौती दी थी, अपील को 'उक्त स्पष्टीकरण' के प्रकाश में तथा *सुमेरा वि. मदन लाल, ए.आई.आर. 1989 एम.पी. 224 (खण्डपीठ)* में किये गये विनिश्चय का अवलम्ब लेते हुए असंधारणीय ठहराया गया। *सुमेरा* (पूर्वोक्त) के मामले में *रानी चौधरी वि. सूरजजीत चौधरी, ए.आई.आर. 1982 एस.सी. 1397* का अवलम्ब लेते हुए यह प्रगट किया गया था कि आदेश 9 नियम 13 द्वारा प्रावधित प्रक्रिया का लाभ लेने के पश्चात् अपील के द्वारा एकपक्षीय आज्ञप्ति को चुनौती नहीं दी जा सकती है।

यहां यह उल्लेखनीय है कि *रानी चौधरी* (पूर्वोक्त) के मामले में उक्त आशय का कोई विनिश्चय नहीं किया गया था अपितु इस मामले में माननीय शीर्षस्थ न्यायालय ने मूलतः इस बारे में विनिश्चय किया है कि क्या अपील को कालबाधित होने के आधार पर निरस्त किये जाने की दशा में उक्त स्पष्टीकरण के परिप्रेक्ष्य में आदेश 9 नियम 13 के अन्तर्गत अग्रसर होने का अपीलार्थी का अधिकार समाप्त हो जाता है।

माननीय उच्च न्यायालय की पूर्ण पीठ ने *श्रीमति अर्चना कुमार वि. पी.पी.मुखर्जी, 2000 (3) एम.पी. एच.टी. 35* के मामले में *सुमेर* (पूर्वोक्त) में किये गये उक्त विधिक प्रतिपादन की विधि सम्मतता पर विचार करते हुए यह सुस्पष्ट अभिनिर्धारण किया है कि *सुमेर* (पूर्वोक्त) के मामले में किया विनिश्चय विधि सम्मत नहीं हैं अतः उसे सही विधि की संज्ञा नहीं दी जा सकती है। इस निष्कर्ष पर पहुंचने के लिये *रानी चौधरी* (पूर्वोक्त) का संदर्भ भी लिया गया है तथा यह ठहराया गया है कि आदेश 9 नियम 13 का आवेदन निरस्त होने के बाद भी संहिता की धारा 96 (2) के अन्तर्गत एकपक्षीय आज्ञप्ति के विरूद्ध अपील संधारणीय हैं।

रानी चौधरी (पूर्वोक्त) के मामले में किये गये विनिश्चय का उल्लेख पूर्व में किया गया है। समरूप परिस्थितियों में माननीय शीर्षस्थ न्यायालय द्वारा *श्याम सुन्दर वि. पन्नालाल जायसवाल आदि, (2005) 1 एस.सी.सी. 436* के मामले में *रानी चौधरी* (पूर्वोक्त) में किये गये विनिश्चय के आधार पर यह अभिनिर्धारित किया गया है कि जहां कालबाधित अपील तथा उसके साथ परिसीमा में छूट हेतु प्रस्तुत आवेदन पत्र निरस्त कर दिये गये हों वहां ऐसा आदेश अपील में पारित किया गया आदेश है तथा उसे अपील के प्रत्याहरण अथवा अपील

न करने के समान नहीं माना जा सकता है अतः ऐसी स्थिति में अपीलार्थी आदेश 9 नियम 13 के अन्तर्गत अग्रसर होने की पात्रता नहीं रखेगा।

इसके विपरीत जहां आदेश 9 नियम 13 का आवेदन पत्र अस्वीकार होने के बाद आज्ञप्ति को नियमित अपील के द्वारा धारा 96 के अन्तर्गत चुनौती दी गई है वहां ऐसी अपील परिसीमा विधि के अध्याधीन रहते हुए संधारणीय होगी क्योंकि आदेश 9 नियम 13 का स्पष्टीकरण इस हेतु कोई निषेध नहीं करता है। इस बारे में *भानू कुमार जैन वि. अर्चना कुमार, 2005 (1) एस.सी.सी. 787* में माननीय शीर्षस्थ न्यायालय की त्रिसदस्यीय पीठ द्वारा किया गया विनिश्चय सुसंगत एवं अवलोकनीय है। इस मामले में यह भी स्पष्ट किया गया है कि ऐसी अपील में प्रतिवादी को यह विवादित करने की छूट नहीं होगी कि वाद में एकपक्षीय सुनवाई का आदेश उचित नहीं था अथवा प्रतिवादी की अनुपस्थिति के लिये पर्याप्त कारण विद्यमान था।

भानूकुमार जैन (पूर्वोक्त) के मामले में यह स्पष्ट किया गया है कि एकपक्षीय आज्ञप्ति को चुनौती देने के लिये प्रतिवादी के पास दो स्पष्ट विकल्प हैं–

प्रथमः धारा 96 के अन्तर्गत अपील के द्वारा तथा

द्वितीयः आदेश 9 नियम 13 के अन्तर्गत एकपक्षीय आज्ञप्ति अपास्त करने हेतु आवेदन द्वारा।

प्रतिवादी दोनों प्रावधानों के अन्तर्गत एक साथ कार्यवाही करने के लिये तो स्वतंत्र है लेकिन अपील निरस्त हो जाने की दशा में आदेश 9 नियम 13 की याचिका संधारणीय नहीं रह जायेगी। लेकिन इसके विपरीत आवेदन के अस्वीकृत होने की दशा में अपील के असंधारणीय होने का तर्क विधि सम्मत नहीं है। यह बात अलग है कि प्रतिवादी आदेश 9 नियम 13 के आवेदन को निरस्त किये जाने वाले आदेश के विरूद्ध ओदश 43 नियम 1 के अन्तर्गत विविध अपील प्रस्तुत कर सकता है।

उक्त विश्लेषण के प्रकाश में आदेश 9 नियम 13 के स्पष्टीकरण की प्रयोज्यता के विषय में निम्न विधिक स्थिति उभर कर सामने आती हैः–

1. ऐसा प्रतिवादी जिसके विरूद्ध एकपक्षीय आज्ञप्ति पारित की गई है, ऐसी आज्ञप्ति को संहिता की धारा 96 के अन्तर्गत नियमित अपील एवं आदेश 9 नियम 13 के अन्तर्गत आवेदन पत्र प्रस्तुत कर साथ–साथ चुनौती दे सकता है।
2. आवेदन अस्वीकृत हो जाने की दशा में अपील की प्रचलनशीलता पर कोई प्रभाव नहीं पड़ेगा तथा ऐसी अपील का निराकरण गुण दोष के आधार पर किया जा सकेगा।
3. अपील के निरस्त हो जाने की दशा में आवेदन प्रचलनशील नहीं रह जायेगा।
4. यदि अपील को कालबाधित होने के आधार पर निरस्त कर दिया है तो भी उसे एकपक्षीय आज्ञप्ति के विरुद्ध अपील में पारित आदेश माना जायेगा तथा तत्पश्चात आदेश 9 नियम 13 के अन्तर्गत आवेदन प्रचलनशील नहीं रहेगा।

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दोषमुक्ति/दण्ड के परिणाम को परिवादी द्वारा पुनरीक्षण में चुनौती दिए जाने के अधिकार का विस्तार

न्यायिक अधिकारीगण
जिला–सागर

दण्ड प्रक्रिया संहिता, 1973 जिसे अत्रपश्चात् केवल 'संहिता' कहा जायेगा, की धारा 397 उच्च न्यायालय तथा सत्र न्यायाधीश को अधीनस्थ दाण्डिक न्यायालयों द्वारा अभिलिखित निष्कर्ष, दोषसिद्धि अथवा आदेश की शुद्धता, वैधता या औचित्य के बारे में या कार्यवाहियों की नियमितता के बारे में आदेश पारित करने की समवर्ती अधिकारिता प्रदान करती है। उच्च न्यायालय की पुनरीक्षण की अधिकारिता के स्वरूप एवं सीमाओं का उल्लेख 'संहिता' की धारा 401 में किया गया है। 'संहिता' की धारा 397 के अन्तर्गत सत्र न्यायालय पुनरीक्षण की अधिकारिता के अन्तर्गत उन सभी शक्तियों का प्रयोग कर सकता है जो धारा 401 के अन्तर्गत उच्च न्यायालय को प्राप्त हैं। धारा 401, जो वर्तमान प्रयोजन हेतु सुसंगत हैं, निम्नवत् हैं:–

> "401.– **उच्च न्यायालय की पुनरीक्षण की शक्तियाँ** – (1) ऐसी किसी कार्यवाही के मामले में, जिसका अभिलेख उच्च न्यायालय ने स्वयं मंगवाया है या जिसकी उसे अन्यथा जानकारी हुई है, वह धाराएँ 386, 389, 390 और 391 द्वारा अपील न्यायालय को या धारा 307 द्वारा सेंशन न्यायालय को प्रदत्त शक्तियों में से किसी का स्वविवेकानुसार प्रयोग कर सकते हैं और जब वे न्यायाधीश, जो पुनरीक्षण न्यायालय में पीठासीन हैं, राय में समान रूप से विभाजित है तब मामले का निपटारा धारा 392 द्वारा उपबन्धित रीति से किया जाएगा।
>
> (2) इस धारा के अधीन कोई आदेश, जो अभियुक्त या अन्य व्यक्ति पर प्रतिकूल प्रभाव डालता है, तब तक न किया जाएगा जब तक उसे अपनी प्रतिरक्षा में या तो स्वयं या प्लीडर द्वारा सुने जाने का अवसर न मिल चुका हो।
>
> (3) इस धारा की कोई बात उच्च न्यायालय को दोषमुक्ति के निष्कर्ष को दोषसिद्धि के निष्कर्ष में सम्परिवर्तित करने के लिए प्राधिकृत करने वाली न समझी जाएगी।
>
> (4) जहाँ सहिता के अधीन अपील होती है किन्तु कोई अपील की नहीं जाती है वहां उस पक्षकार की प्रेरणा पर, जो अपील कर सकता था, पुनरीक्षण की कोई कार्यवाही ग्रहण न की जाएगी।
>
> (5) जहां इस संहिता के अधीन अपील होती है किन्त उच्च न्यायालय को किसी व्यक्ति द्वारा पुनरीक्षण के लिये आवेदन किया गया है और उच्च न्यायालय का यह समाधान हो जाता है कि ऐसा आवेदन इस गलत विश्वास के आधार पर किया गया था कि उससे कोई अपील नहीं होती है और न्याय के हित में ऐसा करना आवश्यक है तो उच्च न्यायालय पुनरीक्षण के लिये आवेदन को अपील की अर्जी मान सकता है और उस पर तदनुसार कार्यवाही कर सकता है।"

संहिता की धारा 386 अपील न्यायालय की शक्तियों के संबंध में हैं। इन शक्तियों के अन्तर्गत ही अपील में सभी प्रकार के आदेश पारित किए जाते हैं। यदि अपील दोषमुक्ति के आदेश के विरूद्ध है तो ऐसा आदेश उलटा जा सकता है या पुनः विचारण का आदेश दिया जा सकता है या दोषी ठहराकर विधि अनुसार दंडादेश दिया जा सकता है। यदि अपील दोषसिद्धि से व्यथित होकर पेश की गई है तो अपीलार्थी को दोषमुक्त या उन्मोचित किया जा सकता है या पुनः विचारण हेतु प्रतिप्रेषित करने का आदेश दिया जा सकता है। सारांश में अपील न्यायालय, अपील में जिन शक्तियों का उपयोग कर सकता है वे सभी संहिता की धारा 386 में उपबंधित हैं।

यद्यपि 'संहिता' की धारा 401 के अनुसार पुनरीक्षण अधिकारिता के अन्तर्गत धारा 386 में वर्णित शक्तियों का उपयोग किया जा सकता है लेकिन ये शक्तियां असीमित नहीं है। धारा 401 (3) के पठन मात्र से यह स्पष्ट है कि पुनरीक्षण शक्तियों के तहत दोषमुक्ति के निष्कर्ष को दोषसिद्धि के निष्कर्ष में सम्परिवर्तित नहीं किया जा सकता है। इसी प्रकार जहां संबंधित पक्ष या व्यक्ति को अपील का उपचार उपलब्ध है परन्तु अपील नहीं की जाती है तो उस पक्षकार की प्रार्थना पर जो अपील कर सकता था, पुनरीक्षण की कार्यवाही ग्रहण नहीं की जा सकती है (संदर्भ धारा 401 (4))।

अतः पुनरीक्षण संबंधी शक्तियों के तहत दोषमुक्ति के निष्कर्ष को दोषसिद्धि के निष्कर्ष में सम्परिवर्तित नहीं किया जा सकता है। इसी प्रकार जिस पक्षकार को अपील का अधिकार उपलब्ध है और वह अपील नहीं करता है तो ऐसे पक्षकार द्वारा प्रस्तुत पुनरीक्षण याचिका भी संधारणीय नहीं होगी।

'संहिता' की धारा 378 (4) में दोषमुक्ति की अवस्था में परिवादी द्वारा उच्च न्यायालय की विशेष अनुमति से अपील का प्रावधान है। अतः जो मामले संहिता की धारा 378 (4) द्वारा आच्छादित होते हैं उनमें पुनरीक्षण याचिका ग्रहण नहीं की जा सकती है।

परिवादी द्वारा पुनरीक्षण में दोषमुक्ति संबंधी आदेश को चुनौती दिए जाने के अधिकार के विस्तार के विषय में माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत *के. चिन्नास्वामी रेड्डी वि. आंध्रप्रदेश राज्य, ए.आई.आर. 1962 सु.को. 1788* में यह प्रतिपादित किया है कि यह सही है कि उच्च न्यायालय प्राईवेट पार्टी द्वारा प्रस्तुत पुनरीक्षण याचिका में दोषमुक्ति संबंधी आदेश को अपास्त कर सकता है भले ही राज्य ने उसे अपील के लिए उपयुक्त मामला नहीं माना हो परन्तु इस क्षेत्राधिकार का प्रयोग सिर्फ ऐसे आपवादिक मामलों में किया जाना चाहिए जहां प्रक्रिया संबंध दैदीप्यमान त्रुटि हो या कानूनी बिन्दु पर सहजदृश्य त्रुटि हो जिसके परिणामस्वरूप ज्वलंत रूप से न्याय का हनन परिलक्षित हो।

न्याय दृष्टांत *लोगेन्द्र नाथ झा वि. पी. विश्वास, ए.आई.आर. 1951 सु.को. 316 तथा डी. स्टीफन्स वि. नोसीबोला, ए.आई.आर. 1951 सु.को. 196* में यह प्रतिपादित किया गया है कि यदि अपील न्यायालय ने संदोष रूप से ग्रहण करने योग्य साक्ष्य को तिरस्कृत किया हो तो न्यायालय पुनरीक्षण की शक्तियों के तहत दोषमुक्ति के आदेश में हस्तक्षेप कर सकता है। इस प्रकार पुनरीक्षण शक्तियों के तहत ग्रहण करने योग्य ऐसी साक्ष्य पर विचार किया जा सकता है जिसे विचारण न्यायालय ने अग्राह्य मानकर विचार में नहीं लिया हो। अतः पुनरीक्षण शक्तियों के तहत ऐसी साक्ष्य पर विचार किया जा सकता है जो ग्रहण करने योग्य हो परन्तु विचारण

न्यायालय ने सदोष रूप से उसे ग्रहण करने योग्य नहीं मानकर विचार में नहीं लिया हो। इसी क्रम में न्याय दृष्टांत *रामवृक्षसिंह वि. अंबिका यादव, ए.आई.आर. 2004 सु.को.4583* में यह प्रतिपादित किया गया है कि यदि मामला आपवादिक स्वरूप का हो और विचारण न्यायालय ने सारवान साक्ष्य को अनदेखा करके निर्णय दिया हो तो पुनरीक्षण न्यायालय दोषमुक्ति का आदेश अपास्त करके पुनः विचारण का आदेश दे सकता है।

लेकिन जैसा कि न्याय दृष्टांत *अकालू अहीर वि. रामदेव राम, ए.आई.आर. 1973 सु.को. 2145* में प्रतिपादित किया गया है परिवादी द्वारा प्रस्तुत पुनरीक्षण याचिका में न्यायालय अपील न्यायालय की भांति साक्ष्य का पुर्नमूल्यांकन करके फिर से विचारण का आदेश नहीं दे सकता। ऐसा ही मत लोगेन्द्र नाथ (पूर्वोक्त) तथा डी. स्टीफन (पूर्वोक्त) में भी प्रतिपादित किया गया है।

डी. स्टीफन (पूर्वोक्त) के मामले में यह भी प्रतिपादित किया गया है कि जहां राज्य को अपील करने का अधिकार उपबंधित है वहां परिवादी द्वारा पेश आवेदन पर पुनरीक्षण की शक्तियों का उपयोग सरलता से नहीं करना चाहिए। ऐसी अवस्था में पुनरीक्षण की शक्तियों का उपयोग ऐसे आपवादिक मामलों में किया जा सकता है जहां लोक न्याय के हित में ऐसा हस्तक्षेप करना आवश्यक हो या न्याय की सम्पूर्ण विफलता को रोकने के लिए ऐसा करना आवश्यक हो या स्पष्ट अवैधानिकता को सुधारने के लिए ऐसा करना आवश्यक हो परन्तु साधारणतया पुनरीक्षण की शक्तियों का उपयोग केवल इस आधार पर नहीं किया जाना चाहिए कि विचारण न्यायालय ने साक्ष्य का समुचित मूल्यांकन नहीं किया है या विचारण न्यायालय का दृष्टिकोण दोषपूर्ण है।

न्याय दृष्टांत *पी.एन.जी. राजू वि. व्ही.पी.अप्पाडू, ए.आई.आर. 1975 सु.को. 1854, सी. कोटैया वि. जी व्यंकटेश्वर, ए.आई.आर. 1973 सु.को. 1274, सत्येन्द्र नाथ दत्ता वि. रामनारायण, ए.आई.आर. 1975 सु.को. 580* तथा *महेन्द्र प्रताप सिंह वि. सरजू सिंह, ए.आई.आर. 1968 सु.को. 707* में उक्त मत को दुहराया गया है।

विंध्येश्वरी प्रसाद सिंह वि. बिहार राज्य, ए.आई.आर. 2002 सु.को. 2907 के मामले में माननीय सर्वोच्च न्यायालय ने अनेक न्याय दृष्टांतों के विश्लेषण के पश्चात यह प्रतिपादित किया है कि पुनरीक्षण न्यायालय, पुनरीक्षण शक्तियों के तहत साक्ष्य का पुर्नमूल्यांकन करके भिन्न निष्कर्ष पर पहुंचकर पुनः विचारण का आदेश नहीं दे सकता। इस प्रकरण में प्रतिपादित सिद्धांतों के आधार पर यह कहा जा सकता है कि यदि प्रक्रिया संबंधी कोई त्रुटि सामने आए और अनुचित रूप से कोई अग्राह्य साक्ष्य ग्रहण कर ली गई हो या अनुचित रूप से कोई ग्रहण करने योग्य साक्ष्य अस्वीकृत कर दी गई हो अथवा प्रक्रिया या विचारण संबंधी कोई कानूनी शिथिलता विद्यमान हो जिससे न्याय विफल हुआ हो तो दोषमुक्ति के आदेश के विरूद्ध परिवादी द्वारा प्रस्तुत पुनरीक्षण याचिका में पुनः विचारण का आदेश दिया जा सकता है, अन्यथा नहीं।

उक्त से प्रकट है कि माननीय सर्वोच्च न्यायालय ने सन् 1951 में *डी. स्टीफन* (पूर्वोक्त) के मामले से लेकर सन् 2004 तक रामवृक्ष सिंह (पूर्वोक्त) तक के मामले में निरन्तर यह मत प्रतिपादित किया है कि यदि परिवादी द्वारा दोषमुक्ति के आदेश के विरूद्ध कोई पुनरीक्षण याचिका पेश की जाती है तो दोषमुक्ति के आदेश में तभी हस्तक्षेप किया जा सकता है जबकि–

1. वैधानिक प्रक्रिया संबंधी कोई गंभीर त्रुटि हो जिससे न्याय विफल हुआ हो,

2. ग्रहण करने योग्य साक्ष्य को ग्रहण करने से इंकार किया गया हो,

3. अग्राह्य साक्ष्य को अनुचित रूप से ग्रहण कर लिया हो,

4. न्याय देदीप्यमान रूप से विफल हुआ हो या न्याय की भ्रूण हत्या परिलक्षित होती हो या,

मामला इतने अधिक आपवादिक स्वरूप का हो कि वह पुनरीक्षण शक्तियों के तहत हस्तक्षेप की मांग करता हो।

परन्तु पुनरीक्षण शक्तियों के तहत साक्ष्य का पुर्नमूल्यांकन नहीं किया जा सकता और न ही साक्ष्य पुर्नमूल्यांकन के आधार पर पुनः विचारण का आदेश दिया जा सकता। मामूली खामियों के आधार पर या वैधानिक दृष्टिकोण संबंधी मत भिन्नता के आधार पर भी ऐसा नहीं किया जा सकता है।

जहां तक दण्ड के परिमाण का प्रश्न है, न्याय दृष्टांत *नादिर खान वि. राज्य (देहली प्रशासन), ए.आई. आर. 1976 सु.को. 2205* में स्थिति यह थी कि आवेदक को सात किलो गांजे का अवैध कब्जा रखने के कारण मेट्रोपालिटन मजिस्ट्रेट दिल्ली ने दो माह का सश्रम कारावास भुगताने का दण्डादेश दिया। अपील उपबंधित नहीं होने के कारण अपर सत्र न्यायाधीश दिल्ली के समक्ष पुनरीक्षण याचिका पेश की गई जो असफल रही। अभियुक्त ने माननीय दिल्ली उच्च न्यायालय में 'संहिता' की धारा 482 के तहत याचिका प्रस्तुत की। माननीय उच्च न्यायालय ने यह महसूस किया कि दण्डादेश अपर्याप्त है। माननीय उच्च न्यायालय ने पुनरीक्षण शक्तियों का उपयोग करते हुए स्वप्रेरणा से कार्यवाही की और दण्डादेश बढ़ाकर छः माह कर दिया। माननीय दिल्ली उच्च न्यायालय द्वारा स्वप्रेरणा से पुनरीक्षण शक्तियों के तहत दण्डादेश बढ़ाने से व्यथित होकर अभियुक्त द्वारा माननीय सर्वोच्च न्यायालय में दाण्डिक अपील प्रस्तुत की गई और यह प्रश्न उठाया गया कि दण्डादेश की अपर्याप्तता के आधार पर अपील के अभाव में क्या उच्च न्यायालय पुनरीक्षण शक्तियों के तहत दण्डादेश में वृद्धि कर सकता है। इस मामले में माननीय सर्वोच्च न्यायालय ने यह प्रकट किया है कि संहिता की धारा 377 के तहत दण्डादेश की अपर्याप्तता के विरूद्ध अपील का उपचार उपलब्ध है परन्तु इससे स्वप्रेरणा के आधार पर उच्च न्यायालय का क्षेत्राधिकार अपवर्जित नहीं होता है। उपर्युक्त मामलों में उच्च न्यायालय दण्डादेश में वृद्धि कर सकता है। उपर्युक्त मामला क्या है, यह उच्च न्यायालय के विवेकाधीन है।

अतः दण्डादेश की मात्रा में वृद्धि के संबंध में वैधानिक स्थिति यह है कि पुनरीक्षण याचिका में इन शक्तियों का उपयोग वर्जित नहीं है। पुनरीक्षण की शक्तियों के तहत दोषमुक्ति के निष्कर्ष को दोषसिद्धि के निष्कर्ष में परिवर्तित नहीं किया जा सकता परन्तु ऐसा कोई प्रतिबंध दण्डादेश में वृद्धि के बारे में नहीं है। अतः उपर्युक्त मामलों में दण्डादेश के परिमाण में परिवर्तन के लिए पुनरीक्षण की शक्तियों का प्रयोग किया जा सकता हैं।

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LEGALITY OF COMMITTAL IN ABSENCE OF ACCUSED

Institutional Article
Ved Prakash
Director, JOTRI

The issue whether a case exclusively triable by a Court of Session can be committed in the absence of the accused person has to be analysed and probed into in the light of provisions contained in Sections 193 and 209 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). Section 193 provides that Court of Session shall not take cognizance of an offence unless "the case has been committed" to it by the Magistrate. Section 209 provides that when the accused *appears or is otherwise brought before the Court of Magistrate"* and it appears to the Magistrate that the offence is triable exclusively by the Court of Session he shall commit the case after complying with sections 207 and 208.

