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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

This is the second issue of this year (2010) and again I have an opportunity to interact with you all through this editorial.

In this issue I would like to lay emphasis on the need of giving reasoned judgments by the judicial officers as is envisaged by the principles of natural justice.

Though the decision making process is a very difficult and complex task, particularly when the decision is required to be taken to resolve the dispute amongst the adversaries, yet it is a must for a judge to take decision every day to render justice. In the process of imparting justice, a Court/Judge is bound to follow the principles of natural justice. To ensure fairness and secure justice, the principles of natural justice are essential attributes of law.

The principle of natural justice demands that the Court rendering justice must be comprised of impartial person acting fairly without bias and in good faith; it must give notice to the parties to attribute and afford each party adequate opportunity of presenting his case. In the case of *S.N. Mukherjee v. Union of India, AIR 1990 SC 1984,* the Apex Court observed that in view of the expanding horizon of the principles of natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities, including exercise of judicial or quasi judicial functions, except in cases where the requirement has been dispensed with expressly or by necessary implication.

It is settled legal proposition that not only an administrative but also a judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of judicial order is its reasons. Therefore, every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as to why his prayer has been rejected.

It is rightly said that reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum.

The Institute, while imparting judicial education, is always emphasizing that the above principles must be followed by every Judicial Officer while rendering judgment/order; final or interim because they are essential and important tools to strengthen the administration of justice, particularly recording of reasons, as it ensures – (i) application of mind by the Court; (ii) prevents prejudices from invading the decision making process; (iii) ensures examination of materials produced and applies the appropriate principle to the decision and (iv) enables the appellate court to examine the basis of the decision.

In view of the above discussion, we can very well understand the need to record reasons in the process of judging and I am sure that all the Judicial Officers shall make every endeavour to adhere to the aforesaid principles of natural justice, particularly assigning reasons for their decisions.

The Institute, in the months of February and March organized two weeks Foundation Course Training Programme for the directly appointed Additional District Judges of 2009 Batch and one week Refresher Course Programme for the directly appointed Additional District Judges of 2008 batch..

In Part I of this issue, we are fortunate enough to include the text of the Address sent by Hon'ble Shri Justice Deepak Verma, Judge, Supreme Court of India on the occasion of First NJA West Zone Conference on 'Enhancing Timely Justice: Strengthening Criminal Justice Administration' held at Indore. Some other articles also find place in this Part. Part II abounds with the latest judgments of Supreme Court and our High Court.

Due to paucity of space, Part III and Part IV are not being included in this issue.

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PART - I

ENHANCING TIMELY JUSTICE: STRENGTHENING CRIMINAL JUSTICE ADMINISTRATION*

Hon'ble Shri Justice Deepak Verma,
Judge, Supreme Court of India

The burden of arrears of cases is becoming heavier and heavier day-by-day, with the result the whole judicial system is likely to collapse one day. This is the time to make sincere efforts to prevent the said consequence by enhancing timely justice and strengthening criminal justice Administration.

At present there are about 39,55,224 pending civil and criminal cases in the High Courts across the country and about 2,67,52,193 civil and criminal cases pending in various subordinate courts across the country. In the Supreme Court of India there are around 52,592 cases pending till date. The lives of quite a few people affected by litigation in this country is apparent from the fact that about 30 million cases are pending in various courts in the country. If litigation traverses from the sub-ordinate court to the highest court, it may take about twenty years before it attains finality. It is no surprise that most of the civil cases pass on to legal heirs.

ADJOURNMENTS

We have to see and work out as to what are the various causes for huge arrears and long pendency of cases. Here, I would like to give you my view point so that you can think over the matter and work it out as to how the arrears can be reduced and delays can be shortened. Delay hurts the weaker party more, rather than the rich.

One of the major factors for delays is adjournments. As you all know that in any given matter, one party would always be interested in adjournment and other party would be too willing to argue it. With the result when the matter comes up for hearing, the learned counsel for the party, who is interested in arguing the matter would be present but the other counsel would be conspicuously absent.

Under these circumstances, what are we supposed to do? Now with the advancement of electronic equipment, it is desirable that the names of counsel who is absent should be flashed on the TV screen so that wherever he is there in the court precincts should make an attempt to reach the court and to perform his duties. In High Courts and District Courts, generally the Usher or the Peon is

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* Extract of the text of address sent by Hon'ble Shri Justice Deepak Verma, Judge, Supreme Court of India on the occasion of First NJA West Zone Conference on *'Enhancing Timely Justice: Strengthening Criminal Justice Administration'* held at Indore from 31.10.2009 to 2.11.2009

sent for the said advocates. I would like to suggest that supposing on a particular date, 10 final hearing matters are listed then it is desirable that in the morning itself, the Court clerk should be asked to write the Case No., parties and lawyers names for the appellant, petitioner or respondent, then he should be sent in the morning itself to inform the concerned Advocates that your case is going to be taken up today. At least, it will be a sort of advance information/intimation to the lawyer that his case is likely to be taken up today. Despite all this, if he does not come, then the matter has to be dealt with in accordance with your own discretion.

In the Supreme Court also, lawyers do seek adjournments on some ground or the other. The procedure is that the advocate-on-record circulates the letter that he wants to file Counter Affidavit, or the Rejoinder or some additional document or on personal grounds etc. etc, but as a matter of routine, we do not grant them adjournments for mere asking unless we are fully satisfied that the cause is genuine. Even in a case where personal ground of the lawyer is sought to, we do make enquiries so as to satisfy ourselves with regard to the reason for adjournment.

In the light of this, my humble request to all of you is that please do not grant adjournments at the drop of the hat. Try to analyze the reason and if it appears to be genuine, then you may do so.

II. REGULAR TRAINING FOR JUDGES AND ADVOCATES

I have full sympathy for the judges of District Courts and High Courts where 200 or more cases are listed daily either for motion hearing or for final hearing. It is humanely not possible for any judge to go through those 200 cases. More so, when it is not known in which case the learned advocate will seek adjournment.

Thus, the need of the hour is that there should be regular training not only for judges but for advocates also. They have to be taught that the submissions should be short and precise, to the point, no deviation from the same.

With regard to pleadings also, all the necessary ingredients alone should be pleaded. If you find that either in plaint/ petition or reply facts are mentioned which are not germane to the case, then you must ask the lawyer to delete the same and file a short, crisp and concise petition or written statement. Not only the judges, but even lawyers should be well prepared. It is desirable that for judges they must go through the files previous day and make their own notes. The point which is likely to crop up, should also be noted and straightway you can ask the counsel to address you on the same. Unless this is done, looking to the limited time available for court work, it would not be possible to cope up with the pendency. Similarly, such training would also be beneficial to the advocates and in each state a training academy should be there for the advocates.

III. AD-HOC JUDGES

Appointment of ad-hoc judges for limited period can also be worked out which should be beneficial for it. In this regard, I have one suggestion that advocate with great repute whose honesty or integrity is not doubtful may be given contract appointment for a period of four or five years. If their performance is not up to the standard, then their services can be terminated forthwith. But while doing so, great care and caution is required. One bad appointment may lead to create problems for the judiciary. Here, I am reminded of the time when retired District Judges were to be appointed as Presiding Officers of the Fast Track Courts. Some of the judges who were not even physically fit were appointed, with the result they were not solution to the problem instead they created more problems not only for the litigants but also for the lawyers. Such things are required to be avoided while making ad-hoc or contract appointments.

IV. ACCOUNTABILITY AND QUALITY OF JUSTICE

Both accountability and quality of justice in a judicial process are most important factors. They have to be kept in mind. Question may arise as to accountability to whom by the judges. It should be your own conscience to see whether you have performed your duties to your own satisfaction on a working day or not. For improvement of quality of justice, you must read the orders again and again before finally pronouncing it in the Court.

V. EXISTING INFRASTRUCTURE

No doubt, it is true that at many places, the existing infrastructure is hardly sufficient or congenial for the judges but we have to make optimum use of the same. In the present day, specialized management schools are required to be provided to the judges.

VI. LITIGATION FOR AND AGAINST GOVERNMENT

Statistics would reveal that government is one of the parties in more than 60 to 70% of the cases. Why so many cases are being filed against the government? When I tried to analyze the situation, I came to the conclusion that it is on account of the fact that Government machinery has become ineffective.

Even when the executive is fully aware that their action in a particular case would not be sustained in a court of law, yet they will not pass any favourable order in favour of the aggrieved party and would only push him to a court of law. The reason is that they do not want to take the burden as they feel even if they are acting within the four corners of law, they would be doing some favour to the party, which may cause an embarrassment or harassment to them in future. Such tendency has to be curbed.

Not only this, even if one party is successful at the first level, then government still prefers to file appeal after appeal in the higher courts knowing it fully well that there is no substance in the same. They only try to save their

own skin. They do not have enough courage and strength to write it on the file that it is not a fit case for preferring further appeal/revision.

On account of huge pendency and long delays of cases, the litigants have started taking law in their own hands which is not a good feature for a democratic country like ours.

VII. NUMBER OF JUDGES

Presently, we have about 15,000 judges working at different levels right from subordinate courts, district courts, High Courts and Supreme Court. We need 35,000 judges more for clearing the backlog and meeting the future need. Unless a road map for judicial reforms is prepared, keeping in mind the requirement 20 years hence, nothing is going to work.

VIII. EVENING COURTS

It is felt that evening courts may be able to achieve the goal. In some states, evening courts are doing well. The only difficulty that I perceive is that same set of judges and lawyers cannot be asked to work continuously from morning till 10 pm. It may not be possible physically or otherwise for a judge or advocate working continuously as it is an intellectual function for both. Some petty matters can be fixed for evening courts and only lawyers who have put in not more than 7 years of practice should be allowed to go there. Initially, only petty criminal matters and simple civil suits may be listed before them and it could be started on trial basis. I have been given to understand that it is working well in Gujarat. We can have their views. For every case, senior advocate may not be required.

IX. GRAM NYAYALAYAS

Government of India has taken a bold step by enacting the Gram Nyayalayas Act, 2008. I have been given to understand that in Madhya Pradesh, 40 Gram Nyayalayas have been created whereby 40 judicial officers would be working there as Presiding Officers. Gram Nyayalayas have been given powers to try criminal cases, civil suits, claims or disputes specified in the I Schedule and II Schedule of the Act. Central Government as well as the State Governments have been given powers to amend the said Schedules as per their respective legislative competence. In the said Act, Section 20 deals with the plea bargaining thereby giving powers to settle the disputes even before it is actually adjudicated upon.

The establishment of Gram Nyayalayas will substantially help in making justice more accessible and affordable and also reducing the arrears of cases in the subordinate courts.

X. ALTERNATIVE DISPUTE REDRESSAL

We must resort to Section 89 of the CPC and try to settle as many matters as could possibly be done. Section 89 has been incorporated only for the said

purpose. When law of limitation prescribes a certain period of limitation for each type of cause of action to be agitated upon within a particular time, then why we cannot fix a time limit for final disposal of matters at each level of hierarchy of courts. It should be treated as an obligation on our part to formulate a scheme in this regard.

The Constitution of India is a monumental document of social engineering. The keystone of the Constitution is Justice in its widest sense, including social, economic and political, meaning thereby Justice is the paramount goal of the Constitution and it is duty of the state to provide justice.

The framers of the Constitution have tried to realize this goal through the twin parts III and IV of the Constitution that deal with Fundamental Rights and the Directive Principles of State Policy. For the sake of proper understanding of the operationalization of the ideal of justice in practice, the twin parts are not to be studied separately but jointly. While it is true that the Fundamental Rights are justiciable whilst Directive Principles are not strictly justiciable but they do represent our yearning for just, fair and equitable social order. Articles 14, 32, 145 and 226 presupposes effective access to justice. As a mechanism of controlling, Constitution has envisaged various concepts and mechanisms to ensure justice but it should be speedy and inexpensive.

XI. COURT FEES

Commercial courts are required to be established in metropolitan cities and the court fees payable should be in accordance with the stake involved. Otherwise, for a very small sum of court fees, crores and crores of rupees have been claimed by paying pittance as court fees.

Take for example, the cases filed under Section 138 of the Negotiable Instruments Act, where hardly any court fee is required to be paid. In such cases, at least 10% of the court fee should have been directed to be imposed.

Therefore, whenever any law is amended, due diligence test is required to be pleaded and it should be worked out as to under this law how many cases are likely to be generated. Accordingly, it should be worked out.

XII. INFLOW AND OUTFLOW OF THE CASES

An endeavour should be made to have a balance between inflow and outflow of the cases. Every judge must have the statistics as to how many fresh matters are being filed everyday, then according to it, an attempt should be made to dispose of equal number of cases per day. But it does not mean that the cases should be dismissed in default or absolutely perfunctory order should be passed. We can achieve it by observing the concept of time management.

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COLLUSIVE PROCEEDINGS: AN ANALYSIS

Ramkumar Choubey
OSD, JOTRI

The maxim *"Fraus Et Jus Nunquam Cohabitant;* Fraud and justice never dwell together" animates a Judge to decline every deceitful and stratagem action of the litigant. The court of law does not, and should not, allow any pretentiousness which would defeat the justice. In order to impede the evil purpose of a litigious, the law provides various measures against collusive proceedings.

Several Acts afforded provisions with respect to the exclusion of collusive proceedings. Some instances are; the doctrine of *lis pendens* recognized by Section 52 of the Transfer of Property Act,1882 does not apply to any suit or proceeding which is collusive. Section 170 of the Motor Vehicles Act,1988 enables the Tribunal to implead the insurer as a party where the Tribunal satisfied that there is collusion between the claimant and the person against whom the claim has been made, and it may allow the insurer to defend the claim on all or any of the grounds that are available to such collude opponent. Order XXXV Rule 1(c) of the Code of Civil Procedure, 1908 ruled that the plaint in interpleader suit, shall state that there is no collusion between the plaintiff and any of the defendants. Similarly, Section 20 of the Hindu Marriage Act,1955 laid down the rule to be stated in every petition presented under the Act that there is no collusion between the petitioner and the other party to the marriage. Further, Section 23 of the Act casts a duty on the Court that it should be satisfied that the petition is not presented or prosecuted in collusion with the respondent before decreeing it. Section 44 of the Evidence Act 1872 provides that any party to a suit or other proceeding may show that a judgment, order or decree which is relevant under Sections 40, 41 or 42 was obtained by fraud or collusion. These legislative measures indicate that the Legislature wanted to prevent collusive behavior of the litigants.

COLLUSION – MEANING OF

The word "collusion" is no where defined under the enacted laws. The literal meaning of the term collusion is a deceitful agreement between two or more persons to some evil purpose such as to defraud a third person of his right. It may be either apparent or patent or secret and covered by an apparent show of honesty. It is a secret agreement or understanding for a fraudulent or deceitful purpose. In other words, collusive is one which is fraudulent, concerted or devised, characterized by collusion. It is an understanding between ostensible opponents in a law suit, thus, an agreement not to oppose is collusion.

According to *WHARTON'S LAW LEXICON,* collusion in relation to a judicial proceeding is a secret agreement between two or more persons that one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose.

It is said that "the collusion implies an agreement or arrangement that the position of the parties to the action apparently hostile shall be friendly, that the action and judgment which purport to be an attack on, shall in fact be a protection to the defendant, an arrangement that the reality shall be different from what is represented."

In *Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib, AIR 1967 SC 878,* the Apex Court has described the term "collusion" and held that the word "collusion" means a secret agreement for illegal purposes or a conspiracy and it implies that a man does something evil designedly.

An elucidatory definition of the term collusion has been given by the Supreme Court, in *V.S. Rahi v. Ram Chambeli, AIR 1984 SC 595,* which is as under:

> "Collusion, if any, between the two unequal parties does not confer any sanctity on the transaction in question in cases of this nature it is always open to the weaker of the two parties to establish that the transaction was only a camouflage used to cover its true nature. Collusion implies the existence of two or more parties who can deal with each other independently with the object of entering into an arrangement which may serve as a cloak to cover up the real state of affairs. When one party can dominate over the will of the other, it would not be a case of collusion but one of compulsion. The above view is fully in consonance with the spirit behind the rule of oppression which is recognized as an exception to the doctrine that a party cannot recover what he has given to the other party under an illegal contract."

The Supreme Court in *Rupchand Gupta v. Raghuvanshi (Private) Ltd. and another, AIR 1964 SC 1889,* opined that one of the simplest definitions of collusion was given by Mr. Justice Bucknill in *Scott v. Scott, 1913 P. 52,* as "an improper act done or an improper refraining from doing an act, for a dishonest purpose."

The true meaning of the word 'collusion' as applied to a judicial proceeding delineated in English Law is reiterated by the Apex Court in *Gram Panchayat of Village Naulakha v. Ujagar Singh and others, AIR 2000 SC 3272,* which is as follows:

> "Collusion, say Spencer-Bower and Turner on Res Judicata (2nd Ed., 1969 para 378), is essentially play-acting by two or more persons for one common purpose - a concerted performance of a fabula disguised as a judicium - an unreal and fictitious pretence of a contest by confederates whose game is the same. As stated by Lord Selborne LC in *Boswell v. Coaks (1894) 6 Rep 167,* there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to

him, there is no party litigating.....no real interest brought into question and to use the words of a very sensible civilian on this point, fabula non judicium, hoc est; in scena, non in foro, res agitur."

DISTINCTION BETWEEN COLLUSION AND FRAUD

The two terms "collusive" and "fraudulent" are distinct from each other. Whereas in a collusive proceeding there is an understanding between claimant and opponent and they are well aware with the reality of the action put before the Court, in fraudulent act, the party (some time the Court) upon whom the fraud is being played is ignorant from it. In other words, the collusion is a bilateral and the fraud is an unilateral action.

The distinction between these two terms "collusive" and "fraudulent", is laid down by the Apex Court in *Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593.* The exposition of law laid down by the Apex Court is as under:

> "There is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose." In such a proceeding, the claim put forward is fictitious the contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceedings is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant had managed, to obtain the verdict of the court in his favour and against his opponent by practicing fraud on the Court. Such a proceeding is started with a view to injure the opponent, and there can no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest."

INFERENCE OF COLLUSION

As the collusive proceeding is one which is fraudulent, concerted or devised, the Court can draw inference of such an act of deceitful purpose by patent or secret attitude of the litigant such as an apparent show of honesty, lack of contest or ostentatiousness of the opponent.

In *Jagdish v. State of MP, AIR 1993 MP132,* a case under the M.P. Ceiling on Agricultural Holding Act, 1960, his Lordship observed that where the defendant did not offer any contest to the claim and rather filed a written statement admitting all the averments made in the plaint. The Ceiling Authority, after holding an

inquiry, formed an opinion that the decree was secured with the idea of defeating the provisions of the Ceiling Act and was not liable to be recognised by the Ceiling Authority. Therefore, before the Ceiling Authority, also before the Court below, the plaintiff/appellant failed to establish that the transfer of title from defendant/respondent No.3 to the plaintiff/appellant was not motivated to defeat the provisions of the Act."

In *Sanjay Dinker Asarkar v. State of Maharashtra, AIR 1986 SC 414,* which is a case under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, their Lordships of the Supreme Court upheld the order of the Ceiling Authority refusing to recognise a Civil Court's decree which was secured without any contest in the suit found to be obviously collusive. The Supreme Court observed that "It may be mentioned that at no stage of the proceedings the fact that ceiling proceedings were pending was brought to the notice of the learned Civil Judge, and that as appears from the decree, there was no contest in the suit. The suit filed by the Appellant through his mother was obviously a collusive suit."

An inference of collusion can be drawn from the negligence of the next friend in case where a decree, passed against the minor, was the result of negligence of the next friend. Therefore, a minor can avoid such decree by taking recourse of Section 44 of the Evidence Act. In this regard, the Supreme Court, in case of *Asharfi Lal v. Smt. Koili, AIR 1995 SC 1440,* has opined that;

> "In cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking S. 44 without taking resort to a separate suit for setting aside the decree or judgment. .....If such an inference can be drawn the minor would not be bound by the judgment in the earlier declaratory suit but if such an inference cannot be drawn he would be bound by the said judgment till it is set aside by the competent Court in an appropriate proceeding."

In the above context, it is also noteworthy that mere failure to contest the petition or to depose against such petition does not necessarily give rise to an inference of collusion with the petitioner. Even, in all cases of consent decrees cannot be said to be inspired by collusion. In this regard the decision of *Daniel John v. Smt. Rajmaya, AIR 1986 MP 245* may be referred. The relevant portion of the judgment reads as under;

> "If the allegations are untrue, they do constitute legal cruelty entitling the wife to file a petition for judicial separation or to oppose a petition for restitution of conjugal rights filed by the husband. Her failure to contest the petition for dissolution or enter the witness box in our opinion, does not give rise to an inference of collusion with the petitioner.

> A perusal of the relevant provisions in the Act would show that it is more onerous for a wife to seek dissolution of marriage or judicial separation than the husband. She is required to satisfy many other requirements before she can successfully obtain a decree against the husband. That also cannot give rise to an inference that the respondent was colluding. No woman in this country ordinarily invites a finding of guilt against her in relation to matrimonial offence, like adultery by remaining ex parte. We are satisfied that there has been no collusion between the parties for the present petition."

COLLUSION AND CONSENT DECREE

A consent or compromise decree is nothing but an order of the Court superadded to the contract between the parties and such a decree can only be set aside on any ground of which a contract can be set aside. A consent decree can be impeached only where the fraud was played upon the Court or where the action was collusive.

In *Smt. Krishna Khetarpal, v. Satish Lal, AIR 1987 P &H 191* it has been held that; "There is a world of difference between consent and collusion. Whereas consent between two people is a state of being of the same mind, collusion between the two is a secret agreement to deceive. It is an effort to mislead the Court from the true state of affairs."

The question, when a consent amounted to collusion has been answered by the Allahabad High Court in *Smt. Hirakali v. Dr. Ram Asrey Awasthi, AIR 1971 All 201,* wherein, while dealing with a case relating to dissolution of marriage, the High Court held thus;

> "The provisions of sub-sec. (1) of S. 23 are mandatory and non-compliance therewith deprives the court of its jurisdiction to grant a decree for judicial separation or dissolution of the marriage. Consent of the parties to judicial separation or dissolution of the marriage does not confer jurisdiction on the court to pass a decree under Section 23 of the Act. In fact, consent in such cases would indirectly amount to collusion in law and, therefore, sub-clause (c) of S. 23(1) would be an absolute bar to a decree passed on such consent. It is evident that the Legislature considered it to be of paramount importance that matrimonial relations between legally wedded persons should be maintained and disruption thereof should be prevented as far as possible, even though the parties to the marriage themselves might be willing to snap the matrimonial tie. This is why the Legislature has provided against collusion between the parties with a view to obtain a decree. As already stated consent is an indirect form of collusion."

However, all cases of consent decrees cannot be said to be collusive. Consent decrees *per se* in matrimonial matters are not collusive. In this regard the decision of the Full Bench of Punjab & Haryana High Court in *Joginder Singh v. Smt. Pushpa, AIR 1969 P&H 397,* which has been countenanced by the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562* is apposite to mention here. The full bench is of the view that "a consent-decree can be passed under certain circumstances and it will depend on the facts and circumstances of each individual case whether such a decree is a good decree or not. On principle also, there is no reason why a consent-decree cannot be passed. The object of such a decree is to bring the parties together. The mere fact, that the disobedience of such a decree furnishes a ground for divorce, is wholly besides the point. The parties may be genuinely willing to live together and later on, circumstances may arise which lead to their breaking apart with the result that the disobedience of the decree follows. But that will not mean that it is merely a collusive consent-decree. If it is a collusive consent-decree, the Court will not take it into consideration for purposes of a petition for divorce. As a matter of law, it cannot be ruled that merely because the decree under section 9 is a consent-decree, therefore, it necessarily is a collusive decree. The High Court, further, ordered that a valid consent-decree can be passed under section 9 of the Hindu Marriage Act and, in any case, even if this view is ultimately found to be erroneous, it cannot be held that such a consent-decree, if passed, is a nullity. At best, it will be an illegal decree which will have to be vacated in accordance with law. It will not be a decree which can just be ignored.....If a consent-decree for restitution of conjugal rights is passed under the Act, it would not be a nullity and when the same becomes final between the parties, it can form a basis of divorce proceedings."

The Apex Court in *Saroj Rani v. Sudarshan Kumar Chadha* (supra) also agreed with the view that all cases of consent decrees cannot be said to be collusive and observed that "from the facts on record it appears that there was no collusion between the parties. The wife petitioned against the husband on certain allegations, the husband denied these allegations. He stated that he was willing to take the wife back. A decree on that basis was passed. It is difficult to find any collusion as such in the instant case."

In *Rupchand Gupta v. Raghuvanshi (Private) Ltd.* (supra), in which a landlord brought a suit against the lessee for ejectment after serving a valid notice to quit but without impleading the sub-lessee as defendant and the lessee did not contest the suit in pursuance of his agreement with the plaintiff landlord and an ex parte decree was passed. The sub-lessee thereupon brought a suit against the landlord and the lessee for a declaration that he was not bound by the decree which had been obtained by collusion. The suit was dismissed on the ground that the plaintiff failed to establish collusion. The Supreme Court, upheld the dismissal and expressed as below;

> "mere fact that the sub-lessee was not impleaded or that the lessee did not actually contest the suit did not render the decree passed in the suit as collusive especially when it was not suggested by the sub-lessee that the lessor had even a plausible defence to the claim for ejectment. Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. Where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee, but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act. The mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion. It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded."

Where a compromise decree was passed in an appeal, according to which a religious trust was created on the basis of a deed, the Supreme Court in the decision of *Jadu Gopal Chakravarty v. Pannalal Bhowmick, AIR 1978 SC 1329* has observed that when two views were possible regarding construction of the deed and decree was based upon one view, it could not be challenged in a subsequent suit on ground of collusion or fraud.

However, the Courts should be cautious while dealing with the cases involving public property or properties of religious and charitable institutions. In such cases, where a compromise is offered or made by the concerned public officers or office bearers of the institutions, the Court has to see whether it is fair act or collusive one. This watchfulness of the Court has been underlined by the Apex Court, in *A. A. Gopalakrishnan v. Cochin Devaswom Board, AIR 2007 SC 3162.* His Lordship K. G. Balakrishnan, CJI speaking for the Bench, commented thus;

> "..... Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the

> concerned authorities. Such acts of 'fences eating the crops' should be dealt with sternly. ..... It is also the duty of Courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

It has been further observed by the Apex Court that the compromise decree can be interfered when allegations of fraud/collusion are made with respect of such compromise.

COLLUSIVE DECREE AND DOCTRINE OF RES-JUDICATA

The provisions of section 11 of the Code of Civil Procedure are mandatory in nature and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of section 44 of the Evidence Act which defines with precision, the grounds of such avoidance as fraud or collusion. Therefore, a party to a suit or proceeding can show that a judgment or decree proved by adverse party against him was obtained by collusion, hence, does not operates as res judicata. However, plea of estoppal can be raised.

In *Laxmi Narain Gododia v. Md. Shafi Bari, AIR 1949 East Punjab 141,* it was held that S.44 is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of res judicata can be avoided. In *Tribeni Mishra and others v. Rampujan Mishra, AIR 1970 Patna 13* it has been held that the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judicata found upon the judgment." In *Vellappan v. Peter Thomas, AIR 1979 Kerala194* it has been observed that "The principle of res judicata is outside the region of fraud or collusion. Section 44 of the Evidence Act is an exception to section 11 of the Code of Civil Procedure."

In *Nachhattar Singh v. Jagir Kaur, AIR 1986 Punjab & Haryana 197* it has been held that;

> "S.40 read with S.44 makes it evident that under S.40 the previous judgments are relevant to bar a second suit or trial. In other words, the earlier judgment operates as res judicata. That will ordinarily be between the same parties and if that is so the said judgment being relevant under S.40 could be challenged, if it was proved by the adverse party, that the same was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It is only under Ss.41 and 42 when the judgment is relevant that even a third party can show that the same was delivered by a Court not competent to deliver it or that it was obtained by fraud or collusion. Therefore, where in a suit by the plaintiff

> for possession of property the defendant claims title to the property under a decree of Court passed in his favour in an earlier suit, the plaintiff can challenge the decree under S.44 as delivered by a Court not competent to deliver it or as obtained by fraud or collusion."

In *Khirod Chandra Mohanty v. Banshidhar Khatua and others, AIR 1978 Orissa 111* it is held that;

> "If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains. Where the ex parte decree in the earlier title suit was obtained by the plaintiff in that suit in collusion with all the defendants in the said suit, it was held that the decree would not operate as res judicata in the subsequent title suit brought against the plaintiff of the earlier suit."

COLLUSION: AS A GROUND OF ATTACK

A person aggrieved by any decree or order can challenge it by filing an appeal, review or revision as the situation warranted. That apart, it is indisputable that a decree can be attacked successfully otherwise than recourse of an appeal, review or revision on the ground that it was procured by the successful party by exerting fraud or collusion. Section 44 of the Evidence Act makes it clear that any party to a suit or other proceedings can establish that any judgment, order or decree which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

In this regard an observation of the Kerala High Court made in *Keepattel Bappu v. Kizhakke Valappil Muhammad, AIR 1993 Kerala 273* may be usefully referred which is as under;

> "The provision in S. 44 of the Evidence Act also allows a party in a case where the opposite party to a suit tenders or has put in evidence, a judgment, order or decree to avoid its effect on any of the three grounds : (i) want of jurisdiction in the court which delivered the judgment, (ii) that the judgment was obtained through fraud, or (iii) through collusion. There are, however, limits on this right. It has to be borne in mind that the decree is challenged not in appeal, but by separate independent proceeding and perhaps in a

collateral proceedings. It is plain and clear that an unsuccessful party will not be allowed to off set the rule of res judicata by proving that the judgment given by the court was wrong, because it came to a wrong conclusion on the evidence placed before it. The findings of the court on all matters which come for decision whether it is a decision on construction of some documents or evidence placed before it and the inference drawn from such evidence or the trustworthiness of the evidence, is final. In those matters if the court acts wrongly, the only remedy open to the defeated litigant is filing an appeal or a review. In such cases, the defeated party has no right to institute a fresh suit to get the judgment vacated. The ground of fraud for vacating a judgment therefore must be extraneous to everything which has been adjudicated on by the court and not any fraud which has already been dealt with by the court. The rule permitting to impeach a judgment on the ground of fraud is not an exception of the rule of res judicata. But it is really a defence or rather independent and outside the scope of that principle, since the judgment to be relied on as foundation of a plea of res judicata should have the quality that it has not been obtained by fraud."

In *Tribeni Mishra and others v. Rampujan Mishra* (supra) the position has been explained thus;

> "It is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. The defrauded party may also apply for review of the judgment to the Court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judicata found upon the judgment." It is further explained that, "any party to a suit or other proceeding may show that a judgment, order or decree referred to in the section, which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The right as given by this section has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose."

Plea that decree passed in earlier proceedings was collusive that it would not operate as res judicata can be raised in latter proceedings even without filing of separate suit for declaration that decree was collusive and no independent suit is necessary. This legal position is concolorous to the English Law. In this regard, the Supreme Court in its decision of *Gram Panchayat of Village Naulakha v. Ujagar Singh and others* (supra) observed the law persists in England as under;

"The law in England also appears to be the same, that no independent suit is necessary. In Spencer-Bower and Turner on Res Judicata (2nd Ed., 1969) it is stated (para 359) that there are exceptions to the principle of res judicata. If the party setting up res judicata as an estoppel has alleged all the elements of an estoppel (i.e. ingredients of res judicata), it is still open to the latter (the opposite party to defeat the estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes - fraud, cross-estoppel, contract and public policy. The author clearly says that no active proceedings for 'rescission' of the earlier judgment are necessary. They state (para 370) as follows :

> "The avoidance of a judicial act on the ground of fraud or collusion is effected not only by active proceedings for rescission..... but also by setting up the fraud as a defence to an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible."

