JOTI JOURNAL

Vol. XIII
APRIL 2007 (BI-MONTHLY)

JUDICIAL OFFICER'S TRAINING & RESERCH INSTITUTE • HIGH COURT OF M.P. • सत्यमेव जयते

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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FROM THE PEN OF THE EDITOR

Ved Prakash
Director, JOTRI

Esteemed Readers !

Months of March and April had been quite action packed for us as regards institutional activities. During this period the Institute organized ten workshops and training programmes covering multiple areas of law. The mega event was the State Level Workshop on Plea Bargaining held on 11th March, 2007 at Indore in which around 800 participants consisting of Judicial Officers, Lawyers, Prosecution Officers and Police Officers participated. The workshop was inaugurated by Hon'ble Shri Justice B.P. Singh, Judge Supreme Court of India. The inaugural function was presided over by Hon'ble the Chief Justice. Hon'ble Shri Justice B.P. Singh emphatically impressed upon the participants that the scheme of Plea Bargaining, as incorporated in the Criminal Procedure Code, should be applied with an open mind and an innovative approach so that the Courts may be in a position to handle the backlog of cases and to dispense quick justice to the satisfaction of all concerned. To quote :

> 'The introduction of plea-bargaining is an important start to judicial reform. This will singularly reduce the backlog of cases that has paralysed our justice mechanism..... If it gets going, the reform could reduce the enormous backlog of cases in our courts. Of around three crore cases clogging the courts, 1.81 crore are criminal cases. Tens of thousands of these criminal cases could vaporize with the plea bargain form.'

The inflow of cases under Section 138 of the Negotiable Instruments Act is on the rise. Hon'ble the High Court in order to address the problem has created 28 Courts of Special Magistrates manned by retired Judicial Officers. As the law in this particular stream has developed at a fast pace, therefore, a day long workshop for the Presiding Officers of the newly established Courts was organized which provided an opportunity to the participants to have a fresh look at the scheme which may help in expeditious disposal of the cases u/s 138 of the Act.

A four days' workshop on – 'Criminal Justice Administration' organized for Chief Judicial Magistrates enabled us to focus on the specific problems of criminal justice administration as well as the methodology which can be helpful in dealing with the problems with which the system is afflicted. Chief Judicial Magistrate happens to be the Head of the Magistracy and is expected to be equipped with all the qualities and skills of judicial leadership. The issue relating to holding regular meetings of District Monitoring Cell, which over the years has almost been forgotten, the approach in preparing work distribution memo, the issues of inspection, guidance and supervision of the Magistrate Courts and management

of Malkhana were some of the important issues discussed at length in the light of relevant provisions as well as judicial pronouncements.

Apart this, three other workshops which need special mention here were on 'Expeditious Execution of Decrees', 'Legal issues in Accident Claim cases under Motor Vehicles Act' and a joint workshop on – 'Forest Laws with specific focus on Wild Life (Protection) Act, 1927' for Forest Officers and Judicial Officers.

The number of execution matters presently pending in Madhya Pradesh is around 50% of the pending civil suits. This is indeed an alarming situation indicating that those who have been successful in getting some relief through a long drawn legal battle are now waiting to reap the fruits of litigation. The workshop on 'Expeditious Execution of Decrees' focused on various issues which are mainly responsible for delay in execution of decrees. The effort was to find out probable solutions within the legal framework.

Again with the increased inflow of claim cases under Motor Vehicles Act as well as the developments which have taken place in the law relating to motor accident claims in the past couple of decades, it was the right time to explore various issues involved in disposal of claim cases and their solutions.

Indian Forest Act, 1927 and Wild Life (Protection) Act, 1972 have many a times been amended to make them more effective. However, the impact is not perceptible due to lapses in investigation, prosecution and trial of the cases. To deal with all these issues a joint workshop of Judicial Officers and Forest Officers was held on 28.04.2007 which was able to generate a lot of sensitivity amongst the participants and it is expected that it will pave the way for effective implementation of these two enactments.

Much water has flown through the Narmada since I joined this Institute in May, 2002. My association with the Institute has throughout been a magnificent opportunity for me to learn not only law but also about a host of issues which have a bearing upon dispensation of quick, qualitative, effective, unpolluted and responsive justice. I, in my own humble way, with the modest knowledge and understanding of law at my command, always tried to contribute to the activities of the Institute with the team which I was fortunate to have in form of Additional Director, Shri Shailendra Shukla, Deputy Director, Shri Kapil Mehta and my staff. Whatever could be achieved during this period, was the result of team efforts. Now, when I prepare to bid adieu to the Institute, I feel a deep sense of satisfaction that with our efforts we could bring the Institute closer to a better tomorrow. The fact remains that whatever we could achieve was the result of everflowing support, guidance and motivation from Hon'ble the Chief Justice, Hon'ble the Chairman and members of High Court Training Committee and Hon'ble Judges of the High Court. I also feel highly indebted to the fellow Judicial Officers who have throughout extended their fullest co-operation to the Institute. Let me conclude with the words of Mahatma Gandhi –

'Satisfaction lies in efforts, not in the attainment. Full effort is full victory'.

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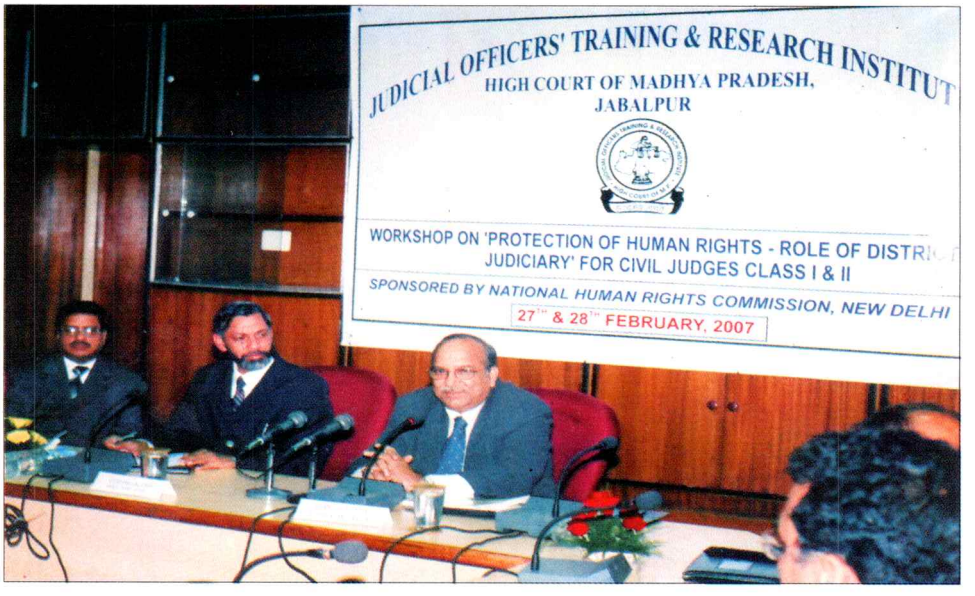

Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of M.P. enlightening the participants in the inaugural session of two days' workshop on – 'Protection of Human Rights – Role of District Judiciary' held at J.O.T.R.I. on 27th & 28th February, 2007. The workshop was sponsored by NHRC, New Delhi

Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee addressing the participants in the workshop on – 'Protection of Human Rights – Role of District Judiciary', (27th & 28th February, 2007). On His Lordship's left is seated Hon'ble Shri Justice V.D. Gyani, Former Judge, High Court of M.P.

Hon'ble Shri Justice D.M. Dharmadhikari, Chairman, M.P. State Human Rights Commission addressing the participants in the workshop on – 'Protection of Human Rights – Role of District Judiciary' held at J.O.T.R.I. on 27th & 28th February, 2007

Hon'ble Shri Justice B.P. Singh, Judge, Supreme Court of India enlightening the participants on the occasion of – 'State Level Workshop on Plea Bargaining' organized jointly by J.O.T.R.I. and State Legal Services Authority held at Indore on 11th March, 2007

Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of M.P. enlightening the participants on the occasion of – 'State Level Workshop on Plea Bargaining' organized jointly by J.O.T.R.I. and State Legal Services Authority held at Indore on 11th March, 2007

Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of M.P. delivering Inaugural Address in the workshop on – 'Criminal Justice Administration' held at J.O.T.R.I. from 20th – 23rd March, 2007. Sitting on His Lordship's left is Hon'ble Shri Justice Dipak Misra and on the right is Ved Prakash, Director, J.O.T.R.I.

Hon'ble Shri Justice S.S. Jha illuminating the participants in the workshop on – 'Legal issues in Accident Claim Cases under Motor Vehicles Act' held at J.O.T.R.I. on 4th and 5th April, 2007

Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee making a point in the workshop on – 'Legal issues in Accident Claim Cases under Motor Vehicles Act' held at J.O.T.R.I. on 4th and 5th April, 2007

APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Anang Kumar Patnaik, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Sanjay Yadav and Hon'ble Shri Justice Kedar Singh Chauhan as Additional Judges of the High Court of Madhya Pradesh on 02.03.2007, in a brief swearing-in-ceremony held in the Conference Hall, South Block, High Court of Madhya Pradesh at Jabalpur.

Hon'ble Shri Justice Sanjay Yadav was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 26.06.1959. Started practicing at Main Seat of High Court of Madhya Pradesh at Jabalpur from 1986. Was appointed Government Advocate in the year 1999. Assumed office of Deputy Advocate General in October 2005. Was holding this post prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 2nd March, 2007.

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Hon'ble Shri Justice Kedar Singh Chauhan was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 06.05.1948. Joined service as Civil Judge Class-II on 21.6.1975. Was promoted as Civil Judge Class-I on 13.12.1983 and as Additional District Judge on 27.6.1989. Worked in different capacities as Additional Welfare Commissioner, Bhopal, District & Sessions Judge, Seoni, Registrar (Judicial) in the High Court of Madhya Pradesh and District & Sessions Judge, Jabalpur. Was District Judge (Vigilance) Jabalpur prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 2nd March, 2007.

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HON'BLE SHRI JUSTICE VINEY MITTAL ASSUMES CHARGE

Hon'ble Shri Justice Viney Mittal on His Lordship's transfer from Punjab and Haryana High Court to High Court of Madhya Pradesh was administered oath of office on dated 11th April, 2007 by Hon'ble the Chief Justice Shri Anang Kumar Patnaik in a brief ceremony held in the Conference Hall of South Block of High Court of Madhya Pradesh at Jabalpur.

Was born on December 1, 1948. Belongs to a generation of lawyers. Was enrolled as an Advocate on July 6, 1972. Practiced in the Punjab and Haryana High Court for 29 years in Civil and Constitutional matters. Dealt with cases pertaining to land disputes, landlord and tenant disputes, disputes regarding commercial transaction and Municipal laws etc. Was designated as an Additional Central Government Standing Counsel in the High Court in the year 1992 and worked till 1995. Was appointed as Additional Judge in the High Court of Punjab and Haryana in the year 2000 and as a permanent Judge of the Punjab and Haryana High Court on July 2, 2002. Was transferred to the High Court of Madhya Pradesh and took oath of office on 11th April, 2007.

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PART - I

ROLE OF THE VICTIM IN THE CRIMINAL JUSTICE PROCESS

Justice (Retd.) P.V. Reddi
Former Judge, Supreme Court of India

In an adversarial system like ours, criminal cases become a contest between the accused and the State, represented by the Public Prosecutor. There is very little role envisaged for the victim, who is the most affected by the crime. Her plight is forgotten in the battle for supremacy between the State and the accused. Instead of being the focus of the debate, she becomes the mere cause of it. This article looks at the role of the victim in the Indian Criminal Justice System and argues for making her an important player in the system, instead to relegating her to the sidelines. Not only will this provide much needed relief and succour to the victims, but will also help in the proper implementation of criminal justice in India. Further, the article makes a case for providing effective justice to the victim by supplementing her participation in criminal proceedings, with compensation for damages suffered due to the crime, and support services to ensure her proper recovery and rehabilitation. In conclusion, the article seeks to suggest ways and means of making the criminal justice delivery mechanism victim friendly and sensitive, so that it can meet the challenges faced by the victim and provide effective justice to those affected by crime.

I. Introduction

To administer the criminal law efficiently, effectively and even-handedly is a fundamental obligation of any State governed by rule of law. This function is an attribute of the sovereign power of the State. The quality of governance in a democratic country is judged *inter alia*, by the manner in which the criminal justice system is administered, and its effectiveness. The desideratum of any system dealing with crimes and punishment is to impart a sense of security and safety to the people – whether it be inhabitants of the country or alien citizens visiting the country. As the society has a legitimate expectation of the State ensuring effective operation of the criminal justice system to promote common good and a hassle-free atmosphere, the failures or inadequacies in the criminal justice system or its apparatus are bound to have an adverse effect on the life and conduct of the people.

Indubitably, the criminal justice system in our country cries for reforms and refinements on many fronts. The inadequacies and aberrations that have been haunting the criminal justice system are too well known to be emphasized. The crude methods of investigation in which the use of third degree methods reigns supreme, ill-trained and ill-equipped police personnel lacking in people-friendly orientation, inefficient prosecuting machinery, lack of coordination between investigating and prosecuting agencies, witnesses being subjected to intimidation, tardy and long-drawn trials, and lack of accountability for the failure of prosecution, are some of the disturbing features of the criminal justice system

of the present day in our country. Though in the post-independence era, there has been an increased awareness regarding the improvement of the quality of recruitment and training of police personnel, and use of scientific methods of investigation, the percentage of crime detection and the rate of conviction for serious crimes remains to be quite low.[1] Inadequate number of courts and ill-trained judicial officers have compounded the problems afflicting the system. The remedy or antidote to the ailments lies not merely in undertaking legislative measures, but in refining or perhaps revamping the present system at work so as to invigorate the criminal justice delivery system, and to put in place a welfare-oriented machinery. Towards this end, one area in which both legislative reform as well as rigorous executive action is required is in respect of meting out justice to the victims[2] of crime.

At present, the role of a victim of crime is only at the periphery of the criminal justice delivery system. Once the first information is furnished, the only stage at which the victim comes into the picture is when she[3] is called upon to give evidence in the court by prosecution. The victim virtually takes a backseat in the Criminal Justice net work. She is neither a participant in the criminal proceedings launched against the offender, nor even reckoned as a guiding element in the process of prosecution or the ultimate decision-making. There is a plethora of instances in which the victim has been subjected to secondary victimization by the acts of the accused or their associates. The law does not afford any relief to the victim by way of monetary compensation or reparation for the harm suffered except to a very limited extent. [4] There has been crass neglect of the victim's needs and interests, even though she ought to be regarded as an important player in the system. The system has no mechanism and no direction to redress the suffering and trauma undergone by her. Except for the cases in which *an ad hoc ex gratia* amount has been sanctioned by the Government in its discretion, the victim has to fend for herself. She has to bear the horrifying experience with all its attendant consequences silently and helplessly. There is none to counsel her, to extend medical assistance, or to recompense her for deprivation of livelihood. The State or its instrumentalities do nothing to heal the scar left behind by the perpetrators of the offence. It is in this scenario that the topic of victimology which, in essence, means the vindication of the victim's cause and the methodology of rendering justice to the victim, has assumed great relevance in recent times. The case for protecting the interests

1. The conviction rate in more serious crimes under the Indian Penal Code, 1860, is said to be in the range of 20% to 34%. It will be much less if the acquittals by appellate courts are taken into account. See NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA (2003).

2. In this paper the term "victim" includes the kith and kin (if victim is dead), and the first informant.

3. In this paper, the words "her/his" and "she/he". apply to both males and females.

4. See Ss. 357, 358, Code of Criminal Proced. e, 1973 [hereinafter Cr.P.C.] & S. 5, Probation of Offenders Act, 1958

of victims of crime, and for providing them succour and relief cannot be gainsaid. It is high time that the legislative and executive wings appropriately attune the criminal justice system so as to unfold its potential to reach the victims who are in dire need of help.

There are four areas in which the criminal justice policy should take care of the interests of victims of crimes. They are:

(i) Furnishing information at the investigation and trial stages;

(ii) Facilitating the victim to take active part in the criminal justice process;

(iii) Providing a monetary relief or compensation; and

(iv) Extending support services such as providing legal aid, counselling, medical aid and rehabilitation.

Broadly, these areas fall under the categories of procedural and service rights, which the criminal justice system should thrive to promote. This paper will examine each of these areas to determine the scope and extent of legal and executive reform needed, to make the criminal justice system victim-friendly. The first part of the paper deals with the first two areas highlighted above. The second part examines the need for ensuring effective justice for victims, by providing them not only with monetary relief, but also with victim support services. In conclusion, the article draws from the entire discussion, and puts forth suggestions for change so as to provide effective justice to victims of crime.

II. VICTIM PARTICIPATION IN CRIMINAL PROCEEDINGS

Whether and to what extent the victim should be given a role in criminal prosecution are core questions that need to be addressed. In India, the system in vogue for the dispensation of criminal justice is the adversarial system. The prosecution and the accused figure as the only parties. They put forward their respective versions, supported by evidence, and the Sessions Judge/Magistrate takes the role of an umpire to determine whether the prosecution has been able to prove its case beyond reasonable doubt. The accused is given an opportunity to take a particular stand in defence of his case, if he is so inclined. However, there is no statutory provision which confers a right on the victim to interpose as a party and play an active role and coordinate with the prosecuting agency to establish the guilt of the accused. Right from the stage of investigation of the crime up to the stage of conclusion of the trial, the role to be played by the victim is by and large determined by the police and the prosecution.

The system in vogue in our country, which is based on the British model of prosecution of criminal cases, is in contrast with the position obtaining in some other jurisdictions especially in Europe. For example, in France, all those who suffer damage as a result of a crime, are entitled to become parties to the proceedings from the stage of investigation. The victim can move the court for appropriate directions if the investigation gets delayed or distorted. She has a right to intervene in the court proceedings. The victim or her lawyer can play an active role at par with the prosecutor in the conduct of the proceedings. She

can also adduce evidence with regard to the loss and suffering undergone by her so as to claim compensation.[5] Even in countries where the adversarial system akin to the one prevailing in our country exists, the victim's views on sentencing are duly considered before awarding appropriate punishment. In some states in U.S.A. & Commonwealth countries, a Victim Impact Statement is taken into account before taking a decision on such issues as plea bargaining and grant of parole.[6] In light of these developments in other jurisdictions, this part will examine the role of the victim at the stage of investigation and in trial, and make suggestions for change in the Indian law with respect to the same.

A. *Role of the Victim in Investigation*

At the stage of investigation, the statement of the victim is recorded and she is sent for medical examination, if necessary. Then the victim is called upon to tender evidence in the court on the scheduled date, which often gets adjourned. Of course, the court has the *suo motu* power to summon the victim as a witness, if the prosecution fails to discharge its duty. [7] The prosecution agency has the overall charge of conducting a criminal proceeding. The victim or the informant who sets the criminal law into motion, is not a party to the proceeding, except in a case where the proceedings are initiated on the basis of a private complaint preferred to a Magistrate. [8] The police investigate the case pursuant to information received by them or on directions of the Magistrate, and file the final report or charge sheet in court. [9] The Magistrate/Judge, after looking into the record of investigation and the report of the police officer, takes cognizance and frames charges paving the way for the trial. However, if on a consideration of the police report or chargesheet, the Magistrate is not inclined to take cognizance and proposes to drop the proceedings, an opportunity is to be given to the victim/informant to have her say. This procedure is being followed in view of the decision of the Apex Court in *Bhagwant Singh v. Commissioner of Police.* [10] This is the limited role that a victim is allowed to play at the stage of investigation.

Indian law should change to accommodate the recognized needs of victims of crime. Necessary steps have to be taken by the State to make the victim play her due role in ensuring prompt investigation and effective prosecution of the

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5. V.S. Malimath Et. Al., Report of the committee on Reforms of Criminal Justice System 76 (2003) [hereinafter Malimath Committee Report].

6. See Ss. 265A-265C, Cr.P.C., introduced by the Criminal Law (Amendment) Act, 2006. This amendment has for the first time, introduced the concept of plea bargaining in India. Notice to the victim is required to be given in such proceedings.

7. See S. 311, Cr.P.C.

8. Ss. 190, 200 & 202, Cr.P.C.

9. Ss. 173 (2) (i), Cr.P.C.

10. *(1985) 2 SCC 537. See also U.P.S.C. v. Papaiah, (1997) 7 SCC 614,* wherein it was held that the judge of the lower Court had erred in accepting closure report from the Central Bureau of Investigation, when such a report was submitted without giving notice to the original complainant and behind its back.

case. The victim should have a sense of satisfaction that she is not being neglected by the State. One way of removing the wounded feelings of the victim, and to sustain the victim's confidence in the criminal justice process, is to make her presence felt both at the stage of investigation and in the course of trial. This can be achieved, firstly by providing the right to information relating to investigation and conduct of trial, to the victim. The victim should have the satisfaction of knowing what is happening. The right to know about the details of the case should include the reasons for the delay in tracking down the culprits, the stage of inquiry or trial before the court, as well as the reasons for the delay in the progress of trial, and on account of the evidence proposed to be adduced by the prosecution. A duty should be cast on the police to apprise the victim of the developments in investigation, unless the information, by any objective standard, is likely to hamper investigation. The victim should have access to a copy of the police report of the charge sheet filed in court. No doubt, under the current Indian law, there are certain provisions which are meant to provide the victim with such information. If the police refuses to investigate a case, then the police officer is required to notify the informant of that fact together with the reason therefor. [11] The Cr.P.C. further requires that the contents of the report sent to the Magistrate after the investigation is completed, shall be furnished to the first informant. [12] However, the police very often breach this obligation. Apart from ensuring strict observance of the said requirement, a further provision ought to be made to cast a duty on the concerned police officer to furnish on request, a copy of such report to the victim, even if she is not the first informant. This should be coupled with the conferral of a right to the victim to contest the findings of the report before a superior police officer.

It may be noticed that in the United Kingdom, the right to information is ensured to the victim by means of executive instructions issued by the Home Ministry. The 1996 Victim's Charter states:

[Y]ou can expect a crime you have reported to be investigated and to receive information about [significant developments in your case]... the police will tell you if someone has been caught, cautioned or charged.... [and on request] you will be told about any decision to drop or alter the charges substantially. You will also be told the date of the trial and the final result.[13]

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11. S. 157 (2), Cr.P.C. Such reason is required to be given in the proforma prescribed by the appropriate Government

12. S.173 (2) (ii), Cr.P.C.

13. VICTIM'S CHARTER 2 (1996), available at http./www.cjsonline.gov.uk/downloads/application/pdf/ Victims% 20 Charter % 20-%20 English pdf. This entitlement is backed by two Home Office Circulars, which require the police to inform the victim about the progress of the case. The 1995 version of the Court's Charter provides that court staff shall explain why delays are necessary and will be available to explain other points of procedure. See generally Helen Fenwick, Procedural rights of the Victims of Crime: Public or Private Ordering of the Criminal Justice Process, 60 MOD. L. Rev. 317 (1997).

In India, with the recent enactment of the Right to Information Act, 2005, the victim's right to secure information from the police at the investigation and subsequent stages, may assume a new dimension, especially in view of the overriding effect given to the provisions of the Act. The entries in the case diary or other police records concerning the stage/progress of the case can be accessed by the victim or the informant, and in case of non-disclosure of information, such person can have recourse to the remedy provided under the Act. [14] However, it is doubtful whether a police officer is under an obligation to furnish explanatory information, such as the reasons for delay, and the steps being taken to expedite the investigation/trial. To clear such doubts, it is advisable that the Governments issue specific instructions to furnish such information, even though there is no specific provision to that effect under the existing law. Secondly, it is quite likely that police authorities will be prone to invoke the exclusionary clause in section 8(h) of the Act, in a mechanical manner.[15] In such an event, the victim will have to take resort to the remedies under the Act, which would cause her further hassles, apart from the delay. It is, therefore, desirable that in a criminal case which is at the stage of investigation, the victim/informant is given a right to approach a Magistrate or a designated Judicial Officer in the district. Such Judicial Officer can examine whether the police is justified in withholding the required information, or is in fact evading a proper response to the victim's query, and then issue appropriate directions. No doubt, the victim has a remedy to invoke the jurisdiction of the High Court under Article 226 of the Constitution. However, this remedy is discretionary and at times, would be a long drawn process. That apart, the High Court normally refrains from probing into disputed questions of fact, which might often come up in such cases.

B. *Role of the Victim in Prosecution*

The next important question is whether and to what extent the victim should be allowed to play a role in the proceedings set in motion by the criminal prosecution.

In India, the prosecution is carried on by the Public Prosecutor ("P.P.") who is supposed to be fair and objective in his approach. He is considered to be an officer of the Court, with a duty to assist the court in arriving at its decision. The P.P. is not supposed to identify himself with the police and seek to get conviction by any means, fair or foul. At times, the court may permit an advocate authorized by the informant or the victim to assist the P.P., but such advocate has no independent right to present the case. His role is that of assisting the P.P. who is in sole charge of the prosecution.

The relevant provision of the Cr.P.C. deserve reference. Section 225, Cr.P.C., enjoins that in every trial before a Court of Session, the prosecution

14. S.20, Right to Information Act, 2005

15. S.8(h), Right to Information Act, 2005, provides that such information as would impede the process of investigation or apprehension or prosecution of offenders need not be disclosed.

shall be conducted by a P.P. Section 301 bears the heading *"Appearance by Public Prosecutors."* Section 301 (1) lays down that the P.P. or the Assistant Public Prosecutor ("A.P.P.") in charge of a case may appear and plead without any written authority. Then follows section 301(2), which seems to qualify the general rule relating to the appearance of P.P.s. it enjoins that where a private person instruct a lawyer to prosecute any person, the P.P. or the A.P.P. in-charge of the case, shall conduct the prosecution, and the lawyer so instructed can only act under the directions of the P.P. or the A.P.P., as the case may be. However, he can, with the permission of the Court, submit written arguments after the evidence is closed. That means that the counsel engaged by a private person such as the victim or the first informant can assist the Prosecutor with the permission of the Court and submit arguments after the evidence is closed. The role of a private counsel in such an event, as pointed out by the Supreme Court in the case of *Shivkumar v. Hukum Chand,* [16] is more or less that of a junior counsel who assists a senior. He cannot act independent of the P.P.

Next is section 302[17] bearing the caption "Permission to conduct prosecution", which is with reference to the inquiries and trials in a Magistrate's court. Section 301 (2) applies to the prosecutions conducted in all courts whereas section 302 is confined in trial in a Magistrate's court. The distinction between sections 301(2) and 302, as highlighted by the Supreme Court in the two decisions of *Shivkumar* and *J.K. International v. State,*[18] seems to suggest that a counsel engaged by a victim or a third party may be allowed to intervene, nay, play a primary role in the conduct of prosecution before a Magistrate's court, whereas in the sessions court, he is only permitted to have a limited or subordinate role.[19]

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16. (1997) 7 SCC 467

17. S. 302 reads :

    (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector, but no person, other than the Advocate General, or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission;

    Provided that no police officer shall be permitted to conduct the prosecution if he has taken part i the investigation into the offence with respect to which the accused is being prosecuted.

    (2) Any person conduction the prosecution may do so personally or by a pleader.

18. (2001) 3 SCC 462

19. It needs to be clarified that even under S. 302 a private party or his counsel cannot be permitted to conduct the prosecution to the exclusion of the public prosecutor, who is already in charge of the case. The more reasonable interpretation would be that S. 302 is meant to take care of situation where no P.P. is available, or the P.P. on record is, in the opinion of the court, unfit to conduct the prosecution. If the P.P. is available, S.301 (2 comes into play in respect of trials in any court, and the private counsel cannot act independent of P.P.

These provisions, namely, sections 301 and 302, give some scope for the intervention of the victim or the persons aggrieved by the offence, in the trial proceedings. [20] Apart from this, the victim also has the opportunity to address the court in case the Magistrate is not inclined to take cognizance after the police report is submitted. [21] Further, the informant or the victim can also have her say when bail is liable to be cancelled. [22] Lastly, the recently introduced provisions in Cr.P.C. relating to "plea bargaining" deserve notice. [23] Notice is required to be given to the victim to participate in the meeting to work out a mutually satisfactory disposition of the case, including the payment of agreed compensation. Thus, in "plea bargaining" matters, an effective right is conceded to the victim. These are the limited areas in which the victim is allowed to participate in criminal proceedings.[24] The primary responsibility of conducting the prosecution however rests with the P.P.

The exclusion of the victim from the prosecution scene is sought to be justified by the concept that, by and large, crimes are directed against the society as a whole. Crimes foment unrest in the society and trigger off repercussions on societal life. The State which take upon itself the duty to protect the life, liberty and property of the people, and to enforce the rule of law, exercises its police power to check crimes and bring offenders to justice. The State apparatus and functions reflect the collective will and expectations of the people at large to provide safety and protection to the members of the society. Furthermore, the state which is the repository of the sovereign power of maintaining law and order, tranquillity and safety of citizens, is duty bound to restrain individuals from taking the law into their own hands.

The State, therefore, undertakes the duty of tracking down, prosecuting and punishing criminals through due process of law while incidentally redeeming the grievance of the victim. Another reason advanced is that the intervention of

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20. In the words of the Supreme Court in J.K. International, an aggrieved private person "is not altogether wiped out from the scenario of the trial" even in a case where cognizance of the offence is taken on the basis of the charge-sheet submitted by the police. The Supreme Court ruled that in a proceeding for quashing the charge, the informant ought to be heard, if he so desires. *Supra* note 18

21. *Supra* note 10.

22. The High Court of Court of Sessions can be approached for this purpose under S.439 (2), Cr.P.C. S. 439 (2) has wide amplitude and does not restrict the scope of moving the court to the prosecution only.

23. Ss. 265A to 265C, Cr.P.C. introduced by the Criminal Law (Amendment) Act, 2006.

24. There are instances in which the Supreme Court has granted leave to the victim's relation or informant in the cases in which the State had not preferred appeal against acquittal or sentence. See, e.g., *P.S.R. Sambarthan v. Arunachalam, (1980) 3 SCC 141 and Saibharati v. Jayalalitha, (2004) 2 SCC 9,* where the Supreme Court even allowed a person who did not figure as a complainant/informant to file an appeal against acquittal of a public servant charged under the Prevention of Corruption Act, 1988. However, this trend rests on a different principle, viz., the amplitude of the jurisdiction of the court under Article 136, and cannot be applied *proprio vigori* to participation in trial cases.

the victims in the prosecution process may vitiate the fairness of the trial, and open the door-way to retributive or vengeful traits of the victim, that might imperil a fair trial. This militates against the desideratum of any civilized system of criminal jurisprudence. These are weighty reasons for placing the conduct of prosecution in the hands of the prosecutor appointed by the State, particularly since he owes a duty to the court to be fair and to render assistance in an objective manner.

The rationale behind assigning this key role to the P.P., and not allowing a third party like the victim to be a co-equal partner in the prosecution of a case is better understood by referring to the observations of the Supreme Court in *Shiv Kumar :*

> From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle or conceal it.[25]

The Supreme Court quoted with approval the following passage from a Division Bench judgment of A.P. High Court :

> Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalized means for wreaking private vengeance. The prosecution instead of being a fair and dispassionate presentation of the facts of the case for the determination of the court, would be transformed in to a battle between two parties in which one was trying to get better of the other, by whatever means available. It is true that in every case there is the overall control for the court in regard to the conduct of the case by either party. But it cannot extend to the point of ensuring that in all the matters one party is fair to the other.[26]

Whether the idealistic role of the P.P., as enunciated by the Supreme Court, is limited to theory or is perceived in actual practice as well, is a different matter. That apart, the important issue that arises is whether there is justification to marginalize or virtually ignore the victim. A progressive nation committed to the welfare of its people should not be content with investigating the offence and prosecuting the offender. It is equally the duty of the State to take care of the

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25. Shiv Kumar v. Hukam Chand, (1999) 7 S.C.C. 467

26. Medichetty Ramakistaiah v. State of Andhra Pradesh, A.I.R. 1959 A.P. 659.

problems and interests of the victims and to bring them closer to the criminal justice process so as to assuage the feelings of injustice and insecurity haunting them. After all, it is they who bear the brunt of the crime.

While there is considerable merit in the contention that the State should be primarily responsible for the prosecution of offenders, we have to take note of the stark realities apparent in our country. That the State conducts the prosecution efficiently and effectively through the media of trained and experienced Prosecutors, with the police officers assisting them, does not convey the true picture. We know how efficient and independent prosecutors really are. The low standards of recruitment of A.P.P.s., inadequate training imparted to them, and advocates with little or no experience in criminal law practice being appointed as P.P.s., on considerations other than merit, are well known.

The Directorate of Prosecution, which is supposed to oversee the working of the P.P.s and A.P.P.s., is handicapped by the lack of adequate powers, resources and infrastructure. Once the charge sheet is filed in court, we find very little coordination between the investigating officer and the P.P. There are innumerable instances in which the investigating officer does not turn up for examination on the scheduled dates. No prompt steps are taken to produce the witnesses on time. Witness protection remains a distant ideal. Police officers seem to think that their duty ends with arresting the suspects and filing the charges sheet, and that they are not concerned with the ultimate result. Inept handling of prosecution has become a rule, instead of being an exception. In this background, the victim's participation, at least to a limited extent, would help the prosecution in fulfilling the duty entrusted to it, and would provide much needed assistance to the court in its voyage of discovery of truth within the framework of criminal jurisprudence, Secondly, the victim will have the satisfaction of guiding the prosecution on the right lines, and of the court hearing her view point. The right approach would be to balance these diverse considerations and to provide a limited role to the victim. While the victim or her counsel should be allowed to appear and assist the prosecution, they should not be placed on an equal pedestal with the P.P. or be given a co-equal role as that of the P.P. At the stage of framing of charges, it is but proper that the victim is heard. The victim can always bring to the notice of the court that a relevant witness has not been examined by the police, or some material piece of evidence, has been left out. It is then for the court to give appropriate directions to the prosecution. The victim's counsel ought to be permitted to put supplemental questions to the prosecution witnesses and cross-examine the witnesses, if any, produced by the accused, without of course, repeating the questions put by the prosecutor. At the conclusion of the trial, supplementary arguments should be allowed to be advanced by the victim's counsel, both on the merits of the charge, as well as on the sentence. These measures, apart from taking care of the interests of the victims, provide considerable assistance to the court in handing down its verdict, without in any way stifling the essential principles of criminal law, including the procedural safeguards available to the accused.

