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मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL APRIL - 2011

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Other people may be there to help us, teach us, guide us along our path, but the lesson to be learned is always ours.

– MELODY BEATTIE

FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The people of this country have immense faith in the Indian judiciary. Due to arrears of cases and for some other reasons, there were occasions when justice was not delivered in time. But even then the faith of the Indians has not shaken. They like such adjudicating body, which is presided over by Judge not by the member of Executive Body or any politician because presence of judge gives them an assurance that the Constitutional provisions including those concerning fundamental rights are not violated and reasoned decision is given after considering the entire relevant evidence produced by the concerning parties. They will get adjudication according to the principles of Natural Justice, fair and due process of law, independently and without any bias. Our success lies in their faith and nothing else. Therefore, the real power of courts does not lie in deciding the cases, or imposing sentences or punishing for contempt, but lies in the credibility of Judiciary as an institution. It lies in the trust and confidence reposed by the public in the judicial system.

Another reason for immense faith in the Judiciary is its responsiveness and accountability.

Every judge is bound to maintain and enhance the faith reposed by the common man and the aforesaid virtues of judicial system. Therefore, every member of Judiciary should be accountable to himself. He has to do the soul-searching and self-introspection. He has to convince himself that what he has done is morally and more importantly legally correct and his decision is not dictated by any extraneous consideration. The Judge individually has to ensure that what he has done would not bring disrespect or disrepute to the Institute on the contrary if it may not increase the respectability and creditability of the Institution it shall not diminish it.

Therefore, the aforesaid mindset and attitude are required to be inculcated by young judicial officers of the subordinate courts as the young judicial officers of the subordinate judiciary constitute the foundation of the whole judicial system. They bear the burden of the entire edifice of the judiciary both literally

and figuratively, for they lay down the foundation of the case in the first instance, which is eventually to be disposed of in appeal. They are also the image-bearers of the whole judicial system, because they are the ones who come into close proximity with the masses and the common man in case of judicial resolution of conflict. The people look up to them for justice. An enlightened subordinate judiciary can only constitute the foundation for real and accelerated administration of justice and secure enforcement of rule of law.

A well-equipped mind and a well-informed intellect are great assets for a Judge. We, judges have to discipline ourselves and read as many books as possible. We should plan our ideas to impart timely and qualitative justice in such a way that the faith of the people in the Judiciary becomes much stronger. Dreaming, visualizing, working at it is very good to achieve our tasks. But unless we make a commitment to the task, we will find a hard time finishing it. A versatile mind will take care of it which can be modulated according to the situation one is facing.

Excellence is a journey. No one is born as the maestro of the art. It is the extra hour of work that one put in that makes them the best of his yard. In our profession, we should be always prepared for incessant hard work for all times to come. Remember nobody has felt tired or worn out by work. Rather, more you do the more it adds to your capacity to work.

Coming to the activities in the Institute, in the month of March, a Workshop/ Symposium on Key issues and challenges under Protection of Women from Domestic Violence Act/Juvenile Justice (Care & Protection of Children) Act, (Regional Level) took place at Indore. Two trainings on Information and Communication Technology also took place apart from the Refresher Course for the fourth batch of Civil Judges Class II of 2007 Batch.

In this bi-monthly journal, we have, as usual articles in Part I and important judgments of the Hon'ble Supreme Court and High Court in Part II and in Part III Notifications are included.

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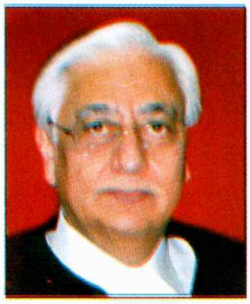
HON'BLE SHRI JUSTICE SUSHIL HARKAULI ASSUMES CHARGE

Hon'ble Shri Justice Sushil Harkauli has been administered the oath of office by Hon'ble the Chief Justice Shri Syed Rafat Alam on 8th April, 2011 on His Lordship's transfer from High Court of Jharkhand to High Court of Madhya Pradesh in a Swearing-in-ceremony held in the High Court of Madhya Pradesh, Jabalpur.



Born on 2nd August, 1951. Was enrolled as an Advocate with the State Bar Council of Allahabad in 1976 after completing Law Graduation from the Allahabad University. Practised basically in Allahabad High Court and worked mainly in civil, constitutional, company, testamentary, matrimonial, arbitration and criminal sides. Elevated to the Bench of High Court of Allahabad as Permanent Judge on 5th February, 1999.

As a Judge of Allahabad High Court delivered landmark judgments in cases relating to Trade Tax Act, Wealth Tax Act, Income Tax Act and other Statutes including Criminal Law.

Was transferred to Jharkhand High Court on 1st July, 2009. Was also Executive Chairman of Jharkhand State Legal Services Authority. In His Lordship's 12 years of Judgeship, acquired rich judicial and administrative experience. Transferred to High Court of Madhya Pradesh and took oath on 8th April, 2011.

We on behalf of JOTI Journal wish His Lordship a successful tenure.

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HON'BLE SHRI JUSTICE MOOL CHAND GARG ASSUMES CHARGE

Hon'ble Shri Justice Mool Chand Garg has been administered the oath of office by Hon'ble Shri Justice Syed Rafat Alam, Chief Justice, High Court of Madhya Pradesh on 18th April, 2011 on His Lordship's transfer from High Court of Delhi to High Court of Madhya Pradesh in a Swearing-in-ceremony held in the High Court of Madhya Pradesh, Jabalpur.

Born on 10th June, 1954. Passed B.Com (Hons.) and LL.B from Delhi University and Diploma in Cyber Laws. Enrolled as an Advocate with the Bar Council of Delhi on 29th September, 1978. Practised in Civil, Criminal, Constitutional and Labour sides in Delhi High Court and Subordinate Courts. Attained specialization in the field of Civil as well as Criminal Law. Was taken on the panel of Advocates of the Government of NCT of Delhi in the year 1985 to represent GNCTD in Delhi High Court and Central Administrative Tribunal and continued to work as such until his appointment to the Delhi Higher Judicial Service as an Additional District Judge in 1995. Worked in different capacities. Authored a number of articles on various subjects of law, which were published in different Journals.

Elevated to the Bench of High Court of Delhi as an Additional Judge on 11th April, 2008.

Transferred to High Court of Madhya Pradesh and took oath as Additional Judge on 18th April, 2011.

We on behalf of JOTI Journal wish His Lordship a successful tenure.

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CORRIGENDUM

The resume of Hon'ble Shri Justice S.N. Aggarwal was published in JOTI Journal December, 2010 issue in Part I at page No. 203. But inadvertently it was published that His Lordship took oath in the High Court of Madhya Pradesh as "Additional Judge" instead of "Puisne Judge".

The error is deeply regretted and therefore, the readers are requested to make necessary correction in this respect.

—Editor

PART - I

LEGAL POSITION REGARDING ASSESSMENT OF COMPENSATION IN CASE OF DEATH OF HOUSEWIFE HAVING NO INCOME IN A MOTOR ACCIDENT CLAIM U/S 163-A OR 166 OF THE MOTOR VEHICLES ACT, 1988*

Judicial Officers
Districts Ratlam and Shivpuri

INTRODUCTION :

The word 'compensation' according to dictionary, means 'compensating or being compensated, thing given in recompense'. In legal sense, it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, injury or loss.

No amount of money can console the children whose mother has been snatched away by the wheels of a vehicle. The Courts can, however, make up for the tragic loss to some extent by awarding just, fair and reasonable compensation so that the loss of life becomes less painful.

In order that there may be a reasonable expectation of pecuniary benefit, it is not necessary that the legal representatives should have been supported by the deceased wife/mother or should have a legal claim to be supported by the deceased. It is not necessary that the deceased should have been earning anything. Further, there is no retirement age for a housewife, she works in the house as long as she is physically capable of doing so. A wife's or mother's loss cannot be evaluated by so much of the amount alone as paid to the servants, and so relegate her to the position of mere house-keeper.

Judicial notice can certainly be taken of the services being rendered by the housewife to the family. In a system where a judicial decision is ordinarily based on statute law or case law, it may be unusual to refer to an e-mail foreword, but one quoted hereinafter is so compellingly appropriate in the context of the present discussion that we cannot help quoting it in its entirety.

> *"Why Women are so Special .....*
>
> Mum and Dad were watching TV when Mum said, I'm tired, and it's getting late. I think I'll go to bed."
>
> She went to the kitchen to make sandwiches for the next day's lunches. Rinsed out the popcorn bowls, took meat out of the freezer for supper the following evening, checked the cereal box levels, filled the sugar container, put spoons and bowls on the table and started the coffee pot for brewing

* The Articles received from Ratlam and Shivpuri have been substantially edited by the Institute.

the next morning. She then put some wet clothes in the dryer, put a load of clothes into the washer, ironed a shirt and secured a loose button. She picked up the game pieces left on the table, put the phone back on the charges and put the telephone book in the drawer. She watered the plants, emptied a water basket and hung up a towel to dry. She yawned and stretched and headed for the bedroom. She stopped by the desk and wrote a note to the teacher, counted out some cash for the excursion and pulled a text book out from hiding under the chair. She signed a birthday card for a friend, addressed and stamped the envelope and wrote a quick note for the grocery store. She put both near her bag. Mum then washed her face with 3 in 1 cleanser, put on her Night Solution and age fighting moisturizer, brushed and flossed her teeth and filed her nails. Dad called out, 'I thought you were going to bed.' 'I'm on my way,' she said. She put some water into the dog's dish and put the case outside, then made sure the doors were locked and the patio light was on. She looked in on each of the kids and turned out their bedside lamps and radios, hung up a shirt, threw some dirty socks into the hamper, and had a brief conversation with the one up still doing homework. In her own room, she set the alarm, laid out clothing for the next day, straightened up the shoe rack. She added three things to her 6 most important things to do list. She said her prayers, and visualised the accomplishment of her goals.

About that time, Dad turned off the TV and announced to no one in particular. I'm going to bed. And he did..... without another thought.

The above quote is only about the services rendered by the lady as mother/wife for half an hour to one hour after dinner.