A bare reading of Section 209 reveals that the magistrate can commit the case relating to an offence exclusively triable by a Court of Session when - **the accused appears or is brought before it**. Appearance may be in person or through counsel as contemplated by Section 317 Clause (1) of the Code. The proceeding of committal being in the nature of inquiry (as defined u/s 2(g) of the Code) Section 317 will squarely apply in such a proceeding.

However, the problem arises when the accused or some of the accused persons are neither personally present nor represented through counsel and are rather absconding, then, whether in such a situation a committal order can legally be passed? If no, what course has to be adopted in such a situation.

Here it is noteworthy that Sections 193 and 209 of the Code speak about the commitment of 'the case' and not of the 'accused', whereas as pointed out by the Apex Court in *Jogendra Singh v. State of Punjab, AIR 1979 SC 389,* under the equivalent provision of the Old Code (i.e. Code of 1898) viz Section 193 (1) and Section 207 (A) the committal was of 'the accused' and not of 'the case'. In the aforesaid case the Apex Court while dealing with the question relating to the ambit and scope of Section 319 of the Code held that pursuant to committal and after taking cognizance a Sessions Court has jurisdiction to add any person as an accused, when such person appears to have committed from the evidence recorded at the trial and that interdict of Section 193 will not be a bar.

Clearly enough, the Apex Court has no occasion in the aforesaid case to deal with the issue whether a case can be committed in the absence of the accused or not. Therefore, the proposition that under the Code of 1973 it is 'the case', which is committed and not 'the accused'; cannot be a basis to infer that a case can be committed in the absence of accused. Therefore, the issue has to be examined in the light of various pronouncement on the point.

The ultimate impact of change in the phraseology from 'committal of the accused' to committal of the case' in the Code of 1898 and the new Code invited attention of a Full Bench of the Kerala High Court in *Kesavan Natesan v. Madhavan Peethambharan and others, 1984 Cr.L.J. 324.* The main controversy in this case related to the issue as to whether there can be two committal orders in police case and complaint case arising out of the same incident. The Court after examining various authorities observed as under:

> "The expression "case" is not synonymous with occurrence of crime or transaction. The court can commit an accused to the Sessions or a case to Sessions but cannot commit a transaction or crime or an offence to the Sessions. "Case" only means the case taken on file by the Magistrate on taking cognizance. Cognizance might have been taken on a police report or otherwise. Having taken cognizance of the offence under one of the provisions of Section 190 of the Code, the Magistrate may take on file another case initiated under the other clauses of Section 190. We are unable to agree that substitution of the expression "accused" by the expression "case" in these provisions postulates an inhibition against taking two cases on file or having two committal proceedings or passing two committal orders."

The Court emphasized that expression "the case" indicates a particular case before the Court qua an accused and not the entire case relating to a particular offence. The Court observed that there could be plurality of cases in regard to the same offence leading to plurality of committal proceedings and orders. The word "case" cannot be interpreted in a narrow and technical way.

The aforesaid proposition of law makes it abundantly clear that out of a single incident concerning an offence there may be a number of cases qua different accused persons and secondly a number of committal proceedings as well, if the need be there.

The next decision in the series is *Ram Deo Roy v. Ram Dhyan Roy & Anr., 1993 (2) Crimes 538 (Patna)*. In this case (a case u/ss 302/201/34 IPC) one of the accused persons remained absent before the committal Court. After committal the absconding accused appeared before the Sessions Court and was allowed to face the trial along with other accused persons. Examining the legality and propriety of the procedure the Court came to the conclusion that for committal it is necessary that either the accused appears or is brought before the Magistrate and in absence of an accused no committal order can be passed. The Court was of the view that Sections 207 and 208 of the Code pre-suppose the appearance of the accused before the Magistrate. The Court further made it clear that presence of an accused before the Sessions Court without committal of his case is meaningless. The presence must be in pursuance of the commitment of the case of the accused to the Court of Sessions under Section 209 of the Code and the appearance of the accused cannot be deemed to be an appearance for the purpose of section 226 of the Code if it is not in pursuance of the commitment of the case under Section 209 of the Code for starting with the trial of the case.

In the aforesaid case the controversy regarding 'committal of the accused' and 'committal of the case' was also examined and it was observed that unless a particular accused appears or is brought before the committing Magistrate "his case" cannot be committed to the Court of Session. The Court summed up the position as under:

> "Thus to sum up it is a condition precedent for trial of an accused before a Court of Session that he should present himself before the Magistrate for observance of the provisions of section 207 as well as the procedure laid by section 209 of the Code by the committing Magistrate. His appearance before the Court of Session directly for the first time bypassing the provisions of Sections 207 and 209 of the Code shall not be deemed to be his appearance before the Sessions Court as an accused in the sessions case in question and he cannot be allowed to join the trial. The Sessions Judge has no power to try the case of an accused in a session trial unless the accused has been committed to the Court of Session, except as provided under Section 319 of the Code, which also does not deal

with an accused in the case but is for those persons who have not been accused in the case."

Again in *Israil Rai & Ors. v. State of Bihar, 1994 (3) Crimes 535 (Patna)* the issue was examined at length and it was held that under the circumstance it can be said that the Magistrate is required to commit the accused persons who are before him and if an additional or supplementary charge-sheet is submitted against some of them in such situation there can be a subsequent committal order and subsequent committal is not prohibited under Section 209 Cr.P.C.

Karnataka High Court also examined this issue in *H.M. Revanna v. State of Karnatak, 1997 (4) Crimes 253* and after referring to various authorities reached the conclusion that it is incumbent on the Magistrate to secure the presence of accused persons first and thereafter to commit the case to the Court of Session. The court also examined the Course to be pursued when it is not possible to secure the presence of the absconding accused persons and held that :

> "If the Magistrate cannot secure the presence of the accused persons, he is at liberty to split up the case against the persons who are present before the Magistrate and to proceed with the case following the necessary procedure as contemplated under Cr.P.C."

Here it may be pointed out that clause (2) of Section 317 of the Code contemplates split of the case either in inquiry or trial when it says that the Court may order that the case of such accused who is neither present nor represented by the pleader can be taken up or can be tried separately.

In view of the aforesaid, there may not be two opinions that a Magistrate has no jurisdiction to commit a case in the absence of an accused person. Where there are more than one accused the Magistrate should make efforts to secure the presence of the absconding accused by resorting to procedure provided in Chapter VI of the Code. If even after that the presence cannot be secured the Magistrate can commit the case regarding those accused persons, who are present, and proceed against the absconding accused persons u/s 317 (2) r/w/s 299 of the Code.

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विधिक समस्याऐं एवं समाधान

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

आदेश 23 नियम 3 व्यवहार प्रक्रिया संहिता के अन्तर्गत पारित आज्ञप्ति को समझौते के अविधिपूर्ण होने के आधार पर अपास्त कराने हेतु अनुज्ञेय विधिक प्रक्रिया क्या है?

व्यवहार प्रक्रिया संहिता (अत्रपश्चात् 'संहिता') के आदेश 23 नियम 3 (ए) के अनुसार किसी आज्ञप्ति को इस आधार पर अपास्त कराने के लिये वाद संधारणीय नहीं होगा कि जिस समझौते पर आज्ञप्ति आधारित है, वह अविधिपूर्ण था। संहिता की धारा 96 (3) प्रावधित करती है कि पक्षकारों की सहमति से पारित आज्ञप्ति के विरूद्ध अपील संधारणीय नहीं है।

उपरोक्त प्रावधानों के परिप्रेक्ष्य में यह प्रश्न उठना स्वाभाविक है कि समझौता आज्ञप्ति के अविधिपूर्ण समझौते पर आधारित होने के आधार पर उसे कहां और किस प्रकार चुनौती दी जा सकती है।

संहिता में वर्ष 1976 में किये गये संशोधन के पूर्व आदेश 43 नियम 1 (एम) के अन्तर्गत समझौता संबंधी आदेश को चुनौती दी जा सकती थी लेकिन इस प्रावधान को वर्ष 1976 के संशोधन द्वारा विलोपित कर दिया गया। इसके साथ–साथ ही आदेश 43 में नियम 1(अ) संयोजित किया गया जिसका उपनियम (2) प्रावधित करता है कि समझौते के आधार पर पारित आज्ञप्ति को अपीलार्थी इस आधार पर चुनौती दे सकता है कि समझौता स्वीकार नहीं किया जाना चाहिये था अथवा स्वीकार किया जाना चाहिये था।

आदेश 23 नियम 3 के परन्तुक में यह भी उल्लेख किया गया है कि जहां दो पक्षों के मध्य इस बारे में विवाद है कि समझौते के आधार पर समायोजन अथवा संतुष्टि हुई है या नहीं, वहां न्यायालय कारण अभिलिखित करते हुए ऐसे प्रश्न का विनिश्चय कर सकेगा। उक्त नियम 3 के स्पष्टीकरण में यह भी उल्लेखित है कि भारतीय संविदा अधिनियम की परिधि में शून्य अथवा शून्यकरणीय समझौते या अनुबंध को नियम 3 प्रयोजन हेतु विधिपूर्ण नहीं माना जायेगा।

माननीय सर्वोच्च न्यायालय ने *बनवारीलाल विरूद्ध चन्दो देवी, ए.आई.आर. 1993 एस. सी. 1139* के मामले में उक्त प्रावधानों के प्रकाश में विधिक स्थिति की समीक्षा करते हुए यह अभिनिर्धारित किया है कि अविधिपूर्ण होने के आधार पर समझौते को चुनौती देने वाला पक्ष या तो संहिता के आदेश 23 नियम 3 के परन्तुक के अन्तर्गत याचिका प्रस्तुत कर उसकी वैधता को चुनौती दे सकता है अथवा धारा 96 नियम 1 के अन्तर्गत अपील में ऐसी समझौता आज्ञप्ति को आदेश 43 नियम 1 (ए) के प्रकाश में चुनौती दे सकता है।

आदेश 23 नियम 3 के परन्तुक के अन्तर्गत प्रस्तुत याचिका उसी न्यायालय के समक्ष, जिसने समझौता आज्ञप्ति पारित की है, उक्त परन्तुक अथवा धारा 151 के अन्तर्गत प्रस्तुत की जा सकती है तथा ऐसा न्यायालय यदि यह पाता है कि समझौता विधिपूर्ण नहीं था तो ऐसी आज्ञप्ति को अपास्त करने के अलावा और कोई विकल्प नहीं होगा।

इस क्रम में न्याय दृष्टांत *भगवती प्रसाद वि. राधाचरण, 2001 (3) एम.पी.एल.जे.387, बाबूलाल*

वि. श्रीमती चातुरिया, 2000 (3) एम.पी.एल.जे. 204 एवं न्याय दृष्टांत बालमुकुंद वि. भुजबल सिंह आदि, 2002 (2) विधि भास्वर 45 भी अवलोकनीय हैं।

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क्या प्रतिवादी का सहवादी के रूप में अन्तर्विनियमन (Transposition) अनुज्ञेय है?

सामान्यतः प्रधान वादकारी होने के रूप में वादी को यह तय करने का अधिकार हैं कि उसके साथ वादी के रूप में किन व्यक्तियों को शामिल किया जाये। लेकिन कतिपय स्थितियों में वाद बाहुल्यता से बचने तथा निहित विवाद का सम्यक् एवं प्रभावी निराकरण करने के लिये प्रतिवादी का सहवादी के रूप में अन्तर्विनियमन (Transposition) आवश्यक हो सकता है। अन्तर्विनियमन की ऐसी अधिकारिता का स्रोत्र व्यवहार प्रक्रिया संहिता के आदेश 1 नियम 10 (2) में विहित प्रावधान हैं जो न्यायालय को इस बारे में विस्तृत विवेकाधिकार प्रदान करते हैं। न्याय दृष्टांत *आर.एस. मदनप्पा वि. चन्द्रम्मा एवं एक अन्य, ए.आई.आर. 1965 एस.सी. 1812* में माननीय सर्वोच्च न्यायालय के द्वारा यह प्रतिपादित किया गया है कि प्रतिवादी के रूप में संयोजित व्यक्ति को मामले की परिस्थितियों को दृष्टिगत रखते हुए न केवल उसकी प्रार्थना पर सहवादी के रूप में अन्तर्विनियमिति (Transpose) किया जा सकता है, अपितु न्यायालय स्वमेव आदेश 1 नियम 10 (2) व्यवहार प्रक्रिया संहिता के अन्तर्गत ऐसा आदेश दे सकता है। न्याय दृष्टांत *भूपेन्द्र वि. राजेश्वर, ए.आई.आर. 1931 पी.सी. 162* में प्रिवी काउन्सिल के द्वारा यह अभिनिर्धारित किया गया है कि प्रतिवादी को सहवादी के रूप में अन्तर्विनियमित करने की अधिकारिता का प्रयोग न्यायालय को पक्षकारों के मध्य सम्यक् न्याय करने के उद्देश्य से करना चाहिये। न्याय दृष्टांत *बासुदेव नारायणसिंह आदि वि. शेष नारायणसिंह आदि, ए.आई.आर. 1979 पटना 73* में अन्तर्विनियमन की उपादेयता स्पष्ट करते हुये यह प्रतिपादित किया गया है कि यदि प्रतिवादी के द्वारा किये जाने वाले अधिकार का दावा वादी के वादकारण पर ही आधारित है तो उस दशा में ऐसे प्रतिवादी को सहवादी के रूप में अन्तर्विनियमित करना विधिक रूप से उचित होगा। बंटवारे के वादों में ऐसी स्थिति सामान्यतया दृष्टिगोचर होती है।

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क्या धारा 89 सिविल प्रक्रिया संहिता के अन्तर्गत न्यायालय द्वारा पक्षकारों को विवादों के निराकरण (Settlement of dispute) के लिये दिये गये किसी प्रकार हेतु निर्देशित (refer) किये जाने पर वादी न्याय शुल्क वापसी का पात्र होगा?

न्याय शुल्क अधिनियम, 1870 की धारा 35 के अन्तर्गत प्रदत्त शक्तियों का प्रयोग करते हुए म.प्र. राज्य शासन द्वारा अधिसूचना एफ. क्रमांक 9–1–86–बी–xxi, दिनांकित 10.04.87 जारी की गई, जिसके पद क्र. (1) के उप पद क्र. (3) अनुसार लोक अदालत तंत्र के माध्यम से किसी सक्षम न्यायालय के समक्ष लंबित प्रकरण के निराकरण पर पक्षकार उसके द्वारा अदा किये जा चुके न्याय शुल्क को वापस पाने का अधिकारी होता है।

तत्पश्चात् म.प्र. राज्य शासन की अधिसूचना एफ.क्र. 17 (b) 4/2003/234/21–बी (II) द्वारा उक्त अधिसूचना में संशोधन करते हुए यह व्यवस्था की गई कि पक्षकार उक्तानुसार उसके द्वारा अदा किये गये न्याय शुल्क में से 10 प्रतिशत राशि कम करने के उपरांत शेष राशि वापस पाने का अधिकारी होगा। किन्तु दिनांक 01.07.02 से सिविल प्रक्रिया संहिता, 1908 में सिविल प्रक्रिया संहिता (संशोधन) अधिनियम, 1999 की धारा 07 के माध्यम से न्यायालय के बाहर विवादों के निराकरण की व्यवस्था हेतु धारा 89 अर्न्तस्थापित की गई और उक्त संशोधन अधिनियम की धारा 34 के अनुसार न्याय शुल्क अधिनियम, 1870 में नवीन धारा 16 अर्न्तस्थापित की गई हैं जिसमें यह व्यवस्था की गई है कि यदि न्यायालय द्वारा

पक्षकारों को धारा 89 सिविल प्रक्रिया संहिता, 1908 के प्रावधानों के अन्तर्गत उक्त धारा के अन्तर्गत विवादों के निराकरण के लिये वर्णित प्रकारों में से किसी प्रकार से निर्देशित (refer) किया जाता है तो वादी संबंधित न्यायालय से इस आशय का प्रमाण पत्र पाने का अधिकारी होगा कि वह संबंधित जिलाधीश से वाद के संबंध में अदा किये गये संपूर्ण न्याय शुल्क को वापस प्राप्त कर सकेगा।

धारा 16 न्याय शुल्क अधिनियम का उक्त अधिसूचनाओं पर अभिभावी प्रभाव (overriding effect) होने से सिविल प्रक्रिया संहिता की धारा 89 के अन्तर्गत विवाद के निराकरण हेतु न्यायालय द्वारा पक्षकारों को निर्देशित किये जाने पर वादी न्याय शुल्क अधिनियम की धारा 16 के अनुसार उसके द्वारा अदा किये गये संपूर्ण न्याय शुल्क की राशि जिलाधीश से वापस प्राप्त करने का अधिकारी होने संबंधी प्रमाणपत्र संबंधित न्यायालय से पाने का पात्र होगा।

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क्या व्यवहार प्रकरणों अथवा दाण्डिक परिवाद प्रकरणों में पक्षकार/पीड़ित व्यक्ति द्वारा नियुक्त मुख्त्यार को पक्षकार/पीड़ित व्यक्ति के स्थान पर या विकल्प में अभिसाक्ष्य देने का अधिकार है?

जहां तक व्यवहार प्रकरणों का संबंध है, आदेश 3 नियम1 व्यवहार प्रक्रिया संहिता मुख्तारनामा धारक को पक्षकार की ओर से 'कार्य' निष्पादित करने का अधिकार प्रदान करती है। प्रश्न यह है कि क्या 'कार्य' की श्रेणी में पक्षकार की ओर से 'अभिसाक्ष्य' दिया जाना भी सम्मिलित है? माननीय सर्वोच्च न्यायालय द्वारा *जानकी वासुदेव भोजवानी एवं अन्य वि. इंडसिंध बैंक लिमिटेड, ए.आई.आर. 2005 सु.को. 439* के न्यायदृष्टांत में विनिर्णीत किया गया है कि 'कार्य' शब्द का विस्तार पक्षकार के स्थान पर एवं उसकी ओर से 'अभिसाक्ष्य' देने तक का नहीं है। ऐसा अभिकर्ता या मुख्त्यार केवल उन्हीं बिंदुओं पर सक्षम साक्षी हो सकता है जो उसके बतौर मुख्त्यार द्वारा किए गए कार्य से संबंध रखते हो। उन बिन्दुओं पर साक्ष्य प्रस्तुत करने से वह निषेधित है जो पक्षकार द्वारा स्वयं संपादित कृत्यों से संबंध रखते हों। इसी प्रकार उन बिन्दुओं पर भी ऐसा मुख्त्यार साक्ष्य नहीं दे सकता है जो कि मूल अभिकर्ता/पक्षकार की व्यक्तिगत जानकारी के विषयक हो और जिनके संबंध में पक्षकार का प्रतिपरीक्षण किए जाने का अधिकार विपक्ष को प्राप्त हो।

दाण्डिक परिवाद प्रकरणों का जहां तक प्रश्न है, तो *डा. अनिल कुमार हरितवाल वि. संत प्रकाश गुप्ता एवं अन्य, 2001 (3) एम.पी.एच.टी. 325* के प्रकरण में यह विनिश्चित किया गया कि मुख्त्यार को परिवादी की ओर से परिवाद प्रस्तुत करने का अधिकार है। यह प्रकरण धारा 138 पराक्राम्य लिखत अधिनियम से संबंधित था। इस न्यायदृष्टांत में धारा 2 पॉवर ऑफ एटार्नी अधिनियम, 1882 का हवाला दिया गया, जिसके अनुसार मुख्त्यार द्वारा किये गये कार्य के विषय में यह उपधारणा होगी कि उक्त कार्य उस व्यक्ति का है जिसने मुख्त्यार नियुक्त किया था। इस प्रकार यदि मुख्त्यार परिवाद प्रस्तुत कर रहा है तो यही माना जाएगा कि मुख्त्यार के नियोक्ता अर्थात् 'Payee' या 'holder in due course' ने परिवाद प्रस्तुत किया है जो कि धारा 142 (a) में विहित निर्धारित परिवादी है। ऐसा मुख्त्यार यद्यपि परिवाद प्रस्तुत करने में सक्षम तो है, तथापि परिवादी की हैसियत से साक्ष्य नहीं दे सकता है। ऐसा अभिनिर्धारण *महेन्द्र कुमार आर्मस्ट्रांग एवं अन्य, 2005 (2) एम.पी.एल.जे. 419* के निर्णय में किया गया है। इस निर्णय में आगे कहा गया है कि धारा 138 पराक्राम्य लिखत अधिनियम के परिवाद का संज्ञान मुख्तार की साक्ष्य के आधार पर लिया जा सकता है एवं धारा 204 दण्ड प्रक्रिया संहिता के अन्तर्गत आदेशिका जारी की जा सकती है परन्तु परिवादी की साक्ष्य के बिना प्रकरण का अंतिम रूप से विनिश्चयन नहीं हो सकता है। इस निर्णय में भोजवानी (पूर्वोक्त) में उच्चतम न्यायालय द्वारा प्रतिपादित सिद्धांतों को निष्कर्ष का आधार बनाया गया है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

64. CONSTITUTION OF INDIA – Article 136

Case of appellant and non-appellant convict standing on the same footing – Apex Court under Article 136 can set aside conviction of non-appellant as well.

Anjlus Dungdung v. State of Jharkhand

Judgment dt. 04.10.2004 passed by the Supreme Court in Criminal Appeal No. 360 of 2004, reported in (2005) 9 SCC 765

Held :

We find that the cases of accused Rajesh Yadav @ Raju Gowala and Silbestor Dungdung stand on the same footing as that of the appellant, though their conviction was upheld by the High Court and no appeal has been preferred to this Court. It is well settled that in such circumstances, this Court, in the exercise of powers under Article 136 of the Constitution, can set aside their conviction as well in spite of the fact that they did not prefer any appeal to this Court if, in its opinion, their case also stands on the same footing. Reference in this connection may be made to the decision of this Court in the case of *Pawan Kumar v. State of Harayana, (2003) 11 SCC 241* in which case even though no appeal was preferred by one of the accused, but while hearing appeal of another accused, this Court having doubted veracity of the prosecution case in its entirety, interfered with the conviction of that accused also who did not prefer any appeal to this Court. Thus, we are of the view that accused Rajesh Yadav @ Raju Gowala and Silbestor Dungdung are also entitled to acquittal along with the appellant.

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65. CRIMINAL TRIAL :

Appreciation of Evidence – Failure to examine all the witnesses named in FIR, effect of – Such failure cannot be a ground to reject prosecution evidence out-rightly – Court should examine the evidence available on record – Non-examination of I.O. – Court should see whether it has prejudiced the accused.