A question may arise as to whether, in the face of the powers vested with the court to summon witnesses *suo motu,* and to put questions on its own, the victim's intervention is going to make any real difference. Under section 311, Cr.P.C., the court has power to summon at any stage, any person as a witness, or examine any person who is in attendance, though she has not been summoned or recall or re-examine any person already examined. The court is enjoined with a duty to do so if the evidence of such person appears to be essential to the just decision of a case. [27] It has been held that this power cannot be availed of in order to fill the gaps or lacunae in the prosecution evidence. [28] The lacuna in the prosecution according to the Supreme Court, "is not to be equated with the fallow of an oversight committed by a Public Prosecutor either in producing relevant material or in eliciting relevant answers from witnesses." [29]

Another provision which is, "in a way complimentary" [30] to section 311 Cr.P.C. is section 165 of the Indian Evidence Act, 1872. It invests the court with the power to ask any question, to any witness, at any time about any fact, and to order the production of any document or thing related to any relevant fact. This power can be exercised by the court "*in order to discover or to obtain proof of relevant facts.*" Despite all these provisions, judges of the trial court seldom exercise these powers, either because of the pressure of work, or indifference of the judge who expects the respective parties to prove or defend the case, or because of the notion that he may be attributed with bias. In *Ramachandra v. State of Harayana,* [31] the Supreme Court deplored the tendency of the trial judge in not exercising proper control over the criminal trial. The recent case of *Best Bakery* [32] is also illustrative of the mindset and passive role of judge trying criminal cases. In the wake of these disturbing features. viz., inefficient prosecution machinery and indifferent presiding judges, the role of the victim assumed importance. The victim can render valuable assistance to the court so as to ensure that material evidence does not escape from the scrutiny of the court, and the witnesses are examined on right lines. If the victim is allowed to have her say on certain crucial aspects, it would facilitate the court to effectively exercise its powers under the provisions noted earlier. The handicaps which the court otherwise faces could be overcome by the timely intervention of the victim. *However, a* balanced approach is called for. The victim should not be allowed to become a parallel prosecutor. Her right of participation should include the right

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27. For an analysis of the section, see Zahira Sheikh v. State of Gujarat, (2004) 4 SCC 158
28. Jamatraj Kewalji v. State of Maharastra, AIR 1968 S.C. 178; Mohanlal Shamji v. Union of India, (1991) 1 SCC Supp. 271: Rambhau v. State of Maharastra, (2000) 4 SCC 759.
29. Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110. The expression "lacuna in the prosecution" has been further explained as "inherent weakness or latent wedge in the matrix of the prosecution case."
30. Zahira, supra note 27, at 189
31. AIR 1981 SC 1036.
32. Zahira, supra note 27, at 197, where the Supreme Court remarked on the passive role played by the trial judge in that case.

to place her submissions before the court so that it can determine whether the exercise of powers under any of the enabling provisions is called for. However, in appreciating the submission of victim in cases involving groups and factions, the court should be extra-cautious because there is generally a tendency on the part of the victim to exaggerate.

At the pre-trail stage, the victim must be heard before framing charges. In the course of the trial, the victim's counsel should be given the opportunity to put supplement questions to the witnesses. In the alternative, the court itself can put such questions after considering the submission of the victim. On behalf of the victim, arguments - written or oral - can be received. Of course, the victim should not be allowed to question interim orders that may be passed on the application of the victim or otherwise, as it has the inevitable effect of prolonging the trial. By allowing a limited role to victims in this manner, and by adopting a cautious approach as mentioned above, the criminal justice system will give victims the much needed satisfaction of knowing that it cares for them. At the same time the courts will be better assisted in their quest for truth and in arriving at a just decision, without pandering to the retributive spirit or vengeful attitude of the victims. It will not in any way diminish the presumption of innocence in favour of the accused, nor jeopardize the due rights of the accused.

C. *Recommendations of Commissions*

A dissertation on the victims' role and rights will not be complete without referring to the reports of various Commissions. The 42nd Report of the Law Commission of India adverted to the topic of providing reparation to the victim of an offence. It pointed out that "in recent times, the compensation aspect is regaining its importance, not, of course, as the principal aim of criminal proceeding, but as a recognized ancillary thereto."[33] After referring to the legal systems in France and Germany, which enable the victim to make a claim for compensation in the course of the criminal proceedings, the Law Commission observed as follows:

> We do not think that any such elaborate procedure as is provided in France or Germany would be suitable for our criminal Courts. It would be unwise to create a legal right in the person or persons injured by the offence to join in the criminal proceedings from the beginning as a regular third party. This would only lead to a mixing up of civil and criminal procedures which in our legal system are kept separate, a confusion of issues and a prolongation of a trial.[34]

The 154th Law Commission Report dealt with the topic of Victimology, but confined itself to a discussion on victim compensation. It did not address the issue of participation of victims in investigation and prosecution.

The topic of *"Justice to Victims"* engaged the attention of the Committee on Reforms of Criminal Justice System, headed by Justice V.S. Malimath. The

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33. Law Commission Of India, 42nd Report On the Indian Penal Code, 1860 3.12 (1971)
34. Law Commission of India, 42nd Report on the Indian Penal Code, 1860, 3.16 (1971).

following are the recommendations made by the Commission in regard to victims' participation in the criminal proceeding;

i. The victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment or more.

ii. In select cases notified by the appropriate government, with the permission of the court, an approved voluntary organization shall also have the right to be impleaded in court proceedings.

iii. The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not a position to afford a lawyer.

iv. The victim's right to participate in criminal trial shall, *inter alia,* include.

   a. To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence.

   b. To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses.

   c. To know the status of investigation and to move the court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation.

   d. To be heard in respect of the grant of cancellation of bail.

   e. To be heard whenever Prosecution seeks to withdraw and to offer to continue the prosecution.

   f. To advance arguments after the Prosecutor has submitted arguments.

   g. To participate in negotiations leading to settlement of compoundable offences.

v. The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court. [35]

By and large, these recommendations deserve acceptance, subject to the qualifications discussed earlier as to the extent of participation by victims. However, the implementation of the Recommendation No. (ii) above, may be fraught with practical difficulties. Though there are some dedicated and service minded N.G.Os. in our country, many such organizations have dubious track records. Their involvement may give rise to complications, such as allegations of blackmail. It is, therefore, advisable to refrain from such a move, for the present.

(Contd...)

35. Malimath Committee Report, supra note 5, at 270-271

RULE AGAINST GOING BEHIND DECREE AND TRANSFER OF DECREE

Justice S.S. Jha,
High Cout of M.P., Jabalpur

It is said that getting a decree is easy, but execution of the decree is difficult. It is also said that in India litigation starts after the decree is passed. It is settled position of law that the executing Court cannot go behind the decree unless it is shown that the decree is passed by a Court having inherent lack of jurisdiction, which would make the decree a nullity. The question is considered by the apex Court in the case of *Bhawarlal Bhamdari v. Universal Heavy Mechanical Lifting Enterprises, (1999) 1 SCC 558.*

When the decree is passed, the executing Court is bound to execute the decree as it is passed. It is seen that whenever a decree is before the executing Court for execution, number of objections are raised as to the legality and propriety of the decree and even such objections are raised which have been decided in the suit before passing of the decree. The powers of the Court under section 47, CPC are narrower than that of appeal. The executing Court is not empowered to review the judgment of the Court of competent jurisdiction. The executing Court cannot sit over the decree and pass orders against the directions of the decree. The executing Court must take the decree according to its tenor.

The court must read section 47 CPC every time when an objection under section 47 of the Code is raised before the Court. Sub-section 1 of section 47, CPC is simple which provides that all questions arising between the parties to the suit in which decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. Sub-section 2 has been omitted by the Act 104 of 1976 and sub-section 3 relates to determination of question whether any person is or is not the legal representative of the original judgment debtor. Parties to the suit are plaintiffs and defendants. Purchaser of property at a sale in execution of a decree is deemed to be party to the suit in which decree is passed. The questions relating to possession of such property to such purchaser or his representative shall be deemed to be the questions relating to execution, discharge or satisfaction of the decree within the meaning of this section.

Thus, after amendment, due to omission of sub-section 2 of section 47, the objection must be determined in execution and not by a separate suit. Cases where there is ambiguity in the decree, the executing Court is required to look to the pleadings of the parties and evidence on record in order to interpret the decree. But the executing Court cannot go behind the decree or reconstruct the decree according to its interpretation. The decree must be executed as it was passed. The court should be careful enough to see through such diabolical plans of the judgment debtor to deny the decree holder the fruits of the decree obtained by him as held in the case of *Ravindra Kumar v. Ashok Kumar, (2003) 8 SCC 289.* If exact description of property is not mentioned in the decree, the executing Court may ascertain the question relating to execution, discharge or satisfaction of the decree within the meaning of section 47 CPC. A decree of competent court should not, as far as practicable, be allowed to be defeated on account of accidental slips or omissions as held in the case of *Pratibha Singh v. Shantidevi Prasad (AIR 2003 SC 643).* The court can only go behind the decree when decree is a nullity or is passed by a court which is not competent to pass such decree or in other words decree is not passed by a court of competent jurisdiction. As and when objection as to nullity of a decree is raised, the court must carefully examine the objections and ensure whether such decree is nullity or has been passed by a court of competent jurisdiction. If the decree is passed by the court having jurisdiction to decide the suit, the objection is required to be rejected. The powers of executing court under section 47 CPC are quite different and much narrower than its powers of appeal, revision or review. The exercise of powers under section 47 CPC is microscopic and lies in a very narrow inspection hole. The executing court should not entertain an objection whether the relief ought to have been granted in the main proceedings or ought not to have been granted in the main proceedings and such objection cannot be raised/ agitated in the execution proceedings. (See- *Food Corporation of India v. S.N. Nagarkar, AIR 2002 SC 808).*

Under section 47 CPC the executing court can only go into the question of execution, discharge or satisfaction of the decree and not beyond the decree. Where decree is passed by the court of competent jurisdiction, objection should not be entertained regarding purely territorial jurisdiction of the court passing the decree particularly when the jurisdiction of the Court was not challenged during trial and before passing of decree. A decree will be nullity when it is

passed by the court having no jurisdiction or against a dead person. Though executing court is competent to construe a decree but it cannot go behind the decree. A decree has sanctity of its own and there cannot be any "fishing" inquiry at the execution stage. Although the executing court cannot go behind the decree it can interpret a decree where the same is not clear in terms. While so interpreting the decree, the Executing court is to presume that the decree was passed keeping correct legal position in mind.

In Section 37 of the Code, expression "Court which passed a decree" has been used. Normally, decree is executed by the cout which passed the decree but under section 38 decree may be executed either by the court which passed the decree or by the court to which it is sent for execution. Under section 39 power is conferred upon the court to send the decree for execution to another court of competent jurisdiction. Under section 39, of the Code, the transferee court shall execute the decree in such manner as may be prescribed by rules enforced in that State. Section 41 lays down that the court to which decree is sent for execution is liable to certify to the court which has passed the decree the fact of such execution or where the former court fails to execute the same and the circumstances attending such failure.

Under section 42 the court executing the decree sent to it, shall exercise same powers in executing the decree as it has passed the decree. The power of Executing Court are conferred under section 42 (2) of CPC. Under subsection (1) of section 46 CPC, the Court on an application of decree holder issue a precept to another court which would be competent to execute such decree, to attach any property belonging to judgment debtor and specified in the precept. The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of decree. Under the precept the attachment will not continue for more than two months unless the period of attachment is extended by an order of the court which passed the decree or unless before determination of such attachment the decree has been transferred to the Court by which the attachment has been made and decree holder has applied for order for sale of such property.

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MOTOR VEHICLES ACT, 1988 – THE PRINCIPLE OF PAY & RECOVER

Ved Prakash
Director, JOTRI

Section 146 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') prohibits the use of a motor vehicle in a public place unless a policy for insurance complying with the conditions stipulated in Section 147 has been obtained in respect of such vehicle. Section 149 (1) in explicit term fastens upon the insurer liability to satisfy an award or decree against the insured in respect of third party risks. At the same time sub-section (2) of Section 149 enables the insurer to defend itself against imposition of such liability on any of the grounds relating to breach of the conditions of the policy including use of the vehicle for hire or reward and driving of such vehicle by a person not duly licenced.

Explaining the purpose and relevance of the provisions providing for compulsory insurance of motor vehicle, it was observed by the Apex Court in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, AIR 1987 SC 1184* that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the Insurance Company but to protect the members of the community who become sufferers on account of accidents arising from use of motor vehicles.

These observations clearly go to demonstrate that the ultimate objective of the provision relating to compulsory insurance of motor vehicles and fastening liability upon insurer regarding third party claims is based on the policy of public welfare.

The insurer in a given case can successfully raise a defence by establishing that there has been a breach of the conditions of the policy bringing the case within sub-section (2) of Section 149, thus entitling him to exoneration. The question arises as to whether in such a situation the claimant, who has to suffer for no fault of his own, should be left to run from pillar to post to recover the amount payable under the decree or award.

Dealing with the question as to who should be made to suffer in a case where the insured is a man of straw and unable to pay the amount under award, the Apex Court observed in *British India General Insurance Co. Ltd. v. Captain Itbar Singh, AIR 1959 SC 1331* that the loss had to fall on someone. However to put the liability in such cases on the insurer may be more equitable because that would be a loss occasioned in the course of a business activity and the business can be so arranged that in the net result the insurer is not going to suffer the loss. However if the poor claimant is made to suffer the loss, then he will be the loser for no fault of his.

Here comes the principle of pay and recover into play. The legal position in this respect has been beautifully summarized by the Apex Court in *New India Assurance Co., Shimla v. Kamla, AIR 2001 SC 1419* as under :

> When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

The genesis of this principle can well be traced to the observations made in *British India General Insurance Co. Ltd.* (supra).

LEGAL BASIS OF THE DOCTRINE

The principle of pay and recover not only has its equitable basis but also a strong legal basis. The fountain source of this doctrine can be found in the provisions contained in sub sections (4) & (5) of Section 149 of the Act which run as under :

> 149 (4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 47, be of no effect:
>
> Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.
>
> (5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer sh ll be entitled to recover the excess from that person.

Interpreting sub-sections (4) and (5) of the Act it has been observed by the Apex Court in *New India Assurance Co., Shimla v. Kamla and others* (Supra) that the language employed therein would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

The issue was also examined at length by the 3 Judge Bench of the Apex Court in *National Insurance Co. Ltd. v. Swaran Singh, AIR 2004 SC 1531.* In this case after scanning through the relevant provisions of the Motor Vehicles Act, 1939 (since repealed) and provisions contained in Section 149 of the Act, it was held that right of insurer to avoid the claim of 3rd party would arise only when the policy is obtained by misrepresentation of material fact and fraud and in no other case. It was further stated that sub-section (1) of Section 149 makes it clear that the insurer should pay first to the third parties and then recover the same if they are absolved on any of the grounds specified in sub-section (2) thereof.

PROCEDURE

The question arises as to what remedy is available to the insurer who has been saddled with the responsibility to pay the award amount to the third party claimant despite the fact that there has been substantial breach of the conditions of the policy, bringing the case within Section 149 (2) of the Act. Whether the insurer should go for a fresh round of litigation in order to recover the amount from the insured or the remedy may lie in the proceedings of that very case during trial or at the execution stage?

Addressing this issue it was laid down by the Apex Court in *National Insurance Co. Ltd. v. Baljit Kaur, AIR 2004 SC 1340* that for the purpose of such recovery, the insurer is not required to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the tribunal and the issue is decided against the owner and in favour of the insurer. The Court was of the view that this course is very much permissible in view of the provisions of Section 168 of the Motor Vehicles Act whereunder the Tribunal is not only entitled to determine the amount of claim as put forth by claimant but also the dispute between the insurer on the one hand and the owner or driver of the vehicle on the other hand.

The procedure to be followed in this respect for ensuring the recovery of the amount from the insured has been elaborated by the Apex Court in *Oriental Insurance Co. Ltd v. Nanjappan, AIR 2004 SC 1630 (decided on 13.02.2004).* Referring to the observations made in *Baljit Kaur's case* (supra) the Apex Court ordained in this case that before release of the amount to the claimants, owner of the offending vehicle, after being noticed, should be required to furnish security for the entire amount which the insurer has to pay to the claimants. Not only this, the offending vehicle should also be attached as part of the security and in case of necessity; assistance of RTA can also be taken by the Executing Court. The Apex Court made it clear that in case of any default on the part of the owner of the vehicle, the executing court can not only direct realization by disposal of the securities furnished by the insured but also from any other property belonging to him. The aforesaid mode of recovery was reiterated in *National Insurance Co. Ltd. v. Challa Bharathamma, (2004) 8 SCC 517.*

The legal position on the issue emerging from the above analysis can be summed up as under :

a. Once there is a policy of insurance, the insurer is under an obligation to satisfy the award regarding the claim of third party even if there is a breach of the conditions of the policy coming within Section 149 (2) of the Act.

b. The aforesaid liability will not arise where the policy has been obtained by misrepresentation or fraud as contemplated by Section 149 (2) (iii) (b).

c. The tribunal can determine in the main proceedings itself about the right of the insurer to recover from the insured, the amount to be paid by it to a 3rd party. The issue can also be raised in execution proceedings.

d. Before releasing the award amount in favour of the claimant, the owner of the vehicle (insured) should be directed to furnish security for the entire amount payable to the claimants.

e. The vehicle involved in the accident shall be attached as part of the security and the assistance of RTA, if found necessary, can be taken for the purpose.

f. If the insured fails to make the payment to the insurer, then executing Court can direct realization of such amount by disposal of the security furnished by the insured as well as by the disposal of vehicle attached by the Court or any other property of the owner of the vehicle.

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FACTORIES ACT, 1948 - AN OVERVIEW AND APPRAISAL OF ISSUES INVOLVED

Shailendra Shukla,
Addl. Director, JOTRI

The jurisdiction to try offences under Factories Act vested with Labour Courts till very recent past. Under Section 64 of M.P. Industrial Relations Act, 1960, Labour Courts were vested with powers of JMFC to try offences punishable under M.P. Industrial Relations Act or any of the Acts specified under Schedule 2-A. Schedule 2-A contains 16 Central Acts and Factories Act is one of them. However, Madhya Pradesh State Government promulgated M.P. Labour Laws (Amendment) and Miscellaneous Provisions Act, 2002 (No. 26 of 2003) and by this Act an amendment was incorporated in M.P. Industrial Relations Act, 1860. By this amendment, wherever the words 'in Schedule 2-A' appeared, they were substituted with the words 'in Schedule 2'. The effect of this replacement was that the Labour Courts ceased to have jurisdiction for trying offences under any of the Acts mentioned in Schedule 2-A, Factories Act being one of them.

The aforesaid M.P. Labour Laws (Amendment) Act of 2002 came into force on 5th August, 2005. From this date, all the Labour Courts were divested of their powers to try offences under Factories Act, 1948. Thus from 5th August, 2005 instant, no Labour Court could try any offence under Factories Act, 1948. By virtue of Section 105 of Factories Act, 1948, the power to try offences under the Act now vests with Presidency Magistrate or Magistrate of First Class. It is thus clear that all the cases pending before Labour Courts on 5th August, 2005 under Factories Act were required to be transferred to the Courts of competent jurisdiction as the Labour Courts ceased to have jurisdiction from that day.

One can thus see that Factories Act, 1948 is a comparatively new arena which the Judicial Magistrates are required to deal with. Therefore, it is important to have an overview of the Act along with discussion of some issues while trying offences under the Act.

The object of the Factories Act, 1948 is best described in the judgment of *S.N. Dutta v. State of Gujarat, AIR 2001 SC 3253.* As per this judgment, Factories Act, 1948 is a welfare legislation where emphasis is laid on the welfare of the workers.

The Act primarily strives to protect employees employed in factories against industrial hazards and for that purpose certain obligations are sought to be imposed upon the owners or occupiers of the factories. The owners are also required to provide healthy and sanitary conditions for the workers. The breach of the obligations is made punishable under Section 92 of the Act. This Section seeks to punish the occupier and manager of the factory in case of contravention of any of the provisions of the Act or of the Rules made thereunder. U/s 92, two years of imprisonment or Rs. 2 lakh fine or both can be imposed. M.P. Factories Rules, 1962 provides for health, safety, welfare, working hours, leave etc of the

workers. Any breach thereof is also punishable u/s 92 of the Act. The offences punishable u/s 92 is required to be tried in a summary manner as they are punishable upto two years.

COGNIZANCE OF OFFENCE

As per Section 105 (1) f the Act, Courts can take cognizance of any offence only on a complaint made by factories 'inspector' or with the previous sanction in writing of the inspector. The factories inspector being a public servant, is not required to be examined on oath by the Magistrate taking cognizance in view of Section 200 proviso (A) of Code of Criminal Procedure.

LIMITATION FOR PROSECUTION

As per Section 106 of the Act, the limitation period for filing complaint in respect of any offence punishable in an Act has been limited to three months from the date of knowledge of alleged commission of the offence.

The first explanation to Section 106 provides that in case the offence is continuing then the period of limitation shall be computed with reference to every point of time during which the offence continues.

In case the offence concerns disobeyance of the orders of the inspector, the limitation period of taking cognizance of such offence is six months from the date of commission of offence [Proviso (2) of S. 106].

SIGNIFICANCE OF THE WORD 'FACTORY'

Any Court dealing with an offence under the Act is required to consider whether the offence was committed in a factory or not. Definition of 'factory' is provided u/s 2 (m) of Factories Act. A perusal of this Section shows that following conditions must be fulfilled in order to conclude that the premises were in fact a factory –

(i) It has to be proved that some manufacturing process was being carried out in the premise;

(ii) If the power was being used in the premises, a minimum of ten workers were working or had been working in the previous 12 months;

(iii) If the power was not being used, then a minimum of twenty persons were working or had been working in the previous 12 months. As per the appended explanation, the number of workers working in factory shall be computed by all the workers working in different shifts combined together.

Section 85 of the Act empowers the State Government to declare application of the provisions of the Act in any premises in which less than 10 workers are working. In view of this empowerment, the State Government has declared some manufacturing units as 'factories' even though only one worker is working therein. These are saw mills, rice mills, dal mill, asbestos mill, stone crushers, chuna bhatta etc. In these establishments, even if one worker is working, the provisions of Factories Act will become applicable. In these matters the defence of offenders

may be that the person who was working, was not worker but was a family member.

Thus we see that manufacturing process is the sine qua non for a premise to be called a factory.

The question is 'what is manufacturing process'?

As one commonly understands, manufacturing would mean 'making something'. But a look at Section 2 (1) (c) makes it clear that manufacturing process is indeed a very wide term. It includes not only making but also includes repairing, ornamenting, washing, cleaning, demolishing, breaking, oiling, packing with a view to its use, sale, transport, delivery or disposal. Similarly five other acts such as pumping oil, water, etc., generating, transforming, transmitting power, composing, typing for printing, constructing, repairing, even breaking ships or vessels and preserving or storing any article in cold storage are included in the ambit of 'manufacturing'.

WHO IS AN OCCUPIER?

Once the Court is satisfied that the premises is a factory, then the question arises as to who is the occupier of the factory because as per Section 92, the occupier or the manager of the factory is liable to be punished for contravention of the provisions of the Act or Rules. As per Section 2 (n) of the Act, 'occupier' of factory means a person who has the 'ultimate control' over the aforesaid factory. The difference between 'ultimate control' and 'immediate control' or 'day to day control' was laid bare by the Apex Court in *J.K. Industries Ltd. and others v. Chief Inspector of Factories and Boiler and others , (1996) 6 SCC 665* and it was held that ultimate control of a company rests with the company through its Board of Directors, whereas immediate or day to day control can be that of a nominated manger or employer of officer. Under Section 2 (n) the word 'ultimate control' is given and not 'day to day control'. Therefore, the Directors or one of the nominated Directors can only have ultimate control of the company.

The definition of occupier being somewhat vague, an amendment was carried out in 1987 in the Act and provisos were added to Section 2 (n) and as per these provisos, in case of company, any one of the Directors shall be deemed to be the occupier and in case of a firm, any one of the individual partners shall be deemed to be the occupier and in case of a factory owned by Government or local authority, the person or persons appointed to manage the affairs of the factory shall be deemed to be the occupier. It was seen that some companies used to nominate one of their employees as 'occupier' of the factory leaving aside any of the Directors. The Apex Court in *J.K. Industries Ltd. case (Supra)* ordained that only one of the Directors of the Company can be nominated as occupier of the factory and none of the employees or officers can be so nominated.

LIABILITY OF THE OCCUPIER

It is thus clear that the liability of occupier is strict and once it is shown that violation of provisions of the Act or Rules has been committed in a factory of

which the accused is the occupier, he shall be liable to be punished u/s 92 of the Act. However, Section 101 provides an escape route for the occupier. Under this Section, if the occupier is able to prove to the satisfaction of the Court that he had used due diligence to enforce the execution of the Act and that some other person had committed the offence under question without his knowledge, consent or connivance, then that other person shall be convicted for the offence.

POWER U/S 102

This Section provides that in case of conviction, the Court may, in addition to the punishment, on an application, require the accused to take such measures for remedying the matters in respect of which the offence was committed within the period specified in the order. Thus using this Section if the prosecution files an application, the Court may, apart from the punishment, order that such and such remedial measures be taken by the offender within such and such period.

LIABILITY UNDER FACTORIES VIS-À-VIS OTHER ACTS

As per Section 119 of the Factories Act, the provisions of this Act shall have effect notwithstanding any other law for the time being in force. Thus supposing the occupier of a factory is accused of causing injury to any worker due to his rash and negligent act, then he can be tried not only under the concerned Section of IPC viz. Section 336/337 but also under the provisions of Factories Act.

INSPECTORS AS PROSECUTORS

Under Section 9 of the Factories Act, 1948, inspector not only can enter premises, enquire into any accident but can also seize or take copies of any register, record or other documents apart from doing other acts in relation to investigation as specified in Section 9. Further Rule 18 (c) of Factories Act empowers the factories inspector to prosecute, conduct or defend before any complaint or other proceeding arising in the Act or in discharge of his duties as an Inspector. It also provides that inspectors can secure any evidence as may be necessary for this purpose. Thus inspectors have been endowed with powers not only for making investigations but also for prosecution of the case and Courts cannot force the inspector to employ a counsel to represent the case.

AMENDMENT OF 1987

The aftermath of Bhopal Gas Tragedy in 1984 resulted in incorporation of far reaching amendments in Factories Act in 1987 and consequently in Factories Rules, 1962. By this amendment, emphasis was laid on the regulation of factories involved in hazardous process. Chapter IV-A was incorporated by this amendment through Act No. 20 of 1987. This Chapter dealt with provisions relating to hazardous process. Definition of 'hazardous process' was incorporated in the list of definitions [Section 2 (c) (b)]. As per this definition 'any process or activity in relation to an industry specified in the First Schedule in which the raw materials used therein or the finished products, bye-products, wastes etc. having the propensity to cause material impairment to the health of the persons

engaged, if special care is not taken or would result in pollution of the general environment in absence of special care would be hazardous process.'

Sections 41 (B), 41(C), and 41 (H) as occurring in newly incorporated Chapter IV-A relate to the responsibility of the occupier and the rights of the workers. As per Section 41(B), the occupier of every factory involving a hazardous process is required to disclose all information regarding dangers including health hazards and measures to overcome such hazards to the workers, general public, the chief inspector and the local authority within whose jurisdiction the factory is situate and he is required to lay down a detailed policy with respect to health and safety of the workers and intimate to the chief inspector and to the local authority. The occupier is also required to draw up a concise emergency plan and total disaster control measures. A failure to observe these directions would entail cancellation of the licence of the factory. As per Section 41 (C), the occupier of a factory involved in hazardous process is required to maintain uptodate health records of the workers working in the factory who are exposed to any chemical, toxic or any other harmful substances inside the factory. Competent person are required to be employed in handling hazardous substances. Section 41 (H) protects the rights of the workers working in such factories regarding intimating the occupier regarding any reasonable apprehension of likelihood of imminent dangers to their health or life due to accident and in that case it shall be the duty of the occupier to take immediate action and report there of is required to be sent to the factories inspector shoes decision as to the existence of such threat shall be final.

A violation of any of these Sections, namely, Sections 41 (B), 41(C), and 41 (H) or the Rules made thereunder are punishable under separate Section namely Section 96-A (S. 96-A also is a newly incorporated penal provision). Under this Section, imprisonment for a term extending upto 7 years and fine extending upto Rs. 2 lakh and incase of failure or continuing contraventions, an additional fine extending to Rs. 5,000/- everyday has been provided for.

Thus one can see that more teeth have been provided to the erstwhile Factories Act, 1948 by way of the amendment carried out in 1987.

In the end, it would be proper to recall that the offences under the Factories Act (excepting those involving which are punishable u/s 96-A) are summarily triable offences and their quick disposal is imperative so that the workers may not be deprived of their earnings due to unwarranted breakdown or closure of the concerned factory due to pendency of the case. These cases may also be disposed of by adopting Plea Bargaining method as per the amended Cr.P.C.. The Presiding Officers should also make it a point to pass order u/s 102 of the Act so that the wrong committed by the occupier may be remedied and the accused may not be allowed to get away only by payment of fine etc. The Court should take special care while dealing with those offences under the Act which involve violation of Section 41 (B), 41(C) and 41(H) (relating to hazardous process).

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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, 2006. The Institute has received articles from various districts. Articles regarding topic no. 1, 2 & 3 respectively, received from Jabalpur, Ratlam and Indore, are being included in this issue. As we have not received worth publishing articles regarding topic no. 4 & 5, the Institute is publishing its article on topic no. 5. Topic no. 4 will be sent in future to other group of districts for discussion:

1. Explain the procedure to be adopted in a criminal trial when the accused appears to be lunatic or a person of unsound mind?

   दाण्डिक विचारण में आरोपी के मानसिक रूप से अस्वस्थ अथवा विकृत चित पाये जाने पर अपनायी जाने वाली प्रक्रिया समझाइये ?

2. Precise procedure to be adopted by a Court where a witness appears to have committed perjury?

   साक्षी द्वारा शपथ पर मिथ्या साक्ष्य दिया जाना परिलक्षित होने पर न्यायालय द्वारा अपनायी जाने वाली प्रक्रिया का सूक्ष्मत: वर्णन कीजिए?

3. Whether a company can be held liable for commission of offence under Indian Penal Code?

   क्या भारतीय दण्ड संहिता के अन्तर्गत अपराध कारित करने के लिये कंपनी को उत्तरदायी ठहराया जा सकता है?

4. Whether an Appellate Court hearing a criminal appeal has jurisdiction to record acquittal of non-appealing convicts?

   क्या दाण्डिक अपील पर सुनवाई में अपीलीय न्यायालय अपील न करने वाले दोषसिद्ध अभियुक्त को दोषमुक्त करने की अधिकारिता रखता है?

5. Explain the ambit, scope and applicability of Section 197 Cr.P.C. relating to bar against cognizance in respect of public servant.

   लोक सेवकों के संबंध में संज्ञान के वर्जन संबंधी धारा 197 दं. प्र. सं. की परिधि, विस्तार एवं प्रयोज्यता समझाइये?

PROCEDURE TO BE ADOPTED WHEN THE ACCUSED APPEARS TO BE LUNATIC OR OF UNSOUND MIND

Judicial Officers
District Jabalpur

Chapter XXV of the Criminal Procedure Code (Sections 328 to 339) deals with the provisions as to the accused of unsound mind.

These provisions can be conveniently divided into three categories:-

(1) Procedure in case of accused being lunatic during inquiry

(2) Procedure in case of accused person of unsound mind at the time of trial, and

(3) Procedure when accused was of unsound mind when offence was committed.

I[st] Category (Section 328) :

Hon'ble the Supreme Court has held that when a question is raised as to the unsoundness of mind of an accused person, the Magistrate is bound to make an inquiry before he proceeds further as to whether the accused is or is not incapacitated by the unsoundness of mind from making his defence? This is clearly in consonance with the principles of fair administration of justice (See : *Dr. Jai Shankar v. State of Himachal Pradesh, AIR 1972 SC 2267*). The words 'reason to believe' indicate that when an accused person is produced before a Magistrate for inquiry, who is alleged to have been suffering from unsoundness of mind, the Magistrate, before he proceeds further, has to inquire with the help of such material as are brought before him, whether there are reasons to believe that the accused before him is suffering from any such infirmity.

Therefore, if he has reason to believe so, then he has to initiate an inquiry into the fact of unsoundness of mind of the accused and cause him to be examined by the Civil Surgeon or such other Medical Officer as the State Government directs. A Magistrate cannot consign a lunatic to any asylum or jail on his unprofessional opinion. He must have before him the deliberate statement of the Medical Officer reduced into writing (See : *State v. Peter, 1981 Cr.L.J. NOC 127 Kerala*). If the report and evidence of Civil Surgeon or Medical Officer is against the accused or the prosecution, either of them will be given chance to rebut the report or evidence. When Magistrate comes to the conclusion that person concerned is of unsound mind, he shall record a finding to the effect and shall postpone further proceeding.

IInd Category (Section 329)

There are two stages of procedure contemplated under this Section. The first stage in the procedure laid down is that it must appear to the Court that the accused placed on trial is of unsound mind and incapable of making his defence. When it appears to the Judge that the accused is of unsound mind and consequently incapable of making his defence, the fact of such unsoundness of mind and incapacity should be inquired into on the material placed before the Court. It has been held by the Supreme Court in the matter of *Shivaswamy v. State of Mysore, AIR 1971 SC 1638* that where it does not appear to the Judge that the accused is of unsound mind or he is incapable of making his defence, it is not necessary for the Judge to adopt the procedure provided by the second part of the Section.

The provision of this Section is mandatory and its non-compliance vitiates the trial (See : *State of Karnataka v. Doragal Kanakappa, 1996 Cr.L.J. 599*).

The difference between first and second category i.e. Sections 328 and 329 is that under the preceding Section, before proceeding to decide the soundness or otherwise, the Court must have *'reason to believe'* that the person proceeded against is of unsound mind. In that case there should be some evidence to that effect. Under Section 329, it should only *'appear to the Magistrate'* that the accused is of unsound mind. There need not be any evidence on record. The Court has to proceed under this Section when it appears that the accused is of unsound mind. If the demeanour of the accused raises a suspicion, the Court must postpone the trial and decide the point, otherwise the conviction is vitiated. (See : *Ram Nath v. Emperor, AIR 1950 Allahabad 450*).

It is true that the word 'appears' in Section 329 imports a lesser degree of probability than 'proof', but this does not mean that whenever a counsel raises such a point before a Judge, he has to straightway hold an elaborate enquiry into the matter. If in the examination of the accused it does not appear to the court that the accused is insane, it is not necessary that it should go further, of course, if the Judge has serious doubt in the matter, he should hold a proper inquiry. (See : *I.V. Shivaswamy v. State of Mysore, AIR 1971 SC 1638*).