B. GENERAL PRINCIPLES ON COMPENSATION IN CASES ARISING OUT OF USE OF MOTOR VEHICLES

Section 168 of the Act enjoins the Tribunal to make an award determining "the amount of compensation which appears to be just." However, the objective factors, which may constitute the basis of compensation appearing as just, have not been indicated in the Act. Thus, the expression "which appears to be just" vests a wide discretion in the Tribunal in the matter of determination of compensation. Nevertheless, the wide amplitude of such power does not empower the Tribunal to determine the compensation arbitrarily, or to ignore settled principles relating to determination of compensation. Similarly, although

the Act is a beneficial legislation, it can neither be allowed to be used as a source of profit, nor as a windfall to the persons affected nor should it be punitive to the person (s) liable to pay compensation. The determination of compensation must be based on certain data, establishing reasonable nexus between the loss incurred by the dependents of the deceased and the compensation to be awarded to them. In a nutshell, the amount of compensation determined to be payable to the claimant(s) has to be fair and reasonable by accepted legal standards. [See *Syed Basheer Ahamed v. Mohd. Jameel, AIR 2009 SC 1219*]

Undoubtedly, the compensation in law is paid to restore the person, who has suffered damage or loss in the same position, if the tortious act had not been committed. The law in all such matters requires payment of adequate, reasonable and just monetary compensation.

In cases of motor accidents, the endeavour is to put the dependents/ claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. The damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong. Compensation is therefore required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act.

However, no amount of compensation can restore the experience of pain and suffering due to loss of life. Loss of life can never be eliminated or ameliorated completely. To put it simply–pecuniary damages cannot replace a human life. Therefore, in addition to the pecuniary losses, the law recognises that payment should also be made for non-pecuniary losses on account of loss of happiness, pain, suffering and expectancy of life, etc. (See *R.K. Malik v. Kiran Pal, AIR 2009 SC 2506*)

C. DEVELOPMENT OF LAW IN ENGLAND AS REFLECTED FROM LEGAL PRONOUNCEMENTS

In *Berry v. Humm and Co., (1915) 1 KB 627,* the plaintiff's wife was knocked down by a motor taxi-cab and instantly killed. The wife had performed the ordinary household duties of a woman in her position, and in consequence of her death, the plaintiff had to employ a housekeeper and to incur extra expenses of management by the housekeeper instead of by his deceased wife. It was held that under the Fatal Accidents Act, the damages recoverable in such an action are not limited to the value of money lost, or the money value of things lost, but includes the monetary loss incurred by replacing the services rendered gratuitously by the deceased where there was a reasonable prospect of their being rendered freely in future but for the death.

In *Kemp and Kemp* on *Quantum of Damages*, (Special Edn. 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's

contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a housekeeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife, and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.

In *Regan v. Williamson, (1976) 2 All ER 241,* Watkins J. observed that the word 'services' has been too narrowly construed. It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conveniently so regarded.

In *Mehmet v. Perry, (1977) 2 All ER 529(DC),* the pecuniary value of a wife's services were assessed and granted under the following heads :

(a) Loss to the family of the wife's housekeeping services.

(b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.

D. DEVELOPMENT OF LAW IN INDIA AS REFLECTED FROM LEGAL PRONOUNCEMENTS:

In *Sunny Chugh v. Darshan Lal, AIR 1985 P & H 343* the compensation was payable amongst others, calculated on the basis of money value of the household work which the deceased woman did as wife or mother, though she had been doing this gratuitously, and that the loss suffered by the husband or children on the death of wife would also include the additional expenses incurred or likely to be incurred by having the household run by a house-keeper or servant, instead of the wife.

Again in *Gurdeep Singh Narula v. Mali Singh, 1990 ACJ 116,* it has been held that the principle is now well established that even on the death of a housewife, who was not an earning hand, the compensation on the principle of taking value of domestic services rendered by household lady are to be taken into consideration while assessing compensation.

The Andhra Pradesh High Court in *C. Venkatesham v. G.M., A.P.S.R.T.C., 1977 ACJ 536 (AP),* considered the case of death of a housewife aged 21 years. The claimants were the husband and two minor children. After deducting the savings for the husband consequent upon the death of his wife, from the value

of the loss of services, the net loss was assessed at ₹ 1,200/- per annum and applying a multiplier of 15, a sum of ₹ 18,000/- was awarded. Sheth and Jeevan Reddy, observed :

> "Therefore, we have to evaluate her services rendered to her family and to her household. The first head under which compensation should be awarded to the claimant is loss of domestic services. This would include the service which she rendered by cooking the food for the family, by maintaining the household and by bringing up the children .
>
> ... . Out of this amount we have to deduct what the claimant used to spend on the deceased and what he has been saving now and while assessing for pain and suffering and loss of consortium the court awarded a further sum of 6,000/-, stating that the said sum includes 'the loss of love and affection' to the young children who, during their infancy had been deprived of the 'motherly affection'."

In *A. Rajam v. M. Manikya Reddy, 1989 ACJ. 542* (Andhra Pradesh HC), M. Jagannadha Rao,. J. (as he then was) advocated giving of a wider meaning to the word 'services' in cases relating to award of compensation to the dependents of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

> "The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From this total must be deducted the expense the family would have otherwise been spending for the deceased housewife.
>
> While estimating the 'services' of the housewife, a narrow meaning should not be given to the meaning of the word 'services' but it should be construed broadly and one has to take into account the loss of 'personal care and attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services."

The Jammu and Kashmir High Court in *Oriental Insurance Co. Ltd. v. Shamsher Singh and others, 2003 ACJ 742* considered this question and held :

> "To say that a lady who is working as a housewife is not making any monthly contribution to the family is an argument which cannot be accepted. The value of the domestic services which are rendered by a maidservant engaged for the entire day, if taken into consideration, then what has been allowed by the Tribunal cannot be said to be on the higher side. If a maidservant is to be engaged, then she would be charging at least ₹ 1,000 p.m. If she is working for the entire day then she is supposed to be provided meals and some other facilities would also be provided.

Recently in *Mustaq Ahmed and others v. State of Jammu & Kashmir and others, 2010 ACJ 1211,* the Jammu & Kashmir High Court on the basis of law laid down by the Hon'ble Supreme Court in *Lata Wadhwa v. State of Bihar, (2001) 8 SCC 197,* has assessed the annual dependency loss in case of housewife at ₹ 36,000 per annum for determination of compensation.

The Delhi High Court in the case of *Chandra Singh & Ors. v. Gurmej Singh & Ors., 2003 VII AD (Delhi) 222* did not accept the view expressed in *Lata Wadhwa's case (supra),* instead it relied on the Minimum Rates of Wages in Delhi which was prevalent at that time and the formula laid down in *Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179* was applied. On this calculation, the Court awarded an amount of ₹ 2,55,000.

But recently in *Partap Singh and others v. Banwari Lal and others, 2010 ACJ 1498,* the Delhi High Court has followed the law laid down in *Lata Wadhwa's case (supra)* for determination of compensation.

In *National Insurance Company Ltd. v. Mahadevan and others, 2009 ACJ 1373,* the High Court of Madras (Madurai Bench) has culled the principle of assessment in case of death of housewife having no visible income by referring almost all the cases referred above in this article and finally observed thus:

> "Courts in India have recognized the invaluable contribution of the housewife to the house which is more than the pecuniary value. Gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A housekeeper or a maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife who would render selfless service to her husband and children. However, the loss of service to the household is estimated on the expenses incurred for the above said multifarious

services rendered by the wife. The claimants who have lost the gratuitous service rendered by the deceased are entitled to adequate compensation.

The notional income for non-earning member was fixed in the year 1994. Quantifying the pecuniary loss at the same rate or amount even after 13 years after the amendment, ignoring the escalation in the cost of living and the inflation, may not be justifiable. Considering the importance of loss of services and the age of the minors, it would be reasonable to fix the annual contribution of the deceased at ₹ 20,000/- and compute the dependency compensation."

The Madhya Pradesh High Court in *Manohar Lal Sobha Ram Gupta v. M.P. Electricity Board, 1975 ACJ 494 (M.P.)* considered the case of the death of a housewife aged 32 years and in the claim by the husband and two minor sons estimated the value of the services at ₹ 500 per annum and applying a multiplier of 16, awarded ₹ 8,000.

In *Dilip and others v. Sukhbeer Kaur and others, 2006 (II) MPWN 125* in the case of housewife the notional income was assessed @ ₹ 2,000/- p.m. i.e. ₹ 24,000 per annum and on the basis of this the loss of dependency was assessed at ₹ 16,000 per annum for determination of compensation.

Again in *Jamunabai (Mahila) v. Sardut Singh and others, 2007 (1) MPWN 3* in a case of housewife aged 35 years, notional income of ₹ 15,000/- per annum was considered and accordingly dependency loss was assessed at ₹ 10,000/- for determination of compensation.

In *Lata Wadhwa's case (supra),* the Apex Court considered various issues raised in the writ petitions filed by the petitioners including the one relating to payment of compensation to the victims of fire accident which occurred on 3.3.1989 resulting in the death of 60 persons and injuries to 113. By an interim order dated 15.12.1993, this Court requested former Chief Justice of India, Shri Justice Y.V. Chandrachud to look into various issues including the amount of compensation payable to the victims. Although, the petitioners filed objection to the report submitted by Shri Justice Y.V. Chandrachud, the Court overruled the same and accepted the report. On the issue of payment of compensation to housewife, the Court observed: (SCC pp. 209-10, para 10)

"10. So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at

₹ 12,000 per annum in cases of some and ₹ 10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be ₹ 3000 per month and ₹ 36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be ₹ 36,000 and thereafter, applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be ₹ 50,000 instead of ₹ 25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at ₹ 10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at ₹ 10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to ₹ 20,000 per annum. In their case, therefore, the total amount of compensation should be re-determined, taking the value of services rendered at ₹ 20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding ₹ 50,000 towards the conventional figure."

In *Laxmi Devi v. Mohammad Tabbar, AIR 2008 SC 1858* the Apex Court while considering the income of the deceased observed as under:

"The High Court came to the conclusion that though the claim of the income of ₹ 4200 per month was not reliable, the notional income should have been held to be ₹ 36,000 per annum, i.e., ₹ 3,000 per month. For this proposition the High Court held that the notional income of ₹ 15,000 in the Second Schedule was prescribed in the year 1994 while the accident had taken place in the year 2004. The second reason given by the High Court was that even an unskilled labourer, these days, can easily earn ₹ 100 per day and ₹ 3,000 per month and, therefore, the High Count held the income to be ₹ 36,000 per annum and by deducting 1/3rd of the income of the deceased for his personal expenses, the claimants' dependency was assessed at ₹ 24,000 per

annum. It was nobody's case that the deceased was not working at all. His wife has entered in the witness box and had asserted that he earned ₹ 140 per day. Even if we ignore the exaggeration, the figure arrived at by the High Court at ₹ 100 per day and ₹ 3,000 per month appears to be correct."