Birendra Rai and others v. State of Bihar

Judgment dt. 18.11.2004 passed by the Supreme Court in Criminal Appeal No. 603 of 2004, reported in (2004) 9 SCC 719

Held :

It is then argued that several persons were named in the first information report, as also by the witnesses, who were present in the nearby shops when the occurrence took place but none of them has been examined. Mere failure to

examine all the witnesses who may have witnessed the occurrence will not result in outright rejection of the prosecution case if the witnesses examined by the prosecution are found to be truthful and reliable. Moreover, we cannot ignore the reality that many eyewitnesses shy away from giving evidence for obvious reasons.

It was then submitted that the investigating officer was not examined in this case and that has resulted in prejudice to the accused. Having gone through the evidence of witnesses and other material on record, we do not find that any prejudice has been caused to the defence by non-examination of the investigating officer. The mere fact that according to the seizure list a stick with blood-stains and pellet marks was seized from the place of occurrence, would not advance this argument any further. The seizures have not been proved in this case because the investigating officer was not examined, and the seizure witness has turned hostile. We, therefore, ignore the seizures made and base our decision on the other evidence and the evidence of two eyewitnesses, who have impressed us as truthful.

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66. MADHYASTHAM ADHIKARAN ADHINIYAM, 1983 (M.P.) – Sections 2 (i) and 20

Bar of jurisdiction of Civil Court u/s 20 regarding dispute concerning 'works contract'– 'Works Contract', meaning of – Law explained.

President, Nagar Panchayat, Pichhore and another v. Rakesh Kumar Sehgal

Reported in 2005 (2) Vidhi Bhasvar 141

Held :

As regards jurisdiction of the civil Court, counsel for appellant submits that State Government has framed a law, namely, M.P. Madhyastham Adhikaran Adhiniyam, 1983. Section 20 of the said Act bars the jurisdiction of the civil Court. After perusing the said section, I find that the said section bars the civil Courts in respect of the matters about which the Tribunal constituted under the said Adhiniyam can take cognizance of the matter. Thus, as per the said section, all the matters which are within the jurisdiction of the Tribunal cannot be decided by the civil Court and the civil Court has no jurisdiction to entertain them and only the Tribunal constituted under the said Adhiniyam is empowered to deal with them. For appreciating the arguments advanced by learned counsel for the appellant it is necessary to find out whether the present suit can be decided by the Madhyastham Adhiniyam. For that purpose, sections 2 (d) and 2 (i) are relevant. Section 2 (d) defines the word 'dispute' and lays down that any claim of ascertained money valued at Rs. 50,000/- or more relating to differences arising out of the execution or non-execution of the work contract or part thereof. Thus, from reading the definition of word 'dispute' it is clear that there must be a dispute about the money valued at Rs. 50,000/- or more relating to execution

or non-execution of work contract. The word 'work contract' is defined is section 2 (i) and reads as under :

> " 2 (i) 'works-contract' means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, power house, transformers or such other works of the State Government or Public Undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works."

Thus, work contract as per the said definition means a contract for a work relating to construction, repair, maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, power house, transformers etc. and includes an agreement for supply of goods or material relating to execution of the said work. This means that there must be an agreement relating to construction of building etc. and the goods have been supplied in relation to execution of the said construction work.

In the present case, plaintiff has approached the Court merely by saying that he has supplied the goods to the Municipal Council. He has nowhere averred that these goods were supplied in connection to a work order issued in respect of any construction work. 'Defendant', in his written statement has also nowhere alleged that the goods were supplied in connection with any construction work and in such circumstances the mere supply of goods unconnected with any particular building or construction work will not be covered under the definition of the word 'work contract' as defined by section 2 (i). Hence the present dispute is not a dispute which is within the jurisdiction of the Tribunal constituted under the said Adhiniyam.

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67. RENT CONTROL AND EVICTION :
Notice – Whether notice terminating tenancy required in cases governed by rent laws? Held, No – Law explained.
Jaswant Raj Soni v. Prakash Mal
Reported in 2005 (II) MPJR 502

Held :

We have heard the learned counsel for the parites. So for as the requirement of issuance of notice under Section 106 of the Transfer of Property Act before institution of an eviction petition is concerned, the issue stands concluded as per a seven Judge bench decision of this Court in *V. Dhanpal Chettiar vs. Yesodai Ammal, 1979 (4) SCC 214.* It has been held that there is no

legal requirement for issuance of a notice under Section 106 of the Transfer of Property Act before institution of an eviction petition. Therefore, requirement of notice under Section 106 is not necessary.

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68. CONSTITUTION OF INDIA : Articles 32 & 226
Ambit and scope of writ jurisdiction under Articles 32 and 226 regarding grant of compensation for violation of fundamental rights – Law explained.
S.P.S. Rathore v. State of Harayana and others
Judgment dated 06.05.2005 Passed by the Supreme Court in Civil Appeal No. 1276 of 2003, reported in (2005) 10 SCC 1

Held :

No doubt, the courts while exercising jurisdiction under Articles 32 and 226 can award compensation for the violation of fundamental rights guaranteed by the Constitution but such a power should not be lightly exercised. In *Rudul Sah v. State of Bihar, (1983) 4 SCC 141* where compensation was awarded, this Court was faced with a situation where the petitioner who was acquitted by the Court of Session was released from jail more than 14 years after he was acquitted. The petitioner approached the Court asking for his release on the ground that his detention in the jail was unlawful and claimed compensation for the illegal incarceration. The petitioner was released from jail and as regards the compensation for illegal detention the Court held that though Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, however, in order to rectify the grave injustice perpetrated upon the petitioner by illegally detaining him in jail for 14 years after his acquittal, which violated his fundamental right to life and liberty guaranteed under Article 21 of the Constitution, the court in the exercise of its jurisdiction under Article 32, can pass an order for the payment of money if such an order is in the nature of compensation *consequential upon the deprivation of a fundamental right.* This principle has been consistently followed in the subsequent line of cases : *Sebastian M. Hongray v. Union of India, (1984) 3 SCC 82, Bhim Singh v. State of J & K, (1985) 4 SCC 677, Peoples' Union for Democratic Rights v. Police Commr., (1989) 4 SCC 730; State of Maharashtra v. Ravikant S. Patil, (1991) 2 SCC 373, Peoples' Union for Democratic Rights v. State of Bihar, (1987) 1 SCC 265, Saheli, A Women's Resources Centre v. Commr. of Police, (1990) 1 SCC 422, Arvinder Singh Bagga v. State of U.P., (1994) 6 SCC 565, P. Rathinam v. Union of India, (1989) Supp (2) SCC 716, Death of Sawinder Singh Grover, in re, (1995) Supp (4) SCC 450; Inder Singh v. State of Punjab, (1995) 3 SCC 702, D.K. Basu v. State of W.B., (1997) 1 SCC 416, Chairman, Rly. Board v. Chandrima Das, (2000) 2 SCC 465.*

In *Nilabati Behera v. State of Orissa, (1993) 2 SCC 746,* a writ petition was filed under Article 32 of the Constitution for determining the claim of compensation consequent upon the death of the petitioner's son in police custody. In view

of the denial by the State that death was due to police harassment when the deceased was in police custody, this Court gave a direction to the District Judge, Sundergarh in Orissa, to hold an inquiry into the matter and submit a report.The District Judge reached the conclusion that it was a case of custodial death. In view of the dispute as to the correctness of the findings in the report of the District Judge, the matter was examined afresh by this Court in the light of the objections raised. This Court also reached the same conclusion on a reappraisal of the evidence adduced at the enquiry. On this conclusion, the question arose as to the liability of the State for payment of compensation for custodial death. The Court held that : (SCC p. 762, para 17)

> " '[A] claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right".

The Court further observed that : (SCC pp. 762-63, para 17)

> "The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

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69. CIVIL PROCEDURE CODE, 1908 – Section 100
Second appeal – Non-formulation of substantial question of law, effect of – It amounts to an illegality – Law explained.
Manicka Poosali (Dead) by LRs. and others v. Anjalai Ammal and another
Judgment dated 17.03.2005 passed by the Supreme Court in Civil Appeal No. 6736 of 1999, reported in (2005) 10 SCC 38

Held :

Sub-section (3) of Section 100 provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that a substantial question of law is involved in a case shall formulate the said question. Sub-section (5) provides that *"the*

appeal shall be heard on the question so formulated". (emphasis supplied) It reserves the liberty with the respondent against whom the appeal was admitted *ex parte* and the question of law was framed in his absence to argue that the case did not involve the question of law so framed. Proviso to sub-section (5) states that the question of law framed at the time of admission would not take away or abridge the power of the High Court to frame any other substantial question of law which was not formulated earlier, if the court is satisfied that the case involved such additional questions after recording reasons for doing so. A reading of Section 100 makes it abundantly clear that if the appeal is entertained without framing the substantial question of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. In a number of judgments it has been held by this Court that the existence of the substantial question of law is the *sine qua non* for the exercise of jurisdiction under Section 100 of the Code of Civil Procedure. (Refer to *Kshitish Chandra Purkait v. Santosh Kumar Purkait, (1997) 5 SCC 438, Panchugopal Barua v. Umesh Chandra Goswami, (1997) 4 SCC 713, Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722, Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 and Thiagarajan v. Venugopala swamy B. Koil, (2004) 5 SCC 762.)*

In *Santosh Hazari case* (supra) a three-Judge Bench of this Court after examining the provision of Section 100 exhaustively has concluded that the scope of hearing of the second appeal by the High Court is circumscribed by the questions formulated by the High Court at the time of the admission of the appeal and that the High Court has to hear the appeal on the substantial questions of law so framed. That the High Court would be at liberty to hear the appeal on any other substantial question of law, not earlier formulated by it, if the Court is satisfied of two conditions i.e. (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

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70. CIVIL PROCEDURE CODE, 1908 – Section 9
WORDS AND PHRASES :

(i) Jurisdiction of Civil Court – Principle relating to exclusion of jurisdiction – Law stated in *Dhulabhai's case* reiterated.

(ii) Expression 'cause of action', meaning and connotation of.

Swamy Atmananda and others v. Sri Ramakrishna Tapovanam and others

Judgment dated 13.04.2005 passed by the Supreme Court in Civil Appeal No. 2395 of 2000, reported in (2005) 10 SCC 51

Held :

(i) In *Dhulabhai v. State of M.P., (1968) 3 SCR 662,* Hidayatullah, C.J. Summarised the following principles relating to the exclusion of jurisdiction of civil courts : (SCR pp. 682 B-H-683 A-C)

(a) "Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(b) "Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

(c) "Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals."

(d) "When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit."

(e) " Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies."

(f) "Questions of the correctness of the assessment apart from its constitutionality, are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry."

(g) "An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

(See *Rajasthan SRTC v. Krishna Kant, (1995) 5 SCC 75, Dwarka Prasad Agrawal v. Ramesh Chander Agarwal, (2003) 6 SCC 220, Sahebgouda*

v. Ogeppa, (2003) 6 SCC 151, and *Dhruv Green Field Ltd. v. Hukam Singh, (2002) 6 SCC 416*)

(ii) Osborne's Concise Law Dictionary "cause of action" as the fact or combination of facts which give rise to a right or action. In *Black's Law Dictionary* it has been stated that the expression cause of action is the fact or facts which give a person a right to judicial relief. In Stroud's Judicial Dictionary a cause of action is stated to be the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.

A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.

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71. SERVICE LAW :

Punishment – Scope of interference with quantum of punishment – Jurisdiction of Court to interfere – Law explained.

Damoh Panna Sagar Rural Regional Bank and another v. Munna Lal Jain

Judgment dated 17.12.2004 passed by the Supreme Court in Civil Appeal No. 8258 of 2004, reported in (2005) 10 SCC 84

Held :

The scope of interference with quantum of punishment has been the subject-matter of various decisions of this Court. Such interference cannot be a routine matter.

Lord Green said in 1948 in the famous *Associated Provincial Picture Houses v. Wednesbury Corpn., (1947) 2 All ER 680 (CA)* that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in *Council of Civil Service Unions v. Minister for Civil Service, 1985 AC 374* (called *"CCSU case"*) summarised the principles of judicial review of administrative action as based upon one or the other of the following viz. illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility."

In *Union of India v. G. Ganayutham, (1997) 7 SCC 463* this Court summed up the position relating to proportionality in paras 31 and 32, which read as follows : (SCC pp. 478-80)

"31. The current position of proportionality in administrative law in England and India can be summarised as follows :

(1) To judge the validity of any administrative order or statutory discretion, normally the *Wednesbury* test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the *Wednesbury* (supra) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational – in the sense that it was in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the *CCSU (supra)* principles.

(3) (a) As per *R.V. Secy. of State for Home Deptt. ex p Bugdaycay, (1987) 1 All ER 940, R.V. Secy. of State for the Home Deptt., ex p Brind, (1991) 1 All ER 720* and *R.V. Ministry of Defence, ex p Smith, (1996) 1 All ER 257* as long as the convention is not incorporated into English law, the English courts merely exercise a *secondary judgment* to find out if the decision-maker could have, on the material before him, arrived at the *primary judgment* in the manner he has done.

(3) (b) If the convention is incorporated in England making available the principle of proportionality, then the English courts will render *primary judgment* on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4) (a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/ tribunals will only play a secondary role while the primary judgment

as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the courts is to be based on *Wednesbury* and *CCSU* principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of 'proportionality' and assume a primary role, is *left open*, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Article 19, 21 etc. are involved and not for Article 14.

32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of 'proportionality'. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to 'irrationality', there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in *'outrageous'* defiance of logic. Neither *Wednesbury* nor *CCSU* tests are satisfied. We have still to explain *Ranjit Thakur, v. Union of India, (1987) 4 SCC 611.*

(emphasis in original)

The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case (supra) the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put differently unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court/tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In the normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the appellate authority to reconsider the penalty imposed.

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72. SPECIFIC RELIEF ACT, 1963 – Section 34
LAND REVENUE CODE, 1959 (M.P.) – Section 57 (2)
Suit for declaration and possession of agricultural land – Whether Civil Court has jurisdiction – Held, suit can directly be filed before Civil Court.
Hukam Singh (Dead) By L. Rs. and others v. State of M.P.
Judgment dated 09.12.2004 passed by the Supreme Court in Civil Appeal No. 103 of 2000, reported in (2005) 10 SCC 124

Held :

A reading of the judgment of the trial court shows as if the suit was for declaration of title. We have seen the original plaint, which is in Hindi. The learned counsel for the State, on seeing the averments made in the plaint and the relief sought for, could not dispute that in the said suit, declaration was sought by the appellant in relation to his rights as a *bhumiswami.*

Paras 14 and 17 of the decision rendered by the Full Bench of the Madhya Pradesh High Court in *Ramgopal Kanhaiyalal v. Chetubatte, AIR 1976 MP 160 (FB)* read: (AIR p. 164)

> "14. It must be remembered that a *bhumiswami* has a title though he is not the 'swami' of the 'bhumi' which he holds, in the sense of absolute ownership, because as declared in Section 257 of the Revenue Code, ownership of land vests in the State Government, yet, he is a *bhumiswami.* He is not a mere lessee. His rights are higher and superior. They are akin to those of a proprietor in the sense that they are transferable and heritable and, he cannot be deprived of his possession, except by due process of law and under statutory provisions, and his rights cannot be curtailed except by legislation.
>
> 17. We, therefore, hold that a *bhumiswami* is not bound to avail himself of the speedy remedy provided in Section 250 of the Code. It is open to him to take recourse to the summary remedy under Section 250, or even without it straightway bring a suit in the civil court for declaration of his title and possession. Even if there has been a decision under Section 250 by a Revenue Court, the party aggrieved may institute a civil suit to establish his title to the disputed land. We further hold that *Nathu v. Dilbande Hussain, AIR 1967 MP 14* was correctly decided. The civil court can take cognizance of a suit. This is our answer to the questions referred to us."

The view taken by the Full Bench of the Madhya Prades High Court is affirmed by this Court in *Rohini Prasad v. Kasturchand, (2000) 3 SCC 668.*

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73. **CRIMINAL TRIAL :**

Appreciation of evidence – Non-examination of eye witnesses named in FIR, effect of – Court should assess worth of the testimony of witness examined by prosecution – Mere non–examination of other witness not to adversely effect prosecution case.

Pohlu v. State of Haryana

Judgment dated 02.11.2004 passed by the Supreme Court in Criminal Appeal No. 936 of 1999, reported in (2005) 10 SCC 196

Held:

It was then submitted that some of the material witnesses were not examined and in this connection it was argued that two of the eyewitnesses named in the FIR, namely, Chander and Sita Ram were not examined by the prosecution. Dharamvir, son of Sukhdei was also not examined by the prosecution though he was a material witness, being an injured eyewitness, having witnessed the assault that took place in the house of Sukhdei, PW2. It is true that it is not necessary for the prosecution to multiply witnesses, if it prefers to rely upon the evidence of the eyewitnesses examined by it, which it considers sufficient to prove the case of the prosecution. However, the intrinsic worth of the testimony of the witnesses examined by the prosecution has to be assessed by the court. If their evidence appears to be truthful, reliable and acceptable, the mere fact that some other witnesses have not been examined, will not adversely affect the case of the prosecution.

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74. **INDIAN PENAL CODE, 1860 – Sections 304-B and 120**

Dowry death – Lack of specific evidence to show complicity of mother-in-law or father-in-law – Mere physical presence in the house not sufficient to establish penal liability or to give rise to inference of criminal conspiracy.

Angoori and another v. State of Rajasthan

Judgment dated 29.07.2004 passed by the Supreme Court in Criminal Appeal No. 1110 of 2002, reported in (2005) 10 SCC 210

Held :

Coming to Crl. A. No. 1110 of 2002, the appellants Angoori and Amrit Lal were admittedly proved to be present in the house. There was no allegation that these appellants were causing any cruelty to deceased Neeraj. In fact, the evidence of PW 1 would show that appellant Amrit Lal came to the house of PW 1 and appealed to him that he would take Neeraj to the matrimonial home and take care of her. As regards appellant Angoori also, there is no case that she caused any cruelty or harassment to the deceased.

Neeraj used to visit her parents' house and narrated the incidents which happened in the matrimonial home and these facts are admitted by PW 1 and PW 10 in their evidence. In any of these incidents she never complained that

the appellants Angoori and Amrit Lal caused any harm or hurt to her life. It appears that the deceased might have wanted to end her life because of the mental and physical torture caused by her husband Hemender Kumar. In the absence of specific evidence to show the complicity of the appellants Angoori and Amrit Lal for the offence punishable under Section 304-B IPC, we can only say that they are not guilty of any offence charged against them. The counsel for the State submitted that these appellants have been convicted under Section 120-B IPC as there was conspiracy on the part of these appellants for the commission of offence. In respect of conspiracy, also, no evidence has been adduced by the prosecution except their physicial presence in the house at the time of incident.

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75. INDIAN PENAL CODE, 1860 – Sections 415, 418 and 420
Cheating, offence of u/s 420 – Complainant must show existence of fraudulent and dishonest intention at the time of commission of offence – Law explained.
Anil Mahajan v. Bhor Industries Ltd. and another
Judgment dated 06.10.2004 passed by the Supreme Court in Criminal Appeal No. 1164 of 2004, reported in (2005) 10 SCC 228

Held :

In *Alpic Finance Ltd. v. P. Sadasivan, (2001) 3 SCC 513* this Court was considering a case where the complainant had alleged that the accused was not regular in making payment and committed default in payment of instalments and the bank had dishonoured certain cheques issued by him. Further allegation of the complainant was that on physical verification certain chairs were found missing from the premises of the accused and thus it was alleged that the accused committed cheating and caused misappropriation of the property belonging to the complianant. Noticing the decision in the case of *Nagawwa v. Veeranna Shivalingappa Kanjalgi, (1976) 3 SCC 736* wherein it was held that the Magistrate while issuing process should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused, and the circumstances under which the process issued by the Magistrate could be quashed, the contours of the powers of the High Court under Section 482 CrPC were laid down and it was held: (SCC p. 520, paras 10-11)

> "10. The facts in the present case have to be appreciated in the light of the various decisions of tis Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for

damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. *Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation.* Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. *In the complaint, there is no alleglation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property.* It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by wilful misrepresentation. We are told that the respondents, though committed default in paying some instalments, have paid substantial amount towards the consideration."

(emphasis supplied by us)

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76. INDIAN PENAL CODE, 1860 – Section 34 and 149
Charge framed with the aid of Section 149 not established – No charge framed with the aid of Section 34 – Whether conviction with the aid of Section 34 proper ? Held, Yes – Further held even solitary accused can be convicted with the aid of Section 34.
Mangu Khan and others v. State of Rajasthan
Judgment dated 24.02.2005 passed by the Supreme Court in Criminal Appeal No. 30 of 2004, reported in (2005) 10 SCC 374

Held :

The High Court, after reappreciating the evidence on record, took the view that the prosecution had failed to establish charges under Sections 148, 302/149 and 323/149 IPC against accused Deen Mohd. and Jamil Khan beyond reasonable doubt. This was the reason why they were acquitted. With regard to the present Appellants 1 to 3, the High Court was of the view that formation of

the common intention to commit the offence on the spot was established against them. Relying on the judgment of this Court in *Malhu Yadav v. State of Bihar, (2002) 5 SCC 724* the High Court held that although a charge under Section 34 IPC had not been framed against the present appellants, since the evidence showed formation of a common intention to commit the offence on the spot, their conviction under Section 302 IPC with the aid of Section 34 IPC would not cause any prejudice to them.

The contention urged by the learned counsel is unsound in law. There is no doubt that Isab and Dhandhad were done to death by serious injuries to the vital parts of their bodies, namely, skull. That the three appellants had a common intention to cause such injuries is evident from their waiting with arms, early in the morning, in the field. The evidence on record justifies the conclusion of the High Court. The manner in which the complainant party was attacked and two of them were done to death is borne out by the evidence and the High Court's findings on this issue are justified. May be, from the evidence, it may not be possible to pinpoint the person who dealt the fatal blow to each of the deceased. That is perhaps the reason why the appellants were all acquitted of the charge under Section 302 simpliciter. But when the evidence indicates that the three accused had repeatedly given blows with lathi, farsi and tanchia, and it is not possible to identify and acribe a particular injury to a particular accused, there would be nothing illegal in convicting the accused of the charge of Section 302 with the aid of Section 34 IPC. As to the object of Section 34, this Court in *Bharwad Mepa Dana v. State of Bombay, (1960) 2 SCR 172* observed: (SCR pp. 186-87)

> "We accept the position that we do not know which particular person or persons gave the fatal blows; but once it is found that a criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. The section is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established, Section 34 is at once attracted."