Thus, the law is well settled that no independent suit as a condition precedent is necessary.

Therefore, it is not necessary for the party against whom a judgment is set up to have it set aside, he may show in the suit or proceeding in which it is set up against him that it was obtained by collusion. A collusive decree can be impeached collaterally as a defence to an action.

WHO CAN SET UP COLLUSION

The right to avoid a judgment on the ground of collusion is just like a right to avoid contract on those grounds, as binding character of the transaction itself is impugned. It is not a rule of procedure or rule of evidence but substantive right independent of the Evidence Act.

Section 44 of the Evidence Act provides that any party to a suit or other proceeding may show that a judgment, order or decree which is relevant under sections 40, 41 or 42 was obtained by fraud or collusion. This right is independent of right to get judgment or decree set aside by regular suit. This section enables any party to a suit or proceeding to show that a judgment or decree proved by adverse party against him was collusive one.

The Division Bench of the Allahabad High Court in *Ibne Hasan v. Smt. Hasina Bibi and others, AIR 1984 All 216,* was of the view that "a party to a decree or a person claiming through such party can, under Section 44 of the Evidence Act, allowed to avoid the effect of the decree on grounds of fraud or collusion and assert that the said decree cannot relied on for the purpose contemplated by Section 40 thereof which includes providing the basis for the plea of res judicata, in view of the inclusion Section 40 in Section 44 of the said Act. However, since Section 43 is not included in Section 44 of the said Act, illusive decree will still be relevant to support the plea of estoppel if the ingredients of estoppel are made out." See also *Khirod Chandra v. Banshidhar* (supra).

In this regard the Supreme Court in *Mahboob Sahab v. Syed Ismail, AIR 1995 SC 1205* has observed that; "If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be re-opened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record."

A stranger can always set out the collusive nature of the decree. The law provides for impeaching not only the judgments *in personam* but also judgments *in rem* on the ground of fraud or collusion. A judgment, order or decree whether of an inferior Court or a superior Court, whether on consent or after contest or ex parte, can always be attacked on ground of collusion.

CONCLUSION

The aforesaid analysis arrived us to the conclusion that as the Courts of law are designed for imparting justice amongst the honest litigious, an ostentatious litigant is liable to be emitted to curb the evil of dishonesty in justice dispensation system. A classical exposition by the Supreme Court in its decision of *S. P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853* can precisely conclude this article which reads as follows;

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

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LEGAL POSITION OF A FOREIGN JUDGMENT RELATING TO ANY MATTER ADJUDICATED UPON BETWEEN THE SAME PARTIES OR BETWEEN THE PARTIES LITIGATING UNDER THE SAME TITLE IN A CIVIL PROCEEDING BEFORE ANY INDIAN COURT

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INTRODUCTION

A State is not bound under the Law of Nations to enforce within its territories the judgment of a foreign tribunal. But in countries where the English system of jurisprudence prevails, judgment of a foreign court is enforced on the principle that it has been adjudicated by the court of competent jurisdiction. The English system of jurisprudence prevails in India, therefore, Indian law provides binding force to foreign judgment in a civil proceeding.

FOREIGN JUDGMENT

Section 2(6) CPC defines that the judgment of a foreign court is a foreign judgment and Section 2 (5) of CPC states about the foreign court that a court situate outside India and not established or continued by the authority of the Central Government. *In Ruku-ul-Mulk S. Abdul Wazid and others v. R. Vishwanathan and others, AIR 1953 Mad 261,* the Madras High Court has referred to the judgment passed by the Privy Council in *Brajlal Ramjidas and another v. Govindram Gordhandas Seksaria and ors., AIR 1947 PC 192* in which the Privy Council has defined the term "foreign judgment" to mean "an adjudication by foreign Court upon the matter before it" and has added that it would be quite impracticable to hold that a foreign judgment means a statement of the reasons by a foreign Judge for his order, since, if that were the meaning of the judgment, Section 13 CPC would not apply to an order where no reasons were given.

Enforcement of foreign judgment and its procedure

A foreign judgment can be enforced in India by following two methods, namely;

a) by filing an application for execution of foreign judgments passed by courts in reciprocating territory:

In the case of *M.V.AL. Quamar v. Tsavliris Salvage (International) Ltd., AIR 2000 SC 2826,* Hon'ble the Supreme Court held that Section 44-A C.P.C. is an independent provision enabling a set of litigants whose litigation has come

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* The articles received from Districts Sheopur and Hoshangabad have been substantially edited by the Institute.

to an end by way of foreign decree and who is desirous of enforcement of the same. It is an authorisation given to the foreign judgments and the Section is replete with various conditions and as such independently of any other common law rights, an enabling provision for a foreign decree-holder to execute a foreign decree in this country has been engrafted on the statute book to wit Section 44-A of the Code. Hon'ble Court further held that Section 44-A CPC indicates an independent right conferred on to a foreign decree-holder for enforcement of its decree in India. It is a fresh cause of action and has no co-relation with jurisdictional issues. The factum of the passing of the decree and the assumption of jurisdiction pertaining thereto, do not really obstruct the full play of the provisions of Section 44-A. It was further observed that the scheme for execution of a foreign judgment provided under Section 44-A CPC is a scheme alien to the scheme of domestic execution as is provided under Section 39(3) of the Code.

In case of *Sheik Ali v. Sheik Mohamed, AIR 1967 Mad 45,* the Full Bench of the Hon'ble Madras High Court held that the right to apply for the execution of the foreign decree under this section accrues on and from the date of filing the certified copy under sub-section (1) of Section 44-A C.P.C.

Where certified copy of a foreign judicial record is produced before the court, the court may presume that any document purporting to be a certified copy of a foreign judicial record is genuine and accurate if the document purports to be certified by the representative of the Central Government in the foreign country in question. The expression "certified copy" of a foreign judgment has to be read consistent with the requirements of Section 86 of the Evidence Act. Photostat copy of judicial record of American Court is inadmissible if it is not certified by representative of Central Govt. of India in the United States as required by Section 86 of Evidence Act [See: *Y. Narasimha Rao and others v. Y. Venkata Lakshmi and another, (1991) 3 SCC 451*].

Hon'ble Patna High Court in case of *M/s Jharkhand Mines & Industries Ltd. and another v. Nand Kishore Prasad and others, AIR 1969 Pat 228* held that where an application is made for the execution of a decree under Section 44-A, C.P.C. it is necessary to send a notice under Order 21 Rule 22 of C.P.C. to the person against whom execution is sought. An order for execution without such notice is illegal.

In case of *Algemene Bank Nederland N.V. v. Satish Dayalal Choksi, AIR 1990 Bom 170* Hon'ble Bombay High Court held that where an application for execution of a foreign decree on guarantee is made under Section 44-A of CPC, prior permission of Reserve Bank or Central Government under Section 47 (3) (b) of the foreign Exchange Regulation Act, 1973 is necessary even before the requirement of Order 21 Rules 11 and 22 of C.P.C. are complied with.

b) by instituting a suit where it is passed by the foreign courts which are not reciprocating territory:

Hon'ble Division Bench of Calcutta High Court in the case of *Ganguli Engineering Ltd. v. Smt. Sushila Bala Dasi and another, AIR 1957 Cal 103* held that a foreign judgment which is conclusive under Section 13 can be enforced in India by instituting a suit on such foreign judgment. [Also see: *Roshanlal Nuthilala & others v. R.B. Mohan Singh Oberai, AIR 1975 SC 824*] The general principle of law is that any decision by a foreign court, tribunal or quasi-judicial tribunal, is not enforceable in a country unless such decision is embodied in a decree of court of that country. In the case of *Manohar Lal v. Raghunath, AIR 1957 MB 74 (DB)*, Hon'ble Madhya Bharat High Court held that in a suit on a foreign judgment, which is not ex parte, the judgment cannot be challenged on the ground of mistake. Foreign Court cannot interfere with the foreign judgment on the ground of mistake and the appropriate forum where it can be challenged on the ground of mistake is by way of review or appeal.

Legal Position of foreign judgment:

To understand the legal position of foreign judgment, it is necessary to go through the bare provisions of Sections 13 and 14 of the C.P.C. which are being reproduced as follows:

> **Section 13** – *When foreign judgment not conclusive* – A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except –
>
> (a) where it has not been pronounced by a Court of competent jurisdiction;
>
> (b) where it has not been given on the merits of the case;
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> (e) where it has been obtained by fraud;
>
> (f) where it sustains a claim founded on a breach of any law in force in India.

> **Section 14** – *Presumption as to foreign judgments* – The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

It is necessary to make the foreign judgment conclusive under Section 13 of C.P.C. that any matter thereby directly adjudicated upon between the same parties or between the parties under whom they or any of them claim litigating under the same title. In this context Hon'ble Karnataka High Court held that the validity of any decree passed by foreign court is beyond the pale of any challenge unless the same is by one of the parties affected by the decree and on a ground which falls in one of the clauses enumerated in Section 13 of C.P.C. . Any person, who was a stranger to the proceedings culminating in the passing of a decree, cannot assail the validity of such a decree unless he had a pre-existing interest that the decree affects adversely. Events that happened subsequent to passing of decree cannot clothe the stranger with right to maintain action against decree. [See: *Deva Prasad Reddy v. Kamini Reddy, AIR 2002 Kant. 356*]

A foreign judgment is conclusive if passed by a competent court except in cases mentioned in clauses (a) to (f) of Section 13. This will be so even though the judgment is subject to appeal and on appeal is actually pending in the foreign country where it was given. Even a stay of execution does not affect the finality of the foreign judgment which nevertheless, can be sued on.

In the case of *R. Viswanathan and others v. Rukn-ul-Mulk Syed Abdul Wajid and others, AIR 1963 SC 1,* Hon'ble Apex Court held that in coming to a conclusion whether a foreign judgment is conclusive, Courts in India will not inquire whether the conclusions are correct or are supported by evidence or are otherwise correct. The binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of Section 13 of C.P.C., and not otherwise. It has further been held that every issue which has been heard and finally adjudicated in a foreign court is not conclusive between the parties. What is conclusive under Section 13 C.P.C., is the judgment i.e. final adjudication and not the reason.

In *Janardan Mohandas Rajan Pillai v. Madhubhai Patel, AIR 2003 Bom. 490* it has been held that when an issue has been decided or adjudicated upon, it would mean that the issue has been conclusively decided between the parties.

Thus, Courts are to see only whether the foreign judgment passes the test laid in Section 13 of C.P.C., this test should be applied in the light of following decisions of Hon'ble Courts :

Clause – A

Hon'ble Rajasthan High Court in the case of *Mithalal and another v. Kapoor Chand and another, AIR 1959 Raj. 47 (DB)* held that clause (a) of Section 13 should be read with Section 14 which provides that when a foreign judgment is relied upon, the production of the copy of the judgment duly authenticated is presumptive evidence that the court which pronounced it had jurisdiction unless the contrary appears on record but that the presumption may be displaced by proving want of jurisdiction and the onus of doing lies on the defendant.

Hon'ble Supreme Court in the cases of *Sankaran Govindan v. Lakshmi Bharathi, AIR 1974 SC 1764* and *R. Viswanathan's case* (supra) held that a judgment of a foreign court will not be conclusive unless it was competent to pronounce it. The competency must be in the international sense (in accordance with the principles of International law) and not merely according to the law of the foreign State in which the Court delivering the judgment functions. Hon'ble Apex Court in the case of *R. Viswanathan* (supra) explained the meaning of International law and stated that International law is not the law governing the relation between independent States, but is a branch of the civil law of the State evolved to do justice between litigating parties in respect of transaction or personal status involving a foreign element.

Hon'ble Apex Court in *R. Viswanathan's case* (supra) further held that the question whether a foreign court is a proper court to deal with a particular matter according to the law of the foreign country is a question for the court of that country and when a foreign court of final authority decides that a particular court is a proper court its decision must be regarded as conclusive for the purpose of Section 13 (a) of C.P.C. [See also: *Brajlal Ramjidas* (supra)].

The Apex Court in *Sankaran Govindan's case* (supra) has observed in this regard that :

> "...It is well-established proposition in private international law that unless a foreign Court has jurisdiction in the international sense, a judgment delivered by that Court would not be recognized or enforceable in India."

Looking to the facts of the case, it was also observed that :

> ".....the guardians of the minors did not enter appearance on behalf of the minors and so it cannot be said that the minors through the guardians submitted to the jurisdiction of the English Court."

It was further held that:

> "...Section 41 of the Evidence Act speaks, only of a final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency

jurisdiction which confers upon or takes away from any person any legal character, or to be entitled to any specific thing, not as against any specified person but absolutely. We are not quite sure their judgments or orders rendered in the exercise of any other jurisdiction would have the effect of a judgement in *rem*. We were referred to no authority wherein it has been held that an order declaring the domicile of a person under Order 11 of R.S.C. of England is a judgment in *rem* and that person affected need not submit to the jurisdiction of the foreign court which makes the declaration if otherwise they are not subject to its jurisdiction."

In the case of *Raj Rajendra Sardar Moloji Nar Singh Rao Shitale v. Shankar Saran and others, AIR 1962 SC 1737,* Hon'ble Supreme Court held that a foreign judgment may be impeached on the ground that the court was without jurisdiction either because the property in respect of which the suit is brought is situate outside its jurisdiction or because the defendant was not a resident within jurisdiction and did not submit himself by appearance or otherwise to the jurisdiction of that court.

Hon'ble Apex Court in the case of *Narhari Shivram Shet Narvekar v. Pannalal Umediram, AIR 1977 SC 164,* held that where the defendant voluntarily appears in the case without any protest as to jurisdiction or without any such protest until a later stage of the case, his conduct will clearly amount to a submission to the jurisdiction of the court. Full Bench of Hon'ble Madras High Court in *Rama Aiyar v. Krishna Patter, AIR 1917 Mad 780* held that where the defendant voluntarily appears and protests against jurisdiction but also pleads on the merits, it will nevertheless, amount to submission to jurisdiction.

Clause – B

Hon'ble Supreme Court in the case of *M/s International Woollen Mills v. M/s. Standard Wool (U.K.) Ltd., AIR 2001 SC 2134,* held that foreign judgment is not enforceable in India if it has not been passed on merits. Therefore, for a decision on the question whether a decree has been passed on merits or not, the presumption under Section 114 of Evidence Act which says that all judicial Acts are presumed to have been regularly performed, would be of no help at all. Hon'ble Court further held in this case the fact that burden of proving that decree is not on merits would be on the party alleging it. Amongst other things, the party must show that decree does not appear to be on merits, if necessary the rules of that court, the existence or lack of existence of material before the court when decree was passed and the manner in which decree is passed. Hon'ble Supreme Court further held that an *ex-parte* judgment in favour of plaintiff may be deemed to be a judgment given on merits if some evidence is adduced

on behalf of the plaintiff and the judgment, howsoever, brief is based on consideration of that evidence. Where however, no evidence is adduced on plaintiff's side and his suit is decreed merely because of absence of defendant either by way of penalty or in a formal manner, the judgment may not be one based on merits of the case. In this case Hon'ble Apex Court further stated that judgment and decree not indicating whether any documents were looked into and/or whether the merits of the case was at all considered, or whether plea of defendant was not dealt with, judgment passed is not judgment on merits and is not enforceable in India.

A decree passed by a foreign court under summary proceedings after refusing leave to defend, sought for by the defendants, is not a decree on merits as held in *Middle East Bank Ltd. v. Rajendraprasad Sethia, AIR 1991 Calcutta 335.*

In *Bharat National Bank v. Thakurdas, AIR 1935 Lahore 729,* it has been held that where a suit filed in the foreign court is dismissed in default of appearance of defendants, the judgment is not one on the merits of the case.

In *Sivagaminatha v. Natrajan, AIR 1961 Mad. 385,* it has been held that where a decree was passed in consequence of default of defendant in furnishing security though he was duly served with summons, is not one upon the merits of the case.

Clause – C

Hon'ble Bombay High Court held that a judgment based upon incorrect view of international law or refusal to recognise the law of India where such law is applicable, is not conclusive. [See: *Mallappa Yellappa Bennur v. Raghavendra Sham Rao Deshpande, AIR 1938 Bom 173 (DB)*]

Hon'ble Apex Court in the case of *Renu Sagar Power Co. Ltd. v. General Electric Company, AIR 1994 SC 860* has extended the scope of this clause and held that the recognition of foreign judgment will be refused if found contrary to public policy of the country where it is sought to be invoked or enforced.

In *Panchpakesa Iyer v. K.N. Husain, AIR 1934 Mad. 145,* Clause C was referred to where a foreign court exercised jurisdiction contrary to the principles of international law. Where a foreign court in an inquiry before it in a probate proceedings refused to recognize the law of British India applicable to the deceased's immovable property in British India, it was held that the judgment of the foreign court was not one on which a suit will successfully lie.

Clause – D

In *Sankaran Govindan's case* (supra), Hon'ble Apex Court held that:

> "... The expression "contrary to natural justice" has figured as prominently in judicial statement that it is essential to fix its exact scope and meaning. When applied to foreign judgments, it merely relates to the alleged irregularities in procedure adopted by the adjudicating Court and has

> nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the foreign Court but that practice is not in accordance with natural justice, this Court will not allow it to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case [See *Cheshire's Private International Law,* 8th ed. p. 656]. The wholesome maxim *audi alteram partem* is deemed to be universal, not merely of domestic application."

Hon'ble Apex Court further held in this case that judgment against a party not properly represented in the proceeding, as for instance, where no guardian *ad litem* is appointed for a minor defendant, or where the interest of the person so appointed is in conflict with that of the minor, or where the legal representative of a deceased party is not brought on record is contrary to natural justice. Hon'ble Apex Court *R. Viswanathan's case* (supra) explained that the minimum requirements of natural justice are (i) the judges must be comprised of impartial persons acting fairly, without bias and in good faith; and (ii) parties must be afforded an opportunity to present their case. Thus, where judgment has been obtained without giving him a reasonable opportunity of presenting his case, is contrary to natural justice.

The expression "natural justice" in this clause refers rather to the form of procedure than to the merits of a particular case. Thus, a foreign judgment obtained without issuing notice of the suit to the defendant is contrary to natural justice and a suit on such judgment is not maintainable in the Indian Court. [See *Harmasji, (1871) ILR 5 Bom. 223*]

In *Algemene Bank Nederland NV case* (supra), it has been held that the defendant was given sufficient opportunity, both, by the Hong Kong Court and by the Indian court, to ensure that he gets adequate opportunity to defend his case. But the defendant did not make proper use of the opportunities which were given to him. Hence, the principle of natural justice had not been violated in any manner and the proceedings in which a foreign judgment had been obtained, were not opposed to be principle of natural justice.

Clause – E

In *Sankaran Govindan's case* (supra), Hon'ble Apex Court held that:

> "It is a well established principle of private international law that if a foreign judgment was obtained by fraud, or if the proceedings in which it was obtained were opposed to natural justice, it will not operate as *res judicata.* An action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits the decision was one which should not have been rendered,

but it can be set aside if the Court was imposed upon or tricked into giving the judgment. A foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action or operate as *res judicata.* The fraud relied upon must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial which were met with counter-statements and the whole adjudicated upon by Court and so passed into the limbo of estoppel by the judgment. That estoppel cannot be disturbed except upon allegation and proof of new and material facts which were not before the former Court and from which is to be deduced the new proposition that the former judgment was obtained by fraud. The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained."

In *N. Khosla v. Rajlakshmi (dead) & Ors., AIR 2006 SC 1249* where the deceased donor, in fact, had expired long before and the respondents fraudulently obtained mutation in their favour showing deceased as present and witnessing the said mutation of immovable property, it has been held by the Apex Court that mutation obtained by fraudulent means is *non-est* just like decree obtained by fraud is a nullity.

Clause – F

Where a foreign judgment is founded on a breach of any law in force in India, it will not be enforced even though the defect is not apparent on the face of the proceedings. Hon'ble Calcutta High Court in the case of *Indian and General Investment Trust Ltd. v. Sri Ram Chandra Mardaraja Deo, AIR 1952 Cal 508,* held that a foreign judgment on a claim which is barred according to law of India cannot be said to be based upon a breach of Indian Law and will be conclusive in a suit upon the judgment in India.

In *Algemene Bank case* (supra) it was held that under Section 47 clause 3 of the Foreign Exchange Regulations Act, a suit for the enforcement of a guarantee for which permission of the Reserve Bank/Central Government would have been required under Section 26 (6), can be brought in India. Filing of a suit, therefore, on such guarantee cannot be said to be contrary to any law of India because Section 47 (3) expressly permits such legal proceedings in India. However, no steps for the purpose of enforcing any judgment or order for the payment of any sum, under such a guarantee except in respect of so much thereof as the Central Government or the Reserve Bank, may permit to be paid. The result is that before executing a foreign decree passed on such a guarantee in India, permission of the Reserve Bank or the Central Government for realizing such sum is necessary.

Difference between Section 13 and Section 11:

Hon'ble the Apex Court in *R. Viswanathan's case* (supra) has distinguished Sections 13 and 11 of C.P.C. and opined that the rule of conclusiveness of a foreign judgment as enacted in Section 13 is somewhat different in its operation from the rule of *res judicata*. Undoubtedly, both the rules are founded upon the principle of sanctity of judgments competently rendered. But the rule of *res judicata* applies to all matters in issue in a former suit which have been heard and finally decided between the parties and also includes matters which might and ought to have been made ground of attack or defence in a former suit. The rule of conclusiveness of foreign judgments applies only to matters directly adjudicated upon manifestly, therefore, every issue heard and finally decided in a foreign Court is not conclusive between the parties. What is conclusive is the judgment.

Legal position of foreign judgments in matrimonial and custodial matters:

It is not out of place to mention here the position of foreign judgments in relation to matrimonial disputes regarding custody of children, divorce and maintenance. In these matters, the law of that place must govern which has the closest concern with the well-being of spouses and welfare of children. In the case of *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another, (1984) 3 SCC 698,* the husband and wife were married in India and thereafter, they shifted to England where a boy was born in England from their marriage. It was held that the father cannot deprive the English Courts of its jurisdiction to decide the custody of the child by fraudulently removing the child to India.

In *Kuldeep Sidhu v. Chanan Singh, AIR 1989 (P & H) 103,* the children and parents were Canadians. The Canadian Court had granted interim custody to the mother. The father had effected unauthorized removal of children from Canada to India. Here the mother was a graduate and financially sound and the father unemployed. It was held that the order of the Canadian Court must be honoured and mere allegation that mother was living in adultery was of no avail.

In the case of *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and another, (1987) 1 SCC 42,* the American Court granted decree for child's custody to mother and visitation right to the father. Thereafter, father secretly brought the child to India against express order of the American Court. The wife filed habeas corpus petition before the Supreme Court of India for restoration of the custody of the child. It was held that the mother is entitled to the child's custody with liberty to take the child to the USA and father may, if he so desires, tender unconditional apology before the American Court for contempt proceedings and seek permission for the restoration of visitation rights. [Also see the latest pronouncement of the Supreme Court in *V. Ravi Chandran (Dr.) (2) v. Union of India and others, (2010) 1 SCC 174* (3-Judge Bench)]

The Apex Court in *Smt. Satya v. Teja Singh, AIR 1975 SC 105* while answering to the question whether Indian Courts are bound to give recognition to divorce decrees of foreign Courts has opined that it depends principally on the rules of Private International Law as recognized in India and that it is no doubt true that whether it is a problem of municipal law or of Conflict of Laws, every case which comes before an Indian Court must be decided in accordance with Indian law. It is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such a recognition is accorded not as an act of courtesy but on considerations of justice. It is implicit in that process that the foreign law must not offend against our public policy. It has further been held that the validity of a foreign judgment rendered in a civil proceeding must be determined in India on the terms of Section 13 CPC. If the judgement falls under any of the clauses of Section 13, it will cease to be conclusive as to any matter thereby adjudicated upon and will be open to collateral attack on the grounds mentioned in Section 13. It is beside the point that the validity of the judgement is questioned in a criminal court and not in a civil court. Thus, a foreign decree of divorce obtained by the husband from the Nevada State Court in U.S.A. in *absentum* of the wife without her submitting to its jurisdiction will not be valid and binding on a criminal court in proceedings for maintenance under Section 488 Criminal Procedure Code when it is found from the facts on record that the decree of divorce was obtained by fraud or by making a false representation as to a jurisdictional fact viz. that the husband was a bona fide resident and was domiciled in Nevada. The decree being open to collateral attack on the jurisdictional fact, the recital in the judgment of the Nevada court that the respondent was a bona fide resident of and was domiciled in Nevada is not conclusive and can be contradicted by satisfactory proof.

The Hon'ble Supreme Court in *Neeraja Saraph v. Jayant Saraph, (1994) 6 SCC 461* has advised examination of feasibility of legislation safe-guarding the interest of women by incorporating following provisions as:

(a) No marriage between an NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(b) Provisions may be made for adequate alimony to the wife in the property of the husband both, in India and abroad;

(c) A decree granted by an Indian Court may be made executable in foreign Courts, both, on principle of comity and by entering into reciprocal agreements like Section 44-A of the Code of Civil Procedure, which makes a foreign decree executable as it would have been a decree passed by the court.

This aspect of enforceability and conclusiveness of a foreign judgment relating to matrimonial disputes is very sensitive and is required to be seen in the light of the recommendations made by Hon'ble Supreme Court of India in *Neeraja Saraph's case* (supra) as in our contemporary society the problem of marriages relating to NRI's is increasing day by day and is likely to blow out of proportion in future.

The operation of the section regarding the foreign judgment may be illustrated by the following cases:

(I) 'A' sues 'B' in a foreign court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by 'A' in India on the original cause of action, unless the decision is inoperative by reason of one or more of the circumstances specified in Section 13 CPC.

If a decree is passed in favour of 'A' in the foreign court and 'A' sues 'B' on the judgment in India, 'B' will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign court, unless the decision of foreign court is inoperative on any of the 6 grounds specified in the section.

(II) 'A' obtained a decree against 'B' in the Cochin court which was then a foreign court and applied for execution of the decree in High Court of Bombay. It was proved that 'A' obtained the decree at Cochin by concealment of essential facts and by fraud. It was held that the execution of decree should be refused as the decree is not conclusive and is hit by clause (e) of the section [*Hajimusa v. Parmanand, (1891) ILR 15 Bom.*].

CONCLUSION:

A foreign judgment wherein any matter directly adjudicated upon between the same parties or between the parties under whom they or any of them claiming litigation under the same title can be enforced by the decree holder before any Indian Court either by instituting a suit or by following the procedure prescribed in Section 44-A of C.P.C. A combined reading of Sections 13 and 44-A of C.P.C. makes it clear that a decree of reciprocating territory can be executed through a District Court, and the judgment debtor is entitled to contest the execution petition if it can be shown that the judgment is not conclusive because it comes within any of the exception under Section 13 (a) to (f) of C.P.C. . These exceptions are incorporated under Section 13 of C.P.C. to safeguard the interest of a person against whom a foreign judgment is claimed as *res judicata*. The burden to prove that on account of these exceptions the foreign judgment is not binding upon him is on the person who takes up such defence. If case is covered by any of these exceptions, decree passed by the foreign court would not be conclusive and binding.

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विधिक समस्यायें एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या एक सह प्रतिवादी, अन्य सह प्रतिवादी एवं उसके साक्षियों की प्रतिपरीक्षा करने हेतु अनुज्ञात किया जा सकता है?

इस समस्या के समाधान हेतु भारतीय साक्ष्य अधिनियम, ए 1872 की धारा 137 एवं 138 सुसंगत है जिनमें क्रमशः साक्षियों की परीक्षा एवं उनके क्रम को परिभाषित किया गया है। उक्त धाराएं निम्नवत् है:–

''धारा – 137 – मुख्य परीक्षा – किसी साक्षी की उस पक्षकार द्वारा जो उसे बुलाता है, परीक्षा उसकी मुख्य परीक्षा कहलायेगी।

प्रतिपरीक्षा – किसी साक्षी की प्रतिपक्षी (Adverse party) द्वारा की गयी परीक्षा उसकी प्रतिपरीक्षा कहलाएगी।

पुनः परीक्षा – किसी साक्षी की प्रतिपरीक्षा के पश्चात् उसकी उस पक्षकार द्वारा, जिसने उसे बुलाया था, परीक्षा उसकी पुनः परीक्षा कहलायेगी।

धारा – 138 – परीक्षाओं का क्रम – साक्षियों से प्रथमतः मुख्य परीक्षा होगी, तत्पश्चात् (यदि प्रतिपक्षी ऐसा चाहे तो) प्रतिपरीक्षा होगी, तत्पश्चात् (यदि उसे बुलाने वाला पक्षकार ऐसा चाहे तो) पुनः परीक्षा होगी।

परीक्षा और प्रतिपरीक्षा को सुसंगत तथ्यों से सम्बन्धित होना होगा, किन्तु प्रतिपरीक्षा का उन तथ्यों तक सीमित रहना आवश्यक नहीं हैं जिनका साक्षी ने अपनी मुख्य परीक्षा में परिसाक्ष्य दिया है।

पुनः परीक्षा की दिशा – पुनः परीक्षा उन बातों से स्पष्टीकरण के प्रति उद्दिष्ट होगी जो प्रतिपरीक्षा में निर्दिष्ट हुए हों, तथा यदि पुनः परीक्षा में न्यायालय की अनुज्ञा से कोई नई बात प्रविष्ट की गई हो, तो प्रतिपक्षी उस बात के बारे में अतिरिक्त प्रतिपरीक्षा कर सकेगा।''

इन दोनों धाराओं के अधीन ''प्रतिपक्षी (Adverse party)'' को ही किसी साक्षी की प्रतिपरीक्षा हेतु अनुज्ञात किया गया है। यहाँ ''प्रतिपक्षी (Adverse party)'' से ऐसा पक्ष अभिप्रेत नहीं है जिसे किसी मामले में प्रतिपक्ष के रूप में अभिवचित (Pleaded) किया गया है। किसी पक्ष को वाद–पत्र में प्रतिवादी के रूप में वर्णित करने मात्र से वह पक्ष प्रतिपक्षी (Adverse party) नहीं हो जाता, जब तक कि वह पक्ष वादी द्वारा वादपत्र में दर्शित मामले में विरोधी नहीं है। यदि कोई पक्ष वादी का मामला स्वीकार कर लेता है तो उस पक्ष एवं वादी के मध्य कोई विवाद दर्शित नहीं होगा और ऐसे प्रतिवादी को प्रतिपक्षी की श्रेणी में नहीं रखा जा सकता है। ऐसा प्रतिवादी वादी की प्रतिपरीक्षा हेतु अधिकृत नहीं होगा। (देखे – *Hussens Hasanali Pulavwala v. Sobbirbhai Hasanali, Pulavwala AIR 1981 Gujarat 190 Para 3 at page 191*)

धारा – 137 एवं 138 में प्रयुक्त ''प्रतिपक्षी (Adverse party)'' से ऐसा पक्ष अभिप्रेत है जिसने किसी सुसंगत एवं तात्विक विवाद्यक (Relevant and Material issue) पर अन्य पक्ष से विरोधाभाषी अथवा उस अन्य पक्ष के हित के प्रतिकूल अवलम्ब लिया है। ऐसे दोनों पक्ष सम्बन्धित मामले में एक दूसरे के प्रतिपक्षी (Adverse party) होते है और ऐसा पक्ष सह प्रतिवादी (co-defendant) भी हो सकता है।

स्पष्ट है कि एक सह प्रतिवादी अन्य सह प्रतिवादी एवं उसके साक्षियों की प्रतिपरीक्षा करने हेतु तभी अनुज्ञात किया जा सकता है जबकि उस अन्य सहप्रतिवादी द्वारा अपने अभिवचन अथवा अभिसाक्ष्य मे मामले के सुसंगत एवं तात्विक विवाद्यक पर उस सहप्रतिवादी के प्रतिकूल अवलम्ब लिया गया है अथवा ऐसा कोई कथन किया गया है जो कि उस सहप्रतिवादी के हित के प्रतिकूल या हानिकारक है। यहाँ यह उल्लेख किया जाना समीचीन है कि ऐसा प्रतिपरीक्षण सह प्रतिवादियों के हित के आपसी विवाद की परिधि में ही अनुज्ञात किया जाना चाहिए। इस बिंदु पर *(Sadhu Singh v. Sant Narain Singh Sewadar, AIR 1978 Punjab and Haryana 319, Sohan Lal v. Gulab Chand, AIR 1966 Raj 229, Sri Mohmed Ziaulla v. Mrs. Sargra Begum, ILR 1997 Kar 1318)* तथा *(Smt. Saroj Bala v. Smt. Dhanpati Devi, AIR 2007, Del 105)* के न्यायदृष्टांत अवलोकनीय है।

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उन अपराधों के संबंध में जिनके लिए कारावास की दण्डाज्ञा 10 वर्ष तक विस्तारित है, दण्ड प्रक्रिया संहिता की धारा 167 (2) के प्रावधान के अंतर्गत अभियुक्त को अधिकतम कितने दिनों के लिये निरूद्ध किया जा सकता है ?