Our own High Court in *Vasudev Singh and others v. Raghuraj Singh and others, ILR 2009 MP 1086* has followed the above determination.

E. CLAIM SHOULD BE EITHER u/s 163-A OR 166

The claim arising out of motor accident may be filed either under Section 163-A or 166 as determination of compensation under both the provisions are final and independent of each other.

In *Deepal Girishbhai Soni v. United Insurance Co. Ltd., Baroda, AIR 2004 SC 2107,* the 3-Judge Bench of the Apex Court has clarified the legal position in this regard by observing that :

> "The scheme envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set off against a higher compensation unlike Section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is ₹ 40,000 or less is covered thereunder whereas Sections 140 and 166 cater to all sections of society."

It was further observed that :

> "Remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/ elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both."

The Apex Court in this case also clarified the upper income limit for filing claims under Section 163-A as under:

> "We, therefore, are of the opinion that *Oriental Insurance Co. Ltd. v. Hansrajbhai v. Kodala and others, AIR 2001 SC 1832* has correctly been decided. However, we do not agree with the findings in *Kodala* (supra) that if a person invokes provisions of Section 163-A, the annual income of

> ₹ 40,000 per annum shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to ₹ 40,000 can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act."

Further in *Oriental Insurance Co. Ltd. v. Meena Variyal, AIR 2007 SC 1609,* the Supreme Court has again observed that:

> "The victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

Recently, again in *Oriental Insurance Company Ltd. v. Dhanbai Kanji Gadhvi and others, 2011 ACJ 721,* the Apex Court has reiterated the law as enunciated in *Deepal Girishbhai (supra)* and held that claimants must opt to go either for a proceeding under Section 163-A or under Section 166 but not under both. Where claimants have obtained compensation under Section 163-A, they are precluded from proceeding further with claim application under Section 166 for the similar case

F. COMPUTATION OF COMPENSATION u/s 163-A IN CASE OF DEATH OF HOUSEWIFE

So far invoking provisions u/s 163-A of Motor Vehicles Act is concerned, it is not necessary for a claimant to establish any act of negligence on the part of the driver. It is not necessary even to plead that the death had occurred owing to any wrongful act or neglect or default of owner of the vehicle.

Quantum of compensation is to be determined in terms of Second Schedule appended thereto. In terms thereof, apart from the amount of compensation as provided for therein only funeral expenses, loss of consortium (if beneficiary is the spouse), loss of estate, medical expenses, would be payable.

As we are concerned with the death of a housewife in motor accident having no income, we have to confine ourselves in determination of compensation looking to the special provisions appended under Clause 6 of Second Schedule of Motor Vehicles Act, 1988 which reads as under :

6. **Notional income for compensation to those who had no income prior to accident** – *Fatal and disability in non-fatal accidents:*

(a) Non-earning persons ₹ 15,000 p.a.

(b) Spouse 1/3rd of income of the earning/surviving spouse.

Section 163-A was inserted by Act No. 54 of 1994 as a special measure to ameliorate the difficulties of the family members of a deceased who died in use of a motor vehicle. It contains a non obstante clause. It makes the owner of a motor vehicle or the authorised insurer liable to pay in the case of death, the amount of compensation as indicated in the Second Schedule to his legal heirs. The Second Schedule provides for the amount of compensation for third party Fatal Accident/Injury Cases Claims. It provides for the age of the victim and also provides for the multiplier for arriving at the amount of compensation which became payable to the heirs and legal representatives of the deceased depending upon his annual income. The Second Schedule furthermore provides that in a case of fatal accident, the amount of claim shall be reduced by 1/3rd in consideration of the expenses which the victim would have incurred upon himself, had he been alive.

As the Second Schedule provides for a structured formula, the question of determination of payment of compensation by application of judicial mind which is otherwise necessary for a proceeding arising out of a claim petition filed under Section 166 would not arise. The Tribunals in a proceeding under Section 163-A of the Act is required to determine the amount of compensation as specified in the Second Schedule.

Though these provisions have been inserted in 1994 and since then much water has flown under the bridge in terms of escalation in the cost of living and the inflation. Even where the claim petition is under Section 163-A, the Tribunal has to decide the claim on the basis of structured formula as laid down in the scheme of the Motor Vehicles Act, 1988 because the general law regarding computation of compensation for claims under Section 166 on the basis of "just compensation" theory is not applicable to the claims under Section 163-A. It has also to be kept in mind that the provision of Section 163-A has overriding effect on other provisions of the Motor Vehicles Act, 1988.

Hence, on the basis of aforesaid observations it is manifestly clear that in case of death of a housewife in a motor accident, for computation of compensation under Section 163-A, the notional income shall be assessed as per sub-clause (a) or (b) of Clause 6 of the Second Schedule of the Motor Vehicles Act, 1988.

G. COMPUTATION OF COMPENSATION u/s 166 IN CASE OF DEATH OF HOUSEWIFE

In case of claim under Section 166 for death of housewife having no income, while assessing the notional income looking to her services and contribution to household activities, the Tribunals are not restricted to any upper

limit of the income as in case of claims under Section 163-A (i.e. upto ₹ 40,000 per annum) and Tribunals can compute the compensation which is "just" in the facts and circumstances of the case under consideration.

As discussed above the development of law in this regard has recognized the non-earning housewives real but camouflaged contribution towards managing domestic services.

Recently in *Arun Kumar Agrawal and another v. National Insurance Company Limited and others, (2010) 9 SCC 218,* the Apex Court has cleared the position of Indian Courts elucidly and observed as under:

> "In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.
>
> It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/ mother. In that context, the term 'services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render

some of the services to the family which the deceased was giving earlier."

The Apex Court further in this case observed that:

"In *National Insurance Company Ltd. v. Mahadevan, 2009 ACJ 1373,* the learned Single Judge referred to the Second Schedule of the Act and observed that quantifying the pecuniary loss at the same rate or amount even after 13 years after the amendment, ignoring the escalation in the cost of living and the inflation, may not be justified.

In *Amar Singh Thukral v. Sandeep Chhatwal, (2004) 112 DLT 476,* the learned Single Judge of Delhi High Court adopted the yardstick of minimum rates of wages for the purpose of award of compensation in the case of death of a housewife and then proceeded to observe 'since there is no scientific method of assessing the contribution of a housewife to her household, in cases such as the present, resort should be had to the wages of a skilled worker as per the minimum rates of wages in Delhi. Although, this may sound uncharitable, if not demeaning to a housewife, there is hardly any option available in the absence of statutory guidelines'.

In our view, it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the legislature had, as early as in 1994, fixed the notional income of a non-earning person at ₹ 15,000 per annum and in case of a spouse, 1/3rd income of the earning/ surviving spouse for the purpose of computing the compensation.

Though, Section 163A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents

of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in clause (6) of the Second Schedule and then apply appropriate multiplier keeping in view the judgments of this Court in *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176, U.P. SRTC v. Trilok Chandra, (1996) 4 SCC 362, Sarla Verma v. DTC, (2009) 6 SCC 121* and also take guidance from the judgment in *Lata Wadhwa's case* (supra). The approach adopted by different Benches of Delhi High Court to compute the compensation by relying upon the minimum wages payable to a skilled worker does not commend our approval because it is most unrealistic to compare the gratuitous services of the housewife/mother with work of a skilled worker."

Finally, the Apex Court in absence of any other definite criteria for determination of compensation payable to the dependents of non-earning housewife/mother has taken aid of Clause 6 of the Second Schedule in a claim under Section 166 of the Motor Vehicles Act, 1988 and held it as "just compensation"

H. CONCLUSION

With the above discussions and legal position emerged, it is now well-settled that the services that a housewife provides for the household, even though rendered gratuitously do indeed have a monetary value in respect of which compensation is payable, particularly to the beneficiaries of such services which would include the husband and the children. It is also pertinent to bear in mind that there is no retirement age for a housewife. She works in the house for as long as she is physically capable of doing so.

Hence, while computing compensation under Section 163-A of the Motor Vehicles Act, 1988, in case of death of a housewife having no income, Tribunals have to determine notional income of such a housewife as per sub-clause (a) or (b) of Clause 6 of Second Schedule as the case may be and then apply appropriate multiplier as per Second Schedule. Only restriction is that while determining the notional income under sub-clause (b) of Clause 6 of Second Schedule, annual income assessed should not exceed ₹ 40,000 per annum.

Whereas for such claim under Section 166, in the absence of any other definite criteria so far, the determination of notional income would also be as per Clause 6 of the Second Schedule but there is no bar of annual notional income and this may exceed to ₹ 40,000 per annum looking to the income of her spouse and in this case appropriate multiplier would be applied to award "just compensation".