IIIrd Category (Sections 333 and 334)

Where the Magistrate is of opinion that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing of offence, the Magistrate cannot discharge the accused on that ground, but should proceed under Section 334. If the committing Magistrate finds that the accused is sane at the time of preliminary inquiry but was insane at the time of committing offence, he has no alternative but to proceed in accordance with this Section.

The fact of unsoundness of mind must be distinctly proved before a Court may be justified in pronouncing a verdict of acquittal under Section 84 of the IPC.

Procedure to be followed when accused person falls under the first or second category:

When acting under Section 328 or 329 of the Cr.P.C., a Magistrate or a Court comes to the conclusion that the person proceeded against or the accused is of unsound mind and consequently he cannot make his defence, the Magistrate or Court has to adopt either of the following two courses:

> **firstly,** he may release him on sufficient security being given, that sufficient care should be taken of the person so that he may not cause any harm to himself or to any other person and that he shall appear at the place and time ordered by the Court. The accused may be released on surety whether the offence is bailable or not.
>
> **secondly,** where in the opinion of the Court the madness is of such serious nature that the accused should not be released on bail as it would be dangerous for the society to release him on bail, or when sufficient security is not given, the accused should be ordered to be detained in safe custody. The detention has to be made in accordance with the rules under Lunacy Act (since repealed) new Act being Mental Health Act, 1987.

When the person concerned ceases to be of unsound mind, the inquiry or trial may be resumed. When the person of unsound mind is ordered by the Court under Section 330, to appear before an officer, the certificate of such officer that the accused is able to make his defence is admissible in evidence. Trial in the case should be *de novo.* If the accused is brought before the Court and it considers him capable of making his defence, the Court may proceed with the case. But if the Court considers that the accused is still of unsound mind, the provision of Sections 328 to 330 are again to be applied.

Procedure to be followed when accused person falls under third category:

When it is found by the Court that at the alleged time of occurrence, the accused due to unsoundness of mind, could not know that the act constituted an offence or that it was contrary to law, he shall be acquitted. But the Court has to record a definite finding to the effect as to whether the act was committed by the accused or not, because that would govern the future custody of the accused.

When the Court, trying the accused, comes to the conclusion that the accused did not commit the act or that act would not have constituted an offence even though the accused was of unsound mind, the accused shall be set at liberty. But when the finding of the trial Court is that the accused committed the act and such act would have constituted an offence but for the unsoundness of mind of the accused, then Court has two courses open. It may order the person to be detained in safe custody in such place as the Court thinks it proper or it may order such person to be delivered to any relative or friend of such person provided the relation or friend makes an application and gives security to the satisfaction of Court to the effect that he shall be properly taken care of and that he shall be produced before such officer for inspection as the State Government may direct.

POWERS OF STATE GOVERNMENT (Sections 333 to 339)

Section 336 Cr.P.C. deals with the powers of State Government to empower officer-in-charge of the jail in which a person is confined under the provisions of Section 330 or Section 335, to discharge all or any of the functions of Inspector General of Prison respectively under Sections 337 and 338. Section 337 deals with the procedure where lunatic prisoner is reported as being capable of making his defence. In case of person detained in jail under Section 330 (2) the Inspector General and in the case of a person detained in a lunatic asylum, two visitors may certify that such person is capable of making his defence. On such certificate the accused shall be taken before the Magistrate of the Court. On his arrival, the Court shall proceed under Section 332, and if the accused appears to be of sound mind, the case would proceed. The certificate granted by the Inspector General or the visitors shall be read as evidence at the inquiry.

Section 339 deals with delivery of lunatic to his relative or friend. When the relative or friend of a person detained under Section 330 or 335 makes an application and gives security to the satisfaction of the State Government to the effect that the person shall be properly cared and that he will be produced for the inspection of such officer at such time and place as the State Government may direct, and in the case of a person detained under sub section (2) of Section 330, he or she shall be produced when required before such Magistrate or Court, the State Government may order such person to be delivered to such relative or friend.

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PERJURY - PROCEDURE INVOLVED IN ACTION TAKEN BY A COURT

Judicial Officers
District Ratlam

Not specifically defined in the Penal Code, but as defined in the dictionary the word 'perjury' means making false statement before a jury. Sec.191 of the I.P.C. prescribes the definition of the offence what is called perjury, in common parlance, "whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, is said to have given false evidence."

The Apex Court expressing its concern over the rising trend of witnesses turning hostile has expressed in *Swaran Singh v. State of Punjab, AIR 2000 SC 201* that:-

> "Perjury has also become a way of life in the law courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him."

The procedure prescribed by law to proceed against a perjurer as contained in Sec. 340 Cr.P.C. requires a complaint being sent in writing to a Magistrate of the First Class having jurisdiction.

The opening words "when upon an application made to it in this behalf, or otherwise" make it clear that for the purpose of section 340 the machinery can be set in motion even by a person other than the trying court, though he is a stranger to the proceeding. As expressed by the Apex Court in the infamous Bombay Blast Case *N.Natarajan v. B.K. Subbarao, AIR 2003 SC 541:*

> "In our view it is not necessary to pursue the approach of either of the parties. It is well settled that in criminal law a complaint can be lodged by any one who has become aware of a crime having being committed and thereby set the law in motion. In respect of offences adverted to in Sec. 195 Cr.P.C. there is a restriction that the same can not be entertained unless a complaint is made by a court because the offence is stated to have been committed in relation to the proceedings in that Court. Sec. 340 Cr.P.C. is invoked to get over the bar imposed u/s. 195 Cr.P.C. We fail to see how any citizen of this country cannot approach u/s 340 Cr.P.C. for that matter the wordings of Sec. 340 Cr.P.C. are significant. The court will have to act in the interest of justice on a complaint or otherwise."

Regarding the stage when the powers contained in this section could be exercised, there seems to be some confusion as related to Sec. 344 of the Cr.P.C. Sec. 344 (1) provides that if at the time of delivery of any judgment or

final order disposing of any judicial proceeding, a Court of Session or Magistrate of the First Class is of the opinion that any witness has given a false evidence, and if he is satisfied that it is necessary and expedient in the interest of justice, he may take cognizance of the offence. But the section itself starts with the heading **"Summary procedure for trial of giving false evidence"**. The language of the section also makes it clear that only if the perjurer is to be tried summarily, the power could be invoked at the termination of the proceedings but there is no such restriction for the procedure contained in Sec. 340 Cr. P.C. This is also noticeable in the light of the provision of making a preliminary inquiry contained in Sec. 340.

Coming back to the procedure prescribed u/s 340, it is clear that what is required by a court is to record a finding to that effect. It is not in every case the court is bound to make an enquiry. The intention is clear by the wordings *"after such preliminary enquiry, if any, as it thinks necessary"*. Thus where the perjury is apparently on record, no inquiry is necessitated. For example, if a witness deposes certain facts in his evidence and later on in the other part of his statement, he admits his previous deposition to be false, or for instance, he makes two inconsistent statements together at a time, then no inquiry is required to find out the falsity of his evidence.

Earlier, Sub-section (3) required that a complaint other than the complaint by a High Court, was to be signed by the presiding judge himself, but the courts were either reluctant in making complaints or made procedural mistakes by making complaint signed by the ministerial staff. The fact was noted by the Apex Court in *Swaran Singh v.State of Punjab (supra)* where in Their Lordships noted:

> "He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendments to clause (B) of Sec. 340(3) of the Cr.P.C. in this respect as High Court can direct any officer to file a complaint. To get rid of the evil of perjury the court should resort to the use of provisions of law as contained in Chapter XXVI of the Cr.P.C."

Taking note of the above situation the law stands amended by the Criminal Law Amendment Act, 2005. Now the Presiding Officer of the court or any other such officer of the court who may be authorised in writing in this behalf is competent to sign a complaint.

Lastly, while lodging a complaint to the Magistrate having jurisdiction, the court is empowered to take security for the appearance before such Magistrate. In case the alleged offence is non-bailable and the court thinks it necessary, he may also be sent in custody to such Magistrate. In relation to any witness in the said perjury case the court can even bind any person to appear and give evidence before such Magistrate.

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LIABILITY OF A COMPANY FOR COMMISSION OF OFFENCE UNDER INDIAN PENAL CODE

Judicial Officers
District Indore

The corporate bodies, such as a firm or company undertake series of activities that affect life, liberty & property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial & sociological sectors that amenability of the corporation to criminal law is essential to have a peaceful society with stable economy.

Regarding the question as to who is the offender, the key word is "Person". The definition of the word "Person" is available in Sec. 11 of I.P.C. as well as in Sec.3 (42) in the General Clauses Act. Both the definitions which are similar, show that the word "Person" includes any Company or Association or body of persons whether incorporated or not. This makes it clear that a company or Corporation can be subjected to penal liability under I.P.C. as in FERA, Income Tax Act, MRTPC Act, Prevention of Food Adulteration Act, 1954, Companies Act, Drugs & Cosmetics Act, Trade Marks Act, Essential Commodities Act, NDPS Act etc.

While laying down criminal liability the statute does not make any distinction between a natural person & corporation. The Criminal Procedure Code dealing with trial of offences contain no provision for exemption of corporation from prosecution if there is difficulty in sentencing them as per statute.

In as much as all criminal and quasi-criminal offences are creatures of statutes, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporation and individual persons stand on the same footing in the face of such a statutory offence.

Ordinarily, a corporate body like a company acts through its Managing Director or Board of Directors or authorized agent or servant and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omission including the state of mind intention, knowledge or belief of the company. These corporate bodies necessarily act through the human agency of their Directors, Officers & Authorized Agents. They reap all the advantages flowing from the acts of their Director, servant or authorized agents.

In *State of Maharashtra v. Syndicate Transport Co., AIR 1964 Bom.195* Hon'ble Bombay High Court while deciding the important question of law regarding the liability of a corporate body for indictment on a criminal charge involving the question of *mens rea,* after referring to Sections 2 and 11 of IPC held that a Company or a corporate body shall be liable for indictment for all kinds of offences.

It is not disputed that there are several offences which could be committed only by an individual human being for instance, murder, treason, bigamy, rape, perjury etc. A Company which does not act by or for itself but acts through some agent or servant would obviously not be capable of commission of the aforesaid offences and therefore, not be liable for indictment for such offences. Again there are certain other offences which necessarily entail the consequences of corporal punishment of imprisonment. A body corporate or a Company cannot be subjected to such corporal punishment of imprisonment. That will mean that the broad definition of a "person" which included a Company will have to be read as being subject to some kind of limitation.

In *The Madras Port Trust v. A.M. Saffula & Co. AIR 1965 Mad. 133 (D.B.),* it was observed that it is now settled law that a corporation can be held liable for wrongful acts and that such liability extends even to cases in which malice, fraud or other wrongful motive or intent is a necessary element. An action for libel, malicious prosecution or deceit will lie against a company. In *Municipal Corporation of Delhi v. J.B. Bottling Co. Pvt. Ltd., 1975 Cr.L.J. 1148 (F.B.),* it was held that a Limited Company can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency which in given circumstances become the acts of the company. The offences for which a Limited Company cannot be indicted are the cases in which from its very nature the offence cannot be committed by a corporation, as for example-giving false evidence, bigamy, riots, assaults, etc. or an offence which can not be vicariously committed or an offence where the only punishment that the court can impose is corporal.

Barring exceptions as enunciated above, a corporate body ought to be indictable for criminal acts or omissions of its Directors, or authorized agents or servants, whether they involve *mens rea,* or not, provided they have acted or have purported to act under authority of the corporate body or in pursuance of the aims or objects of the corporate body.

Therefore, as regard the criminal liability of a company, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether liability is strict or vicarious. The generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation

may be subject to indictment or other criminal process, although the criminal act is committed through its agents. (Please see- *Standard Chartered Bank & other etc. v. Directorate of Enforcement & others etc., 2005 AIR SCW 2829 (5 Judges Bench).*

The question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend upon the nature of the offence disclosed by the allegation in the complaint or in the charge sheet, the relative position of the officer or agent vis-à-vis the corporate body and the other relevant facts and circumstances, which could show that the corporate body, as such, meant or intended to commit that act.

In this context one more question which arises for consideration is that whether a company could be prosecuted for which sentence of imprisonment is a mandatory punishment. A five Judge Bench of Apex Court in the case of *Standard Chartered Bank* (supra) has settled the position of law. It was expressly stated in this case that the company is liable to be prosecuted even if the offence is punishable both with a term of imprisonment and fine. In case the company is found guilty, the sentence of imprisonment cannot be imposed on the company and then the sentence of fine is to be imposed and the court has got the judicial discretion to do so. The sentence of imprisonment can be ignored as it is impossible to be carried in respect of company. It is an acceptable legal maxim that law does not compel a man to do that, which cannot possibly be performed.

So for the offences, which prescribe punishment of imprisonment or fine or both or fine only, there should not be any difficulty as in such cases the punishment of fine can be imposed. It should also be kept in mind that while imposing punishment of fine, in lieu of fine, punishment of imprisonment cannot be imposed against the company. Only recourse of recovery of the fine as prescribed by law can be taken.

In view of the above, it is amply clear that a company can be held liable for commission of offence under I.P.C. With certain limitation as discussed above, the company can be held liable as well as can be punished with fine for the offences under IPC relating to weights and measures, affecting the public health, safety, offence of cheating, fraud, offences relating to documents, and to property marks, offences of criminal breach of contracts of services and offences of defamation. These are illustrative examples and are not exhaustive. Each case will have necessarily to depend on its own facts which will have to be considered by Magistrate or Judge before deciding whether to proceed against a corporate body or not.

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AMBIT, SCOPE AND APPLICABILITY OF SECTION 197 CR.P.C.

Institutional Article

Ved Prakash
Director, JOTRI

Section 197 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') is an exception to the general rule incorporated in Section 190 of 'the Code' which provides that a Magistrate can take cognizance of an offence in the manner provided therein. S. 197 stipulates a special protection against prosecution to public servants who are not removable from their offices save by or with the sanction of the State Government or the Central Government when they are charged with having committed offences while acting or purporting to act in the discharge of their official duties. The object and purpose underlying section 197 Cr. P.C., as explained in *Bhagwan Prasad Srivastava v. N. P. Mishra, AIR 1970 SC 1661,* is two fold :

firstly - to afford protection to specified public servants against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty, and

secondly- to facilitate effective and unhampered performance of official duty by public servants by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for the prosecution as a condition precedent to the cognizance of the cases against them, by the courts.

In order to appreciate the ambit, scope and applicability of Section 197, following main issues are required to be examined :

(a) Nature of the bar and applicability
(b) Test to determine the official duty
(c) Stage to consider the bar
(d) Applicability regarding retired public servants
(e) Proof of the sanction
(f) Cases of criminal misappropriation, fraud, etc.

NATURE OF THE BAR

The provisions of Section 197 Cr.PC are very much mandatory in nature. As expressed in *State of Orissa through Kumar Raghvendra Singh and others v. Ganesh Chandra Jew, (2004) 8 SCC 40* the mandatory character of the protection afforded to a public servant is well brought out by the expression 'no court shall take cognizance'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete because the very cognizance is barred.

As laid down in *Dhananjay Ram Sharma v. M.S. Upadhyaya, AIR 1960 SC 745* following two conditions must be satisfied for invoking Section 197 Cr.PC:

(i) the accused must be a public servant of the kind mentioned in the section i.e. he must be a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the State Government or Central Government and

(ii) the offence must be committed by the accused while acting or purporting to act in the discharge of his official duty.

TEST TO DETERMINE OFFICIAL DUTY

It is not that every public officer facing a prosecution can avail the protection available u/s 197 Cr.PC. The protection is available only to those public servants who are not removable from the service except by or with the sanction of the Government, State or Central, as the case may be, and to certain other category of public servants provided under sub-sections (2) and (3) of Section 197. Therefore, a Class IV employee of the Postal Department, who could have been removed from the service by the Senior Superintendent of Post, was not found entitled to get protection u/s 197 against his prosecution (See : *Salighram v. State of Himachal Pradesh, 1973 Cr.L.J. 1030*). However, in an another case a Tehsildar who could not have been removed except with the sanction of the State Government was held entitled to the protection u/s 197, provided other conditions stipulated in the Section were satisfied (See : *Kailash Chandra Harbans Singh Chabra, 1988 JLJ 499).* In *K.H. Shukla v. Navneet Lal Bhatt, 1967 Cr.L.J. 1200 (SC)*, where the accused was appointed as Class I Officer in officiating capacity by the Railway Board, removable from service by the Board itself and not by the Central Government, it was held that he was not entitled for the protection of Section 197. The aforesaid distinction should always be kept in mind while considering the applicability of Section 197.

The provisions of Section 197 make it abundantly clear that the protection is available not only regarding acts committed in discharge of official duty but also to the acts *"purportedly committed in the discharge of official duty".* Considering the scope of expression "official duty", the Apex Court observed in *Ganesh Chandra Jew's case (supra)* –

> ".....This protection ..... is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty, and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be sufficient ground to deprive the public servant of the protection."

In *Bhagwan Prasad Srivastava v. N. P. Mishra, AIR 1970 SC 1661* the alleged act consisted of the use of defamatory and abusive words by a Civil Surgeon and of getting the complainant-respondent forcibly turned out of the operation theatre by the cook. Dealing with the plea of applicability of Section 197 it was held that there was nothing on the record to show that this was a part of the official duty of the appellant as Civil Surgeon or that it was so directly connected with the performance of his official duty that without so acting he could not have properly discharged it.

In *Prabhakar v. Sinari v. Shanker Anant Verlekar, AIR 1969 SC 686* the issue related to the sanction for prosecution of a Police Officer who interfered in a dispute over land asking one party to take possession. It was held that ordinarily if a person is in possession of some property and other persons are threatening to dispossess him, it is no part of the duty of a police officer to take sides and decide the dispute in favour of one party or the other or to force one party to give up possession to the other, even if he was satisfied that the party seeking to take possession was lawfully entitled to do so. The police officer could only do this if there had been any direction by a competent court for rendering help in the matter of delivery of possession.

However, where accused a police officer acting in his official capacity caused death of a person to avert booth capturing, it was held that the act of the accused was purportedly in the discharge of official duty and hence protection of Section 197 was available, though it cannot be said that causing death was part of the duty of the police officer (See : *Sankaran Moitra v. Sadhna Das and another, (2006) 4 SCC 584*)

The classical exposition on the point is found in the pronouncement made by the Constitution Bench of the Apex Court in *Matajog Dobey v. H.C. Bhari, AIR 1966 SC 44* wherein after scanning through the various authorities on the point it was held as under –

> ".....There must be a reasonable connection between the act and the discharge of official duty; the act must bear **such relation to the duty that the accused could lay a reasonable,** but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

The ultimate precise test as pointed out by the Apex Court in *B. Saha and others v. M.S. Kochar, (1979) 4 SCC 177* (3 Judge Bench) is the one stated by Lord Simonds in *H.H.B. Gill v. King, AIR 1948 PC 128.* To quote:

> "test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does it by virtue of his office."

Another test as outlined in *Ganesh Chandra Jew's* case (supra) is –

....if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant....."

STAGE TO CONSIDER THE BAR

The issue relating to the appropriate stage to consider the applicability of Section 197 was examined by the Apex Court in *Matajog Dobey's case (supra).* Referring to the observation made by Sulaiman, J. in *Sarjoo Prasad v. Emperor, AIR 1946 FC 25* to the effect that as the prohibition is against the institution itself, the applicability must be judged in the first instance at the earliest stage of institution, the Court observed that–

> "The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction."

The concluding observations on this point as made in the aforesaid case are as under –

> "Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

RETIRED PUBLIC SERVANT

Section 197 in its present shape creates a bar against taking cognizance by a Court against a person who is **'or was'** a public servant, meaning thereby that the protection engrafted in Section 197 is available not only to the public servant who is in service but also to the public servant who has since retired. The expression 'or was' was put into Section 197 after the recommendations made by the Law Commission of India in its 41st report (paragraph 15.123) to the effect that protection afforded by Section 197 will be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The legal position in this respect has been elaborately stated by the Apex Court in *Ganesh Chandra Jew* (supra).

PROOF OF SANCTION

A sanction order, issued by the State in discharge of its statutory functions

in terms of Section 19 of the Prevention of Corruption Act has been held to be a public document within the meaning of Section 74 of the Indian Evidence Act (See : *State v. K. Narasimhachary, AIR 2006 SC 628*) The position cannot be different in respect of a sanction issued under Section 197 of 'the Code'. In *State v. K. Narasimhachary* (Supra) it has been held that the sanction can be proved either by producing the original sanction order which itself contains the facts constituting the offence and ground of satisfaction or by adducing evidence allude to show that the facts were placed before the sanctioning authority and the satisfaction arrived at by the same. The law is well settled that where the sanction order is itself clear and indicates that all the material was placed before the sanctioning authority, then it will not be necessary to produce the sanctioning authority as a witness of Court. (See : *State of Tamil Nadu v. Damodaran, AIR 1992 SC 563*)

The observations made by the Apex Court in its latest pronouncement in *Parkash Singh Badal and another v. State of Punjab and another, (2007) 1 SCC 1* may also be usefully referred in this respect.

CASES OF CRIMINAL APPROPRIATION, MISAPPROPRIATION, FRAUD, ETC.

Now it is well settled by a catena of decisions that it is no part of the duty of a public servant to commit an act of criminal misappropriation. Therefore, the question of necessity of sanction for prosecuting a public servant charged with criminal misappropriation or like offences may not at all arise. The legal position in this respect was beautifully summarized as under by the Apex Court in *Harihar Prasad v. State of Bihar, (1972) 3 SCC 89* (SCC p. 115, para 66) :

> "As far as the offence of criminal conspiracy punishable under Section 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5 (2) of the Prevention of Corruption Act are concerned they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar."

This view has been reiterated in the latest pronouncement of the Apex Court in *State of Himachal Pradesh v. M.P. Gupta, (2004) 2 SCC 349* wherein it has been pointed out that offence u/Ss 467, 468 and 471 relating to forgery of valuable security, forgery for the purpose of cheating and using as genuine forged documents respectively cannot be a part of the duty of a public servant while discharging his official duties. Therefore, want of sanctio u/s 197 of the Code may not be a bar for prosecution of such public servant.

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 2006 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)

क्या पश्चात्वर्ती शपथपत्र के आधार पर साक्षी को पुनः परीक्षण हेतु आहूत किया जाना विधि सम्मत एवं औचित्यपूर्ण हैं ?

अनेक मामलों में, विशेषतः दाण्डिक प्रकरणों में, साक्षी का नियमित परीक्षण हो जाने के बाद न्यायालय के समक्ष उसका शपथपत्र प्रस्तुत कर उसे साक्ष्य में पुनः प्रति परीक्षण हेतु आहूत करने की प्रार्थना इस आधार पर की जाती है कि उसका न्यायालीन कथन शपथपत्र में वर्णित तथ्यों से भिन्न है। ऐसी स्थिति में साक्षी को पुनः प्रतिपरीक्षण हेतु आहूत किया जाना किस सीमा तक विधिसम्मत एवं औचित्यपूर्ण है यह एक महत्वपूर्ण प्रश्न है। *मांगीलाल विरूद्ध मध्यप्रदेश राज्य 1997 (1) एम. पी. डब्लयू. एन. 138 तथा मानसिंह विरूद्ध मध्यप्रदेश राज्य 2000 (1) एम. पी. एल. जे. शार्ट नोट 8* के मामलों में पश्चात्वर्ती शपथपत्र के आधार पर साक्षी को पुनः परीक्षण के लिए बुलाने की प्रार्थना को सही निरूपित किया गया लेकिन न्याय दृष्टांत *याकूब इस्माईल भाई पटेल विरूद्ध गुजरात राज्य, ए. आई. आर. 2004 एस.सी. 4209* में माननीय सर्वोच्च न्यायालय ने यह स्पष्ट रूप से यह प्रतिपादित किया है कि साक्षी के एक बार परीक्षित कर लिए जाने के बाद उसे न्यायालय में शपथ पर दिए गए कथन से विरत होने की अनुमति नहीं दी जा सकती है। इस मामले में पूर्व परीक्षित साक्षी का इस आशय का शपथपत्र न्यायालय के समक्ष प्रस्तुत किया गया था कि पूर्व में उसने न्यायालय के समक्ष पुलिस के दबाव में आकर कथन दिया था जो सही नहीं था। इस शपथपत्र के आधार पर साक्षी के पुनः परीक्षण की प्रार्थना अस्वीकृत किये जाने को माननीय सर्वोच्च न्यायालय ने विधिसम्मत ठहराया। उक्त परिपेक्ष में यह साफ प्रकट है कि पश्चातवर्ती शपथ पत्र के आधार पर साक्षी को पुनः परीक्षण हेतु बुलाया जाना विधि सम्मत व औचित्यपूर्ण नहीं हैं।

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संविदा के विनिर्दिष्ट अनुपालन संबंधी वाद में पारित आज्ञप्ति में आधिपत्य की सहायता प्रदान नहीं किये जाने पर भी क्या प्रवर्तन न्यायालय में आज्ञप्ति धारी को विवादित सम्पति का आधिपत्य प्रदान कर सकता है ?

इस संबंध में विर्निदिष्ट अनुतोष अधिनियम की धारा 28 (3) (बी) सन्दर्भ योग्य है जो कतिपय परिस्थितियों में आज्ञप्तिधारी को विवादित सम्पत्ति का आधिपत्य दिलाने हेतु सशक्त करती है। इसी प्रकार सम्पत्ति अन्तरण अधिनियम की धारा 55 यह उपबंधित करती है कि विपरीत अनुबंध के अभाव में विक्रेता, क्रेता को विक्रित सम्पत्ति का आधिपत्य प्रदान करने के दायित्वाधीन होगा।

इसके अतिरिक्त यदि प्रवर्तन न्यायालय आधिपत्य की सहायता प्रदान किये बिना मात्र विक्रय पत्र के निष्पादन की सहायता ही प्रदान करता है तो इसे विक्रय की संविदा की आज्ञप्ति का प्रभावी प्रर्वतन नहीं माना जा सकता है क्योंकि ऐसी आज्ञप्ति का प्रभावी प्रवर्तन तभी हो सकता है जब आज्ञप्ति धारी को विवादित सम्पत्ति का आधिपत्य भी दिलाया जाए।

अतः निष्पादन न्यायालय संविदा के विनिर्दिष्ट अनुपालन के वाद में पारित आज्ञप्ति में आधिपत्य प्रदान करने की सहायता का उल्लेख नहीं होने पर भी आज्ञप्ति के प्रवर्तन में आधिपत्य प्रदान करने की सहायता दे सकता है।

उक्त विधिक स्थिति के संबंध में माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टाँत *बाबूलाल विरूद्ध हजारीलाल किशोरी लाल एवं अन्य, ए. आई. आर. 1982 सु. को. 818* एवं माननीय मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टाँत *सुदंर लाल विरूद्ध गोपाल, 2003 (1) एम. पी. एच. टी. 330, बाटा शू कम्पनी विरूद्ध प्रीतमदास 1983 जे. एल. जे. 422 तथा दादुलाल विरूद्ध श्रीमती देव कुँअर बाई ए. आई. आर. 1963 एम. पी. 86* में प्रतिपादित न्याय सिद्धान्त उल्लेखनीय है।

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

PART - II

NOTES ON IMPORTANT JUDGMENTS

65 CRIMINAL PROCEDURE CODE, 1973 – Section 164
Confession, recording of by Magistrate – Provisions of S.164 should be complied with in letter and spirit – Whether oath can be administered to the accused while recording confession? Held, No.
Babubhai Udesinh Parmar v. State of Gujarat
Reported in 2006 AIR SCW 6329

Held:

A judicial confession undoubtedly is admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary and if clearly proved. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged on the basis of the entire prosecution case. [See *Bharat v. State of U.P. (1971) 3 SCC 950* and *Subramania Goundan v. The State of Madras, (1958) SCR 429*

In *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600],* this Court observed. (2005 AIR SCW 4148, Para 8)

> "Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide Taylor's Treatise on the Law of Evidence Vol. I). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer.

Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police."

However, it was categorically stated that retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false.

Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance of the statutory provisions in a routine or mechanical manner.

The court must give sufficient time to an accused to ponder over as to whether he would make confession or not. The appellant was produced from judicial custody but he had been in police custody for a period of 16 days. The learned Magistrate should have taken note of the said fact. It would not be substantial compliance of law. What would serve the purpose of the provisions contained in Section 164 of the Code of Criminal Procedure are compliance of spirit of the provisions and not merely the letters of it. What is necessary to complied with, is strict compliance of the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance of the statutory provisions in letter and spirit. We do not appreciate the manner in which the confession was recorded. He was produced at 11.15 a.m. The first confession was recorded in 15 minutes time which included the questions which were required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The learned Magistrate, therefore, should have allowed some more time to the appellant to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the appellant.

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We do not appreciate as to why oath had to be administered to the accused while recording confession. Taking of a statement of an accused on oath is prohibited...

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66. CIVIL PROCEDURE CODE, 1908 – Order VIII Rule 6-A
Counter-claim, filing of – Whether it can be filed after settlement of issues? Held, No.
Rohit Singh and others v. State of Bihar (now State of Jharkhand)
Reported in AIR 2007 SC 10

Held:

We shall first consider whether there was a counter claim in the suit in terms of Order VIII Rule 6A of the Code in this case. The suit was filed against the Divisional Forest Officer and the State of Bihar as defendants 1 and 2 on 26.2.1996 by respondent No.6 herein. After the written statement was filed by the defendants issues were framed and the suit went to trial. On 3.6.1996 and 6.6.1996 the evidence on the side of the plaintiff was concluded. On 14.6.1996 the evidence on the side of the defendants was completed. On 24.6.1996 arguments were concluded. Judgment was reserved. 25.6.1996 was fixed as the date for pronouncing the judgment. The judgment was not pronounced and it appears that the Judge was subsequently transferred. Therefore, on 20.8.1996 arguments were again heard by the successor Judge and judgment was reserved. 27.8.1996 was fixed as the date of judgment. Apparently, it was not pronounced. It is thereafter that defendants 3 to 17 filed an application on 11.9.1996 for intervention in the suit. We have already referred to the allegations in that application for impleading filed. We only notice again that they claimed to be in possession of the property and that their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. On 19.9.1996 the application for intervention was allowed. On 30.9.1996 a written statement was filed by defendant Nos. 3 to 12. We have already summarised the pleas raised therein.

After this, the witnesses of the plaintiff were recalled and permitted to be cross-examined by these defendants. That was on 5.10.1996. Again the witnesses for defendants 1 and 2, were recalled and they were permitted to be cross-examined on behalf of these defendants. The evidence on the side of defendants 3 to 17 was let in. It commenced on 24.2.1997 and was closed on 30.1.1997. Thereafter arguments were heard again and the arguments on the side of the defendants including that of defendants 3 to 17 were concluded on 4.3.1997. The suit was adjourned for arguments on the side of the plaintiff. On 5.3.1997, the suit was dismissed for default of the plaintiff. It was then restored on 29.5.1998. It was thereafter on 5.6.1998, that defendants 3 to 17 filed an application for amending the written statement. The amendment was allowed on 20.7.1998. There was no order treating the amended written statement as a counterclaim or directing either the plaintiff or defendants 1 and 2 to file a written statement or an answer thereto. Defendants 3 to 17 had questioned the pecuniary jurisdiction of the trial court in their written statement. That plea was permitted to be withdrawn on 4.2.1999. It is clear that after the evidence was closed, there was no occasion for impleading the interveners. Even assuming that they were properly impleaded, after they had filed their written statement, the suit had gone for further trial and further evidence including that of the interveners had been taken, the evidence again closed and even arguments on the side of the interveners had been concluded. The suit itself was dismissed for default only because on behalf of the plaintiff there was a failure to address arguments. But the suit was subsequently restored. At that stage no counterclaim could be entertained

at the instance of the interveners. A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed....

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67. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 & 13 (1) (d) PROBATION OF OFFENDERS ACT, 1958 – Sections 18 & 19

(i) Acceptance of illegal gratification preceeded by a demand or not, difference between – Held, one is punishable u/s 7 while other u/s 13 (1) (d) – Demanding and receiving illegal gratification constitutes offence both u/Ss 7 and 13 (1) (d).

(ii) Reference of S. 562 Cr.P.C. and S.5 (2) of the Prevention of Corruption Act, 1947 (Old Act) in Section 18/19 of Probation of Offenders Act have to be read as reference to the corresponding provisions in new Cr.P.C. and new Act of 1988 – Law explained.

The State v. A. Parthiban

Reported in AIR 2007 SC 51

Held:

(i) Every acceptance of illegal gratification whether preceded by a demand or not, would be covered by Section 7 of the Act. But if the acceptance of an illegal gratification is in pursuance of a demand by the public servant, then it would also fall under section 13(1)(d) of the Act. The act alleged against the respondent, of demanding and receiving illegal gratification constitutes an offence both under Section 7 and under Section 13 (1) (d) of the Act. The offence being a single transaction, but falling under two different Sections, the offender cannot be liable for double penalty. But the High Court committed an error in holding that a single act of receiving an illegal gratification, where there was demand and acceptance, cannot be an offence both under Section 7 and under Section 13(1)(d) of the Act. As the offence is one which falls under two different sections providing different punishments, the offender should not be punished with a more severe punishment than the court could award to the person for any one of the two offences. In this case, minimum punishment under Section 7 is six months and the minimum punishment under Section 13(1)(d) is one year. If an offence falls under both Sections 7 and 13 (1) (d) and the court wants to award only the minimum punishment, then the punishment would be one year.

It was next contended by the respondent that in the absence of any bar in the Act for extending the benefits under the provisions of Probation Act provisions of the said Act could have also been applied, as has been noted by the High Court. In any event Section 360 of the Code has been rightly applied by the High Court by taking note of the extenuating circumstances. Section 18 of the Probation Act stipulated that the Act was inapplicable to offences punishable under Section 5(2) of the Old Act. Specific reference was made to Section 5(2) of the Old Act which corresponds to Section 13 of the Act. But no change was made in the Probation Act after the Act was enacted and brought into force in

1988. Much stress was laid on the non-amendment of the Probation Act which referred to the old Act and not the present Act. It was submitted that since there has been no corresponding change in the Probation Act, therefore, the provisions of said Act cannot be applied to cases under the Act. The argument overlooks the principles underlying Section 8 of the General Clauses Act. When an Act is repealed and re-enacted unless a different intention is expressed by the legislature, the reference to the repealed Act would be considered as reference to the provisions so re-enacted.