द.प्र.सं. की धारा 167 (2) के परन्तुक (क) के खण्ड (i) के अनुसार कोई न्यायिक मजिस्ट्रेट मृत्यु दण्ड, आजीवन कारावास या दस वर्ष से अन्यून की अवधि के लिये कारावास से दण्डनीय अपराध हेतु किसी अभियुक्त को अधिकतम 90 दिवस की अवधि के लिये एवं शेष अपराधों हेतु अधिकतम 60 दिवस की अवधि के लिये निरोध में रखे जाने का आदेश दे सकता है।

उक्त विधिक प्रावधान से ऐसे अपराधों के मामले में कारावास की अधिकतम अवधि के संबंध में भ्रम उत्पन्न होता है जिन के लिये कारावास की दण्डाज्ञा 10 वर्ष तक विस्तारित हो सकती है। ऐसे अपराधों से संबंधित अभियुक्त को अधिकतम 90 दिवस के लिये निरोध में रखा जा सकता है या 60 दिवस के लिये ? यह प्रश्न कई बार न्यायिक मजिस्ट्रेट के समक्ष उत्पन्न होता है।

सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *राजीव चौधरी विरूद्ध देहली (एन.सी.टी.) राज्य, ए.आई.आर. 2001 सुको 2369* में उक्त प्रश्न पर विचार करते हुए धारा 167 (2) में प्रयुक्त पद 'दस वर्ष से अन्यून' (not less ten years) का अर्थ न्यूनतम 10 वर्ष या अधिक होना बताया गया है एवं धारा 167 (2) के परन्तुक (क) के खण्ड (i) में वही अपराध सम्मिलित होना माने गये है जिनके लिये स्पष्टतः न्यूनतम 10 वर्ष या उससे अधिक का कारावास प्रावधानित है।

उक्त प्रकरण में उच्चतम न्यायालय द्वारा भा.द.वि. की धारा 386 के अंतर्गत अपराध के मामले में, जो दस वर्ष तक के कारावास की दण्डाज्ञा से दण्डनीय है, द.प्र.सं. की धारा 167 (2) के परन्तुक के खण्ड (ii) न कि खण्ड (i) लागू होना मानते हुए यह स्पष्ट किया गया है कि ऐसे अपराध से संबंधित अभियुक्त को अधिकतम 60 दिवस की अवधि के ही लिए निरोध में रखा जा सकता है। इस संबंध में म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत *सुन्दर विरूद्ध म.प्र. राज्य, 2010 (I) एम.पी.एच.टी. 426* भी अवलोकनीय है।

इस प्रकार यह स्पष्ट है कि उन अपराधों के संबंध में, जिनके लिये कारावास की दण्डाज्ञा 10 वर्ष तक विस्तारित होती है, द.प्र.सं. की धारा 167 (2) के परन्तुक (क) का खण्ड (ii) लागू होगा और ऐसे अपराध से संबंधित अभियुक्त को किसी न्यायिक मजिस्ट्रेट द्वारा अधिकतम 60 दिवस तक निरूद्ध रखा जा सकता है।

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

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PART - II

NOTES ON IMPORTANT JUDGMENTS

72. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f) Suit for eviction on the ground of bonafide need – Case of plaintiff is that the suit shop was obtained on rent by defendant from his father and later on after the partition the plaintiff became its owner and landlord – During evidence certified copy of partition decree was produced – Its admissibility was objected for want of stamp and registration – Trial Court decreed the suit in favour of plaintiff without deciding the objection – Held, objection as to admissibility of partition decree is to be decided before recording the findings about bonafide need.

Mahesh Kumar Goyal (died) through LRs Smt. Kirandevi and others v. Birendra Kumar Dosi

Judgment dated 23.09.2009 passed by the High Court in S.A. No. 59 of 2003, reported in 2010 (1) MPLJ 135

Held:

Hon'ble Supreme Court in the case of *SK. Sattar SK. Mohd. Choudhari v. Gundappa Ambadas Bukate, (1996) 6 SCC 373* has held that tenant is entitled to take a plea that a partition alleged by the plaintiff/landlord is a sham transaction and is brought into existence merely in order to seek eviction. This being so, it is obligatory on the part of the plaintiff/landlord to prove partition in accordance with law because in the absence of partition, entire property belonging to HUF becomes accountable. Viewing from this angle, it was necessary for the trial Court to decide the question of admissibility of Ex. P/11 before deciding the suit on merits.

This Court in *Paras Ram and another v. Pooran and others, F.A. No. 76/1992 dated 20.09.1995* held in its decision that: —

> "The next contention is important, it is apparent from the record that when the statement of Puran Singh (P.W. 1) was being recorded and the documents was shown to the witness, an objection was raised that the agreement was not properly stamped and stamp duty ought to have been paid on the whole of the amount involved. The learned Court did not pass an order on this objection and proceeded to record the evidence reserving the right of objection, the evidence was taken. Thus, it was the duty of the learned trial Court to have disposed of the objection of the defendant with respect to the admissibility of the document on account of insufficiency of stamp-duty. As it was not done, the learned Court failed in its duty. The case could not proceed in absence of disposal of this objection, as the document

cannot be read unless the objection is disposed of and it was held that it was admissible. The duty of the trial Court is to have disposed of the objection. The document could be read or taken into evidence. If the Court holds that stamp duty was properly paid or if it was not property paid, the document is impounded and then the stamp duty is paid. The finding of the learned trial Court based upon such a document cannot therefore be allowed to stand and must be set aside under these circumstances."

The Apex Court in the case of *Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655* has observed:

> "Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence."

Question of bona fide need is to be examined only after decision of admissibility of the said decree because the yardsticks for examining such need would be different when the partition is held proved and when the partition is not held proved. However, it is held that the finding about bona fide need recorded by the Courts below without deciding the objection about the admissibility of Ex. P/11 is not presently sustainable in law.

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73. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f) and (c)
EVIDENCE ACT, 1872 – Section 116

(i) Eviction suit – Enquiry as to title, extent and proof of – Title of the landlord does not require strict investigation – The standard of proof of the ownership in such cases is not the same as it is to be adopted in title suit – Landlord was claiming title through a Will but attestation of Will was not proved by him – Eviction suit based on the ground available under Section 12 (1) (c) of the Act was decreed by the Trial Court keeping in view the admission made by the defendant and the decree was confirmed by the First Appellate Court – Held, the suit was correctly decreed.

(ii) Denial of title in WS, effect of – If a title of the landlord is disclaimed in the written statement, the ground is made out for eviction under Section 12 (1) (c) of the Act.

Ram Kishan Soni v. Dr. Surendra Bahre
Judgment dated 07.12.2009 passed by the High Court in Second Appeal No. 1045 of 2009, reported in 2010 (1) MPHT 252

Held:

In the present appeal, it was never disputed by the appellant that Shankar Lal Bahre, father of Dr. Surendra Bahre was not the owner and landlord of the suit premises. Now, after Will was made in respondent's favour by his father and mother, the appellant paid rent to respondent and recognized him as his landlord for a period of more than 14 years. It is, therefore, not open to him to question the validity of Will. Taking the above into consideration, the respondent would be owner of the suit shop because he has right to occupy the same in his own right. He has a right against the tenant to occupy building himself and exclude anyone holding a title lesser than him. He is the owner of the suit accommodation within the meaning of Section 12 (1) (f) of the Act. Once the title of the landlord is admitted by tenant by paying rent for a period of more than 14 years, it is not open to him to challenge the same, later. The decision of the Supreme Court in the case of *Subhash Chandra v. Mohammad Sharif, 1990 JLJ 209,* as noticed above would not permit him to do so. Section 116 of the Act would come into operation and act as a bar against him in the matter. Under the circumstances, the appellant could not be permitted to deny the title of the respondent.

The standard of proof of the ownership in such cases is not the same as it is to be adopted in title suit. In the case of *Zehra Bai (Mst.) v. Jagmohan Arora, 2000 (2) MPWN Note No. 142,* Gwalior Bench of M.P. High Court has held that it is not necessary for the landlord to produce the document of her title when defendant had admitted the relationship of landlord and tenant. Once rent is paid to landlady, she shall be landlord within the definition of the landlord under the M.P. Accommodation Control Act.

In view of the discussion aforesaid, this Court is of the opinion that the evidence on record fully establishes that respondent was the owner of the premises. After giving may anxious and serious consideration to the contentions of the learned Counsel for the appellant, I find no force and substance in the submission made by the learned Counsel for the defendant-appellant and the principles laid down by the Apex Court in the case of *Apoline D'Souza v. John D'Souza, (2007) SCC 225,* Will not be applicable in eviction suit. Even in the absence of examination of the attesting witnesses of the Will, it cannot be said that respondent has failed to prove his ownership over the suit premises, approach of the Courts below based on admission of the appellant, does not appear to be contrary to law or record.

It is true that in the plaint as originally filed no ground under Section 12 (1) (c) of the Act has been taken directly. The appellant in Para 3 of his written statement denied the title of respondent and, therefore, the respondent amended the plaint and also prayed for decree under Section 12 (1) (c) of the Act. It is well settled that even if a title of the landlord is disclaimed in the written statement, the grounds is made out once the relationship of landlord and tenant is admitted or proved, tenant is stopped from denying the title of the landlord under Section 116 of the Evidence Act.

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*74. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (f) and 13 (6)**

Suit for eviction on the ground of bonafide need that plaintiff's son wanted to do footwear business in the suit premises – The High Court was of the view that since plaintiff's son had no experience in footwear business, hence there was no bonafide need – The Supreme Court has set aside the judgment of the High Court and held, that the person can start new business even if he has no experience in the new business – Claim should not be rejected only on the ground that plaintiff's son had no experience in footwear business.

Ram Babu Agarwal v. Jay Kishan Das

Judgment dated 07.10.2009 passed by the Supreme Court in Civil Appeal No. 1388 of 2003, reported in (2010) 1 SCC 164

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75. **ARBITRATION ACT, 1940 – Sections 30, 33 and 14**

Scope of interference with reasoned award by the Court – Re-appreciation of evidence on record is not permissible under the Act.

Ravindra Kumar Gupta and Company v. Union of India

Judgment dated 03.12.2009 passed by the Supreme Court in Civil Appeal No. 8019 of 2007, reported in (2010) 1 SCC 409

Held:

The High Court committed a serious error in re-appreciating the evidence led by the parties before the arbitrator. The said evidence was duly scrutinized and evaluated by the arbitrator. With regard to the claim in question, the arbitrator had given elaborate reasons. Therefore, findings recorded by the arbitrator cannot be said to be either perverse or based on no evidence. A firm finding had been recorded that under the said claim there was default and delay on the part of the respondent Union of India with respect to the items specified. The said conclusion had been erroneously substituted by the High Court with its own opinion on appreciation of the evidence. Such a course was not permissible to the High Court while examining objections to the award under Section 30 of the Arbitration Act, 1940.

State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485; Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449; ONGC Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705; Kwality Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142; M.P. Housing Board v. Progressive Writers and Publishers, (2009) 5 SCC 678; Ispat Engg. & Foundry Works v. SAIL, (2001) 6 SCC 347, followed.

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***76. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (1) (b) and 7 (2) STAMP ACT, 1899 – Section 3**

Meaning of arbitration agreement – It need not be stamped.

Section 2 (1) (b) of the Arbitration and Conciliation Act, 1996 defines the term "arbitration agreement" to mean an agreement referred to in Section 7– Sub-section (2) of Section 7 further provides that :

> **"7. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."**

Here the facts of the case make it very clear that the arbitration agreement is in the form of an arbitration clause i.e. Clause 11.7 incorporated in Share Subscription and Shareholders Agreement (SHA) dated 01.12.2005. The law does not provide that an arbitration clause incorporated in a contract should be stamped.

Geo-Group Communications Inc. v. IOL Broadband Limited

Judgment dated 17.11.2009 passed by the Supreme Court in Arbitration Petition No. 9 of 2009, reported in (2010) 1 SCC 562

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77. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7, 8 and 11

Whether *Will* or further declaration of the testator (deceased) provides for reference of dispute to arbitrator can be considered as arbitration agreement among the legatees as contemplated under Section 7 of the Arbitration and Conciliation Act, 1996? Held, No.

Vijay Kumar Sharma alias Manju v. Raghunandan Sharma alias Baburam and others

Judgment dated 05.01.2010 passed by the Supreme Court in Civil Appeal No. 89 of 2010, reported in (2010) 2 SCC 486

Held:

Whether there was any arbitration agreement, as contemplated under Section 7 of the Act. Section 7 defines 'arbitration agreement', as meaning an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Subsections (2) and (3) of Section 7 require that an arbitration agreement shall be in writing (whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement). Sub-section (4) of Section 7 enumerating the circumstances in which an arbitration agreement will be considered as being in writing, is extracted below:

> "7. (4) An arbitration agreement is in writing if it is contained in-
>
> (a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."

In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in Section 7 between the parties.

The alleged Will, admittedly, does not contain any provision for arbitration, though the learned Designate has proceeded on an erroneous assumption that the Will provides for arbitration. Even if the Will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an Arbitrator agreement among the legatees. In this case, according to the respondents, the provision for arbitration is not in the Will but in a subsequent declaration allegedly made by Durganarayan Sharma, stating that if there is any dispute in regard to his Will dated 28.12.2003, it shall be referred to his friend, U.M. Bhandari, Advocate, as the sole arbitrator whose decision shall be final and binding on the parties, A unilateral declaration by a father that any future disputes among the sons should be settled by an arbitrator named by him, can by no stretch of imagination, be considered as an arbitration agreement among his children, or such of his children who become parties to a dispute. At best, such a declaration can be expression of a fond hope by a father that his children, in the event of a dispute, should get the same settled by arbitration. It is for the children, if and when they become parties to a dispute, to decide whether they would heed to the advice of their father or not. Such a wish expressed in a declaration by a father, even if proved, cannot be construed as an agreement in writing between the parties to the dispute agreeing to refer their disputes to arbitration.

We are therefore of the view that there is no arbitration agreement between the parties.

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*78. **ARBITRATION AND CONCILIATION ACT, 1996 – Section 14**

The Court does not have any power to extend the time for making and publishing an award under the Arbitration and Conciliation Act – It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of the arbitration proceeding but the Court can opt to do so in the exercise of inherent power on the application of either party – Where however, the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it and consented to the enlargement of time by arbitrator – Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them – Hence, the mandate of the arbitrator would be automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings.

NBCC Limited v. J.G. Engineering Private Limited

Judgment dated 05.01.2010 passed by the Supreme Court in Civil Appeal No. 8 of 2010, reported in (2010) 2 SCC 385

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79. **CIVIL PROCEDURE CODE, 1908 – Sections 2 (2), 54 and Order 20 Rule 18**
LIMITATION ACT, 1963 – Article 137

Partition – Passing preliminary decree – Proceedings not closed – It remains pending till partition by passing of a final decree.
No application is required to pass the final decree – Hence, provisions of Limitation Act do not attract.

Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others

Judgment dated 21.08.2009 passed by the Supreme Court in SLP (C) No. 17932 of 2009, reported in (2009) 9 SCC 689

Held:

A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.

In so far as final decree proceedings are concerned, the Civil Procedure Code, 1908 does not contemplate filing an application for final decree. Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.

Every application which seeks to enforce a right or seeks a remedy or relief on the basis of any cause of action in a civil court, unless otherwise provided, will be subject to the law of limitation. But where an application does not invoke the jurisdiction of the court to grant any fresh relief based on a new cause of action, but merely reminds or requests the court to do its duty by completing the remaining part of the pending suit, there is no question of any limitation. Such an application in a suit which is already pending, which contains no fresh or new prayer for relief is not one to which Limitation Act, 1963 would apply.

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***80. CIVIL PROCEDURE CODE, 1908 – Section 10 and Order 22 Rule 4**
Non-bringing of LRs of proforma defendant – No abatement.
Non-bringing of LRs of proforma defendant, effect of – Suit initially filed by plaintiffs only against the defendant No. 1 – During the pendency of the case, the defendant No. 2 was impleaded under Order 1 Rule 10 CPC – No relief was claimed against her – While the first appeal was pending, she died and her LRs could not be brought on record – Held, merely on account of non-bringing the LRs of the defendant No. 2 on record, the suit cannot be treated to be abated in toto because the executable decree could have been passed in the matter in presence of the parties available on record.

Mohanlal Gupta v. Radheshyam Gupta and another
Judgment dated 17.07.2009 passed by the High Court in Second Appeal No. 1485 of 2006, reported in 2010 (1) MPHT 190

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81. CIVIL PROCEDURE CODE, 1908 – Sections 35-B & 148 and Order 17 Rule 1 (2)

(i) Non-payment of costs – Effect – Section 35-B does not contemplate or require dismissal of the suit as an automatic consequence of non-payment of costs by the plaintiff – If the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit.

(ii) Extension of time for payment of costs – Court can do it in exercise of its general power to extend time under Section 148 CPC, but such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms.

(iii) Adjournment, grant of – Where a genuine and bonafide request is made for adjournment, instead of resorting to forfeiture of the right to cross-examine, the court may grant time by levying costs.

Manohar Singh v. D.S. Sharma and another
Judgment dated 13.11.2009 passed by the Supreme Court in Civil Appeal No. 7554 of 2009, reported in (2010) 1 SCC 53

Held:

Section 35B provides that if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date, shall be a condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant.

This takes us to the meaning of the words "further prosecution of the suit" and "further prosecution of the defence". If the Legislature intended that the suit should be dismissed in the event of non-payment of costs by plaintiff, or that the defence should be struck off and suit should be decreed in the event of non-payment of costs by the defendant, the Legislature would have said so. On the other hand, Legislature stated in the rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by plaintiff (where the plaintiff was ordered to pay such costs), and a condition precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party will of course be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law. We therefore reject the contention of the respondents that Section 35-B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by plaintiff.

We may also refer to an incidental issue. When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay.

We may also refer to the provisions of Rule 1 of Order XVII of CPC which deals with grant of time and adjournments.

It is evident from Rule 1(2) proviso (e) of Order 17 that where a witness is present in court but the other side is not ready to cross-examine the witness, the court can dispense with his cross-examination. But where a genuine and

bona fide request is made for adjourment, instead of resorting to forfeiture of the right to cross-examine, the court may grant time by levying costs.

A conspectus of the above provisions clearly demonstrates that under the scheme of CPC, a suit cannot be dismissed for non-payment of costs. Non-payment of costs results in forfeiture of the right to further prosecute the suit or defence as the case may be. Award of costs, is an alternative available to the court, instead of dispensing with the cross- examination and closing the evidence of the witness. If the costs levied for seeking an adjournment to cross-examine a witness are not paid, the appropriate course is to close the cross-examination of the witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party.

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*82. **CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 8 Rule 1**
CIVIL COURT RULES, 1961 (M.P.) – Rules 110-A and B
Closure of defendants right to file written statement due to non-filing of W.S. within the period of 90 days – On the same day an application under Section 151 was filed by the defendant for directing plaintiff to supply copies of the documents relied upon by him and an opportunity to file W.S. may be granted – However the documents were supplied by the plaintiff to the defendant on subsequent date, the application was rejected – Held – Rule 110-A of M.P. Civil Court Rules obliges the court to pass proper order for supply of documents which are demanded by the defendant after appearance on account of having been filed with the plaint –Trial Court's order closing thereby right to submit written statement despite demand of documents by the defendant is illegal.

Girwar Singh v. Jhanak Singh & ors.
Judgment dated 03.12.2009 passed by the High Court in F.A. No. 150 of 2006, reported in I.L.R. 2010 M.P. 442

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*83. **CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**
Execution of decree for specific performance of agreement for sale and for possession – Amendment application for praying for delivery of possession after 12 years from the date of affirmation of decree, maintainability of – Suit for specific performance of agreement to sell and for possession of the property decreed in favour of plaintiff – Prayer for delivery of possession not being prayed earlier in the application for execution of decree, amendment application was filed for praying for issuance of warrant possession after 12 years from the date of affirmation of decree – The said application allowed by the executing court – Held, decree for possession is already passed by the Court, therefore, even if prayer for possession is not

specifically made, still the relief is implicit and the Court has jurisdiction to deliver possession even without praying for possession – Further held, the amendment application cannot be said to be barred by limitation because until and unless the sale deed is executed, the decree holder does not get right to enter into the possession.

Sitaram Pal v. Ram Prasad & Ors.

Judgment dated 28.10.2009 passed by the High Court in W.P. No. 378 of 2009, reported in 2010 (I) MPJR 145 (DB)

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*84. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

(i) Application for rejection of plaint, disposal of – Court has to read only plaint averments and nothing beyond that.

(ii) Order 7 Rule 11 CPC, scope of – When a question is beyond the scope of clauses (1) to (f) of Order 7 Rule 11 – Such question is to be raised in the written statement.

(iii) Rejection of plaint – Application under Order 7 Rule 11 (d) as suit is barred by limitation and no relief can be granted in view of Section 58 (c) of Transfer of Property Act – Application rejected – Held – Plaintiffs pleaded that the sale deed was sham and bogus and it was not to be acted upon – They have also pleaded that they went to the defendant along with the amount for re-conveyance of the property but the defendant refused to do so – In view of the pleadings, it cannot be held that there is no cause of action and suit is barred by limitation – At this stage, Court is not required to enter into the applicability of the provisions contained under Section 58 (c) of the Transfer of Property Act – Question of maintainability of suit and limitation will have to be decided at the time of hearing.

Keshav Prasad Sharma v. Halke Raikwar and another

Judgment dated 12.10.2009 passed by the High Court in W.P. No. 10239 of 2007, reported in I.L.R. 2010 M.P. 179 (DB)

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85. CIVIL PROCEDURE CODE, 1908 – Order 7 Rules 11 and 11 (a)

(i) Rejection of plaint – Powers of Court – A plaint shall be rejected on the grounds mentioned in the Rule, but the instances as given cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof – Provision are procedural and enacted with an aim and object to prevent vexatious and frivolous litigation.

(ii) Rejection of plaint – Duty of Court – Court is also required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the Court for nothing.

(iii) Rejection of plaint – Where it does not disclose a cause of action – Mere writing that plaintiff is having cause of action would in itself is not sufficient to hold that plaintiff has disclosed the cause of action.

Karim Bhai v. State of Maharashtra & ors.

Judgment dated 21.07.2009 passed by the High Court in S.A. No. 495 of 2005, reported in I.L.R. 2009 M.P. 3167

Held:

The learned Trial Court decided the application under Order VII Rule 11, CPC holding that the plaint is liable to be rejected.

On three ground that, (1) the suit of plaintiff is hit by the doctrine of lis pendens; (2) barred by the dictum of res judicata; and (3) the plaintiff is not having any cause of action of file the suit and, hence the plaint has been rejected. The Appellate Court has also affirmed the order of learned trial court. The contention of learned counsel is that this could hardly be a ground to allow the application under Order VII Rule 11, CPC and to reject the plaint at the threshold. In support of his contention, the learned counsel has placed heavy reliance on the decision of the Supreme Court *State of Orrissa v. Klockner & Co., AIR 1996 SC 2140.*

On the other hand the learned counsel for the respondent argued in support of the impugned judgment and submitted that the cogent reasons have been assigned by the learned two Courts below in passing the impugned judgment and no interference is required since no substantial question of law is involved in this appeal, therefore, this appeal and connected second appeals be dismissed. In support of their contention, the larned counsel have placed reliance on the decisions *Smt. Sulochana v. Rajendra Singh, 2008 (4) MPHT 136 (SC); Arjan Singh v. Punit Ahluwalia, 2009 (1) MPLJ 495; Kedarnath v. Sheonarain, AIR 1970 SC 1717;* and *Sales Tax Commissioner, Indore v. M/s. J. Singh, AIR 1967 SC 1454.*

Learned counsel for the respondents have further invited my attention by submitting a certified copy of the judgment of the High Court of judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No. 529/05 (*Amiruddin Hasan Noorani Malak Saheb v. Salimbhai Mukhtar Jafarbhai Chimthanawala & others*) dated August 24, 2007, directing Wakf Board to take not of recitals of Paragraph 3 of the joint pursis mentioned in the order and in view of the Joint Pursis all Civil Applications were stood disposed of.

The learned counsel for the appellants did not dispute that in the earlier round of litigation, the predecessor of the plaintiff was party. The said litigation attained finality the Supreme Court has categorically held in Paragraph 9 of the order that the properties mentioned in Ex. P/249 are Trust's properties and the

said finding has become final and it is not open to contend that the properties mentioned in Ex.P/249 is not the Public Trust's properties. The learned counsel for the appellants did not dispute rather has admitted that the suit property is also included in Ex.P/249. This decision of Supreme Court has been reported in *Salimbhai Mukhtar Jafarbhai Chimthanawala v. Amiruddin S/o Hasan Noorani & anr., 1991 (1) SCALE, 389.*

In the earlier round of litigation, Hasan Noorani, who is the father of defendant-respondent no. 20, was the party and during the pendency of the earlier litigation, the plaintiff-appellant bought the suit property on 23.6.1979. Thus the plaintiff purchased the suit property from a person who was already a party in earlier round of litigation, which traveled upto the Supreme Court and the point was put to rest, since in Ex. P/249 of the earlier suit, the Supreme Court has categorically held that for all practical purposes, the properties mentioned in this exhibit (including the suit property) is the Trust's property and, therefore, now the plaintiff cannot re-agitate this point by filing the present suit.

In view of the finding of the Supreme Court on Ex.P/249 and since the suit property has been sold by the predecessor of defendant no. 20 and because the predecessor of defendant no. 20 was the party in the earlier suit, the doctrine of lis pendens would be applicable as well as the decision passed in earlier suit would also operate as res judicata in the present suit.

On reading of the plaint it appears to be manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue and therefore, the Trial Court has rightly exercised its power under Order VII Rule 11 CPC taking care to see that the ground mentioned in the said provision is fulfilled.

Under Order VII Rule 11 CPC, a plaint shall be rejected on the ground mentioned in the Rule, but the instances as given cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof. The provisions of Order VII Rule 11 CPC are procedural and they are enacted with an aim and object to prevent vexatious and frivolous litigation. The Court is also required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the Court for nothing.

According to me, the given case in hand is nothing but a vexatious and frivolous litigation, which is not permitted to proceed.

The decision of *Klockner* (supra) placed reliance by the learned counsel for the appellants speaks that the powers under Order VII Rule 11 (a), CPC should not be exercised only on the ground that the plaintiff has no cause of action. The said decision is not applicable because taking the cumulative effect, apart from the reasonings which have been assigned by the learned First Appellate Court and this Court hereinabove the plaint does not disclose a cause of action. Mere writing that the plaintiff is having cause of action would in itself is not sufficient to hold that the plaintiff has disclosed the cause of action.

Hence plaint is rightly rejected.

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86. CIVIL PROCEDURE CODE, 1908 – Order 18 Rule 12
Remark on demeanour of witnesses – The scope of Order 18, Rule 12 CPC is that the demeanour can be recorded when the witness in under examination and not at a subsequent stage.

Yogendra Kumar & ors. v. Pavan Kumar Jain & anr.
Judgment dated 04.01.2010 passed by the High Court in W.P. No. 13812 of 2009, reported in I.L.R. 2010 M.P. 415

Held:

Order 18 rule 12, C.P.C. provides that the Court may record such remarks as it thinks material respecting the demeanour of any witness while the witness in under examination. The scope of Order 18 Rule 12 C.P.C. is that the demeanour can be recorded when the witness is under examination and not at a subsequent stage.

In re. Venkatarama Iyer, AIR 1957 AP 441, a learned Single Judge of Andhra Pradesh High Court considering the question of remarks on demeanour of witness held in para 11 of the judgment that "The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. It is a salutary rule that the facts observed by a trial Judge regarding the demeanour of a witness while in the witness box should be immediately placed on record by the Judge, especially incases involving the liberty of the citizen.

The learned Judge further held that the omission may be immaterial where as observed by Lord Atkin during the arguments in *Seethalakshmi Ammal v. Venkatasubramanian, AIR 1930 PC 130,* the judge writes his judgment a very few days after the close of the evidence and before his recollection of the witnesses' demeanour in the box has become dim. It was held that the demeanour of the witness is to be recorded while the witness is under examination. But at any subsequent stage by filing of an application such demeanour can not be recorded. Apart from this, the Order 18 Rule 12 CPC does not provide for holding of an inquiry in respect of the demeanour of witness transpired during the course of the examination.

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***87. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 97**

(i) Resistance or obstruction to possession of immovable property – Application/objection how to be adjudicated – Holding the inquiry by Executing Court does not mean to adduce the evidence but the inquiry means the satisfaction of the Court in the available circumstances with respect of objections raised by the objectors – Court is not bound to record the evidence or direct the parties to adduce the evidence in support of the objections.

(ii) **Resistance or obstruction to possession of immovable property – Married daughters of deceased tenant filed objections that they were not impleaded as party and no opportunity of hearing given to them, therefore, decree is not binding – Held, objectors did not have any right to inherit the tenancy right as member of the family of deceased tenant – Objectors were neither in possession of the premises nor paid the rent – Objections rightly dismissed by executing Court and appellate Court.**

Shobha Mishra & anr. v. Vinod Kumar & ors.