●

चैक अनादरण के मामलों में संक्षिप्ततः विचारण में दण्ड के दायित्व का विस्तार एवं अन्तर*

न्यायाधीशगण
जिला सीहोर, मंदसौर एवं श्योपुर

धारा 138 परक्राम्य लिखत अधिनियम, 1881 जिसे अत्रपश्चात् 'अधिनियम' कहा जावेगा, के अनुसार चैक अनादरण से संबंधित अपराध कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी या जुर्माने से, जो चैक की रकम का दुगुना तक हो सकेगा, या दोनों से दण्डनीय है। पूर्व में यही अपराध कारावास से, जिसकी अवधि एक वर्ष की हो सकेगी या जुर्माने से, जो चैक की रकम का दुगुना तक हो सकेगा, या दोनों से दण्डनीय था जिसमें **परक्राम्य लिखत (संशोधन और प्रकीर्ण उपबंध) अधिनियम, 2002 (वर्ष 2002 का 55),** जिसे आगे अत्रपश्चात ''संशोधन अधिनियम'' कहा जावेगा, के द्वारा वृद्धि की गई है। यह संशोधन 6 फरवरी 2003 से प्रभावशील किया गया है। ''संशोधन अधिनियम'' प्रभावशील होने के पूर्व ''अधिनियम'' की धारा 142 (ग) द्वारा यह उपबंधित किया गया था कि ***''महानगर मजिस्ट्रेट या प्रथम वर्ग न्यायिक मजिस्ट्रेट के न्यायालय से अवर कोई न्यायालय धारा 138 के अधीन दण्डनीय अपराध का विचारण नहीं करेगा।''***

''संशोधन अधिनियम'' प्रवृत्त होने के पूर्व प्रभावशील, उपरोक्त प्रावधान एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का अधिनियम संख्यांक 2), जिसे अत्रपश्चात् ''संहिता'' कहा जावेगा, की धारा 29(2) की विवेचना करते हुए न्याय दृष्टांत ***पंकज भाई नगजी भाई पटेल विरूद्ध गुजरात राज्य, ए.आई.आर. 2001 सु.को. 561*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया था कि ***''अधिनियम'' की धारा 138 के अंतर्गत दोषसिद्धि की दशा में न्यायिक मजिस्ट्रेट प्रथम श्रेणी ''संहिता'' की धारा 29(2) में उपबंधित अर्थदण्ड की उसकी सीमा ₹5,000 से अधिक अर्थदण्ड अधिरोपित नहीं कर सकता है।*** ''संहिता'' की धारा 4 व 5 का समेकित अर्थान्वयन करते हुए माननीय सर्वोच्च न्यायालय ने उपरोक्त न्याय दृष्टांत के चरण क्रं. 11 में यह भी प्रतिपादित किया था कि

> ''तत्समय प्रवृत्त किसी अन्य विधि द्वारा प्रदत्त किसी विशेष अधिकारिता या शक्ति'' पर ''संहिता'' का अप्रयोज्यशील होना उसी क्षेत्र तक सीमित है जहां उक्त ''विशेष अधिकारिता या शक्ति'' प्रदत्त की गई है, ''अधिनियम'' की धारा 142 (ग) द्वारा न्यायिक मजिस्ट्रेट प्रथम श्रेणी को दण्ड अधिरोपित करने की कोई – ''विशेषज्ञ अधिकारिता या शक्ति'' प्रदान नहीं की गई है बल्कि यह धारा, ''अधिनियम'' की धारा 138 के अंतर्गत के अपराध के विचारण के संबंध में न्यायिक मजिस्ट्रेट प्रथम श्रेणी के अतिरिक्त अन्य मजिस्ट्रेट की अधिकारिता अपवर्जित मात्र करती है, फलतः ''अधिनियम की धारा 138 के अंतर्गत दोषसिद्धि की दशा में न्यायिक मजिस्ट्रेट प्रथम श्रेणी ''संहिता'' की धारा 29 (2) में उल्लेखित अधिकारिता ₹ 5,000 से अधिक अर्थदण्ड

* इस लेख में इस संस्था द्वारा आवश्यक संपादन के साथ ही सारभूत रूप से आवश्यक वैधानिक स्थिति को स्पष्ट किया गया है।

अधिरोपित नहीं कर सकेगा एवम् यदि उसे इससे अधिक अर्थदण्ड अधिरोपित करना है तो प्रकरण को "संहिता की धारा 325 (1) के अनुसार मुख्य न्यायिक मजिस्ट्रेट के समक्ष प्रेषित करना होगा अथवा "संहिता" की धारा 357 के अनुसार परिवादी को प्रतिकर दिलाया जा सकता है।"

यद्यपि तत्समय "अधिनियम" की धारा 138 में "चेक धनराशि की दुगनी कितनी भी धनराशि तक" अर्थदण्ड का प्रावधान था किन्तु "अधिनियम" के तत्समय प्रवृत्त प्रावधानों पर आधारित शीर्षस्थ न्यायालय के उपरोक्त निर्णय के प्रकाश में चैक अनादरण संबंधी प्रकरणों में न्यायिक मजिस्ट्रेट प्रथम श्रेणी, "संहिता" की धारा 29(2) में यथाउल्लेखित अर्थदण्ड अधिरोपण की मजिस्ट्रेट की अधिकतम शक्ति ₹ 5,000 रूपये से अधिक अर्थदण्ड अधिरोपित करने में असमर्थ थे एवम् इससे अधिक अर्थदण्ड अधिरोपित करने की आवश्यकता होने पर प्रकरण को मुख्य न्यायिक मजिस्ट्रेट की ओर प्रेषित करना अनिवार्य था, फलतः प्रक्रिया की जटिलता होने से प्रकरणों के निराकरण में विलम्ब भी हो रहा था। इस पृष्ठभूमि पर आधारित "संशोधन अधिनियम" अधिनियमित करने के **उद्देश्य एवं कारणों के कथन के अनुसार,** "परक्राम्य विलेख अधिनियम, 1881 के अध्याय 17 के अंतर्गत धारा 138 से 142 के प्रावधान चैकों के अनादरण से निपटने में अक्षम पाये गये थे, न केवल अधिनियम के अंतर्गत उपलब्ध दण्ड अपर्याप्त सिद्ध हुआ था, बल्कि ऐसे प्रकरणों के संबंध में न्यायालय के लिये विहित की गई प्रक्रिया भी कष्टसाध्य पाई गयी थी। अधिनियम में उपबंधित प्रक्रिया को दृष्टिगत रखते हुए न्यायालय ऐसे प्रकरणों को त्वरित व समयबद्ध रूप से निराकृत करने में असमर्थ थे। चूंकि देश की विभिन्न अदालतों में परक्राम्य विलेख अधिनियम की धारा 138 से 142 के अंतर्गत बड़ी संख्या में मामले लम्बित होना बताए गए थे अतः विभिन्न अदालतों के समक्ष "अधिनियम" के अंतर्गत लंबित परिवादों की बड़ी संख्या को दृष्टिगत् रखते हुए "अधिनियम" की धारा 138 के पुनर्विलोकन हेतु एवं इस धारा के उद्देश्य को प्रभावपूर्ण तरीके से प्राप्त करने के लिये आवश्यक परिवर्तनों की अनुशंसा हेतु कार्यशील समूह का गठन किया गया। कार्यशील समूह सहित अन्य विभिन्न संस्थाओं एवं संगठनों द्वारा की गई अनुशंसाओं का शासन द्वारा, भारतीय रिजर्व बैंक एवं अन्य विधि विशेषज्ञों की सलाह से परीक्षण किया गया एवं "परक्राम्य विलेख (संशोधन) बिल 2001 नामक बिल 24 जुलाई 2001 को लोकसभा संसद के समक्ष प्रस्तुत किया गया, एवम् **चैक अनादरण से संबंधित प्रकरणों का त्वरित निराकरण करने, अपराधियों के दण्ड में वृद्धि करने** आदि के लिये संशोधन प्रस्तावित किये गये।"

"संशोधन अधिनियम" के द्वारा "अधिनियम" में विभिन्न प्रावधान समायोजित किये गये थे, किन्तु प्रश्नगत विषय से सुसंगत प्रावधान दो ही हैं। इनमें से एक तो धारा 138 में उपबंधित कारावास का दण्ड 1 वर्ष तक से बढ़ाकर दो वर्ष तक किया गया है तथा दूसरा, नवीन धारा 143 अन्तः स्थापित की गई है। माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत ***मांडवी को–आपरेटिव्ह बैंक लिम. विरूद्ध निमेश बी., (2010) 3 एस.सी.सी. 83*** में परक्राम्य लिखत अधिनियम 1881 में सन् 2002 में धारा 143 में किये गये उक्त संशोधन के उद्देश्य को प्रकट किया है कि विचारण की उक्त समन प्रक्रिया को अंगीकृत करने से प्रकरण के निराकरण में विलम्ब हो रहा था, तथा न्यायालयों में उक्त मामलों की संख्या में तीव्रता से वृद्धि हो रही थी। न्यायालयों में बढ़ते मामलों को निर्धारित समय सीमा में निराकृत करना असंभव हो रहा था तथा न्यायालय के नियमित दाण्डिक मामलों के निराकरण पर भी विपरीत प्रभाव पड़ने लगा था।

जहां तक धारा 143 के प्रावधानों का प्रश्न है इसका तीन भागों में अध्ययन किया जा सकता हैं। प्रथम भाग में धारा 143 की उपधारा (एक) समाहित है तथा द्वितीय व तृतीय भाग में इस उपधारा के क्रमशः प्रथम व द्वितीय परन्तुक समाहित हैं। धारा 143 के प्रथम भाग (उपधारा–एक) में उपबंधित किया गया है कि "दण्ड प्रक्रिया संहिता, 1973 में किसी बात के होते हुए भी अध्याय 17 के अंतर्गत सभी अपराधों का विचारण न्यायिक मजिस्ट्रेट प्रथम श्रेणी या मेट्रोपोलिटन मजिस्ट्रेट के द्वारा किया जाएगा एवम् संहिता की धारा 262 से 265 के उपबन्ध (दोनों को समाहित करते हुए) ऐसे विचारण पर **यथासम्भव** प्रवृत्त होंगे। "संहिता" की धारा 262 से 265 के उपबन्ध संक्षिप्त विचारण प्रक्रिया से संबंधित हैं। "अधिनियम" की उपरोक्त उपधारा (एक) की भाषा से यह भ्रम होता है कि "अधिनियम" के अध्याय 17 के अंतर्गत अपराधों का विचारण संक्षिप्त विचारण प्रक्रिया अपनाकर करना अनिवार्य नहीं होकर ऐच्छिक है, किन्तु यह सही स्थिति नहीं है।

"संहिता" में मजिस्ट्रेट के द्वारा मात्र तीन प्रकार के मामलों के विचारण की प्रक्रिया उपबंधित की गई है। **प्रथम** वारन्ट मामलों का विचारण (अध्याय 19), **द्वितीय** समन मामलों का विचारण (अध्याय 20) एवम **तृतीय** संक्षिप्त विचारण (अध्याय 21)। संक्षिप्त विचारण "संहिता" में परिभाषित नहीं किया गया है। "संहिता" की धारा 2 (ब) के अनुसार "समन मामला" से ऐसा मामला अभिप्रेत है जो किसी अपराध से संबंधित है और जो "वारन्ट मामला" नहीं है। धारा 2 (भ) के अनुसार "वारण्ट मामला" से ऐसा मामला अभिप्रेत है जो मृत्यु, आजीवन कारावास या दो वर्ष से अधिक की अवधि के कारावास से दण्डनीय किसी अपराध से संबंधित है। "संशोधन अधिनियम" प्रवृत्त होने के पश्चात "अधिनियम" की धारा 138 के अंतर्गत उल्लेखित अपराध दो वर्ष तक की अवधि के कारावास से दण्डनीय है, अस्तु संहिता की धारा 2 (ब) व (भ) के अनुसार धारा 138 के तहत दण्डनीय अपराध का विचारण वारण्ट मामले के रूप में नहीं किया जा सकता है। इस संबंध में न्याय दृष्टांत ***श्रीनिवास बी. पाण्डिया विरूद्ध अकोला जनता कामर्शियल कोआपरेटिव बैंक लिमिटेड व अन्य, 2009 क्रिमनल लॉ जनरल 110*** भी अवलोकनीय है।