The Parliament has enacted the Probation Act and Section 1(3) thereof stipulated that it shall come into force in a State on such date as the State Government may by notification in the official gazette appoint. In State of Tamil Nadu it came into force in the entire State in the year 1964. Section 19 of that Act lays down that, subject to the provisions of Section 18, Section 562 of the Criminal Procedure Code, 1898 (hereinafter referred to as 'Old Code') shall cease to apply to the States or parts in which the Probation Act is brought into force. Old Code came to be repealed and replaced by the Code and Section 360 of the Code is the corresponding provision to Section 562 in the Old Code. In *Bishnu Deo Shaw v. State of West Bengal (1979 (3) SCC 714)*, this Court ruled that Section 360 of the Code i.e. enacts in substance Section 562 of the Old Code. That apart, Section 18 of the Probation Act interalia stipulates that nothing in the said Act shall affect the provisions of sub-section (2) of Section 5 of the Old Act. This Court in the decisions reported in *Isher Das v. The State of Punjab (1973 (2) SCC 65) and Som Nath Puri v. State of Rajashtan (1972 (1) SCC 630)*, has held specifically adverting to Section 18 that the said provision renders the Probation Act inapplicable to an offence under sub-section (2) of Section 5 of the Old Act, by expressly excluding its operation. Section 13(2) of the re-enacted Act is the corresponding provision to Section 5(2) of the Old Act.

The import of the above provisions, in view of the new enactment of the Code and the Act requires and has to be considered in the light of Section 8 of the General Clauses Act which reads as under:

> "8. Construction of references to repealed enactments. [(1) Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.
>
> (2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then references in any [Central Act] or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.]"

(ii) The object of the said provision, obvious and patently made known is that where any Act or Regulation is repealed and re-enacted, references in any other enactment to provisions of the repealed former enactment must be read and construed as references to the re-enacted new provisions, unless a different intention appears. In similar situations this Court had placed reliance upon Section 8 of the General Clauses Act to tide over the situation. In *New Central Jute Mills Co. Ltd. v. The Asstt. Collector of Central Excise, Allahabad and Ors. (1970 (2) SCC 820),* this Court held it to be possible to read the provisions of the Customs Act, 1962 in the place of Sea Customs Act, 1878 found mentioned in Section 12 of the Central Excise and Salt Act, 1944. In *State of Bihar v. S.K. Roy (AIR 1966 SC 1995),* this Court held that by virtue of Section 8 of the General Clauses Act, references to the definition of the word 'employer' in Clause (e) of Section 2 of the Indian Mines Act, 1923 made in Coal Mines Provident Fund and Bonus Schemes Act, 1948 should be construed as references to the definition of 'owner' in Clause (1) of Section 2 of the Mines Act, 1952, which repealed and re-enacted 1923 Act. Consequently, the references to Section 562 of Old Code in Section 19 of the Probation Act and to Section 5(2) of the Old Act in Section 18 of the Probation Act, respectively have to be inevitably read as references to their corresponding provisions in the newly enacted Code and the Act. Consequently, for the conviction under Section 13(2) of the Act the principles enunciated under the Probation Act cannot be extended at all in view of the mandate contained in Section 18 of the said Act. So far as Section 360 of the Code is concerned, on and from the date of extension and enforcement of the provisions of the Probation Act to Madras powers under Section 562 of the Old Code and after its repeal and replacement powers under Section 360 of the Code, cannot be invoked or applied at all, as has been done in the case on hand.

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68. CIVIL PROCEDURE CODE, 1908 – Order IX Rule 13
WORDS AND PHRASES :
Expression 'Payment into Court' as used in O.IX R. 13, meaning of.
Tea Auction Ltd. v. Grace Hill Tea Industry & Anr.
Reported in AIR 2007 SC 67

Held:

We may at once notice that whereas Order IX, Rule 7 postulates setting aside of orders passed by the Court upon such terms of costs or otherwise; Order IX, Rule 13, inter alia, postulates "payment into Court".

What would be the meaning of "Payment into Court" is the core question.

In *G.P. Srivastava v. R.K. Raizada & Ors. [(2003) 3 SCC 54],* a similar question came up for consideration. A Division Bench of this Court opined that the provision under Order IX, Rule 13 of the Code of Civil Procedure should receive a broad construction and no hard and fast guidelines can be prescribed. The courts have a wide discretion to set aside an ex parte decree on satisfying itself as regards existence of a "sufficient cause", opining:

"The "sufficient cause" for nonappearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause", is made out for nonappearance of the defendant on the date fixed for hearing when expert proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

In *Ramesh & Ors. vs. Ratnakar Bank Ltd. [JT 2000 (10) SC 325]*, however, this Court, while directing that the ex parte decree be set aside, also directed deposit of a further sum of Rs. 5 lakhs over and above the amount of Rs. 7 lakhs directed by the Court on an earlier occasion. No law has been, however, laid down therein.

In *Vijay Kumar Madan & Ors. vs. R.N. Gupta Technical Education Society & Ors. [(2002) 5 SCC 30]*, this Court deprecated the practice of imposing an undue condition and putting the defendant on onerous terms, stating:

"Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "upon such terms as the court directs as to costs or otherwise". It is settled with the decision of this Court in *Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993* that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of *Arjun Singh* the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation."

However, the interpretation of the expression "payment into Court" did not directly fall for consideration in those cases.

Order IX, Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his nonappearance even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of R. 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.

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69. EVIDENCE ACT, 1872 – Section 113-B
WORDS AND PHRASES :
Dowry death – Presumption u/s 113-B – Expression 'soon before', meaning of – Expression is pregnant with idea of proximity but not synonymous with the term 'immediately before'.
Kailash v. State of M.P.
Reported in AIR 2007 SC 107

Held:

No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty or harassment there-after. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is "soon before". The expression is a relative term which is required to be considered under specific circumstances of each case and no strait-jacket formula can be laid down by

fixing any time-limit. The expression is pregnant with the idea of proximity test. It cannot be said that the term "soon before" is synonymous with the term "immediately before". This is because of what is stated in Section 114, Illustration (a) of the Evidence Act. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link [see : *Hira Lal v. State (Govt. of NCT), Delhi, (2003) 8 SCC 80].*

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70. CIVIL PROCEDURE CODE, 1908 – Section 80 (2)
Suit against Government without complying with S.80 (1) – Leave of the Court, grant of – Condition precedent for such suit – Court can grant relief against Government only after giving reasonable opportunity of showing cause – Government not raising objection in written statement regarding non-issue of notice u/s 80 – Objection deemed to have been waived.
State of A.P. & Ors. v. M/s Pioneer Builders, A.P.
Reported in AIR 2007 SC 113.

Held :

... Sub-section (2) carved out an exception to the mandatory rule that no suit can be filed against the Government or a public officer unless two months' notice has been served on such Government or public officer. The provision mitigates the rigours of sub-section (1) and empowers the Court to allow a person to institute a suit without serving any notice under sub-section (1) in case it finds that the suit is for the purpose of obtaining an urgent and immediate relief against the Government or a public officer. But, the Court cannot grant relief under the sub-section unless a reasonable opportunity is given to the Government or public officer to show cause in respect of the relief prayed for. Proviso to the said sub-section enjoins that in case the Court is of the opinion that no urgent and immediate relief should be granted, it shall return the plaint for presentation to it after complying with the requirements of sub-section (1). Sub-section (3), though not relevant for the present case, seeks to bring in the rule of substantial compliance and tends to relax the rigour of sub-section (1).

Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by a court in which cases a suit against the Government or a public officer may be instituted, but with the leave of the Court. Leave of the Court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even through Section 80(2) does not specify how the leave is to sought for or given yet the order granting leave must indicate the ground(s) pleaded and application

of mind thereon. A restriction on the exercise of power by the Court has been imposed, namely, the Court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit.

The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80. C.P.C. the State had not raised such a plea in the written statement or additional written statement filed in the suit, and therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here.

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71. SERVICE LAW :

Dismissal from service for misconduct – Delinquent employee using abusive language against superior officer – Dismissal of the employee for such misconduct whether proper? Held, Yes.

L.K. Verma v. H.M.T. Ltd. & Anr.

Reported in 2006 AIR SCW 460

Held:

Mahindra and Mahindra Ltd. v. N.N. Narawade etc. [JT 2005 (2) SC 583 : (2005) 3 SCC 134] is a case wherein the misconduct against the delinquent was 'verbal abuse'. This Court held:

> "It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the Labour Court Industrial Tribunal in interfering with the quantum of punishment awarded by the management where the workmen concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which require the reduction of the sentence or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment. As noticed hereinabove at least in two of the cases cited before us i.e. *Orissa Cement Ltd. and New Shorrock Mills* this Court held, "Punishment of dismissal for using of abusive

language cannot be held to be disproportionate." In this case all the forums below have held that the language used by the workman was filthy. We too are of the opinion that the language used by the workman is such that it cannot be tolerated by any civilised society. Use of such abusive language against a superior officer, that too not once but twice, in the presence of his subordinates cannot be termed to be an indiscipline calling for lesser punishment in the absence of any extenuating factor referred to hereinabove."

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72. EVIDENCE ACT, 1872 – Section 106
Appreciation of evidence – Facts within special knowledge of the accused – Duty of the accused to explain – Evidence of last seen with the deceased – Extent of burden on the accused to offer explanation – Law explained.
State of Rajasthan v. Kashi Ram
Reported in AIR 2007 SC 144

Held:

...The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Re. *Naina Mohd. AIR 1960 Madras 218.*

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73. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES ACT, 1989 – Section 3 (2) (v)
INDIAN PENAL CODE, 1860 – Section 376
Rape against girl belonging to Scheduled Caste – Unless rape committed on the ground that person belongs to Scheduled Caste, it is not covered by S.3 (2) (v).
Ramdas & Ors. v. State of Maharashtra
Reported in AIR 2007 SC 155

Held:

At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a scheduled caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside.

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74. ADVERSE POSSESSION :

Adverse possession against co-sharer – Unless ouster is proved, there cannot be adverse possession against co-sharer – Law explained.

Govindammal v. R. Perumal Chettiar & Ors.

Reported in AIR 2007 SC 204

Held:

In the case of *Mohammad Baqar & Ors. v. Naim-un-Nisa Bibi & Ors.* reported in *AIR 1956 SC 548* it was observed that under the law possession of one co-sharer is possession of all co-shares, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period. There can be no question of ouster, if there is participation in the profits to any degree.

In the case of *Md. Mohammad Ali (dead) by LRs v. Jagadish Kalita & Ors. reported in (2004) 1 SCC 271* this Court examined a series of decisions on the question of adverse possession and after extracting the legal propositions from various decisions, their Lordships concluded that long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of a person or his predecessors-in-interest is deemed to have been protected by the trustees.

As against this, our attention was also invited to a decision in the case of *T.P.R. Palania Pillai & Ors. v. Amjath Ibrahim Rowther & Anr.* reported in *AIR 1942 Madras 622,* their Lordships observed that in order to constitute adverse possession, the possession must be adequate in continuity, in publicity and in

extent to show that it is possession adverse to the competitor. Therefore, in cases of adverse possession also their Lordships have said that the possession should be for longer period and it is known to the competitor that it is held adverse to his knowledge. Their Lordships further held that in cases of usufructuary mortgage granted by one of several co-shearers if a person remains in possession of the land and cultivates it for years, the requirement of continuity, publicity and extent for adverse possession are fully complied with. But that is not the case here.

In the case of *Nirmal Chandra Das and Ors. v. Mohitosh Das & Ors.* reported in *AIR 1936 Calcutta 106* their Lordships observed abserved that in order to succeed on the round of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. Their Lordships further observed that there can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster. Therefore, what is ouster and what is adverse to the interest of the claimant depends upon each case...

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75. WORDS AND PHRASES :
Expressions 'children', 'issue' and 'heirs', meaning of and difference.
M/s Bay Berry Apartments Pvt. Ltd. & Anr. v. Shobha & Ors.
Reported in AIR 2007 SC 226

Held:

The expressions 'children', 'issue' and 'heirs' would ordinarily be not synonymous but sometimes they may carry the same meaning. All the aforementioned terms have to be given their appropriate meanings.

In P. Ramanatha Aiyar's Advanced Law Lexicon at page 2111, it is stated:

"There is doubtless a technical difference in the meaning of the two words "heirs" and "children", and yet in common speech they are-often used as synonymous. The technical distinction between the terms is not to be resorted to in the construction of a will, except in nicely balanced cases.

"When the general term "heirs" is used in a will, it will be construed to mean 'child' or 'children', if the context shows that such was the intent of the testator."

Where the words "children" and "heirs" are used in the same instrument in speaking of the same person, the word "heirs" will be construed to mean "children"; such usage being treated as sufficient evidence of the intention to use the word "heirs" in the sense of "children"."

Heirs may be lineal or collateral. When we say that the Will was a carefully drafted document, evidently, the guarantor thereof was aware of the fact that as thence some of the sons having not been married; the question as to who would be their heirs was uncertain.

If they did not have any issue, the properties in terms of the law as then existing might have passed on to their brothers.

Whether the expression 'heirs' would, thus, mean legal heir, the question specifically came up for consideration in *N. Krishnammal vs. R. Ekambaram & Sons [(1979) 3 SCR 700]*, wherein it was stated:

"It is well settled that legal terms such as "heirs" used in a Will must be construed in the legal sense, unless a contrary intention is clearly expressed by the testator...."

Referring to an earlier decision of this Court in *Angurbala Mullick v. Debabrata Mullick [(1951) 2 SCR 1125]*, this Court opined that the expression 'heirs' cannot normally be limited to issues and it must mean all persons who are entitled to the property held and possessed by/or under the law of inheritance. In that case, the widow would not have been entitled to inherit the property of her husband as she was not an heir. However, she became an heir by reason of the provisions of the Hindu Succession Act.

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76. CIVIL PROCEDURE CODE, 1908 – O.VI R.17
Amendment in plaint – Doctrine of relation back, when applicable – Law explained.
Kanhaiyalal Vishwambherdayal Agrawal v. Muktilal Rameshwardas Naredi
Reported in AIR 2007 MP 1 (DB)

Held:

The learned counsel for the appellant has canvassed that the amendment should date back to the original point of time of filing of the counterclaim. He has placed reliance on *Sampath Kumar v. Ayyakannu and another, AIR 2002 SC 3369* wherein it has been held that in view of the doctrine of relation back an amendment once incorporated relates back to the date of the filing of the suit. The appellant defendant has also sought support from the decision of the Apex Court rendered in the case of *Pankaja and another v. Yellappa and others, AIR 2004 SC 4102* to reinforce that an amendment even if barred by limitation can be allowed and would relate back to the date of filing of the suit.

The learned counsel for the respondent-plaintiff has relied upon the judgment of the *Supreme Court in the case of Vishwambhar and others v. Laxminarayana and another, AIR 2001 SC 2607* wherein a prayer for amending the plaint to incorporate a relief which was barred by time was rejected and was held to be impermissible. It was also held that the doctrine of the amendment relating back to the date of filling of the suit is not applicable when the proposed amendment changes the nature of the relief claimed. It was held that such amendments have to be taken to have been filed on the date the amendment is allowed and not earlier. Paragraph 10 of the judgment may be profitably reproduced:-

"10. From the averments of the plaint it cannot be said that all the necessary averments for setting aside the sale deeds executed by Laxmibai were contained in the plaint and adding specific prayer for setting aside the sale deeds was a mere formality. As noted earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were abinitio void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seeking setting aside the alienations of the property by the guardian. In such circumstances the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that."

In the case of *Muni Lal v. The Oriental Fire and General Insurance Company Ltd. and another, AIR 1996 SC 642,* the Apex Court has held that a person cannot be permitted to amend the plaint if relief and plea sought to be introduced by way of amendment has become barred by limitation during the pendency of the proceedings.

The law as discernible from the judgments of the Supreme Court is that while the normal rule is that amendments in plaint relate back to the date of filing of the suit in view of the doctrine of relation back but in cases like the present one where while allowing the amendment the question as to whether the relief sought by way of amendment was barred by time or not has been left open and where the specific statutory provision of Section 3 (2) (b) of the Limitation Act provides that the counterclaim shall be deemed to have been instituted on the date on which it is made in Court the doctrine of relation back does not get attracted and hence, has no applicability.

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77. EXAMINATION :

Examination – Duty of the Board to ensure correction of marksheet – Due to negligence lesser marks shown in the marksheet – Held, Board rightly saddled with liability to pay Rs. 20,000/- as damages to the concerned.

President, Board of Secondary Education, Orissa and another v. D. Suvankar and another

Judgment dated 14.11.2006 by the Supreme Court in Civil Appeal No. 4926 of 2006, reported in (2007) 1 SCC 603

Held :

Ultimately, it is the Board which has to ensure that the correct marksheet is issued to the candidates since candidates who appear at the High School Certificate are of tender age. If by mistake the Board indicates to the candidates incorrect marks, it is bound to have adverse effect on the mind of the candidates of tender age. Therefore, it is imperative on the part of the Board to ensure that

errorless marksheet is issued to each candidate. The plea of the computer firm that considering the large number of candidates the mistake is not serious has no substance. The computer entries are made to ensure accuracy and to do away with defects which arise from manual recording of marks. The Assistant Examiner and the Scrutiniser appear to have taken their jobs casually, negligent of the consequences which result from their negligent acts. Therefore, the sum of Rs. 20,000 has to paid to Respondent I by the Board out of which it shall recover Rs 15,000 from computer firm. It appears that the Board has taken action against the Assistant Examiner and the Scrutiniser for their negligence. While affirming action taken against them, We express our displeasure for their careless and negligent acts which have led to unnecessary litigation.

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78. PROBATION OF OFFENDERS ACT, 1958 – Sections 3 & 4
CRIMINAL PROCEDURE CODE, 1973 – Sections 360 & 361
Applicability of S. 3/4 of the Probation of Offenders Act and S. 360/361 of the Code – Law explained.
Gulzar v. State of M.P.
Judgment dated 04.01.2007 by the Supreme Court in Criminal Appeal No. 7 of 2007, reported in (2007) 1 SCC 619

Held:

The residual question is applicability of Sections 3 and 4 of the PO Act and Section 360 of the Code.

Where the provisions of the PO Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the PO Act and the Code wanted to abviate. Yet the legislature in its wisdom has obliged the court under Section 361 of the Code to apply one or the other beneficial provisions; be it Section 360 of the Code or the provisions of the PO Act. It is only by providing special reasons that their applicability can be withheld by the court. The comparative elevation of the provisions of the PO Act are further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said section shall affect the provisions of the PO Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the PO Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation officers in assisting the courts in relation to supervision and other matters while the PO Act does make such a provision. While Section 12 of the

PO Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the PO Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provisions. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the PO Act, as applicable at the same time in a given area, cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

Enforcement of the Probation Act in some particular area excludes the applicability of the provisions of Sections 360 and 361 of the Code in that area.

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79. INDIAN PENAL CODE, 1860 – Section 409
Offence of criminal breach of trust by public servant, ingredients of – Proof of the offence – If entrustment is admitted by the accused he should prove that entrustment has been carried out.
Mustafikhan v. State of Maharashtra
Judgment dated 04.12.2006 by the Supreme Court in Criminal Appeal No. 1261 of 2006, reported in (2007) 1 SCC 623

Held:

In order to sustain a conviction under Section 409 IPC the prosecution is required to prove that (a) the accused, a public servant was entrusted with property of which he was duty-bound to account for, and (b) the accused had misappropriated the property.

Where the entrustment is admitted by the accused, it is for him to discharge the burden that the entrustment has been carried out as accepted and the obligation has been discharged.

The above position was reiterated in *Jagat Narayan Jha v. State of Bihar, 1995 Supp. (4) SCC 518*

It is not necessary or possible in every case to prove as to in what precise manner the accused had dealt with or appropriated the goods. In a case of criminal breach of trust, the failure to account for the money, proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused. Although onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it would be difficult for the prosecution to prove the actual mode and manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or falsity of the explanation given by the accused....

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80. CRIMINAL TRIAL :

Appreciation of evidence – Corroboration, insistence on – In offence relating to sexual assault including one u/s 377 IPC rule regarding non-requirement of corroboration applicable – Law explained.

State of Kerala v. Kurissum Moottil Antony

Judgment dated 09.11.2006 by the Supreme Court in Criminal Appeal No. 1134 of 2006, reported in (2007) 1 SCC 627

Held:

An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in *Rafiq v. State of U.P., (1980) 4 SCC 262* with some anguish. The same was echoed again in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217.* It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity or dignity had ever occurred. She would be conscious of the danger of being ostracised by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration is not the sine qua non for conviction in a rape case. The observations of *Vivian Bose, J. in Rameshwar v. State of Rajasthan, AIR 1952 SC 54* were:

> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

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

It is unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life can be protected only if courts deal strictly with those who violate the social norms.

The above position was highlighted by this Court in *Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551*

The rule regarding non-requirement of corroboration is equally applicable to a case of this nature, relating to Section 377 IPC.

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81. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 156 & 157 Registration of FIR on the basis of anonymous complaint or vague information – Mode of dealing with the complaint/information – Police Officer can make preliminary enquiry before registering an offence – Law explained.
Shashikant v. Central Bureau of Investigation and others
Judgment dated 07.11.2006 by the Supreme Court in Criminal Appeal No. 1127 of 2006, reported in (2007) 1 SCC 630

Held :

Although ordinarily in terms of Section 154 of the Code, when a report is received relating to the cognizable offence, a first information report should be lodged, to carry out a preliminary inquiry even under the Code is not unknown.

When an anonymous complaint is received, no investigating officer would initiate investigative process immediately thereupon. It may for good reasons carry out a preliminary enquiry to find out the truth or otherwise of the allegations contained therein.

A three-Judge Bench of this Court in *State of U.P. v. Bhagwant Kishore Joshi, (1964) 3 SCR 71* referring to the provisions of Section 5-A of the Prevention of Corruption Act, opined : (SCR pp. 78-79)

"Even so the said police officer received a detailed information of the offences alleged to have been committed by the accused with necessary particulars, proceeded to the spot of the offence, ascertained the relevant facts by going through the railway records and submitted a report of the said acts. The said acts constituted an investigation within the meaning of the definition of 'investigation' under Section 4(1) of the Code of Criminal Procedure as explained by this Court. The decisions cited by the learned counsel for the State in support of his contention that there was no investigation in the present case are rather wide off the mark. In *Nandamuri Anandayya, In re, AIR 1915 Mad 312* a Division Bench of the Madras High Court held that an informal enquiry on the basis of a vague telegram was not an investigation within the meaning of Section 157 of the Code of Criminal Procedure. In *Rangarujulu Naidu. In re, AIR 1958 Mad 638* Ramaswami, J. of the Madras High Court described the following three stages a policemen has to pass in a conspiracy case:

> .... hears something of interest affecting the public security and which puts him on the alert; makes discreet enquires, takes soundings and sets up informants and is in the second stage of *qui vive* or lookout; and finally gathers sufficient information enabling him to bite upon something definite and that is the stage when first information is recorded and when investigation starts.'

This graphic description of the stages is only a restatement of the principle that a vague information or an irresponsible rumour would not in itself constitute information within the meaning of Section 154 of the Code or the basis for an investigation under Section 157 thereof. In *State of Kerala v. M.J. Samuel, ILR 1960 Ker 783 (FB)* a Full Bench of the Kerala High Court ruled that, 'it can be stated as a general principle that it is not every piece of information however vague, indefinite and unauthenticated it may be that should be recorded as the first information for the sole reason that such information was the first, in point of time, to be received by the police regarding the commission of an offence'. The Full Bench also took care to make it clear that whether or not a statement would constitute the first information report in a case is a question of fact and would depend upon the circumstances of that case."

Only when an FIR is lodged, the officer in charge of the police station is statutorily liable to report thereabout to a Magistrate who is empowered to take cognizance in terms of Section 157(1) of the Code. Proviso (b) appended thereto empowers the investigating officer not to investigate where it appears to him that there is no sufficient ground for entering into an investigation. Sub-section (2) of Section 157 reads as under:

> "157. (2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated."

The question, therefore, as to whether an empowered officer has made investigation or caused the same to be made in a cognizable offence within the meaning of Section 157 of the Code or had not initiated an investigation on the basis of an information which would not come within the meaning of Section 154 of the Code is essentially required to be determined in the fact situation obtaining in each case.

Yet again in State of *Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335* this Court referred to *P. Sirajuddin v. State of Madras, (1970) 1 SCC 595* and State of U.P. v. *Bhagwant Kishore Joshi, (1964) 3 SCR 71* in the following terms: (SCC pp. 371-72, paras 77-78)

"77. In this connection, it will be appropriate to recall the views expressed by *Mitter, J. in P Sirajuddin v. State of Madras (Supra), State of U.P. v. Bhagwant Kishore Joshi (Supra)* in the following words: (SCC p. 601, para 17)

> 'Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general.... The means adopted no less than the end to be achieved must be impeccable.'

78. Mudholkar, J. in a separate judgment in *State of U.P. v. Bhagwant Kishsore Joshi (Supra) at p. 86* while agreeing with the conclusion of Subba Rao, J. (as he then was) has expressed his opinion stating: (SCR pp. 86-87)

> 'In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a police officer to make preliminary enquiries before registering an offence and making a full-scale investigation into it.' "

Thus, registration of a case is a *sine qua non* for starting investigation (see *Mohindro v. State of Punjab, (2001) 9 SCC 581*).

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82. CRIMINAL PROCEDURE CODE, 1973 – Section 389
Conviction and sentence – Conviction, stay of – Held, order granting stay of conviction not a rule but an exception – Appellant seeking stay must show consequences of non-stay of conviction – Law explained.
Ravikant S. Patil v. Sarvabhouma S. Bagali
Judgment dated 14.11.2006 by the Supreme Court in Civil Appeal No. 5034 of 2005, reported in (2007) 1 SCC 673

Held:

The question whether an order of conviction can be stayed, in the absence of a specific provision for such stay in the Code, came up for consideration before this Court in *Rama Narang v. Ramesh Narang, (1995) 2 SCC 513.* In the said case, the order that had been passed, while admitting the appeal, by the High Court purporting to be one under Section 389 (1) of the Code was to the following effect: (SCC p. 522, para 11)

> "Accused be released on bail on his furnishing a personal bond in the sum of Rs. 10,000 with one surety in the like amount to the satisfaction of the trial Judge. The operation of the impugned order shall remain stayed."

One of the question that was examined in that case was whether the power under Section 389 (1) of the Code could be invoked to stay the conviction. This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, but in certain situations, the order of conviction can become executable in a limited sense, inasmuch as it may result in incurring of some disqualification under other enactments; and that in such cases, it was permissible to invoke the power under Section 389 (1) of the Code for staying the conviction also. We extract below the reasoning for such a conclusion, given by this Court: (SCC p. 527, para 19)

> "19. That takes us to the question whether the scope of Section 389 (1) of the Code extends to conferring power on the appellate court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389 (1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389 (1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389 (1) of the Code." This Court, however, clarified that the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed; and that unless the attention of the court to the specific consequences that are likely to fall upon conviction, the person convicted cannot obtain in order of stay of conviction. In fact, if such specific consequences are not brought to its notice, the court cannot be expected to grant stay of conviction or assign reasons relevant for staying the conviction itself, instead of merely suspending the execution of the sentence. In that case, it was found on facts that the appellant therein had not specified the disqualification he was likely to incur under Section 267 of the Companies Act, if his conviction was not stayed. Therefore, this Court refused to infer that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted stay of conviction or the operation of the impugned judgment. Consequently, the order of stay was not construed as a stay of conviction.

It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative....

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83. CRIMINAL TRIAL :

Appreciation of evidence – Interested witnesses – Relationship not a factor to effect credibility of the witness – Court should be careful where foundation of a false implication has been made – Law explained.

Salim Sahab v. State of M.P.

Judgment dated 05.12.2006 by the Supreme Court in Criminal Appeal No. 1269 of 2006, reported in (2007) 1 SCC 699

Held :

The plea relating to interested witness is a regular feature in almost every criminal trial.

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

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

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

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

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

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

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

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

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84. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17
Amendment of pleadings – Scope and applicability of O.VI R. 17 as amended by Amending Act of 2002 – Held, provisions not applicable to cases filed before commencement of Amending Act of 2002.
State Bank of Hyderabad v. Town Municipal Council
Judgment dated 01.12.2006 by the Supreme Court in Civil Appeal No. 5294 of 2006, reported in (2007) 1 SCC 765

Held :

The short question which arises for consideration is as to whether the proviso appended to Order 6 Rule 17 of the Code is applicable in the instant case.

Order 6 Rule 17 of the Code reads thus:

> "The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The proviso appended thereto was added by the Code of Civil Procedure (Amendment) Act, 2002 which came into force with effect from 1.7.2002. It reads as under:

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

Section 16 (2) of the amending Act of 2002 reads as under:

> "16. (2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897, –
>
> (a) ★ ★ ★
>
> (b) the provisions of Rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act;"

In view of the said provision there cannot be any doubt whatsoever that the suit having been filed in the year 1998, proviso to Order 6 Rule 17 of the Code shall not apply.

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85. LIMITATION ACT, 1963 – Article 59
SPECIFIC RELIEF ACT, 1963 – Section 31
Suit for cancellation of document – Documents whether void or voidable, determination of – Lamitation – Article 59 applicable where coercion, undue influence, misappropriation of fraud is alleged – Law explained.
Prem Singh and others v. Birbal and others
Reported in 2007 (1) MPLJ 1 (SC)

Held:

Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are *voidable* transactions.

A suit for cancellation of instrument is based on the provisions of section 31 of the Specific Relief Act, which reads as under:

> "31. *When cancellation may be ordered.* – (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

Section 31 of the Specific Relief Act, 1963 thus, refers to both *void* and *voidable* documents. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation, When a document is *void ab initio,* a decree for setting aside the same would not be necessary as the same is *non est* in the eye of the law, as it would be a nullity.

Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be.

Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments, which are presumptively invalid. (See *Unni vs. Kanchi Amma, ILR (1891) 14 Mad 26 and Sheo Shankar Gir vs. Ram Shewak Chowdhri, ILR (1897) 24 Cal 77*)

It is not in dispute that by reason of Article 59 of the Limitation Act, the scope has been enlarged from the old Article 91 of the 1908 Act. By reason of Article 59, the provisions contained in Articles 91 and 114 of the 1908 Act had been combined.

If the plaintiff is in possession of a property, he may file a suit for declaration that deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed'. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void.

Respondent I has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.

In *Ningawwa vs. Byrappa, AIR 1968 SC 956* this Court held that the fraudulent misrepresentation as regards character of a document is *void* but fraudulent misrepresentation as regards contents of a document is *voidable* stating:

> "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."

In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practised on her, the same was *void*. It was, however, held:

> "Article 91 of the Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three years' limitation which begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial Court has found, upon examination of the evidence, that at the very time of the execution of the gift deed, Ext. 45 the appellant knew that her husband prevailed upon her to convey Surveys Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial Court is based upon the admision of the appellant herself in the course of her evidence. In view of this finding of the trial Court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are concerned."

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86. SERVICE LAW :
Compulsory retirement – Basis of opinion to be formed about compulsory retirement – Held, entire record of service to be seen – Law explained.
State of M.P. and others v. M.S. Wakankar and another
Reported in 2007 (1) MPLJ 99

Held:

In the case of *Baikuntha Nath Das v. Chief District Medical Officer, Baripada, AIR 1992 SC 1020*, the Supreme Court has held in sub-para (iv) of Para 32 of the judgment as reported in the AIR that the Government (or the Review Committee, as the case may be), shall have to consider the entire record of service before taking a decision in the matter attaching more importance to record of and performance during the later years. It was again reiterated by the Supreme Court in the case of *State of Gujarat vs. Umedbhai M. Patel, (2001) 3*

SCC 314 that the Government before taking such a decision to retire a Government employee compulsorily from service, has to consider the entire record of the Government servant including the latest reports. In the case of *State of M.P. and another vs. Ram Sewak Jaiswal and another, 2006 (4) MPLJ 150* a Division Bench of this Court after discussing the aforesaid law laid down by the Supreme Court in the case of *Baikuntha Nath Das and Umedbhai M. Patel* (supra) found in that case that during the period from 1966 to 1995, Ram Sewak Jaiswal had been graded in ACRs for 15 periods as "Good", for 17 periods as "Average" and for 5 periods as "Adverse", but the Screening Committee had ignored the 15 periods during which he had been graded as "Good" and had considered only the last 5 years ACRs. On these peculiar facts, the Division Bench held that the whole approach of the Screeing Committee was clearly contrary to the aforesaid law laid down by the Supreme Court in the cases *Baikuntha Nath Das and Umedbhai M. Patel* (supra) and the Tribunal was right in quashing the order of compulsory retirement.

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87. PRACTICE & PROCEDURE :
Best evidence rule – Duty of a party to a suit in possession of important documents to produce them in Court – Law explained.
Shamim Afroz @ Ajra and others v. Mehfooz-ul-Hassan Through L.Rs. Aneesa and others
Reported in 2007 (1) MPLJ 103

Held:

Supreme Court in the case of *Kundan Lal Rallaram vs. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316* while considering the question with regard to relevant evidence being withheld by the plaintiff and presumption to be drawn in a proceeding under the Negotiable Instruments Act, 1961 has laid down the following principle :–

> "The same rule was reaffirmed in *Rameshwar Singh vs. Bajit Lal, AIR 1929 PC 95 and was approved by this Court in Hiralal vs. Badkulal, AIR 1953 SC 225.* These three decisions lay down that it is the duty of a party to a suit in possession of important documents to produce them in Court, and if that duty is not discharged the Court may as well draw the presumption which it is entitled to do under section 114 of the Evidence Act. A Division Bench of the Madras High Court in *Narayana Rao vs. Venkatapayya, ILR (1937) Mad 229 : (AIR 1937 Mad 182)* considered the interaction of the provisions of section 118 of the Negotiable Instruments Act and section 114 of the Evidence Act in the matter of rebuttal of the presumption under the former section. After considering the earlier decisions, including those of the Privy (Council, Varadachariar, J. summarized the law at p. 311 (of ILR Mad) : (at p. 187 of AIR) thus:" (Emphasis Supplied)

"It has to be borne in mind that, when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances, of *Yellappa Ramappa Naik vs. Tippanna, 56 Mad Lj 287 :* (AIR 1929 Mad 8) and that even the onus under section 118 of the Negotiable Instruments Act need not always be discharged by direct evidence adduced by the defendant; *Muhammad Shafi Khan vs. Muhammad Moazzam Ali Khan, 79 Ind Cas 464 : (AIR 1923 All 214), Singar Kunwar vs. Basdeo Prasad, 124 Ind Cas 717 : (AIR 1930 All 568) and Bishambar Das vs. Ismail, AIR 1933 Lah 1029.* Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce better evidence deliberately abstains from doing so; AIR 1917 PC 6, *Guruswami Nadan vs. Gopalaswami Odayar, ILR 42 Mad 629 : (AIR 1919 Mad 444) and Raghavendra Rao vs. Venkataswami Naicken, 30 Mad LW 966 at p. 971 : (AIR 1930 Mad 251 at p. 254).*"

"We respectfully accept the correctness of the said observations."