Judgment dated 26.08.2009 passed by the High Court in S.A. No. 1415 of 2007, reported in I.L.R. 2009 M.P. 3182

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88. **CONSTITUTION OF INDIA – Articles 15 and 17**
INDIAN PENAL CODE, 1860 – Sections 302/149, 395, 364 and 201
CRIMINAL PROCEDURE CODE, 1973 – Sections 374 and 386 (b)
EVIDENCE ACT, 1872 – Section 32 (1)

(i) **Centuries old Indian caste system still takes its toll from time to time which needs to be abolished for a smoother functioning of the rule of law.**

(ii) **Abduction and murder trial – Appreciation of evidence – Finding of the Appellate Court should be based on proper analysis and marshalling of entire evidence and documents on record.**

(iii) **Delayed recording of statement not fatal – As prime witness 'K' was hiding and saving his life from the mighty and cruel caste group was a normal human instinct – Three months delay in giving his statement to the police in the facts and circumstances of the case is fully explained.**

(iv) **In mass murder case, one of the injured lady in her dying declaration before succumbing to her injuries, due to fear psychosis, omitted to mention the names of some accused – In the given circumstance, it is not unnatural and her testimony cannot be discarded on that account.**

(v) **Witness turning hostile due to fear psychosis of upper caste people is not unnatural.**

State of Uttar Pradesh v. Ram Sajivan and others

Judgment dated 04.12.2009 passed by the Supreme Court in Criminal Appeal No. 686 of 2002, reported in (2010) 1 SCC 529

Held:

In the instant case, the accused persons belonging to Thakur caste literally butchered seven totally innocent persons belonging to the Harijan caste and to wipe out the entire evidence of their atrocities, after shooting they were thrown in the river Ganges where currents were very strong. Out of seven, even the bodies of five persons could not be recovered.

Unfortunately, the centuries old Indian Caste System still takes its toll from time to time. This case unfolds the worst kind of atrocities committed by the so called upper- caste (Kshatriya or Thakur) against the so called lower-caste - Harijan caste in a civilized country. It is absolutely imperative to abolish the caste system as expeditiously as possible for the smooth functioning of Rule of Law and Democracy in our country.

The Trial Court (ASJ, Fatehpur) upon carefully examining all the prosecution witnesses and after detailed appreciation of evidence has observed that the testimony of prime witness Kallu (PW 14) is reliable and his statement contains the true version of the occurrence.

The trial court found that the prosecution had succeeded in establishing the charge of abduction of Kallu, his wife Jasodiya, Ganga, Tulsi, Deo Nath, Din Dayal, Shripal and Sukhlal with the intention of committing their murder.

The appeal before the High Court was in the nature of first appeal and the High Court in a case of this nature was expected to carefully analyze the entire evidence and documents on record but unfortunately the High Court without analyzing the entire evidence set aside the judgment of the trial court.

The High Court termed the testimony of Kallu PW14 as untrustworthy. The findings of the High Court are not based on proper analysis and marshalling of the entire evidence on record. As a matter of fact, the High Court in the impugned judgment did not discuss the evidence on record.

A careful examination of the case in a proper perspective leads us to an entirely different conclusion. The High Court ought to have appreciated the mental frame of Jasodiya wherein she gave a statement which was construed as a dying declaration. The eight persons who were abducted and tied with rope and brought to river Ganges in the midstream and after their murder were thrown in the river one by one except Kallu PW14 who escaped because he jumped into the river. In that fear psyche, naming the appellants would have meant risking her life and in that state of mind, the omission of mentioning the names of the appellants is not unnatural and her testimony cannot be discarded on that count.

Similarly, the High Court has failed to appreciate the circumstances in which Kallu PW14 has survived by jumping into the river and hiding at certain places. In a genocide and massacre which was witnessed by him, wherein all his seven close relatives including his wife were killed one after other in his presence and were thrown in the river Ganga, his escaping the death was a miracle. Hiding and saving his life from a mighty cruel upper caste group was a normal human instinct. Any reasonable or prudent person would have behaved in the same manner. Immediately after his escape, he tried to make a complaint but he did not succeed. Ultimately when he wrote to Smt. Indira Gandhi and Shri Jagjivan Ram, perhaps at the intervention of someone, the police seriously investigated the matter and he was brought to his village Lohari under police protection. The delay in giving his statement is fully explained and in the facts and circumstances of the case delay was quite natural.

In a case of this nature, the witnesses turning hostile is not unusual particularly in a scenario where upper caste people have created such a great fear psyche. The instinct of survival is paramount and the witnesses cannot be faulted for not supporting the prosecution version. Even the evidence which is on record particularly of Jasodiya and Kallu PW14 supported by the evidence of Head Constable Kashi Prasad Tiwari PW27 is sufficient to bring home the guilt of the accused. The evidence of PW14 and PW27 lead to the only conclusion that the accused were squarely responsible for committing such a ghastly crime.

In our considered view, on proper scrutiny of the entire evidence and documents on record, no other view is possible except the guilt of some of the accused. The High Court without analyzing the evidence and assigning any cogent reason set aside the well-reasoned judgment of the Additional Sessions Judge and acquitted all the respondents.

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89. CONSUMER PROTECTION ACT, 1986 – Section 17 (2) (b) (as amended w.e.f. 15.02.2003)

Territorial jurisdiction of consumer forums – Insurance policy taken at Ambala (Haryana) but claim for compensation made at Chandigarh where also respondent Insurance Company has a branch office – Not permitted as the expression "branch office" in amended Section 17 (2) (b) of the Act would mean branch office where cause of action had arisen – Legal position explained.

Sonic Surgical v. National Insurance Company Limited

Judgment dated 20.10.2009 passed by the Supreme Court in Civil Appeal No. 1560 of 2004, reported in (2010) 1 SCC 135

Held:

In our opinion, no part of the cause of action arose at Chandigarh. It is well settled that the expression 'cause of action' means that bundle of facts which gives rise to a right or liability. In the present case admittedly the fire broke out in the godown of the appellant at Ambala. The insurance policy was also taken at Ambala and the claim for compensation was also made at Ambala. Thus no part of the cause of action arose in Chandigarh.

One of us (Hon'ble Mr. Justice A.K. Ganguly, J) while a Judge of the Calcutta High Court in the case of *IFB Automotive Seating and System Ltd. v. Union of India, AIR 2003 Cal 80* has dealt with the question as to the meaning of the expression "cause of action".

Placing reliance on a decision of this Court in the case of *Union of India v. Adani Exports Ltd., AIR 2002 SC 126,* in para 40 of the said judgment it has been observed as under: (*IFB Automotive Seating case* (supra), AIR p. 95)

> "40. (iv) In Adani Exports (supra) the learned Judges in para 13 set out the facts pleaded by the petitioner to give rise to cause of action conferring territorial jurisdiction on

the Court at Ahmedabad. One of the facts pleaded is that non-granting and denial utilization of the credit in the pass book will affect the business of the respondents at Ahmedabad. This fact is not pleaded in the case in hand.

Even then the learned Judges held that those facts are not sufficient to furnish a cause of action as they are not connected with the relief sought for by the respondents.

Here also the relief is against the orders of approval and this High Court has no territorial jurisdiction to grant that relief. Therefore, the communication to the effect that the petitioners' representation against orders of approval is rejected is of no consequence.

The Supreme Court, further dealing the concept of Article 226(2) and relying on the decision of *ONGC v. Utpal Kumar Basu, (1994) 4 SCC 711,* explained the concept of cause of action in para 17 at AIR p. 130 of the Report and the relevant extracts wherefrom are excerpted below: (SCC pp. 573-74)

> '17. ....It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the *lis* that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned.'

The learned Judges also held in para 18 as follows: (SCC p. 574)

> '18. ..... The non-granting and denial of credit in the passbook having an ultimate effect, if any, on the business of the respondents at Ahmedabad would not also, in our opinion, give rise to any such cause of action to a Court at Ahmedabad to adjudicate on the actions complained against the appellants'."

We respectfully agree with the view taken by the Calcutta High Court in the aforesaid decision of *IFB Automotive Seating* (supra). Hence, in our opinion, no part of the cause of action in the present case arose at Chandigarh.

The learned counsel for the appellant then invited our attention to the amendment brought about in Section 17(2) of the Act in the year 2003. The Amended Section 17(2) of the Act reads as under:-

> "17. (2) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,-

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally works for gain, as the case may be, acquiesce in such institution;

(c) the cause of action, wholly or in part, arises."

In our opinion, an interpretation has to be given to the amended Section 17(2) (b) of the Act, which does not lead to an absurd consequence. If the contention of the learned counsel for the appellant is accepted, it will mean that even if a cause of action has arisen in Ambala, then too the complainant can file a claim petition even in Tamil Nadu or Gauhati or anywhere in India where a branch office of the insurance company is situated. We cannot agree with this contention. It will lead to absurd consequences and lead to bench hunting. In our opinion, the expression 'branch office' in the amended Section 17(2) would mean the branch office where the cause of action has arisen. No doubt this would be departing from the plain and literal words of Section 17(2)(b) of the Act but such departure is sometimes necessary (as it is in this case) to avoid absurdity. [vide *G.P. Singh's Principles of Statutory Interpretation, Ninth Edition, 2004 p. 79*]

In the present case, since the cause of action arose at Ambala, the State Consumer Redressal Commission, Haryana alone will have jurisdiction to entertain the complaint.

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***90. CONTEMPT OF COURTS ACT, 1971 – Section 12**
CONSTITUTION OF INDIA – Article 215
Maintainability of Contempt Petition for execution of a decree passed by competent civil Court – Held, not maintainable – When the Code of Civil Procedure provides for instituting a proceeding for execution of the judgment and decree, then a contempt application under Article 215 of Constitution r/w/s 12 of the Act is not maintainable as the statute provides for a mechanism for execution of the decree passed.

Horilal v. Bhajanlal

Judgment dated 06.11.2009 passed by the High Court in Contempt Case No. 1047 of 2009, reported in I.L.R. 2009 M.P. 3061

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91. COURT FEES ACT, 1870 – Section 7 (iv) (c)
Proper court fees, determination of – Suit for declaration that sale deed is illegal and void – Sale deed in question executed by the husband of plaintiff No. 1 and father of remaining plaintiffs – Plaintiffs were not party to sale deed – Held, being the successor of executant of the sale deed in question, plaintiffs are bound by the sale deed – Even if the relief clause is couched in declaratory form, the relief of avoidance and/or cancellation is implicit in the declaratory relief – Plaintiffs are required to pay *ad valorem* court fees on the valuation of sale deed.

Israt Jahan v. Rajia Begum and others

Judgment dated 25.08.2009 passed by the High Court in W.P. No. 4846 of 2008, reported in 2010 (1) MPLJ 50 (DB)

Held:

The plaintiffs are claiming the suit property from Sabdar Hussain, who has executed the registered sale deed in question. Thus, they represent the estate of Sabdar Hussain and in absence of avoidance of the registered sale deed, they would remain bound by the same. It is not a case where the plaintiffs claimed the suit property independent of Sabdar Husain. Thus, without avoiding the sale deed executed by the Sabdar Husain, no relief would be available to the plaintiffs.

In the case of *Manoharlal v. Vedahisharan and others, 1995 (1) VIBHA 148,* has after taking into consideration various authorities observed :-

"(i) Where a party seeks to avoid a deed or a decree to which he is party, then ad valorem Court-fees is payable.

(ii) where substance of the relief is either for setting aside the decree or for a declaration with a consequential relief for cancellation or restraining then, ad valorem Court-fees is payable."

In the present case that according to the plaint averments themselves, the suit property was owned by Sabdar Hussain, who was husband of plaintiff No. 1 and plaintiffs No. 2 to 7. It allegedly devolved upon the plaintiff after death of Sabdar Hussain. In case, if the registered sale deed executed by Sabdar Hussain on 24-4-2007 is not avoided, the suit property cannot be treated as available for devolution on plaintiffs. Thus, it is obligatory on the part of plaintiffs to seek the cancellation or avoidance of the said sale deed. Although relief clause is couched in declaratory from, relief of avoidance and/or cancellation is implied in the declaratory relief contained in plaint. This being so, the case of the plaintiff is found squarely covered by the Apex Court decision in the case of *Shamsher Singh v. Rajendra Prasad & others AIR 1975 S.C. 2364.* Plaintiffs are directed to pay ad valorem Court fees on the valuation of the sale deed.

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92. CRIMINAL PROCEDURE CODE, 1973 – Section 154
INDIAN PENAL CODE, 1860 – Section 300

(i) F.I.R. is not substantive piece of evidence – It need not contain every minute detail of the incidence including name of every person present there – If presence of witness otherwise proved, his/her statement be relied.

(ii) Alteration made in F.I.R. regarding time of the incident is not significant, if offence proved by ocular evidence.

Motilal & ors. v. State of U.P.

Judgment dated 02.12.2009 passed by the Supreme Court in Criminal Appeal No. 1035 of 2005, reported in AIR 2010 SC 281

Held:

(i) Learned senior counsel further submitted that presence of PW6 (Smt. Kaushalya Devi) at the place of occurrence is highly doubtful since her name is not mentioned in the first information report lodged by Smt. Manju Singh (PW5). It is well settled that the first information report need not contain every minute detail about the occurrence. It is not a substantive piece of evidence. It is not necessary that the name of every individual present at the scene of occurrence is required to be stated in the first information report. It is true that Smt. Kaushalya Devi (PW6) admitted in her cross-examination that she was residing in Gorakhpur in connection with the education of her minor daughter. But she also stated that she very often comes to her village to look after cultivation of lands and household affairs. It is in her evidence that she came to the village about 4 - 5 days prior to the occurrence. It is an admitted fact that deceased Sita Ram Singh and Bichari Singh, husband of Smt. Kaushalya Devi are real brothers and residing in the same house in the village, but in separate portions. Bichari Singh has interest in the lands possessed by the family in the village. There is nothing improbable in Smt. Kaushalya Devi frequently visiting the village and staying in the house at her own convenience. It is relevant to note that the Investigating Officer (PW9) stated that on 26.6.1994, he visited the spot and examined PW6 along with other witnesses. Therefore, there is no reason to disbelieve her statement that she was very much present on that fateful night at the scene of occurrence.

(ii) Both the Courts below found that there is some overwriting in the original report (Ka-1) and Chick FIR (Ka-43) as regards the timing. Initially, it was written as 1.30 a.m. in the night and subsequently some re-writing was made and time of occurrence was shown as 1.45 a.m. There is no dispute that Toofani Singh was murdered at about 1.30 a.m. in the same night and the present incident admittedly has taken place subsequent to the murder of Toofani Singh. It is thus clear that the occurrence had taken place after 1.30 a.m. Admittedly, the murder of Toofani Singh and occurrence in the present case had taken place one after the other in that sequence at different places. It is not in dispute that the houses of Toofani Singh and deceased Sita Ram Singh are not adjacent to each other. In the circumstances, there cannot be any doubt whatsoever that the incident

had taken place at about 1.45 a.m. after the murder of Toofani Singh at about 1.30 a.m. As rightly observed by the Courts below, the police in some confusion, initially treated the present case as the cross case of Crime No. 151 of 1994 concerning the murder of Toofani Singh and accordingly registered the case as Crime No. 151A of 1994. It is evident from the evidence of Umesh Chandra Misra, the Investigating Officer (PW9) that it was a mistake on their part to register the present case as a cross case. Having regard to the facts and circumstances of the case, the corrections, if any, made by the Investigating Officer or the Station House Officer, as the case may be, in the first information report do not have any vital bearing on the case of the prosecution. On that score lodging of the first information report itself cannot be doubted. Once it is conceded that the occurrence had taken place after the murder of Toofani Singh at about 1.30 a.m. on the same intervening night, the overwriting in first information report, if any, itself has no material bearing on the prosecution's case.

An analysis of the sequence of events apparent from the record would reveal that admittedly there was enmity between the appellants and Bichari Singh Vakil who is none other than the elder brother of deceased Sita Ram Singh with regard to some landed property. Toofani Singh, who is none other than the real brother of appellant Sharda Singh was murdered at about 1.30 a.m. on the same intervening night and the appellants suspected that the murder was committed by Bichari Singh and his family members. The suspicion entertained by the appellants about the involvement of the deceased led to the murderous attack on deceased Sita Ram Singh and his family members. Bichari Singh Vakil escaped from the wrath of the appellants as he was not in the village on that particular day. These facts are clearly evident from the evidence of Smt. Manju Singh (PW5) and Smt. Kaushalya Devi (PW6). In the circumstances, the alteration, if any, made in the first information report as regards the time of occurrence is not of much significance.

Secondly, the distance between the place of occurrence and the police station is about five kilometres. Smt. Manju Singh (PW5) was not seriously injured. She explained that her husband and two sons were killed on that fateful intervening night of 24th/25th June, 1994 and there was no male members left in the house and it was under those circumstances she had to muster her courage and reach the police station to lodge first information report. We find no reason whatsoever to doubt her statement in this regard. It is true that she admitted in her evidence that apart from the other injured persons, one Uday Singh who was not injured was also present in the house, but it is not brought on record as to who this Uday Singh was. There is nothing strange in Smt. Manju Singh securing the help of a person who dropped her at the police station on his bicycle. Non-examination of the said person and equally the non-examination of the scribe of the first information report, in our considered opinion, are not that fatal to doubt the entire prosecution story. There is nothing unnatural and improbable in Smt. Manju Singh reaching the police station and lodging the first information report at about 2.40 a.m.

The omission on the part of the Investigating Officer in not mentioning the case number in the injury report and inquest is not a ground by itself to doubt the reliable and clinching evidence adduced in this case by the prosecution. The Investigating Officer may have committed an error in registering the first information report lodged by PW5 as a cross case initially to that of Toofani Singh's murder case which he rectified subsequently. The Investigating Officer may not have been that diligent that led to making some corrections in the first information report but that is no reason to reject the evidence of Smt. Manju Singh (Pw5). The courts below rightly appreciated the evidence available on record and found the so-called interpolation in the first information report, if any, itself was no ground to doubt the prosecution's story.

The ocular evidence of PWs 5 and 6 and the medical expert's (PW7) evidence leads us to an irresistible conclusion that the appellants are guilty of all the charges levelled against them and the Courts below rightly convicted all of them for the charged offences.

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93. CRIMINAL PROCEDURE CODE, 1973 – Section 428
Benefit of set off under Section 428 CrPC – Only the period of detention undergone by the convict during the investigation, enquiry or trial of the same case can be set off – Detention in other cases cannot be considered for set off – Legal position in this regard by referring its earlier cases explained.

Atul Manubhai Parekh v. Central Bureau of Investigation
Judgment dated 24.11.2009 passed by the Supreme Court in Crl. MP No. 13384 of 2009 in Criminal Appeal No. 164 of 2004, reported in (2010) 1 SCC 603

Held:

It may be relevant to reproduce the provision of Section 428 CrPC:

> "428. Period of detention undergone by the accused to be set off against the sentence of imprisonment.– Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. Provided that in cases referred to in Section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section."

In *State of Maharashtra v. Najakat Alia Mubarak Ali, (2001) 6 SCC 311,* the majority view of three Judge Bench was that the that the period of imprisonment undergone by an accused as an undertrial during investigation, enquiry or trial of a particular case, irrespective of whether it was in connection with that very case or other cases, could be set-off against the sentence of imprisonment imposed on conviction in that particular case.

Their Lordships held that the words "same case" used in Section 428 do not suggest that set-off would be available only if the period undergone as an undertrial prisoner is in connection with the same case in which he was later convicted and sentenced to a term of imprisonment. According to Their Lordships, the said expression merely denoted the pre-sentence period of detention undergone by an accused and nothing more.

In *State of Punjab v. Madan Lal, (2009) 5 SCC 238* following the decision in *Najakat Alia Mubarak Ali* (supra), Their Lordships interpreted the same to mean that the purpose of introduction of Section 428 into the Code was to give the convicted person "the right to reckon the period of his sentence of imprisonment from the date he was in jail as an undertrial prisoner" and that the period of his being in jail as an undertrial prisoner would be added as a part of the period of imprisonment to which he was sentenced.

The three Judge Bench of this Court earlier in *Champalal Punjaji Shah v. State of Maharashtra, (1982) 1 SCC 507,* has held that in order to secure the benefit of Section 428 of the Code, the prisoner has to show that he had been detained in prison for the purpose of investigation, enquiry or trial of the case for which he is later on convicted and sentenced, but he cannot claim a double benefit under Section 428, i.e., the same period being counted as part of the period of imprisonment imposed for committing the former offence and also being set-off against the period of imprisonment imposed for committing the latter offence as well. Their Lordships further held that if a person is undergoing a sentence of imprisonment on being convicted of an offence in one case during the period of investigation, enquiry or trial of some other case, he cannot claim that the period occupied by such investigation, enquiry or trial should be set-off against the sentence of imprisonment to be imposed in the latter case, even though he was under detention during such period. In such a case, the period of detention is really a part of the period of imprisonment which he is undergoing on being sentenced for another offence.

From the wording of Section 428 it is clear that what is to be set-off is the period of detention, if any, undergone by the convict during the investigation, enquiry or trial of the same case and before the date of such conviction. What has fallen for the interpretation of the courts is the expression "the same case". While in one set of judgments it has been held that periods of detention undergone in connection with other cases can be counted towards set-off under Section 428 Cr.P.C. in respect of the conviction in another case, in the other set of cases it has been held that it cannot. However, even in Najakat Alia's case,

one of the three Hon'ble Judges took a dissenting view that set-off under Section 428 of the Code would have to be in respect of the detention undergone in respect of the same case. It is the said view which had earlier been accepted in *Raghbir Singh v. State of Haryana, (1984) 4 SCC 348* and in the case of *Champalal Punjaji Shah's case* (supra).

The wording of Section 428 is, in our view, clear and unambiguous. The heading of the Section itself indicates that the period of detention undergone by the accused is to be set off against the sentence of imprisonment. The Section makes it clear that the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case. It is quite clear that the period to be set off relates only to pre conviction detention and not to imprisonment on conviction.

Let us test the proposition by a concrete example. A habitual offender may be convicted and sentenced to imprisonment at frequent intervals. If the period of pre-trial detention in various cases is counted for set-off in respect of a subsequent conviction where the period of detention is greater than the sentence in the subsequent case, the accused will not have to undergo imprisonment at all in connection with the latter case, which could not have been the intention of the legislature while introducing Section 428 in the Code in 1973. The reference made in the several decisions cited before us to Section 427 Cr.P.C. appears to be a little out of focus since the same deals with several sentences passed in the same case against the same accused on different counts which are directed to run concurrently. Section 428 Cr.P.C. deals with a different situation, where the question of merger of sentence does not arise and the period of set-off is in respect of each separate case and the detention undergone by the accused during the investigation or trial of such case. The philosophy of Section 428 Cr.P.C. has been very aptly commented upon by this Court in *Govt. of A.P. v. Anne Venkatesware, (1977) 3 SCC 298,* in the following terms: (SCC p. 303, para 5)

> "5. ....Section 428 provides that the period of detention of an accused as an undertrial prisoner shall be set off against the term of imprisonment imposed on him on conviction."

In fact, a similar situation arose in the case of *Maliyakkal Abdul Azeez v. Collector, (2003) 2 SCC 439,* wherein it was sought to be argued on behalf of the petitioner that he was entitled to the benefit of set-off under Section 428 Cr.P.C. for the period of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. While deciding the said case, the Hon'ble Judges observed that Section 428 Cr.P.C. had been brought on the statute book for the first time in 1973 and was incorporated in the light of the proposal put forward by the Joint Select Committee which noticed that in many cases the accused persons were kept in prison for a very long period as undertrial prisoners and in some cases the period spent in jail by undertrial prisoners far exceeded the sentence of imprisonment ultimately awarded. It was also noticed by the Select Committee with concern that a large number of prisoners in the

overcrowded jails of the country were undertrial prisoners and that Section 428 Cr.P.C. was introduced to remedy the unsatisfactory state of affairs by providing for setting-off of the period of detention as an undertrial prisoner against the sentence of imprisonment imposed on the accused.

The decision in the case of *Maliyakkal Abdul Azeez* (supra) was rendered after the decision in *Najakat Alia's case* (supra) and we respectfully follow the same as it reiterates the law laid down in the earlier cases such as in the case of *Anne Venkatesware* (supra), *Raghubir Singh* (supra) and *Champalal Punjaji Shah* (supra).

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94. CRIMINAL PROCEDURE CODE, 1973 – Section 438
Anticipatory bail – Anticipatory bail can be granted at any time so long as the applicant has not been arrested – It cannot be permitted to be jettisoned on technicalities such as the challan having been presented, as this provision was introduced to enable the Court to prevent deprivation of personal liberty.

Ravindra Saxena v. State of Rajasthan

Judgment dated 15.12.2009 passed by the Supreme Court in Criminal Appeal No. 2406 of 2009, reported in (2010) 1 SCC 684

Held:

The provision with regard to the grant of anticipatory bail was introduced on the recommendations of the Law Commission of India in his 41st Report dated 24.09.1969. The recommendations were considered by this Court in a Constitution Bench decision in the case of *Gurbaksh Singh Sibbia and others v. State of Punjab, (1980) 2 SCC 565.* Upon consideration of the entire issue this Court laid down certain salutary principles to be followed in exercise of the power under Section 438 Cr. P.C. by the Sessions Court and the High Court. It is clearly held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made to the High Court or Court of Sessions it must apply its own mind on the question and decide when the case is made out for granting such relief.

In our opinion, the High Court ought not to have left the matter to the Magistrate only on the ground that the challan has now been presented. There is also no reason to deny anticipatory bail merely because the allegation in this case pertains to cheating or forgery of a valuable security. The merits of these issues shall have to be assessed at the time of the trial of the accused persons and denial of anticipatory bail only on the ground that the challan has been presented would not satisfy the requirements of Sections 437 and 438 CrPC.

In our opinion, the High Court committed a serious error of law in not applying its mind to the facts and circumstances of this case. The High Court is required to exercise its discretion upon examination of the facts and circumstances and to grant anticipatory bail "if it thinks fit". The aforesaid

expression has been explained by this Court in *Gurbaksh Singh's case* (supra) as follows: (SCC p. 583, para 18)

> "The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal."

The salutary provision contained in Section 438 Cr. P.C. was introduced to enable the Court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented anticipatory bail cannot be granted". We may notice here some more observations made by this Court in the case of *Gurbaksh Singh* (supra): (SCC p. 586, para 26)

> 26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi v. Union of India, (1978) 1 SCC 248* that in order to meet the challenge of Article 21 of the Constitution, the procedure

established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

The defence put forward by the appellant cannot be obliterated at this stage itself. We are also of the opinion, that the submission of the learned counsel for the appellant that the dispute herein is purely of a civil nature cannot be brushed aside at this stage. We, therefore, grant anticipatory bail to the appellant.

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*95. **CRIMINAL PROCEDURE CODE, 1973 – Section 438**

Anticipatory bail – Anticipatory bail should be of limited duration only and primarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted – The object of Section 438 CrPC has been repeatedly explained by the Apex Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant – But at the same time the provisions of Section 438 CrPC cannot also be invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation – Once the investigation makes out a case against him and he is included as an accused in the charge-sheet, the accused has to surrender to the custody of the court and pray for regular bail – On the strength of an order granting anticipatory bail, an accused cannot avoid appearing before the trial court.

HDFC Bank Limited v. J.J. Mannan alias J.M. John Paul and another

Judgment dated 16.12.2009 passed by the Supreme Court in Criminal Appeal No. 2415 of 2009, reported in (2010) 1 SCC 679

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96. **CRIMINAL PROCEDURE CODE, 1973 – Sections 438 and 439**

(i) **Application of bail under Section 439 of the Code, maintainability and pre-condition therefor – Application may be presented through a counsel yet, it can be considered only when the accused is in custody, i.e. is in physical control of the Court or at least physically present in the Court and has submitted himself to the jurisdiction and order of the Court.**

(ii) **Regular bail application, expeditious disposal of – Application for regular bail must be considered and disposed of on merits as expeditiously as possible in view of the pre-condition as to custody.**

(iii) **Interim bail, grant of – In order to enable production of case diary on the date of hearing, accused may disclose the date of his proposed surrender to custody at least three days in advance – No adjournment should be asked for by the Prosecutor on the ground of non-availability of case diary – However, as the Court hearing a regular bail application has inherent power to grant interim bail, accused may alongwith his regular bail application, also apply for interim bail on ground of non-availability of case diary – If the application is filed, the Court must hear and decide the interim bail application on the same day.**

Sonu @ Shahazad v. State of M.P.

Judgment dated 08.01.2010 passed by the High Court in Misc. Criminal Appeal No. 13030 of 2009, reported in 2010 (1) MPHT 421

Held:

The decision in *Rajul Rajendranath Dubey v. State of M.P., 2006 (3) M.P.H.T. 65,* contemplates two different approaches to be adopted by the Court of Session and the High Court while dealing with an application under Section 439 of the Code of Criminal Procedure (for short 'the Code') for grant of regular bail to an accused enjoying liberty of release on anticipatory bail. The relevant observations may be reproduced as under:-

> "When an accused on anticipatory bail makes an application for regular bail, either under Section 437 or 439 of the Code, it is not necessary by reason of umbrella over him that either he should be present or should be in custody for consideration of his regular bail application. But, once such application is rejected and either he is not taken into custody or moves out of the custody of the Court for any reason, the application under Section 439 of the Code made to Higher Court, which may either be the Court Sessions or the High Court, as depending in the individual case, is not then maintainable."

A close analysis of the decision would reveal that it contained reference to an earlier decision rendered by the same Bench in *Sunil Gupta v. State of M.P., 2005 (3) M.P.H.T. 272,* and the negative answers given by a Division Bench of this Court in *Brijesh Garg @ Poda v. State of M.P., Misc. Cr. Case No. 4984/2005,* decided on 18-8-2005, to the questions as to –

(i) whether the protective umbrella granted under the anticipatory bail order can be claimed by an accused whose application for regular bail is rejected by the Court of Session and in such a situation, whether his application under Section 439 of the Code would be maintainable before the High Court?

(ii) whether the accused who has been enlarged on anticipatory bail for a limited duration and whose application for regular bail is rejected by the Court of Session but at the time of consideration of his application, either he was not present before the Court or had moved out the custody of the court, whether his application under Section 439 of the Code would be maintainable before the High Court?

It is relevant to note that in *Sunil Gupta's case,* (supra) the legal position as explained by the Apex Court in *Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558, and reaffirmed in Sunita Devi v. State of Bihar, (2005) 1 SCC 608,* was also taken into consideration. However, none of these precedents had recognized maintainability of an application under Section 439 of the Code of a person who is not in custody irrespective of whether he is under the protective umbrella of Section 438 of the Code or not.

Further, in *State of Haryana v. Dinesh Kumar, 2008 AIR SCW 696,* the Supreme Court, though in a different context, while disapproving the contrary view taken by a Full Bench of *Madras High Court Roshan Beevi v. Joint Secretary to Govt. of Tamil Nadu, 1984 Cr.LJ 134,* on the question as to what constitutes 'arrest' and 'custody' in relation to criminal proceedings, quoted with approval the following observations made by Justice V.R. Krishna Iyer, in his inimitable style, in the case of *Niranjan Singh v. Prabhakar Rajaram Kharote, AIR 1980 SC 785* –

> "When is a person in custody, within the meaning of Section 439, Cr.PC ? When he is, in duress either because he is held by the Investigating Agency or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics

but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in Court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Session Judge and the jurisdiction to grant bail thus arose.

Custody, in the context of Section 439, is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and order of the Court.

He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions ....."

The word 'custody' was used with the same meaning in *Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558.* The basic rule, as propounded therein and re-affirmed in *Sunita Devi v. State of Bihar, (2005) 1 SCC 608,* "that an application, under Section 439 of the Code for grant of bail, would not maintainable unless a person is in custody", has been approved by the Supreme Court in all subsequent decision on the point including *Naresh Kumar Yadav v. Ravindra Kumar, AIR 2008 SC 218* and *Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281.*

In *Naresh Kumar Yadav's case* (supra), the Apex Court proceeded to add –

"In *Nirmal Jeet Kaur's case* and *Sunita Devi's case,* certain grey areas in *K.L. Verma v. State, (1998) 9 SCC 348,* were noticed. The same related to the observation 'or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire'. It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is 'in custody'. In *K.L. Verma's case, reference was made to Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667.* In the said case there was no such indication as given in *K.L. Verma's case* that a few days can be granted to the accused to move the Higher Court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation."