In fact, this precisely appears to be the role of Section 34, as this Court had indicated in *Harshadsingh Pahelvansingh Thakore, (1976) 4 SCC 640.* In the felicitous words of Krishna Iyer, J. the legal proposition is : (SCC pp. 642-43, para 7)

> "[W]e make the legal position clear that when a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play

with knives and lives, the cricumstance that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See *Amir Hussain v. State of U.P., (1975) 4 SCC 247; Maina Singh v. State of Rajasthan, (1976) 2 SCC 827.)* Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse 'They also serve who only stand and wait' a *fortiori* embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

In a situation when all the accused but one have been acquitted of the charge, it is possible to convict even the solitary accused under Section 302 with the aid of Section 34 (see also in this connection *Sukh Ram v. State of U.P., (1974) 3 SCC 656* and *Pipal Singh v. State of Punjab, (2001) 2 SCC 292.*

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77. INDIAN PENAL CODE, 1860 – Section 34
Common intention – Whether overt act on the part of accused necessary for bringing the case within Section 34 ? Held, No – Legislative history of Section 34 explained.
Babulal Bhagwan Khandare and another v. State of Maharashtra
Judgment dated 02.12.2004 passed by the Supreme Court in Criminal Appeal No. 1403 of 2004, reported in (2005) 10 SCC 404

Held :

As it originally stood Section 34 was in the following terms:

> "34. When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of Section 34 clear. This position was noted in *Mahbub Shah v. King Emperor, AIR 1945 PC 118.*

The section does not say "the common intention of all", nor does it say "an intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an

accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy v. State of A.P., AIR 1993 SC 1899,* Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

The above position was highlighted recently in *Anil Sharma v. State of Jharkhand, (2004) 5 SCC 679.*

In *Afrahim Sheikh v. State of W.B., AIR 1964 SC 1263* this Court stated that no doubt a person is only responsible ordinarily for what he does and Section 38 IPC ensures that. But Section 34 as well as Section 35 provide that if the criminal act is the result of the common intention, then every person who did the criminal act with such intention would be responsible for the total offence irrespective of the share which he had in its perpetration. The logic, highlighted illuminatingly by the Judicial Committee in the illustrious case of *Barendra Kumar Ghosh v. King Emperor, AIR 1925 PC 1* is that in crimes as in other things "they also serve who only stand and wait".

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78. CRIMINAL TRIAL :
SENTENCING :
Sentencing – Undue sympathy to impose inadequate sentence more harmful to justice delivery system – Determination of just and appropriate punishment, factors to be considered – Law explained.
State of U.P. v. Shri Kishan
Judgment dated 30.11.2004 by the Supreme Court in Criminal Appeal No. 1381 of 2004, reported in (2005) 10 SCC 420

Held :

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of T.N., (1991) 3 SCC 471.*

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed

a difficult task. It has been very aptly indicated in *Dennis Councle Mc Gautha v. State of California, 402 US 183* that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

Imposition of sentence without considering its effect on the social order in many cases may in reality be a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude of moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

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79. FOREST ACT, 1927 – Sections 52 and 68
Confiscation of seized vehicle etc. – Whether confiscating authority under obligation to release the seized vehicle on payment of its estimated value ? Held No.
State of Jharkhand and another v. Govind Singh
Judgment dated 03.12.2004 passed by the Supreme Court in Criminal Appeal No. 1405 of 2004, reported in (2005)10 SCC 437

Held :

The matter can be looked at from another angle. Section 68 of the Act read as follows :

"68. *Power to compound offences.* – (1) The State Government may, by notification in the Official Gazette, empower a forest officer–

(a) to accept from any person against whom a reasonable suspicion exists that he has committed any forest offence, other than an offence specified in Section 62 or Section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(b) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A forest officer shall not be empowered under this section unless he is a forest officer of a rank not inferior to that of a Ranger and is in receipt of a monthly salary amounting to at least one hundred rupees, and the sum of money accepted as compensation under clause (a) of subsection (1) shall in no case exceed the sum of fifty rupees."

The said section was also amended by the State amendment. The amended provision reads as follows :

"68. *Power to compound offences.* – (1) The State Government may, by notification in the Official Gazette, empower a forest officer–

(a) to accept from any person against whom a reasonable suspicion exists that he has committed any forest offence, other than an offence specified in clauses (c) and (d) to Section 26, clauses (c) and (d) to Section 33 or Section 62 or Section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(b) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A forest officer shall not be empowered under this section unless he is a forest officer of a rank not inferior to that of an Assistant Conservator of Forests".

The power to act in terms of Section 68 of the Act is limited to offences other than those specified in clauses (c) and (d) to Section 26, clauses (c) and

(d) to Section 33 or Section 62 or Section 63. Sub-section (1)(b) of Section 68 is also relevant. It provides that where any property has been seized as liable for confiscation, an officer empowered by the State Government has power to release the same on payment of the value thereof as estimated by such officer. The officer has to be empowered in the Official Gazette by the State Government. To act in terms of the position the value of the property seized or as liable for confiscation has to be estimated. Therefore, on a combined reading of Section 52 and Section 68 of the Act as amended by the Bihar Act, the vehicle as liable for confiscation may be released on payment of the value of the vehicle and not otherwise. This is certainly a discretionary power, exercise of which would depend upon the gravity of the offence. The officer is empowered to release the vehicle on the payment of the value thereof as compensation. This discretion has to be judicially exercised. Section 68 of the Act deals with power to compound offences. It goes without saying that when the discretionary power is conferred, the same has to be exercised in a judicial manner after recording of reasons by the officer concerned as to why the compounding was necessary to be done. In the instant case, learned Single Judge did not refer to the power available under Section 68 of the Act and on the contrary, introduced the concept of reading into Section 52 of the Act, a power to levy fine in lieu of confiscation which is impermissible. In the impugned judgment nowhere the value of the truck which was liable for confiscation was indicated. It appears that the first appellate court and the revisional authority did not consider it to be a fit case where the vehicle was to be released and were of the considered view that confiscation was warranted. They took specific note of the fact that fake and fabricated documents were produced to justify possession of the seized articles. In any event the respondent had not made any prayer for compounding in terms of Section 68 of the Act.

Confiscation in terms of sub-section (3) of Section 52 of the Act is the immediate statutory action which provides that when forest offence as defined in Section 2(3) of the Act is believed to have been committed in respect of the seized vehicle, the authorised officer may confiscate the forest produce and the vehicle involved in the transportation of the forest produce. Foundation for action in terms of Section 52(3) of the Act is the belief entertained by the officer concerned that forest offence has been committed. It is not the value of the forest produce which is relevant, but the value of the article liable for confiscation. In the instant case it is the truck carrying the forest produce.

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80. ENVIRONMENTAL LAWS :
Principle of polluter-pays/sustainable development, applicability of in cases of environment – Law explained.
Research Foundation for Science Technology National Resource Policy v. Union of India and another
Judgment dated 14.10.2003 passed by the Supreme Court in Writ Petition No. 657 of 1995, reported in (2005) 10 SCC 510

Held :

The legal position regarding applicability of the precautionary principle and polluter-pays principle which are part of the concept of sustainable development in our country is now well settled. In *Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647* a three-Judge Bench of this Court, after referring to the principles evolved in various international conferences and to the concept of "sustainable development", inter alia, held that the precautionary principle and polluter-pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48-A and 51-A (g) of our Constitution and that, in fact, in the various environmental statutes including the Environment (Protection) Act, 1986, these concepts are already implied. These principles have been held to have become part of our law. Further, it was observed in *Vellore Citizens' Welfare Forum case* (supra) that these principles are accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of our domestic law. Reference may also be made to the decision in the case of *A.P. Pollution Control Board v. Prof. M.V. Nayudu, (1999) 2 SCC 718* where, after referring to the principles noticed in *Vellore Citizens' Welfare Forum case,* (supra) the same have been explained in more detail with a view to enable the courts and the tribunals or environmental authorities to properly apply the said principles in the matters which come before them. In this decision, it has also been observed that the principle of good governance is an accepted principle of international and domestic laws. It comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens in the political process of their countries and in the decisions affecting their lives. Reference has also been made to Article 7 of the draft approved by the Working Group of the International Law Commission in 1996 on "Prevention of Transboundary Damage from Hazardous Activities" it include the need for the State to take necessary "legislative, administrative and other actions" to implement the duty of prevention of environmental harm. Environmental concerns have been placed on the same pedestal as human rights concerns, both being traced to Article 21 of the Constitution. It is the duty of this Court to render justice by taking all aspects into consideration. It has also been observed that with a view to ensure that there is neither danger to the environment nor to the ecology and, at the same time, ensuring sustainable development, the court can refer scientific and technical aspects for an investigation and opinion to expert bodies. The provisions of a covenant which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can be relied upon by courts as facets of those fundamental rights and hence enforceable as such (see *People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433*). The Basel Convention, it cannot be doubted, effectuates the fundamental rights guaranteed under Article 21. The right to information and community participation for protection of environment and human health is also a right which flows from Article 21. The Government and authorities have, thus to mo-

tivate the public participation. These well-enshrined principles have been kept in view by us while examining and determining various aspects and facets of the problems in issue and the permissible remedies.

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81. INDIAN PENAL CODE, 1860 – Section 324
Expression 'any instrument, which used as a weapon of offence, is likely to cause death' meaning and connotation of
Anwarul Haq v. State of U.P.
Judgment dated 26.04.2005 passed by the Supreme Court in Criminal Appeal No. 625 of 2005, reported in (2005) 10 SCC 581

Held :

Section 324 provides that

> Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal"

can be convicted in terms of Section 324. The expression "any instrument, which used as a weapon of offence, is likely to cause death" should be construed with reference to the nature of the instrument and the manner of its use. What has to be established by the prosecution is that the accused voluntarily caused hurt and that such hurt was caused by means of an instrument referred to in this section.

The section prescribes a severer punishment where an offender voluntarily causes hurt by dangerous weapon or other means stated in the section. The expression "any instrument which, used as weapon of offence, is likely to cause death" when read in the light of marginal note to Section 324 means dangerous weapon which if used by the offender is likely to cause death.

Authors of IPC observed, as noted below, the desirability for such severer punishment for the following reasons :

> "... Bodily hurt may be inflicted by means the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting an injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of a society than who has only used his fist. It

appears to us that many hurts which would not, according to our classification, be designated as grievous ought yet, on account of the mode in which are inflicted, to be punished more severely than many grievous hurts".

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82. CRIMINAL TRIAL :

Appreciation of witness – Non-examination of independent witness, effect of – If evidence of alleged eye-witnesses is doubtful on the point of their presence at the time of incident, unexplained omission to examine independent witness may have significance – Law explained.

Hem Raj and others v. State of Haryana

Judgment dated 29.03.2005 passed by the Supreme Court in Criminal Appeal No. 957 of 1998, reported in (2005) 10 SCC 614

Held :

Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness Kapur Singh, would assume significance. This Court pointed out in *Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145 : (SCC p. 155, para 19) 6 SCC 145 :*

> "[I]f already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein".

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83. CRIMINAL TRIAL :

Examination of witness – A witness should not be recalled and re-examined even though such witness had given an inconsistent statement subsequently – Law explained.

Mishrilal and others v. State of M.P. and others

Judgment dated 11.05.2005 passed by the Supreme Court in Criminal Appeal No. 939 of 2004, reported in (2005) 10 SCC 701

Held :

The Learned counsel for the appellants seriously attacked the evidence of PW2 Mokam Singh. This witness was examined by the Sessions Judge on 6-2-1991 and cross-examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused persons an application was filed and PW 2 Mokam Singh was recalled. PW2 was again examined and cross-examined on 31-7-1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was tried by the Juvenile Court. PW2 Mokam Singh was also examined as a witness in the case before the Juvenile Court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW 2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge under Section 307 IPC for having made an attempt on the life of this witness.

In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW2 Mokam Singh on 6-2-1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or for some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses.

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84. CIVIL PROCEDURE CODE, 1908 – Sections 9 and 20
Whether parties can confer jurisdiction by agreement when the Court does not possess such jurisdiction – Held, No – No interim relief can be granted unless Court has jurisdiction – Law explained.
Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia and others
Judgment dated 29.03.2005 passed by the Supreme Court in Civil Appeal No. 7653 of 2004, reported in (2005) 10 SCC 704

Held :

In *Hakum Singh v. Gammon (India) Ltd., (1971) 1 SCC 286* it has been held that it is not open to the parties to confer by their agrement jurisdiction on a Court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or a proceeding, an agreement between the parties that the disputes between them shall be tried in one of such courts is not contrary to public policy and that such an agreement does not contravene Section 28 of the Contract Act. In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163* it was held as under : (SCC pp. 175-76, paras 20-21)

> "When the court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jursidction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jursidction of other courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jursidction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim *"expressio unius est exclusio alterius"* – expression of one is the exclusion of another – may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

This view has been reiterated in *Angile Insulations v. Davy Ashmore India Ltd, (1995) 4 SCC 153.*

The plea of the jurisdiction goes to the very root of the matter. The trial court having held that it had no territorial jurisdiction to try the suit, the High Court should have gone deeper into the matter and until a clear finding was

recorded that the court had territorial jurisdiction to try the suit, no injunction could have been granted in favour of the plaintiff by making rather a general remark that the plaintiff has an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the court.

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85. CIVIL PROCEDURE CODE, 1908
LIMITATION ACT, 1963 – Article 136
Decree in partition suit, commencement of limitation for execution of – Limitation cannot be made dependent upon engrossment of decree on stamp paper – Limitation starts from the date of decree – Law explained.
Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) By LRs.
Judgment dated 13.05.2005 Passed by the Supreme Court in Civil Appeal
No. 3745 of 2002, reported in (2005) 10 SCC 746

Held :

The question that arises for determination in this matter is when would the period of limitation for execution of a decree passed in a suit for partition commence. In other words, question is when such a decree becomes enforceable, from the date when the decree is made or when the decree is engrossed on the stamp paper, which, out of these two, would be the starting point of limitation?

A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, AIR 1951 SC 16* it was said that the payment of

court fee on the amount found due was entirely in the power of the decree-holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As abovenoted, there is no statutory provision prescribing a time-limit for furnishing of the stamp paper for engrossing the decree or time-limit for engrossment of the decree on stamp paper and there is no statutory obligation on the court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time-limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided uner Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper. The engrossment of the decree on stamp paper would relate back to the date of the decree, namely, 7-8-1981, in the present case. In this view the execution application filed on 21.3.1994 was time-barred having been filed beyond the period of twelve years prescribed under Article 136 of the Act.

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86. CIVIL PROCEDURE CODE, 1908 – Section 11
Res Judicata – Whether disposal of suit on account of non-furnishing of better particulars amounts to a decree and operates as res judicata? Held, Yes – Law explained
Nand Kishore and others v. Pandu and others
Reported in 2006 (1) MPHT 261

Held :

The contention of learned Counsel for the petitioners is that Full Bench of this Court in the case of *Budhulal Vs. Chhotelal and others, 1976 JLJ 797* has held in Para 13 that dismissal of suit on account of non-furnishing of further and better particulars amounts to the decree. The Full Bench relied earlier decision of this Court in *Nazir Abbas Sujjat Ali Vs. Raza Azamshah Baja Suleman Shah and others, AIR 1941 Nagpur 223.* In the case of *M.P. State Co-operative Land Development Bank Ltd., Bhopal Vs. J.L. Chouksey, AIR 1980 MP 204,* the Single Bench of this Court has also placed reliance on the Full Bench decision of *Budhulal* (supra) and has held that the dismissal of the suit on account of fuilure on the part of the plaintiff to furnish better particulars, amounts to decree.

It be seen that Section 11, CPC is based partly on the maxim of Roman

jurisprudence, *"interest reipublicae ut sit finis litium"* it concerns the State that there be an end to law suits and partly on the maxim *Memo debet bis vexari pro una et eadem causa* which would mean that no man should be vexed twice over the same cause.

The question is whether in the earlier suit the Court was having jurisdiction to dismiss the suit specially when an application was filed on behalf of plaintiff for withdrawal of the suit and whether in those circumstances, the decision of earlier suit would amount to *res judicata* or not. The Full Bench of this Court in the case of *Budhulal* (supra) in Para 13 specifically held and decided by placing reliance on the decision of *Nazir Abbas Sujjat Ali* (supra) that if a previous suit has been dismissed on account of failure to furnish further and better particulars, the second suit on the same cause of action can not be instituted.

The Court dismissing the earlier suit was having jurisdiction to dismiss it. It can not be said that there was inherent lack of jurisdiction in the Court dismissing the suit for want of better particulars. The question is altogether different whether the order of dismissal of the suit was contrary to the law or erroneous or dismissal of the suit was without jurisdiction. If a decision of a Court is without jurisdiction such a decision will not operate as *res judicata* in the subsequent suit. Thus, the test is whether the decision passed in the earlier suit is without jurisdiction or *non est.* It is well settle in law that the order without jurisdiction is *non est,* it neither confer any right in any party nor takes away any right from it. In the case of *State of M.P. Vs. Mulamchand, 1973 JLJ 489* while laying down the various tests in regard to the applicability of *res judicata* it has been held that even an erroneous decision will operate as *res judicata.*

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87. LAND ACQUISITION ACT, 1894 – Sections 18 and 20
Whether reference can be heard without noticing the applicant – Held, No.
Parasmal v. State of M.P.
Reported in 2006 (1) MPWN 9

Held:

I find that the learned Reference Judge did not take notice of the provisions of section 20 of the Land Acquisition Act which makes it obligatory on him to issue notice to the land owner and then decide the reference u/s 18 of the Land Acquisition Act on merits. In other words it is obligatory, upon the reference Court to first issue notice to the land owner before passing any award either in favour of the land owner or against him. In no case, the reference can be answered and that too against the land owner by the reference Court without issuing any notice to the land owner and only on hearing the State as also the land owner whose land has been acquired in the acquisition proceedings.

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88. WORDS AND PHRASES :

Word "Hindu", meaning and connotation of.

M.P. Gopalkrishnan Nair and another v. State of Kerala

Judgment dated 20.04.2005 by the Supreme Court in Civil Appeal No. 6675 of 1999 reported in (2005) 11 SCC 45

Held :

The word "Hindu" is not defined. A Hindu admittedly may or may not be a person professing Hindu religion or a believer in temple worship. A Hindu has a right to choose his own method of worship. He may or may not visit a temple. He may have a political compulsion not to openly proclaim that he believes in temple worship but if the submission of the appellants is accepted in a given situation, the 1978 Act itself would be rendered unworkable. Idol worships, rituals and ceremonials may not be practised by a person although he may profess Hindu religion.

A five-Judge Bench of the *Kerala High Court in Krishnan v. Guruvayoor Devaswom Managing Committee, 1979 KLT 350* in para 40 of its judgment noticed: (KLT pp. 376-77)

> "It is well known that there are sections of Hindus whose schools of thought and philosophy do not consider idol worship, rituals and ceremonials as necessary or even conducive to the spiritual progress of man. There are also political creeds or social theories which openly condemn such forms of worship as being based on mere superstition and ignorance. Many persons, who are born Hindus and who may be said to profess Hinduism solely because they have not openly renounced the Hindu faith by any recognised process, may ardently believe in such political or social ideologies which do not view temple worship with favour."

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89. SALE OF GOODS ACT, 1930 – Section 11

Time, when essence of the contract – A party to contract cannot unilaterally fix outer limit of time for completion of contract – Law explained.

Claude – Lila Parulekar (Smt.) v. Sakal Papers (P) Ltd. and others

Judgment dated 18.03.2005 passed by the Supreme Court in Civil Appeal No. 698 of 1995 reported in (2005) 11 SCC 73

Held:

Section 11 of the Sale of Goods Act, 1930 expressly says:

> "11. *Stipulation as to time.*– Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

As there was no time fixed either under Article 57-A or in the offer letters, the question of time being of the essence did not at all arise. As was held in *Gomathinayagam Pillai v. Pallaniswami Nadar, (1967) 1 SCR 227:* (SCR p. 233 A-B)

> "The stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable."

If there is no stipulation as to time, it is not open to a party to unilaterally stipulate a time and then cancel the contract because of an alleged failure of the other party to act within the time stipulated. (See *National Coop. Sugar Mills Ltd. v. Albert & Co., AIR 1981 Mad 172* (DB)). Of course if time is fixed by the contract but it is not originally of the essence, a party could by notice served upon the other call upon him to complete the transaction within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled (ibid., p. 872). But where no time is fixed for completion, it is not open to either the vendor or purchaser to serve notice limiting a time at the expiration of which he will treat the contract as at an end.

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90. ADVERSE POSSESSION:

Adverse possession, plea as to – Adverse possession being a question of fact has to be specifically pleaded and proved – Law explained.

B. Leelavathi v. Honnamma and another

Judgment dated 06.05.2005 passed by the Supreme Court in Civil Appeal No. 7034 of 2003, reported in (2005) 11 SCC 115

Held :

Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession.

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91. TRANSPLANTATION OF HUMAN ORGANS ACT, 1994 – Section 9

Authorisation Committee, jurisdiction and function of – Committee of the State of which the donor and donee belong has jurisdiction to decide the matter – Law explained.

Kuldeep Singh and another v. State of T.N. and others

Judgment dated 31.03.2005 in Writ Petition (C) No. 156 of 2005, reported in (2005) 11 SCC 122

Held:

Rule 3 deals with "Authority for removal of human organ". The conditions for removal before death are incorporated in Form 1. The same reads as follows:

"3. *Authority for removal of human organ.* – Any donor may authorise the removal, before his death, of any human organ of his body for the therapeutic purposes in the manner and on such conditions as specified in Form.1"

Form 1 reads as follows :

"I,....., aged.... s/o, d/o, w/o, Mr..... resident of..... hereby authotise to remove for thereapeutic purposes/consent to donate my organ, namely, ... to:

OR

(i) Mr/Mrs..... s/o, d/o, w/o Mr..... aged..... resident of..... who happens to be my near relative as defined in clause (i) of Section 2 of the Act.

OR

(ii) Mr/Mrs ..... s/o, d/o, w/o Mr. ..... aged ..... resident of..... towards whom I possess special affection or attachment, or for any special reason (to be specified).

I certify that the above authority/consent has been given by me out of my own free will without any undue pressure, inducement, influence or allurement and that the purposes of the above authority/donation and of all possible complications, side effects, consequences and options have been explained to me before giving this authority or consent or both.

Signature of doner

Where the donor is not "near relative" as defined under the Act the stituation is covered by sub-section (3) of Section 9. As. Form 1 in terms of Rule 3 itself shows, the same has to be filed in both the cases where the donor is a near relative and where he is not, so far as the recipient is concerned. In case the donor is not a near relative the requirement is that he must establish that removal of the organ was being authorised for transplantation into the body of the recipient because or attachment or for any special reasons to make donation of his organ. As the purpose of enactment of the statute itself shows, there cannot be any commercial element involved in the donation. The object of the statute is

crystal clear that it intends to prevent commercial dealings in human organs. The Authorisation Committee is, therefore, required to satisfy that the real purpose of the donor authorising removal of the organ is by reason of affection or attachment towards the recipient or for any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements. Above being the intent, the inevitable conclusion is that the Authorisation Committee of the State to which the donor and the donee belong have to take the exercise to find out whether approval is to be accorded. Such Committee shall be in a better position to ascertain the true intent and the purpose for the authorisation to remove the organ and whether any commercial element is involved or not. They would be in a better position to lift the veil of projected affection or attachment and the so-called special reasons and focus on the true intent. The burden is on the applicants to establish the real intent by placing relevant materials for consideration of the Authorisation Committee. Whether there exists any affection or attachment or special reason is within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Several relevant factors like relationship if any (need not be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds can throw light on the issue. It is always open to the Authorisation Committee considering the application to seek information/materials from the Authorisation Committees of other States/State Governments, as the case may be for effective decision in the matter. In case any State is not covered by the operation of the Act or the Rules, the operative executive instructions/government orders will hold the field. As the object is to find out the true intent behind the donor's willingness to donate the organ, it would not be in line with the legislative intent to require the Authorisation Committee of the State where the recipient is undergoing medical treatment to decide the issue whether approval is to be accorded. Form 1 in terms requires the applicants to indicate the residential details. This indication is required to prima facie determine as to which is the appropriate Authorisation Committee. In the instant case, therefore, it was the Authorisation Committee of the State of Punjab which is required to examine the claim of the petitioners.

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92. EVIDENCE ACT, 1872 – Section 106

Section 106, scope and applicability of – Facts specially within the knowledge of the accused – When burden lies on accused to prove such facts – Law explained.