"अधिनियम" के अध्याय 17 के अधीन अपराधों का विचारण किस प्रक्रिया अनुसार किया जावेगा, इस संबंध में एक अन्य विवादित स्थिति फिर भी शेष रहती है। "अधिनियम" की धारा 143 (1) द्वारा उक्त अपराधों का विचारण संक्षिप्त प्रक्रिया द्वारा वांछनीय किया गया है। इसके प्रथम परन्तुक के द्वारा ऐसे विचारणों के लिये मजिस्ट्रेट की दण्ड अधिरोपित करने की शक्ति के संबंध में उपबन्ध किया गया है तथा इसी धारा के द्वितीय परन्तुक में उपबंधित किया गया है कि विहित परिस्थितियों में विहित प्रक्रिया का पालन कर संक्षिप्त विचारण के स्थान पर मजिस्ट्रेट, **"संहिता" में उपबंधित रीति से** मामले की पुनः सुनवाई हेतु अग्रसर हो सकता है। यह पुनः सुनवाई "संहिता" के अध्याय 20 में उल्लेखित समन मामले की विचारण प्रक्रिया अनुसार की जाएगी, इस स्थिति के संबंध में कोई विवाद नहीं है, किन्तु "संहिता" के अध्याय 20 के अंतर्गत धारा 259 समन मामलों को वारन्ट मामलों में संपरिवर्तित के लिये न्यायालय को शक्ति प्रदान करती है। न्याय दृष्टांत *मेसर्स स्टील ट्यूब ऑफ इण्डिया विरूद्ध मेसर्स स्टील अथोरिटी ऑफ इंडिया, 2006 क्रिमनल लॉ जनरल, 1988* में माननीय मध्यप्रदेश उच्च न्यायालय द्वारा अभिनिर्धारित किया गया है कि "अधिनियम" की धारा 143 न्यायालय को प्रकरणों का संक्षिप्त विचारण करने की शक्ति प्रदान करती है, इस धारा का आज्ञापक

प्रभाव है जो नान एब्स्टेनिंग खण्ड (Non abstaining clause) से प्रारंभ होती है, इसका यह तात्पर्य है कि अधिनियम के अध्यधीन अपराधों के विचारणों में वारन्ट विचारण से संबंधित धारा 259 की कोई प्रयोज्यशीलता नहीं रहेगी''। इस प्रकार स्पष्ट है कि ''अधिनियम'' के अधीन अपराधों का विचारण, वारन्ट विचारण प्रक्रिया में, परिवर्तित नहीं किया जा सकता है। इस प्रकार यह स्थिति अविवादित हो जाती है कि 'अधिनियम' की धारा 143 (1) के विषयाधीन करते हुए ''अधिनियम'' के अध्याय 17 के अंतर्गत समस्त अपराधों के संबंध में **संक्षिप्त विचारण आज्ञापक** है एवम् इस धारा के द्वितीय परन्तुक के विषयाधीन रहते हुए **समन विचारण ऐच्छिक है,** जबकि **वारन्ट विचारण निषेधित है।**

''संहिता'' के अंतर्गत समन्स विचारण से संबंधित अध्याय 20 में मजिस्ट्रेट की दण्ड अधिरोपित करने की शक्ति के संबंध में कोई प्रावधान नहीं किया गया है। फलतः समन्स मामले में मजिस्ट्रेट की कारावास एवम् अर्थदण्ड अधिरोपित करने की शक्ति, ''संहिता'' की धारा 29 (2) से शासित होगी, जिसके अनुसार ''प्रथम वर्ग मजिस्ट्रेट का न्यायालय तीन वर्ष से अनधिक अवधि के लिये कारावास का या दस हजार रूपये से अनधिक (दण्ड प्रक्रिया संहिता संशोधन अधिनियम 2005 की धारा 5 द्वारा ''पांच हजार रूपये'' के स्थान पर प्रतिस्थापित व दिनांक 23–06–2006 से प्रभावी) जुर्माने का, या दोनों का दण्डादेश दे सकता है। संक्षिप्त विचारण से संबंधित ''संहिता'' के अध्याय 21 के अंतर्गत धारा 262 (2) में उपबंधित किया गया है कि ''तीन मास से अधिक की अवधि के लिये कारावास का कोई दण्डादेश उक्त अध्याय के अधीन दोषसिद्धि के किसी मामले में नहीं दिया जाएगा'' जबकि अर्थदण्ड के संबंध में उक्त अध्याय में कोई प्रावधान नहीं किया गया हैं फलतः ''संहिता'' के अधीन संक्षिप्त विचारण में मजिस्ट्रेट धारा 262 (2) के अनुसार कारावास तो तीन मास से अधिक अवधि का नहीं दे सकता है, किन्तु अर्थदण्ड धारा 29 (2) द्वारा यथा उपबंधित दस हजार रूपये तक का अधिरोपित कर सकता है। इस प्रकार ''संहिता'' के अध्यधीन समन विचारण में न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा 2 वर्ष तक का कारावास अधिरोपित किया जा सकता है क्योंकि ''संहिता'' की धारा 2 (ब) एवं (भ) को देखते हुये समन मामला केवल 2 वर्ष तक दण्डनीय अपराधों के लिये ही हो सकता है इससे अधिक अवधि से दण्डनीय मामला वारंट मामला होगा। वही ''संहिता'' के ही अध्यधीन संक्षिप्त विचारण में मात्र 3 माह तक का कारावास ही अधिरोपित किया जा सकेगा जबकि इन दोनों ही विचारण प्रक्रियाओं में मजिस्ट्रेट की अर्थदण्ड अधिरोपित करने की शक्ति समान होकर धारा 29 (2) से शासित होगी।

''अधिनियम'' की धारा 143 का प्रथम भाग अर्थात उपधारा (एक) नान अब्सटेन्टे क्लाज से प्रारंभ हुई व इसके द्वारा ''अधिनियम'' के अध्याय 17 के अधीन समस्त अपराधों को न्यायिक मजिस्ट्रेट प्रथम श्रेणी के द्वारा विचारणीय बनाया गया तथा प्रक्रियात्मक रूप से इसके द्वारा संक्षिप्त विचारण को आज्ञापक करते हुए ''संहिता'' की धारा 262 से 265 (दोनों को शामिल करते हुए), को ऐसे विचारण हेतु यथासंभव प्रयोज्यशील बनाया गया हैं। चूंकि ''संहिता'' की धारा 262 (2) के अनुसार संक्षिप्त विचारण में मजिस्ट्रेट के द्वारा मात्र तीन माह तक का कारावास अधिरोपित किया जा सकता है एवं ऐसे विचारण में धारा 29 (2) के अनुसार मात्र दस हजार रूपये (पूर्व में पांच हजार रूपये) का अर्थदण्ड ही अधिरोपित किया जा सकता है जबकि चेक अनादरण से संबंधित प्रकरणों के लिए विधायिका का यह आशय था कि दण्ड में वृद्धि की जावे फलतः धारा 143 के द्वितीय भाग – (प्रथम परन्तुक) में प्रावधान किया गया है कि **धारा 143 के अधीन संक्षिप्त विचारण में किसी दोषसिद्धि की दशा**

में मजिस्ट्रेट के लिये यह विधिपूर्ण होगा, कि वह एक वर्ष से अनधिक अवधि का कारावास व पांच हजार रूपये से अधिक अवधि का अर्थदण्ड अधिरोपित करें। "संहिता" की धारा 143 का यह द्वितीय भाग (प्रथम परन्तुक) एक सामर्थ्यकारी प्रावधान (Enabling Provision) है जिसके द्वारा संक्षिप्त विचारण में मजिस्ट्रेट की कारावास अधिरोपित करने की शक्ति पर "संहिता" की धारा 262 (2) के माध्यम से अधिरोपित निर्बन्धन को हटाते हुए दोषसिद्धि की दशा में 1 वर्ष तक के कारावास या चैक धनराशि की दुगनी तक, किसी भी राशि का अर्थदण्ड अथवा दोनों को अधिरोपित करने के लिये मजिस्ट्रेट को सामर्थ्यशील बनाया है।

उपरोक्त के पश्चात् "अधिनियम" की धारा 143 के तृतीय भाग (द्वितीय परन्तुक) द्वारा उपबंधित किया गया है कि धारा 143 के अधीन संक्षिप्त विचारण प्रारंभ होने पर अथवा उसके दौरान मजिस्ट्रेट को यह प्रतीत होता है कि (1) प्रकरण की प्रवृति इस प्रकार की है जिसमें एक वर्ष से अधिक अवधि का कारावास अधिरोपित किया जा सकता है अथवा यह कि (2) किसी अन्य कारण से संक्षिप्त विचारण अवांछनीय है, तो मजिस्ट्रेट पक्षकारों को सुनने के पश्चात् इस प्रभाव का आदेश अभिलिखित कर एवं तत्पश्चात्, परीक्षित हो चुके किसी साक्षी को पुनः आहूत कर **संहिता में उपबंधित प्रकार से प्रकरण की सुनवाई अथवा पुनः सुनवाई हेतु अग्रसर हो सकता है।**