Needless to say the Subordinate Courts are bound to follow the decision of the High Court only when there is no apparently contrary view expressed by the Apex Court on the point.

The legal position that emerges on a broad conspectus of these decisions rendered by the Supreme Court, may be summed up in the following words :-

> "an application under Section 439 of the Code for grant of bail can be considered only when the accused is in custody, meaning of which has been explained in *Niranjan Singh's case* (supra) irrespective of whether the period of anticipatory bail has expired or not. "

In the words, even though, an application for grant of regular bail on behalf of an accused, enjoying liberty of release on anticipatory bail, may be presented through a Counsel yet, it can be heard and decided only when he is in custody.

The ideal situation would be that an application for regular bail must be considered and disposed of on merits as expeditiously as possible in view of the pre-condition as to custody and no adjournment should be asked for by the Public Prosecutor on the ground of non-availability of the case diary. Moreover, in order to enable production of the case diary on the date of hearing, the accused may also disclose, in his bail application, the date of his proposed surrender to custody at least 3 days in advance [See: *Naresh Kumar Yadav's case* (supra)] –

This apart, as observed by the Apex Court in *Kamlendra Pratap Singh v. State of U.P., 2009 (4) Scale 77,* the Court hearing the regular bail application has inherent power to grant interim bail pending final disposal of the regular bail application. Accordingly, in case, the accused-applicant along with his regular bail application also applies for interim bail on the ground of non-availability of the case diary, the Court concerned should hear and decide the interim bail application on the same day.

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97. CRIMINAL PROCEDURE CODE, 1973 – Section 439
INDIAN PENAL CODE, 1860 – Sections 392, 395 and 120-B
ARMS ACT, 1959 – Sections 25 and 27
Application of bail under Section 439 CrPC in case of dacoity – Bail application cannot be accepted on the ground that a person cannot be booked for offence on the basis of confession or information given by co-accused under Section 27 of the Evidence Act particularly when the entire chain of events is complete in nature and conspiracy to commit the offence is also established.

Rajendra Verma v. State of M.P
Judgment dated 18.11.2009 passed by the High Court in Misc. Criminal Case No. 6530 of 2009, reported in 2010 (1) MPHT 364

Held:

A prompt report of the incident was lodged by one Jameel Khan, Driver of

the Bus on date 13.07.2009 at 22:00 hrs. with the Police Station by complaining that four unknown persons were travelling in the Bus and out of those four persons two persons who were sitting on the Bonut of the Bus took out a Country Made Pistol and place on the Temporal Region (Head) of the Driver and rest of the persons snatched the suitcase and the bag from one passenger, Rakesh Jain, a business man who was carrying with him a sum of Rs. 15 lakhs. The driver further narrated in the FIR that under the threat of shooting the driver and the passengers, the Dacoits took away the bags containing the cash amount as also a Videocon Repairing Kit from another passenger Ashok Yadav. He further submitted that the assailants had left a carry bag which was containing the clothes of the co-accused persons.

The Investigating Agency has examined the Driver, Jameel Khan, Mr. Rakesh Jain and Mr. Ashok Yadav and also examined the Tailor who had stitched the clothes of the persons whose clothes were found in the carry bag.

Learned Public Prosecutor has referred to the documents demonstrating the result of the Test Identification Parade carried out by the Investigating Authority to demonstrate that the complainant Rakesh Jain has identified as many as 5 persons, namely, Bablu, Prasann, Uttam, Chandrabhan and Shiv Kumar. Shri Bharadwaj has further relied upon the fact of information and discovery successfully carried out by the Investigating Agency, in terms of the Memo prepared under Section 27 of the Evidence Act to connect the guilt/crime with the guilty/criminal.

The Counsel for the applicant while attacking on the veracity and acceptability of the confession of the co-accused in the Memo prepared under Section 27 of the Evidence Act has relied upon four judgments reported as *Prakash Singh v. State of M.P., 1994 (II) M.P. Weekly Notes 72, Jayendra Saraswathi Swamigal v. State of Tamil Nadu, 2005 (I) Crimes (SC) 113, Suresh Budharmal Kalani, 1998 SCC (Criminal) 1625* and *Susheel Kumar Sharma v. State of M.P., 1995 (I) M.P. Weekly Notes 248* to demonstrate that no proceeding could be initiated and/or no charge could be framed or sustained against an accused persons on sole confession or information of the co-accused and, therefore, the memo prepared under Section 27 of the Evidence Act cannot be relied upon to connect the applicant with the offence.

The aforesaid judgments definitely deals with an issue of confession of co-accused or the information of a co-accused leading to the discovery of a fact but in view of the catena of judgment of the Supreme Court, it has to be examined as to whether the information given by a co-accused about the commission of the offence has a corroborative value or it could be ignored at the stage of the consideration of the bail application and since none of these four judgments cited on behalf of the applicant deals with the controversy in question, no benefit could be given to the accused persons at this stage.

Since the entire chain of events right from the stage of the commission of the conspiracy at Ashok Nagar up till the commission of the offence at Village

Todia appears to be prima facie complete in nature, which further finds reflection in the information by the applicant/accused persons in their Memo prepared under Section 27 of the Evidence Act, it could not be said that there is any discrepancy in the entire chain of events and no benefit of any lacuna, of a petty nature, could be given to the accused/applicant at this stage particularly when the accused person giving information about the involvement of the other co-accused persons are all being tried together in the trial.

In these facts and circumstances it appears that a serious offence of committing dacoity and conspiracy has been committed by the accused persons with an established previous meeting of mind, therefore, even when the driver of the bus has suggested for the actual commission of the offence by only four unknown persons, inside the bus, it could not be said that the accusation levelled against all the 13 persons are beyond the purview of the scope of Section 392, 395 and 120-B of the Indian Penal Code.

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98. CRIMINAL TRIAL:
INDIAN PENAL CODE, 1860 – Section 302

(i) Factors relevant to grant of death sentence – It is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant.

(ii) *Honour killing over inter caste/community marriage*
In the facts and circumstances of this case, death sentence modified into life imprisonment with directions to undergo actual imprisonment of 25 years to two accused persons and 20 years to another accused person.

Dilip Premnarayan Tiwari and another v. State of Maharashtra
Judgment dated 10.12.2009 passed by the Supreme Court in Criminal Appeal No. 1026 of 2008, reported in (2010) 1 SCC 775

Held:

All murders are foul, however, the degree of brutality, depravity and diabolic nature, differ in each case. It has been held in the earlier decisions of this Court which we may not repeat that the circumstance under which the murders took place, differ from case to case and there cannot be a straightjacket formula for deciding upon the circumstances under which the death penalty is a must.

Insofar as the accused 1, Dilip is concerned, there can be no doubt that he was the chief architect of the crime. There can also be no doubt that he entered the house of the victims in the dead of night. Obviously, the visit was not intended to be a courtesy call. It was obvious that he had visited being duly armed and in company of three other friends. What was then the psychology of Dilip, accused 1 and why did he wait for seven months are the relevant questions which must attract our attention.

Sushma was the younger sister of this accused. It is a common experience that when the younger sister commits something unusual and in this case it was an intercaste, intercommunity marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. Dilip, therefore, must have been a prey of the so-called insult which his younger sister had imposed upon his family and that must have been in his mind for seven long months.

It has come in the evidence that even if the marriage was performed with Prabhu, there were efforts made by the family members of Dilip to bring Sushma back. It has come in evidence that mother of Dilip tried to lure back Sushma and so did her other married sister Kalpana who actually went on to meet Sushma in her college. Those efforts paid no dividends. In stead, Sushma kept on attending the college thereby openly mixing with the society. This must have added insult to the injury felt by the family members and more particularly, accused Dilip. Why did he wait for seven months? The answer lies in the fact that Sushma became pregnant and thus reached a point of no return. Till such time as she became pregnant, there might have been some hopes in the family to win her back but once she became pregnant, even that distant hope faded away and, in our opinion, that is the reason why this ghastly episode took place. As if all this was not sufficient, Dilip himself must have had the feeling of being cheated. It is not that Dilip did not know Prabhu who was living only three houses away from his house. The secret love affair which went on between Sushma and Prabhu for which Abhayraj acted as a messenger must have raised the feeling of being cheated by Prabhu. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so- called non-Brahmin status of Prabhu.

It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

No doubt, the murder was brutal. However, it has been pointed out by advocates for the appellants that this was not a diabolic murder nor had the murderers acted in depravity of their minds by disfiguring the bodies. The incident must have taken place barely within 10-15 minutes when they came, assaulted the family members and left. True it is that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence.

The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana, (1999) 3 SCC 19* where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In fact in one other case reported as *Ram Pal v. State of U.P., (2003) 7 SCC 141* total 21 persons were killed as the accused trapped them in a house and burnt the house. Advocate appearing on behalf of the State very strongly contended as against this, that in the present case while four persons were killed, two helpless ladies were also assaulted and very seriously injured and it is only because the accused thought that those two ladies had died and left, that the lives of Deepa and Indira were spared. Therefore, in the circumstances of this case, we must lean in favour of the death sentence.

In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. No doubt in *Ravji v. State of Rajasthan, (1996) 2 SCC 175* this Court held as under: (SCC p. 187, para 24)

> "24. ...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."

It is also true that this case was followed in as many as six cases where the death sentence was approved of. However, in his judgment reported as *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498* Hon'ble Sinha, J. pointed out that this judgment is per incuriam as the law laid down

therein is contrary to the law laid down in *Bachan Singh v. State of Punjab, (1980) 2 SCC 684* where the principle has fallen out to the effect that the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal. It is because of this that we have ventured to consider the mindset of accused 1, Dilip and the vicious caste grip that might have catapulted the crime committed by him. We would, thus, follow *Bachan Singh's case* (supra) and the principles therein rather than following the narrow approach given in *Ravji's case* (supra).

Hence, after confirming conviction, sentence modified from death sentence to life imprisonment to undergo actual imprisonment of 25 years for accused Dileep (A 1) and Manoj (A 3) and 20 years to accused Sunil (A 2).

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***99. CRIMINAL TRIAL:**

INDIAN PENAL CODE, 1860 – Sections 45 and 57

CRIMINAL PROCEDURE CODE, 1973 – Sections 432, 433 and 433-A

CONSTITUTION OF INDIA – Articles 72 and 161

"Life imprisonment" means imprisonment for the whole of the remaining period of the convicted person's natural life within the scope of Section 45 of IPC – On a conjoint reading of Sections 45 and 57 of the Penal Code and Sections 432, 433 and 433-A CrPC, it is now well established that a convict awarded life sentence has to undergo imprisonment for at least 14 years – While Sections 432 and 433 empower the appropriate Government to suspend, remit or commute sentences, including a sentence of death and life imprisonment, a fetter has been imposed by the legislature on such powers by introduction of Section 433-A into the Code of Criminal Procedure by the amending Act of 1978, which came into effect on and from 18.12.1978 – By virtue of the non obstante clause used in Section 433-A, the minimum term of imprisonment in respect of an offence where death is one of the punishments provided by laws or where a death sentence has been commuted to life sentence, has been prescribed as 14 years and in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the powers vested in the Governor under Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years.

Ramraj alias Nanhoo alias Bihnu v. State of Chhattisgarh

Judgment dated 10.12.2009 passed by the Supreme Court in SLP (Crl.) No. 4614 of 2006, reported in (2010) 1 SCC 573

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100. ELECTRICITY RULES, 2005 – Rule 12
ELECTRICITY ACT, 2003 – Sections 135 and 151
Whether a Court can take cognizance of an offence punishable under the Electricity Act upon a report of a police officer filed under Section 173 of CrPC before coming into force of Electricity (Amendment) Act, 2007? Held, Yes.

Vikram Singh v. State of M.P.

Judgment dated 01.09.2009 passed by the High Court in Criminal Appeal No. 753 of 2005, reported in 2010 (I) MPJR 155 (DB)

Held:

It is submitted that Electricity Act of 2003 has been amended vide amendment Act No. 26 of 2007, which has come in force w.e.f. 29.5.2007 and the following proviso has been inserted in Section 151 of the Act :-

> "Provided that the Court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure, 1973 (2of 1974);
>
> Provided further that a special Court constituted under Section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial."

It is submitted that the object to amend Section 151 of Electricity Act was that as per Section 151 of the Act the offence is relating to theft of electricity, electric lines and interference with meters are cognizable offences. Concerns have been expressed that the present formulation of Section 151 stands as a barrier to investigation of these cognizable offences by the police. It is proposed to amend Section 151 so as to clarify the position that the police would be able to investigate the cognizable offences under the Act, to expedite the trial before the Special Courts, it is also proposed to provide that a Special court shall be competent to take cognizance of an offence without the accused being committed to it for trial.

It is submitted that thus, the respondent was authorized to file the charge sheet against the appellant after 29.05.2007 but in the present case the charge sheet has been filed by the respondent on 08.01.2005. It is submitted that the proviso to Section 151, which has been amended to the Electricity Act cannot be given retrospective effect. It is submitted that the appeal filed by the appellant be allowed and the impugned judgment be set-aside.

Learned counsel for the respondent submits that the contention raised by the learned counsel for the appellant is having no force. Reliance is placed on a decision of this Court in the matter of *Sheikh Mohd. Khalil v. State of M.P.*, reported in 2005 *(4) MPLJ 479,* wherein the incident of theft of electricity took place on 06.04.2004 i.e. prior to the date of amendment and the charge sheet was filed by the State. This Court observed as under:—

"When, on a complaint made by anyone who is competent to make a complaint under Section 151 of the Electricity Act, the police takes cognizance and after investigation sends its report to the Court along with the complaint received by it on which the investigation started, the Court can take cognizance because the person making the complaint to the police is one enumerated under Section 151 as competent to make a complaint. There is no illegality in the procedure, as Section 151 of the Act does not require that the complaint should directly be made to the Court. The substance of the provision of Section 151 of the Act is a complaint for taking cognizance made by one who is competent to make it under that section and not that it should be directly presented to the Court. This is also the scheme of Rule 12 of the Electricity Rules, 2005 made by a notification dated 08.06.2005. Rule 12 enables that the complaint can be made to the police and the police will sent the complaint alongwith its report to the Court for taking cognizance. Even though the said rule came later, the same procedure was adopted in this case and such a procedure does not go against Section 151 of the Act. Admittedly, the complaint was also made by a person enumerated under Section 151 of the Act as competent to make."

The offence of theft of electricity was committed by the petitioner on 29.11.2004. Proviso to Section 151 Electricity Act was amended on 29.05.2007. Charge sheet was filed by the prosecution on 08.01.2005. Electricity Rules 2005 came in force with effect from 08.06.2005. Rule 12 of the Rules has empowered the police to take cognizance of the offence punishable under the Act. In the matter of *Sheikh Mohd. Khalil* (supra) this Court has taken the view that even though the said Rule came later the same procedure was adopted in this case and such a procedure does not go against Section 151 of the Act. In view of this the objection regarding the validity of the proceedings initiated by the prosecution has no merits and on that ground the judgment passed by the learned Court below cannot be set aside.

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***101. EVIDENCE ACT, 1872 – Sections 3 and 119**
CRIMINAL PROCEDURE CODE, 1973 – Section 282
INDIAN PENAL CODE, 1860 – Section 376 (2) (g)

(i) Examination of dumb and deaf witness – Procedure and precautions for recording evidence – Explained.

(ii) Appreciation of evidence of deaf and dumb witness – Signs and gestures made by prosecutrix are not recorded by trial Court – Therefore, cannot be examined by appellate Court while

appreciating her evidence – Apart from that, it appears that no oath was administered to the Instructor, Deaf and Dumb Welfare Society – Evidence of the prosecutrix cannot be said to be legal evidence.

(iii) Prosecutrix dumb and deaf – It is true that normally conviction for commission of offence under Section 376 of IPC can be based on the statement of prosecutrix without any corroboration – Moreover, the statement of the prosecutrix in the present case is not corroborated by any evidence even doctor has not given a definite opinion about the commission of rape – Evidence of the prosecutrix is not legal evidence to support the conviction – Conviction and sentence set aside – Appeal allowed.

Vinod v. State of M.P.

Judgment dated 01.12.2009 passed by the High Court in Criminal Appeal No. 232 of 2003, reported in I.L.R. 2009 M.P. 3440

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*102. EVIDENCE ACT, 1872 – Sections 9, 32 (2) and 67
INDIAN PENAL CODE, 1860 – Section 376

(i) Medical report – How can be proved if doctor not available – Medical report may be proved by examining any other employee of the same hospital like ward boy, nurse etc., who are acquainted with the hand writing and signature of the doctor, as per provision under Section 67 of the Evidence Act and same could have been admissible in evidence as per provision under Section 32 sub-section (2) of the Evidence Act because the medical report was given by doctor in discharge of his professional duty – Trial Court may have called as court witness any other doctor or witness from concerned hospital in exercise of its power under Section 311 of the CrPC for proving the medical report in the interest of justice for just decision of the case and finding out the truth.

(ii) No test identification parade – Effect – Prosecutrix remained in company of accused persons for a pretty long time – She had sufficient time to see, identify and keep their features and personality in mind – Description and features of accused persons was stated in FIR which was lodged without any delay – No harm would cause to prosecution case if no test identification parade was held.

Subhash v. State of M.P.

Judgment dated 06.08.2009 passed by the High Court in Criminal Appeal No. 804 of 1995, reported in I.L.R. 2009 M.P. 3226

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*103. EVIDENCE ACT, 1872 – Section 45
CRIMINAL PROCEDURE CODE, 1973 – Section 154
INDIAN PENAL CODE, 1860 – Sections 376 and 363

(i) Age of prosecutrix – Margin of error – Age of prosecutrix assessed above 14 and below 16 years on the basis of findings of radiological examination of joints comprising radius, ulna and femur bones and crest of ilium – Admission of doctor regarding margin of error of two years on both sides was misconceived as ossification test was not confined to x-ray examination of a single bone only – Margin of error could be 6 months.

(ii) Delay in lodging FIR – FIR was lodged after the father returned back to home as reputation of the family and future of the prosecutrix were at stake – Explanation is sufficient and delay in lodging FIR is inconsequential.

(iii) Kidnapping – Word 'takes' does not necessarily connote taking by force and is not confined only to use of force, actual or constructive but means 'to cause to go', 'to escort' or 'to get into possession'.

Nanda v. State of M.P.

Judgment dated 31.07.2009 passed by the High Court in Criminal Appeal No. 575 of 1994, reported in I.L.R. 2009 M.P. 3221

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*104. FAMILY COURTS ACT, 1984 – Sections 7 and 20
MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 5
CRIMINAL PROCEDURE CODE, 1973 – Section 125

(i) Provisions of Family Courts Act shall have over riding effect on all other enactments in force dealing with the subject matters governed under Section 7 of the Act which also include a suit or proceeding for maintenance.

(ii) Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 CrPC as long as she does not remarry – The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only.

(iii) A Family Court established under the Family Courts Act shall exclusively have jurisdiction to adjudicate an application filed under Section 125 CrPC irrespective of absence of any application under Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 – Cumulative reading of the relevant portions of the judgments of this Court in *Danial Latifi v. Union of India, (2001) 7 SCC 740 and Iqbal Bano v. State of U.P., (2007) 6 SCC 785* would make it crystal clear that even a divorced Muslim

woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry – This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

Shabana Bano v. Imran Khan

Judgment dated 04.12.2009 passed by the Supreme Court in Criminal Appeal No. 2309 of 2009, reported in (2010) 1 SCC 666

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*105. HINDU LAW:

(i) Joint family property – Factum of proof – Determination – Plaintiff is required to establish that there was sufficient nucleus which could have been the source of acquisition of property – Whole of the money required for the purchase of the property is not required to be proved.

(ii) Self acquired property – Factum of proof – Determination – It is sufficient in law that there is proof about the nucleus which could have been the source of acquisition – Once the existence of such a nucleus is proved, obviously it is for the person asserting his self acquired property to prove affirmatively that he acquired it from his own self acquired funds.

Shyamlal & ors. v. Babulal & ors.

Judgment dated 29.06.2009 passed by the High Court in S.A. No. 410 of 1999, reported in I.L.R. 2010 M.P. 225 (DB)

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106. HINDU MARRIAGE ACT, 1955 – Sections 13 and 28
EVIDENCE ACT, 1872 – Section 112

(i) Question relating to legitimacy of child in divorce matter on an application of husband – High Court directed for DNA test of the child on the ground that there will be possibility of reunion if the test revealed that the child was born from the wedlock of the parties – The Apex Court held that it was not open to the High Court at the appellate stage to direct a DNA test to be performed on the child while there is no allegation that the child was born as a result of illicit relationship.

(ii) Presumption of legitimacy is a presumption of law – When a child is born from a wedlock, there is a presumption in favour of his legitimacy which largely depends on the presumed fact that the parties to a marriage have necessary access to each other.

Ramkanya Bai v. Bharatram

Judgment dated 22.10.2009 passed by the Supreme Court in Civil Appeal No. 7018 of 2009, reported in (2010) 1 SCC 85

Held:

This appeal is directed against the judgment and order dated 26.06.2008 passed by the High Court of Madhya Pradesh at Indore Bench in IA No. 803 of 2007, which arose in a pending first appeal, which has been filed against the Judgment and order dated 07.12.2006 passed by the Additional District and Sessions Judge, District Mandsor, Madhya Pradesh. In the impugned order in the pending first appeal, the High Court had directed DNA test of the child of the parties to be performed.

In the said pending appeal, an application was made by the respondent husband for an order to perform DNA test of the child born in the month of November 2004 on the ground that such child could not be taken to be a child born out of the wedlock of the parties. It was the appellant who objected to this application stating inter alia that the child was born from the wedlock of the parties and it was also brought to the notice of the High Court that the respondent husband did not deny the paternity of the child while the suit was pending before the trial Court.

The High Court, by the impugned order, allowed the said application of the respondent husband by making the following observation:

> "However, since the appellant has made a prestige issue and it appears to this Court that in case in DNA test if it is found that the son of the respondent is from the appellant then the family can be reunited."

We are unable to accept the impugned order of the High Court. The High Court was not justified in allowing the application for grant of DNA test of the child only on the ground that there will be a possibility of reunion of the parties if such DNA test was made and if it was found from the outcome of the DNA test that the son was born out of the wedlock of the parties. In the absence of any reason except on the ground that the respondent husband had made a prestige issue about the paternity of the child, nothing could be found from the impugned order of the High Court which could invite the Court to allow such application.

On a perusal of the application for grant of an order for DNA test of the child, it would also be evident that there was no allegation made by the respondent husband that as a consequence of illicit relationship with some third person, the child was born to the appellant wife. Apart from that, it is an admitted position that during the pendency of the divorce proceedings in trial Court, neither such prayer for performing DNA test to find out the paternity of the child was ever made by the respondent husband nor any allegation in the plaint was made by him in his pleading. Therefore, it was not open to the High Court at the appellate stage to direct the DNA test to be performed on the child of the appellant wife.

It is also well settled that the presumption of legitimacy is a presumption of law. When a child is born out of a wedlock, there is a presumption in favour of his legitimacy and presumption of legitimacy largely depends on the presumed fact that the parties to a marriage have necessary access to each other when a

divorce petition is filed and specially, when the respondent husband did not assert that the son of the appellant wife was a consequence of illicit relationship with some third person. The High Court, in the impugned order, has also observed that the son of the appellant wife has begotten from the respondent husband, which cannot be disputed at this stage on the basis of mere desire of the respondent husband to deny such paternity of the child.

For the reasons aforesaid, the impugned order is set aside and the application of DNA test to be performed on the child of the appellant wife is hereby rejected.

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107. HINDU SUCCESSION ACT, 1956 – Sections 15 (2) and 16
Property inherited by daughter from her parental family died issueless, devolution of – Property inherited by a daughter from the side of her parental family, shall devolve on her death upon the heirs of her father and not to the husband or her in-laws family.

Anandilal Jhariya & Anr. v. Ramlal Jhariya & anr.
Judgment dated 14.09.2009 passed by the Supreme Court in S.A. No. 1300 of 2008, reported in AIR 2010 MP 21

Held:

According to aforesaid sub-section (2) of Section 15 of the Act, the property which was inherited by a daughter from the side of her parental family then after her death the same was devolved upon the heirs of her father and not to the husband or her in-laws family. In the case at hand, undisputedly, Tulsabai inherited the disputed land from her father and died issueless, the present case is not governed by Section 15 (1) of the Act but the same is governed by Section 15 (2) of the Act. In such premises, even on excluding the alleged Will of Fagulal in favour of respondent No. 1 the disputed property which was inherited by Tulsabai from her father, the same has been devolved to the legal representatives of her parental family and not to the husband's family and respondent No. 1 being nephew (sister's son) of late Fagulal is falling under such category under Class-II of the Schedule enacted under the Act.

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***108. INDIAN PENAL CODE, 1860 – Sections 96, 304 Part II/304 Part II r/w/s 34**
CATTLE TRESPASS ACT, 1871 – Sections 10 and 20
Right of private defence in case of rescuing cattle being taken to the cattle pond – Death caused to a person – No offence – If deceased, without having right to rescue the cattle being taken to the cattle pond, tried to rescue under the circumstances in which accused apprehended that the deceased or other person accompanying him may cause grievous injury.
The incident occurred when a goat belonging to deceased entered into the field of A-2 and the goat was being taken to the pond by A-2

and his brothers, the other accused persons – Accused persons were jointly attacked by the deceased 'N' and three other persons – Trial Court convicted the accused persons under Section 304 Part II r/w/s 34 of IPC and sentenced accordingly – Placing reliance on the ratio laid down by the Apex Court in the case of *Ram Ratan v. State of Bihar, AIR 1965 SC 926* that:

When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that, and he was taking them to the pond, he commits no offence of theft, however, mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Act. He has no right to use force to rescue the cattle so seized.

As the accused and their men could have apprehended, in the circumstances, that owner's party was not peacefully inclined and would use force against them in order to rescue the cattle and that the force likely to be used could cause grievous hurt, the accused committed no offence in causing injuries to persons in the owner's party and in causing the death of a person in that party."

Setting aside the conviction and sentences, the accused persons were acquitted by the High Court.

Taj Mohammad and others v. State of M.P.

Judgment dated 03.08.2009 passed by the High Court in Criminal Appeal No. 1241 of 1994, reported in 2010 (1) MPHT 184

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109. INDIAN PENAL CODE, 1860 – Sections 107, 109 and 306

Abetment of suicide when made out as provided for under Section 107 restated.

The offence of abetment of suicide is not established as there is no direct evidence to show that the accused, by his act, instigated or provoked or facilitated to commit suicide.

However, the offence of 'cruelty' is proved as the accused husband tortured deceased wife both physically and mentally on refusal to permit for his second marriage with one lady 'A' and insisting again and again for such permission – Apart from that, accused brought 'A' to stay with him in his house three months prior to the death of the deceased.

Accordingly, conviction under Section 306 set aside and conviction under Section 498-A upheld.

Amalendu Pal alias Jhantu v. State of West Bengal

Judgment dated 11.11.2009 passed by the Supreme Court in Criminal Appeal No. 2091 of 2009, reported in (2010) 1 SCC 707

Held:

The expression 'abetment' has been defined under Section 107 IPC. A person is said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause firstly or to do anything as stated in clauses secondly or thirdly of Section 107 IPC. Section 109 IPC provides that if the act abetted is committed pursuant to and in consequence of abetment then the offender is to be punished with the punishment provided for the original offence. Learned counsel for the respondent-State, however, clearly stated before us that it would be a case where clause 'thirdly' of Section 107 IPC only would be attracted. According to him, a case of abetment of suicide is made out as provided for under Section 107 IPC.

It is not the case of the prosecution that the case in hand would fall within the ambit of clause firstly of or Explanation 1 to Section 107 IPC. The prosecution, however, heavily relies on the clause thirdly of Section 107 IPC because, according to the prosecution, the appellant by way of harassment and torturing the deceased at various point of time and by marrying said Anita for the second time without the permission and against the will of the deceased, intentionally aided the commission of suicide by the deceased.

In support of the aforesaid contention, learned counsel for the prosecution relied upon Explanation 2 to Section 107. He submitted that prior to the commission of suicide by the deceased, the appellant had, by bringing said Anita as his second wife to his house facilitated the commission of suicide by the deceased and thus, the appellant intentionally aided the commission of suicide by the deceased. The evidence on record, however, does not support such a case.

It is pertinent to note that the appellant had brought Anita to stay with him at his house three months prior to the date of the death of the deceased. If the deceased had been so perturbed by the act of the appellant in marrying the said Anita and in bringing her to his house that she felt impelled to commit suicide then she could have done so on the very day when Anita had come to stay with the appellant in his house as naturally at that point of time her annoyance or dismay with life would have been at its pinnacle. From the period of three months which elapsed in between the incidents of the appellant bringing Anita to his house and the deceased committing suicide, it can be clearly inferred that it was not the act of the appellant which instigated or provoked the deceased to commit suicide.

The perpetration of physical torture on the deceased on the day prior to the date of the incident which led the deceased to commit suicide is the prosecution case all throughout. It is nowhere the case of the prosecution that the appellant had played any active role either in instigating or aiding the commission of suicide by the deceased for denying to accept Anita as the wife of the appellant. Anita, the second wife of the appellant was brought by the appellant to his house about three months prior to the date of the incident of

suicide by the deceased and therefore, bringing of the second wife to the house by the appellant cannot be said to have either incited or facilitated the commission of suicide by the deceased. It is also not the case of the prosecution as disclosed from the evidence led which we have scrutinised very minutely. The aforesaid contention, in our considered opinion, is far fetched and is not established by the facts of the present case.

After carefully assessing the evidence on record we find that there is no direct evidence to show that the appellant had by his acts instigated or provoked the deceased to commit suicide and has not done any act which could be said to have facilitated the commission of suicide by the deceased.

From the evidence of record available before us, we find that the prosecution witnesses have in their testimonies stated that the deceased was tortured both physically and mentally by the appellant for the first time after his marriage with the deceased when he was refused permission for marriage with said Anita by the deceased. On having been refused the permission for his second marriage with Anita, the appellant again, after a few days requested the deceased to accede to his request for marriage with Anita, which request was again refused by the deceased. Consequent to the said position and due to the adamant position taken by the deceased, cruelty was meted out to her by the accused which fact is sufficiently proved from the evidence on record. Therefore, we find no reason to take a different view than what has been taken by the trial Court and the High Court as far as Section 498-A IPC is concerned.

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110. INDIAN PENAL CODE, 1860 – Sections 107 and 306

Abetment to suicide – It involves a mental process of instigating a person or intentionally aiding a person in doing of a thing (suicide) – It also requires an active act or direct act which leads deceased to commit suicide – Hypersensitivity to ordinary petulance, discord and differences in domestic life quite common to society, should not be sufficient for conviction under Section 306.

Gangula Mohan Reddy v. State of Andhra Pradesh

Judgment dated 05.01.2010 passed by the Supreme Court in Criminal Appeal No. 1301 of 2002, reported in (2010) 1 SCC 750

Held:

Facts in the instant case:

The appellant, who is an agriculturist had harassed his agriculture labour (servant) deceased Ramulu by levelling the allegation that he had committed theft of some gold ornaments two days prior to his death. It was also alleged that the appellant had demanded Rs.7,000/- from the deceased which was given in advance to him at the time when he was kept in employment. The prosecution further alleged that the deceased Ramulu could not bear the harassment meted out to him and he committed suicide by consuming pesticides.