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88. TRANSFER OF PROPERTY ACT, 1882 – Section 126
Gift – Revocation or suspension of gift deed – Conditions to be fulfilled – Law explained.
Nanhibai v. Govindrao
Reported in 2007 (1) MPLJ 115

Held:

Under section 126 of the Transfer of Property Act, 1882, the instances are given when a gift deed can be revoked or suspended. However, the provisions of section 126 of the said Act can be made applicable only when the following conditions are fulfilled:

(i) that the donor and donee must have agreed that the gift shall be suspended or revoked on the happening of specified event;

(ii) such event must be one which does not depend upon the donor's Will;

(iii) the donor and donee must have agreed to the condition at the time of accepting the gift; and

(iv) The condition should not be illegal or immoral and should be repugnant to the state created under the gift.

On bare perusal of this section, one can say that there should be an agreement between donor and donee that on the happening of the particular event which does not depend on the Will of the donor, the gift shall be suspended or revoked, otherwise a gift cannot be revoked. Since there is nothing on record in order to hold that defendant agreed with the plaintiff that in case he fails to

discharge the work of *'Puja-Archana'*, the gift deed shall be suspended or revoked, therefore, I am of the view that the first Appellate Court did not commit any error in passing the impugned judgment....

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89. ESSENTIAL COMMODITIES (EXHIBITION OF PRICES AND PRICE CONTROL) ORDER, 1977 (M.P.)
Order of 1977 rescinded by subsequent notification dated 2.9.2002 w.e.f. 13.9.2002 – Subsequent notification not having any saving clause regarding pending proceedings – Whether pending proceedings can be continued ? Held, No – Law explained.
Ashwani Kumar Tandon v. State of M.P.
Reported in 2007(1) MPLJ 162

Held :

First of all it will be useful to reproduce the Notification (Annexure P-8), so that its meaning can be properly understood. Notification reads as under:–

> "(113) – Notification No. F 4-17-98-XXIX-1 dated the 2nd September, 2002 – In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955 (No. 10 of 1955), read with the order of the Government of India, the Ministry of Consumer Affairs Food and Public Distribution (Department of Consumer Affairs). No. GSR 104(E), dated 15th February, 2002, the Ministry of Agriculture and Irrigation (Department of Food) GSR 316(E), dated 20th June, 1972, the Ministry of Industry and Civil Supplies (Department of Civil Supplies and Co-operation), S.O. No. 681 (E), dated 30th November, 1974 and S.O. No. 682 (E), dated 30th November, 1974, the State Government with the prior concurrence of the Central Government hereby rescind the Madhya Pradesh Essential Commodities (Exhibition of Prices and Price Control) Order, 1977 with effect from the date of publication of this Notification in the "Madhya Pradesh Gazette"."

Notification clearly shows that the State Government with the prior concurrence of the Central Government has rescinded the M.P. Control Order, 1977 with effect from the date of its publication in the M.P. Gazette and this Notification was published in M.P. Rajpatra dated 13-9-2002 at page 2114.

The meaning of the word "Rescind" as per Chambers 21st Century Dictionary is to cancel, annul or revoke (an order, law, custom, etc.). This meaning shows that by using the word rescind the actual intention is that of cancelling or annulling an order and making annulling the particular order indicates that thereby that particular order, law or custom etc., was removed for taking effect and has been revoked and has been omitted from the law books.

In the case of *Kolhapur Canesugar Works Ltd. and another vs. Union of India and others, (2000) 2 SCC 536* the five Judges Bench of Supreme Court has considered the effect of deletion of Rule 10 and Rule 10-A of Central Excise

Rules on 6-8-1977 and effect of introduction of new provision. At that time proceedings were going on against petitioner of that case for recovery of certain amount rebate of which was erroneously sanctioned to their personal ledger account. The question for consideration before Supreme Court was whether after omission of old Rules 10 and 10-A and their substitution by new Rule 10 by Notification No. 267/77 dated 6-8-1977 the proceedings initiated by the notice dated 27-4-1977 could be continued in law. In this regard the provisions of section 6 of General Clauses Act were considered by the Supreme Court and has been quoted in paragraph 16 of the judgment. In paragraphs No. 37 and 38 of the judgment, it was held as under :–

> "Paragraph 37– The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision.
>
> Paragraph 38 – In the present case, as noted earlier, section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceedings. Therefore, action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."
>
> Therefore, on the basis of the law laid down by the five Judges Bench of the Supreme Court in the abovestated case, it is very clear that normal effect of repealing the statute or deleting the provision is to obliterate it from the statute-book as completely as if it had never been passed, and it should be considered as a law that never existed. Unless there is a saving clause in favour of pending proceedings, all actions must stop where the omission finds them.

Notification of the year 2002 for the resentment of the M.P. Control Order, 1977 contains no saving clause for any pending prosecution. The control order,

which has been rescinded for not an Act passed by the Parliament. This was the order issued by the State Government, which has now been rescinded.

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90. CIVIL PROCEDURE CODE, 1908 – Order XLI Rr. 22 and 33
Eviction suit decreed on the ground u/s 12(1) MPACA, 1961–Tenant preferring appeal – Whether landlord can support the decree of eviction on other grounds set forth in the plaint ? Held, Yes.
Pandit Hardutt Mishra v. Mithailal and another
Reported in 2007(1) MPLJ 177

Held :

The trial Court decreed the suit plaintiff only on the ground under section 12(1)(a) of the Act. On the other grounds the suit was dismissed since they were not found to be proved. The tenant/appellant preferred the appeal before the First Appellate Court assailing the decree of eviction passed against him under section 12(1)(a) of the Act. The landlord supported the decree of eviction on other grounds also. In the case of *Kamal Kumar vs. Smt. Imrati Bai and others, 2003(1)JLJ 296*, it has been categorically held by this Court that if a decree of eviction on a particular ground under the Act has been passed by the trial Court which is assailed by tenant by filing appeal before the Appellate Court, a landlord can support the decree of eviction on other grounds also under Order 41, Rule 31, Civil Procedure Code, without filing the cross-objection under Order 41, Rule 22, Civil Procedure Code. This Court placed reliance on earlier decisions, they are *Taj Kumar Jain vs. Purshottam and another, AIR 1981 MP 55, Hiralal vs. Om Prakash, 1981(1) MPWN 236 and Ismail Khan vs. Shankarlal Chaurasia, 1984 MPLJ 511 = 1984 JLJ 609.*

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91. LAND REVENUE CODE, 1959 (M.P.) (As amended by Act No. 2000) – Section 248
Maintainability of suit against order passed u/s 248 of MPLRC – S. 248 clause (3) deleted vide Amendment Act of 2000 – Held, suit not maintainable.
Director, Mansik Chikitsalaya, Ramdas Ghati, Gwalior v. State of M.P. and others
Reported in 2007(1) MPLJ 206

Held :

Short facts of the case are that respondent No. 14 filed a suit against petitioner and rest of the respondents under Order 1 Rule 8, Civil Procedure Code wherein it was alleged that respondent No. 14 is in occupation of the land admeasuring 70x40 feet bearing Survey Nos. 1250 and 1251 situated at village Bahodapur, opposite to Mental Hospital, Gwalior. It was alleged that on a part of the land admeasuring 15x20 feet two temples have been constructed and the rest of the property was covered by boundary wall. It was alleged that in the

suit land there is no personal interest of resspondent No. 14. It was also alleged that proceedings were initiated under section 248 of the M.P. Land Revenue Code and fine was imposed vide order dated 26-12-1994. In the circumstances it was prayed that State be restrained from dismantling the boundary walls and temple in compliance of the order dated 26-12-1994.

During pendency of the suit an application was filed by the petitioner under Order 7 Rule 11, Civil Procedure Code wherein it was alleged that the suit is not maintainable because the civil Court has no jurisdiction to examine the validity of the order passed under section 248 of the M.P. Land Revenue Code. The application was dismissed, against which the present revision has been filed.

Learned counsel for the petitioner submits that prior to the amendment in M.P. Land Revenue Code there was sub-section (3) to section 248 M.P. Land Revenue Code, which lays down as under :

> "(3) No order under sub-section (1) shall prevent any person from establishing his rights in a Civil Court."

Learned counsel submits that vide Amendment Act No. 7/2000 which came into force w.e.f. 15-3-2000 sub-section (3) of section 248 of the M.P. Land Revenue Code has been deleted. It is submitted that in view of this the suit is not maintainable.

Shri K.M. Mishra, learned Panel Lawyer, submits that section 257 of the M.P. Land Revenue Code provides exclusive jurisdiction of Revenue Autuorities.

Learned counsel for respondent No. 14 submits that no amendment has been made in section 257 of the Act, therefore, even after amendment it is the choice of the party to challenge the order before the Civil Court or before the Revenue Court. Since, every order passed by the Revenue Authorities is appellable or revisable under section 44 and section 50 and section 248 of the M.P. Land Revenue Code, is amended, therefore, the impugned order passed by the learned Court below is illegal and deserves to be set aside. After the amendment the order passed under section 248 of the M.P. Land Revenue Code cannot be challenged before Civil Court.

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92. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction for prosecution – Whether sanction necessary in case of a public servant who has ceased to hold the office by misusing and abusing which the offence was committed ? Held, No.
Parkash Singh Badal and another v. State of Punjab and others Judgment dated 06.12.2006 by the Supreme Court in Civil Appeal No. 5636 of 2006, reported in (2007) 1 SCC 1

Held :

The main contention advanced by learned Senior Counsel appearing for the appellant is that a public servant who continues to remain so (on transfer)

has got to be protected as long as he continues to hold his office. According to the learned counsel, even if the offending act is committed by a public servant in his former capacity and even if such a public servant has not abused his subsequent office still such a public servant needs protection of Section 19 (1) of the Act. According to the learned counsel, the judgment of this Court in, *R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183* holding that the subsequent position of the public servant to be unprotected was erroneous.

According to the learned counsel, the public servant needs protection all throughout as long as he continues to be in the employment.

The plea is clearly untenable as Section 19(1) of the Act is time and offence related.

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The underlying principle of Sections 7,10,11,13 and 15 have been noted above. Each of the above sections indicates that the public servant taking gratification (Section 7), obtaining valuable thing without consideration (Section 11), committing acts of criminal misconduct (Section 13) are acts performed under the colour of authority but which in reality are for the public servant's own pleasure or benefit. Sections 7, 10, 11, 13 and 15 apply to afforestated acts. Therefore, if a public servant in his subsequent position is not accused of any such criminal acts then there is no question of invoking the *mischief* rule. Protection to public servants under Section 19(1) (1) has to be confined to the time-related criminal acts performed under the colour or authority for public servant's own pleasure or benefit as categorised under Sections 7, 10, 13 and 15. This is the principle behind the test propounded by this Court, namely, the test of abuse of office.

Further, in cases where offences under the Act are concerned the effect of Section 19 dealing with question of prejudice has also to be noted.

In *Balakrishnan Ravi Menon v. Union of India, (2007) 1 SCC 45* a similar plea was rejected. It was inter alia held as follows : (SCC pp. 47-48, paras 5-7)

> "5. Hence, it is difficult to accept the contention raised by Mr. U.R. Lalit, the learned Senior Counsel for the petitioner that the aforesaid finding given by this Court in *Antulay case* 1 is obiter.
>
> 6. Further, under Section 19 of the PC Act, sanction is to be given by the Government or the authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed. The question of obtaining sanction would arise in a case where the offence has been committed by a public servant who is holding the office and by misusing or abusing the powers of the office, he has committed the offence. The word 'office' repeatedly used in Section 19 would mean the 'office' which the public servant misuses of abuses by corrupt motive for which he is to be prosecuted .....

7. Clauses (a) and (b) of sub-section (1) specifically provide that in case of a person who is employed and is not removable from his office by the Central Government or the State Government, as the case may be, sanction to prosecute is required to be obtained either from the Central Government or the State Government. The emphasis is on the words 'who is employed' in connection with the affairs of the Union or the State Government. If he is not employed then Section 19 nowhere provides for obtaining such sanction. Further, under sub-section (2) the question of obtaining sanction is relatable to the time of holding the office when the offence was alleged to have been committed. In case where the person is not holding the said office as he might have retired, superannuated, be discharged or dismissed then the question of removing would not arise."

The effect of sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In sub-section (3) the stress is on "failure of justice" and that too "in the opinion of the court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is (*sic* not) considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to the root of jurisdiction as observed in para 95 of *P.V. Narasimha Rao v State (CBI/SPE), (1998) 4 SCC 626.* Sub-section (3)(c) of Section 19 reduces the rigour of prohibition. In Section 6(2) of the old Act [Section 19(2) of the Act] question relates to doubt about authority to grant sanction and not whether sanction is necessary.

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93. PREVENTION OF CORRUPTION ACT, 1988 – Section 13
INDIAN PENAL CODE, 1860 – Sections 467 & 468
CRIMINAL PROCEDURE CODE, 1973 – Section 197
Sanction – Chargesheet filed against the accused and his family members for offence u/s 13 – S. 13 (1) containing five clauses for different types of offences – Whether at the stage of filing of the chargesheet it is necessary to show which particular clause covers the alleged offence – Again whether sanctioning authority is required to separately specify each offence in the sanction order ? Held No. Prakash Singh Badal and another v. State of Punjab and others Judgment dated 06.12.2006 by the Supreme Court in Civil Appeal No. 5636 of 2006, reported in (2007) 1 SCC 1

Held :

It is the stand of the State that the appellant Prakash Singh Badal was the fulcrum around which the entire corruption was woven by the members of his family and others and it was his office of Chief Ministership which had been

abused. Therefore, Sections 8 and 9 of the Act would not be applicable to him and would apply only to his wife, son and others. It is the stand of the appellants that in the documents filed only Section 13(1) has been mentioned and not the exact alleged infraction. It is to be noted that the offence of criminal misconduct is defined in Section 13. Five clauses contained in the said provision represent different types of infraction under which the offence can be said to have been committed. If there is material to show that the alleged offence falls in any of the aforesaid categories. It is not necessary at the stage of filing of the charge-sheet to specify as to which particular clause covers the alleged offence. It is the stand of the respondent State that clauses (a), (b), (d) and (e) are all attracted and not clause (c). Therefore, the sanctioning authority has rightly referred to Section 13(1) and that does not make the sanction order vulnerable.

The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

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Great emphasis has been laid on certain decisions of this Court to show that even in relation to the offences punishable under Sections 467 and 468 sanction is necessary. The foundation of the position has reference to some offences in *Rakesh Kumar Mishra v. State of Bihar, (2006) 1 SCC 557.* That decision has no relevance because ultimately this Court has held that the absence of search warrant was intricately (*sic* linked) with the making of search and the allegations about alleged offences had their matrix on the absence of search warrant and other circumstances had a determinative role in the issue. A decision is an authority for what it actually decides. Reference to a particular sentence in the context of the factual scenario cannot be read out of context.

The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120-B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence.

In *Baijanath Gupta v. State of M.P., (1966) 1 SCR 210* the position was succinctly stated as follows : (SCR P. 223 B-C)

> "It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

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94. CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 228, 239, 240 & 245 Framing of charge – Whether order framing charge should contain reasons ? Held, No – Further held, only in case of discharge a reasoned order necessary.

Lalu Prasad alias Lalu Prasad Yadav v. State of Bihar Through CBI (AHD) Patna

Judgment dated 06.12.2006 by the Supreme Court in Criminal Appeal No. 1276 of 2006, reported in (2007) 1 SCC 49

Held :

The question raised relating to recording of reasons at the time of framing of charge is different from a case of opinion on the basis of which an order of discharge of the accused is passed. Sections 227 and 228 of the Code are with regard to discharge of the accused and framing of charges against the accused respectively in a case triable by the Court of Session; Sections 239 and 240 concern discharge and framing of charge in case of warrant, triable by the Magistrate whereas Section 245 deals with discharge and framing of charges in cases instituted other than on the police report, indicates the difference. The relevant provisions read as follows :

> "227. *Discharge.* – If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> 228. *Framing of charge.* – (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which –
>
> (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the First Class and direct the accused to appear before the chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the First Class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report :
>
> (b) is exclusively triable by the court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1). the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

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239. *When accused shall be discharged.* – (1) If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

240. *Framing of charge.* – (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

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245. *When accused shall be discharged.* – (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

This Court in *State of Bihar v. Ramesh Singh, (1977) 4 SCC 39* observed as follows : (SCC p. 41, para 4)

> "Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction."

In *Kanti Bhadra Shah v. State of W.B., (2000) 1 SCC 722* again the question was examined. It was held that the moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge the court is required to form an opinion that there is ground for presuming that the accused has committed the offence. In case of discharge of the accused the use of the

expression "reasons" has been inserted in Sections 227, 239 and 245 of the Code. At the stage of framing of a charge the expression used is "opinion". The reason is obvious. It the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial....

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95. CRIMINAL PROCEDURE CODE, 1973 – Section 439
Bail, grant of – Whether bail can be granted solely on the ground of long incarnation in jail and inability of accused to conduct the defence? Held, No.
Rajesh Ranjan Yadav alias Pappu Yadav v. CBI Through its Director Judgment dated 16.11.2006 by the Supreme Court in Criminal Appeal No. 1172 of 2006, reported in (2007) 1 SCC 70

Held:

Learned counsel for the appellant has repeatedly referred to Article 21 of the Constitution and on that basis has submitted that the appellant should be released on bail particularly, since he has already been imprisoned for more than six years.

We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the interest of the society.

It has been stated that the appellant has been a Member of Parliament on four occasions. In our opinion, this is wholly irrelevant. The law is no respecter of persons, and is the same for everyone.

A perusal of the FIR itself shows that it is a triple murder case, and the incident was committed in broad daylight with sophisticated weapons. It is true that the appellant was not named in the FIR, but it has come in the statement before the Magistrate under Section 164 CrPC of one Ranjan Tiwari that he and other assailants had been hired by the appellant to commit this ghastly crime.

We are not inclined to comment on the veracity or otherwise of the statement of Ranjan Tiwari and other witnesses as it may influence the trial, but looking at the allegations against the appellant, both in the statement of Ranjan Tiwari and other witnesses, we are of the opinion on the facts and circumstances of the case, that this is certainly not a case for grant of bail to the appellant, particularly since the prosecution witnesses have been examined and now the defence witnesses alone have to be examined. It would, in our opinion, be wholly inappropriate to grant bail when not only the investigation is over but even the trial is partly over, and the allegations against the appellant are serious.

The conduct of the appellant as noted in the decision in *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 3 SCC 284* is also such that we are not inclined to exercise our discretion under Article 136 for granting bail to the appellant.

Learned Additional Solicitor General, submitted that the appellant himself was at least partly responsible for the delay in the conclusion of the trial because most of the prosecution witnesses were cross-examined by his counsel for several days, mostly by asking irrelevant questions, and this was deliberate dilatory tactics used for delaying the trial so that on that basis the appellant may pray for bail.

It is not necessary for us to go into this aspect of the matter because we have already noted above that this is certainly not a case for grant of bail to the appellant as the facts and circumstances of the case disclose.

Learned counsel for the appellant then submitted that since the appellant is not on bail, he cannot conduct his defence effectively. In our opinion if this argument is to be accepted, then logically in every case bail has to be granted. We cannot accept such a contention.

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96. PRACTICE AND PROCEDURE :

Joint trial – Court has inherent power to order a joint trial where it appears that rival parties have filed independent suit on same cause of action – Law explained.

State Bank of India v. Ranjan Chemicals Ltd. and another

Judgment dated 11.10.2006 by the Supreme Court in Civil Appeal No. 4443 of 2006, reported in (2007) 1 SCC 97

Held:

... A question of joint trial arises when the rival parties file independent actions but based on the same cause of action; for enforcement of rights or obligations springing out of that cause of action. Here, the Bank had approached the Debt Recovery Tribunal for recovery of amounts paid on the basis of the loan transaction and the cash credit facility extended to the Company. The Company had gone to the civil court claiming that it had suffered damages because the Bank had failed to fulfil its obligations based on the cash credit facilities and the rehabilitation package extended to it. The question, therefore, was whether it could be said that both claims arose out of the same cause of action giving rise to different rights of action. The elements of a cause of action are: first, the breach of duty owing by one person to another and; second, the damage resulting to the other from the breach, or the fact or combination of facts which gives rise to a right to sue. Viewed thus, it cannot but be said that both claims have arisen out of the same transaction or out of the same relationship that came into existence between the Bank and the Company and the alleged breach of obligations by one or the other. We have, therefore, no hesitation in holding that the two actions have sprung out of the same cause of action.

Then the question is whether the cause of action put in suit by the Company could be considered to be one in the nature of a set-off or a counterclaim within

the meaning of Section 19 of the Recovery of Debts Act. It is clear from sub-sections (6) to (11) of Section 19 of the Act that the Debt Recovery Tribunal has the jurisdiction to entertain a claim of set-off or a counterclaim arising out of the same cause of action and has also the power to treat the counterclaim as a cross-suit. Therefore, if the claim of the Company in the suit partakes the character of a cross-action founded on the same cause of action, the same could be tried by the Debt Recovery Tribunal....

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A joint trial can be ordered by the court if it appears to it that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial. Where the plaintiff in one action is the same person as the defendant in another action, if one action can be ordered to stand as a counterclaim in the consolidated action, a joint trial can be ordered. An order for joint trial is considered to be useful in that, it will save the expenses of two attendances by the counsel and witnesses and the trial Judge will be enabled to try the two actions at the same time and take common evidence in respect of both the claims. If therefore the claim made by the Company can be tried as a counterclaim by the Debt Recovery Tribunal, the court can order joint trial on the basis of the above considerations. It does not appear to be necessary that all questions or issues that arise should be common to both actions before a joint trial can be ordered. It will be sufficient if some of the issues are common and some of the evidence to be let in is also common, especially when the two actions arise out of the same transaction or series of transactions.

A joint trial is ordered when a court finds that the ordering of such a trial, would avoid separate overlapping evidence being taken in the two causes put in suit and it will be more convenient to try them together in the interests of the parties and in the interests of an effective trial of the causes. This power inheres in the court as in inherent power. It is not possible to accept the argument that every time the court transfers a suit to another court or orders a joint trial, it has to have the consent of the parties. A court has the power in an appropriate case to transfer a suit for being tried with another if the circumstances warranted and justified it.

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97. PRACTICE AND PROCEDURE :
Injunction – Injunction restraining enforcement of order passed by a Tribunal having jurisdiction to pass such order, propriety of – Held, normally such orders should not be granted unless fraud or some other vitiating factor shown – Law explained.
Industrial Investment Bank of India Ltd. v. Marshal's Power & Telecom (I) Ltd. and another
Judgment dated 08.11.2006 by the Supreme Court in Civil Appeal No 4728 of 2006, reported in (2007) 1 SCC 106

Held:

We also find that the Division Bench has clearly acted illegally in purporting to pass an interim order of injunction restraining the enforcement of any order that may be passed by the Debts Recovery Tribunal. The Debts Recovery Tribunal is a special forum created by a special enactment for the purpose of enforcement of special types of claims arising in favour of financial institutions. Thus, competent proceedings are instituted before such a Tribunal by a financial institution seeking to enforce its claimed rights. Whatever defences the plaintiff herein may have against the claims of the first defendant before the Debts Recovery Tribunal, have to be put forward by the plaintiff before the Debts Recovery Tribunal. The mere fact that the plaintiff chose to rush to the civil court on receipt of a notice from the first defendant in an attempt to thwart the enforcement of the obligations it has allegedly incurred, does not justify the grant of an interim order of injunction restraining the enforcement of the rights arising out of an alleged hypothecation and a charge created by the plaintiff in favour of the first defendant. That apart, to grant in injunction restarting the enforcement of orders passed by the Tribunal having jurisdiction to pass such orders cannot normally be granted unless it is case of fraud or the existence of some such vitiating factors is established or prima facie made out. Even then, the order of injunction as now granted could be granted only in exceptional cases.

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98. CRIMINAL PROCEDURE CODE, 1973 – Section 173 (2)
Role of Police Officer-incharge of the police station in investigation and submission of report u/s 173 (2) – Held, Court has no jurisdiction to direct submission of report of a particular nature – Law explained.
M.C. Mehta (Taj Corridor Scam) v. Union of India and others
Judgment dated 27.11.2006 by the Supreme Court in IA No. 431 in Writ Petition (C) No. 13381 of 1984, reported in (2007) 1 SCC 110

Held:

In *K. Veeraswami v. Union of India, (1991) 3 SCC 655* this Court observed *vide para 76* as follows : (SCC p. 716)

> "76. The charge-sheet is nothing but a final report of police officer under Section 173 (2) of the Criminal Procedure Code. Section 173 (2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The report must be in the form prescribed by the State Government and stating therein (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested: (f) whether he had been released on his bond and, if so, whether with or without sureties: and (g) whether he has been forwarded in custody under Section 170. As observed by this Court

in *Satya Narain Musadi v. State of Bihar, (1980) 3 SCC 152* that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the Magistrate that upon investigation into a cognizable offence the investigating officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. *In fact, the report under Section 173(2) purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the court.* The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175 (5). Nothing more need be stated in the report of the investigating officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt of the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

(emphasis supplied)

In *Kaptan Singh v. State of M.P., (1997) 6 SCC 185* this Court held vide para 5 as follows : (SCC pp. 188-89)

"5. From a conspectus of the above decisions it follows that the revisional power of the High Court while sitting in judgment over an order of acquittal should not be exercised unless there exists a manifest illegality in the judgment or order of acquittal or there is grave miscarriage of justice. Read in the context of the above principle of law we have no hesitation in concluding that the judgment of the trial court in the instant case is patently wrong and it has caused grave miscarriage of justice. The High Court was therefore fully justified in setting aside the order of acquittal. From the judgment of the trial court we find that one of the grounds that largely weighed with it for acquitting the appellants was that an Inspector of CID who had taken up the investigation of the case and was examined by the defence (DW 3) testified that during his investigation he found that the story as made out by the prosecution was not true and on the contrary the plea of the accused (appellants) that in the night of the incident a dacoity with murder took place in the house of Baijnath by unknown criminals and the appellants were implicated falsely was true. *It is trite that result of investigation can never be legal evidence;* and this Court in *Vijender v. State of Delhi, (1997) 6 SCC 171* made the following comments while dealing with this issue;

'The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean

that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 CrPC, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an investigating officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance thereupon under Section 190(1)(b) CrPC and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The trial court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further'."

(emphasis supplied)

In *R. Sarala v. T.S. Velu, (2000) 4 SCC 459* the facts were as follows. A young bride committed suicide within seven months of her marriage. An inquiry under Section 174(3) CrPC was held. The Magistrate conducted the inquiry and submitted a report holding that due to mental restlessness she had committed suicide and no one was responsible. He further opined that her death was not due to dowry demand. However, the police continued with the investigation and submitted a challan against the husband of the deceased and his mother for the offence under Sections 304-B and 498-A IPC. The father of the deceased was not satisfied with the challan as the sister-in-law and the father-in-law were not arraigned as accused. Therefore, the deceased's father moved the High Court under Section 482 CrPC. Single Judge of the High Court directed that the papers be placed before the Public Prosecutor. He was asked to give an opinion on the matter and, thereafter, the Court directed that an amended charge-sheet should be fielding the court concerned. This Court held as follows: (SCC p. 460)

"In this case the High Court has committed an illegality in directing the final report to be taken back and to file a fresh report incorporating the opinion of the Public Prosecutor. Such an order cannot stand legal scrutiny. *The formation of the opinion, whether or not there is a case to place the accused on trial, should be that of the officer in charge of the police station and none else. There is no stage during which the investigating officer is legally obliged to take the opinion of a Public Prosecutor or any authority, except the superior police officer in the rank as* envisaged in Section 36 of the Code. *A public Prosecutor is appointed, as indicated in Section 24 CrPC, for conducting any prosecution, appeal or other proceedings in the court.* He has also the power to withdraw any case from the prosecution with the consent of the court. *He is the officer of the court.* Thus the *Public Prosecutor is to deal with a different field in the administration of justice and he is not involved in investigation.* It is not the scheme of the Code for

supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing the report in the court."

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99. HINDU SUCCESSION ACT, 1956
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 & 23-J Jurisdiction of civil Court *vis-a-vis* Rent Controlling Authority in a case where one of the plaintiffs covered by S.23-J and the other one dies during the pendency of the civil suit – Question of jurisdiction should be determined on the basis of facts on the date of institution of suit – Law explained.
Praveen Kumar v. Kesar Bai and another
Reported in 2007 (1) MPLJ 490

Held:

As far as the substantial question framed is concerned, the same is based on the ground that plaintiff is a widow and falls within the special category of landlord as contemplated under section 23-J of the M.P. Accomodation Control Act, 1961 and, therefore, it is only the Rent Controlling Authority who has jurisdiction to deal with the matter under Chapter III-A under section 23-A and the Civil Court has no jurisdiction. It may be indicated that the special provision as contemplated under Chapter III-A was inserted by Amending Act 27/83 on 16.8.1983 and further section 23-J was amended by Amending Act No. 7/85 w.e.f. 16.1.1985. The definition of the "landlord" for the purpose of Chapter III-A was incorporated by Amending Act No. 7/85 w.e.f. 16.1.1985. The question is whether the said provision will be attracted in the facts and circumstances of the case and whether the Civil Courts had no jurisdiction to deal with the matter.

A perusal of the record indicates that the suit in question was filed by the plaintiff Smt. Keshar Bai on 26-10.1978. In the plaint filed she is not indicated as a widow. The plaint indicates that she is wife of Shri Ram Singh Sahu and the suit was never filed by her in her capacity as a widow. She has filed the suit claiming herself to be the owner of the suit property and sought eviction of the defendant on the grounds of bona fide need, arrears of rent and sub-letting. When the suit was filed in the year 1978 the provisions of section 23-A and section 23-J were not incorporated in the M.P. Accommodation Control Act, 1961. In I.A. No. 3054/05, it is indicated by the plaintiff that her husband Ram Singh Sahu died on 20.8.1993 as per death certificate Annexure-A i.e. during the pendency of the suit before the trial Court.

It is therefore, clear from the aforesaid narration of the facts that the suit was never filed by a widow claiming eviction of the suit property on the grounds contemplated under section 23-A, B of the M.P. Accommodation Control Act but it was the suit composite in nature filed by the plaintiff on the grounds contemplated under section 12(1)(a)(b) and (f). Even the Appellate Court has passed decree under section 12(1), (b) and (f). Merely because during the

pendency of the proceedings before the Courts below plaintiff's husband died and she became widow, the jurisdiction of the trial Court is not taken away as the suit was never instituted by a widow and the ejectment is not only under the provisions of section 12(1)(f) but is also under the provisions of section 12 (1) (a) of the M.P. Accommodation Control Act. Full Bench of this Court in the case of *Ashok Kumar vs. Babulal and another, 1998 (1) MPLJ (FB) 461= 1998 (1) JLJ 311 (F.B.)* in para 8 has considered the question of jurisdiction of Civil Court and has observed as under :–

> 8. If the landlord defined in section 23-J, wants to avail the benefit of Chapter III-A then they can maintain a suit for eviction of a tenant before the Rent Controlling Authority on the ground of bona fide requirement and in case, they do not want to avail the special froum created under the Chapter III-A and want to invoke the ordinary Civil Court remedy then that forum will be available to them and their suit will not be dismissed on the ground that they should invoke the remedy provided under Chapter III-A. It will be open for the Landlords of file a civil suit before the Civil Court on the basis fo the bona fide requirement or on any other grounds mentioned in section 12 of the Act. Similarly, it will be open for the landlords defined in section 23-J to maintain a suit before the Rent Controlling Authority on the ground of reasonable bona fide requirement. The forum is for the benefit of the landlords defined under section 23-J and that does not exclude the jurisdiction of the Civil Court, if the landlords so choose. It is the choice of the landlord and it cannot be restricted that he can only avail the remedy for eviction on the ground of reasonable bona fide requirement before that forum alone.

Even though Shri K.S. Tomar, learned Senior Counsel appearing for the appellant placing heavy reliance on a judgment of the Supreme Court in the case of *Ashok Kumar Gupta vs. Vijay Kumar Agrawal, 2002(3) MPLJ (SC) 50= (2002) 3 SCC 717* submitted that the Civil Court has no jurisdiction in the matter and reliance was also placed by him on judgment of Single Bench of this Court in the case of *Nandlal vs. Mangibai, 2006(1) MPLJ 231 = 2006(2) MPWN 28* emphasised that the Civil Court has no jurisdiction, the fact remains that all these judgments including the Full Bench judgment in the case of *Ashok Kumar* (supra) will not apply in the facts and circumstances of the present case for the following reasons :–

i) Present is not a suit filed by a widow solely based on her bona fide need but

ii) Present suit was instituted by a owner of the property, who at the relevant time was not a widow and she has claimed eviction on various grounds as contemplated under section 12(1) of the M.P. Accommodation Control Act.

The question involved in this appeal is considered by a bench of this Court in *Munnalal vs. Subhash, 1997(1) MPWN 31.* It has been held in the aforesaid judgment that Civil Courts had jurisdiction in case when the suit is instituted by

a person at a time when he does not fall in the special category of landlord as defined in section 23-J but comes in the said category subsequently during pendency of the suit. In the said case also a suit was filed before the Civil Court by one Smt. Prabha Devi who at the relevant time was a Government servant and retired during the pendency of the suit. Similar argument raised with regard to jurisdiction of the Civil Court was rejected and it was held that at the time of institution of the suit, Civil Court had jurisdiction and the jurisdiction will not be taken away merely because on a subsequent date the landlord falls in the special category as contemplated under section 23-J. Similarly, in the present case also, on the date when the suit was instituted repondent Kesarbai was not widow and Civil Court had jurisdiction to entertain the suit. The judgment in the case of *Nandlal* (supra) is, therefore, distinguishable on fact. Similarly the argument advanced by Shri Tomar to the effect that the judgment of the Full Bench in the case of *Ashok Kumar* (supra) stands over-ruled by the Supreme Court by implication in the case of *Ashok Kumar Gupta* (supra) is also of no consequence in this appeal as the facts of the present case are entirely different. This is a case where on the date of institution of the suit Civil Court had jurisdiction and if subsequently the respondent Kesarbai became a widow during the pendency of the suit it cannot be held that the Civil Court's jurisdiction is taken away. That being so, the judgments relied upon by Shri Tomar are not appliable in the present case.