धारा 143 के तृतीय भाग (द्वितीय परन्तुक) में बताई गई उपरोक्त दो परिस्थितियों में से प्रथम परिस्थिति के लिये मजिस्ट्रेट को "संहिता" के अध्याय 20 के अंतर्गत समन विचारण प्रक्रिया अनुसार ही कार्यवाही करना आवश्यक होगा, और द्वितीय परिस्थिति जिसमें संक्षिप्त विचारण किसी अन्य कारण अवांछनीय है तो भी समन विचारण प्रक्रिया अनुसार ही सुनवाई आवश्यक होगी। इन दोनों ही परिस्थितियों में समन मामले की सुनवाई उपरांत मजिस्ट्रेट को "संहिता" अनुसार ही दोषसिद्धि पर दण्ड अधिरोपित करने का अधिकार होगा, क्योंकि धारा 143 के पूर्व में उल्लेखित द्वितीय भाग (प्रथम परन्तुक) में जो प्रावधान किया गया है वह स्पष्टतः **"धारा 143 के अधीन संक्षिप्त विचारण में किसी दोषसिद्धि की दशा में"**, के परिपेक्ष्य में किया गया है और जब धारा 143 के तृतीय भाग (द्वितीय परन्तुक) के अंतर्गत बताई गई दोनों परिस्थितियों में से किसी भी दशा में संक्षिप्त विचारण के परिस्थिति को परिवर्तित किया जाता है तो विचारण भिन्न प्रकृति का अर्थात "समन मामला" हो जाता है। "संहिता" में भी समन मामले और संक्षिप्त विचारण को अलग–अलग क्रमशः अध्याय 20 एवं 21 में प्रावधानित किया गया है।

उपरोक्त परिस्थितियों में जब धारा 143 के तृतीय भाग (द्वितीय परन्तुक) के अंतर्गत कार्यवाही संहिता अनुसार समन मामले की होना है तो इसके अंतर्गत अंततः सुनवाई उपरांत दोषसिद्धि की दशा में मजिस्ट्रेट धारा 143 के द्वितीय भाग (प्रथम परन्तुक) से संबंधित प्रावधान जो की स्पष्टतः **"धारा 143 के अधीन संक्षिप्त विचारण में किसी दोषसिद्धि की दशा में"**, के लिये प्रावधानित है, का अवलम्बन नहीं ले सकता है अर्थात मजिस्ट्रेट के लिये ऐसी परिस्थिति में संहिता के अंतर्गत उसे प्राप्त अधिकार अनुसार ही दण्डादेश पारित करने के अलावा और कोई विकल्प नहीं रहता है। ऐसी स्थिति में वह दोषसिद्धि की दशा में 2 वर्ष तक का कारावास अथवा संहिता की धारा 29 (2) द्वारा यथा उपबंधित दस हजार रूपये के अर्थदण्ड अथवा दोनों का दण्डादेश देने में सक्षम होगा।

इस प्रकार उपरोक्त विवेचन से यह स्पष्ट है कि धारा 143 के अंतर्गत यदि मजिस्ट्रेट मामले का विचारण संक्षिप्त विचारण प्रक्रिया अनुसार करता है तो ही दोषसिद्धि की दशा में इस धारा के प्रथम परन्तुक अनुसार दण्डादेश पारित किया जा सकता है, लेकिन यदि ऐसा ना करते हुये द्वितीय परन्तुक अनुसार मामले का विचारण समन मामले अनुसार संहिता की अध्याय 20 के अंतर्गत किया जाता है, तो मजिस्ट्रेट को ऐसे मामले में दोषसिद्धि की दशा में कारावास की सजा अधिकतम प्रावधानित 2 वर्ष तक अधिरोपित करने का अधिकार तो होगा लेकिन अर्थदण्ड की सीमा धारा 143 के द्वितीय परन्तुक अनुसार ना होकर संहिता की धारा 29 (2) में यथा उपबंधित ₹ 10,000 रूपये तक ही हो सकेगी। ऐसी प्रगट परिस्थिति अर्थदण्ड अधिरोपित कर सकने के अधिकार के संदर्भ में प्रथम दृष्टया भले ही अस्वाभाविक दृष्टिगत होती है, लेकिन धारा 143 के प्रथम परन्तुक की परिस्थिति स्पष्टतः संक्षिप्त विचारण में दोषसिद्धि से संबंधित होने से उसे धारा 143 के द्वितीय परन्तुक अनुसार होने वाले समन विचारण के मामले तक विस्तारित नहीं किया जा सकता है, और द्वितीयक परन्तुक का मामला स्पष्टतः संहिता के प्रावधानों अनुसार ही निर्धारित होगा।

इसके उपरांत ऐसे मामलों में दण्ड अधिरोपित करते समय दिये जाने वाले अन्य अनुतोष मुख्यतः अनादरित चैक के संदर्भ में युक्तियुक्त प्रतिकर अदायगी आदि के संबंध में विचार उचित होगा तथा उसके पूर्व संबंधित एवं सुसंगत वैधानिक प्रावधानों का उल्लेख समीचीन हैं जो निम्नानुसार है –

धारा 117 (परक्राम्य लिखत अधिनियम, 1881) – प्रतिकर के बारे में नियम–

धारक या किसी पृष्ठांकिती के प्रति दायित्वाधीन किसी भी पक्षकार द्वारा ..... चैक का अनादर किए जाने की दशा में देय प्रतिकर निम्नलिखित नियमों द्वारा अवधारित किया जाएगा –

(क) धारक लिखत पर शोध्य रकम, उसे उपस्थापित करने, और टिप्पणित और प्रसाक्ष्यित कराने में उचित तौर पर उपगत व्ययों सहित पाने का हकदार है;

(ख) .....

(ग) जिस पृष्ठांकक ने दात्विधीन होते हुए उस पर शोध्य रकम का संदाय किया है वह ऐसी संदत्त रकम संदाय की तारीख से उसके निविदान (Tender) या आपन (Realization) की तारीख तक (अठारह प्रतिशत) प्रतिवर्ष ब्याज सहित तथा अनादर और संदाय के कारण हुए सब व्ययों सहित पाने का हकदार है;

(घ) .....

(ड.) .....

357 द.प्र.सं. – प्रतिकर देने का आदेश – "(1) जब कोई न्यायालय जुर्माने का दण्डादेश देता है या ऐसा कोई दण्डादेश (जिसके अंतर्गत मृत्यु दण्डादेश भी है), जिसका भाग जुर्माना भी है, तब न्यायालय आदेश दे सकता है कि, ... वसूल किये गये जुर्माने या उसके किसी भाग का उपयोजन" –

(क) अभियोजन में उचित रूप से उपगत व्ययों को चुकाने में किया जाए,

(ख) किसी व्यक्ति को उस अपराध द्वारा हुई किसी हानि या क्षति का प्रतिकर देने में किया जाए, यदि न्यायालय की राय में ऐसे व्यक्ति द्वारा प्रतिकर सिविल न्यायालय में वसूल किया जा सकता है,

(ग) .....

(घ) .....

(2) .....

"(3) जब न्यायालय दण्ड अधिरोपित करता है, जिसका भाग जुर्माना नहीं है, तब न्यायालय निर्णय पारित करते समय अभियुक्त व्यक्ति को प्रतिकर के रूप में ऐसी धनराशि, जैसा कि आदेश में विनिर्दिष्ट किया जाए उस व्यक्ति को, जो कार्य, जिसके लिये अभियुक्त दण्डित किया गया है, के कारण किसी क्षति या उपहति से ग्रस्त हुआ है, अदा करने का आदेश दे सकेगा।

(4) .....

(5) .....

359 द.प्र.सं. – असंज्ञेय मामलों में खर्चा देने के लिए ओदश –

(1) जब कभी किसी असंज्ञेय अपराध का कोई परिवाद न्यायालय में किया जाता है तब, यदि न्यायालय अभियुक्त को दोषसिद्ध कर देता है तो, वह अभियुक्त पर अधिरोपित शास्ति के अतिरिक्त उसे यह आदेश दे सकता है कि वह परिवादी को अभियोजन में उसके द्वारा किए गए खर्चे, पूर्णतः या अंशतः दे और यह अतिरिक्त आदेश दे सकता है कि उसे देने में व्यतिक्रम करने पर अभियुक्त तीस दिन से अनधिक की अवधि के लिए सादा कारावास भोगेगा और ऐसे खर्चो के अंतर्गत आदेशिका फीस साक्षियों और प्लीडरों की फीस की बाबत किए गए कोई व्यय भी हो सकेंगे जिन्हें न्यायालय उचित समझे।

(2) .....

उपरोक्त संदर्भित प्रावधानों से यह स्पष्ट है कि जब कभी चैक अनादरण के मामले में दोषसिद्धि उपरांत अभियुक्त से व्यथित परिवादी को प्रतिकर दिलवाये जाने पर विचार करेंगे तो अधिनियम की धारा 117 के उक्त प्रावधान को भी विचार में लिया जायेगा, जिससे परिवादी को हुई हानि के संबंध में युक्तियुक्त प्रतिकर निर्धारित किया जा सके।

इसी प्रकार धारा 357 द.प्र.सं. के उल्लेखित प्रावधान से यह स्पष्ट है कि धारा 357 (1) के अंतर्गत प्रतिकर का आदेश अधिरोपित अर्थदण्ड की राशि में से ही दिया जा सकता है, अर्थात ऐसी स्थिति में प्रतिकर की राशि अधिरोपित अर्थदण्ड की राशि से अधिक नहीं हो सकती है। चैक अनादरण के मामले