Regarding abetment of suicide:

The word "suicide" in itself is nowhere defined in the Penal Code, however, its meaning and import is well known and requires no explanation. "Sui" means "self" and "cide" means "killing", thus implying an act of self-killing. In short, a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

Suicide by itself is not an offence under Indian Criminal Law but abetment of suicide is punishable under Section 306 IPC which reads as under:

> "306. Abetment of suicide – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

In *Mahendra Singh v. State of M.P., 1995 Supp (3) SCC 731* the allegations levelled are as under:-

> "1. ... My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

The court on aforementioned allegations came to a definite conclusion that by no stretch the ingredients of abetment are attracted on the statement of the deceased. According to the appellant, the conviction of the appellant under section 306 IPC merely on the basis of aforementioned allegation of harassment of the deceased is unsustainable in law.

In *Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618* a three-Judge bench of this court had an occasion to deal with a case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant Ramesh Kumar committed suicide. The Court in paragraph 20 has examined different shades of the meaning of "instigation'. Para 20 reads as under: (SCC p. 629)

> "20. Instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. the present one is not a case where the accused had by his acts or omission or by a continued course of conduct

created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

In *State of W.B. v. Orilal Jaiswal, (1994) 1 SCC 73,* this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trail for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

In *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi), (2009) 16 SCC 605* had an occasion to deal with this aspect of abetment. The court dealt with the dictionary meaning of the word "instigation" and "goading". The court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self esteem and self respect. Therefore, it is impossible to lay down any straight-jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the Legislature and the ratio of the cases decided by this court is clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.

Final Order:

In the instant case, the deceased was undoubtedly hyper sensitive to ordinary petulance, discord and differences which happen in our day-to-day life. Human sensitivity of each individual differs from the other. Different people behave differently in the same situation.

In the light of the provisions of law and the settled legal positions crystallized by a series of judgments of this Court, the conviction of the appellant cannot be sustained. Consequently, the appeal filed by the appellant is allowed and disposed of.

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111. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 114

(i) Murder trial based on circumstantial evidence, principles of – When an incriminating circumstance is put to the accused and the accused either offers no explanation or offers the explanation which is found to be untrue, then the same becomes additional link in the chain of circumstances to make it complete.

(ii) Closely related witnesses, appreciation of – The evidence of such witnesses, cannot be ignored or thrown out solely on this ground.

Jayabalan v. Union Territory of Pondicherry

Judgment dated 06.11.2009 passed by the Supreme Court in Criminal Appeal No. 1246 of 2002, reported in (2010) 1 SCC 199

Held:

We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

It is trite law that in a case where there is no direct eye-witness version available and the case is based on circumstantial evidence, the principle which is to be applied by the Court is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

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***112. INDIAN PENAL CODE, 1860 – Section 302/34**

Murder trial, appreciation of evidence – Held, the knowledge of medicine and human body is a matter of science – A court of law, which has not acquired special knowledge and skill in medical science, would not be justified in brushing aside opinion of a medical officer, who has performed the post-mortem of a dead body, without any evidence on record to the contrary supported by the opinion of learned authors of standard textbooks.

State of Uttar Pradesh v. Rashid and another

Judgment dated 03.11.2009 passed by the Supreme Court in Criminal Appeal No. 751 of 2002, reported in (2010) 1 SCC 153

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113. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part II r/w Section 149

Culpable homicide not amounting to murder – The appellant/accused killed the deceased by throwing palm sized brick on him – Under circumstances of the case, the intention to commit murder cannot be attributed – But when the bricks were thrown on the vital part of the deceased, an old man of 78 years, the knowledge to cause death can definitely be attributed to the appellant/accused – Conviction altered from Section 302 IPC to Section 304 Part II IPC.

Naimuddin v. State of West Bengal

Judgment dated 06.11.2009 passed by the Supreme Court in Criminal Appeal No. 816 of 2002, reported in (2010) 1 SCC 123

Held:

On 27.02.1983, at about 11.00 a.m., the accused alongwith others started demolishing the fencing of the land in possession of the informant, to which the informant alongwith some others protested. It was protested by the victim Munshi Basiruddin and his two sons. The victim, Munshi Basiruddin died on the spot being hit by the bricks thrown by the accused-appellants Naimuddin and Muslim Mian. It was also incorporated in the FIR that two sons of the victim also sustained injuries by the bricks thrown by the other accused persons. The accused fled away from the spot and the informant P.W. 1 Abdul Razzak went to the police station and lodged the FIR.

The learned Sessions Judge charged eight accused persons under Sections 148, 323 read with 149 and 302 read with 149 IPC. The learned Sessions Judge acquitted all other accused of all charges, but convicted the appellants Naimuddin and Muslim Mian under Section 302 read with 34 IPC on a specific finding that both these accused participated in the commission of the offence, namely, in launching assault on the victim by bricks which caused the instantaneous death of the victim on the spot. The High Court upheld the conviction and sentence of the appellants.

The trial court, while convicting the appellant and Muslim Mian and acquitting the other six accused, observed that there is no evidence that these accused went to the place of occurrence. It is clear from the evidence of P.W. 1 that the accused party was unarmed. The appellant had no weapon with him.

The short question which falls for consideration of this Court is whether the injuries sustained by the deceased could be caused by the bricks. According to the opinion of the doctor, except injury No. 3, the other injuries could be caused by bricks.

Learned Senior Counsel for the appellant submitted that the appellant was unarmed is not disputed. According to him, merely throwing palm size bricks on the deceased should not lead to the definite conclusion that the appellant had intention to kill the deceased, therefore, according to him, appellant's conviction

under section 302/149 IPC is not sustainable. Learned Senior Counsel for the appellant further submitted that the conviction of the appellant also cannot be recorded even under section 304 Part-II IPC because even the knowledge to commit murder cannot be attributed to him in the facts and circumstances of this case.

We have heard the learned counsel for the parties at length. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under sections 302/149 IPC. However, we do not agree with the second submission of Learned Senior Counsel for the appellant that the appellant also cannot be convicted under section 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries.

On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under sections 302/149 IPC is set aside and the appellant is convicted under Sections 304 Part-II/149 IPC.

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***114. INDIAN PENAL CODE, 1860 – Sections 302 and 307**
EVIDENCE ACT, 1872 – Sections 32 and 157

(i) Murder trial, appreciation of interested witness – The injured witness PW 3, wife of the deceased and PW 4, minor daughter of the deceased, did not mention the name of the accused/appellant while narrating the incident to the neighbours, police or the Magistrate, though the appellant was very well known – Enmity between the deceased and accused/appellant might be one possible reason for them to implicate the appellant/accused – Held, no reliance can be placed upon such witnesses.

(ii) Statement made under Section 164 CrPC in expectation of death – Evidentiary value of – When maker of the statement not dying – It is not a dying declaration and is not admissible under Section 32 of the Evidence Act – However, such statement is admissible under Section 157 of the Evidence Act as former statement made by the witness in order to corroborate his testimony in the Court.

Gajula Surya Prakasarao v. State of Andhra Pradesh
Judgment dated 10.11.2009 passed by the Supreme Court in Criminal Appeal No. 1038 of 2008, reported in (2010) 1 SCC 88

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*115. INDIAN PENAL CODE, 1860 – Section 306
EVIDENCE ACT, 1872 – Sections 3 and 32 (1)

(i) 15 years old prosecutrix all alone in her house – Accused suddenly entered there into and closed the door from inside – Accused squeezed mouth of prosecutrix and gave threats to defame her and came out of the house and ran away when inhabitants of the locality came there and called the prosecutrix by name – Just after some time prosecutrix committed suicide by hanging from roof – Held, there was proximate and live link between offending act of accused and the extreme step taken by the prosecutrix – Accused was rightly held abettor of the suicide.

(ii) Just after the incident and before suicide, prosecutrix had described misdemeaour of the accused to eye-witness – Entire statement made by prosecutrix to eye-witness soon before her death was admissible u/s 32 (1) of Act.

(iii) Appreciation of evidence – Defence plea – Love letters of accused recovered from the house of prosecutrix was suggestive that she was in love with the accused – Held, such plea was neither raised by the accused in his examination under Section 313 of CrPC nor in the cross-examination of prosecution witnesses – Further, no love letter said to have been written by prosecutrix to the accused was tendered in evidence – Defence plea cannot be accepted.

(iv) Appreciation of evidence – Defence plea of alibi and alternative plea that accused was invited to her house by the prosecutrix only – These inconsistent and alternative pleas cannot be accepted – However, they strengthened the prosecution case.

(v) Prosecutrix dead – Effect of non-examination – Merely because the prosecutrix was dead and consequently could not be examined, can never be a ground to acquit accused if there is evidence otherwise available proving the criminal act of the accused.

Mohammad Hafeez v. State of M.P.
Judgment dated 07.10.2009 passed by the High Court in Criminal Appeal No. 62 of 1995, reported in I.L.R. 2010 M.P. 261

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*116. INDIAN PENAL CODE, 1860 – Sections 375 and 376
Rape of minor – Importance for determination of age of prosecutrix. Appellant-accused belonged to the same caste and gotra of the prosecutrix and was a frequent visitor to the house of the prosecutrix – There was a love affair between them and the Court also observed that she did not ever resist her being repeatedly deflowered by the appellant-accused – In the absence of primary evidence, non-

performance of test for proving age of prosecutrix prescribed by the doctor is a serious flaw in prosecution version – In a criminal trial, as in this case of alleged rape of minor who found as being habitual to sex and her secondary sexual characteristics well developed, conviction cannot be based on in the given circumstances on an approximate age which is not supported by any credible record.

Sunil v. State of Haryana

Judgment dated 04.12.2009 passed by the Supreme Court in Criminal Appeal No. 2308 of 2009, reported in (2010) 1 SCC 742

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117. INDIAN PENAL CODE, 1860 – Sections 376 (2) (g)
CRIMINAL PROCEDURE CODE, 1973 – Section 154
Gang rape – Delay in lodging FIR, effect of – Held, when FIR by a Hindu lady is to be lodged with regard to such an offence, many questions would obviously crop up for consideration before one finally decides to lodge the FIR – Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR – Thus, it cannot be said that there has been inordinate or unexplained delay in lodging FIR.
Gang rape, appreciation of evidence – Evidence of prosecution witnesses clearly establishes that the appellants/accused persons committed rape on the prosecutrix and said evidence inspires confidence – Prosecutrix is a married lady therefore, it was not necessary that some external or internal injuries should have been found on her person – Appellants/accused had taken a plea of consensual sex with victim which was found to be unbelievable – Offence proved.

Sohan Singh and another v. State of Bihar

Judgment dated 09.10.2009 passed by the Supreme Court in Criminal Appeal No. 971 of 2003, reported in (2010) 1 SCC 68

Held:

The prosecution case, in short, is as under:

On 23.07.1983 at about 7.00 p.m., P.W.3, prosecutrix was returning home along with Shiela Devi, her sister-in-law, after giving fodder to cattle. After they had proceeded few steps from the place, Sohan Singh aged 19 years and his brother, Mohan Singh aged about 22 years waylaid them. Mohan Singh confronted the prosecutrix whereas Sohan Singh caught hold of Shiela Devi. They threatened them on the point of pistol not to raise any alarm, otherwise they would be met with dire consequences. Mohan Singh got in full grip of the prosecutrix and forcibly took her to the nearby maize field. There, he committed offence of rape on the prosecutrix. Subsequently, Sohan Singh also repeated

the crime of sexual assault upon her. In the meantime, on alarm being raised, P.W.2, husband of prosecutrix came. He was assaulted by both of them with the butt of the pistol. He sustained injuries. Thereafter, some other villagers came on the spot. Obviously, both the accused fled away from the place of occurrence.

The prosecution case was based on fardbeyan of P.W.3 prosecutrix. P.W.3 prosecutrix did not lodge an FIR immediately. The same was lodged on 24.07.1983 at about 8.30 in the morning. Reasons have been assigned by her as to why she was not able to lodge the FIR immediately, which have been found by both the courts below to be reasonable and plausible.

P.W.3 prosecutrix also deposed in categorical terms with regard to the manner in which the offence of rape was committed on her - first by Mohan Singh and the same assault was thereafter committed by his brother Sohan Singh. Thus, the evidence of P.W.1, P.W.2 and P.W.3 clearly establishes that it was appellants who had committed rape/assault on the prosecutrix.

The prosecutrix was also examined by P.W.6 Dr. (Smt.) B. Mishra on 24.07.1983 who had not found any external or internal body injuries on the person of the prosecutrix. Her hymen was found to be ruptured. Her uterus was of normal size and she was menstruating during that period. No dead or alive spermatozoa was found. Doctor was not able to give any definite opinion regarding rape.

Learned counsel for the appellants strenuously contended before us that:

(i) FIR was delayed and no plausible or valid reasons have been assigned for the delay;

(ii) no external or internal injuries were found on the body of the victim or even on her private parts;

(iii) the prosecutrix failed to inform Dr. Chandra Prakash who had examined her husband and given him the treatment; and

(iv) there was enmity between the two families which has resulted in false implication of the appellants.

We have critically gone through the material evidence of P.W.1, P.W.2 and P.W.3. They all have said in one voice with regard to the manner in which the offence was committed by the appellants. The said evidence inspires confidence, more so, when the evidence was recorded almost after eight years from the date of commission of the offence, yet, there is great consistency therein. There is no reason to doubt the truthfulness of the evidence so deposed by the aforesaid three witnesses.

As far as delay in lodging the FIR is concerned, we are also satisfied that it cannot be termed to be inordinately delayed. Even otherwise, in our considered opinion too, it cannot be said that there has been inordinate or unexplained delay in lodging the FIR.

When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR. Precisely this appears to be the reason for little delayed FIR. As mentioned hereinabove, the delay has already been found to be properly explained by both the courts below. Thus, we are not required to deal with this issue any more.

Admittedly the prosecutrix was already a married lady and, therefore, it was not necessary that some external or internal injuries should have been found on her person. No doubt, it is true that doctor could not give any definite opinion with regard to commission of offence, but, it was not the case of the appellants that they had not committed the rape but they had taken a plea of consensual sex with the prosecutrix which has not been believed by the two courts below. Enmity between the two families would not lead to such a serious consequence of lodging FIR of commission of gang rape by the appellants.

Thus, looking to the matter from all angles, we are of the opinion that there is no merit or substance in this appeal. The same is accordingly hereby dismissed.

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118. LAND ACQUISITION ACT, 1963 – Sections 3 (a) and 25
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17
Application for inclusion of claim with respect to compensation of Nilgiri trees and water tank on the acquired land – Application allowed on the ground that compensation for land must be determined inclusive of benefits arising out of the land and things attached to the earth – However, the mere allowing the application would not clothe claimants to claim higher compensation – They have to prove existence of facts on the basis of which they are claiming higher compensation.

Rajesh Kumar v. State of M.P. and others
Judgment dated 13.10.2009 passed by the High Court in W.P. No. 4903 of 2007, reported in 2010 (1) MPLJ 156

Held:

After hearing learned counsel for the parties, in our opinion, the reference application ought to have been permitted to be amended for various reason. We are not going to examine the factual question whether the trees or the water tank structure were in fact in existence, this is function Court, belated moving of application may have the bearing on aforesaid aspect. The question being question of fact has to be gone into by the Court-below based on the various documents of taking possession and other evidence to be adduced by the parties. The section 25 of the Land Acquisition Act has been amended. Section 25 is quoted below:

"25. Amount of compensation awarded by Court not be lower than the amount awarded by the Collector. — The amount of compensation awarded by Court shall not be less than the amount awarded by the Collector under section 11."

A Full Bench of High Court of Karnataka in *The Special Land Acquisition Officer (NHW) Dharwad vs. Kallangouda and others etc., AIR 1994 Karnataka 112* has considered the amended section 25 and has held that section 25 as it now stands totally liberates the claimant from all restraints that held him in check earlier from making a claim before Court for the first time even where he had not made any claim before the Collector. He can claim higher compensation after seeking reference before the Reference Court without furnishing any reasons or affording an explanation for making a lower claim before the Collector (L.A.O.).

The Apex Court in *Hans Raj Sharma (deed) by LRs. v. Collector, Land Acquisition, Tehsil and District Doda, (2005) 1 SCC 553* has considered the expression 'land' as defined in section 3 (a) of the Land Acquisition Act and has held that once the compensation for the land acquired has been determined same has to be inclusive of the benefit, arising out of the land and things attached to the earth. It was not necessary to refer the issue of higher valuation of trees. The Apex Court has laid down thus:

"13. Turning to the other question as to the valuation of trees, it appears that there has been an omission on the part of the Reference Court in rejection the claim on the ground that there was no specific reference made. It must be remembered that the reference made under section 18 was for determination of the amount of compensation payable to the appellant for the "land" acquired. The expression "land" as defined in section 3 (a) of the Act is inclusive of benefits to arise out of the land and things attached to the earth or permanently fastened to anything attached to the earth. As a matter of fact, the Land Acquisition Officer had worked out the compensation for 261 trees in Khasra No. 804 determined as Rs. 17315 and the court of 96 trees in Khasra No. 804 determined as Rs. 6207/-.

14. Issue 2 raised by the Reference Court was "whether the value of trees worth Rs. 300 per tree, has not been included in the award". While answering this issue, the Reference Court has taken the view that the Reference Court has no jurisdiction to determine the controversy as it has not been referred by the Collector. This, in our view, is erroneous. The Reference Court ought to have adjudicated the claim of the appellant for higher compensation in respect of trees. On account of the unduly restrictive view taken of its own jurisdiction, the Reference Court fell into error. The Single

Judge and the Division Bench also fell into the same error in totally rejecting this claim as beyond jurisdiction."

In view of the aforesaid decision of *Hans Raj Sharma vs. Collector, Land Acquisition* (supra) and amended provision of Section 25 of the Land Acquisition Act, we allow the application seeking amendment in the reference application. However, we make it clear that the mare allowing the application would not clothe claimants to claim higher compensation they have to prove existence of facts on the basis of which they are claiming higher compensation.

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119. LAND ACQUISITION ACT, 1894 – Section 18

(i) Who can make reference

Reference under Section 18 can be filed only by "person interested" – It does not include "a body of persons", means any Union or Association – Similarly, State, Company or a Local Authority for whose benefit the lands are acquired, is not entitled to file any application for reference having regard to the provisions of Section 50 (2) of the Act.

(ii) Limitation and constructive knowledge of award

The application for reference has to be filed within prescribed period – Where State has issued Notification in connection with the award, it would amount to a constructive knowledge of award – The onus would be on the applicant to show that he did not have the knowledge of the same.

M/s Steel Authority of India Ltd. S.U.T.N.I. Sangam & ors.

Judgment dated 29.07.2009 passed by the Supreme Court in Civil Appeal No. 3874 of 2006, reported in AIR 2010 SC 112

Held:

(i) The expression "person interested" for the purpose of Section 18 of the Act may be given a restricted meaning. A State is not a person interested. A company or a local authority for whose benefit the lands are acquired, having regard to the provisions of Sub-section (2) of Section 50 of the Act, is not entitled to file any application for reference.

The Association, therefore, could file a writ application representing its members but, *stricto sensu,* it could not have filed any application for reference in terms of Section 18 of the Act.

In a land acquisition matter, the question of a body of the persons being represented by Association does not arise. The statute provides for filing of claim applications as also filing of objections by the land holders and not by and/or on behalf of the Association and that too an independent body corporate.

(ii) For the purpose of making such an application, indisputably, the period of limitation provided for therein must be resorted to. However, there cannot be any doubt whatsoever that a statute of limitation should receive strict construction.

In *Parsottambhai Maganbhai Patel and Others v. State of Gujarat Through Dy. Collector Modasa and Another [(2005) 7 SCC 431]*, it was observed:

> "7. This Court, therefore, held that the limitation under the latter part of Section 18(2)(b) of the Act has to be computed having regard to the date on which the claimants got knowledge of the declaration of the award either actual or constructive. This principle, however, will apply only to cases where the applicant was not present or represented when the award was made, or where no notice under Section 12(2) was served upon him. It will also apply to a case where the date for the pronouncement of the award is communicated to the parties and it is accordingly pronounced on the date previously announced by the Court, even if, the parties are not actually present on the date of its pronouncement."

Similar observations have been made in *State of Punjab v. Mst. Qaisar Jehan Begum, AIR 1963 SC 1604*, thus:

> "...Now knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under Section 12(2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award. Looked at from that point of view, we do not think that it can be inferred from the petition dated December 24, 1954 that the respondents had knowledge of the award."

The said decision, therefore, itself is an authority for the proposition that constructive knowledge would also subserve the purpose of the Act. Whether a person had the actual or constructive knowledge of the contents of a document is essentially a question of fact. The onus would be on the landholder to show that he did not have any knowledge of the contents of the award.

The State issued a notification directing the Collector to exercise its jurisdiction under Section 18 of the Act. Such a notification, therefore, would amount to a constructive knowledge. It was obligatory on the part of the land owners to file an appropriate application within the prescribed period.

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120. LAND ACQUISITION ACT, 1894 – Section 23

Determination of market value – Depends on many factors including nature and quality of land; agricultural and homestead land – Location and position of land also play an important role – Courts are expected to consider negative and positive factors.

Bhagat Singh and ors. v. Union of India and anr.

Judgment dated 04.08.2009 passed by the Supreme Court in Civil Appeal No. 7209 of 2004, reported in AIR 2010 SC 99

Held:

The principal question which arises for our consideration is what principle should be applied for determining the market value of the land. It is now a well settled principle of law that the determination of the market value of the land acquired, indisputably would depend upon a large number of factors, including the nature and quality thereof. The norms which are required to be applied for determination of the market value of the agricultural land and homestead land may be different. In given cases location of land and in particular, closeness thereof from any road or high-way would play an important role for determination of the market value wherefor belting system may in appropriate cases have to be resorted to. The position of the land, particularly in rainy season, existence of any building etc. also plays an important role. A host of other factors including development in and around the acquired land and/or the potentiality of the development will have a bearing on determination of the value of the land.

Determination of the market value of the land may also depend upon the facts and circumstances of each case, amongst them, however, would be the price of land, amount of consideration mentioned in a deed of sale executed in respect of similarly situated land near about the date of issuance of Notification under Section 4(1) of the Act ; in the absence of any such exemplars the market value can be determined on yield basis or in case of an orchard on the basis of number of fruit bearing trees. It is also well settled that for price determination purposes, the courts would be well advised to consider the positive and negative factors, as has been laid down by this Court in *Viluben Jhalejar Contractor v. State of Gujarat, (2005) 4 SCC 789,* namely:-

	Positive factors		Negative factors
(i)	Smallness of size	(i)	Largeness of area
(ii)	Proximity to a road	(ii)	Situation in the interior at a distance from the road
(iii)	Frontage on a road	(iii)	Narrow strip of land with very small frontage compared to depth
(iv)	Nearness to developed area	(iv)	Lower level requiring the depressed portion to be filled up
(v)	Regular shape	(v)	Remoteness from developed locality

(vi) Level vis-a-vis land under acquisition

(vii) Special value for an owner of an adjoining property to whom it may have some very special advantage.

(vi) Some special disadvantageous factors which would deter a purchaser

Also see – *Union of India v. Pramod Gupta, 2005 AIR SCW 4645* and *Ranvir Singh v. Union of India, 2005 AIR SCW 4565*

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121. LAND ACQUISITION ACT, 1894 – Sections 23 and 24

(i) Concept and scope of deduction of "development cost" to arrive at market value – Explained – Purpose or future use of acquired land and any increase of value of land will have no role in determination of market value as a general rule.

(ii) In certain acquisitions, Courts have chosen to ignore the difference in the quality/situational advantages and treat all lands equally for awarding uniform compensation having regard to the common purpose of acquisition – Such course is proper or not, may have to be decided in the context of respective acquisitions – In this regard, relevancy of purpose is required to be properly understood and carefully applied with reference to special circumstances, otherwise, it may lead to absurd and unjust results.

Subh Ram and others v. State of Haryana and another

Judgment dated 20.10.2009 passed by the Supreme Court in Civil Appeal No. 5844 of 2004, reported in (2010) 1 SCC 444

Held:

Deduction of "development cost" is the concept used to derive the 'wholesale price' of a large undeveloped land with reference to the 'retail price' of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the 'development cost'. Two factors have a bearing on the quantum (or percentage) of deduction in the 'retail price' as development cost. Firstly, the percentage of deduction is decided with reference to the extent and nature of development of the area/layout in which the small developed plot is situated. Secondly, the condition of the acquired land as on the date of preliminary notification, whether it was undeveloped, or partly developed, is considered and appropriate adjustment is made in the percentage of deduction to take note of the developed status of the acquired land.

The percentage of deduction (development cost factor) will be applied fully where the acquired land has no development. But where the acquired land can be considered to be partly developed (say for example, having good road access or having the amenity of electricity, water etc.), then the development cost (that

is percentage of deduction) will be modulated with reference to the extent of development of the acquired land as on the date of acquisition. But under no circumstances, the future use or purpose of acquisition will play a role in determining the percentage of deduction towards development cost.

Section 24 of Land Acquisition Act prohibits the court from taking into consideration any increase to the value of the land acquired, likely to accrue from the use to which it will be put when acquired. A three-judge Bench of this Court in *Tarlochan Singh v. State of Punjab, (1995) 2 SCC 424* held: (SCC p. 426, para 5)

> "5. ... Section 24 of the Land Acquisition Act expressly prohibits and puts an embargo on the Court in taking the factors mentioned in section 24 as relevant in determining the market value. Under these circumstances, the future development and potential prospective use of the acquisition etc., are not relevant circumstances. Even the purpose of acquisition is not relevant."

But in certain acquisitions, courts have chosen to ignore the difference in the quality/situational advantages and treat all lands equally for awarding uniform compensation having regard to the common purpose of acquisition. How far such a course is proper or valid may be debatable. Whether such a procedure is legally valid or proper or not, may have to be decided in the context of the respective acquisitions. The use to which the acquired land may be put, can have no bearing upon the deduction to be made towards development cost. Nor can the purpose of acquisition be used to increase the compensation awardable with reference to the expected profits from the future user. The observation of the Supreme Court in certain cases that purpose of acquisition is a relevant factor, unless properly understood and carefully applied with reference to special circumstances, may lead to absurd or unjust results. The said observation may not apply in all cases and all circumstances as the general rule is that the landowner is being compensated for what he has lost and not with reference to the purpose of acquisition. The purpose of acquisition can never be a factor to increase the market value of the acquired land.

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122. LIMITATION ACT, 1963 – Section 5
CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 9 & 10-A
Condonation of delay in bringing on record the legal representatives – Consideration therefor – Two of the plaintiffs/respondents died on 31.05.1999 and 14.01.2000 respectively and the application for bringing their legal heirs on record filed in December, 2006 – No sufficient cause shown for condonation of delay – Mere ignorance of legal consequence would be not sufficient to condone such a long delay – Position explained.

Katari Suryanarayana & Ors. v. Koppisetti Subba Rao & Ors.
Judgment dated 08.04.2009 passed by the Supreme Court in Civil Appeal No. 2240 of 2009, reported in AIR 2009 SC 2907

Held :

Effect of abatement of an appeal, as envisaged under Order 22 Rule 9 of the Code of Civil Procedure is involved in this appeal which arises out of a judgment and order dated 26.12.2006 passed by a learned Single Judge of the High Court of Judicature Andhra Pradesh at Hyderabad in Second Appeal No.192 of 1997 dismissing an application of the appellant herein to condone the delay of 2381 days and 2601 days respectively in bring on records, the legal heirs and representatives of two respondents therein being respondents No.2 and 3 holding that the second appeal preferred by them must be dismissed having abated, since cause of action therefor was indivisible.

Indisputably during the pendency of the said appeal; whereas Respondent No.3 expired on 31.5.1999, Respondent No.2 expired on 14.1.2000. No application for their substitution within the period prescribed under Order XXII Rule 9 of the Code of Civil Procedure was filed. Appellant filed an application for bringing on record the heirs and legal representatives of the said respondent Nos.2 and 3 only in December 2006 alleging that they had been informed thereabout by their counsel only on 19.11.2006. An application for condonation of delay in filing the said application was also filed. The said applications, as noticed hereinbefore, were barred by 2381 days and 2601 days respectively. By reason of the impugned judgment and order, the High Court refused to condone the delay in bringing on records the heirs and legal representatives of respondent Nos.2 and 3. Consequently, as indicated hereinbefore, it was held that the appeal had abated.

It is now trite by reason of various decisions of this Court that different considerations arise in the matter of condoning the delay in filing an application for setting aside an abatement upon condonation of delay in a suit and an appeal. It is furthermore neither in doubt nor in dispute that such applications should be considered liberally. The Court would take a more liberal attitude in the matter of condonation of delay in filing such an application. There are, however, exceptions to the said rule.

Parties hereto were neighbours. They were fighting over the right to use a lane which connects their respective residential houses. It is, therefore, difficult for us to appreciate that the appellant was not aware of the dates of death of respondent Nos.2 and 3. It may be true that a distinction exists where an application for setting aside of the abatement is filed in a suit and the one which is required to be filed in a second appeal before the High Court but the same, in our opinion, by itself may not be sufficient to arrive at a conclusion that the parties were not aware of the consequences thereof. Appellants themselves rely on the provisions of Order XXII Rule 10A of the Code of Civil Procedure, which was inserted by reason of Code of Civil Procedure (Amendment) Act, 1976. It does not, however, provide for

consequences. It does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representatives of a deceased plaintiff/ appellant or defendant/respondent within the period prescribed.

It is not in dispute that the appellants were neighbours. They were co-sharers. The respective dates of death of the respondent Nos.2 and 3, thus, were known to them. It is difficult to conceive that the petitioners were not in touch with their learned advocates from 1999 to December 2006. If not every week, they are expected to contact their lawyers once in a year. Ignorance of legal consequence without something more would, in our opinion, be not sufficient to condone such a huge delay. Appellants are literates. They have been fighting their cases for a long time. The High Court in its impugned judgment has categorically arrived at a finding that no sufficient cause has been shown for the purpose of condonation of delay in bringing on record the names of the heirs or legal representatives of the deceased respondent Nos.2 and 3. Appellants have pleaded about the intimation from their counsel. There is nothing on record to show whether the said intimation was written or oral.

In vies view of the matter, we are of the opinion that it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. This appeal is dismissed accordingly. No costs.

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***123. LIMITATION ACT, 1963 – Article 64**

Adverse possession – Finding about actual owner is necessary. Derivative title, proof of – Finding about vendor title is must.

Brief facts:

'A' (plaintiff) purchased a house from 'B' by registered sale deed. As per his averments, after obtaining vacant possession, 'C' was inducted by him as a tenant in the suit house. After the death of 'C' he obtained the possession of the house. Thereafter 'D' (defendant No. 1) had illegally entered into possession of the house without plaintiff's permission and knowledge. 'D' in her WS denied the tenancy of 'C' and asserted that 'C' enjoyed the house in her life as owner. Thus 'C' was in adverse possession in the house and 'C' executed a Will in her favour. 'B' had no right to sell the house to 'A'.