Similar question was Considered by this Court in the case of *Bagmal Rajmal Singhai vs. Kamal Kumar Mukundrao @ Balmukund, 1998(1) MPLJ 98* and in paras 5 and 6 it has been so observed in the aforesaid case:

> 5. Both the Courts noticed that the suit was filed on 20.4.1983 whereas the Act conferring jurisdiction for specified categories of landlords on Rent Controlling Authority, came into force on 16.8.1983. It was noticed that there was no provision for transfer of the pending suits to the Rent Controlling Authority. This being so, there was no question of bar of jurisdiction in respect of the proceedings initiated before the commencement of Act No. 27 of 1983, enforced from 16.8.1983. Even otherwise, the appellant got the benefit of regular trial as also of two appeals. No prejudice is thus, shown to have been caused. The contention of jurisdiction is thus, manifestly meritless and deserves to be rejected.
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> 6. In these facts and circumstances, it becomes luculent that the jurisdiction of the Civil Court was not barred in terms of sections 23-A, 23-J and section 45 of the M.P. Accommodation Control Act.

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100. SUCCESSION ACT, 1925 – Section 63 (c)
Proof of Will – The propounder should prove not only due execution but also due attestation.
Keshav Prasad and another v. Smt. Bhuwani Bai and another
Reported in 2007 (1) MPLJ 499

Held:

The Supreme Court in the case of *Girja Datt Singh Vs. Gangotri Datt Singh, AIR 1955 SC 346,* has held in para-14 that in order to prove the due attestation of the Will the propounder of Will has to prove by examining attesting witnesses that the attesting witnesses saw the testator signing the Will and they themselves signed the same in the presence of the testator. Since it has not been come in the testimony of the attesting witnesses that they have signed the Will in presence of testator Kaushalya Bai, I am of the view that the Will and its attestation is not duly proved. The Supreme Court in another decision *Kashibai vs. Parwatibai, AIR 1995 SCW 4631,* has reiterated the same principle which has been laid down by the Apex Court earlier in the case of *Girja Datt Singh* (supra). Shri A.K. Mathur, Chief Justice of this Court (as His Lordship then was) in the case of *Mannudas vs. Govinddas and others, 1997(2) Vidhi Bhasvar 199,* by following the decision laid down by Supreme Court in the case of *Kashibai* (supra) has held that the attestation of the Will should be duly proved and it should come in the evidence in the attesting witnesses that not only the testator has put his/her thumb impression in presence of the attesting witnesses but the attesting witnesses have also signed the Will in presence of the testator. Since the attesting witnesses D. W. 3-Ramnath Pathak and D.W. 4-Ramnarayan have at all not stated that they also signed the Will in presence of the testator, the due attestation of the Will has not at all been proved.

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101. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 6 & 12 Compromise in eviction suit before Lok Adalat – Suit decreed on the condition that landlord will pay Rs. 1,88,000/- to defendant/tenant – Whether compromise violative of S.6 and contrary to public policy – Held, Yes – Further held, such compromise not binding on the parties.
Kamal Kumar Jain v. Babilata Jain
Reported in 2007 (1) MPLJ 532

Held:

From the perusal of the impugned order it is clear that the signature of present petitioner/plaintiff does not appear on the order nor his presence is marked in the impugned order. The presence of his counsel is of course marked. Thus, the present petitioner was not consenting party before the Lok Adalat. Apart from this even assuming that the present petitioner was a consenting party to the agreement this Court will have to decide whether the order passed by the Lok Adalat is in accordance with the provisions of the Legal Services Authorities Act or not. The compromise application is nothing but an agreement between the parties and in an agreement which is contrary to the public policy cannot be enforced.

The provisions of M.P. Accommodation Control Act clearly bars payment of any money for letting the premises or vacating the same.

Section 6 of the said Act lays down subject to the provisions of this Act, no person shall claim or receive any rent in excess of the standard rent, notwithstanding any agreement to the contrary.

Sub-clause (2) of section 6 provides that no person shall, in consideration of the grant, renewal or continuance of a tenancy or sub-tenancy of any accommodation.

(a) Claim or receive any payment or any sum as premium or *pugree* or claim or receive any consideration whatsoever, in cash or in kind, in addition to the rent.

Sub-clause (3) of section 6 provides that it shall not be lawful for the person acting or purporting to act on behalf of the tenant or a sub-tenant to claim or receive any payment in consideration of the relinquishment, transfer or assignment of his tenancy or sub-tenancy, as the case may be, of any accommodation.

Thus, to claim or receive any amount by a tenant for relinquishment of his tenancy rights is prohibited by section 6 of the M.P. Accommodation Control Act.

Section 23 of the Indian Contract Act, 1872 provides that if consideration or object of the agreement is unlawful or is contrary to the public policy then such contract is illegal and does not bind the parties.

Thus, in the present case the order passed by the Lok Adalat is not only against section 6 of the M.P. Accommodation Control Act but also against the public policy hence, such contract is illegal and is nullity and cannot be enforced in the eyes of law.

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102. CIVIL PROCEDURE CODE, 1908 – Order XLI Rule 14 (4)
Power of Appellate Court to dispense with notice where respondents failed to appear before trial Court – Direction to dispense with notice should be made on sound basis and correct factual matrix – Law explained.
Imratlal v. Vishnu Prasad and others
Reported in 2007 (1) MPLJ 540

Held:

... Learned counsel appearing on behalf of the plaintiffs/respondents has relied upon the decision of the Full Bench in *Smt. Jamuna Bai and ors. vs. Chhote Singh and ors, 2004 (2) MPLJ (FB) 376 = 2004 (2) MPHT 325* wherein this Court has laid down that once the certain respondents have failed to appear before the trial Court, they cannot claim right of hearing at the first instance. No benefit can be claimed by such a party against the exercise of discretion by the Court in dispensing with the notice, when the notices were dispensed with, appeal cannot be dismissed. The effect of dispensing with service is that the respondent remains a party in the appeal but service of notice is dispensed with. Dispensing with notice cannot be termed as deleting the name of unserved respondents,

on the contrary they continue to remain party in the appeal. The Full Bench of this Court has held that the three decisions of this Court in *Sushila and anr. vs. Rajveer Singh and ors., 2000 (1) MPHT 331 = 2000 ACJ 719, Raghvendra Naik and anr vs. Mahavir and ors., 2001(2) JLJ 135 and Kalabai Choubey vs. Rajabahadur Yadav, AIR 2002 MP 8* do not lay down the correct law. The Full Bench has further held that there is no inconsistency in the M.P. Amendment and sub-rule (4) of Rule 14, Order 41 and the service of notice can be dispensed with upon the parties, who were proceeded ex parte before the Court of first instance. The Full Bench of this Court has laid down thus:

> "15. Thus, is clear that there is no inconsistency in the M.P. Amendment and sub-rule (4) of Rule 14 of Order XLI and the notice can be dispensed with upon the parties, who was proceeded ex parte before the Court of first instance. Language of sub-rule (4) of Rule 14 of Order XLI is clear where it provides that it shall not be necessary to serve notice of any "proceeding incidental to an appeal.". So the Legislature has made it mandatory that it is not necessary to serve notice and when Legislature has provided that it is not necessary to serve notice upon the party, who has not appeared in the Court of first instance or failed to file address for service of notice, the appeal cannot be dismissed after notice upon the respondents are dispensed with by the Court."
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> 16. We, therefore, hold that Division Bench judgments delivered in the cases of *Sushila* (supra), *Raghvendra Naik (supra) and Kalabai Choubey* (supra) do not lay down the correct law. We answer the question that the appeal shall not fail on account of dispensing with notice upon the respondents, who were exparte before the Court of first instance and they have not submitted the address of service for notice. Since respondents have chosen not to appear before the Court of first instance, they cannot claim right to be heard at the appellate stage. No benefit can be claimed by the party against the exercise of discretion of the Court in dispensing with notice. When notices have been dispensed with appeal cannot be dismissed and Appellate Court has power to modify or enhance the quantum of compensation. Reference is answered accordingly. File be placed before the Bench for decision of appeal on merits."

There is no dispute as to proposition laid down by the Full Bench, no doubt about it that merely by dispensing with the service of notice, the appeal does not become not maintainable, when the respondents have not chosen to appear before the Court of first instance and cannot claim right to be heard before the Appellate Court, but, at the same time discretion to dispense with service has to be used by the Court on sound basis and correct factual matrix not procured by false statement. In the instant case, the facts are writ large, totally incorrect statement was made.

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103. CRIMINAL PROCEDURE CODE, 1973 – Section 190
Cognizance by Magistrate – Whether Magistrate can take cognizance u/s 190 regarding an offence triable by Sessions Court? Held, Yes.
Rajendra Singh v. Sate of M.P. and others
Reported in 2007 (1) MPLJ 564

Held:

....In the trial Court, petitioner moved an application under section 190 of Criminal Procedure Code for taking cognizance against the non-petitioner Nos. 2 to 5. The application was opposed by non-petitioners in the trial Court and the trial Court after hearing the parties allowed the application filed by the complainant and taking cognizance under section 190 of Criminal Procedure Code and issued non-bailable warrant for arrest in the case.

Being aggrieved by the aforesaid order, the non-petitioner Nos. 2 to 5 filed revision petition before the Sessions Judge, Morena and after hearing both the parties the Court set aside the order passed by the trial Court on the ground that case was registered under sections 147, 148, 149, 307, 294 of Indian Penal Code and subsequently due to death of Sarnam Singh, the case was also registered under section 302, read with section 120-B of Indian Penal Code, The view of the Sessions Judge is that in case triable by the Court of Session, the Magistrate has no power to take cognizance under section 190 of Criminal Procedure Code and, therefore, set aside the order passed by the trial Court.

The complainant filed this revision petition on the ground that the Revisional Court commits irregularity and illegality by setting aside the order passed by the trial Court because under section 190 of Criminal Procedure Code, the Court can take cognizance even if the case is triable by the Sessions Court. In view of sections 190 and 191(b) of Criminal Procedure Code, Magistrate cannot take cognizance if the case is triable exclusively by the Court of Session.

Under section 190 of Criminal Procedure Code, there are various ways in which a Magistrate can take cognizance of an offence, i.e., take notice of an allegation of commission of offence with a view to taking some kind of action provided in the Code to bring the offender to justice. Cognizance can be taken in three ways: (a) upon a complaint (b) upon a police report (c) upon other information or Magistrate's own knowledge while under sections 193 and 195 to 199 of Criminal Procedure Code regulate the competence of the Court and bar its jurisdiction in certain case excepting in compliance therewith. The section says that except as otherwise expressly provided, no sessions Court can take cognizance of any offence without any commitment by a Magistrate. In the present Code, committal has been made a formal affair by omitting altogether committal proceedings. When an offence is exclusively triable by a Court of Session, the Magistrate shall commit the accused to the Court of Session. The meaning of cognizance from the language of section 193 and definition of "offence" in section 2 (n), it seems to follow that the prohibition in section 193 is against taking cognizance of the act or omission unless there is a commitment therefor and

not against taking cognizance of a different *mens rea* or a subsequent consequence of the act punishable under a different provision of law.

After having heard the arguments at length, learned counsel for the petitioner relied on the decision of this High Court in the case of *Rukvendra Singh and others vs. State of M.P. and another,* reported in *2004 (4) MPLJ 249= 2004(2) JLJ 61.* It lays down that under sections 190, 193, 209 and 319, charge-sheet filed by police for offences exclusively triable by Court of Sessions. Judicial Magistrate First Class can exercise jurisdiction under section 190 for adding accused not charge-sheeted. Sessions Court can do so after case is committed to it under section 319.

In the aforesaid pronouncement, it is also held that Magistrate can take cognizance of any offence and in view of the specific bar under section 193 of Criminal Procedure Code that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session can take cognizance of any offence as a Court of original jurisdiction unless case has been committed to it by a Magistrate under this Code. Reliance was placed in *Raj Kishore Prasad vs. State of Bihar and another, 1996 SCC (Cri) 772: Raghu Bans Dubey vs. State of Bihar, AIR 1967 SC 1167; Ranjit Singh vs. State of Punjab, 1998 SCC (Cri) 1554 and Swil Ltd vs. State of Delhi and another, (2001) 6 SCC 670.*

In the case of *Rejendra Prasad vs. Bashir Ahmed,* reported in *2001 CAR 485,* the Supreme Court has considered the provisions of section 190, 209, 216 and 323 of Criminal Procedure Code and after placing reliance on two earlier decisions i.e., in the case of *Raghu Bans Dubey vs. State of Bihar,* reported in *AIR 1967 SC 1167 and Swil Ltd., vs. State of Delhi,* reported in *(2001) 6 SCC 670,* held that under section 190 of Criminal Procedure Code, Magistrate can exercise jurisdiction and can take cognizance in the matter.

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104. SPECIFIC RELIEF ACT, 1963 – Section 16 (c)
Earnest money, forfeiture of – Principle regarding forfeture of earnest money – Law explained.
Parmanand Soni and others v. Radhakrishna Dharmartha Pvt. Trust and others
Reported in 2007 (1) MPLJ 589

Held:

.... In *V. Lakshmanan vs. B.R. Mangalagiri and others, (1995) BC 315 (SC),* it was held that when appellant has failed to perform his part of the contract, the earnest money was rightly forfeited. In *Shri Hanuman Cotton Mills and others vs. Tara Air Craft Limited, 1969 (3) SCC 522,* principles regarding earnest have been laid down in para 21 thus :–

> *21. From a review of the decisions cited above, the following principles emerge regarding "earnest"*

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

On facts forfeiture of earnest money was held to be proper on the breach of contract.

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105. INDIAN PENAL CODE, 1860 – Sections 354, 375 & 511
Difference between rape, attempt to rape and outraging the modesty – Law explained.
Bhurji and others v. State of M.P.
Reported in 2007 (1) MPLJ 600

Held:

The Supreme Court, in the case of *Aman Kumar and another v. State of Haryana, (2004) 4 SCC 379* exhaustively explained the meaning of rape and outraging the modesty of a woman. Under section 375 Indian Penal Code rape is defined and in its explanation penetration is sufficient to consitute the sexual intercourse and necessary to the offence of rape. The Supreme Court has held that :–

"Penetration is the sine qua non for an offence of rape. In order to constitute penertration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is non necessary. To constitute the offence of rape merely requires evidence of penetration and this may occur with the hymen remaining intact. The actus reus is complete with penetration."

In paras 10 and 11, the Supreme Court has observed about attempt to commit rape is under :–

"An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of offence, unless some thing, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design amounting to more than mere preparation, but falling short of actual consummation and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling

short of its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

In the light of the aforesaid Supreme Court observation, there is no material available on record go to show that the accused persons were determined to have sexual intercourse in all events with the prosecutrix PW4. She has specifically stated that her under garments were not removed and the appellants were also wearing underwears. They had not exposed their genitals. According to the prosecutrix PW-4, accused persons were having deadly weapons, but, they did not cause any injury or even forced to the prosecutrix to surrender hereself. As mentioned hereinabove, the evidence of this prosecutrix regarding putting resistance, we find exaggeration in her version which is clear from her medical report (supra). Therefore, in the facts and the circumstances of the present case, the offence cannot be said to of attempt to commit rape to attract culpability under section 376/511, Indian Penal Code with the prosecutrix PW-4.

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106. ACCOMMODATION CONTROL ACT (M.P.) 1961 – Section 23-A (b) Eviction suit by landlord of specified category on the ground provided u/s 23-A(b) – Expression 'for whose benefit accommodation is held' as used in S. 23-A(b), meaning of – Law explained.
Swaroop Chand v. Gumana Bai
Reported in 2007 (1) MPLJ 246

Held:

The application for eviction has been submitted under section 23-A (b) of the Act which reads as under :–

> "23-A(b) that the accommodation let for non-residential purposes is required "bona fide" by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonable suitable non-residential accommodation of his own in his occupation in the city or town concerned"

A bare look on the provision makes it clear that a landlord specified under section 23-J of the said Act may seek eviction of tenant from non-residential accommodation under the aforesaid provision in case, if the premises is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if landlord is the owner of the tenanted premises. This provision further makes it clear that in case, if the landlord specified u/s 23-J of the Act, is holding the accommodation for the benefit of any other person then, eviction may be sought, if it is required bona fide by landlord for such person. eviction may be ordered only, in case, if there is no reasonably suitable, self owned alternative non-residential accommodation in vacant condition in the city or town concerned.

The crucial question in this case is what is meant by the words "for whose benefit accommodation is held". Former portion of section 23-A(b) deals with the situation when the landlord of specified category is owner of the premises. Later portion deals with the situation when the landlord requires bona fide the premises for a person for whose benefit the accommodation is held. Holding of accommodation in the later portion is in contradistinction to the concept of ownership which is dealt with in the earlier portion of the provision. Meaning of the word "to hold" in contradistinction to ownership is "to possess an accommodation for the purpose of administration." The word "to hold" has been defined in the Black's Law Dictionary as "to be in possession and administration of".

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107. INDIAN PENAL CODE, 1860 – Section 354
SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (xi)
Applicability of S.3 (1) (xi) in cases of outraging of modesty or causing dishonour to the victim belonging to SC/ST – Law explained.
Dabloo alias Shahjad v. State of M.P.
Reported in 2007 (1) MPLJ 250

Held:

Now, the next important question involved is that whether the appellant can be convicted both under section 354, Indian Penal Code and under section 3(1)(xi) of S.C.S.T. Act. In this case the trial Court has convicted the appellant on both count. Before examining this point it will be useful to reproduce the relevant provisions below :–

Section 354, Indian Penal Code :–

> Assault or criminal force to woman with intent to outrage her modesty-whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years but which shall not be less than two years.

Section 3(1)(xi) of S.C.S.T. Act :–

Section 3(1) :– Whoever, not being a member of a Scheduled Caste or Scheduled Tribe, –

Section 3(1)(xi) :– assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;

From the perusal of above sections, it is clear that section 3(1)(xi) of the Act is of aggravated offence under section 354, Indian Penal Code. The Apex Court in the case of *Vidyadharan vs. State of Kerala, 2004(2) MPLJ 251 = 2004 Cri L.J. 605* laid down the following proposition :–

> Section 3(1)(xi) of the Act deals with assault or use of force in any women belonging to Scheduled Castes and Scheulded Tribes with an intention to dishonour or degenerate her modesty is an aggregated from of the offence under section 354, Indian Penal Code. The only difference between section 3(1)(xi) is essentially the caste or tribe to which the victim belongs. If she belongs to Scheduled Caste or Scheduled Tribe, section 3(1)(xi) applies. The other difference is that under section 3(1)(xi) dishonour of such victim is also made the offence. So, a person inorder to punish at a time both under section 354 and 3(1)(xi), Indian Penal Code or the S.C.S.T. Act for the same offence.

Now, the question for consideration is that in the present case whether the offence under section 354, Indian Penal Code or 3(1)(xi) of the S.C.S.T. Act is made out. In the first information report Exp. 4 as well as in the statement of the prosecutrix it is nowhere mentioned that the act was committed by the accused against the prosecutrix because she belongs to a particular community. It is the duty of the prosecution to prove the ingredients of the offence under section 3(1)(xi) of the S.C.S.T. Act. In this case there is no evidence to show that the appellant used criminal force against the prosecutrix to degenerate her modesty only because she belongs to a particular caste or community, whereby there was no such circumstances to suggest that her modesty was intended or tried to degenerate simply because she belongs to a particular community. Thus, the ingredients under section 3(1)(xi) of the Act was not proved by the prosecution. But, from the evidence of prosecutrix and other witnesses as discussed above, it is clear that ample evidence was produced against the appellant to hold him guilty under section 354, Indian Penal Code, although on the date of incident the appellant caught hold the prosecutrix and molested her by pressing her breasts with the knowledge that he will by doing such act is the intention or to outrage the modesty of the prosecutrix.

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108. ACCOMMODATION CONTROL ACT, (M.P.) 1961 – Section 12 (1) (b) Sub-letting as a ground for eviction – Tenant entering partnership and carrying on business in the suit premises retaining legal possession of the same – Whether it amounts to sub-letting? Held, No.
Yasin Ali (dead) through LRs. Akbar Ali and others v. Gafoor Mohammad and others
Reported in 2007 (1) MPLJ 266

Held:

..... On going through the testimony of this witnesses nowhere it is gathered that he is not in possession of the suit property or has lost control over the same. In para 16 of the written statement also he has specifically pleaded that only in the business defendant No. 3 is a partner. In the case of *Mahendra Saree Emporium (II) vs. G. V. Srinivasa Murthy, (2005) 1 SCC 481,* it has been held by the Supreme Court that a transfer of a right to enjoy the property concerned to the exclusion of others during the term of the lease is a *sine qua* non of a lease. A sub-lease would imply parting with the said right in a favour of the sub-tenant by the tenant. By placing reliance on earlier decisions *Krishnawati vs. Hans Raj, (1974) 1 SCC 289* and *Associated Hotels of India Ltd. vs. S.B. Sardar Ranjit Singh, AIR 1968 SC 933* it was held that onus to prove sub-letting is on the landlord. If the landlord prima facie shows that the occupant who was in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence. The Supreme Court after placing reliance on earlier decisions *Murlidhar vs. Chuni Lal, 1970 Rent Control Jounral 922, Helper Girdharibhai vs. Saiyed Mohd. Mirasahab Kadri, (1987) 3 SCC 538* and *Parvinder Singh vs. Renu Gautam, (2004) 4 SCC 794* has categorically held that if a tenent becoming partner to carry on business in the suit premises and he himself retaining the legal possession of the same it would not amount to sub-letting. In the present case also since there is a specific pleading of defendant No. 1 in para 16 of his written statement and which has been substantiated by him in his testimony, it is proved that since he was suffering a great loss in the hotel (restaurant) business, he started business of grocery in the partnership of defendant No. 3, but he was possessing and having control over the entire suit premises. The finding in regard to existence and determination of partnership is a mixed question of fact as held by the Supreme Court in the case of *Helper Girdharibhai* (supra). In view of the decisions of Supreme Court it is not necessary to discuss the decision of learned Single Bench of this Court *Noor Mohammad v. Radheshyam and others, 1996 MPLJ 1076.*

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109. PRACTICE AND PROCEDURE :
Whether civil suit should be stayed when criminal suit is pending on the same cause of action? Held, no hard and fast principle that whenever criminal case is instituted, civil suit on the same cause of action must be stayed – Law explained.
Bhagwat Singh and another v. Ram Prasad and another
Reported in 2007 (1) MPLJ 273

Held:

This Court has considered the judgment of Apex Court referred above in its decision in case of *Sai Udyog (Pvt. Ltd.) Raipur and ors. vs. Central Bank of India, Raipur, AIR 1998 M.P. 191* and held that the Apex Court has not laid down any hard and fast rule and the question whether to stay the suit or not is a question has to be decided. Keeping in view the facts and circumstances of each case and in that case as held that it is not necessary for the court to stay the civil suit. Similar, view is taken by this Court in case of *State Bank of Indore vs. Abdul Razzak, 1997 (2) MPWN 201, Sheetal K. Bandi vs. Rishi Shaik, 1998 (2) MPLJ SN 6, Central Bank of India vs. M/s Nemichand Harilal Jain and ors., 1997 (2) MPLJ 646 = 1997 (1) JLJ 120* and by the Apex Court in case of *State of Rajasthan vs. Kalyan Sundaram Cement Industries, (1996)3 SCC 87. In case of State of Rajasthan vs. Kalyan Sundaram Cement Industries (supra)* the Supreme Court has set aside the order of the High Court staying the civil suit, which was passed on the ground that criminal case in respect of some cause of action is pending. After perusing this judgment it is clear that as a hard and fast principle of law, it cannot be laid down that whenever a criminal case is instituted, then civil suit on the same cause of action must be stayed. The Court may be guided by the attending circumstances. Where a criminal action provides a cause of action for the civil action, then Court may if the facts so demand stay proceedings in the civil suit. There is no implement in proceedings that the civil suit on the ground of pendency of a criminal case is stayed unless and until serious prejudice is caused to his defence in a criminal matter.

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110. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b) Sub-letting, proof of – No direct evidence required to prove sub-letting – The same can be inferred from circumstances – Law explained. Shyam Kant Nigam and another v. Nawab Ahmad Yar Jahangeer Khan Reported in 2007 (1) MPLJ 279

Held:

It is very difficult to give direct evidence in regard to sub-letting for the simple reason that the contract of sub-tenancy is normally done privately and the landlord is not aware about the terms of the sub-tenancy. Thus, in order to prove a ground under clause (b) of section 12(1) of the Act, the decision is required to be based on the basis of probability of preponderance. Defendant No. 2 himself has stated that defendant No. 1 always remains out of Jabalpur in regard to the demonstration of his magic shows and, therefore, it can be inferred that since there is no control of defendant No. 1 on the ground floor in which the business of photocopy is carried out, the two Courts below did not commit any error in holding that defendant No. 1 has sub-let the ground floor to defendant No. 2.

In the case of *Bharat Sales Ltd. vs. Life Insurance Corporation of India, (1998)3 SCC 1* the Supreme Court has specifically held that the sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the

tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This type of arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scence. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. While placing reliance on earlier decision in the case of *Rajbir Kaur vs. S. Chokesiri and Co., (1989) 1 SCC 19,* it has been held by the Supreme Court that it would not be impossible for the Court to draw an inference that transaction was entered into with the monetary consideration of any kind and it is always not necessary for the landlord in every case to prove the payment of consideration.

The Single Bench of this Court in the case of *Dhanya Kumar Jain vs. Mata Prasad Gupta and another, 2001 (2) MPLJ 497* has also reiterated the same principle and further held that the negative burden is on the tenant to prove that tenanted premises were not sub-let. The Single Bench of this Court while allowing the second appeal passed the decree of eviction under section 12(1)(b) of the Act.

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111. CRIMINAL PROCEDURE CODE, 1973 – Section 156 (3)
Whether Special Judge exercising jurisdiction under Prevention of Corruption Act can pass order u/s 156(3)? Held, Yes – Law explained.
Satyanand and another v. Prakash Chand Jain and another
Reported in 2007 (1) MPLJ 291

Held:

The next facet of the argument of the learned counsel for applicants that the Special Judge is not a Magistrate, therefore, cannot pass order under section 156(3) of the Criminal Procedure Code. This Controversy is set at rest long back by a unanimous decision of five Judges Bench of the Apex Court in case of *A.R. Antulay v. Ramdas Srinivas Nayak and another, AIR 1984 SC 711* and ruled as under in paragraph 27 :–

> "The Court of a Special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied".

In view of the aforesaid Supreme Court dicta, the learned Special Judge has power to pass order under section 156(3) of the Criminal Procedure Code as a Court of original criminal jurisdiction. This power is not restrained or specifically denied by any Statute.

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112. MOTOR VEHICLES ACT, 1988 – Section 149

Tractor trolley, use of for non-agricultural purpose – Death of person sitting on the tractor due to accident of tractor – Insurance policy stipulating use of tractor only for agricultural purpose – Whether Insurance Company exonerated due to breach of policy condition? Held, Yes.

Mithlesh and others v. Brijendra Singh Baghel and others
Reported in 2007 (1) MPLJ 315

Held:

... In defence B.K. Menon (D.W.1) was examined on behalf of the Insurance Company. He was working as Assistant Administrative Officer in the Insurance Company. He has produced the office copy of the insurance policy, which was for agriculture use and the vehicle was not insured for any other purposes except the agriculture use. In the FIR also it has been mentioned that deceased had gone along with Brijendra Singh for taking sand from the Govinda Ghat and when he was coming back, tractor met with an accident. From the aforesaid evidence, it is clear that the vehicle was insured for agriculture use only and it was not insured for any other purposes other than agriculture use and from the evidence of the claimants it is also clear that at the relevant time the said tractor trolley was not being used for agriculture purpose. Claimants witnesses have admitted that it was being used for bringing the sand for the construction of the house of Brijendra and even the sand was not being transported for agriculture purposes. In the case of *National Insurance Co. Ltd. vs. V. Chinnamma and others, 2004 ACJ 1909 (SC)* the Hon'ble Apex Court has considered the various other decisions on the subject and also considered the effect of amendment of 1994 in the Motor Vehicles Act and in the case of *National Insurance Company Ltd. vs. Baljit Kaur, 2004 (2) MPLJ (SC) 4= 2004 ACJ 428 (SC)* and also the decision in the case of *New India Assurance Co. Ltd. vs. Asha Rani, 2003 ACJ 1 (SC)*. According to the aforesaid decision a trailor attached to the tractor is required to be used for agriculture purposes, unless registered otherwise and on owner of a passenger carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of 1994 amendment would only cover a third party as also the owner of the goods or his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise. In the case of *National Insurance Co. Ltd. vs. Bommithi Subhayamma and others, 2005 ACJ 721 (SC)*, Hon'ble the Apex Court again affirmed the same legal position.

"It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in section 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

Thus, from the aforesaid evidence on record, it is clear that the tractor was insured for agriculture purpose and at the relevant time the same was not being used for agriculture purposes. It is not the case of the appellants that the owner of his representative was travelling on the vehicle along with the goods. Therefore from the aforesaid discussion it is clear that the Insurance Company is not liable for payment of any compensation as the liability of the deceased is not covered under the policy and more so it is not the case of third party risk as the deceased was not third party.

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113. SERVICE LAW :

M.P. CIVIL SERVICES (GENERAL CONDITIONS OF SERVICE) RULES, 1961 – Rule 8 (6)

Whether completion of probation period simplicitor amounts to confirmation of the probationer? Held, No – Law explained.

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

Reported in 2007 (1) MPLJ 328

Held:

It may be seen that Rule 8(6) only requires that on successful completion of probation and passing of the prescribed departmental examination, if any, the probationer shall, if there is a permanent post avilable, be confirmed in the service or post of which he has been appointed, either a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that he will be confirmed as soon as a permanent post becomes available. Sub-rule (7) of Rule 8 further prescribes that in case where the certificate is not issued and the probationer has not been confirmed, then he shall be deemed to be appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960. On the basis of the same, learned counsel for the petitioner submitted that on completion of successful probation, petitioner has acquired a status of permanent employee particularly when the certificate in favour of the petitioner has already been issued, which is Annexure P-3 to the petition.

The aforesaid submission of the learned counsel for the petitioner cannot be accepted. Sub-rule (6) of Rule 8 itself prescribes that on availability of the vacancy of a permanent post, the employee as such shall be confirmed. This clause applies in favour of an employee who has successfully completed his probation period. Sub-rule (7) of Rule 8 prescribes that where the certificate is not issued and the probationer is not confirmed, then he shall be deemed to be a quasi permanent employee in terms to Madhya Pradesh Government Servants (Temporary and Quasi - Permanent Service) Rules, 1960, Thus, keeping in view the aforesaid Rules, there is no provision as such with regard to the deeming provision conferring status in favour of probationer as a confirmed employee either on the issuance of certificate as such or on completion of probation period.

In this reference, it would be profitable to mention the judgment of the Apex Court reported in *AIR 1991 SC 1402, Municipal Corporation, Raipur vs. Ashok Kumar Misra* wherein it is held that probationer has no right to be confirmed automatically even though the probation period has expired. This was the case where the Apex Court has interpreted the same Rule of 1961 as relied upon by the counsel for the petitioner and para-4 of the said judgment is relevant, which is quoted as under:–

> "Thus, it is clear from R.8 of the Rules that the procedure to place a direct recruit on probation for a prescribed period was provided. The appointing authority would be entitled to place a direct recruit on probation for a specified period and for sufficient reasons may extend the period of probation to a further period not exceeding one year. Under the note to sub-rule (2) if the probationer is neither confirmed nor discharged from service at the end of the period of probation, he shall be deemed to have been continued service as probationer subject to the condition of his service being terminated on the expiry of a notice of one calendar month given in writing by either side. As per sub-rule (6) on passing the prescribed departmental examination and on successful completion of the period of probation, the probationer shall be confirmed in the service or post to which he has been appointed. Then he becomes an approved probationer. Therefore, after the expiry of the period of probation and before its confirmation, he would be deemed to have been continued in service as probationer. Confirmation of probation would be subject to satisfactory completion of the probation and to pass in the prescribed examinations. Expiry of the period of probation, therefore, does not entitle him with a right to a deemed confirmation. The rule contemplates to pass an express order of confirmation in that regard. By issue of notice of one calendar month in writing by either side, the tenure could be put to an end, which was done in this case."

If the ratio of the said case is applied in the present case, then merely because certificate in favour of petitioner is issued or the petitioner has already

completed his probation period, he will not be deemed to have been confirmed into the services or on the post on which he was initially appointed on probation. His status continues to be there as a quasi-permanent employee and shall be governed by Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960.

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114. CIVIL PROCEDURE CODE, 1908 – Section 11

Res judicata, **doctrine of – Applicability of the doctrine to interlocutory order – Law explained.**

Kashi Bai through LRs. Pinkal Gupta v. Sundarlal Vaidh and others Reported in 2007 (1) MPLJ 359

Held:

Under section 11 of Civil Procedure Code, no Court is permitted to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the same parties, under whom they or any of them claim, litigating and the same has been heard and finally decided in the earlier suit.

As indicated hereinabove, when the earlier application for temporary injunction was filed and when the order, Annexure P/4 dated 5th July, 2005 was passed rejecting the same, there was no determination of the dispute involved in the matter on merit.

Question of applicability of *res judicata* to interlocutory orders was considered by the Supreme Court in the case of *Arjun Singh vs. Mohindra Kumar and others, AIR 1964 SC 993.* In the aforesaid case, it has been observed as under by the Supreme Court :

> "Interlocutory orders are of various kinds: some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not to be prejudiced by the normal delay which the proceedings before the Court usually take. They did not in that sense, decide in any manner the merits of the controversy to issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse of the process of Court."

The principle laid down by the Supreme Court in the case of *Satyadhan Ghosal vs. Smt. Deorajin Debi, AIR 1960 SC 941* which has been applied by the

learned Court below in the present case only contemplates that the principle of *res judicata* will apply even in different stages of a pending suit. However, a complete reading of the principle laid down in paragraph 8 of the aforesaid judgment clearly indicates that while applying the principle in-between two stages of the same litigation, the question involved has to be decided on merit. In the present case, the application for temporary injunction was not decided on merit. The case of *Satendra Ghosal* (supra) was considered by the Supreme Court in the case of *Arjun Singh* (supra) and the same is explained in paragraph 10 of the said judgment and it is only then that the principle as indicated hereinabove is laid down by the Supreme court in the case of *Arjun Singh* (supra).