में यदि धारा 143 के प्रथम भाग अनुसार संक्षिप्त विचारण प्रक्रिया को अपनाया गया है तो उक्त धारा के द्वितीय भाग (प्रथम परन्तुक) अनुसार दोषसिद्धि पर कारावास के दण्ड के अलावा अर्थदण्ड की राशि ₹ 5,000 रूपये से अधिक हो सकती है। यह सही है कि इसकी कोई सीमा निर्धारित नहीं की गई है लेकिन धारा 138 के अपराध के संबंध में प्रावधानित मूल दण्ड में ऐसे अर्थ दण्ड की सीमा अनादरित चैक की राशि की दुगनी तक हो सकना बताया गया है, जिससे इसी अनुरूप में अर्थदण्ड की अधिकतम सीमा हो सकती है। ऐसी स्थिति में जब अर्थ दण्ड अधिरोपित किया जायेगा तो उसमें अनादरित चैक की राशि के साथ ही अधिनियम की धारा 117 एवं धारा 357 (1) द.प्र.सं. के खण्ड 'क' एवं 'ख' के उपरोक्त प्रावधानों पर भी विचार करते हुये ही उचित अर्थ दण्ड अधिरोपित किया जायेगा, जिससे ऐसे अर्थ दण्ड की राशि में से धारा 357 (1) द.प्र.सं. के अंतर्गत उचित प्रतिकर राशि अदायगी का आदेश दिया जा सके, क्योंकि जब तक चैक अनादरण के मामले में अधिनियम की धारा 138 के अंतर्गत दोषसिद्धि पर इसी अनुरूप उचित अर्थ दण्ड का दण्ड देते हुये उसमें से धारा 357 (1) द.प्र.सं. अनुसार व्यथित प्रतिवादी को प्रतिकर अदायगी का आदेश नहीं दिया जायेगा तब तक धारा 138 एवं धारा 143 के ऐसे प्रावधानों को परक्राम्य लिखत अधिनियम में जोड़े जाने का उद्देश्य ही सफल नहीं होगा। वर्तमान वाणिज्यिक संव्यवहारों में राशि के भुगतान की अधिकांश व्यवस्था चैकों के जरिये होने को देखते हुये ऐसे संव्यवहारों की विश्वसनीयता बनाये रखने एवं इस दौरान चैक अनादरण के कारण व्यथित पक्षकार को हुई आर्थिक हानि और असुविधा को देखते हुये दण्ड के मामले में उपरोक्तानुसार दृष्टिकोण अपनाना ही मजिस्ट्रेट से अपेक्षित है। (***गोवा प्लास्ट प्राईवेट लिमिटेड विरूद्ध चिको उर्सूला डिसूजा एवं अन्य, 2004 (2) सुप्रीम कोर्ट केसेस 235*** अवलोकन योग्य है)।

जहां तक धारा 143 के तृतीय भाग (द्वितीयक परन्तुक) अनुसार समन विचारण प्रक्रिया अनुसार धारा 138 के अंतर्गत दोषसिद्धि पर दण्ड का प्रश्न है, तो इसमें कारावास के अलावा अर्थदण्ड धारा 29 (2) द.प्र.सं. अनुसार अधिकतम ₹ 10,000 रूपये का ही अधिरोपित किया जा सकता है। ऐसी स्थिति में यदि अनादरित चैक की राशि ₹ 10,000 रूपये से अधिक है अथवा जहां अनादरित चैक की राशि के संबंध में अधिनियम की धारा 117 के उपरोक्त प्रावधान अनुसार प्रतिकर राशि का निर्धारण करते वह राशि ₹ 10,000 रूपये से अधिक की होती है तो भी मजिस्ट्रेट द्वारा धारा 29 (2) द.प्र.सं. की सीमा में रहते हुये ₹ 10,000 रूपये का अर्थदण्ड और इसी अनुरूप धारा 357 (1) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी का आदेश दिया जा सकेगा जो व्यथित परिवादी के लिये किसी भी प्रकार से न्याय संगत नहीं माना जा सकता हैं।

ऐसी स्थिति में जब विचारण समन मामले के अनुसार किया जाता है तो धारा 138 के अंतर्गत दोषसिद्धि उपरांत दण्डादेश पारित करते समय मजिस्ट्रेट को कारावास की सजा मात्र देते हुये इसके साथ धारा 357 (3) द.प्र.सं. के प्रावधान का उदारता पूर्वक उपयोग करते हुये, अनादरित चैक की राशि और प्रतिकर निर्धारण के उल्लेखित प्रावधानों पर विचार करते हुये उचित प्रतिकर दिलवाये जाने का आदेश दिया जाना चाहिये जिससे परिवादी को चैक की राशि के साथ ही प्रतिकर के रूप में उचित राशि मिल सके (***के.ए. अब्बास विरूद्ध साबू जोसफ एवं अन्य, 2010 ए.आई.आर. एस.सी.डब्ल्यू. 3398*** अवलोकन योग्य है)।

समन विचारण प्रक्रिया में अंततः दोषसिद्धि उपरांत उपरोक्तानुसार धारा 357 (3) द.प्र.सं. के अंतर्गत युक्तियुक्त प्रतिकर राशि अनादरित चैक की राशि के परिपेक्ष्य में दिलवाये जाने का आदेश दिये जाने के उपरांत भी व्यथित परिवादी को ऐसे परिवाद को प्रस्तुत किये जाने से होने वाले व्ययों की क्षतिपूर्ति नहीं हो सकती है क्योंकि धारा 357 (1) एवं धारा 357 (3) द.प्र.सं. के अंतर्गत दिलवाये जाने वाले प्रतिकर की राशि के आधार भिन्न हैं। जहां 357 (1) द.प्र.सं. के अंतर्गत उसमें बताये अनुसार 4 मदों जिनमें से इस विषय के लिये मद क्रमांक 'क' व 'ख' सुसंगत है, को विचार में लेते हुये प्रतिकर की राशि का निर्धारण किया जा सकता है, वहीं धारा 357 (3) द.प्र.सं. के अंतर्गत इनमें से केवल मद क्रमांक 'ख' के लिये ही प्रतिकर राशि स्वीकृत की जा सकती है। ऐसी स्थिति में परिवाद प्रस्तुती, साक्षियों पर व्यय, अभिभाषक शुल्क आदि आवश्यक व्ययों के लिये धारा 357 (3) द.प्र.सं. के अंतर्गत कोई प्रावधान न होने से इनके लिये पूर्व में उल्लेखित धारा 359 द.प्र.सं. के प्रावधान का उपयोग करते हुये उचित राशि दोषसिद्धि उपरांत अभियुक्त से परिवादी को दिलवाये जाने का अतिरिक्त आदेश दिया जा सकता है, क्योंकि यह प्रावधान चैक अनादरण जैसे परिवाद पर संस्थित असंज्ञेय अपराधों के संबंध में लागू होता है।

जहां धारा 357 (3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी का आदेश दिया जाता है वहां मजिस्ट्रेट को ऐसी राशि के अदायगी में व्यतिक्रम पर कारावास की सजा भी दिये जा सकने का अधिकार है, जैसा कि माननीय सर्वोच्च न्यायालय द्वारा ***हरिसिंह विरूद्ध सुखबीर सिंह ए.आई.आर. 1988 सुप्रीम कोर्ट 2127, सुगंधी सुरेश कुमार विरूद्ध जगदीशन ए.आई.आर. 2002, सुप्रीम कोर्ट 681 एवं विजयन विरूद्ध सदानंदन के. एवं अन्य 2009 (भाग–2) एम.पी.जे.आर. 433*** (सुप्रीम कोर्ट) में प्रतिपादित किया गया है।

निष्कर्ष –

इस प्रकार उपरोक्त विवेचना उपरांत चैक अनादरण के मामलों में संक्षिप्त विचारण तथा समन मामले अनुसार विचारण में दोषसिद्धि उपरांत अधिरोपित किये जाने वाले दण्ड का विस्तार और उसी अनुरूप अंतर निम्नानुसार प्रकट होता है –

1. संक्षिप्त विचारण में दोषसिद्धि पर न्यायिक मजिस्ट्रेट प्रथम श्रेणी को एक वर्ष तक के कारावास अथवा चैक की राशि की दुगनी राशि तक के अर्थदण्ड अथवा दोनों का दण्डादेश देने का अधिकार है, जबकि समन विचारण मामले में दोषसिद्धि पर ऐसे मजिस्ट्रेट को दो वर्ष तक के कारावास अथवा ₹ 10,000 रूपये तक के अर्थदण्ड अथवा दोनों, का दण्डादेश पारित करने का अधिकार है।

2. चैक अनादरण के मामलों के संबंध में धारा 138 एवं 143 के प्रावधानों के उद्देश्य एवं वाणिज्यिक समव्यवहारों की विश्वसनीयता तथा व्यथित परिवादी के साथ न्याय करने के लिये ऐसे मामले में यह भी आवश्यक है कि संक्षिप्त विचारण के मामले में दोषसिद्धि पर अर्थदण्ड इस सीमा तक किया जावे जिससे व्यथित परिवादी को धारा 357 (1) द.प्र.सं. अनुसार युक्तियुक्त प्रतिकर राशि, परिवाद के कारण हुये समस्त व्ययों, चैक की राशि और उसके अदायगी में हुये विलंब के कारण ब्याज आदि के कारण हुई हानि की क्षतिपूर्ति सुनिश्चित हो सके और यदि अर्थदण्ड की राशि

समस्त व्ययों की राशि की क्षतिपूर्ति करने में असफल हो तो ही ऐसे मामले में भी धारा 359 द.प्र.सं. के प्रावधान का उपयोग करते हुये व्ययों की अवशेष राशि की क्षतिपूर्ति कराई जा सकती है। इसके विपरीत समन मामले में दोषसिद्धि पर अभियुक्त को कारावास का दण्ड मात्र देते हुये इसके साथ ही धारा 357 (3) द.प्र.सं. के अंतर्गत चैक की राशि और उसकी अदायगी में हुये विलंब के कारण ब्याज की हुई हानि के लिये प्रतिकर राशि अदायगी के साथ ही परिवाद के कारण हुये समस्त व्ययों की क्षतिपूर्ति के लिये धारा 359 द.प्र.सं. के अंतर्गत भी उचित प्रतिकर राशि की अदायगी का आदेश दिया जावे।

3. धारा 357 (3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के आदेश के साथ ही उसकी अदायगी पर व्यतिक्रम पर उचित कारावास का अतिरिक्त दण्डादेश भी दिया जा सकता है। धारा 359 द.प्र.सं. के प्रावधान में ही प्रतिकर अदायगी के व्यतिक्रम पर अभियुक्त को अधिकतम 30 दिवस की अवधि के साधारण कारावास का आदेश दिये जा सकने का स्पष्ट प्रावधान है।

4. धारा 357 (1) द.प्र.सं. के अदायगी के व्यतिक्रम पर अतिरिक्त कारावास का आदेश अनावश्यक है क्योंकि ऐसा प्रतिकर अधिरोपित अर्थदण्ड की राशि में से ही दिलवाया जाता है और अर्थदण्ड का दण्डादेश देते समय उसके व्यतिक्रम में उचित कारावास का दण्ड उसी स्टेज पर दिया जाता है।