Murlidhar and others v. State of Rajasthan

Judgment dated 09.05.2005 passed by the Supreme Court in Criminal Appeal No. 355 of 2004 reported in (2005) 11 SCC 133

Held:

In *State of W.B. v. Mir Mohd. Omar, (2000) 8 SCC 382* it was established

that the accused had abducted the victim, who was later found murdered. The abductors had not given any explanation as to what happened to the victim after he was abducted by them. The Sessions Court held that the prosection had failed to establish the charge of murder against the accused persons beyond any reasonable doubt as there was "a missing link in the chain of events after the deceased was last seen together with the accused persons and the discovery of the dead body of the deceased at Islamia Hospital". Rejecting the said contention this Court observed (vide SCC p. 392, para 31):

> "31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty."

This Court further observed thus (vide SCC p. 392, para 33):

> "33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existene of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct, etc. in relation to the facts of the case."

The judgment of Vivian Bose, J. in *Shambu Nath Mehra v. State of Ajmer, 1956 SCR 199* lays down the legal principle underlying the shifting of burden of proof under Section 106 of the Evidence Act thus (vide SCC p. 393, para 38): (SCR p. 203)

> "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are *pre-eminently* or *exceptionally* within his knowledge."
>
> (emphasis in orginal)

In our judgment, the High Court was not justified in relying on and applying the rule of burden of proof under Section 106 of the Evidence Act to the case. As pointed out in *Mir Mohd Omar (Supra)* and *Shambu Nath Mehra (Supra)* the rule in Section 106 of the Evidence Act would apply when the facts are "especially within the knowledge of the accused" and it would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts, "especially within the knowledge of the accused". In the present case, the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused and, therefore, the principle in Section 106 could not apply.

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93. CRIMINAL TRIAL :
APPRECIATION OF EVIDENCE:

(i) Relative witness – Evidence of a witness not to be discarded merely because he is a relative witness or the sole witness – Non-production of an independent witness named in FIR also not in itself a ground to discredit the evidence of interested witness – Law explained.

(ii) Medical evidence – Successive injuries inflicted in quick succession, proof of – Generalised statement regarding injuries sufficient.

Seeman alias Veeranam v. State, by Inspector of Police
Judgment dated 12.09.2005 passed by the Supreme Court in Criminal Appeal No. 972 of 2004, reported in (2005) 11 SCC 142

Held:

(i) It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinising the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement.

(ii) PW 2 while describing the incident, has deposed that A-1, appellant Seeman had inflicted injury on the neck of the deceased by *patta knife* and, thereafter caused cut on the right side of his head and further inflicted cut on the neck and that he has also inflicted injuries on the back. It is submitted by the

learned counsel that no injury was found on the back of the deceased and, therefore, the medical evidence does not corroborate the statement of PW2. It is to be noticed that the duration of the occurrence was short. The injuries on the deceased were inflicted with quick succession and it is too much to expect from a witness in such circumstance to narrate the exact injuries caused on the person of the deceased. The generalised statement as regards the injuries would be more credible than the particularised statement of location of injuries on the body when the injuries were caused in quick succession and in short time.

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94. CRIMINAL PROCEDURE CODE, 1973 – Section 319
Section 319, applicability and scope of – Power to summon an accused being an extraordinary power be used very sparingly and for compelling reasons – Law explained.
Kailash Dwivedi v. State of M.P. and another
Judgment dated 03.02.2005 passed by the Supreme Court in Criminal Appeal No. 214 of 2005 reported in (2005) 11 SCC 182

Held:

In the case of *Krishnappa v. State of Karnataka, (2004) 7 SCC 792* this Court, considering the appeal on almost similar factual background held that: (SCC pp. 794-95, paras 6-7 & 9-10)

> "6[A]. it has been repeatedly held that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.
>
> 7[B]. In the present case, we need not go into the question whether prima facie the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established, for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and circumstances of the case.
>
> ★ ★ ★

9[C]. .... for exercise of discretion under Section 319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

10[D]. Applying the test as, aforesaid to the facts of the present case, in our view, the trial Magistrate is right in rejecting the application. The incident was of the year 1993. Seventeen witnesses had been examined. The state-

ments of the accused under Section 313 CrPC had been recorded. The role attributed to the appellant, as per the impugned judgment of the High Court, was of instigation. Having regard to these facts coupled with the quashing of proceedings in the year 1995 against the appellant, it could not be held that the discretion was illegally exercised by the trial Magistrate so as to call for interference in exercise of revisional jurisdiction by the High Court."

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95. HINDU LAW :

Whether transfer of movable/immovable property through settlement deed is a legal and valid mode of transfer of property? Held, Yes – Distinction between settlement deed and will – Law explained.

Kokilambal and others v. N. Raman

Judgment dated 21.04.2005 passed by the Supreme Court in Civil Appeal No. 6994 of 1999, reported in (2005) 11 SCC 234

Held:

Settlement is one of the recognised modes of transfer of movable and immovable properties under Hindu law. The courts have accepted such mode as legal and valid mode of transfer of properties. Courts have emphasised that in order to find out the correct intent of the settler the settlement deed has to be read as a whole and draw their inference from its content. Therefore, it has always been emphasised that the terms of the settlement should be closely examined and the intention of the settler should be given effect to. Sometimes there is absolute vesting and sometimes there is contingent vesting as contemplated in Sections 19 and 21 of the Transfer of Property Act, 1882. In order to ascertain the true intention of the settler one has to closely scrutinise the settlement deed, whether the intention of the settler was to divest the property in his lifetime or to divest the property contingently on the happening of a certain event. In this connection, reference may be made to a decision of this Court in the case of *Rajes Kanta Roy v. Santi Debi, 1957 SCR 77.* Their Lordships observed that the determination of the question as to whether an interest created is vested or contingent has to be guided generally by the principles recognised under Sections 19 and 21 of the Transfer of Property Act, 1882 and Sections 119 and 120 of the Indian Succession Act, 1925. Their Lordships quoted a passage (at SCR pp. 89-90) from *Jarman on Wills* (8th Edn., Vol. II at p. 1390) which states as follows:

> "So, where a testator clearly expressed his intention that the benefits given by his Will should not vest till his debts were paid,.... the intention was carried into execution, and the vesting as well as payment was held to be postponed."

Their Lordships in the case of *Rajes Kanta Roy, (supra)* have observed as follows: (SCR p. 90)

> "Apart from any seemingly technical rules which may be gathered

from English decisions and textbooks on this subject, there can be no doubt that the question is really one of intention to be gathered from a comprehensive view of all the terms of a document."

Their Lordships have clearly observed that in order to decide the issue one has to closely go through the terms of settlement and the intention of the settler.

In this connection, our attention was invited to a decision of this Court in the case of *Usha Subbarao v. B.N. Vihveswaraiah, (1996) 5 SCC 201* wherein it was observed as follows: (SCC p. 208, para 8)

> "An interest is said to be a vested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest."

Their Lordships also relied upon an observation made in Halsbury's Laws of England, 4th Edn., Vol. 50, paras 591, 592 which read as under:

> "Although the question whether the interest created is a vested or a contingent interest is dependent upon the intention to be gathered from a comprehensive view of all the terms of the document creating the interest, the court while construing the document has to approach the task of construction in such cases with a bias in favour of vested interest unless the intention to the contrary is definite and clear. As regards Wills the rule is that 'where there is a doubt as to the time of vesting the presumption is in favour of the early vesting of the gift and, accordingly, it vests at the testator's death or at the earliest moment after that date which is possible in the context'."

Their Lordships also relied upon *Halsbury's Laws of England*, 4th Edn., Vol. 50, para 589 at p. 395 which reads as under :

> "It is necessary to construe the Will to find out the intention of the testator. With regard to construction of Wills the law is well settled that intention has to be ascertained from the words used keeping in view the surrounding circumstances, the position of the testator, his family relationship and that the Will must be read as a whole."

8. Our attention was also invited to a decision of this Court in the case of *Namburi Basava Subrahmanyam v. Alapati Hymavathi, (1996) 9 SCC 388.* In this case also the question was whether the document is a Will or settlement. Their Lordships held that the nomenclature of the document is not a conclusive one. It was observed as follows: (SCC p. 388)

> "The nomenclature of the document is not conclusive. The recitals in the document as a whole and the intention of the executant and acknowledgment thereof by the parties are conclusive. The Court has

to find whether the document confers any interest in the property in *praesenti* so as to take effect *intra vivos* and whether an irrevocable interest thereby, is created in favour of the recipient under the document, or whether the executant intended to transfer the interest in the property only on the demise of the settlor. Those could be gathered from the recitals in the document as a whole.

The document in this case described as 'settlement deed' was to take effect on the date on which it was executed. The settlor created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the schedule with the boundaries mentioned thereunder. A combined reading of the recitals in the document and also the schedule would clearly indicate that on the date when the document was executed she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property in *praesenti* and vested the remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on the settlor's demise. Thus the document in question could be construed rightly as a settlement deed but not as a Will. The settlor, having divested herself of the right and title thereunder, had, thereafter, no right to bequeath the same property in favour of her first daughter."

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96. CIVIL PROCEDURE CODE, 1908 – O.1 R.10 & O.22 R.10
TRANSFER OF PROPERTY ACT 1882 – Section 52
Whether an application for substitution by subsequent transferee can be rejected outright? – Held, No – Transferee's application should ordinarily be allowed – Law explained.
Amit Kumar Shaw and another v. Farida Khatoon and another
Judgment dated 13.04.2005 passed by the Supreme Court in Civil Appeal No. 2592 of'2005, reported in (2005) 11 SCC 403

Held:

On a combined reading of Order 1 Rule 10, Order 22 Rule 10 of the Code of Civil Procedure and Section 52 of the Transfer of Property Act, can an application for substitution by a subsequent transferee be rejected and the subsequent purchaser be non-suited altogether is the prime question for consideration in these appeals.

The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and *bona fide* claimants from being non-suited. The power to strike out or add parties can be exercised by the court at any stage of the

proceedings. Under this rule, a person may be added as a party to a suit in the following two cases:

(1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or

(2) when, without his presence, the questions in the suit cannot be completely decided.

The power of a court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable legal right.

The application under Order 22 Rule 10 can be made to the appellate court even though the devolution of interest occurred when the case was pending in the trial court.

Under Order 22 Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.

In this connection, the provisions of Section 52 of the Transfer of Property Act, 1882 which has been extracted above may be noted.

An alienee *pendant lite* is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under this rule as also under Order 1 Rule 10. Since under the doctrine of *lis pendens* a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed.

Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that *pendente lite*, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their apponent during the pendency of the suit. In order to constitute a *lis pendens*, the following elements must be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.

2. The suit or proceeding must not be collusive.

3. The litigation must be one in which right to immovable property is directly and specifically in question.

4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The doctrine of *lis pendens* applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral.A transferee *pendente lite* to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order 22 Rule 10 an alience *pendente lite* may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee *pendent lite* of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

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97. MOTOR VEHICLES ACT, 1988 – Section 147
Liability of insurer for compensation in respect of gratuitous passenger carried in goods vehicle – Held, insurer not liable – Law explained.
National Insurance Co. Ltd. v. Swaroopa and others
Judgment dated 17.03.2005 passed by the Supreme Court in Civil Appeal No. 1805 of 2005 reported in (2005) 11 SCC 419

Held:

Respondents 1 to 6 are the legal representatives of the deceased who died in an accident on 28.1.1996 leading to the filing of a claim petition on 9.7.1996 under the provisions of the Motor Vehicles Act, 1988. By order dated 20.8.1990 (sic), the Motor Accidents Claims Tribunal (for short "the Tribunal") granted compensation both against the appellant Insurance Company and the owner of the vehicle, Respondent 7 herein. The appeal filed in the High Court by the appellant Insurance Company disputing its liability to pay to the legal representatives of the deceased was dismissed on 27.8.2002, in view of the law then prevailing as a result of the decision of this Court in *New India Assurance Co. v. Satpal Singh, (2000) 1 SCC 237.* The said decision has now been overruled by this Court in *New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223* wherein it has been held that an insurance company will not be liable to pay

compensation in respect of a gratuitous passenger being carried in a goods vehicle if the vehicle meets with an accident. In this view, we set aside the impugned judgment of the High Court affirming the order of the Tribunal.

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98. INDIAN PENAL CODE, 1860 – Sections 354, 451, 452
House trespass for committing offence u/s 354 is covered by Section 451 and not by Section 452 – Law explained.
Moreshwar v. State of Maharashtra and another
Judgment dated 29.04.2005 passed by the Supreme Court in Criminal Appeal No. 641 of 2005, reported in (2005) 11 SCC 429

Held:

Learned Senior Counsel appearing for the appellant contends that from the reading of the complaint and the charge framed, an offence under Section 452 is not made out as he did not trespass into the house occupied by the complainant for putting the complainant in the fear of hurt or of assault or of wrongful restraint. Learned Senior Counsel also contends that from a reading of the complaint and the charge framed, if at all, an offence under Section 451 is made out which provides for the commission of house trespass in order to the committing of any offence punishable with imprisonment. From the reading of the allegations made against the appellant, it is evident that the appellant had entered the house for seeking sexual favours from the complainant and not for causing any physical hurt or assault or wrongful restraint. We agree with the contention raised by the learned Senior Counsel for the appellant that the offence made out against the appellant is only under Section 451 which is compoundable and not under Section 452.

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99. TRANSFER OF PROPERTY ACT, 1882 – Section 53-A
Whether a transferee in possession of land in part-performance can seek injunction without seeking specific performance of agreement? Law explained.
Sunkara Venkata Rao v. K. Venkata Rao and others
Judgment dated 17.03.2005 passed by the Supreme Court in Civil Appeal No. 5612 of 1999, reported in (2005) 11 SCC 436

Held :

The respondent defendants, the landowners, entered into an agreement of sale dated 7-8-1977 to sell 8.31 acres of land to the appellant plaintiff for a total consideration of Rs. 10,795 out of which Rs. 1500 were paid at the time of the execution of the agreement of sale and the balance amount of consideration of Rs. 9295 was to be paid at the time of execution of sale deed. The appellant was put in possession of the suit land in part-performance of the agreement under Section 53-A of the Transfer of Property Act at the time of execution of the agreement of sale. It seems some dispute arose between the

parties and ultimately the sale deed was not executed. The proposed vendee i.e. the appellant filed a suit for permanent injunction restraining the defendant-respondents herein from interfering with his possession and enjoyment of the suit property.

The trial court found the appellant to be in possession and accordingly granted a decree injuncting the respondents from interfering with the possession of the appellant. The trial court further directed that the appellant be not dispossessed except in accordance with law. Being aggrieved, the respondents filed the appeal. The first appellate court upheld the findings recorded by the trial court and dismissed the appeal.

Aggrieved against the judgment and decree passed by the courts below, the respondents filed Second Appeal No. 282 of 1989 in the High Court. The learned Single Judge reversed the judgments and decree passed by the courts below on the ground that simple suit for injunction without seeking specific performance of the agreement of sale was not maintainable. Relief of injunction was declined on the ground that the said relief being discretionary, the appellant was not entitled to relief of injuhction as he had failed to file the suit for specific performance within the period of limitation.

Being aggrieved against the order of the High Court, the appellant has filed the present appeal.

Admittedly, the appellant is in possession of the suit land. Without going into any other questions and leaving them open, We dispose of the appeal by observing that the appellant be not dispossessed except in accordance with law.

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100. SERVICE LAW :

Date of birth, correction of in service records – Correction cannot be allowed just a few years before retirement – Law explained.

U.P. Madhyamik Shiksha Parishad and others v. Raj Kumar Agnihotri Judgment dated 21.04.2005 passed by the Supreme Court in Civil Appeal No. 2798 of 2005, reported in (2005) 11 SCC 465

Held :

In *Secy. & Commr., Home Deptt. v. R. Kirubakaran, 1994 supp (1) SCC 155* this Court held : (SCC pp. 158-59 & 160, paras 7 & 9)

> "An application for correction of the date of birth by a public servant cannot be entertained at the fag end of his service. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for

their promotion, may lose the promotion forever. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible and before any such direction is issued, the court must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within time fixed by any rule or order. The onus is on the applicant to prove about the wrong recording of his date of birth in his service-book.

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As such whenever an application for alteration of the date of birth is made on the eve of superannuation or near about that time, the court or the tribunal concerned should be more cautious because of the growing tendency amongst a section of public servants, to raise such a dispute, without explaining as to why this question was not raised earlier. In the facts and circumstances of the case, it is not possible to uphold the finding recorded by the Tribunal.

It is thus seen from the above quoted judgments that this Court has consistently taken the view that correction in entries made in government records on the basis of which the government servant got the service cannot be allowed to be changed just a few years before retirement.

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101. CIVIL PROCEDURE CODE, 1908 – Section 55 and 9

Execution proceedings in land acquisition case –Whether warrant of arrest can be issued – Held, No.

State of Bihar and another v. Gauri Shankar Mishra (Dead) By LRs. Judgment dated 18.04.205 passed by the Supreme Court in Civil Appeal No. 2722 of 2005, reported in (2005) 11 SCC 500

Held :

The State is aggrieved by an order passed by the High Court whereby the High Court refused to stay the proceedings of the execution court in a land acquisition matter. We see from the impugned order that the execution court has directed issuance of warrants against the judgment-debtor. We are afraid, as to how the court issued warrants of arrest in a land acquisition matter. We hereby set aside the order of arrest passed by the execution court. The execution court is at liberty to proceed with the execution proceedings if there is no stay of proceedings by any superior court.

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102. CRIMINAL PROCEDURE CODE, 1973 – Section 215
EVIDENCE ACT, 1872 – Section 27
INDIAN PENAL CODE, 1860 – Section 120-B

(i) Defective charge, effect of – Unless the defect is fundamental and has caused prejudice, it cannot be quashed – Law explained.

(ii) Confession or retracted confession, use of – Approach of the Court considering confession or retracted confession – Use of retracted confession against co-accused – Law explained.

(iii) Criminal conspiracy, connotation and proof of.

(iv) Discovery and recovery u/s 27 – Presence of accused at the time of recovery not a sine qua non – Joint disclosures – Admissibility and value of evidence based on joint disclosures – Law explained.

State of (NCT of Delhi) v. Navjot Sandhu@ Afsan Guru
Judgment dated 04.08.2005 passed by the Supreme Court in Criminal Appeal No. 373 of 2004 reported in (2005) 11 SCC 600

Held:

(i) It is settled law that a "fundamental defect" should be found in the charges if the court has to quash them. Whether the accused was misled and whether there was reasonable possibility of prejudice being caused to the accused on account of defective charges are relevant considerations in judging the effect of wrong or deficient charges. Section 215 CrPC makes it clear that no error or omission in stating either the offence or the particulars required to be stated shall be regarded as material unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. The test of prejudice or reasonable possibility of prejudice was applied by this Court in *Willie (william) slaney v. State of M.P., AIR 1956 SC 116* in testing the argument based on the omission, error or irregularity in framing the charges. The same test was also applied in *State of A.P. v. Cheemalapati Ganeswara Rao, (1964) 3 SCR 297.* It has not been demonstrated in the instant case as to how the accused or any of them were misled or any prejudice was caused to them on account of the alleged defects in the framing of charges. No Such objection was even taken before the trial court. As pointed out in *William Slaney case* (supra) (para 45 of AIR) it will always the material to consider whether the objection to the nature of charge was taken at an early stage. To the same effect are the observations in *Ganeswara Rao case* (supra). It is difficult to spell out with exactitude the details relating to the starting point of conspiracy. As pointed out in *Esher Singh v. State of A.P., (2004) 11 SCC 585* (SCC p. 607, para 39) it is not always possible "to give affirmative evidence about the date of the formation of the criminal conspiracy". We do not think that if instead of mentioning "the first week of December 2001" the wording "before December 2001" is employed, the prosecution should fail merely for that reason. The accused cannot be said to have been misled or prejudiced on that account. On the other hand, it is more than clear

that the accused did understand the case they were called upon to meet. The question whether Section 120-B applies to the POTA offences or Section 3 (3) alone applies is not a matter on which a definite conclusion could be reached ahead of the trial. It is not uncommon that the offence alleged might seemingly fall under more than one provision and sometimes it may not be easy to form a definite opinion as to the section in which the offence appropriately falls. Hence, charges are often framed by way of abundant caution. Assuming that an inapplicable provision has been mentioned, it is no ground to set aside the charges and invalidate the trial.

(ii) As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in *Bharat v. State of U.P., (1971) 3 SCC 950* Hidayatullah, C.J., speaking for a three-Judge Bench observed thus: (SCC p. 953, para 7)

> "Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker, Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true. This was laid down by this Court in an earlier case reported in *Subramania Goundan v. State of Madras, 1958 SCR 428.*

The use of retracted confession *against the co-accused* however stands on a different footing from the use of such confession against the maker. To come to grips with the law on the subject, we do no more than quoting the apt observations of Vivian Bose. J., speaking for a three-Judge Bench in *Kashmira Singh v. State of M.P., 1952 SCR 526.* Before clarifying the law, the learned Judge noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co-accused". The legal position was then stated thus: (SCR p. 530)

> "Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, *if it is believed,* a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, *if believed,* it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept".
>
> (emphasis in original)

(iii) In the case of *State v. Nalini, (1999) 5 SCC 253* S.S.M. Quadri, J. after a survey of case-law made the following pertinent observations : (SCC at pp. 568-69\ para 662)

> "In reaching the stage of meeting of minds, two or more persons share information about-doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy : some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

There is exhaustive reference to various cases by *Arijit Pasayat, J.*, in *Mohd. Khalid v. State of W.B., (2000) 7 SCC 334.* In *Mohd. Usman Mohd. Hussain Maniyar v. State of Maharashtra, (1981) 2 SCC 443,* it was observed that the agreement amongst the conspirators can be inferred by necessary implication.

There is one particular observation made by *Jagannatha Shetty, J. in Kehar Singh v. State (Delhi Admn), (1988) 3 SCC 609* which needs to be explained. The learned Judge observed: (SCC p. 733, para 275)

> "It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. ..... Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

The expression "physical manifestation" seems to be the phraseology used in the article referred to by the learned Judge. However, the said expression shall not be equated to "overt act" which is a different concept. As rightly stated by the learned Senior Counsel Mr. Gopal Subramanium, the phrase has reference to the manifestation of the agreement it self, such as by way of meetings and communications.

Mostly, conspiracies are proved by circumstantial evidence, as the conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused (per Wadhwa, J. in *Nalini case (supra).* The well-known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and "the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible" *(Tanviben Pankajkumar. Divetia v. State of Gujarat, (1997) 7 SCC, 156 SCC p. 185, para 45). G.N. Ray, J. in Tanviben Pankajkumar* (supra) observed that this Court should not allow suspicion to take the place of legal proof.

As pointed out by *Fazal Ali, J., in V.C. Shukla v. State (Delhi Admn, (1980) 2 SCC 665* (SCC pp. 669-70, para 8)

> "[I] n most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence".

In this context, the observations in the case of *Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696* are worth noting: (SCC pp. 699-700, para 7)

> "[I]n most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material."

(iv) There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. The concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

In *Mohd. Abdul Hafeez. v. State of A.P., (1983) 1 SCC 143* the prosecution sought to rely on the evidence that the appellant along with the other two accused gave information to the IO that the ring (MO-1) was sold to the jeweller, PW 3 in whose possession the ring was. PW 3 deposed that four accused persons whom he identified in court came to his shop and they sold the ring for Rs. 325 and some days later the Police Inspector accompanied by Accused 1, 2 and 3 came to his shop and the said accused asked PW 3 to produce the ring which they had sold. Then, he took out the ring from the showcase and it was seized by the Police Inspector. The difficulty in accepting such evidence was projected in the following words by D.A. Desai, J. speaking for the Court : (SCC p. 146, para 5)

> "Does this evidence make any sense ? He says that Accused 1 to 4 sold him the ring. He does not say who had the ring and to whom he paid the money. Similarly, he stated that Accused 1 to 3 asked him to produce the ring. It is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and we record our disapproval of the same. If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery, pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person".