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115. SERVICE LAW :

Concealment of material facts from employer – Employee at the time of verification while entering service, not disclosing information regarding his prosecution for an offence – Such information not specifically asked in the verification roll – Whether it amount to concealment of material facts? Held, No.
Union of India and others v. Hariom
Reported in 2007 (1) MPLJ 362

Held:

On perusal of the enquiry report, we find that the only question which related to criminal case in the verification roll was question No. 9 and the said question No. 9 read as follows:

> "Have you ever been convicted by Court of offence?
>
> If the answer is 'Yes' the full particulars of the conviction and the sentence should be given".

Respondent answered this question by putting the word 'Nil'. This was done by the respondent because, at the time when he filled up verification roll in the year 1984, the aforesaid criminal case was pending against him and he had not been convicted of any offence. At the end of question No. 10, the following certificate was required to be furnished by the candidate in the verification roll :

> "I certify that the **foregoing** information is correct and complete to the best of my knowledge and belief. I am not aware of any circumstances which might impair fitness for employment under Government".
>
> Signature of the candidates,
>
> Sd/-
>
> (emphasis supplied).

The underlined expression "foregoing information" shows that the certificate given by the candidate is with regard to the information furnished in answer to the several questions in the verification roll. There was no question in the

verification roll as to whether, any criminal case was pending against a candidate. As indicated above, the only question i.e. question No. 9 required an information from a candidate as to whether, he had been convicted by the Court of any offence and the respondent had given correct information that he has not been convicted by the Court of offence by using the word 'Nil'.

In the last portion of the certificate, the respondent was required to certify that he was not aware of any circumstance which might impair fitness for employment under Government. The respondent who was an illiterate scheduled caste person obviously is not expected to know as to which circumstance might impair fitness under Government. It is for the authorities proposing to appoint a candidate as Safai Karmachari to indicate clearly in the different questions in the verification roll the circumstances which might impair fitness for employment under Government by putting a question in that regard in the verification roll. No question whatsoever was included in the verification roll as to whether a criminal case was pending against a candidate and hence, the circumstance that a criminal case was pending against a candidate and had not ended in conviction, presumably was not treated as a circumstance which would impair fitness for employment under Government. As a matter of fact, in *A.P. Public Service Commission vs. Koneti Venkateshwarulu and others, 2006 (1) MPLJ (SC) 274* the Supreme Court has held that as to the purpose for which the information is called for, the employer is the ultimate judge and it is not open to the candidate to sit in a judgment about the relevance of the information called for and decide to supply it or not. Since, the petitioners in this case had not called for any information in the verification roll as to whether a criminal case was pending against a candidate, it was not expected of the candidate to treat this information as relevant and furnish the same voluntarily even through, there was no question in the verification roll asking from the candidate.

In *Kendriya Vidyalaya Sangathan and others vs. Ram Ratan Yadav, (2003) 3 SCC 437* cited by Mr. Singhal, there was a clear column i.e. Column No. 12 putting a question to a candidate as to whether the candidate had even been prosecuted/kept under detention or bound down/fined, convicted by a Court of law of any offence and to both these questions, the candidate answered "no" and the Court found subsequently that a criminal case under sections 323, 341, 294, 506B read with section 34 of Indian Penal Code was pending against the candidate on the date of filing of the attestation form. Obviously, this was a case of suppression of material information and the termination of the candidate from the service was found to be justified by the Supreme Court.

In *A.P. Public Service Commission vs. Koneti Venkateshwarulu and others* (Supra) cited by Mr. Singhal Column No. 11 of the application form given to the candidate required the candidate to give information about his previous employment but the candidate left this column totally blank and it was found by the authorities that the candidate had been employed and was working as a teacher and therefore, his candidature was cancelled and the Supreme Court

found the cancellation justified, because the appellant had left Column No. 13 blank and furnished a declaration that all statements made in the application are true and correct.

As discussed above, in the verification roll in the present case, there was no column or no question pertaining to pendency of a criminal case against a candidate and the only question i.e. question No. 9 related to the conviction of a candidate in a criminal case of an offence was there. The facts of the present case, therefore, are different from the aforesaid two cases of *Kendriya Vidyalaya Sangathan and others vs. Ram Ratan Yadav and A.P. Public Service Commission vs. Koneti Venkateshwarulu and others* (Supra). In our considered opinion, the Tribunal was right in coming to the conclusion that the respondent was under no obligation to narrate all facts regarding the pendency of a criminal case and his omission to do so does not amount to suppression or concealment of any material information. Moreover, although subsequently conviction of the trial Court ended in acquittal in the appeal, the fact that the respondent was acquitted in the criminal case ultimately is a relevant factor for the Court to take into consideration for deciding whether the order of removal should be sustained or should be set aside. There was nothing wrong for the Tribunal to have taken this fact of exoneration of the respondent of the charges in a criminal case together with all other facts for deciding to set aside the order of removal passed against him.

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116. CIVIL PROCEDURE CODE, 1908 – Section 151 Order XXIII Rule 3 Whether a compromise decree can be challenged by way of regular suit? Held, No – Further held, such a suit can be treated as an application u/s 151 C.P.C. to determine whether compromise was unlawful – Law explained.
Brajesh Kumar Awasthi and another v. State of M.P. and others
Reported in 2007 (1) MPLJ 369

Held :

.... learned senior counsel has raised a singular contention that the suit filed by the State of M.P. and its functionaries is not maintainable in view of the decision rendered in the case of *Banwarilal vs. Chando Devi and another, 1993 MPLJ (S.C.) 469 = (1993) 1 SCC 581.*

Learned Deputy Advocate General for the State has supported the judgment passed by the learned trial Judge.

The solitary question that arises for consideration is whether the suit filed for setting aside the compromise decree is maintainable or not. In the case of *Banwarilal* (supra) it has been held as under:

> "7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was

enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:

"3-A. Bar to suit.- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

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The application for exercise of power under proviso to Rule 3 of Order 23 can be labelled under section 151 of the Code but when by the amending Act specifically, such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to Rule 3. It has been held by different High Courts that even after a compromise has been recorded, the Court concerned can entertain an application under section 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases *Tara Bai (Smt.) vs. V.S. Krishnaswami Rao, S.G. Thimmappa vs. T. Anantha; Bindeshwari Pd. Chaudhary vs. Debendra Pd. Singh; Mangal Mahton vs. Behari Mahton and Sri Ishwar Gopal Jew vs. Bhagwandas Shaw* where it has been held that application under section 151 of the Code is maintainable. The Court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that Court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then in shall be deemed to be void within the meaning of the explanation to the proviso to Rule 3 and as such not lawful. The learned subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise on February 27, 1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order."

This Court in the case of *Raghuvir Singh and others vs. Ramdarshan Ramcharan Kirar and others, 2002 (1) MPLJ 617* expressed the opinion as under:

"There is no procedural hurdle in treating the suit which is legally not maintainable as an application under section 151, Civil Procedure Code in the earlier suit. The procedure devised by the Court to entertain an application under section 151, Civil Procedure Code for enquiring whether the compromise was unlawful is a judicial innovation in order to ensure that a party does not suffer because he was the victim of fraud or misrepresentation or the compromise is otherwise unlawful. Even after the decree has been passed on the basis of a compromise after verification by the Court, it is still permissible in a given case to assail the compromise on the ground of its unlawfulness. A separate suit has been barred but by a process of interpretation a procedure has been carved out to challenge an unlawful compromise. It would only be an extension of the said innovative thinking to treat the suit as an application under section 151, Civil Procedure Code in the earlier suit. Therefore, in substance the trial Court had not committed any legal error in fixing the case for inquiry whether the compromise was lawful. The trial Court directed to treat the subsequent civil suit as an application under section 151 and then proceed further according to law."

Recently in the case of *Pushpa Devi Bhagat vs. Rajinder Singh and others, (2006) 5 SCC 566* a two Judge Bench of the Apex Court culled out the principles in paragraph 17 as under:

"17. The position that emerges from the amended provisions of Order 23 can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) Civil Procedure Code.

(ii) No appeal is maintainable against the order of the Court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1, Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the Court which passed the consent decree, by an order on an application under the proviso to Rule 3, Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but

contract between parties superimposed with the seal of approval of the Court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the Court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in section 96(3) of the Code."

In view of the aforesaid pronouncement of law we are of the considered opinion the suit instituted by the State of M.P. and its functionary before the learned trial Judge was not maintainable and, therefore, the judgment and decree passed thereon are vulnerable and are bound to be set aside and accordingly we so do. However, following the law laid down in the case of *Reghubir Singh and others* (supra) we direct the learned trial Judge to treat the plaint as an application for setting aside the judgment and decree passed in the earlier suit by way of compromise and proceed as per law.

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117. M.P. VAN UPAJ (VYAPAR VINIYAMAN) ADHINIYAM, 1969 – Section 15(6) Confiscation of vehicle used for commission of offence under the Act – Expression 'used without his knowledge or connivance' as appearing in S.15 (6) meaning of – Burden is on the owner to prove that the vehicle was used without his knowledge or connivance.
Dhanaram Golhani v. State of M.P. and others
Reported in 2007 (1) MPLJ 375

Held :

A procedure for search and seizure of the property liable to confiscation is provided under section 15 of the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969. Sub-section (6) of the same is reproduced below for convenience :–

> "(6) No order of confiscation under sub-section (4) of any tools, vehicles, boats, ropes, chains or any other articles (other than specified forest produce seized) shall be made if any person referred to in clause (b) of sub-section (5) proves to the satisfaction of authorised officer that any such tools, vehicles, boats, ropes, chains or other articles were used without his knowledge or connivance or as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against use of objects aforesaid for commission of an offence under this Act."

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Sub-section (6) of the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 make it obligatory that all reasonable necessary precautions must have been taken. It is clear from the record that the transit pass was neither available nor obtained in respect of transportation of the disputed wood. Transportation of the sawn wood without transit pass is obviously an offence under the provisions of the said Act. The petitioner and/or his driver have failed to ensure that the transit pass was issued for the transportations of the disputed wood and have thus, failed to take all sorts of reasonable and necessary precautions while transporting the goods. In the case of *State of M.P. vs. Ram Gopal Sharma, 1991 (1) MPWN 66* it was found that the owner of the vehicle was unaware of the commission of the offence. In the case in hand, the petitioner and driver are found to have not taken all reasonable and necessary precautions. If the transportation was made without reasonable and necessary precautions, it cannot be said that the order of confiscation is in contravention of section 15 of the said Act. Hon'ble Supreme Court of India in the case of *State of M.P. vs. Suresh Kumar, (1997) 9 SCC 647* has held in paragraph-9:–

> "A bare reading of sub-section (6) of section 15 of the Adhiniyam quoted hereinabove shows that the burden is on the owner to prove to the satisfaction of the authorised officer that his vehicle was used without his knowledge or connivance and that all reasonable and necessary precautions were taken by him against use of his truck for the commission of an offence under this Adhiniyam. During confiscation proceedings, the competent authority recorded the statements of various forest employees including the officers and permitted the respondent to cross-examine them but the opportunity was not availed. The forest employees when tried to stop the truck, one of the inmates of the truck tried to scare the forest employees by firing a shot from the firearm and thereafter escaped from the truck to avoid being caught. This would unmistakably show that the truck driver and other inmates were involved in illegal activities forbidden by the Adhiniyam. It also cannot be overlooked that the concealment of 120 logs of teak wood was arranged perfectly by putting tarpaulin over the logs to avoid its detection. These facts were held proved by the Forest Authorities and on these proved facts, the Forest authorities concluded that the driver of the truck in connivance with the other inmates of the truck was carrying the wooden logs illegally. Under sub-section (6) burden is cast upon the owner of the truck to prove that his truck was used for illegal activities without his knowledge and not with his connivance. The statement of the owner of the truck was recorded by the competent authority and the explanation sought to be given by him did not find favour with the said authority. The respondent owner did not produce any other material on record to discharge the burden under sub-section (6). If this be so, it cannot be said that the competent authority and the appellate authority committed

any error in coming to the conclusion that the respondent owner has failed to satisfy the authorised officer that the illegal activity committed by the driver of the truck was without his knowledge or connivance. Mere *ipse dixit* of the respondent owner cannot be said to be sufficient evidence to discharge burden under section 15(6) of the Adhiniyam. In our opinion, the High Court has totally misread and misinterpreted provisions of section 15(6). We, therefore, cannot sustain the reasoning of the High Court and the Sessions Court as regards interpretation of section 15(6)."

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118. SPECIFIC RELIEF ACT, 1963 – Section 19 (b)
Protection contemplated for subsequent bonafide purchaser for value without notice of original contract – Necessary conditions to be proved to claim protection – Law explained.
Ratan Kumar Savnani v. Lakhanlal Agrawal and others
Reported in 2007 (1) MPLJ 378

Held:

The Hon'ble Supreme Court of India in a case involving the relief of specific performance against a subsequent purchaser has held in the case of *R.K. Mohammed Ubaidullah and others vs. Hajee C. Abdul Wahab (D) by L.Rs. and others, reported as (2000) 6 SCC 402* that it is to be considered :–

(1) Whether the subsequent purchaser is a bona fide purchaser of the suit property in good faith for value without notice of original contract; and

(2) Whether the subsequent purchaser in the absence of necessary enquiry can be said to be a bona fide purchaser.

It has been further held : –

"Section 19(b) protects the bond fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. 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.

Notice is defined in section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads :

"Explanation II- Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

It has been further held :–

"Hence with reference to subsequent purchaser it is essential that he should make 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. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property."

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119. ELECTRICITY SUPPLY ACT, 1948 (since repealed) – Sections 49 & 79 Theft of electricity – Right of Electricity Board to recover loss caused to the Board due to theft or unauthorized use of electrical energy – Law explained.
Jabalpur Steels Pvt. Ltd. v. State of M.P. and others
Reported in 2007 (1) MPLJ 388

Held:

... Since the petitioner has been found to be involved in the case of theft of electricity, it would be appropriate to refer to paragraphs 6 & 7 of the decision of the Supreme Court in the case *M.P. Electricity Board, Jabalpur and others vs. Harsh Wood Products and another, (1996) 4 SCC 522* as under:

"6. The question, therefore, is: whether the view of the High Court is sustainable in law. It would be seen that section 49 read with section 79 of the Electricity (Supply) Act, 1948 gives power to the appellant Board to determine and also to revise tariff from time to time. Admittedly, in exercise of the power the tariff has been determined and the principles governing the supply of electricity have been enumerated. Clause 31 (e) is relevant in this behalf. It provides as under :–

"(e) Where any consumer is detected in the commission of any malpractice with reference to his use of electrical energy including authorised alternations to installations, unauthorised extension and use of devices to commit theft of electrical energy the Board may, without prejudice to its other rights, cause the consumer's supply to be fofthwith disconnected. The supply may be restored in the discretion of the Division Engineer of the Board if the consumer forthwith compensates the Board and pays all dues as per bill and takes such other actions as he may be directed by the Divisional Engineer of the Board to take in this connection."

7. A reading thereof clearly indicates that the appellant Board, when it detects that any consumer had committed any malpractice with reference to his use of electrical energy including authorised alternations to installations, unauthorised extension and use of devices to commit theft of electrical energy, may, without prejudice to its other rights, disconnect the supply of electricity forthwith and may call upon the consumer to make payment for compensation of the unauthorised use of electricity which is now stated to be a theft of electricity. It is not in dispute that an FIR had already been lodged for theft of electrical energy. It is seen that the proceedings have been drawn in the presence of the representative of the respondent Industry and the meters were found to have been tampered with. In furtherance thereof, a prima facie conclusion of pilferage has been reached that the matters were tampered with and the respondents were called upon to pay the difference of the rate for electricity said to have been consumed during the stated period of the detection. It would appear that the said assessment was based upon the pervious consumption. It is seen that since the proceedings are pending, it would not be desirable to record any finding in this behalf."

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120. LAND ACQUISITION ACT, 1894 – Section 18
Whether Reference Court can remand the matter to Land Acquisition Officer for re-consideration ? Held, No, because reference u/s 18 not an appeal – Law explained.
Gabbar Singh and others v. The Collector, Gwalior and others
Reported in 2007 (1) MPHT 509

Held :

Though, even assuming that the provisions of CPC are applicable to the reference application pending before the Reference Court, the powers under Order 41 of CPC are not available, so that the Reference Court can remand the matter for determination of compensation. While Section 54 provides that appeal against the award passed by the District Court lays down with the Appellate Court, hearing the appeal against the award of the District Court, shall have all the powers provided in Civil Procedure Code.

After hearing parties and perusing the award I find that the Land Acquisition Officer has passed the award in respect of the land only, so that the claimants can get compensation without any delay. He has specifically mentioned that he is not passing award in respect of crops and trees standing on the land, as it will delay the matter of passing the award in respect of the land and therefore he reserved his rights to pass supplementary award in respect of the trees and the crops standing on the land.

Even otherwise if the District Court come to the conclusion that it was incumbent on the Land Acquisition Officer to pass award in respect of the trees and crops then he would have passed award for the trees and crops standing

on the land as he has already recorded evidence on this point. Therefore, he has committed error in remanding the matter. Thus, I find that the District Court has committed error in treating the award as interim award.

Moreover, as per the provisions of law, discussed above the District Court has no power of remand while hearing the application under Section 18 of the Land Acquisition Act because it is a reference Court and not an Appellate Court.

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121. PUBLIC INTEREST LITIGATION :
ESSENTIAL COMMODOTIES ACT, 1955 – Sections 3 & 5
Exercise of power by State Government u/s 3 (2) (c) of the Act for controlling the price of milk – Duty of the State Government explained – Necessary directions issued.
Nagrik Upbhogkta Margadarshka Manch v. Secretary, Food, Civil Supplies and Consumer Protection Department, Govt. of M.P. and others
Reported in 2007 (1) MPHT 512

Held :

Although it is stated in Para 5.6 of the petition that the rates of milk at Jabalpur have been increasing year after year and has increased from Rs. 16/- per litre in 2003 to 20/- per litre in 2006, in the Return and Additional Return filed by the respondents, these statements in Para 5.6 of the writ petition have not been disputed by the State Government. The State has also brought on record the fact that the Jabalpur Co-operative Milk Producers Union is selling pasteurized milk with varying fat content in poly-packs at the rate of Rs. 18/-, 17/-, Rs. 16/- and Rs. 14/- per litre. Thus, it is evident that while the Dairy Union is selling its best quality milk in poly-packs after pasteurisation at the rate of Rs. 18/- per litre, the private dairy owners are selling the same milk at the rate of Rs. 20/- per litre in the absence of fixation of price by the State Government under Section 3 (2) (c) of the Act resulting in the Essential Commodity being sold at an unfair price. In the Additional Return filed on behalf of the State Government, on the other hand, the increase in the rates of milk has been brushed aside with the following reasons :–

> "**8**. As per petitioner's own showing, price of milk has increased from Rs. 18 to Rs. 20 in the past three years. There has thus been increase of about 11% in the price of milk in the last three years. On the contrary price of cereals, pulses and edible oils have increased much manifolds. The petitioner has however not espoused any cause in regard to increase in the prices of other essential commodities like cereals, pulses and edible oils."

It will be clear from the aforesaid reasons given in the Additional Return filed by the respondents that the State Government is unwilling to exercise its power under Section 3 (2) (c) of the Act as vested in it by the Central Government

under Section 5 of the Act by the Central Government Order No. G.S.R. 800, dated 9th June, 1978 for wholly extraneous considerations in disregard of its statutory duty conferred under the Act. We therefore, have no option but to quash the impugned order dated 24.8.2006 of the State Government in the Food, Civil Supplies and Consumer Protection Department and direct the State Government to make an order under Section 3 (2) (c) of the Act for controlling the price of milk in Jabalpur area so that the same in available to weaker sections of the society in Jabalpur area at a fair price.

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122. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 & 457
Supardgi of vehicle – Whether a person can have supardgi of the vehicle purchased by him though not registered by RTO in his name? Held, Yes – Law explained.
Dashrath Prasad v. State of Madhya Pradesh and others
Reported in 2007 (1) MPHT 520

Held :

Applicant is not accused in the present case. He purchased the aforesaid Maruti Van from Dashrath Prasad Dubey through sale letter dated 30.9.2004. Though the sale letter and other documents obtained from Dashrath Prasad Dubey were filed before the Regional Transport Officer for transfer of the vehicle in the name of the applicant, but the registration of the vehicle called not be issued in his name and the vehicle was seized by the police. Learned Addl. Sessions Judge rejected the application filed by applicant on the ground that the vehicle was not transferred to the applicant the registration certificate was not issued to him.

Perusal of the documents filed by the applicant shows that the sale letter and other documents were produced before the concerned Regional Transport Officer for transfer of the vehicle. The vehicle was insured and the seller viz; Abdul Sameer had furnished affidavit stating that he had sold the vehicle to applicant and had obtained full price of it.

In case of sale/transfer of movable property the title of the property passes to transferee as soon as the price is paid and the possession of the vehicle is delivered to transferee. The motor vehicle being movable property its sale is covered under the provisions of Sales of Goods Act. The registration of the vehicle under the provisions of Motor Vehicle Act is only for the purpose of fixing ostensible ownership for the liability of taxes etc. In the present case, since the sale letter has been issued and submitted to the Regional Transport Officer, it cannot be said that the applicant had no title of the vehicle. Since the applicant is a title holder of the vehicle, he is definitely entitled for its custody subject to other conditions imposed on him.

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123. CRIMINAL PROCEDURE CODE, 1973 – Section 174
CRIMINAL TRIAL :
Appreciation of evidence – Inquest report – Details to be mentioned in the inquest report – Omission to mention names of the accused in the inquest report, effect of – Held, inquest report is confined to ascertainment of the apparent cause of death – Details of overt acts etc. not necessary to be recorded– Law explained.
Dinesh and Rajesh v. State of Madhya Pradesh
Reported in 2007 (1) MPHT 564 (DB)

Held :

In support of the next contention that the absence of names of the accused in the inquest report was indicative of the fact that the prosecution case was in embryo state up to the point of time when the dead body of Kailash was sent for post-mortem. The learned Senior Counsel placed strong reliance on the observations made by the Supreme Court in *Thanedar Singh Vs. State of M.P. AIR 2002 SC 175.* However, the principle propounded in *Maharaj Singh Vs. State of U.P., (1994) 5 SCC 188,* and reaffirmed in *Thanedar Singh's case (supra),* stands overruled by the latest latest decision of the Apex Court in *Radha Mohan Singh Vs. State of U.P., 2006 Cri. LJ 1121 (SC).* Highlighting the very purpose of Inquest report, under Section 174 of Criminal Procedure Code, the Court observed :–

> "Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal, or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details."
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> 1994 AIR SCW 2210, overruled. (Paras 12, 13)

Accordingly, no significance could be attached to non-mention of names of the assailants in the Inquest Report.

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124. INDIAN PENAL CODE, 1860 – Sections 193 & 196

Doctor conducting post martem not referring certain injuries in the post mortem report – On appreciation found that post mortem report was left incomplete to give undue advantage to the accused – Such willful act amounts to an offence u/s 193/196 IPC – Prosecution of the doctor ordered for intentionally giving false evidence.

Mangal Prasad v. Johar and others

Judgment dated 09.03.2007 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Criminal Revision No. 955 of 1999.

Held :

If a public servant corruptly makes a report in a judicial proceeding it will be offences under section 193 IPC and section 196 IPC and preparation of document with an intention to save person from punishment, it will be an offence falling under section 196 IPC. Thus, willful act of the Doctor in not referring to other injuries in the post mortem report discloses his intention to protect the respondents who are quilty of commission of murder. Witnesses were firm on the point of beating of deceased by lathi and number of injuries received by the deceased. It is held that post mortem report is incomplete report prepared by the doctor to give undue advantage to the accused. Appropriate steps for prosecution of PW9 Dr. Y.K. Malaiya be initiated for intentionally preparing false evidence.

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125. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Maintenance order –Whether an application u/s 125 can be dismissed on account of delay ? Held, No – Controversy arising out of two conflicting views on the point resolved – Law explained.

Makarchand v. Smt. Leelabai and another.

Judgment dated ------ 03.2007 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Criminal Revision No. 4 of 2002

Held :

Chapter IX of the Code is a self contained Code. It relates to filling of the application. It gives circumstances when application will not be maintainable. The procedure of trying the application is provided under section 126 of the Code and the alteration in allowance or modification of order is provided under section 127 of the Code. Section 128 of the Code relates to enforcement of order of maintenance. Thus, Chapter IX is a self contained Code. Sub section (4) and (5) of Section 125 has given the circumstances when wife is not entitled for maintenance. Sub section (4) and (5) of Section 125 nowhere provided that mere delay in filing the application will be a ground to non sue the wife from receiving the maintenance. Under sub section (4) it is provided that no wife shall be entitled to receive an allowance from her husband if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband,

or if they are living separately by mutual consent. Thus, only on the grounds enumerated under sub section (4) of Section 125 of the Code, application for maintenance can be rejected. Even if maintenance is granted then also if proof is given that any wife in whose favour an order has been passed is living in adultery or withour sufficient reason refuses to live with her husband, or living separately by mutual consent, the Magistrate may cancel the order.

Thus, this provision is for grant of maintenance to the wives who are unable to maintain themselves. So the order can be passed when it is proved that wife is unable to maintain herself. The aims and object of Section 125 are crystal clear and the ingredient when application can be allowed is that wife is unable tomaintain herself and her husband has 'sufficient means' and is willfully neglecting to maintain her. Similarly this provision is applicable to children and parents. What is required to be seen by the Magistrate is whether wife, parents or children are unable to maintain themselves. No period of limitation is prescribed in the Code. Inordinate delay in filing the application will not be a ground to reject the application as cause of action accrues to the applicant everyday when person having sufficient means neglects or refuses to maintain his wife, parents or children.

Division bench of this court in *Nanhibai v. Netram, 2001 (3) MPLJ 170,* has held in para 28 of the judgment that Section 125 of the Code is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. It is held in para 28 as under :

> It cannot be disputed or denied that section 125 criminal Procedure Code is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. There is no doubt that sections of words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance, without doing annihilation to the object and plain language used in section 125 (3), Criminal Procedure Code.

This question came up for consideration before the division bench of Andhra Pradesh High Court in the Case of *Golla Seetharamulu v. Golla Rathanamma , 1991 CrLJ 1533.* In this case it is specifically held that unless the restrictions mentioned in sub section (4) of Section 125 of the Code are proved by the husband, the applicant will have a right to claim maintenance. Mere delay on the part of wife, parents of children is not sufficient to hold that the applicants have waived their right. We may clarify that there is no waiver against the statutory right.

Apex Court in the case of *Bhagwan Dutt v. Smt. Kamla Devi and another, AIR 1975 SC 83,* has held as under :

> "The object of the provisions of Sections 488, 489 and 490 being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirement of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments."

In the case of *Smt. Savitri v. Govind Singh Rawat, AIR 1986 SC 984,* it is held as under :

> "Having regard to the nature of the jurisdiction exercised by a Magistrate under S. 125, the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to pending final disposal of the application."

In the case of *Bai Tahira v. Ali Hussain, 1979 SC 326,* it is held that neglect is the *sine qua non* for the application under Section 125 of the Code. The wife must be able to prove that she had been neglected. The proceeding may not operate as final verdict, a decisive one, in a civil proceeding between the parties for determining the issues for declaration as to legitimacy of children and related reliefs but it cannot be said that when the wife is unable to maintain herself, her application would be thrown at the threshold or not be entertained or allowed as she has come to Court at a belated stage.

Considering the spirit and intention of the legislature we hold that there is no period of limitation to entertain the application under section 125(1) of the Code. Application cannot be thrown out at the threshold. If husband, son or father neglects or refuses to maintain their wife, parents or children respectively, the application will not be thrown at the threshold unless the husband is able to prove the grounds mentioned under sub section (4) of section 125 of the Code. Code nowhere provides for rejecting the application on the ground of delay. With due respect, we hold that the earlier judgments have not laid down the correct law and the question is answered as under :

> "that the application for maintenance after inordinate delay is maintainable and it cannot be thrown out after the applicant proves that he or she, as the case may be, is not in the position to maintain `himself or herself."

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126. CRIMINAL PROCEDURE CODE, 1973 – Section 310

Spot inspection by presiding officer of the Court dealing with the case – Normally Court should refrain from making such inspection – Spot inspection may be only for appreciating the evidence adduced in the trial and not as evidence in the case – Mode and manner of conducting spot inspection – Law explained.

State of M.P. v. Mujjaffar Hussain@ Munna Painter and others Judgment dated 05.04.2007 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Criminal Appeal No. 130 of 2001 and Criminal Appeal No. 3427 of 1999

Held :

...There is nothing on record to suggest that local inspection was necessary. Order sheet is silent about the local inspection by the Presiding Officer in presence of parties. Normally whenever local inspection is carried out in presence of the parties and notes of inspection are prepared, its copy is supplied to counsel for the parties free of cost. An opportunity ought to have been given to counsel for the parties to address the Court on the notes of Presiding Officer. Normally the object of local inspection is to enable the Judge to understand correctly the topography of the spot in which offence is alleged to have been committed. We may hasten to add that place of incident was the Court building itself where Presiding Officer was holding court sitting every day throughout the year. Thus, the spot map prepared by him will not form part of the evidence as he has not prepared notes of inspection and given it to the parties and the local inspection carried out by him cannot take place of evidence and the Presiding Officer cannot be a witness of the case. Spot map prepared by the Presiding Officer does not bear any date or signatures of the counsel for the parties. Trial Court on the basis of spot map has proceeded to decide the case.

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Two facets weighed in the mind of the trial Court while rejecting the case of prosecution namely : (i) video cassette prepared by the local administration and (ii) the spot map prepared by the Presiding Officer and his unwritten opinion which was in his mind that it was not possible for the witnesses to see the incident.

The map prepared by the Presiding Officer has not been exhibited nor the witnesses have been confronted with it. Section 310 of Cr.P.C. provides that any Judge or Magistrate may, at any stage of inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection. It further provides that such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desire, then a copy of the memorandum shall be furnished to him free of cost. Thus,

under section 310, Cr.P.C., the presiding officer can inspect the spot at any stage of the trial and shall record a memorandum of any relevant fact observed by him at the spot. In this case, ordersheets do not disclose that the Presiding Officer, after notice to the parties, has inspected the spot and has prepared a memorandum of relevant facts observed in such inspection. On the contrary, he has prepared a spot map, whereas spot map (Ex.P/13) filed by the prosecution is already on record, coupled with the fact that the place of incident is the district Court building. As such, dispute regarding correctness of the spot map prepared by the investigating officer could be raised by the defence during his cross-examination. Spot map (Ex.P/13) is prepared by the investigation officer on 10.7.96 in presence of two witnesses. No reasons have been assigned by the trial Court for not considering the spot map (Ex.P/13) filed by the prosecution along with challan papers. Though, it is written in the judgment that map was prepared by the Presiding Officer in presence of counsel for both the parties, but preparation of the map in presence of parties creates doubt as it has not been signed by the counsel for the parties and the spot map does not bear any date on which it was prepared. In the case of *Keisam Kumar Singh vs. State of Manipur (AIR 1985 SC 1964)*, it is held in paragraph 13 of the judgment that normally a court is not entitled to make a local inspection and even if such an inspection is made, it can never take the place of evidence or proof but is really meant for appreciating the position at the spot. The Sessions Judge seems to have converted himself into a witness in order to draw full support to the defence case by what he may have seen. Similarly in the case of *Pritam Singh vs. State of Punjab (AIR 1956 SC 415)* it is held that a Magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same. Division Bench of the Nagpur High Court in the case of *Daljit Singh vs. Emperor [(1938) 39 CrLJ 92]* has held that an inspection note by a Magistrate is not evidence and is nothing more than a record made by the Magistrate to enable him to understand better the evidence to be recorded. He is entitled to embody in his note only facts observed by himself on the spot and not the result of statements made to him there. Recently in the case of *State of M.P. vs. Mishrilal (AIR 2003 SC 4089)*, it is held in paragraph 9 of the judgment as under :-

> "... the learned trial Judge made a spot inspection on 11.3.1991 under section 310, Cr.P.C. However the trial Judge did not choose to record the memo of inspection. The judgment was delivered on 16.3.1991. What had prompted the learned trial Judge to have recourse to spot inspection was not spelled out because no memorandum of inspection was prepared. But it is clearly suggestive of deficiency of evidence with regard to place of occurrence. In such a situation, it was incumbent on the part of the learned trial judge, to have recorded the memo of inspection for proper appreciation of the inspection. Undoubtedly, the mandatory provision has not been followed by the trial Court."

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127. CRIMINAL TRIAL :

Appreciation of Evidence – FIR – Delay in lodging FIR, effect of – Though mere delay not necessarily fatal, however, delay must be explained – Factors leading to delay, appreciation of – Appreciation of evidence regarding delay – Law explained.

Ramdas and Ors. v. State of Maharashtra

Reported in 2007 (1) ANJ (SC) 217

Held:

Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the Court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the Court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the Court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explaination for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the Court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitationl of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the Court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the Court that is important. No straitjacket formula can be evolved in such matters, and each case must rest on its own

facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See - *AIR 1956 SC 216 : Pandurang and Others vs. State of Hyderabad*). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the Court of fact.

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128. CRIMINAL PROCEDURE CODE, 1973 – Section 31
Sentence in case of conviction for several offences at one trial – Though sentences may be ordered to run consecutively, such period should not be more than 14 years – Law explained.
Chatar Singh v. State of M.P.
Reported in 2007 (1) ANJ (SC) (NOC) 72 = AIR 2007 SC 319

Held:

Interpretation and application of Section 31 of the Criminal Procedure Code, 1973 is involved in this appeal...

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We, although, appreciate the anxiety on the part of the learned Sessions Judge as also the learned Judge of the High Court not to deal with such a matter leniently, but, unfortunately, it appears that the attention of the learned Judges was not drawn to the provision contained in Section 31 of the Criminal Procedure Code. The said provision reads thus:

> "**31. Sentence in cases of conviction of serveral offences at one trial** – (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the serveral punishments prescribed therefor which such Court is competent to inflict, such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court."
>
> Provisos appended to the said Section clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years.

Learned Sessions Judge as also the High Court, in our opinion, thus, committed a serious illegality in passing the impugned judgment.

In *Kamalanantha & Ors. vs. State of T.N. 2005 (5) SCC 194,* this Court although, held that even the life imprisonment can be subject to consecutive sentence, but it was observed:

"Regarding the sentence, the Trial Court resorted to Section 31 Cr.P.C. and ordered the sentence to run consecutively, subject to proviso (a) of the said section."