Held – This is the case of derivative title. In such case it is necessary to decide the question of title of vendor. The law in this regard is well settled in *Sabrani v. Muniya, 1967 RN 507.* **This Court has held in para 9 thus: –**

> **"9. All that the respondent have succeeded in proving is that they purchased the land from Govinddas Dubey who had himself obtained his title from Parwatsingh P.W. 2 but the possession of none of them over the land has been proved. The**

execution of sale-deed alone would not be enough to prove the title of the respondent unless the title of Parwatsingh has been satisfactorily established."

With respect to the plea of adverse possession, it is necessary to find out the actual owner of the property – In the instant cases, as the appellate court has failed to determined the aforesaid question of proof of derivative title, it cannot be said that the judgment and decree are sustainable.

The finding with respect to adverse possession has been arrived at without consideration the ingredients of adverse possession *nec vi. nec clam nec precario.* **In respect of adverse possession it was necessary to the appellate court to appreciate the evidence and thereafter to decide question of adverse possession.**

With respect to the plea of adverse possession, it is necessary to find out the actual owner of property. Resultantly, the appeals are allowed. The judgment and decree passed by the appellate court is set aside. Appellate court is directed to decide the appeal after going into the aforesaid aspects and to render fresh decision in accordance with law.

Sumatra Bai v. Abdul Wahid & ors.

Judgment dated 01.04.2009 passed by the High Court in S.A. No. 117 of 1994, reported in 2009 (IV) MPJR 341

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124. LIMITATION ACT, 1963 – Article 127

CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 89

Application by judgment-debtor to set aside sale in execution of a decree – Period of limitation – The execution proceeding was stayed at the instance of the third party – Application under Order 21 Rule 89 CPC was made by the judgment-debtor after the stay order stood vacated – Whether the judgment-debtor would be entitled to the benefit of the period during which he was prevented by the execution proceedings in taking steps to file the application for setting aside the sale? Held, Yes.

Banda Chinna Subbarayudu and others v. Thailam Vishwanatha Rao and another

Judgment dated 27.10.2009 passed by the Supreme Court in Civil Appeal No. 7153 of 2009, reported in (2010) 1 SCC 168

Held:

The appellants suffered a decree for recovery of money in O.S.458/98, in the court of Principal Junior Civil Judge, Proddatur. Pursuant to the said decree, the respondent No. 1 herein, who is the plaintiff-decree-holder, filed Execution Proceedings, 352 of 2000, for sale of the property indicated in the said proceedings.

On 25.11.2003, the sale was conducted and the property in question was sold to the second respondent. On the same date, in an appeal filed by one Chennakkagari Ravindranath Reddy, being A.S. No. 10/2003, the said Execution Proceedings No. 352/2000 were stayed. Subsequently, in the said Execution Proceedings the appellants/judgment-debtors filed an application under Order 21 Rule 89 of the C.P.C. to set aside the sale, which had been held on 25.11.2003. The respondent No. 1 herein filed objection to the said application for setting aside the sale mainly on two grounds, namely,

(1) that the deposit made by the judgment-debtor was less than what was required to be deposited under Order 21 Rule 89 of the Code; and

(2) that the application had been filed well beyond the period of limitation prescribed under Article 127 of the Limitation Act.

The application filed by the appellant/judgment-debtor was dismissed by the Executing Court on both grounds. Even in appeal, the said order was confirmed. When the matter was taken to the High Court, it found in favour of the appellant as far as the amount of deposit is concerned. However, the High Court affirmed the order of the Executing Court, as well as of the Appellate Court, on the question of limitation. Aggrieved thereby, the appellants have preferred the instant appeal.

The suit of the respondent No. 1 was decreed in 1998 and after the decree was put into execution, the sale of the judgment-debtor's property was conducted on 25.11.2003, on which date Chennakkagari Ravindranath Reddy obtained a stay of the Execution Proceedings in the appeal filed by him. The sale was, however, yet to be confirmed. In the meantime, on 02.12.2004, the appeal filed by the said third party Chennakkagari Ravindranath Reddy was dismissed and the stay order stood vacated. An application was made by the appellant/judgment-debtor under Order 21 Rule 89 CPC and the amount, as required to be deposited under Rule 89 (1), was deposited on 15.12. 2004.

Senior Advocate for the appellants has questioned the decision of the courts below, including the High Court, on the ground that since the Execution Proceedings were stayed, albeit, at the instance of a third party, the appellant was unable to take any steps in the said proceedings for setting aside the sale and once the stay was lifted, he proceeded to take steps and that, accordingly, the period during which the Execution Proceedings remained stayed, should have been excluded from the period as contemplated under Article 127 of the Limitation Act. This factor does not appear to have been considered by the Executing Court or the appellate court and was for the first time considered by the High Court, which held that the stay of the proceedings at the instance of a third party could not come to the aid of the appellant/ judgment-debtor for the purpose of filing an application under Order 21 Rule 89 of the Code. In effect,

the finding of the High Court was that such pendency would not come to the aid of the judgment-debtors for extending the period of limitation prescribed.

The only question we are, therefore, left to answer is whether the appellants would be entitled to the benefit of the said period during which they were prevented by (*sic* stay of) the Execution Proceedings in taking steps to file the application for setting aside the sale.

Having heard learned counsel for the respective parties and considering the facts, as disclosed in the records, we are unable to uphold the decision of the High Court in this regard. Whether the stay of the Execution Proceedings was obtained by the judgment-debtor or by any other person is hardly relevant except to decide whether the judgment-debtor could have taken any steps in the proceedings which were stayed. That a stay of the Execution Proceedings was granted on 25.11.2003 is admitted. That such stay was vacated on 02.12.2004 is also admitted. If the period between 25.11.2003, and 02.12.2004, when the stay was vacated is excluded, then the steps taken by the judgment-debtor thereafter under Order 21 Rule 89 CPC would be in time.

In our view, since the appellants were prevented by the stay order from taking any further steps in the Execution Proceedings, they would be entitled to the benefit of the said period and the same has to be excluded while considering the question of limitation as prescribed under Article 127 of the Limitation Act.

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125. MEDICAL TERMINATION OF PREGNANCY ACT, 1971 – Sections 2,3,4 & 5 PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995 – Sections 2 (i), (q) & (r) CONSTITUTION OF INDIA – Article 21
WORDS & PHRASES:

(i) Consent of mentally retarded woman for termination of pregnancy is essential except where the woman is minor or mentally ill [Section 3 (4) (a)] and where Registered Medical Practitioner has to form an emergency opinion to save a pregnant woman's life [Section 5 (i)].

(ii) Distinction between 'mentally retarded person' and 'mentally ill person' explained in the context of human and civil rights of disabled persons – When such distinction can be collapsed also stated.

(iii) A woman's right to make reproductive choices to procreate or not to procreate is a dimension of 'personal liberty' under Article 21 of the Constitution of India – Woman's right to privacy, dignity and bodily integrity should be respected.

Suchita Srivastava and another v. Chandigarh Administration
Judgment dated 28.08.2009 passed by the Supreme Court in Civil Appeal No. 5845 of 2009, reported in (2009) 9 SCC 1 (3-Judge Bench)

Held:

A plain reading of the provision of Section 3 of Medical Termination of Pregnancy Act, 1971, makes it clear that Indian law allows for abortion only if the specified conditions are met.

Ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a

> 'continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health'

[as per Section 3(2)(i)] or when

> 'there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped'

[as per Section 3 (2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman.

In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.

The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman'. Clearly, none of these exceptions are applicable to the present case.

It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed and essential condition for proceeding with the termination of a pregnancy.

We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the

requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

As per Section 2 (b) of the Medical Termination of Pregnancy Act, 1971 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation;'. It is apparent from the definition of the expression 'mentally ill person' that the same is different from that of 'mental retardation'. A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats 'mental illness' and 'mental retardation' as two different forms of 'disability'. This distinction is apparent if one refers to Section 2(i), (q) and (r) which define 'disability', 'mental illness' and 'mental retardation' in the following manner:

> "2(i) 'disability' means - (i) blindness; (ii) low vision; (iii) leprosy-cured; (iv) hearing impairment; (v) locomotor disability; (vi) mental retardation; (vii) mental illness;
>
> 2(q) 'mental illness' means any mental disorder other than mental retardation
>
> 2(r) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The same definition of 'mental retardation' has also been incorporated in Section 2(g) of The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

In some of the provisions like the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between 'mental illness' and 'mental retardation' has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures.

We must emphasize that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the

exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. As the provisions of MTP Act clearly contemplates that even a woman who is found to be 'mentally retarded' should give her consent for the termination of a pregnancy.

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***126. MOTOR VEHICLES ACT, 1988 – Sections 3, 10, 147 and 149**

Driving licence – Breach of policy – Exoneration of insurance Company, when not permissible – Explained – Driver was holding licence to drive the motor cycle without gear and light motor vehicle with gear – Accident caused while he was driving motor cycle with gear – It was argued on behalf of the Insurance Company that at the relevant time, the driver was driving the two wheeler with gear for which he was not holding the licence as such there was breach of policy – Held, the driver was well acquainted how to use the gears as he was holding the licence of greater responsibility than the one which is required for driving the two wheeler with gear – Therefore, there was no breach much less substantial breach on the part of the owner/ driver so as to exonerate the insurer.

Oriental Insurance Co. Ltd. v. Purushottam

Judgment dated 03.12.2009 passed by the High Court in Misc. Appeal No. 3512 of 2007, reported in 2010 (1) MPHT 259

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***127. MOTOR VEHICLES ACT, 1988 – Sections 166 and 173**

Ignorance of claimant's evidence on the basis of correspondence between respondent owner and insurer – Not legal.

Occurrence of motor accident, proof of – Injured working with non-applicant No. 1 was sitting on a large stone near main road, allegedly sustained grievous injuries on the stone being dashed by the dumber

driven by non-applicant No. 2 and insured with non-applicant No. 3 – The Claims Tribunal relying on the correspondence between non-applicants No. 1 (owner) and 3 (insured) did not consider oral evidence adduced by the applicant and dismissed the claim petition – Held, the approach of the Tribunal in disbelieving the appellant's version only on the basis of such documents by which the intimation has been given by the first respondent being employer of the appellant to the Insurance Company of its labourers, it cannot be held that the accident did not occur by the said Dumper – In the absence of any contrary evidence and in the absence of examination of any witness, in support of the said documents the finding of the Tribunal ignoring the oral evidence of the eye witnesses of the accident, cannot be sustained – Allowing the appeal, the matter remanded to the Tribunal for fresh adjudication.

Sanwar Aalam @ Sarware Khan v. Arun Kumar Chog and others

Judgment dated 19.01.2009 passed by the High Court in Misc. Appeal No. 2875 of 2007, reported in 2010 (1) MPHT 374

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128. N.D.P.S. ACT, 1985 – Sections 20 and 42

Search and seizure of *charas* from the accused's house – Compliance with requirement of Section 42 – Information was received by the police officer when he was on patrol duty in the town – He immediately, after receipt of the information, informed his superior officer on wireless – It would be substantial compliance of Section 42 of the N.D.P.S. Act since the situation was of an emergency.

Dalel Singh v. State of Haryana

Judgment dated 07.10.2009 passed by the Supreme Court in Criminal Appeal No. 1034 of 2003, reported in (2010) 1 SCC 149

Held:

The prosecution story in very short conspectus is that on 4.7.1997 at about 2 p.m., Inspector Mahabir Singh along with other police officials was present at Gubhana bus-stop where he received a secret information that the appellant-accused was doing the business of selling charas and was keeping charas in the courtyard of his house. On this information, Inspector Mahabir Singh immediately informed his superior Kala Ramchandran, Additional Superintendent of Police on wireless and the police party went to the house of the accused after joining Surajbhan, Namberdar and Chanderbhan, Chowkidar as witnesses. In the meantime, ASP Kala Ramchandern also reached the spot and directed the Inspector Mahabir Singh to conduct the search of the premises. The house of the accused which was in a gher (compound) was found locked. Ultimately, it was the wife of the accused who brought the key of that "gher". The "gher" had

three rooms. The "gher" was opened and searched. In the fodder room (kotha of tura) inside the "gher", one plastic bag was found which was opened and checked and charas weighing 6.5 kilo gram was recovered. The usual investigation went on. The samples were collected and sent along with the seal; a rukka (information) was immediately sent on the basis of which the first information report was registered in the police station concerned.

In support of its case, prosecution examined PW6 Inspector Mahabir Singh, PW5 ASP Kala Ramachandra apart from examining, PW1 Surajbhan, PW2 Satbir Singh, PW3 Constable Sunil Kumar and PW4 ASI Hari Singh. They were all part of the raiding party along with Inspector Mahabir Singh. On the basis of their evidence, the trial court convicted the accused against which there was an appeal before the High Court. The High Court dismissed the appeal. Hence, the present appeal.

Learned counsel for the appellant very vehemently urged that there was total non-compliance of Section 42 of the NDPS Act. We do not think that the accused can succeed even on this point in view of the judgment of Constitution Bench of this court rendered in *Karnail Singh v. State of Haryana, (2009) 8 SCC 539* wherein, in paragraph 10, it was held as under: (SCC pp. 554-55, para 35)

> "35. In conclusion, what is to be noticed is *Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham v. State of Kerala, (2001) 6 SCC 692* hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediately official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the officer superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

In this backdrop when we see the prosecution case here, it is apparent that the information was received by PW6 Inspector Mahabir Singh when he was not in the police station but was on patrol duty in the town. He immediately, after receipt of the information, informed his superior officer on wireless. There is no doubt that he did not record it in writing but passed on it to his superior ASP Kala Ramachandran by wireless. The fact that the superior officer was informed is deposed to by ASP Kala Ramachandran who appeared as PW5. We have seen her cross-examination which really is totally irrelevant. Similarly, we have gone through the evidence of PW6 Inspector Mahabir Singh. Again, his cross-examination is also redundant cross-examination. Both the witnesses have deposed about the information having been transmitted through wireless and in our opinion would be a substantial compliance of Section 42 of the NDPS Act

since the situation was of emergency. Had the police officer not moved right in the earnest, the appellant-accused would have had an opportunity to remove the contraband charas and escaped from the arms of police.

Under the circumstances, we are unable to agree with the contentions raised before us by learned counsel for the appellant. In our view, there is no infirmity in the judgments of the courts below. The appeal, being devoid of any merit, is dismissed.

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129. N.D.P.S. ACT, 1985 – Sections 27, 42 (2) and 50
N.D.P.S. (AMENDMENT) ACT, 2001

(i) Whether non-corroboration of prosecution version by *Panch* witnesses and non-compliance of the mandatory requirements of Sections 42 (2) and 50 vitiate the search and seizure? Held, No – Drug traffickers should not go scot free on technical pleas.

(ii) Seizure of 100 grams of Ganja – Whether it was intended for accused's personal consumption – Burden to prove lies on accused (Law explained).

(iii) N.D.P.S. (Amendment) Act, 2001 – Not applicable to any pending appeal.

Khanchedilal v. State of M.P.

Judgment dated 17.02.2009 passed by the High Court in Criminal Appeal No. 1421 of 1994, reported in 2009 (IV) MPJR 380

Held:

It is true that none of the panch witnesses came forward to support the evidence of the detecting officer yet, their non-corroborative evidence would not afford a ground for acquittal as the offence does not affect any private individual but the society at large. Moreover, as observed by the Apex Court in *State of Punjab v. Baldev Singh, AIR 1999 SC 2378,* the social malady of drug abuse has already acquired the dimensions of an epidemic.

The evidence on record clearly proves that the search and seizure or the contraband were effected only after complying with the requirements of Section 42 (2) of the Act. The contention that fro want of compliance with the mandatory provision of Section 50 of the Act, the search was vitiated, is not acceptable as the Ganja was allegedly recovered at a public place from a plastic bag being carried by the appellant (*State of H.P. v. Pawan Kumar, AIR 2005 SC 2265* followed). In this case, while explaining the malefic drug abuse, the Apex Court has struck a note of caution that drug traffickers should not go scot-free on technical grounds.

As explained in the Supreme Court in *Gaunter Edwin Kircher v. State of Goa, Secretariat Panji, Goa, AIR 1993 SC 1456,* the burden to prove that the Ganja was to be used for his personal consumption was on the appellant. However, neither in his answer to the charge nor in the examination, under

Section 313 of the Code of Criminal Procedure, the appellant raised a specific plea as to prospective use of the contraband. In such a situation, learned trial Judge, while placing reliance on the decision of the Apex Court in *Duran Didier v. Chief Secretary, Union Territory of Goa, AIR 1989 SC 1966,* proceeded to hold that Ganja seized from the possession of the appellant, though in a small quantity, was not to be meant fro his personal consumption. But, the distinguishing feature was that, in Durand Didier's case, the appellant was found to be in possession of the narcotic drugs or substances far in excess of the respective quantity mentioned in column 3 of the table under the notification [No. 0.827 (E) dt. 14.11.85 issued by the Ministry of Finance Department of Revenue], that too, in many ingeniously devised places of concealment in the camera, shaving tube, torch and shoes whereas, in the case in hand, the appellant, who is a vegetable seller by profession, was found carrying only 100 gms. of Ganja in a bag.

Legal position is well settled on the point that the burden on an accused person to establish the plea of defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence. Further, in a criminal case, the accused is not bound by his pleadings and it is open to him to prove his defence even from the admissions made by the prosecution witnesses.

The preponderance of probability, in the light of circumstances surrounding seizure of only 100 gm. of Ganja, favoured the defence that the contraband was not meant for sale or distribution. Accordingly, it ought to have been inferred that Ganja, forming 1/5th of the small quantity specified in the notification, was possessed by the appellant for his personal consumption.

It is relevant to note that the Supreme Court in *Basheer v. State of Kerala, (2004) 3 SCC 609,* by overruling a contrary view taken by a Division Bench of this Court in *Ramesh v. State of M.P., 2004 CrLJ 62,* has held that the amendment introduced by the NDPS (Amendment) Act, 2001 would not be applicable to any pending appeal. As an obvious consequence, the appellant is not entitled to get benefit of the quantity based mollification of the rigour of sentencing process brought into effect by the Act of 2001.

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130. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141

(i) Dishonour of cheque – Offence by Company – Legal requirement to fasten vicarious liability against the officers of the Company – Held, a person should be responsible to the Company for the conduct of the business of the Company and also a person incharge of the business of the Company.

(ii) Necessary averments in the complaint where necessary – Held, if the accused is the Managing Director or a Joint Director, it is not necessary to make an averment in the complaint that he is incharge of and is responsible to the Company, for the conduct of the business of the company – If the accused is a Director or an officer of a Company who signed the cheque on behalf of the Company, there is no need to make a specific averment or make any specific allegation about consent, connivance or negligence – In the case of Director, Secretary or Manager or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business, is necessary – In case of any other officers of the Company, they can be made liable only by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance and negligence.

K.K. Ahuja v. V.K. Vora and another

Judgment dated 06.07.2009 passed by the Supreme Court in Criminal Appeal No. 1130 of 2003, reported in (2009) 10 SCC 48

Held:

Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under Section 141(1) of the Act.

It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. For making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.

Another aspect that requires to be noticed is that only a Director, Manager, Secretary or other officer can be made liable under sub-section (2) of Section 141. But under sub-section (1) of Section 141, it is theoretically possible to

make even a person who is not a director or officer, liable, as for example, a person falling under category (e) and (f) of Section 5 of Companies Act, 1956. When in *S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla (I), (2005) 8 SCC 89,* this Court observed that

> 'conversely, a person not holding any office or designation in a company may be liable if he satisfies the requirement of being in charge of and responsible for conduct of the business of the company',

this Court obviously had in mind, persons described in clauses (e) and (f) of section 5 of Companies Act. Be that as it may.

The position under Section 141 of the Act can be summarized thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/ employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

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***131. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147**

In view of the *non-obstante* clause, the provision of Section 147 of the Negotiable Instruments Act have an overriding effect over the provisions of CrPC relating to the compounding of offences – Section 147 does not bar the parties from compounding the offence under Section 138 even at the appellate stage of the proceedings. [Also see: *Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., (2008) 2 SCC 305*]

K.M. Ibrahim v. K.P. Mohammed and another

Judgment dated 02.12.2009 passed by the Supreme Court in Criminal Appeal No. 2281 of 2009, reported in (2010) 1 SCC 798

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***132. PARTNERSHIP ACT, 1932 – Sections 4 and 42 (2)**

Dissolution of a partnership firm on account of death of one of the partners is subject to the contract entered into by the parties – But when there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which say otherwise – A partnership is a contract between the partners – There cannot be any contract unilaterally without the acceptance by the other partners – When there are only two partners, the legal representative of one of the deceased partner cannot be asked to continue the partnership, as there is no legal obligation upon them to do so, as partnership is not a matter of heritable status but purely one of contract, which is also clear from the definition of partnership under Section 4.

Mohammad Laiquddin and another v. Kamala Devi Misra (dead) by LRs and others

Judgment dated 05.01.2010 passed by the Supreme Court in Civil Appeal No. 6933 of 2002, reported in (2010) 2 SCC 407

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133. PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 (1) (d)/13 (2), 7 and 20

Trap – In case of illegal gratification – When it is proved that the accused accepted illegal gratification of substantial amount – Presumption under Section 20 arises in favour of prosecution and the burden to prove demand also discharged and shifted on the accused to explain as to how the amount came in his possession.

State represented by CBI, Hyderabad v. G. Prem Raj

Judgment dated 19.11.2009 passed by the Supreme Court in Criminal Appeal No. 261 of 2007, reported in (2010) 1 SCC 398

Held:

The High Court, without going into the details of the evidence, has merely come to the conclusion that no demand was made. Now, if no demand was made, there was no reason for the respondent-accused to accept the money offered by the complainant. The respondent-accused cannot deny that the money was actually touched by him. There is absolutely no cross-examination on the fact that when he dipped his finger in the solution of Sodium Carbonate, same turned pink, which was clear indication that he touched the money and handled it. There is no explanation, whatsoever, of this second fact as to how the fingers of the respondent-accused were soiled with phenolphthalein. This is the second circumstance, which was a very major circumstance, that the High Court has failed to note and explain, which shows that the High Court has taken a very casual attitude.

We have scanned the judgment of the High Court very carefully and find that the High Court has not, in any manner, considered the factum of solution of Sodium Carbonate turning pink when the fingers of the respondent-accused were dipped. In fact, that was a major circumstance and the most important incriminating circumstance, which was bound to be explained by the respondent-accused.

Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he finds that "there is not sufficient ground" for proceeding against the accused. In other words, his consideration of the record and documents at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was

introduced in the Code to avoid wastage of public time which did not disclose a *prima facie* case and to save the accused from avoidable harassment and expenditure.

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134. PRACTICE & PROCEDURE:

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

(i) After passing of final order, interim order merges with the final order – Undue advantage taken by the party under interim order should be neutralized.

(ii) Without challenging the basic order only challenge to consequential order is not permissible.

Amarjeet Singh and others v. Devi Ratan and others

Judgment dated 18.11.2009 passed by the Supreme Court in Civil Appeal No. 5790 of 2002, reported in (2010) 1 SCC 417

Held:

No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. [Vide *Shiv Shankar v. U.P. SRTC., 1995 Suppl. (2) SCC 726, GTC Industries Ltd. v. Union of India, AIR 1998 SC 1566* and *Jaipur Municipal Corpn. v. C. L. Mishra, (2005) 8 SCC 423*].

In *Ram Krishna Verma v. State of U.P., AIR 1992 SC 1888* this Court examined the similar issue while placing reliance upon its earlier judgment in *Grindlays Bank Limited v. I.T.O., AIR 1980 SC 656* and held that no person can suffer from the act of the Court and in case an interim order has been passed and petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

In *Mahadeo Savlaram Sheke v. Pune Municipal Corpn.., (1995) 3 SCC 33,* this Court observed that while granting the interim relief, the Court in exercise of its discretionary power should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the Court that in the event of his

failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the Court while exercising its equity jurisdiction in granting injunction is also competent to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the Court. The Court can do so in exercise of its inherent jurisdiction in doing *ex debito justitiae* mitigating the damage suffered by the defendant by the act of the Court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. Such a procedure is necessary as a check on abuse of the process of the Court and adequately compensate the damages or injury suffered by the defendant by act of the Court at the behest of the plaintiff.

In *South Eastern Coalfields Ltd. v. State of M.P., AIR 2003 SC 4482,* this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaming an advantage it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

The Court further held:[*South Eastern Coalfields Ltd.* (supra), SCC pp. 664-65, para 28]

> "28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance, in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are earlier to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant 'would stand to gain by swallowing the benefits yielding out of the interim order even though the

battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated....."

Similarly in *Karnataka Rare Earth v. Deptt. of Mines & Geology, (2004) 2 SCC 783,* a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the Court would not have passed an interim order.

In the instant case, promotions had been made by two different DPC's held on 19.12.1998 and 22.1.1999. Both the DPC's had made promotions under different rules on different criterion and their promotions had been made with retrospective effect with different dates notionally. In the writ petition before the High Court, the promotion of the appellants had not been under challenge. The seniority which is consequential to the promotions could not be challenged without challenging the promotions. Challenging the consequential order without challenging the basic order is not permissible. [Vide *P. Chitharanja Menon v. A. Balakrishnan, AIR 1977 SC 1720*].

In such a case, a party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

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135. PREVENTION OF CRUELTY TO ANIMALS ACT, 1960 – Section 11 (1) (d) CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457
Interim custody of livestock – Goats and sheep illegally filled in trucks in cruel manner while transporting, seized by police and kept in custody on account of alleged commission of offence under Section 279 of IPC and Section 11 (1) (d) of Prevention of Cruelty to Animals Act – The respondents by vocation, trade in goats and sheep which is not prohibited by any law and by production of goats and sheep during trial, it cannot be proved that they were subjected to cruelty because no marks of cruelty would be found by the time elapsed – Respondents who are owners of the livestock are entitled to the interim custody of the same, subject to certain conditions.

Bharat Amratlal Kothari and another v. Dosukhan Samadkhan Sindhi and others

Judgment dated 04.11.2009 passed by the Supreme Court in Criminal Appeal No. 2020 of 2009, reported in (2010) 1 SCC 234

Held:

Whether respondents 1 to 6 are entitled to relief of interim custody of goats and sheep seized pursuant to filing of complaint No. II-C.R. 3131 of 2008 registered with Deesa City Police Station.

The fact that respondent Nos. 1 to 6 are owners of the goats and sheep seized is not disputed either by the appellant No. 1 or by the contesting respondents. Though the respondent No. 8 has, by filing counter reply, pointed out that the officials of Panjarapole at Patan are taking best care of the goats and sheep seized in the instant case, this Court finds that keeping the goats and sheep in the custody of respondent No. 8 would serve purpose of none. Admittedly, the respondent Nos. 1 to 6 by vocation trade in goats and sheep. Probably a period of more that one and half years has elapsed by this time and by production of goats and sheep seized before the court, the prosecution cannot prove that they were subjected to cruelty by the accused because no marks of cruelty would be found by this time. The trade in which respondent Nos. 1 to 6 are engaged, is not prohibited by any law. On the facts and in the circumstances of the case this Court is of the opinion that respondent Nos. 1 to 6 would be entitled to interim custody of goats and sheep seized in the case during the pendency of the trial, of course, subject to certain conditions.

For the foregoing reasons the appeal partly succeeds. The directions Nos. 1 to 6, contained in paragraph 14 of the impugned judgment, are hereby set aside. The Special Criminal Application No. 1387 of 2008 is accepted in part by directing the respondent No. 8 to hand over custody of goats and sheep seized in the instant case to the respondent Nos. 1 to 6, who are owners thereof, in such proportion as the original number of seized animals bears to the number of surviving animals, on each of them depositing a sum of rupees fifty thousand with the trial court and each furnishing two sureties of Rs. 50,000/- to the satisfaction of the trial court.

Respondents 1 to 6 be handed over custody of goats and sheep in the presence of Police Officer in-charge of the Police Station at Patan, who shall supervise delivery of the animals to the respondent Nos. 1 to 6 in such manner that the animals are not subjected to further cruelty in their transportation within the area of his jurisdiction. The respondent Nos. 1 to 6 are directed to see that no cruelty is meted out to the surviving animals and submit an undertaking to that effect to the trial court within a period of two weeks from today.

Subject to abovementioned directions regarding handing over of interim custody of goats and sheep, the appeal is allowed.

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136. PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971 – Section 2
FLAG CODE OF INDIA, 2002
Insult to Indian National Flag – Petitioner was the Chief Guest in the function – It was alleged that in the said function, the National Flag continued to fly in the premises even after the sunset and when the fact was brought to the notice to the organizers, the National Flag was pulled down in a disrespectful and insulting manner – Cognizance was taken by the JMFC under Sections 2 and 3 of the Prevention of Insults to National Honour Act 1971, Flag Code of India, 2002 and

Section 109 of I.P.C. – Order of taking cognizance against the petitioner was quashed under Section 482 because of non-availability of evidence to prove that petitioner has caused insult to the National Flag.

Aamir Khan v. State of M.P.

Judgment dated 03.08.2009 Passed by the High Court in M.Cr.C. No. 6424 of 2007, reported in 2009 (IV) MPJR 244

Held :

Section 2 of the Prevention to National Honour Act, 1971 reads as under:-

> *Insult to Indian National Flag and Constitution of India :*
>
> Whoever in any Public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples, upon or [otherwise shows disrespect to or brings] into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.
>
> Section 109 of Indian Penal Code reads as under:
>
> "Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by that code for the punishment of such abetment be punished with the 'punishment provided for the offence."

So far as Flag Code of India, 2002 is concerned, in the matter of *Union of India v. Naveen Jindal, AIR 2004 SC 1559,* Hon'ble Supreme Court has held that the Flag Code is not a statute and cannot regulate fundamental right to fly National Flag.

As per the complainant himself who is respondent herein the petitioner was the chief-guest of the function while other accused persons were organizer. Either in the complaint or in the evidence oral or documentary adduced by the respondent No.2, nothing has been stated against the petitioner except the fact that the petitioner was present in the said function. Since prima facie there is no evidence to prove that petitioner has caused insult to the National Flag, the learned Court below committed error in passing the impugned order whereby cognizance of the alleged offences was taken against the petitioner. In view of this petition filed by the petitioner is allowed and the impugned order whereby the cognizance has been taken against the petitioner stands quashed to that extent.

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137. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 2 (q), 12 (1) and 19

(i) Application under Section 12 of the Act – Respondent, who may be – Only adult male member may be a respondent – Female cannot be impleaded as respondent.

(ii) Right of residence, claim of – Right of residence can be claimed in respect of shared house belonging to husband or house belonging to joint family of which husband is a member.

Tehmina Qureshi v. Shazia Qureshi

Judgment dated 13.11.2009 passed by the High Court in Misc. Criminal Case No. 3312 of 2009, reported in 2010 (1) MPHT 133

Held:

It is contended by learned Counsel for the petitioner that as per section 2 (q) of the Act, it is crystal clear that an application can be filed by an aggrieved person including the respondent claiming relief under the Act only against the adult male person. However, as per the proviso appended to this proviso, a wife or female living in relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

Learned Counsel for the petitioner drew this Courts attention to a citation *Ajay Kant Sharma and others v. Smt. Alka Sharma, 2008 (2) Crimes 235,* in which, a Bench of this Court has held that application for seeking one or more relief under the Act of 2005 can be filed only against adult male person. Relying that citation, it is further urged that in the present case, petitioner against whom. The application is filed under Section 12 of the Act is not adult male person, therefore, proceedings initiated against her and application filed against her is not maintainable. It is urged on behalf of the petitioner that considering the view expressed in above citation, the petitioner being a lady, proceedings initiated against her in Cr. Case No. 2694 of 2009 be quashed.