There is nothing in this judgment which suggests that simultaneous disclosures by more than one accused do not at all enter into the arena of section 27, as a proposition of law.

Another case which needs to be noticed is the case of *Ramkishan Mithanlal Sharma v. State of Bombay, (1955) 1 SCR 903.* The admissibility or otherwise of joint disclosures did not directly come up for consideration in that case. However, while distinguishing the case of *Gokulchand Dwarkadas Morarka v. R., AIR 1948 PC 82* decided by the Bombay High Court a passing observation was made that in the said case the High Court had "rightly held that a joint statement by more than one accused was not contemplated by Section 27" (SCR p. 925). We cannot understand this observation as laying down the law the information almost simultaneously furnished by the two accused in regard to a fact discovered cannot be received in evidence under Section 27. It may be relevant to mention that in the case of *Lachman Singh v. State, 1952 SCR 839* this Court expressed certain reservations on the correctness of the view taken by some of the High Courts discountenancing joint disclosures.

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103. LEGAL MAXIMS :

Maxims *'Actus curiae neminem gravabit'* and *'lexnon cogit ad impossibilia'*, meaning and connotation of.

Shaikh Salim Haji Abdul Khayumsab v. Kumar and others

Reported in 2006 (1) MPLJ 11 (SC)

Held :

In the facts and circumstances of the case, the maxim of equity, namely, *actus curiae neminem gravabit* - an act of Court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia* - the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in *Raj Kumar Dey v. Tarapada Dey, 1987 (4) SCC 398, Gursharan Singh vs. New Dehli Municipal Committee, 1996 (2) SCC 459* and *Mohammod Gazi vs. State of M.P. and others, 2000 (4) SCC 342.*

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104. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (g) and 14

Cheques issued by Unit Trust of India through Postal Department not reaching the sendee because intercepted and fraudulently encashed – UTI raising the plea of lack of negligence and lack of deficiency in service – Whether plea tenable ? Held, No.

Unit Trust of India v. Ravinder Kumar Shukla and others

Reported in 2006 (1) MPLJ 20 (SC)

Held :

The Consumer Forums have held, that there was negligence on the part of the appellant. It has been held that the post offices were agents of the appellant and, therefore, the loss, if any, has to be borne by the appellant. It has been held that as the appellant had not paid the unit-holders, the unit-holders are entitled to receive the money from the appellant.

The question before this Court is whether the loss is to be borne by the unit-holder payee and/or by the appellant. The answer to this question would depend on whether the post office was acting as an agent of the unit-holder and/or the appellant.

In the case of *CIT vs. Ogale Glass Works Ltd., 1955 SCR 185* the question was whether the respondent therein, which was a non-resident company, could be said to have received payment in India for the purposes of the Income Tax Act. On the request of the assessee, the amounts of the bills were sent to them by means of cheques which were drawn in Delhi. It was held that as the assessee had requested that the amounts be sent by post, the post office became the agent of the assessee. It was held that as the post office was in Delhi the assessee had received the amounts in Delhi.

In the case of *H.P. Gupta vs. Hiralal, (1970) 1 SCC 437* the appellant was a Director of a company. The respondent had filed a complaint under section 207 of the Companies Act on the ground that the dividends declared by the company had not been paid within the prescribed time. This complaint was filed at Meerut where the complainant resided. The question was whether the Magistrate at Meerut had jurisdiction to try the complaint. This Court held that section 207 of the Companies Act casts an obligation on the company to pay the dividend, which is declared, to the shareholders within 42 days from its declaration. It was held that the offence u/s 207 is the failure to pay dividend. It was held that the failure to pay will arise when the warrant is not posted. It was held that the offence was failure to post and not the non-receipt of the warrant by the shareholders. It was held that the obligation to pay, therefore, arises at the place where it is to be performed i.e. at the post office where the cheque is to be posted and not at the address at which the cheque is to be delivered. It was, therefore, held that the Magistrate at Meerut did not have jurisdiction as the post office was in Delhi. It was held that it is only the Magistrate at Delhi who would have jurisdiction. It must be mentioned that in coming to this decision this Court implied an agreement/request from the dividend-holder to send the dividends by post.

Thus the law is that in the absence of any contract or request from the payee, mere posting would not amount to payment. In cases where there is no contract or request, either express or implied, the post office would continue to act as the agent of the drawer. In that case the loss is of the drawer.

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105. CIVIL PROCEDURE CODE, 1908 – Section 96 (2) and 0.9 R.13
Whether time spent in proceedings under 0.9 R. 13 can constitute sufficient cause for condoning delay in appeal ? Held, No.
Narmada Club Registered Society and another v. P.K. Tare
Reported in 2006 (1) MPLJ 33

Held :

Now coming to the ground of sufficient cause it is to be examined whether time spent in proceedings under Order 9, Rule 13 of the Civil Procedure Code can be treated as sufficient cause for condoning the delay and second ground as argued by counsel for appellant that the appeal could not have filed within limitation due to lack of advice.

So far first ground is concerned, it is admitted fact that Apex Court has considered the facts and circumstances of the case under Order 9, Rule 13 of the Civil Procedure Code and upheld the dismissal of said proceedings. Although such proceeding was not on merits of the matter but as per decided case of the Apex Court in the matter of *M.K. Prasad vs. P. Arumugam reported in (2001)6 SCC 176*, in which it was held as under :

> "10. In the instant case, the appellant tried to explain the delay in filing the application for setting aside the *ex parte* decree as is evident from his application filed under section 5 of Limitation Act accompanied by his own affidavit. Even though the appellant appears not be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should not have been more vigilent but his failure to adopt such extra vigilence should have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the *ex parte* decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case, we set aside the order impugned and condone the delay in filing the application for setting aside *ex parte* decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the *ex parte* decree as well."

In aforesaid decisions, their Lordship of the Apex Court has also observed that while deciding the application for setting aside the ex parte decree the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties and with this background by imposing the cost the *ex parte* decree was set aside.

But in the case at hand it is apparent and matter of record that Apex Court on considering the matter of Civil Appeal No. 641/03 (might have considered the aforesaid circumstances and merits as said in aforesaid Apex Court decision) dismissed the appellant's appeal regarding setting aside the ex parte decree. So in view of the Apex Court decision dated 19-8-2004 in Civil Appeal No. 641/03 the hand of this Court is tied and thus the proceedings which has been struck down by the Apex Court on considering the aforesaid aspect the same could not be a ground a sufficient cause for condoning the delay in filling the present appeal.

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106. ACCOMMODATION CONTROL ACT, 1961 (MP) – Sections 12 (1) (e)/(f) and 12 (1)(g)/(h)
Whether provisions contained in Sections 12 (1)(e)/(f) and 12 (1) (g)/(h) are mutually exclusive with separate rights and obligations ? Held, Yes – Law explained.
T.R. Sah v. Kundan Kaur and others
Reported in 2006 (1) MPLJ 41

Held :

It is evident from the decisions of the Supreme Court that the ground of eviction under section 12(1)(e) or (f) on the one hand and ground of eviction under section 12(1)(g) or (h) on the other, are mutually exclusive with separate rights and obligations.

Many a times, the landlords in their anxiety to get decree for eviction, or on wrong advice, tend to raise as many grounds as possible. In several cases, where they want to occupy the premises for their own use and for that purpose if they want to demolish the existing building and construct a new building before occupying the same, instead of filing the suit only under ground (e) or (f), they may file the suit under ground (g) or (h) also in addition to ground (e) or (f). They overlook the fact that where the ground of eviction is need for self occupation, the averments relating demolition and reconstruction are only a step in fulfilment of their need to occupy the premises, and such averments form an integral part of the averments relating to bona fide requirement for own use and there is no need to invoke ground (g) or (h). In such cases, if the bona fide requirement pleaded under Clause (e) or (f) is made out by the landlord, the ground under (g) and (h) even if mentioned would be redundant and shall have to be ignored. To reject the case relating to a genuine and relevant ground, merely because a redundant ground is also mentioned, is neither just nor logical.

It is also possible that landlords in their anxiety, or on advice, after pleading the ground under (e) or (f), may alternatively and independently plead a ground under Clause (g) or (h). In that event, if the prayer under Clause (e) or (f) is allowed, then the ground under Clause (g) or (h) will not survive for consideration. On the other hand, if the ground under Clause (e) or (f) should fail,

the grounds under Clause (g) or (h) will survive and will have to be considered separately. Therefore, whenever a landlord pleads a case for eviction under Clause (e) or (f) and also pleads a specific alternative case for eviction under Clause (g) or (h), the ground under Clause (g) or (h) will have to be considered only in the event of ground of eviction under Clause (e) or (f) being rejected. Under no circumstance, the landlord can be non-suited merely on the ground he has invoked a ground under Clause (g)/(h) in addition to the ground under Clause (e)/(f). We therefore overrule the decision of the learned Single Judge in *Smt. Parmeshwari Devi v. Thakur Nathhu Singh, 1998 (1) MPJR 462.*

We may also notice, at this juncture, that the question came up recently before a learned Single Judge in *Babukhan vs. Dr. R.D.S. Ahluwalia, 2003 (3) MPLJ 69.* The learned Single Judge after referring to the decision of the Supreme Court in *Modern Tailoring Hall,* held that the decision in *Parmeshwari Devi* (Supra) is no longer good law.

Conclusion :

The answer of the question of law formed in the order of reference is as under :–

When a suit is filed by a landlord under section 12(1)(e) and 12(1)(h), pleading that he requires the accommodation for his own use and also states that he wants to demolish and reconstruct the building, and he establishes a case for eviction under section 12(1)(e), he will be entitled to an order under section 12(1)(e) and the averments relating to demolition and reconstruction will be construed as a part of ground under section 12(1)(e). In such an event, if will be immaterial whether he demolishes the building or not. When a Court grants an eviction under Clause (e), it shall dispose of the claim under Clause (h) as having become infructuous or rendered redundant. When granting a decree under section 12(1)(e), the question of applying section 12(7) or section 18 does not arise. On the other hand if the ground under section 12(1)(e) is rejected, then the Court may consider the ground under section 12(1)(h) independently subject to section 12(7) and section 18.

The question of law on which the petition was admitted, is answered thus: Mere invoking the ground under section 12(1)(h) or filing the case under section 12(1) (h) in addition to the ground under section 12(1)(e) will not invalidate the claim for eviction under Clause 12(1)(e). Where the bona fide requirement of the landlord under section 12(1)(e) of the Act is proved, the claim can be allowed under section 12(1)(e), ignoring the ground under section 12(1)(h).

●

107. SERVICE LAW :

Transfer – Judicial review of order of transfer, ambit and scope of – Law explained.

Padma Singh v. State of M.P. and others

Reported in 2006 (1) MPLJ 71

Held :

While considering the question of judicial review into the administrative order of transfer in the case of *Union of India and others vs. Janardhan Debanath and another reported in (2004)4 SCC 245*, it was observed by the Supreme Court that when adjudicating a dispute of transfer in a case if Court is required to go into factual enquiry of certain issues, examination of such a question of fact by exercising jurisdiction in a petition under Articles 226 and 227 of the Constitution is not permissible. In the aforesaid case Supreme Court has clearly disapproved enquiry into factual aspect of the matter. To adjudicate the dispute as to whether calculation of surplus staff or teacher in an institute has been done properly or not so also for considering the question as to whether the strength of students and teachers have been properly determined or not, this Court is required to conduct a factual enquiry with regard to the strength of the students or the staff and other aspects of the matter for assessing surplus in the institute. As factual enquiry in such matter is beyond the scope and jurisdiction of this Court as held by the Supreme Court in the case of *Janardhan Debanath* (supra) this Courts has to restrict interference with regard to only questions of law, if any involved in the matter.

●

108. STAMP ACT, 1899 – Sections 2 (5) and 2 (22)
'Bond' and 'Promissory note', difference between – Law explained.
Praveen Nahar v. Krishna Gopal Sanghi and another
Reported in 2006 (1) MPLJ 83

Held :

A Full Bench of this Court in *Sant Singh vs. Madandas Panika, 1976 MPLJ (F.B.) 238 = 1976 JLJ 235*, considering the distinction between promissory note and Bond held :

"4. The essentials of a promissory note are :–

(1) An unconditional undertaking to pay;

(2) The sum should be a sum of money and should be certain;

(3) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and

(4) The maker should sign it, if these four conditions exist, the instrument is a promissory note.

The question of distinguishing a promissory note from a bond arises by reference to clause (b) of the above definition of bond. Thee essentials of a bond are :–

(1) There must be an undertaking to pay;

(2) The sum should be a sum of money but not necessarily certain;

(3) The payment will be to another person named in the instrument;

(4) The maker should sign it;

(5) The instrument must be attested by a witness; and

(6) It must not be payable to order or bearer.

On a comparison between the essentials of a promissory note and those of a bond three distinguishing features emerge :–

(i) If money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond.

(ii) If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note.

(iii) If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note.

Therefore, an instrument, which is not payable to bearer or order but is attested by a witness will also be a bond within a definition of section 2(5) of the Stamp Act, although simultaneously it may also fall within the definition of a promissory note within the meaning of section 2(22) of the Stamp Act read with section 4 of the Negotiable Instruments Act.

> Having thus pointed out the distinction between promissory note and a bond, we may at once say that in the last mentioned situation that is, where an instrument comes within the description of a promissory note as well as that of a bond, by virtue of section 6 of the Stamp Act, it will be chargeable only with the highest of the duties chargeable, that is, stamp duty as chargeable on a bond. That section reads thus :
>
> "Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule 1 shall where the duties chargeable thereunder are different be chargeable only with the highest of such duties :
>
> Provided that nothing in this Act contained shall chargeable with duty exceeding one rupee a counter-part or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."

As a result of the above discussion we would answer the two questions set out in the beginning as follows :

(1) An instrument is a promissory note if there are present the following elements :

(i) There should be an unconditional undertaking to pay;

(ii) The sum should be a sum of money and should be certain;

(iii) The payment should be to the order of a person who is certain, or to the bearer of the instrument and

(iv) The maker should sign it.

(2) An instrument is a bond within the meaning of section 2(5) (b) of the Stamp Act, if the following elements are present :–

(i) There must be an undertaking to pay;

(ii) The sum should be a sum of money but not necessarily certain;

(iii) The payment will be to another person named in the instrument;

(iv) The maker should sign it;

(v) The instrument must be attested by a witness; and

(vi) It must not be payable to order or bearer.

(3) A bond has two distinguishing features;

(i) Positive - it must be attested by a witness.

(ii) Negative - it must not be payable to order or bearer.

(4) For the purposes of the Stamp Act, it is only the definition as contained in section 4 of the Negotiable Instruments 'Act' which is to be read as if reproduced verbatim in section 2(22) of the stamp Act, but no other provision of the Negotiable Instruments Act can be read in section 2(22) of the Stamp Act, because of the restrictive words "as defined in".

(5) Explanation (i) to section 13 of the Negotiable Instruments Act may have its own effect and impact on a promissory note for the purposes of the Negotiable Instruments Act, but it has nothing to do with the "definition" of promissory note and, therefore, that explanation is wholly irrelevant for the purposes of the Stamp Act. It cannot, therefore be said that every promissory note must be excluded from the definition of Stamp Act, unless it contains an express prohibition within the meaning of the explanation to section 13 of the Negotiable Instruments Act."

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109. EVIDENCE ACT, 1872 – Sections 65 & 74
REGISTRATION ACT, 1908 – Section 51
Public document v. private document – Whether a registered sale deed is a 'public document'? Held, No – Evidentiary value of certified copy of a sale deed – Law explained.
Rekha and others v. Smt. Ratnashree
Reported in 2006 (1) MPLJ 103

Held :

On the points urged by both sides and the reference by the Learned Single, Judge, the following points arise for consideration :

"*(i) Whether a sale-deed (duly registered) is a public document ?*

(ii) Whether a certified copy of a sale-deed issued by the Registering Officer is a public document ?

(iii) Whether a certified copy of a public document can be received in evidence without any further proof?

(iv) What is the effect and efficacy of producing and marking a certified copy of the sale-deed ?

If the person producing the certified copy of a registered instrument, without establishing the existence of any of the grounds under clause (a), (b) or (c) of section 65, seeks to mark the certified copy, then it will not be secondary evidence of the original sale-deed, but only be secondary evidence of the entries in a public document, that is the entries in Book I in the Registration Office which issued the certified copy. Such certified copy marked without laying foundation for receiving secondary evidence, though admissible for the purpose of proving the contents of the original document, will not be proof of execution of the original document.

Certain amount of confusion exists because a certified copy can be produced as secondary evidence either under clauses (e) and (f) of section 65 or under clauses (a), (b) or (c) section 65. But the difference is that a certified copy is the only mode of secondary evidence that is permissible in cases falling under clauses (e) or (f) of section 65. But in the cases falling under clauses (a), (b) or (c), the secondary evidence can be a certified copy in the case of a registered instrument or by other modes described in section 63 in regard to unregistered documents. Be that as it may.

We may summarize the position thus :

(i) Production and Marking of a certified copy as secondary evidence of a public document under section 65 (e) need not be preceded by laying of any foundation for acceptance of secondary evidence. This is the position even in regard to certified copies of entries in Book I under Registration Act relating to a private document copied therein.

(ii) Production and marking of a certified copy as secondary evidence of a private document (either a registered document like a sale deed or any unregistered document) is permissible only after laying the foundation for acceptance of secondary evidence under clause (a), (b) or (c) of section 65.

(iii) Production and marking of an original or certified copy of a document does not dispense with the need for proof of execution of the document. Execution has to be proved in a manner known to law (sections 67 and 68 and ensuing sections in chapter V of Evidence Act).

●

110. CRIMINAL PROCEDURE CODE, 1973 – Section 427
Sentence – Principles governing concurrent running of sentence u/s 427 – Law explained.
Nandkishore v. State of M.P.
Reported in 2006 (1) MPLJ 145

Held :

The applicant has been convicted by II Addl. Sessions Judge, Indore by judgment dated 18.1.1999 for the offences under sections 306 and 304-B of Indian Penal Code whereas for the another offence he has been convicted by the learned XII Addl. Sessions Judge, Indore for a separate and distinct offence under section 307 of Indian Penal Code by judgment dated 2.3.2000. The Supreme Court in the case of *Mohd. Akhtar Hussain & Ibrahim Ahmed Bhatti. v. Assistant Collector of Customs, AIR 1988 SC 2143* has held in paragraphs 8, 9 and 10 as under :–

> "8. Section 427, Criminal Procedure Code incorporates the Principle of sentencing an offender who is already undergoing a sentence of imprisonment.
>
> The relevant portion of the section reads :
>
> "427. (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence."
>
> 9. The section relates to administration of criminal justice and provides procedure for sentencing. The sentencing Court is, therefore, required to consider and make an appropriate order as to how the sentence passed in the subsequent case is to run. Whether it should be concurrent or consecutive ?
>
> 10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

In view of the above mentioned law laid down by the Supreme Court, the applicant cannot get benefit of section 427 of Criminal Procedure Code because he was not convicted for both the offences committed by him in the same transaction or the same facts constituting the two offences. Both the offences

are quite different and also committed by the applicant on a different different date. He was convicted under sections 306, 304-B, Indian Penal Code, this offence is the offence of commission of dowry death and abetment to commit suicide by wife of the applicant. It was committed in the year 1991 or prior to that whereas the offence under section 307 of Indian Penal Code is attempt to commit murder. This was also committed on a different date. Both the offences were not committed by the applicant in one and the same transaction and both were not depending on same facts. Therefore, applying the test as laid down by the Supreme Court mentioned hereinabove, no case is made out in favour of the applicant to order for running his sentence concurrently passed by two different Sessions Courts as mentioned in this order hereinabove.

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111. CRIMINAL PROCEDURE CODE, 1973 – Section 438
Anticipatory bail, maintainability – Bailable warrant issued upon filing of complaint/ chargesheet – Whether application for anticipatory bail maintainable ? Held, Yes.
Hariom Lokhande v. M.P. State Electricity Board
Reported in 2006 (1) MPLJ 156

Held :

As earlier discussed, there appears reasonable apprehension that the applicant might be taken into custody after rejection of the bail application under section 437 of the Code, if filed before the committal Court. Such well founded apprehension or belief is a good ground for filing of an application under section 438 of the Code. The learned Special Judge, Betul has come to the wrong conclusion that since the bailable warrant was issued, therefore, there is no apprehension of arrest of the applicant and the application for anticipatory bail would not be maintainable under section 438 of the Code. The learned Special Judge has failed to consider this aspect that after appearance of this applicant, he might be taken into custody on this ground that the Judicial Magistrate is not empowered to grant bail, as the offence is triable by Special Court. As observed above, I am of the considered opinion that the application which was filed before the Special Judge, should have been considered on the merits of the case, as the applicant has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence.

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112. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 6 & 13
GUARDIANS AND WARDS ACT, 1890 – Section 17
Custody of minor child – Principles governing grant of custody – Welfare of minor paramount consideration – Law explained.
Ashok Kumar Jatav v. Kumari Roshani and another
Reported in 2006 (1) MPLJ 178

Held :

Before deciding the appeal I shall have to take into consideration the relevant provisions of the Hindu Minority and Guardianship Act, 1956 and of Guardian and Wards Act, 1890, section 6 of Hindu Minority and Guardianship Act lays down that the natural guardian of minor Hindu unmarried girl in respect of the person as well as the property shall be the father and after him the mother. Since the age of Ku. Roshani is more than 5 years, obviously the appellant being her father is her natural guardian. Proviso to section 6 is in the nature of disqualification for being natural guardian in case if the father ceases to be Hindu or renounces the world completely or finally by becoming a hermit or ascetic. In the present case the appellant is an employee of Railway and has not incurred the disqualification under the said provision.

Section 13 of the said Act prescribes the appointment or declaration of any person as guardian of Hindu minor by Court. The welfare of minor should be the paramount consideration. It further lays down that no person shall be entitled to the guardianship by virtue of provisions of the Act (supra) or of any law relating to guardianship among Hindus, if the Court is of the opinion, the guardianship will not be for the welfare of the minor. Little more and definitely more exhaustive provisions are made in section 17 of Guardians and Wards Act which is reproduced below :–

> "**17.** *Matters to be considered by the Court in appointing guardian* –
>
> (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor of his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
>
> (4) (Omitted by Act III of 1951, section 3 and Schedule).
>
> (5) The Court shall not appoint or declare any person to be a guardian against his will."

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113. CRIMINAL PROCEDURE CODE, 1973 – Section 259
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 143
Whethe summary trial contemplated u/s 143 N.I. Act be converted into warrant trial v/s 259 Cr.P.C. ? Held, No – Law explained.
Steel Tubes of India v. Steel Authority of India
Reported in 2006 (1) MPLJ 194

Held :

The point raised by the learned counsel for the applicant in all these petitions i.e. conversion of summons case into warrant case tested on an anvil of aims, objections and reasons, does not stand in favour of the applicant. The complaint was filed in the year 2000 and yet plea of accused is not recorded. During this period, the Act has been amended by the Act No. 55 of 2002 came into force with effect from 6-2-2003. By this amendment, new provision i.e. sections 143 to 147 have been incorporated. All these Provisions are regarding procedure. It is well settled principle of interpretation of statute that if in the statute it is not mentioned specifically about the application of Provision retrospectively or prospectively then the procedural provisions will have retrospective effect in the pending cases. Section 143 gives power to the Court to try cases summarily. This section has a mandatory effect and the provisions start from non-obstante clause. This means that provisions of section 259 of the Code regarding warrant trial shall have no application in the case for trying the offence falling under the Act. This is further strengthened by the provisions of sections 4 and 5 of the Code, Section 4 of the Code says that when in the Statute there is specific provision for trying a particular offence of the said Statute then the provision of the Code shall not apply and the Special provisions of the Statute or law that is provisions under section 143 of the Act is saved by saving provision of section 5 of the Code. Sub-section (3) of section 143 of the Code has also saved for expeditious trial and endeavour shall be made to conclude trial within six months from the date of filing of complaint. There is no room of doubt that for the purposes of trial an offence falling under the Act, provisions of Summary trial sections 262 to 265 of the Code would be applicable and the summary trial cannot be converted in the warrant trial.