Although, the power of the Court to impose consecutive sentence under Section 31 of the Criminal Procedure Code was also noticed by a Constitution Bench of this Court in *K. Prabhakaran vs. P. Jayarajan, 2005 (1) SCC 754,* but, therein the question of construing proviso appended thereto did not and could not have fallen for consideration.

The question, however, came up for consideration in *Zulfiwar Ali & Anr. vs. State of U.P. 1986 All. L.J. 1177,* wherein it was held;

"The opening words "In the case of consecutive sentences" in sub-section. 31(2) make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. After providing that in such a case if an aggregate of punishment for serveral offences is found to be in excess of punishment which the Court is competent to inflict on a conviction of single offence, it shall not be necessary for the Court to send the offender for trial before a higher Court. After making such a provision, proviso (a) is added to this sub-section to limit the aggregate of sentences which such a Court pass while making the sentence consecutive. That is this proviso has provided that in no case the aggregate of consecutive sentence passed against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above proviso. It is accordingly not liable to be sustained."

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129. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 23-E, 31 & 32 Jurisdiction – Whether an order by RCA in awarding damages in execution proceedings regarding a decree of eviction passed under Chapter III-A of the Act is appealable? Held, No – The only remedy can be by way of revision u/s 23-E – Law explained.
State Bank of India, Nagda Branch, Nagda, v. Smt. Suraj Bai
Judgment dated 28.03.2007 passed by the High Court of Madhya Pradesh (Indore Bench) in S.A. No. 1282 of 2005.

Held :

Under the Scheme of the M.P. Accommodation Control Act, the power to decide the cases and in particular eviction cases is conferred on civil court as also on Rent Controlling Authority (RCA). Some eviction cases specified in Chapter III-A of the Act are decided exclusively by RCA whereas those specified in Chapter III of the Act are decided by Civil Court. So far as cases falling in Chapter III-A of the Act is concerned, the jurisdiction to decide these cases lie exclusively with the RCA. Section 23-E which is a part of Chapter III-A provides for a remedy to an aggrieved for filing Revision to High Court against the orders passed by RCA in relation to eviction cases falling in Chapter III-A. Section 23-E

however gives overriding effect on the 2 appellate legal remedies provided under sections 31 and 32 of the Act.

Sections 31 & 32 of the Act fall in Chapter V. Section 31 gives right of appeal to an aggrieved against all orders of RCA passed under the Act except those orders which fall under Chapter III-A. The first appeal under section 31 *ibid* lies to District Judge; whereas second appeal lies under Section 32 to High Court against the first appellate court's order passed under section 31 *ibid.* Section 35 empowers the RCA to exercise all powers of civil court as an executing court while executing the orders passed by RCA or by District Court or by High Court under the Act.

Coming now to the facts of this case, it is not in dispute that the original order of eviction, dated 14.10.1998 was passed by RCA in the eviction proceedings which squarely fell in Chapter III-A i.e. under Section 23-A ibid. In these circumstances, the order dated 7.03.2003, passed by RCA as an executing court on an application made under Section 47 of C.P. Code which arose out of main eviction proceedings was also an order passed in Chapter III-A of the Act. In other words, when the original proceedings were emanated from Chapter III-A then it follows as a necessary consequence that even the execution proceedings also deem to arise out of original proceedings and thus would fall in the same Chapter III-A for the purpose of determining as to whether right of revision an provided in Chapter III-A is available to an aggrieved against an order passed in execution proceedings or right of appeal as provided in Chapter V of the Act ?

It is not in dispute that all orders whether interim or final when passed by RCA in section 23-A proceedings under Chapter III-A are revisable by High Court under section 23-E Revision. As a necessary corollary, even the orders passed by RCA in execution proceedings arising out of original proceedings under section 23-A which is a part of Chapter III-A would also be subject to Revision by the High Court under section 23-E of the Act. In other words, no first appeal would lie under section 31 of the Act to District Judge against such orders passed by RCA in execution proceedings by virtue of overriding effect given by section 23-E over section 31 and section 32 ibid.

In my view, it would be incongruous to hold that though revision lies under section 23-E of the Act against the final or interim order passed by RCA in proceedings under Chapter III-A to High Court but first appeal would lie under section 31 of the Act to District Court against all orders passed by RCA in execution proceedings which arise out of main case under section 23-A of Chapter III-A. In other words, if the revision lies to High Court against all orders passed by RCA in proceedings falling in Chapter III-A then any order passed by RCA in execution proceedings arising out of original proceedings decided by RCA under Chapter III-A would also be amenable to Revisionary jurisdiction of the High Court under section 23-E ibid and not to appellate jurisdiction of District Court under Section 31 ibid. The legislative intent in recognizing exclusive Revisionary jurisdiction of High Court in proceedings under Chapter III-A is clear when we read section 23-E ibid. As observed supra, it gives overriding effect over section 31-32 of the Act.

In my considered view, therefore, the learned Additional District Judge while entertaining and deciding the appeal should have taken note of this legal issue appearing on the face of the record. Infact, I am constrained to mention that the appeal memo did not even mention any provision of law under which the appeal was filed by appellant. It was thus a lapse on the part of appellant as also on the part of court to ignore this material issue which led him to usurp the appellate jurisdiction when infact he had none for deciding the appeal.

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130. M.P. MADHYASTHAM ADHIKARAN ADHINIYAM, 1983 – Sections 2 (g), 2 (i), 7 & 20
ARBITRATION AND CONCILIATION ACT, 1996 - Section 11 (6)
Dispute between a registered society constituted by the Government for constructing roads under PMGSY and the consultant appointed by it regarding execution of the contract – Whether the disputant society is covered by the definition of 'State' or 'Public undertaking' of the State Government and the dispute can be covered by disputes under 'works contract' u/s 2 (i) of the State Act ? Held, Yes – Further held, S.11 (6) of the Act of 1996 not applicable in such a case.
M/s Technogem Consultants Pvt. Ltd. v. The General Manager, Madhya Pradesh Rural Development Authority
Judgment dated 16.01.2007 passed by the High Court of Madhya Pradesh (Indore Bench) in M.C.C. No. 850 of 2005

Held:

With a view to develop and upgrade the road conditions of rural areas of various States in the country including that of State of Madhya Pradesh, the Government of India has framed a **Yojana** called **"Pradhan Mantri Gram Sadak Yojana"** (for short called **"PMGSY"**). The Government of India for execution of this **Yojana** has given huge funds to State of M.P. so that construction and upgradation of rural roads in the State of M.P. can be undertaken by the State. The State of M.P. with a view to enable them to properly execute the work of construction of road and its up-gradation pursuant to this Yojana has formed one society by name **"M.P. Rural Road Development Authority"** (respondent herein and is called hereinafter for brevity **"Authority"**). This Authority i.e. Society is registered under Societies Registration Act (Annexure R-3). It is fully owned and controlled by State officials as is clear by its by-laws (Annexure R-3), As observed supra, it is this Authority through which the State has undertaken the execution of the entire construction work of road as also its up-gradation in rural areas of State of M.P. under the **PMGSY**.

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The stand of the respondent in substance in their reply is; that application made by the petitioner under section 11(6) of **"The Act"**, is not maintainable. According to respondent, since the respondent happens to be a State and the agreement in question (Annexure P-1) is a **"works contract"** or in other words is in the nature of a **"works contract"** as defined in **section 2(i) of M.P.**

Madhyastam Adhikaran Adhiniyam, 1983 (for short hereinafter called "**Adhiniyam**") and hence, the remedy of petitioner lies in referring the dispute to the Tribunal as defined in section 2(h) read with section 3 of Adhiniyam by filing the dispute under section 7 of the Adhiniyam before the Tribunal. It is also contended that respondent being a **"public undertaking"** as defined under section 2(g) of Adhiniyam and hence, also this application is not maintainable. It is thus, contended that this court has no jurisdiction to entertain the application made by the petitioner under section 11(6) of the Act.

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Sections 2(g), 2(i), 7 and 20 of the Adhiniyam are relevant for deciding the aforesaid issue. They read as under :-

> **"S.2(g).- "Public Undertaking"** means a Government Company within the meaning of Section 617 of the Companies Act, 1956 (No.1 of 1956) and includes a Corporation or other statutory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government.
>
> **S.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, work-shop, powerhouse, 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.**
>
> (emphasis supplied)
>
> **S.7- Reference to Tribunal.** – (1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.
>
> (2) Such reference shall be drawn up in such form as may be prescribed and shall be supported by an affidavit verifying the averments.
>
> (3). The reference shall be accompanied by such fee as may be prescribed.
>
> (4) Every reference shall be accompanied by such documents or other evidence and by such other fees for service or execution of process as may be prescribed.

(5) On receipt of the reference under sub-section (1), if the Tribunal is satisfied that the reference is a fit case for adjudication, it may admit the reference but where the Tribunal is not so satisfied it may summarily reject the reference after recording reasons therefor.

S.20.- Bar of jurisdiction of civil court. - (1) As from the date of the constitution of the Tribunal and notwithstanding anything contained in Arbitration Act, 1940 (No.10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act.

1(A) Notwithstanding anything contained in sub-section (1), a Civil Court may entertain and decide any dispute of the nature specified in the said sub-section referred to it by a person in the capacity of indigent person.

Explanation.- For the purpose of this sub-section "indigent person" shall have the meaning assigned to it in the Code of Civil Procedure, 1908 (No.5 of 1908).

(2) Nothing in sub-section (1) shall apply to any arbitration proceeding either pending before any arbitrator or umpire or before any court or authority under the provisions of Arbitration Act, or any other law relating to Arbitration and such proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force."

Coming now to the undisputed facts of the case, I am inclined to hold that respondent **"Authority"** is none other than the **"State"** i.e. State of M.P. whereas; the agreement (Annexure P-1) is a **"works contract"** as defined under section 2(i) of the Adhiniyam. As observed supra, the State of M.P. themselves have for their own convenience formed a Society and got the same registered under the Society Registration Act. Indeed, it is clear from letter of invitation (Annexure P-1, page 18), as also the by-laws filed by respondent (Annexure R-3). The following recitals in letter of invitation are material:-

Letter of Invitation

Subject:- Supervision consultancy for the work of construction/ upgradation of rural roads in Madhya Pradesh under PMGSY.

1. INTRODUCTION :-

1.1. **The MADHYA PRADESH RURAL ROAD DEVELOPMENT AUTHORITY is a registered Society constituted by Government of Madhya Pradesh under Societies Registration Act for construction of rural**

roads in the State. At present there are 17 Project Implementation Units (PIU) as field formation of the State unit of MPRRDA each covering 2 to 4 districts of the State list of Programme Implementation Units along with their Jurisdictions is attached as Appendix-II. The number of Project Implementation Units is likely to be increased to 27. A list of works and their probable amount for which the offers are invited is annexed as Appendix-I."

(emphasis supplied)

In my considered view, merely because the State has formed a **"Society"** for execution of Yojana would not make such **"Society"** a distinct legal entity from the State thereby losing all the attributes of State. In other words. even after forming the society, by the State, it remains a **"State"** for all purposes and thus retains all its characteristics of a **"State"** - the only difference being that one legal entity by separate name has come into existence. In my humble view, it is only for the convenience of State for execution of the project in hand and nothing else. At least it remains a State Government for the purpose of attracting the provisions of Adhiniyam.

In my considered view, therefore, the respondent – Authority is a **"State Government"** for all practical purposes and hence, amenable to the provisions of Adhiniyam provided other conditions necessary for invoking the jurisdiction of the said Adhiniyam, are found present in the case. In other words, notwithstanding forming of a society i.e. **Authority** by the State, the respondent remains a State and retains all characteristics and attributes of a **"State"** so as to attract the rigour of Adhiniyam in question.

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Mere perusal of aforequoted definition of **"works contract"** in section 2(i) and in particular the words underlined would go to show that if the **State Government** or its **official** enters into a contract with any person for construction, repairs and maintenance of road then it becomes a works contract, as defined in section 2(i). Similarly, definition of **"works contract"**, also include an agreement in relation to all other matters relating to execution of any of the said work i.e. road. In other words, if in execution of main work as in this case **road**, any other agreement is entered into by State Government with any person for accomplishing execution of road work then the said agreement would also be regarded as **"works contract"** within the meaning of section 2(i) ibid.

In my considered view, therefore, the agreement in question (Annexure P-1) being in the nature of providing all kind of consultancy services by the petitioner to State Government which are necessary for construction and development of road and hence, it becomes a **"works contract"** as defined under section 2(1) ibid. In other words, it is a contract which falls in second category of **"works contract"** in its inclusive definition namely **"all other matters relating to execution of any of the said work"** i.e. road.

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131. FACTORIES ACT, 1948 – Sections 2(m), 7(1) (f) and 92
Liability of a city engineer looking after water treatment plant of Municipal Corporation as 'occupier' u/s 2(n) and r/w/s 92 for the violation of the provisions of the Act – Held, prosecution of the City Engineer cannot be quashed on the ground that actual offender is someone else though such defence can be taken by him at a later stage.
Sunil Shrivastava v. State of Madhya Pradesh
Judgment dated 30.03.2007 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Misc. Cr. Case No. 10333 of 2006

Held:

The following facts are not in dispute:-

> "Each one of the abovementioned Water Treatment Plants is a "factory" within the meaning of Section 2(m) of the Act. The petitioner is employed as Assistant Engineer in the Public Health Engineering Department of Madhya Pradesh. At the relevant point of time, he was working on deputation as City Engineer in the Municipal Corporation of Bhopal."

According to the petitioner, his prosecution for the alleged offences on the assumption that he was the manager of the respective Factory is an abuse of the process of the Court as he was neither appointed nor nominated by the Municipal Corporation as such. Moreover, City Engineer is not included in the authorities specified under Section 6 of the M.P. Municipal Corporation Act, 1956, to carry out various statutory functions including construction, maintenance and upkeep of the Water Works under Section 220 of the Act. In such a situation, he could not be held liable either personally or vicariously for any violation of the provision of the Act or the rules made thereunder.

The prayer to quash the prosecution has been opposed on the ground that the petitioner, even in absence of a formal nomination, under Section 7(1) (f) of the Act, as Manager of the factory, was liable as the deemed "occupier" by virtue of proviso (iii) appended to Section 2(n) of the Act. Further, it has also been submitted that the inherent power under Section 482 of the Code should not be exercised to stifle a legitimate prosecution. For this, reliance has been placed on the decision of the Apex Court in *CBI vs. Ravi Shankar Srivastava, (2006) 7 SCC 188.*

The offence punishable under Section 92 of the Act is a strict liability offence. However, the legislature has itself taken care to dilute the rigour of this penal provision by providing an exception to the strict liability rule by laying down a third party procedure in Section 101 that enables the occupier or the manager of the Factory to extricate himself from punishment by establishing that the actual offender is someone else by giving satisfactory proof of the facts as contemplated by sub-section (a), and (b) thereof *(J.K. Industries Ltd. vs. Chief Inspector of Factories and Boilers (1996) 6 SCC 665* referred to).

●

PART - III

CIRCULARS/NOTIFICATIONS

मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय

क्रमांक सी/3/9/1/3/2005 भोपाल, दिनांक 30 अगस्त, 2006.

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मण्डल, म.प्र. ग्वालियर,
समस्त संभागीय आयुक्त,
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,
समस्त मुख्य कार्यपालन अधिकारी जिला पंचायत,
मध्यप्रदेश,

विषय:– मध्यप्रदेश के स्थानीय निवासी की परिभाषा का निर्धारण।

सन्दर्भ:– सामान्य प्रशासन विभाग का परिचय क्रमांक 381–2417/1/3/74 दिनांक 11.6.75, क्रं. 501/1386/1/3/75, दिनांक 25.7.75, क्रं. 489/2250/1/3/77 दिनांक 24.11.77 क्रं.सी 3–30/83/3/1 दिनांक 1.10.83, क्रं.सी/3–17/87/3/1 दिनांक 18.8.87, क्रं.3–22/88/3/49 दिनांक 9.9.88, क्रं. 17/392/49/3/88 दिनांक 12.1.89, क्रं.618/352/49/3/89 दिनांक 11.10.89 क्रं.सी 3–3/93/3/1 दिनांक 12.2.93, क्रं. सी 3–23/95/3/1 दिनांक 15.12.95, क्रं. सी 3–18/03/3/1 दिनांक 6.10.2003, क्रं. सी 3–9/05/3/1, दिनांक 5.11.2005, क्रं.सी 3–9/2005/3/1 दिनांक 21.11.2005।

.....

राज्य शासन एतद् द्वारा संदर्भित परिपत्रों को निरस्त करते हुए मध्यप्रदेश के स्थानीय निवासी की पात्रता के लिए निम्नानुसार मापदण्ड निर्धारित करता है :–

1.1 वह मध्यप्रदेश में पैदा हुआ हो,

अथवा

1.2 वह, अथवा उसके पालकों में से कोई, अथवा उसके पालकों में से कोई जीवित न हो तो उसका वैध अभिभावक (गार्जियन) मध्यप्रदेश में कम से कम 15 वर्ष से निरंतर रह रहा हो,

अथवा

1.3 उसके पालकों में से कोई राज्य शासन का सेवारत या सेवानिवृत्त कर्मचारी हों,

अथवा

1.4 केन्द्रीय शासन का मध्यप्रदेश में सेवारत कर्मचारी हो,

अथवा

1.5 वह स्वयं/उसके पालक का राज्य में पिछले पांच वर्षों से अचल संपत्ति/उघोग/व्यवसाय हो।

एवं

2. उपरोक्त शर्तों के साथ वह निम्नलिखित अतिरिक्त शर्त की पूर्ति करते हों :–

2.1 उसने मध्यप्रदेश राज्य अथवा अविभाजित मध्यप्रदेश राज्य के ऐसे जिले जो वर्तमान में मध्यप्रदेश राज्य के अन्तर्गत आते हैं, में स्थित किसी भी शिक्षण संस्था में कम से कम तीन वर्ष तक शिक्षा प्राप्त की हो,

अथवा

2.2 उसने मध्यप्रदेश राज्य अथवा अविभाजित मध्यप्रदेश राज्य के ऐसे जिले जो वर्तमान में मध्यप्रदेश राज्य के अन्तर्गत आते हैं, से निम्नलिखित परीक्षाओं में से कम से एक परीक्षा पास की हो :–

2.2.1 यदि किसी संस्था में प्रवेश के लिए या शासन के अधीन सेवा के लिए न्यूनतम शैक्षणिक योग्यता मान्यता प्राप्त विश्वविघालय की स्नातक उपाधि निर्धारित हो तो उच्चतर माध्यमिक परीक्षा या 8वीं कक्षा की परीक्षा,

अथवा

2.2.2 यदि किसी संस्था में प्रवेश के लिए या शासन के अधीन सेवा के लिए न्यूनतम शैक्षणिक योग्यता किसी भी बोर्ड की इन्टरमीडिएट, हायर सेकेण्डरी या कोई समकक्ष परीक्षा निर्धारित की गई हो, तो 8वीं कक्षा की परीक्षा,

अथवा

2.2.3 अन्य मामलों में पांचवी परीक्षा।

3. परन्तु उपरोक्तानुसार बिन्दु क्रं.–2 की मध्यप्रदेश से शिक्षा संबंधी अतिरिक्त शर्तें निम्नलिखित स्थितियों में लागू नहीं होगी :–

3.1 ऐसे आवेदक जो अंध, मूक, बधिर हैं, यदि अन्य प्रदेश से शिक्षा ग्रहण करते हैं।

3.2 शैक्षणिक संस्थाओं में प्रवेश हेतु, मध्यप्रदेश के स्थानीय निवासी की परिभाषा के अन्तर्गत आने वाले सेना के अधिकारी/कर्मचारियों एवं भूतपूर्व सैनिक यदि सैनिक सेवा के कारण मध्यप्रदेश में पदस्थ नहीं हो सका हो तो उसकी संतान द्वारा म.प्र. से बाहर शिक्षा ग्रहण करने पर।

3.3 मध्यप्रदेश के स्थानीय निवासी की परिभाषा के लिए निर्धारित उपरोक्त शर्त क्रमांक 1.2 की पूर्ति करने पर –

3.3.1 अशिक्षित व्यक्ति अथवा

3.3.2 मध्यप्रदेश के स्थानीय निवासी की परिभाषा के अन्तर्गत आने वाले व्यक्ति की संतान यदि मध्यप्रदेश के बाहर की शिक्षण संस्थाओं से शिक्षा ग्रहण करते हैं।

4. निम्नलिखित प्रवर्ग भी मध्यप्रदेश के स्थानीय निवासी होंगे :–

4.1 अखिल भारतीय सेवाओं के मध्यप्रदेश को आवंटित अधिकारियों की संतान एवं उनकी पत्नी/पति।

4.2 शासन द्वारा वर्तमान में निर्धारित मध्यप्रदेश के स्थानीय निवासी की परिभाषा के अन्तर्गत आने वाले व्यक्तियों की पत्नी/पति।

4.3 मध्यप्रदेश में संवैधानिक या विधिक पदों पर महामहिम राष्ट्रपति/राज्यपाल द्वारा नियुक्त व्यक्तियों की संतान एवं उनकी पत्नी/पति।

5. स्थानीय निवासी का प्रमाण पत्र प्राप्त करने के लिये आवेदक नायब तहसीलदार या उससे ऊपर के राजस्व अधिकारी को अपना आवेदन प्रस्तुत करेगें । संबधित अधिकारी आवेदक द्वारा प्रस्तुत प्रमाण पत्रों एवं अन्य अभिलेखों के सत्यापन करने के बाद प्रकरण का परीक्षण कर पात्रता होने पर स्थानीय निवासी प्रमाण पत्र संलग्न निर्धारित प्रपत्र में प्रदाय किया जावेगा ।

6. स्थानीय निवासी प्रमाण पत्र प्रदाय करने हेतु वर्तमान में मूल निवासी, वास्तविक निवासी आदि शब्दों का उपयोग किया जाता है । अब भविष्य में केवल ''स्थानीय निवासी'' शब्द का ही उपयोग किया जाए ।

7. मध्यप्रदेश के स्थानीय निवासी के निर्देश एवं स्थानीय प्रमाण पत्र का प्रारूप विभागीय वेबसाईट http://www.mp.nic.in./gad/ के तहत नियम एवं निर्देश में भी उपलब्ध होंगे।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार
सही/–
(राजेन्द्र शर्मा)
उप सचिव, मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
भोपाल, दिनांक 30 अगस्त, 2006.

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MINISTRY OF ENVIRONMENT AND FOREST

No. S.O. 1402 (E), dated September 4, 2006. – In exercise of the powers conferred by sub-section (2) of Section 1 of **the Wild Life (Protection) Amendment Act, 2006 (39 of 2006),** the Central Government hereby appoints the 4th day of September, 2006 as the date on which the provisions of the said Act shall come into force.

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HIGH COURT OF MADHYA PRADESH : JABALPUR

ORDER

No./ B-7057 Jabalpur, dated 29th Nov., 2006
II-15-18/05

In view of the Circular No. F.11-37/2005/1/9, Bhopal, dated 02nd Sept: 2006 issued by the GAD Govt. of M.P. Bhopal, Hon'ble the Chief Justice is pleased to designate the following officers as "State Public Information Officer" and "Appellate Authority" only for such cases where information under the Right to Information Act, 2005 is sought in respect of the State Public Information Officers or Appellate Authority themselves who have been designated so earlier U/s 5(1) of the Right to Information Act, 2005 vide the Registry Order No. 62 & 64 dated 8 Feb, 2006.

[A] HIGH-COURT

(I) **State Public Information Officer.**

(i) For the Principal Seat at Jabalpur	: Additional Registrar-Cum P.P.S.
(ii) For the Bench at Indore	: Section Officer [Establishment]
(iii) For the Bench at Gwalior	: Section Officer [Establishment]

(II) Appellate Authority

(i) For the Principal Seat at Jabalpur	: The Rigistrar General
(ii) For the Bench at Indore	: The Rigistrar General
(iii) For the Bench at Gwalior	: The Rigistrar General

[B] DISTRICT COURTS

(I) State Public Information Officer

(i) For each District Court : Deputy Clerk of the Court of the Office of the District & SessionsJudge.

(II) Assistant State Public Information Officer

(i) For the Courts situated at places other than District Head Quarter : Reader to the Court of Senior most Judge posted at that place.

(III) Appellate/Authority : Senior most Additional District Judge posted at the District Head Quarter.

(C) FAMILY-COURTS

(I) State Public Information Officer : Senior most Ministerial Officer, other than Deputy Clerk of Court, of the concerned Family Court.

(II) Appellate Authority : District Judge of the District in which such Family Court is situated.

By Order of Hon'ble The Chief Justice
Sd/-
[K.C. Sharma]
Registrar General

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE WILD LIFE (PROTECTION) AMENDMENT ACT, 2006

No. 39 of 2006*

[3rd September, 2006]

An Act further to amend the Wild Life (Protection) Act, 1972.

BE it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows :-

1. Short title and commencement.– (i) This Act may be called the Wild Life (Protection) Amendment Act

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

(2) .....

3. Amendment of section 51. – In section 51 of the principal Act, after sub-section (1B), the following sub-sections shall be inserted, namely :-

"(1C) Any person, who commits an offence in relation to the core area of a tiger reserve or where the offence relate to hunting in the tiger reserve or altering the boundaries of the tiger reserve, such offence shall be punishable on first conviction with imprisonment for a term which shall not be less than three years but may extend to seven years, and also with fine which shall not be less than fifty thousand rupees but may extend to two lakh rupees; and in the event of a second or subsequent conviction with imprisonment for a term of not less then seven years and also with fine which shall not be less than five lakh rupees but may extend to fifty lakh rupees. (1D) Whoever, abets any offence punishable under sub-section (1C) shall, if the act abetted is committed in consequence of the abetment, be punishable with the punishment provided for that offence."

K.N. Chaturvedi
Secy. to the Govt. of India

THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2006

No. 2 of 2007*

[Received the assent of the Governor on the 19th December, 2006; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 11th January, 2007.]

An Act further to amend the Court-fees Act, 1870 in its application to the State of Madhya Pradesh.

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

1. Short title and commencement .– (1) This Act may be called the Court-fees (Madhya Pradesh Amendment) Act, 2006.

(2) It shall come into force on the first day of April, 2006.

2. Amendment of Central Act No. VII of 1870 in the application to the State of Madhya Pradesh. – The Court-fees Act, 1870 (No. VII of 1870) (hereinafter referred to as the principal Act) in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Section 7. – In Section 7 of the principal Act, –

(i) in sub-clause (f) of clause (iv), for the words "forty rupees" the words "one hundred rupees" shall be substituted.

(ii) in sub-clause (c) of clause (v), for the words "five rupees" the words "ten rupees" shall be substituted.

4. Amendment of Section 18. – In Section 18 of the principal Act, for the words "two rupees" the words "five rupees" shall be substituted.

5. Amendment of Section 19 G. – In Section 19G of the principal Act, for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

6. Amendment of Schedule I. – In Schedule I to the principal Act, –

(i) for article 1-A, the following article shall be substituted, namely

"1-A. Plaint, written statement, pleading, a set-off or counter claim, or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in Section 3.	When the amount or value of the subject matter in dispute does not exceed ten thousand rupees.	Twelve percent subject to a minimum of one hundred rupees.
	When such amount or value exceeds ten thousand rupees but does not exceed five lacs rupees.	One thousand two hundred rupees plus fourteen percent on the amount of value in excess of ten thousand rupees.

	When such amount or value exceeds five lacs rupees but does not exceed ten lacs rupees.	Sixty-nine thousand and eight hundred rupees plus eight percent on the amount or value in excess of five lacs rupees.
	When such amount or value exceeds ten lacs rupees: Provided that minimum fee leviable on a memorandum of appeal shall be one hundred rupees. ".	One lac nine thousand eight hundred rupees plus eight precent on the amount or value in excess of ten lack rupees.

(ii) in article 6, in the column pertaining to proper fee, for the words, "Two rupees", "Four rupees" and "Five rupees", the words "Five rupees", "Ten rupees" and "Fiteen rupees" shall respectively be substituted;

(iii) in article 7, in the column pertaining to proper fee, for the words "Two rupees", "five rupees" and "Ten rupees", the words "five rupees", "Ten rupees" and "Twenty rupees" shall respectively be substituted;

(iv) in article 8, in the column pertaining to proper fee, for the words "Two rupees", the words "Five rupees" shall be substituted;

(v) in article 9, in the column pertaining to proper fee, for the words "Two rupees", the words "Five rupees" shall be substituted;

(vi) for article 11, the following article shall be substituted, namely :–

"11. Probate of a Will or letters of administration with or with out will annexed	When the amount or the value of the property in respect of which the grant of probate or letters is made, exceeds one thousand rupees but does not exceed twenty five thousand rupees.	Four percentum on such amount.
	When such amount or value exceeds twenty five thousand rupees but does not exceed fifty thousand rupees.	One thousand rupees plus five percentum on the amount or value in excees of twenty five thousand rupes.

	When such amount or value exceeds fifty thousand rupees but does not exceed five lacs rupees.	Two thousand two hundred fifty rupees plus six percentum on the amount or value in excess of fifty thousand rupees
	When such amount or value exceeds five lacs rupees:	Twenty seven thousand rupees plus seven percentum on the amount or value in excess of one lac rupees.
	Provided that when after the grant of a certificate under Part X of the Indian Succession Act, 1925 (XXXIX of 1925) in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount the fee paid in respect of the former grant.".	

(Vii) for article 12, the following article shall be substituted, namely :–

"12. Certificate under Part X of the Indian Succession Act, 1925 (XXXIX of 1925).	When the total amount or value of the debts or securities specified in the certificate under Section 374 of the Act exceeds one thousand rupees but does not exceed twenty five thousand rupees.	Four percentum on such amount or value and six percentum on the amount of any debt or security to which the certificate is extended under Section 376 of the Act.
	When such amount or value exceeds twenty five thousand rupees but does not exceed fifty thousand rupees.	One thousand rupees plus five percentum on the amount or value in excess of twenty five thousand rupees and seven percentum on the amount or value of

		any debt or security to which the certificate is extended under Section 376 of the Act.
	When such amount or value exceeds fifty thousand rupees but does not exceed five lacs rupees.	Two thousand two hundred fifty rupees plus six percentum on the amount or value in excess of fifty thousand rupees and thirteen percentum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.
	When such amount exceeds five lacs rupees.	Twenty nine thousand two hundred fifty rupees plus seven percentum on the amount of value in excess of Five lacs rupees and thirteen percentum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.".

(viii) in article 14, in the column pertaining to proper fee, for the words, "Ten rupees" and "Three rupees", the words "Twenty rupees" and "Five rupees" shall respectively be substituted.

7. Amendment of Schedule II. – In Schedule II to the principal Act, –

(i) except clause (e) and (f) of article 1 and article 17, in the remaining articles and clauses, in the column pertaining to proper fee, –

(a) for the words "two rupees" wherever they occur, the words "Five rupees" shall be substituted;

(b) for the words "Five rupees", "Ten rupees", "Fifteen rupees" and "Twenty rupees" wherever they occur, the words "Ten rupees", "Twenty rupees", "Thirty rupees" and "Forty rupees" shall respectively be substituted;

(c) for the words "Thirty rupees" "Forty rupees" and "Fifty rupees" wherever they occur, the words "Sixty rupees", "Eighty rupees" and "One hundred rupees" shall respectively be substituted;

(d) for the words "Sixty rupees", "Seventy five rupees" and "One hundred rupees" wherever they occur, the words "One hundred and twenty rupees", "One hundred and fifty rupees" and "Two hundred rupees" shall respectively be substituted;

(e) for the words "One hundred and fifty rupees" the words "Three hundred rupees" shall be substituted;

(ii) for clause (e) and (f) of article 1, the following clauses shall be substituted namely :–

"(e) when presented to the High Court –

(i)	otherwise than –	One hundred rupees.
	(a) under Article 226 of the Constitution of India;	
	(b) under Section 25 of the Provincial Small Cause Courts Act, 1887 (9 of 1887);	
	(c) under Section 115 of the Code of Civil Procedure, 1908 (5 of 1908);	
	(d) under Section 64 of the Estate Duty Act, 1953 (34 of 1953);	
	(e) under Section 27 of the Wealth-tax Act, 1957 (27 of 1957);	
	(f) under Section 26 of the Gift-tax Act, 1958 (18 of 1958);	
	(g) under Section 256 of the Income-tax Act, 1961 (43 of 1961);	
	(h) under Section 70 of the Madhya Pradesh Vanijyik kar Adhiniyam 1994 (5 of 1995);	
	(i) under Section 45-B of the Banking Regulation Act, 1949 (10 of 1949);	
(ii)	under Article 226 of the Constitution of India;	Five hundred rupees.
(iii)	under Section 25 of the Provincial Small Cause Courts Act, 1887 (9 of 1887);	One hundred rupees.
(iv)	under Section 115 of the Code of Civil Procedure, 1908 (5 of 1908);	One hundred rupees.

(v)	under Section 64 of the Estate Duty Act, 1953 (34 of 1953);	Five hundred rupees.
(vi)	under Section 27 of the Wealth-tax Act, 1957 of 1957);	Five hundred rupees.
(vii)	under Section 26 of the Gift-tax Act, 1958 (18 of 1958);	Five hundred rupees.
(vii)	under Section 256 of the Income-tax Act, 1961 (43 of 1961);	Five hundred rupees.
(viii)	under Section 256 of the Income-tax Act, 1961 (43 of 1961);	Five hundred rupees.
(ix)	under Section 70 of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (5 of 1995)	One hundred rupees.
(x)	under Section 45-B of the Banking Regulation Act, 1949 (10 of 1949) in respect of any claim, counter-claim or set-off–	
	(a) when the amount or value does not exceed two thousand and five hundred rupees;	One hundred rupees.
	(b) when the amount or value exceeds two thousand and five hundred rupees, but does not exceed ten thousand rupees;	Two hundred rupees.
	(c) when the amount of value exceeds ten thousand rupees.	Five hundred rupees.
(f)	when presented to the High Court by way of appeal or revision –	
	(i) otherwise than –	One hundred rupees
	(a) under Section 25 of the Provincial Small Cause Courts Act, 1887 (9 of 1887);	
	(b) under Section 115 of the Code of Civil Procedure 1908 (5 of 1908);	
	(c) under Section 45-B of the Banking Regulation Act, 1949 (10 of 1949);	
(ii)	under Section 45-B of the Banking Regulation Act, 1949 (10 of 1949):–	
	(a) when the amount or value does not exceed two thousand and five hundred rupees;	Two hundred rupees.