Learned Counsel for the respondent vehemently opposed the application and submitted that while disposing of the application under sub-section (1) of Section 12 of the Act of 2005, Magistrate may on being satisfied that domestic violence has taken place, pass a residence order.

It is submitted that the above proviso of Section 19 would indicate that the only embargo against the passing of residence order while disposing of an application under Section 12 (1) of the Act is that if the respondent is a woman the Magistrate shall not direct such woman respondent to remove herself from the shared household. In other words if the respondent to the application is a woman, the Magistrate can grant all the reliefs against such woman in an application under Section 12 (1) of the Act except directing such woman respondent to remove herself from the shared household. Hence, it is urged that the petitioner is also liable under Section 12 of the Act of 2005 and proceedings are not liable to be quashed.

Learned Counsel's argument is based on a citation *Remadevi v. State of Kerala, I (2009) DMC 297,* in which, it is held by Kerala High Court that "aggrieved person" under Section 12 of the Act can file application not only against adult male relatives including husband but also against any female relatives. Term "respondent" appearing in Section 12 takes within its fold not only adult male. It is further observed that on bare perusal of Section 19 of the Act and the proviso, it is apparent that Magistrate can grant all the relief against woman also in an application filed under Section 12(1) of the Act except directing such woman respondent to remove herself from shared household. So Act is applicable to female also.

So far as citation of Kerala High Court cited by learned Counsel for the respondent is concerned, with due respect, I find myself unable to agree with the decision of Kerala High Court. Application for seeking one or more relief under the Act can be filed against adult male member only as is apparent from Section 2 (q) of the Act wherein, it is specifically mentioned that 'respondent means only adult male person. It is apparent that complaint against relative of husband cannot include female members. In case of *Smt. Menakuru Renuka and other v. Menakuru Mona Reddy and another, 2009 Cri.L.J. (NOC) 819 (AP) = AIR 2009 (NOC) 1544 (AP),* similar view is expressed that in view of the contents of Section 2 (q) of the Act of 2005 female members of the domestic relationship have to be excluded, as the word used in Section 2 (q) of the Act is that respondent means any adult male person. The words used are not like that 'respondent' means any adult person. So complaint against relatives of husband cannot include female members. Female members cannot be made respondents in proceedings under the Protection of Women from Domestic Violence Act, 2005.

It is well known that Protection of Women from Domestic Violence Act, 2005 came into force from 26th October, 2006, Vide S.O. 1776 (E), dated 17th October, 2006 published in Gazette of India, Extra, Pt. II and this Act is to provide more effective protection to the rights of woman guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for members connected therewith or incidentally thereof. The Act is applicable against male persons who can be respondent.

In case of *Razzaq Khan vs. Shahnaz Khan, 2008 (4) M.P.H.T. 413 = ILR (2008) M.P. 963,* it is held that wife is entitled to a right of residence in a shared house belonging to husband or house which belongs to joint family of which, husband is a member. In *Vimlaben Ajitabhai Patel v. Vatslaben Ashok Bhai Patel and other, (2008) 4 SCC 649* and *S.R. Batra v. Tarun Batra, (2007) 3 SCC 169,* Apex Court has held that even wife could not claim right of residence in the property belonging to her mother-in-law that means protection order cannot be passed against mother-in-law. Wife is only entitled to the residence order which extends only to joint property in which, husband has a share.

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138. RENT CONTROL & EVICTION:

Issue regarding the title of the landlord raised by the tenant by way of amendment application in WS in a suit for eviction – Permissibility – Held, in a suit for eviction, if it is not filed on the ground of bonafide requirement of the landlord and more so when relationship of landlord and tenant between parties have been admitted, it would not be open for the tenant to deny the title of the landlord – The amendment application rejected – Legal position explained.

Transmarine Corporation and others v. Zensar Technologies Limited and others

Judgment dated 01.09.2009 passed by the Supreme Court in Civil Appeal No. 5914 of 2009, reported in (2009) 10 SCC 750

Held:

Having considered the nature of the suit which is simply a suit for eviction and also repeated rejection of the application for amendment of the written statement by the courts below, the High Court although had not allowed the writ petition, but at the same time, directed the trial Court to decide the issue of title, which is not permissible in law in a suit for eviction simplicitor. In our view, in a suit for eviction, if it is not filed on the ground of bonafide requirement of the landlords and since the respondents have already admitted the relationship of landlord and tenant between the parties, there was no necessity for the High Court to direct that the issue regarding the title of the plaintiff in respect of the suit premises should be decided in accordance with law and also on the evidence other than the admission of the respondents.

In view of the discussions made hereinabove, we are, therefore, unable to accept this part of the impugned order, particularly in view of the fact that in a suit for eviction in which relationship between the parties has been admitted, it would not be open for the tenant to deny the title of the landlords/appellants. In view of the above, we are, therefore, of the view that the courts below had rightly rejected the application for amendment of the written statement filed by the respondents and at the same time, the High Court was not justified in directing the trial Court to decide the issue which involves the title of the plaintiffs/appellants on the basis of evidence other than the admission of the respondents.

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***139. RENT CONTROL AND EVICTION:**

Bonafide requirement of landlord – Powers of Court – Once it is not disputed that the landlord is in bonafide need of the premises, it is not for the courts to say that he should shift to the first floor or any higher floor – It is well known that shops and businesses are usually (though not invariably) conducted on the ground floor, because the customers can reach there easily – The court cannot dictate to the landlord which floor he should use for his business; that is for the landlord himself to decide.

Uday Shankar Upadhyay and others v. Naveen Maheshwari
Judgment dated 18.11.2009 passed by the Supreme Court in Civil Appeal No. 5888 of 2006, reported in (2010) 1 SCC 503

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*140. SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) ACT, 1992 – Sections 7 and 8
EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Sections 120-A, 464, 467, 471, 477-A, 409 and 411
PREVENTION OF CORRUPTION ACT, 1988 – Section 13

(i) Criminal conspiracy, constitution of – Criminal conspiracy is an independent offence – It is punishable separately – A criminal conspiracy must be put to action; for, so long as a crime is generated in the mind of the accused, the same does not become punishable – Thoughts even criminal in character, often involuntary, are not crimes but when they take a concrete shape of an agreement to do or caused to be done an illegal act or an act which is not illegal, by illegal means then even if nothing further is done, the agreement would give rise to a criminal conspiracy.

(ii) Criminal conspiracy, ingredients of – Ingredients of the offence of criminal conspiracy are:
(1) an agreement between two or more persons;
(2) an agreement must relate to doing or causing to be done either (a) an illegal act; (b) an act which is not illegal in itself but is done by illegal means.
Condition precedent for holding the accused persons to be guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of the fact which must be established by the prosecution, viz., meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means.

(iii) Criminal misconduct, what is – If a public servant obtain for himself or for any other person, any valuable thing or pecuniary advantage, he would be guilty of criminal misconduct.

(iv) Offences under Section 13 (1) (c) and (d) – Criminal misconduct, ingredients of –
The ingredients of Section 13 (1) clause (c) are that the public servant must dishonestly or fraudulently misappropriate or otherwise convert to his own use or allow any other person to misappropriate or otherwise convert for his own use any property – Such property must have been entrusted to such public servant or must be in the alternative under his control as a public servant – Further such conversion or misappropriation must be done with a dishonest or fraudulent intention – If the said three

conditions have been satisfied then the public servant would be guilty of an offence under clause (c) of the Section 13 (1) – If there is a dishonest or fraudulent intention on the part of a public servant and he with that intention misappropriates or otherwise converts for his own use or allows any one else to misappropriate or otherwise convert for his own use, any property which has been entrusted to him or is under his control as a public servant.

The ingredients of Section 13 (1) clause (d) are that the public servant must by abusing his position as a public servant, obtain for himself or for any other person any valuable thing or pecuniary advantage to be liable for criminal misconduct under the section.

(v) Criminal breach of trust, scope and ingredients of – The terms of Section 405 are very wide – It applies to one who is in any manner entrusted with property or dominion over property – The section does not require that the trust should be in furtherance of any lawful object – The section provides that if such a person dishonestly misappropriates or converts to his own use property entrusted to him he commits criminal breach of trust – There are separate offences by which criminal breach of trust may be committed – This section requires entrusting any person with property or with dominion over property and that person entrusted (a) dishonestly misappropriates or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract made touching the discharge of such trust.

(vi) Stolen property, connotation of – For the purpose of Section 410, a property is stolen when its possession is transferred by theft, extortion, robbery, dacoity or criminal breach of trust or which was obtained under misappropriation committed whether in India or outside.

'Stolen property', meaning of – 'Stolen property' means not only things which have been stolen, extorted or robbed but also things which have been obtained by criminal misappropriation or criminal breach of trust are within the meaning assigned to these words.

Mir Nagvi Askari v. C.B.I.

Judgment dated 07.08.2009 passed by the Supreme Court in Criminal Appeal No. 1477 of 2004, reported in AIR 2010 SC 528

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141. SPECIFIC RELIEF ACT, 1963 – Section 6
CIVIL PROCEDURE CODE, 1908 – Section 115
Scope of relief under Section 6 of Specific Relief Act about recovery of possession when wrong-doer has also made construction on the land – Held, Court is competent to grant relief to restore possession but order regarding removal of construction cannot be given as it would be beyond the jurisdiction of the Court.

Ramniwas Sharma v. Jasoda Bai (Smt.) and others

Judgment dated 24.11.2009 passed by the High Court in Civil Revision No. 3 of 2009, reported in 2010 (1) MPHT 124

Held:

It is submitted that relief for removal of construction could not have been granted in a suit under Section 6 of the Specific Relief Act Reliance for this purpose is placed on the Apex Court decisions in the cases of *Mahabir Prasad Jain v. Ganga Singh, (1999) 8 SCC 274, Rahmatulla v. Maftzuilla and other, AIR 1915 Cal. 687* and *Sona Mia* and *another v. Prakash Chandra Bhattachariya and others, AIR 1940 Calcutta 464.*

In the case of *Mahabir Prasad Jain* (supra), there was no prayer for removal of the construction in the plaint. Relief granted by the Trial Court for removal of the construction in the plaint. Relief granted by the Trial Court for removal of construction was confirmed by the High Court. In this background the Apex Court has observed as under:-

> "As already pointed out, the decree passed by the Trial Court as affirmed by the High Court travels beyond the prayer in the plaint and also the scope of Section 6 of the Specific Relief Act. Apart from granting a decree for possession as prayed for by the respondent, the Trial Court has granted an additional relief which was not prayed for by him in that the Trial Court has directed the appellant to remove the construction put up by him including the dismantling of the glass. Such a relief cannot be granted under the provisions of Section 6 of the Specific Relief Act, particularly when there is no prayer therefore in the plaint."

Judgment of Calcutta in the case of *Rahmatulla* (supra), relied upon by learned Sr. Advocate for the revisionist is very short which may be reproduced as under:-

> "The suit is, therefore, decreed with costs against defendant Nos. 1 to 8 and it is ordered that the plaintiffs do recover possession of the land by removing the house built on it by the defendants if necessary.
>
> We grant a Rule calling upon the opposite party to show cause why the order complained of should not be set aside

on the ground that it was beyond the jurisdiction of the Court. That portion of the order which allows the plaintiff to remove the house built on the land by the defendant is beyond the jurisdiction of the Court under the Section; for under that section the Court cannot do more than make an order with respect to possession of the land. The rule is, therefore, made absolute, the first part of the order remains unaffected and that part of the order which directs to remove the house, etc., is set aside. The petitioner is entitled to his costs, the hearing fee being assessed at one gold mohur."

In another decision of Calcutta High Court in the case of *Sona Mia and another* (supra), it has been held as under:-

> "All that the Court can do under Section 9, Specific Relief Act, is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under Section 9 of the Act the question of the title of the respective parties is not adjudicated upon and, therefore, it would be wrong to pass any order regarding the structures on the land. The order of the learned Munsif ejecting the defendants from the land is maintained, but the order regarding the structures erected on the land by the defendants in set aside."

From the aforesaid decisions, it is clear that in a suit filed under Section 6 of the Specific Relief Act, the hands of the Courts are not tied if the defendant dispossesses the plaintiff and the plaintiff establishes that he was in possession within six months preceding the institution of the suit and dispossessed by the defendant in al illegal and forcible manner. Possession of suit property may be restored to him. Limitation of six months in such a suit is provided under Section 6 itself of the Specific Relief Act. Even if the defendant after dispossessing the plaintiff in an illegal and forcible manner makes a construction in hasty manner that will not dislodge the plaintiff from invoking Section 6 of the Specific Relief Act and Jurisdiction of the Court under Section 6, cannot be ousted by the wrong of the defendant in the form of illegal and forcible construction. In case of contrary interpretation, it would provide a tool in the hands of the defendant to forcibly occupy anybody's property and make a speedy construction. It, perhaps, may not be the object of legislative intent. Even the Apex Court in the case of *Mahabir Prasad Jain* (supra), has not held that in case if the construction is made on the subject matter of the suit under Section 6 of the Specific Relief Act, the suit will have to be dismissed for want of jurisdiction. In the cases of Calcutta High Court cited above, the judgments pertaining to restoration of possession have been maintained, setting aside the direction for removal.

Accordingly, impugned judgment and decree with regard to direction to the defendant for removal of construction within two months is hereby set aside. Rest of the judgment is maintained. Decree be modified accordingly. However, this order will come into force after one month in order to enable the defendant to either remove the construction or to institute a suit as envisaged in sub-section (4) of Section 6 of the Specific Relief Act.

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***142. SPECIFIC RELIEF ACT, 1963 – Section 20**
EVIDENCE ACT, 1872 – Section 91

(i) Suit for specific performance of agreement to sell agricultural land – Suit resisted on the ground that it was a loan transaction – Held, when execution of agreement to sell is admitted then in view of Section 91 of the Evidence Act, the oral evidence about loan transaction cannot be taken into consideration to draw any inference contrary to the terms of agreement.

(ii) Suit for specific performance of agreement to sell agricultural land – Agreement by one co-owner – Suit could not be decreed for specific performance contrary to the interest of other co-Bhumiswami – Plaintiffs also failed to prove readiness and willingness to perform their part of contract – Decree of specific performance cannot be granted.

(iii) Suit for specific performance of agreement to sell – Held, when it is found that plaintiff was not ready and willing to perform his part of contract then the suit could be decreed for refund of the advance money.

Ammilal & anr. v. Kamla Bai

Judgment dated 09.09.2009 passed by the High Court in S.A. No. 172 of 1994, reported in I.L.R. 2010 M.P. 243

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143. SPECIFIC RELIEF ACT, 1963 – Sections 34 and 38

Muafi (Aukaf) Land belonging to deity, whether transferable by pujari? Held, No – Transferee gets no right or interest in the property by such transfer – Further held, no title or other rights can be acquired in respect of such property by adverse possession – However, right to cultivation may be granted by the Government to any suitable person, if necessary.

Roshanlal & Anr. v. Murti Laxminarayanji & Ors.

Judgment dated 20.03.2009 passed by the High Court in S. A. No. 279 of 2003, reported in 2010 (I) MPJR SN 10

Held:

Brief facts of the case:

Respondent No. 1 plaintiff filed a suit for declaration of his title and permanent injunction on the ground that the suit land comprising of 7 bigha and 1 biswa of Survery no. 322 situated at Village Sirsaud, Tehsil Gohad, District Bhind is a 'Muafi Land' and temple Shri Laxmi Narayan is bhumiswami of said agriculture land. Therefore, respondent No. 1-plaintiff be declared owner and title holder of the land in question. The appellants denied the averments made in the plaint and contended that his name has been recorded in the revenue record. After abolition of Madhya Bharat Abolition Zamindari Act, Samvat, 2008 he became Maurasi Krishak and by reasons of M.P. Land Revenue Code he became bhumiswami of the land and he is in continuous possession of the land to the knowledge of the respondent No. 1 for the period of more than 30 years and therefore, he has acquired title by adverse possession.

The trial Court after appreciating the oral and documentary evidence came to the conclusion that the suit land is in the name of Shri Mandir Laxmi Narayan and as per Ex.P.1 of Aukaf Register the land is recorded as 'Muafi Land' of Aukaf Department and appellants cannot be declared as bhumiswami and title holder of the land and no right and title accrued in their favour. The trial Court declared respondent no. 1 as owner and title holder of the land.

The Apex Court in the case of *Kanchaniaya (Mst.) and others v. Shiv Ram and others, 1992 RN 194* has held that Pujari acts as manager having no right to lease out the land. Patta given by Pujari confers no right, title or status of leassee to the grantee, his possession is the possession of a trespasser such grantee is an encroacher and liable to be evicted under section 248 and resort to provisions of section 168 (4) are not available. It is also held that the Pujari or manager having rights of Kashtakar Mourusi under Section 13 of Kawaid Muafidaran and he could be dispossessed without order of the Court if failed to perform his duties properly. It is also held that as per section 13 of Kawaid Muafidaran the pujari or manager acquiring right of Dakhilkar by virtue of parwana under Section 13 of Kawaid Muafidaran cannot transfer the land by sale, mortagage or even by lease. Muafi land is of Milkiyat Sarkar under the management of Aukaf Department. In view of the law laid down by the Apex Court in the case of *Kanchaniya (Mst.)* (supra) both the Courts below have not committed any legal error in decreeing the suit the respondent No. 1 and dismissing the suit of the appellant.

Learned counsel for the appellant drew my attention to para 23 and 24 of the Apex Court judgment in the case of *Kanchaniya* (supra) and submitted that the appellants be permitted to cultivate the land in dispute on terms which may be suitably revised by the senior officials in the Aukaf Department of the Government of M.P. and he may be permitted to file an application before the Collector, District Bhind. Para 23 and 24 of the Apex Court Judgment in the case of *Kanchaniya* (supra) is relevant which reads as under:

> "23. On the aforesaid view of the matter, the appellants must fail and the appeal has to be dismissed, But before

we do so, we consider it necessary to advert to an aspect which cannot be ignored. We have found that the Pujari or the Manager of the Devasthan holds the lands given to him under the Parwana issued under S.13 of the Kawaid Maufidaran as a Manager of Government property. He functions under the overall control and supervision of the Aukaf Department because in the event of his failure to properly manage the affairs, he can be removed and the Parwana Issued in his favour can be revoked. Since under the terms of the Parwana, the Pujari or the Manager can get the land given for the worship and upkeep of the Devasthan cultivated by some other person, it is necessary that the Aukaf Department exercises control in the matter of initiation of proceedings for ejectment of a person who is allowed to cultivate by the Pujari of the Manager which means that the proceedings for such ejectment under Section 248 (1) of the Code should be initiated by a Pujari or Manager only after obtaining the approval of the Aukaf Department. In the instant case, the Board of Revenue, has stated that respondent No. 1 has never cultivated the land and has no arrangement for cultivation and that even if the land is given in his possession he would give it to somebody else for cultivation. In these circumstances, we consider it appropriate to direct that a senior official in the Aukaf Department of the Government of Madhya Pradesh should examine whether the appellants can be permitted to cultivate the land in dispute on terms as suitably revised and till the matter is so considered, the appellants are not dispossessed from the land in dispute.

"24. The appeal is therefore dismissed. It is, however, directed that a senior official in the Aukaf Department of the Government of Madhya Pradesh shall Consider whether the appellants can be permitted to cultivated the land in dispute on terms which may be suitably revised. In case the said official is of the view that the appellants can be so permitted, suitable direction in that regard may be given by the Aukaf Department directing respondent No. 1 to permit the appellants to cultivate the land on the revised terms."

In view of the above the appellants are at liberty to file an application before the Collector, District Bhind within a period of four weeks from today. Learned Collector, District Bhind shall pass an appropriate order in accordance with law without being influenced by the order of this Court.

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*144. STAMP ACT, 1899 – Sections 35 and 36
EVIDENCE ACT, 1872 – Section 65
Secondary evidence – Copy of unstamped instrument – Not admissible in evidence.
Sections 35 and 36 of Stamp Act and Section 65 of Evidence Act, scope, comparison and constitutionality of – Section 35 of the Stamp Act deals with original instruments only and not copies – Therefore, Section 36 of the Stamp Act cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit – The words "an instrument" in Section 36 must have the same meaning as that in Section 35 – The legislature only related through Section 36 from the strict provisions of Section 35 that a party who has a right to object to the reception of an original instrument on the insufficiency of the stamp affixed on it, must do so when the document is first tendered – Once the time for raising such objection is passed, no such objection can be raised at a later stage – However, this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped – There is a difference between an instrument and a document – Section 65 of the Evidence Act deals with secondary evidence relating to documents only – The two provisions are not to be compared – Since both the statutes operate in different fields, they cannot be given equal platform – The legislature in its wisdom has made a distinction which appears to be rational and relevant and does not invite the frown of Article 14 of the Constitution of India – A photocopy of the alleged instrument cannot be tendered in evidence – Section 35 clearly prohibits so.

Vijay Choudhary v. Union of India and others
Judgment dated 30.11.2009 passed by the High Court in Writ Petition No. 741 of 2004, reported in 2010 (1) MPHT 435 (DB)

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145. SUCCESSION ACT, 1925 – Section 63 (c)
EVIDENCE ACT, 1872 – Section 68
Will – Proof of – When no suspicious circumstances are pleaded and the execution of document is proved by attesting witness – It would be invalid to hold that the document is suspicious.

Nathia Bai and others v. Gangaram and others
Judgment dated 09.10.2009 passed by the High Court in Second Appeal No.422 of 2000, reported in 2010 (1) MPHT 70

Held:

The *will* is required to be proved just like any other document by adducing the additional evidence to prove the ingredients as envisaged under Section 63 (c) of the Succession Act by examining the attesting witness according to Section 68 of the Evidence Act. It is also well settled that the propounder of the *Will* is required to prove the *Will* by removing all suspicious circumstances. Thus, if suspicious circumstances would have been pleaded by the defendants, then only the plaintiffs, who are the propounder of the *Will*, were legally bound to remove those suspicious circumstances, The contestant opposing the *Will*, according to me, was required to bring the material on record so that the *Will* can be said to be a suspicious document and in that event the onus would shift back on the propounder of the *Will* to satisfy the Court by adducing positive evidence that the *Will* is not suspicious.

The Supreme Court in another decision *PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and others, AIR 1995 SC 1852 Para 4,* held that the propounder of the *Will*, who was the defendent, has set up the *Will*, but, nothing prevented either the respondent or any of the contesting defendants to file a rejoinder, i.e., additional written statement with leave of the Court under Order 8 Rule 9 of CPC pleading the invalidity of the *Will* propounded by the appellant, but nothing was stated in the pleadings. The Supreme Court further held in Para 5 that it is a trite law that the propounder of the *Will* is duty bound to prove the Will and to remove all the suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind.

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146. TRANSFER OF PROPERTY ACT, 1881 – Section 55
CIVIL PROCEDURE CODE, 1908 – Sections 20 and 92
CONTRACT ACT, 1872 – Section 55
SPECIFIC RELIEF ACT, 1963 – Sections 16 (c) and 20

(i) Sale of immovable property – Where a contract for sale lays down the terms and conditions to govern sale transaction, Section 55 of the Transfer of Property Act would have no application – Legal position explained.

(ii) Transfer of immovable property belonging to a religious or charitable trust – Territorial jurisdiction as to the application of law – The relevant law applicable to a charitable trust would be that of the State in which the head office of the trust is registered – Legal position restated.

(iii) When time is the essence of contract – When there are many instances of contract for sale where the fact that time is to be of essence of the contract has been specifically mentioned which clearly shows the intention of the parties to make time to be the

essence of the contract – It would be apposite to conclude that the intention of the parties of making the time being the essence of the contract.

(iv) Specific performance of contract for sale – Readiness and willingness – In a suit for specific performance of contract for sale, it has to be proved that the plaintiff must always be ready and willing to complete the terms of the agreement for sale and that he has not abandoned the contract and his intention is to keep the contract subsisting till it is executed – Position explained.

A.K. Lakshmipathy (dead) and others v. Rai Saheb Pannalal H. Lahoti Charitable Trust and others

Judgment dated 28.10.2009 passed by the Supreme Court in Civil Appeal No. 7208 of 2009, reported in (2010) 1 SCC 287

Held:

The trust owned properties in Hyderabad, Andhra Pradesh and Hingoli in Maharashtra. The registered office was in Kolkata, West Bengal. Respondent No. 2 on behalf of the trust entered into a written contract for sale with appellant No. 1 on 6th of December 1978 agreeing to sell the property in question measuring 9400 sq. yards along with constructions thereon. The contract contained certain terms and conditions. The first of such condition was that Appellant No. 1 would advance a sum of Rs. 1 lakh and the rest of the balance amount, i.e., Rs. 5 lakhs would be paid by the appellants on or before 05.06.1979.

Under the contract, the appellants also agreed to obtain the necessary permission or exemption from the competent authorities under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the ULC Act"). It was also alleged that the respondents shall cooperate with the appellants in getting all such necessary permissions from the competent authority under the ULC Act. Clause 10 of the Contract emphatically mentioned that time was the essence of the contract. It reads as under:

"Time will be of essence of the contract."

The said contract also mentioned that in case of failure of the appellants to pay the balance amount within the stipulated time, the respondents would forfeit the balance amount.

From a bare perusal of clauses 4, 7, 8 and 9 of the Contract for sale, it would be evident that the onus is on the appellants to obtain clearance from the competent authorities under the ULC Act. The respondents were nevertheless bound to extend their full cooperation to the vendees and to sign all necessary papers and documents. In clauses 7 to 9 of the said contract, the respondents agreed to obtain non-encumbrance and clearance certificates from the Income Tax Department and also to settle all payments to be made towards Municipal

taxes, water tax, non- agricultural land assessment tax, etc. In the Contract, there is no such clause where the certificate from the Endowment Department was also to be taken for specific performance of the contract.

Nevertheless, it must be recognized that it is generally the prerogative of the buyer to find out the defects in a property before buying it and also to make the seller rectify such defects. The rights of the buyer to seek reasonable clarifications and raise reasonable doubts have been statutorily recognized by Section 55 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act).

In this case, sub-section (c) of Section 55 of the T.P. Act is pertinent. According to the appellants and keeping in view of sub- section (b) and (c) of Section 55 of the T.P. Act, it was open to the appellants to seek clarifications regarding the procurement of clearance or exemption from the Endowment Department which should be a reasonable clarification. A reading of the provisions under Section 55 of the T.P. Act which starts with "In the absence of a contract to the contrary' would clearly mean that Section 55 (1) (b) and (c) of the T.P. Act would become applicable only in the absence of these words "contract to the contrary.

Section 55 of the T.P. Act deals with rights and liabilities of buyer and seller. Sub- section (b) of Section 55(1) clearly says that it would be open to the buyer to ask the seller to produce for examination all documents of title relating to the property which are in the possession of the seller or buyer. A plain reading of this provision would amply show that documents of title relating to the property in respect of which agreement for sale was entered into must be in the possession or power of the seller which should be produced to the buyer for examination. So far as the present case is concerned, the condition regarding the clearance or exemption from the Endowment Department is not a document of title relating to the property which would benefit the buyer for examination for the purpose of completing the agreement for sale.

Clause (c) of Section 55(1) of the T.P. Act also equally cannot be applicable in the facts and circumstances of the present case. That apart, it is evident from a plain reading of Section 55 that this section becomes applicable only in the absence of the contract to the contrary. In this case, there is admittedly a contract for sale which clearly lays down the terms and conditions to govern the sale transaction.

We are in agreement with the views expressed by the High Court in the impugned judgment holding that since the Head Office of the Trust is registered at Kolkata which would be enough to show that the relevant law applicable to a charitable trust would be that of the state in which the Head Office of the Trust is registered. [See: *State of Bihar v. Charusila Dasi, AIR 1959 SC 1002* and *Anant Prasad Lakshminivas Ganeriwal v. State of A.P., AIR 1963 SC 853*].

It was next contended by the learned senior counsel appearing for the appellants that although there is a specific clause in the agreement, namely, clause 10 where one of the conditions has been embodied that "time is the essence of the contract" even then it is well settled that in many instances, a mere clause in the agreement to be insufficient as a sole reason to lead one to the conclusion that "time was to be of essence of the contract". This submission of counsel for the appellants was hotly contested by the learned senior counsel appearing for the respondents. In order to decide this question, it would be relevant for us to look into the clauses in the agreement entered into by the parties because they are of utmost importance.

In our view, the High Court has rightly pointed out that there are many instances in the said contract where the fact that time is to be of essence of the contract has been specifically mentioned. Clause 10 of the Agreement of sale which reads *"Time will be of essence of the contract"*, therefore, has been clearly mentioned in the agreement for sale. However, it is well settled proposition of law by now that time is not to be of essence in case of sale of immoveable property. In *Chand Rani v. Kamal Rani, AIR 1993 SC 1742,* this Court clearly held that in the case of sale of immoveable property, there is no presumption as to time being the essence of the contract.

Keeping this principle in mind, we now turn to the clauses of the contract for sale entered into by the parties. Clause 3 and 5, in our view, of the contract for sale are of no inconsiderable importance. So far as clause 10 of the agreement for sale is concerned, we have already referred to the same earlier. At this juncture, we now reproduce clause 3 of the agreement for sale which reads:-

> "Payment of the balance amount of Rs. 5, 00,000/- (Rupees 5 lacs only) on or before 06.06.1979 is the essence of the agreement. If the vendees fail to pay the balance amount in time as aforesaid for whatsoever reason, the advance earnest amount paid today shall stand forfeited and the vendees shall have no right whatsoever in the scheduled property and they shall not in any case be entitled to ask for refund of the earnest money which by his non payment of the balance amount as aforesaid shall irrevocably stand forfeited."

A reading of this clause, namely, clause 3 of the agreement for sale would clearly show that what was the intention of the parties to make time to be the essence of the contract. If we read clause 3 and clause 10 of the agreement for sale conjointly, it would not be unsafe for us to conclude that the intention of the parties to enter into the agreement for sale incorporating clauses 3 and 10 in the same for the purpose of making the time being the essence of the contract.

Next is the question whether the appellants were ready and willing to complete their part of the agreement. It is well settled that in a suit for specific performance of a contract for sale, it has to be proved that the plaintiff who is seeking for a decree for specific performance of the contract for sale must always be ready and willing to complete the terms of the agreement for sale and that he has not abandoned the contract and his intention is to keep the contract subsisting till it is executed. This readiness and willingness on the part of the appellants in the facts and circumstances of the case, in our view, cannot be found in favour of the appellants. In this case, not only the trial court as well as the High Court on concurrent findings of fact and on consideration of the evidence on record came to the conclusion that the appellants were not ready and willing to perform the terms and conditions of the agreement for sale.

This was also the view expressed by this Court in *Chand Rani case* (supra) wherein this Court held that if the final ultimatum by the seller has been given for payment of balance amount then the best thing for the purchasers is to pay the amount and then take appropriate steps. Therefore, in our view, the appellants having failed to do so, they cannot be allowed to take advantage of their own mistake and conveniently pass the blame to the respondents.

In the case of *K.S. Vidyanadam v. Vairavan, (1997) 3 SCC 1,* it has been held that in an agreement for sale of immoveable properties, the readiness and willingness of the parties to perform their part of the contract is essential. Hence, we are of the view that the concurrent findings of fact arrived at by the High Court and the trial court on the question of readiness and willingness to perform their part of obligation, so far as the appellants are concerned, cannot at all be interfered with. Accordingly, we are of the view that the High Court has rightly confirmed the concurrent findings of fact arrived at by the courts below on the question of readiness and willingness on the part of the appellants to complete the agreement for sale.

NOTE: Asterisk (*) denotes brief notes.

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