●

114. SPECIFIC RELIEF ACT, 1963 – Section 19 (b)
Bonafide purchaser for value without notice – Nature and scope of protection available u/s 19 (b) – Law explained.
Gyaneshwar v. Smt. Moongabai @ Muneshwaribai and another
Reported in 2006 (1) MPLJ 221

Held :

The Hon'ble Supreme Court in *R.K. Mohammed Ubaidullah and others vs. Hajee C. Abdul Wahab and others, (2000) 6 SCC 402* has held that section 19 (b) of Specific Relief Act, 1963 protects bona fide purchaser in good faith for value

without notice of the original contract. This protection is in the nature of an exception to the general rule. Hence, the onus of proof of good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty. The Apex Court has further held that it is essential that the subsequent purchaser makes an enquiry as to the title or interest of the person in actual possession as on the date when the sale transaction was made in his favour. In the instant case respondent No. 2 is not found to have acted in good faith, so as to claim the protection of section 19(b) of Specific Relief Act.

The Madras High Court in *Veeramalai Vanniar and others vs. Thadikara Vanniar and others, AIR 1968 Madras 383* has held that a subsequent transferee can retain the benefit of his transfer by purchase which prima-facie, he has no right to get, only after satisfying the two conditions concurrently viz. (1) he must have paid the full value for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. The High Court has further held that the burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale. It is also the duty of the subsequent purchaser to enquire from the persons in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into.

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115. INDIAN PENAL CODE, 1860 – Section 498-A

Cruelty against married woman – Territorial jurisdiction of the Court – Alleged acts of harassment committed at Asansol – Whether Court at Indore has territorial jurisdiction – Held, No.

Gurmeet Singh v. State of M.P.

Reported in 2006 (1) MPLJ 250

Held :

I have gone through the FIR lodged by the complainant. On perusal of the FIR it is crystal clear that the complainant was subjected to cruelty and harassment and demand of dowry was also made at Asansol only. She was forced to leave her matrimonial place on account of failure to fulfil the said demand of dowry. She has started to reside at Indore since October, 2003, and thereafter at Indore not even a whisper of allegations about any demand of dowry or commission of any act constituting an offence has been committed or demand of dowry was made continuously by the applicant- husband.

The facts of the present case are quite similar to the referred case of *Y. Abraham Ajith v. Inspector of Police, Chennai, AIR 2004 SC 4286.* In para-11 the Apex Court has held that *"in the present case the factual position is different*

and the complainant herself left the house of the husband on 15-4-1997 on account of alleged dowry demands by the husband and his relations. There is thereafter not even a whisper of allegations about any demand of dowry or commission of any act constituting an offence much less at Chennai. That being so, the logic of section 178(c) of the Code relating to continuance of the offence cannot be applied".

In the present case also the complainant had left the matrimonial place on account of demands of dowry and thereafter no allegations about demand of dowry and commission of cruelty or harassment was made. Therefore in the present case also the logic of section 178 (c) of the Code relating to continuance of the offence cannot be applied.

This Court has also considered the application of sections 177 and 178 of the Code in respect of the offence under section 498A read with section 34 of the Penal Code in the matter of *Shakuntala Sharma and ors. vs. State of M.P. and another reported in 2005 (3) MPLJ 338.* In this case also the demand of dowry was made at Bhopal, whereas the FIR was lodged by the complainant at Police Station Chhatarpur and the charge-sheet was filed at Chhatarpur. The learned Single Judge of this Court relying upon the principles laid down by the Apex Court in *Y. Abraham Ajith's* case (supra) held that the Criminal Court of Chhatarpur has no jurisdiction to try the alleged offences against the accused.

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116. CIVIL PROCEDURE CODE, 1908 – Section 11
Res Judicata, principle of – Whether principle applicable regarding two stages in same litigation – Held, Yes.
Jagjeet Singh v. Bhopal Vikas Pradhikaran and another
Reported in 2006 (1) MPLJ 254

Held :

Now the question arises is that the question which was decided on an application filed by the respondent could have been reagitated or reconsidered by the Tribunal. In this regard the law laid down by the Apex Court in *Mohanlal Goenka v. Benoy Kishna Mukherjee and others, AIR 1953 SC 65* may be seen in which the Apex Court considering the controversy held :

> "There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata'. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties : see – *Abhoy Kanta vs. Gopinath Deb. AIR (3) 1943 Cal. 460.*

The learned Chief Justice concedes that the principle of 'res judicata' applies to the execution proceedings but he refused to apply it to the present case on the ground that there was lack of inherent jurisdiction in the execution Court to proceed with the execution. He relied upon *Lagard vs. Bull, 13 Ind App 134 (PC).* This case is distinguishable upon the facts. This was a suit instituted before the Subordinate judge for infringement of certain exclusive rights secured to the plaintiff by three Indian Patents. Under the Patents Act the suit could be brought only before the District Judge. The defendant raised an objection to the jurisdiction of the Court. It appears that subsequently the defendant joined the plaintiff in petitioning the District Judge to transfer the case of his own Court. This was done. The suit was transferred under section 25, Civil Procedure Code. It was admitted that the suit could not be transferred unless the Court from which the transfer was sought to be made had jurisdiction to try it. The defendant adhered to the plea of jurisdiction throughout the proceedings but it was urged that by his subsequent conduct he had waived the objection to the irregularity in the institution of the suit. Their lordships held that although a defendant may be barred by his own conduct from objecting to the irregularity in the institution of the suit, yet where the Judge had no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. This decision has no bearing upon the present case as no question of constructive 'res judicata' arose in that case."

In *Satyadhan Ghosal & others v. Smt. Deorajin Debi & Anr., AIR 1960 SC 941* the Apex Court has held thus:–

"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the Original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of 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 early 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. Thus this however mean that because at an earlier stage of the litigation a Court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher Court cannot at a later stage of the same litigation considered the matter again?"

Respondent has placed reliance to *Mathura Prasad Sarjoo Jaiswal & others v. Dossibai N. B., Jeejeebhoy, AIR 1971 SC 2355* wherein the Apex Court considering the question of *res judicata* held :

> "A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision; the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

In view of aforesaid settled law there is no iota of doubt that if the issue decided between the parties in proceedings, it is having effect of res judicata and such issue cannot be reopened by the party at a later stage in the same proceedings. However, the party against whom the issue is decided can challenge the same before the higher forum or after the decision if advised so may agitate in appeal, but in the same proceedings against whom the question has been decided cannot in any manner reagitate the matter. In those proceedings the issue decided between the parties is having the effect of res judicata and cannot be permitted to be reagitated.

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117. HIRE PURCHASE

Whether acquisition of financed vehicle by financer in terms of hire purchase agreement amounts to an offence u/s 379 IPC – Held, No.
Mohan Singh Rathore and another v. State of M.P.
Reported in 2006 (1) MPLJ 271

Held :

In my opinion, under the facts and circumstances of the case, the First Information Report lodged against the applicants and the criminal case registered against the applicants deserve to be quashed. The financer is found to have taken back the possession of the financed vehicle on the stand of the terms and conditions of the hire-purchase agreement on account of failure of hire purchaser to pay the amount of instalments as per the agreement.

In *K.A. Mathai @ Babu and another vs. Kora Bibikutty and another, (1996) 7 SCC 212,* it has been laid down that if the possession of the vehicle is taken by the financer as per terms of the hire-purchase agreement, the act does not amount to a criminal offence.

In view of this judgment the prosecution against the financer for offence punishable under section 379 of the Indian Penal Code is liable to be quashed in exercise of inherent powers.

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118. MOTOR VEHICLES ACT, 1988 – Section 166
Limitation – Accident taking place before amendment of 1994 – Whether limitation clause applicable – Held, No – Further held, there is no limitation for filing claim after amendment of Section 166.
Devkaran v. Suresh Kumar
Reported in 2006 (1) MPLJ 288

Held :

Learned counsel for the appellant submits that accident took place on 13-2-1991, and at the time of accident the Motor Vehicle's Act, 1988 was in force. According to section 166 of the MV Act the claim petition was filed within six months from the date of accident or within a period of 12 months, after showing the sufficient ground for delay in filing the application. It was submitted that in the year 1994 section 166 of MV Act has been amended and application for compensation can be filed at any time. It is submitted that in the case of *Dhannalal vs. D.P. Vijayvargiya, reported in 1997 (1) MPLJ (S.C.) 195 = 1996 JLJ 528,* wherein the Hon'ble Apex Court observed that the effect of the amending Act is that with effect from 14-11-1994, there is no limitation for filing claims before the Tribunal in respect of any accident.

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119. CRIMINAL TRIAL :
Chemical analysis of seized contraband – Appropriate quantity to be sent for such examination – Law explained.
Babulal v. State of M.P.
Reported in 2006 (1) MPLJ 317

Held :

The next contention of the learned counsel for the accused/applicant is that the prosecution has failed to establish beyond doubt that the bulk of the material said to have been seized from the accused/applicant is liquor. He stressed that the quantity put to test by the Excise Sub Inspector out of the quantity in question has not been sufficient, consequently the bulk in question is not proved to be liquor and thus the applicant deserves acquittal. In this respect PW-5 Vivek Chauhan has deposed that at the relevant time he seized from the accused vide Ex. P/2-C, 288 quarter bottles of Whisky, 350 quarter bottles of plain liquor and 20 bottles of plain liquor each of 750 ML. The seizure memo shows that they were placed in containers (KATTIS) PW-5 has also deposed that he did not remember whether he sent the entire bulk seized for test to excise SI or sent how much to him I further find that PW-1 G.L. Jonvar the Excise SI as per his assertion in his statment, had received one bottle of plain liquor and three or four quarter bottles of English and plain liquor. On their test he opined them as liquor vide reports Ex. P/1 and Ex. P/2. As per statment of P.W-5 Vivek Chauhan and the seizure memo Ex. P/2-C total quantity of material in question is 129 bulk liters, therefore, the quantity put to test out of the above being comparatively very meagre the above reports cannot be attached any conclusiveness. They being the only basis for proving the liquor in question to be liquor when under the circumstances they are bereft of probative value the Courts below went perverse to find the accused/applicant guilty of illegally possessing liquor, not understanding the direction of the Hon'ble Apex Court laid down in *Gaunter Edwin Kircher vs. State of Goa, 1993 Cri. L.J. 1485* in this respect, though with reference to narcotic law, that concerned authorities must send entire of seized quantity or sufficient quantity therefrom by way of samples for analysis.

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120. COURT FEES ACT, 1870 – Section 7 (xi)
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (o)
Suit filed on different grounds including ground contemplated u/s 12 (1) (o) of Accommodation Control Act – Whether separate court fees payable for ground u/s 12 (1) (o)? Held No – Law explained.
Pandharinath v. Rukminibai and others
Reported in 2006 (1) MPLJ 338

Held:

Now, with regard to ground under section 12(1) (o) of the Act, the trial Court did not pass the decree under this provision because the plaintiff failed to pay the Court-fees. There is no provision to this effect that whenever a suit is filed under different grounds of the Act, Court-fees has to be paid on all these grounds separately by the plaintiff. Section 7 (xi) of the Court Fees Act, 1870 provides as follows :–

"(xi) In the following suits between landlord and tenant :–

(a) for the delivery by a tenant of the counter part of lease,

(b) to enhance the rent of a tenant having a right of occupancy,

(c) for the delivery by a landlord of a lease,

(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,

(d) to contest a notice of ejectment,

(e) to recover the occupancy of immovable property from which a tenant has been illegally ejected by the landlord, and

(f) for abatement of rent.

according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint."

It is held in *Kevalchand Puranchand and another vs. Suganchand Puranchand, 1983, MPLJ 381* in para 14 that :-

> "14. In the light of the foregoing discussion, question No. (i) is answered as under :-
>
> No separate valuation for the purposes of jurisdiction and Court-fees with regard to the ejectment from the encroached accommodation is necessary to be put when the suit is brought by the landlord against the tenant for ejectment on ground under section 12 (1) (o). The valuation for the purposes of jurisdiction and Court-fees put for ejecting the tenant from the let accommodation as well as the encroached accommodation according to the annual rental value of the let accommodation in accordance with sub-clause (cc) of clause (xi) of section 7 of the Court Fees Act is proper, and a decree, on the proof of the ground under section 12(1)(o) of the Act, for ejectment from the encroached accommodation subject to the affording of an opportunity to the tenant under section 12(11), of the Act, can be passed."

Since, the ground with regard to illegal possession of the defendant on the adjacent land raised under the Act, there was no need to pay the Court fees separately. This fact has not been discussed in the light of the provisions of the Court Fees Act either by the trial Court or by the First Appellate Court. It is proved by the plaintiff that the defendant took the possession of the vacant land illegally, during the pendency of the suit which was not in his tenancy, and the plaint has been amended accordingly, the suit should have been decreed under section 12 (1) (o) of the Act also.

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121. CRIMINAL TRIAL :

Appreciation of evidence – Child witness – Evidence of child witness not to be rejected merely because witness is child – Law explained.
Jujhar Singh v. State of M.P.
Reported in 2006 (1) MPLJ 356

Held :

The Supreme Court in the case of *State of Maharashtra vs. Bharat Fakir, (2002)1 SCC 622,* while reversing the judgment of acquittal passed by the High Court, held that *"Merely because a witness is child, his/her evidence is not always liable to be rejected. Where trial Court found the testimony of child witness to be reliable, such witness stood the test of searching cross-examination, and even otherwise his evidence was supported by a number of other circumstances, the High Court erred in disbelieving the evidence of such witness". (Emphasis supplied). In the case of State of Karnataka vs. Sherrif, AIR 2003 SC 1074,* (Para 15) the Supreme Court, while appreciating the evidence of child-witnesses discussed as under :–

> "In our opinion the view taken by the learned Sessions Judge that it would be unsafe to rely upon the testimony of PW-3 regarding the actual factum of incident is not correct. A boy agad 8/9 years would be near his mother and would be sleeping in the same house where she was sleeping. There was no occasion for him to go to the house of Jaina Bi and to sleep with her. If PW-3 was not present in the house and was in the house of her grandmother in the night in question, he could not have conveyed the information about the incident to PW-1 and PW-2 nor they would have come to know about the incident forthwith. If PW-3 was present in the house he was bound to witness the incident, namely picking up quarrel by the accused with his wife and setting her on fire. There was absolutely no reason why PW-3 would give a false statement against his own father that he had tied the hands and legs of his mother and had burnt her. We are of the opinion that the testimony of PW-3 is fairly reliable on the factum of the incident and the same cannot be discarded only on account of a stray sentence in his cross-examination where he has stated that when his mother caught fire he was in his grandmother's house. The High Court did not examine the testimony of this witness carefully and we find ourselves unable to agree with the view taken by it."

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In the instant case, the child witness PW-6 Krishna Bai did not give any chance to the defence to bring any such material on the basis of which it can be held that she was not inside the room with her father and mother and she was tutored for giving the statement in the Court against the appellant. *Also see :*

Ratansingh vs. State of Gujarat, (2004)2 SCC 64, Suryanarayan vs. State of Karanataka, AIR 2001 SC 482, Radheshyam vs. State of Orissa, (1990)1 SCC 858 (Paras 11 and 12)

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122. ACCOMMODATION CONTROL ACT, 1961 (MP) – Section 12 (1) (e) and (f) Proof of ownership in eviction matters – Degree of proof required to establish ownership – Law explained.
Ram Pukar Singh v. Bhimsen and another
Reported in 2006 (1) MPLJ 381

Held :

Before proceeding with the case, it is necessary to understand the degree of proof required to be established for ownership in a suit for eviction based on ground under section 12(1) (e) and 12(1) (f) of the M.P. Accommodation Control Act wherein the ownership of the landlord is required to be proved. This is because the definition of landlord contained in section 2(b) of the M.P. Accommodation Control Act, 1961 does not contemplate ownership. The word 'landlord' has been defined in section 2(b) of the M.P. Accommodation Control Act as under :–

> "landlord" means a person who for the time being is receiving or is entitled to receive, the rent of any accommodation, whether on his own account or on account 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 accommodation were let to a tenant and includes every person not being a tenant who from time to time derives title under a landlord.

A bare perusal of the definition makes it clear that a landlord may even be devoid of ownership within the meaning of the said Act. Therefore, in a case where ownership is required to be proved, it is not sufficient for the plaintiff to merely establish his landlordship. He is also required simultaneously to prove that he is owner of the suit premises. However, there is a difference of degree of proof in a suit for eviction based on the relationship of landlord and tenant and in a suit for possession based on title. Both kinds of suits cannot be treated at par. The burden of proving ownership in a suit between landlord and tenant where the landlord-tenant relationship is either admitted or proved is not so heavy as in a title suit and lesser quantum of proof may suffice then what can be needed in a suit based on title against a person setting up a contending title while disputing the title of the plaintiff.

Learned counsel for the appellant relying upon the decisions of the Hon'ble Supreme Court of India in *Dilbagrai Punjabi vs. Sharad Chandra* reported in *AIR 1988 SC 1858* and *Sheela and others vs. Firm Prahlad Rai Prem Prakash reported in AIR 2002 SC 1264* contended that proof of ownership of the plaintiff/ landlord is must and in the absence of such proof, a suit for eviction under

section 12 (1) (e) (f) of the M.P. Accommodation Control Act ought not to have been decreed. As regards, the contention of the learned counsel that the plaintiffs were required to prove ownership, is cannot be disputed. The question in the present case is whether there is a sufficient proof regarding ownership of the plaintiff and requisites under the provisions of section 12(1)(e) of the said Act are available on record and whether the Courts below have found the ownership of the plaintiffs on the basis of the proof on record permissible under the law. In the case of *Dilbagrai* (supra), the Courts below dismissed the suit for eviction based on section 12(1)(f) of the M.P. Accommodation Control Act on the ground that the plaintiff did not produce any document of title. However, Hon'ble High Court has held the ownership of the plaintiff/landlord as proved on the basis of admission contained in the reply issued by the defendant in response to the notice given by the plaintiff. Moreover, the counterfoils of rent receipts described the plaintiff as owner of the property. This evidence was held by the Hon'ble High Court to be sufficient proof of ownership and the same was confirmed by the Apex Court. In the case of Sheela and others (supra), the Apex Court had the occasion to deal with the degree of proof required to prove ownership in a suit based on ground under section 12(1)(f) of the M.P. Accommodation Control Act. The Apex Court had held in paragraph-10 of its judgment :-

> "While seeking an ejectment on the ground of bona fide requirement under Cl.(f) abovesaid the landlord is required to allege and prove not only that he is a 'landlord' but also that he is a the 'owner' of the premises. The definition of 'landlord' and 'tenant' as given in Cls. (b) and (i) of section 2 of the Act make it clear that under the Act the concept of landlordship is different from that of ownership. A person may be a 'landlord' though not an 'owner' of the premises. The factor determinative of landlordship is the factum of his receiving or his entitlement to receive the rent of any accommodation. Such receiving or right to receive the rent may be on the own account of the landlord or on account of or for the benefit of any other person. A trustee, a guardian and a receiver are also included in the definition of landlord. Such landlord would be entitled to seek an eviction of the tenant on one or more of such grounds falling within the ambit of section 12(1) of the Act which do not require the landlord to be an owner also so as to be entitled to successfully maintain a claim for eviction. Clause (f) contemplates a claim for eviction being maintained by an owner-landlord and not a landlord merely. Though of course, we may hasten to add, that the concept of ownership in a landlord-tenant litigation governed by Rent Control Law has to be distinguished from the one in a title suit. Ownership is a relative term the import whereof depends on the context in which it is used. In Rent Control Legislation the landlord can be said to be owner if he is entitled in his own legal

right, as distinguished from for and on behalf of someone else, to evict the tenant and then to retain, control, hold and use the premises for himself. What may suffice and hold good as proof of ownership in a landlord-tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit."

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123. CRIMINAL PROCEDURE CODE, 1973 – Sections 303 & 304
Whether an accused availing legal aid u/s 304 can engage defence counsel at his own? Held, Yes – Law explained.
Pyar Singh v. State of M.P.
Reported in 2006 (1) MPLJ 395

Held:

A bare reading of section 303 of Criminal Procedure Code clears that every person accused for an offence before the Criminal Court has got a right to be defended by a pleader of his choice. Section 304 contains provision regarding legal act to the accused at State expenses in certain cases. Provisions of section 304 only applies when in a trial before the Court of Sessions the accused is not represented by a pleader and it appears that he does not have sufficient means to engage a pleader. But the provisions of section 304 of the Code never comes in the way of right of accused to be defended by an Advocate of his choice. The person who has been granted legal aid as per the provisions of section 304 of the Code can always on the latter stage of the trial engage a counsel of his choice if circumstances permits him or if some Advocate of his choice agrees to appear on his behalf either on payment of fees by the accused himself or by his relatives or even without payment of any fees.

Under the provisions of Article 22(i) of the Constitution of India also an accused of an offence has got a legal right to engage any lawyer of his own choice and this freedom of engaging lawyer of his choice cannot be taken away by any Court merely on the ground that legal aid has already been provided to the accused in the case.

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124. SERVICE LAW :
M.P. CIVIL SERVICES (PENSION) RULES, 1976 – Rr. 9 (1) and (2) (a)
Continuation of departmental proceedings against employee after retirement – Whether the disciplinary authority can order for recovery of pecuniary loss? Held, No – Power to pass such order vests only with the Governor.
State of M.P. and others v. R.L. Ogale and others
Reported in 2006 (1) MPLJ 412

Held :

A reading of sub-rule (1) of Rule 9, quoted above, shows that the power to pass an order for recovery of any pecuniary loss caused to the Government is reserved only to the Governor and no other authority. Sub-rule (2) (a) of Rule 9 of the Rules of 1976 however, provides that if departmental proceedings were instituted while the Government servant was in service whether before his retirement or during his re-employment, all such departmental proceedings shall be deemed to be proceedings under Rule 9 of the Rules of 1976, after the final retirement of the Government servant and shall be continued and concluded by the authority by which they were commenced, in the same manner as if the Government Servant had continued in service. Hence, if the Conservator of Forest was the Disciplinary Authority in the case of the original respendent and before the retirement of the original respondent from service on 31-8-1985, departmental proceedings have been initiated and charge-sheet has been issued on 22-8-1984 by the Conservator of Forest, the said departmental proceedings are deemed to be proceeding under Rule 9 of the Rules of 1976, even after retirement of the original respondent. The proviso of sub-rule (2)(a) of Rule 9 of the Rules of 1976, however, makes it amply clear that where the departmental proceedings are instituted by the authority subordinate to the Governor, that authority shall submit a report regarding its findings to the Governor. In the present case, therefore, the Conservator of Forest having initiated the departmental proceedings, before the retirement of the original respondent, was only entitled to continue and complete the same and submit a report to the Governor regarding his findings in the departmental proceedings, but was not entitled to pass a final order for recovery of the loss of Rs. 4,10,071.84 from the original respondent. In our view, therefore, the Tribunal was right in quashing the order dated 1-6-1991 passed by the Conservator of Forest, Khandwa for recovery of Rs. 4,10,071.84 from the original respondent after his retirement on 31.8.1985.

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125. ENVIRONMENT AND POLLUTION CONTROL :

Public trust doctrine – State as a trustee of all natural ressources is under legal duty to protect them – Doctrine explained.

T.N. Godavarman Thirumulpad v. Union of India and others

Judgment dated 26.09.2005 by the Supreme Court in Writ petition No. 202 of 1995, reported in (2006) 1 SCC 1

Held :

The duty to preserve natural resources in pristine purity has been highlighted in *M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.* After considering the opinion of various renowned authors and decisions rendered by other countries as well on environment and ecology, this Court held that the notion that the public has a right to expect certain lands and natural areas to retain their natu-

ral characteristics is finding its way into the law of the land. The Court accepted the applicability of public trust doctrine and held that it was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by the Government in trusteeship for the free and unimpeded use of the general public. These natural resources have a great importance to the people as a whole that it would be wholly unjustified to make them subject to private ownership. These resources being a gift of nature, should be made freely available to everyone irrespective of their status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. It was held that our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of these resources. The State as a trustee is under a legal duty to protect these natural resources. Summing up the Court said: (SCC p. 413, para 35)

> "35, We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining the legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the nature resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."

In view of the above, we hold that the natural resources are not the ownership of any one State or individual, the public at large is its beneficiary...

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126. CIVIL PRACTICE :

Defect in signing memorandum of appeal or pleadings or omission to file vakalatnama in appeal, effect of – Such defect or omission does not *ipso facto* invalidate the proceedings – Course to be adopted – Law explained.

Uday Shankar Triyar v. Ram Kalewar Prasad Singh and another

Judgment dated 10.11.2005 by the Supreme Court in Civil Appeal No. 6701 of 2005, reported in (2006) 1 SCC 75

Held :

It is, thus, now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial court, then he need not present a fresh vakalatnama along with the memorandum of appeal, as the vakalatnama in his favour filed in the trial court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4(2) of Order 3 CPC, read with Explanation (c) thereto. In such an event, a mere memo referring to the authority given to him in the trial court may be sufficient. However, filing a fresh vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office.

An analogous provision is to be found in Order 6 Rule 14 CPC which requires that every pleading shall be signed by the party and his pleader, if any. Here again, it has always been recognised that if a plaint is not signed by the plaintiff or his duly authorised agent due to any bona fide error, the defect can be permitted to be rectified either by the trial court at any time before judgment, or even by the appellate court by permitting appropriate amendment, when such defect comes to its notice during hearing.

Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so man-

dates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.

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We may at this juncture digress and express our concern in regard to the manner in which defective vakalatnamas are routinely filed in courts. Vakalatnama, a species of power of attorney, is an important decument, which enables and authorises the pleader appearing for a litigant to do several acts as an agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled/ attested/ accepted with care and caution. Obtaining the signature of the litigant on blank vakalatnamas and filling them subsequently should be avoided. We may take judicial notice of the following defects routinely found in vakalatnamas filed in courts:

(a) Failure to mention the name(s) of the person(s) executing the vakalatnama and leaving the relevant column blank.

(b) Failure to disclose the name, designation or authority of the person executing the vakalatnama on behalf of the grantor (where the vakalatnama is signed on behalf of a company, society or body) by either affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the vakalatnama).

(c) Failure on the part of the pleader in whose favour the vakalatnama is executed, to sign it in token of its acceptance.

(d) Failure to identify the person executing the vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the vakalatnama.

(e) Failure to mention the address of the pleader for purpose of service (in particular in cases of outstation counsel).

(f) Where the vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the vakalatnama without any endoresement/ statement that the signature is for "self and as guardian of his minor children". Similarly, where a firm and its partner, or a company and its director, or a trust and its trustee, or an organisation and its office-bearer, execute a vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorised to sign on behalf of the corporate body/firm/society/organisation.

(g) Where the vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an attorney-holder and failure to annex a copy of the power of attorney.

(h) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets. (Many a time it is not possible to know who have signed the vakalatnama where the signatures are illegible scrawls.)

(i) Pleaders engaged by a client, in turn, executing vakalatnames in favour of other pleaders for appearing in the same matter or for filing an appeal or revision (it is not uncommon in some areas for *mofussil* lawyers to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court and engage a pleader for appearance in a higher court and execute a vakalatnama in favour of such pleader.)

We have referred to the above routine defects, as Registries/offices do not verify the vakalatnames with the care and caution they deserve. Such failure many a time leads to avoidable complications at later stages, as in the present case. The need to issue appropriate instructions to the Registries/offices to properly check and verify the vakalatnames filed requires emphasis.

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127. ARBITRATION ACT, 1940 – Section 13

Arbitration award – Whether reasons are required to be given in award – Unless contract so requires, reasons need not be given – Law explained.

State of Rajasthan v. Nav Bharat Construction Co.

Judgment dated 04.10.2005 by the Supreme Court in Civil Appeal No. 2500 of 2001, reported in (2006) 1 SCC 86

Held :

We, however, see no substance in the third ground i.e. that reasons should have been given by the umpire. It is settled position that under the Arbitration

Act, 1940, unless the contract so required, reasons were not required to be given. A Constitution Bench of this Court in the case of *Raipur Development Authority v. Chokhamal Contractors, (1989) 2 SCC 721* has held that it is not necessary to give reasons and that an award cannot be set aside merely because it is a non-speaking award. The mere fact that two arbitrators had differed and that the matter was required to be dealt with by an umpire does not mean that the umpire should give reasons for his award. We further clarify that the umpire now being appointed by us need not give reasons.

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128. RENT CONTROL AND EVICTION :

Whether co-owners can seek partition of the tenanted premises – Held, Yes – Whether co-owners after partition can seek eviction ? Held, Yes – Law explained.

Messrs. Karta Ram Rameshwar Dass v. Ram Bilas and others

Judgment dated 23.11.2005 by the Supreme Court in Civil Appeal No. 6986 of 2005, reported in (2006) 1 SCC 125

Held :

... It has been laid down by this Court that if all the co-owners "agree among themselves split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor". It was further laid down that there was no right in the tenant to prevent the co-owners from partitioning the tenanted accommodation among themselves unless it was shown that the partition was not bona fide and was a sham transaction to overcome the rigours of rent control laws which protected eviction of tenants except on the grounds specified in the relevant statute meaning thereby that a tenant could be evicted only by taking recourse to the provisions of rent control laws upon proof of the grounds enumerated thereunder. This Court came to the conclusion that the partition between the co-sharers was bona fide and as the tenant had acquired the share of Shaikh Jaffar as owner thereof, the claim for eviction from the remaining portion which fell to the share of the plaintiff was granted.

In view of the foregoing discussion, we hold that in a suit for partition filed by one co-sharers against another if a tenant is made party, he can object to the claim for partition if it is shown that the same was not bona fide and made with an oblique motive to overcome the rigours of rent control laws which protected the eviction of the tenant except on the grounds set out in the relevant statute. After a partition is effected or a decree for partition is passed, it would be open to the co-sharers to evict a tenant from that portion of tenanted premises which had fallen in their respective shares by filing separate proceedings for eviction under rent control laws on the grounds enumerated thereunder.

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129. CIVIL PRACTICE :

Maintainability of suit – Whether maintainability to be examined on basis of law on the date of filing of the suit or when the suit comes for trial or disposal – Law explained.

Sudhir G. Angur and others v. M Sanjeev and others

Judgment dated 27.10.2005 by the Supreme Court in Civil Appeal NO. 2273 of 2002, reported in (2006) 1 SCC 141

Held :

In our view Mr. G.L. Sanghi is also right in submitting that it is the law on the date of trial of the suit which is to be applied. In support of this submission, Mr. Sanghi relied upon the judgment in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass, AIR 1952 Bom 365* wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes or for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repealed. It could not be denied that now the Court has jurisdiction to entertain this suit.

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130. CIVIL PROCEDURE CODE, 1908 – O.23 R. 3

Determination of suit on the basis of compromise between parties – Duty of the Court – Law explained.

Amteshwar Anand v. Virender Mohan Singh and others

Judgment dated 07.10.2005 by the Supreme Court in Civil Appeal No. 6326 of 2005, reported in (2006) 1 SCC 148

Held :

... Order 23 Rule 3 casts an obligation on the court to be satisfied that a suit has been adjusted wholly or in part by a lawful agreement or compromise in writing and signed by the parties. On the material before it, the High Court would have had no reason to hold that the suits had not been adjusted as affirmed by the parties to the application. It was not necessary for the Court to say in express terms that it was satisfied that the compromise was a lawful one. There is a presumption that the Court was so satisfied unless the contrary is proved (See- *Suleman Noormohamed v. Umarbhai Janubhai, (1978) 2 SCC 179*).

No doubt in *Ajad Singh v. Chatra, (2005) 2 SCC 567* this Court has said that the suit could not have been disposed of except by recording its satisfaction as contemplated by Rule 3 Order 23 of the Code. However, in that case there was in fact no proceeding under Order 23 Rule 3 at all. There the suit was decreed by the trial court on the basis of a compromise which had been entered into during the pendency of the suit which was not only on plain paper but was executed in a police station. This Court held that the suit could not have been disposed of except by recording the compromise and by following the procedure contemplated by Rule 3 of Order 23. The decision is therefore distinguishable on facts.

The second obligation cast on the court by Order 23 Rule 3 is to order the agreement to be recorded. This is normally done simultaneously with the passing of the decree. In the present case the rights of the other parties to the suit in respect of the suit properties had not yet been agreed upon, the stages were split into two. This does not mean that the orders dated 18.3.1993 and 27.5.1993 were not in keeping with the provisions of Order 23 Rule 3. What the High Court has done by the two orders dated 18.3.1993 and 27.5.1993 is to comply with the mandate to record the agreements.

Finally, the court is required to pass decree in accordance with the agreement or compromise. The learned Single Judge correctly came to the conclusion that no decree could be passed disposing of the suits at that stage as the other parties in the suit had not yet entered into any settlement. When the third agreement was also filed subsequently, the Court recorded the statements of VMS who had also signed the third agreement as the assignee of the appellants, as well as the statements of the representatives of the other heirs. All the parties to the suits by this time had settled their differences in the pending suits. The submission of the appellants that their statements were required to be recorded is unacceptable in view of our finding that they had assigned their rights in the suit properties (except as provided in the two agreements) and in view of their affidavits which were already on record.

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131. EVIDENCE ACT, 1872 – Sections 40 to 44.

Relevancy of judgment passed in respect of one accused in a trial against another accused of the same incident – Law explained.

Rajan Rai v. State of Bihar

Judgment dated 10.11.2005 by the Supreme Court in Criminal Appeal No. 199 of 2000, reported in (2006) 1 SCC 191

Held :

Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Evidence Act, 1872 (in short "the Evidence Act") which are under the heading

"Judgments of courts of justice when relevant", and in the aforesaid sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment, order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 insofar as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of the earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

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A three-Judge Bench of this Court had occasion to consider the same very question in *Karan Singh v. State of M.P., (1965) 2 SCR 1* in which there were in all 8 accused persons out of whom the accused Ram Hans absconded, as such trial of seven accused persons, including the accused Karan Singh, who was the appellant before this Court, proceeded and the trial court although acquitted the other six accused persons, convicted the seventh accused i.e. Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, the accused Ram Hans was apprehended and put on trial and, upon its conclusion, the trial court recorded the order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of the accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of the accused Ram Hans, the conviction of the accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when the other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the conten-

tion, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Sections 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of the accused Ram Hans, it was not permissible in law for the High Court to uphold the conviction of the accused Karan Singh. This Court repelling the contention, held that the decision in each case had to turn on the evidence led in it. Case of the accused Ram Hans depended upon evidence led there while the case of the accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering the merits of the case of Karan Singh, who was the appellant before this Court. This Court observed at AIR p. 103 thus: (SCR pp. 3-4)

> "As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ram Hans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ram Hans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ram Hans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of the accused Karan Singh from sections 302/149 to one under Section 302 read with Section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh. This Court was of the view that in spite of the fact that the the accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering the appeal of the accused Karan Singh, to consider the evidence recorded in the trial of Karan Singh only for a limited purpose to find out as to whether Karan Singh could have shared the common intention with the accused Ram Hans to commit the murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans.

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PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADESH

ORDER

No. 64/

Dated : 7/8 February, 2006

(I) In exercise of powers conferred by Section 5 (1) of the Right to Information Act, 2005 Hon'ble the Chief Justice of the High Court of Madhya Pradesh hereby designates -

1. Clerk of Court of the Office of District & Sessions Judge in each Civil District as State Public Information Officer for that District,

2. Deputy Clerk of Court attached to Family Court as State Public Information Officer for that Family Court.

(II) In exercise of powers conferred by Section 5(2) of the Right to Information Act, 2005 Hon'ble the Chief Justice of the High Court of Madhya Pradesh hereby designates –

1. Naib Nazir as State Assistant Public Information Officer for the Courts situated at places other than District Head Quarter.

(III) Hon'ble the Chief Justice of the High Court of Madhya Pradesh hereby designates –

(1) District Judge in each District and

(2) Principal Judge of each Family Court,

to function as Appellate Authority for the purpose of Section 19 of the Right to Information Act, 2005.

BY ORDER OF HIGH COURT

REGISTRAR GENERAL

HIGH COURT MADHYA PRADESH, JABALPUR
NOTIFICATION

No. C/1099
Four-8-59/2005

Jabalpur, Dated : 10 March, 2006

In exercise of the powers conferred by clause (2) of Article 227 of the constitution of India, the High Court of Madhya Pradesh hereby makes the following amendments in the Rules and Orders (criminal) for the guidance of Criminal Courts in Madhya Pradesh, namely :-

AMENDMENT

1. IN PART - I, IN CHAPTER 5, under the heading "General procedure in enquiries and Trials".–

In rule 124 -

(a) in sub-rule (2), the words "Exceeding Rs. 100/- in aggregate value" shall be omitted,

(b) in sub-rule (3), the words "if the value of the packet exceeds Rs. 100" shall be omitted,

2. IN PART - V, in CHAPTER 27, under the heading "Nazarats," - in Rule 680, under the heading "Register of property made over to the Nazir in criminal cases", for sub rule (1), the following sub-rule shall be substitutedn namely :–

"(1) Pending the completion of an enquiry or trial, the articles in evidence or the personal property of an accused produced by the police shall, unless otherwise ordered by the court, remain in the custody of the nazir, except where it consists of valuables, currency notes or coins. Valuables, currency notes or coins, invariably by kept into a sealed packet in the presence of the Magistrate and a memorandum in the prescribed form (Schedule V. No. 198) giving the list of the property and the estimate value thereof prepared. The sealed packet and memorandum shall be sent to the Treasury or Sub-Treasury officer through the Nazir to be kept in the treasury for safe custody and the treasury officer or sub-treesury officer shall proceed in accordance with Financial Rules 9 and 10. The Memorandum shall be returned to the Magistrate and filed in the record of the enquiry or trial. Each packet, whether sent to the treasury officer or sub-treasury officer shall be entered in the above-mentioned register and the alleged contents and their value noted in the appropriate columns.".

BY ORDER OF THE HIGH COURT

ADDL. REGISTRAR

भाग–4 (ग)

अंतिम–नियम

मध्य प्रदेश शासन

वित्त विभाग

मंत्रालय, वल्लभ भवन, भोपाल

भोपाल, दिनांक 22 दिसम्बर 2005

क्रमांक एफ. 1–2–2005 नियम– चार – भारत के संविधान के अनुच्छेद 283 (2) के परन्तुक द्वारा प्रदत्त शक्तियों को प्रयोग मे लाते हुए, मध्यप्रदेश राज्यपाल, एतद् द्वारा, मध्यप्रदेश कोषालय संहिता भाग–एक तथा भाग–दो में निम्नलिखित और संशोधन करते हैं, **अर्थात** : –

संशोधन

उक्त संहिता में,–

(1) भाग–एक में, सहायक नियम 447 के पश्चात् विद्यमान टिप्पण (नोट) के स्थान पर, निम्नलिखित टिप्पण स्थापित किया जाय, अर्थात् :–

"टिप्पण–" शासन का नकदी कारोबार, भारतीय रिजर्व बैंक अधिनियम, 1934 (1934 का 2) के उपबंधों के अधीन, भारतीय रिजर्व बैंक द्वारा उसके अभिकर्ता के रूप में कार्य करने के लिये प्राधिकृत बैंकों द्वारा संचालित किया जाएगा।"

(2) भाग–दो में, परिशिष्ट–23 में, पैरा सोलह के स्थान पर, निम्नलिखित पैरा स्थापित किया जाए, अर्थात :–

"सोलह–बैंकरों को परामर्श:– समस्त चैक, कोषालय अधिकारी द्वारा भारतीय स्टेट बैंक पर या भारतीय रिजर्व बैंक द्वारा उसके अभिकर्ता के रूप में शासकीय कारोबार करने के लिये प्राधिकृत किसी अन्य बैंक कर आहरित किए जाएंगे, चैकों पर हस्ताक्षर करने के लिये प्राधिकृत अधिकारियों के हस्ताक्षर के नमूने कोषालय अधिकारी द्वारा वह तारीख उपदर्शित करते हुए, जिससे अधिकारी चैकों पर हस्ताक्षर करना प्रारंभ करेगा, बैंक को भेजे जाएंगे ।"

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

ए.पी. श्रीवास्तव, सचिव,

भोपाल, दिनांक 22 दिसम्बर, 2005

Court Fees Act (7 of 1870), S. 35 – Remitting of Court Fees payable in the cases filed by the State Government before a Court of competent jurisdiction – In exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (No. 7 of 1870) and in supersession of this Department's Notification No. F. 17 (e) 34-05 XXI-B (II), dated 17th May, 2005, the State Government hereby remits in whole of the State of Madhya Pradesh, the Court Fees payable in the cases filed by the State Government before a Court of competent jurisdiction.

Explanation : (a) "Court of competent jurisdiction" includes High Court of Madhya Pradesh, District Court, Sessions's Court, Chief Judicial Magistrate's Court, Magistrate's Court, Special Courts, Tribunal, Arbitration Tribunal, Boards, Board of Revenue, Revenue Courts Forum and any other Court, which the State Government may specify, by Notification, from time to time, where any Court Fee is required to be paid;

(b) "Cases" includes Writ Petition, Application, Suits, Appeals, Counter Claims, Counter Appeal, Revision, Review, Miscelleneous Applications in pending cases and Vakalatnama filed on behalf of the State Government, Rejoinders, Caveat, Process Fee etc.

[Notfn. dt. 13-10-2005 published in M.P. Govt. Gazette (Extraordinary) dt. 13.10.2005, p. 1021]

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NOTIFICATION REGARDING ENFORCEMENT OF HINDU SUCCESSION (AMENDMENT) ACT, 2005

(Ministry of Law and Justice (Legislative Department) Notification No. S.O. 1248 (E) dated the 9th September, 2005. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 9-9-2005 page 1).

In exercise of the powers conferred by sub-section (2) of section 1 of the *Hindu Succession (Amendment) Act, 2005 (No. 39 of 2005),* the Central Government hereby appoints 9th day of September, 2005 as the date on which the said Act shall come into force.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE INDIAN STAMP (MADHYA PRADESH AMENDMENT) ACT, 2005

No. 5 of 2006[**]

[Received the assent of the Governor on the 30th January, 2006; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 1st February, 2006].

An Act further to amend the Indian Stamp Act, 1899 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-sixth Year of the Republic of India as follows :-

1. Short title and commencement.- (1) This Act may be called the Indian Stamp (Madhya Pradesh Amendment) Act, 2005.

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

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 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, in article 45, for clause (d), the following clause shall be substituted, namely :-

"(d) when given without consideration and authorizing the agent to sell, gift, exchange or permanently alienate any immovable property situated in Madhya Pradesh :-

(i)	for a period not exceeding one year from the date of its execution.	One hundred rupees
(ii)	for a period exceeding one year from. the date of its execution or when it is irrevocable or when it does not purport to be for any definite term.	The same duty as a conveyance (No. 22) on the market value of the property".

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* Published in M.P. Rajpatra (Asadharan) dated 1-2-2006 Page 106.

** Published in M.P. Rajpatra (Asadharan) 1-2-2006 Page 108 (i)

THE CRIMINAL LAW (AMENDMENT) ACT, 2005

No. 2 of 2006*

An Act further to amend the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

[11th January, 2006]

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

Chapter I

Preliminary

1. Short title and commencement.– (1) This Act may be called the Criminal Law (Amendment) Act, 2005

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act.

Chapter II

Amendment to the Indian Penal Code

2. Insertion of New section 195A.– After section 195 of the Indian Penal Code (45 of 1860), the following section shall be inserted, namely :–

"**195A. Threatening or inducing any person to give false evidence.**– Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both ;

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced".

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* Received the assent of the President on the 11th January, 2006 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 12-1-2006 Pages 1-6.

Chapter III
Amendments to the Code of Criminal Procedure, 1973

3. Amendment of section 195.– In section 195 of the Code of Criminal Procedure, 1973 (2 of 1974) (hereafter in this chapter referred to as the Code of Criminal Procedure) in sub-section (I), for the words "except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate", the words "except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate" shall be.substituted.

4. Insertion of new Chapter XXIA.– After Chapter XXI of the Code of Criminal Procedure, the following Chapter shall be inserted, shall be inserted, namely :–

Chapter XXIA
Plea Bargaining

265A. Application of the Chapter.– (1) This Chapter shall apply in respect of an accused against whom–

(a) the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204.

but does not apply where such offence affects the socio- economic condition of the country or has been committed against a woman, or a child below the age of fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

265B. Application for plea bargaining.– (1) A person accused of an offence may file an application for plea bargaining in the Court in which such offence is pending for trial.

(2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

(3) After receiving the application under sub-section (1), the Court shall issue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused *in camera*. Where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where –

(a) the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;

(b) the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).

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BOOK REVIEW

Six Years' Diglot Edition of ANJ which encompasses the digest of cases of the Supreme Court and High Courts from the year 2000-2005 is a painstaking effort on the part of the ANJ Publications and bound to come in handy for the large number of law practitioners and Judicial Officers in grasping the subject matter in their own language. The Diglot Edition in fact acts as a bridge meat to come over the handicap caused by the language barrier. Great care appears to have been taken to keep the opinion expressed in the original text of the judgment intact while translating in Hindi. The subject index given in the beginning is comprehensive and shows that the digest covers a number of useful subjects whether on civil side or on criminal side which one commonly comes across in day to day disputes. It also encompasses multiple cross references and cross references and cross citations which comes in handy for person using other journals. The publication, indeed, is a milestone in the journey initiated in year 2000 by the A.N.J. Publications by publishing monthly Journals for Supreme Court & High Court cases, separately in diglot. The digest will no doubt encourage the use of Hindi, which happens to be the mother tongue of the litigants apart from being our National Language. Indeed it is going to prove of immense help to a vast section of judicial fraternity.

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Mortality is that which sustains life. Sin is that which destroys life. Morality is the standard of human relations. Conceptualise morality as constructivity; sin as destructivity. Morality is solving problems; sin is creating problems.

GARY NOVAK

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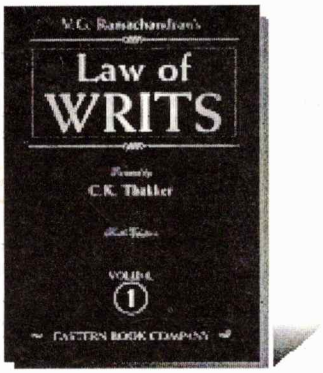

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