5. यदि न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा समन विचारण उपरांत दोषसिद्धि पर मात्र कारावास का दण्ड देकर इसके साथ ही प्रतिकर एवं व्ययों की अदायगी के लिये धारा 357 (3) एवं 359 द.प्र.सं. के प्रावधानों का उपयोग किया जाता है तो वह स्वयं ही ऐसे मामले का न्याय संगत विनिश्चय कर सकता है, और उसे पूर्व में उल्लेखित धारा 325 द.प्र.सं. के प्रावधान का उपयोग करने की कोई आवश्यकता नहीं रहेगी।

6. संक्षिप्त विचारण एवं समन मामले अनुसार विचारण उपरांत दोषसिद्धि की स्थिति में उपरोक्तानुसार अंतर केवल तभी संभव है जब विचारण न्यायिक मजिस्ट्रेट प्रथम श्रेणी मात्र द्वारा ही किया जावे, यदि ऐसा विचारण मुख्य न्यायिक मजिस्ट्रेट/अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट द्वारा किया जाता है तो वह दोषसिद्धि पर दोनों ही परिस्थितियों में अर्थदण्ड की दशा में चैक की राशि की दुगनी राशि की सीमा तक का अर्थदण्ड अधिरोपित कर सकता है।

नोट– ***जिला सीहोर द्वारा प्रेषित लेख में धारा 143 के प्रथम परंतुक में बताई गई अर्थदण्ड की सीमा को इस धारा के द्वितीयक परंतुक में ऐसे मामले का विचारण समन मामले से किये जाने पर भी लागू किया जा सकना बताया गया था, जो उक्त लेखों एवं इस संस्थान के मत में सही निर्वचन नहीं है जैसा कि उपरोक्त वर्णन से स्पष्ट है। तद्नुसार सीहोर का आलेख उक्त सीमा तक संशोधित कर इस लेख में संयुक्ततः शामिल किया गया है।***

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PRIMACY OF ORDER PASSED BY CRIMINAL COURT U/S 145 CR.P.C. AND BY CIVIL COURT IN A CIVIL SUIT REGARDING POSSESSION OF THE SAME IMMOVABLE PROPERTY

Judicial Officers
District Katni

INTRODUCTION

Chapter X of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") deals with "Maintenance of Public Order and Tranquility". Part-D of Chapter provides for disputes as to immovable property wherein Sections 145 to 148 provide a speedy remedy for the prevention of breach of peace arising out of disputes relating to immovable property. The object of Section 145 Cr.P.C. is explained by the Delhi High Court in *Jagdish Gandhi and another v. State and another,* (Cr.Rev.P. No.383/2007 and Cr.M.A.No. 6405/2007, decided on 03.10 2008) which is as follows;

> "The object of Section 145 Cr.P.C. is to provide a speedy remedy for the prevention of breach of peace arising out of disputes relating to immovable property. The Code contemplates determination of this question without any reference to the merits of the respective claims of the disputing parties as to the 'right to possess' the subject matter of dispute. The question of possession, moreover, has to be determined with reference to a specified point of time as specified in Section 145 of Cr.P.C., namely the date of the initial order, or in the case of forcible dispossession, the date within two months next preceding the date on which the report of a police officer or other information regarding the dispute was received by the Magistrate."

The proceeding under Section 145 Cr.P.C. has been held to be quasi-civil and quasi-criminal in nature or an executive on police action. The purpose of the provision is to provide a speedy and summary remedy so as to prevent breach of peace by submitting the dispute to the Executive Magistrate for resolution of dispute between the parties disputing the question of possession over an immovable property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in proviso to sub-section (4) of Section 145 Cr.P.C., and maintain the *status quo* as to possession until the

entitlement to possession was determined by a Court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot have. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere with it if there is no likelihood of breach of peace or if the likelihood of breach of peace, though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned. (See *Shanti Kumar Panda v. Shakuntala Devi AIR 2004 SC 115*).

The Full Bench of the Supreme Court in *Bhinka v. Charan Singh, AIR 1959 SC 960* has explained the legal effect of Section 145 Cr.P.C. as under :

> "This leads us to the consideration of the legal effect of the order made by the Magistrate under S. 145 of the Code of Criminal Procedure. Under Section 145(6) of the Code, a Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is coterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. The Privy Council in *Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani, (1901) 29 Ind App 24, 33* tersely states the effect of order under Section 145 of the Code of Criminal Procedure thus :
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> > "These orders are merely police orders made to prevent breaches of the peace. They decide no question of title. .."

PRIMACY

As discussed above, we have seen that the proceedings under Section 145 Cr.P.C. are temporary in nature and does not have any effect on final determination of the rights of the parties. The Executive Magistrate has power under Section 145 Cr.P.C. to prevent breach of peace and the Civil Courts have

powers to determine the final rights of the parties. The Supreme Court in the matter of *Jhunamal @ Devandas v. State of M.P. and others, AIR 1988 SC 1973* has held that an order made under Section 145 Cr.P.C. deals only with the factum of possession of the party as on a particular day. It confers on title to remain in possession of the disputed property. The order is subject to decision of the Civil Court.

In *Mathuralal v. Bhanwarlal, AIR 1980 SC 242,* Supreme Court observed as under :

> ".....Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of the three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leave the parties to go to the Civil Court. Proceeding may however be stopped at any time if one or other of the parties satisfies the Magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the Magistrate disappears. The Magistrate then cancels the preliminary order. This is provided by Section 145 (5). Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course".

In *Dharam Pal v. Srimati Ram Sri, AIR 1993 SC 1361* it has been held as follows :

> "It is obvious from sub-section (1) of Section 146, that the Magistrate is given power to attach the subject of dispute 'until the competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof.' The determination by a competent Court of the rights of the parties spoken of there has not necessarily to be a final determination. The determination may be even tentative at the interim stage when the competent Court passes an order of interim injunction or appoints a receiver in respect of the subject-matter of the dispute pending the final decision in the suit. The moment

the competent Court does so, even at the interim stage, the order of attachment passed by the Magistrate has to come to an end. Otherwise, there will be inconsistency between the order passed by the Civil Court and the order of attachment passed by the Magistrate. The proviso to sub-section (1) of Section 146 itself takes cognizance of such a situation when it states that 'Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of any breach of peace with regard to the subject of dispute.' When a Civil Court passes an order of injunction or receiver, it is the Civil Court which is seized of the matter and any breach of its order can be punished by it according to law. Hence on the passing of the interlocutory order by the Civil Court, it can legitimately be said that there is no longer any likelihood of the breach of the peace with regard to the subject of dispute."

The Madhya Pradesh High Court in the matter of *Santosh v. State of M.P. and another, ILR (2010) MP 2233* has observed that where an attempt is made to forcibly occupy disputed property and there being an apprehension of breach of peace and, therefore, proceedings under Section 145 Cr.P.C. was initiated, the said proceedings would be maintainable. The Court held that mere pendency of the civil suit will not *ipso facto* operate bar to the proceedings under Section 145 Cr.P.C.

CONCLUSION

The Supreme Court in *Shanti Kumar Panda* (supra) summaries the law as to effect of the order of the Executive Magistrate for the purpose of legal proceedings initiated before a competent Court subsequent to the order of an Executive Magistrate under Sections 145 and 146 of Cr.P.C. as under :

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

(2) A party unsuccessful in an order under Section 145 (1) would initiate proceedings in a competent Court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily, a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent Court consequent upon attachment under Section 146 (1) it is not necessary to seek relief of

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

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

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

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SCOPE OF SECTIONS 91 & 92 OF EVIDENCE ACT RELATING TO EXCLUSION OF ORAL EVIDENCE ABOUT THE CONTENTS AND EFFECTS OF DOCUMENTARY EVIDENCE

Judicial Officers
District Sidhi

Section 91 of the Evidence Act, 1872 reads as under:

Section 91 : *Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.* – When the terms of a contracts, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Exception 1.– When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.– *Wills* admitted to probate in India may be proved by the probate.

Explanation 1.– This section applies, equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.– Where there are more originals than one, one original only need be proved.

Explanation 3.– The statements, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters, in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) *A* contracts, in writing, with *B*, for the delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) *A* gives *B* receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

One of the fundamental principles of the law of evidence is that in all cases the best evidence should be given. Where the fact to be proved is embodied in a document, the document is the best evidence of the fact. Such fact should, therefore, be proved by the document itself, that is, by the primary or secondary evidence of the document. The maxim of law is that *whatever is in writing must be proved by writing.* Section 91 of the evidence Act, incorporates this principle.

THE TERMS OF A CONTRACT AND OF A GRANT, ETC.

It is general and most inflexible rule that wherever written instruments are created either due to requirement of law or by the contract of the parties to be memorials of truth of the terms of the contract, any other evidence is excluded from being led, either as a substitute for such instrument or to contradict it. It is a matter both of principle and of policy; of principle because such instruments are in their own nature entitled to a much higher degree of credit than oral evidence; of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose and uncertain parole evidence. The document which itself is the best evidence of the terms should be produced in the court. If a document is lost, or is in possession of adversary, secondary evidence under Section 65 of the Evidence Act of its terms may be adduced. For example, *A* mortgaged his property to *B* for ₹ 10,000 A mortgage deed is executed by *A*. This is also attested by two witnesses and the deed is handed over to *B*. After a few years, *A* files a suit for redemption and possession of the property mortgaged. *B* denies the existence of mortgage and alleges to be owner of the property and not a mortgagee of it. In this case, issue would be whether *B* is mortgagee of plots in dispute? In this case none of the parties would be allowed to adduce oral or any other secondary evidence to prove the terms of mortgage. The mortgage deed must be produced. But in this case, the document being in possession of adversary *B*, *A* may take a certified copy from the registration and produce it before the Court.

ONLY TERMS OF A CONTRACT

Section 91 of the Evidence Act, states that when the terms of the contract have been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself or in certain circumstances, secondary evidence of the contents. From this, it clearly follows that oral evidence of a fact relating to a contract in writing which are not the terms of the contract may be given.

For example : A pronote for ₹ 500 was executed in favour of *C* by *A* and *B*. Evidence is to the effect that it was agreed between lender and borrower that *A* will be liable to pay ₹ 400 and B to ₹ 100 is admissible because it is not a term of a contract.

DOCUMENT INADMISSIBLE FOR WANT OF REGISTRATION

Where document is inadmissible for want of registration, no other evidence of the contents of the document can be received. A combined effect of Section 49 of Registration Act and Section 91 of Evidence Act, is to completely shut out all the terms of an unregistered deed compulsorily registrable. For example *A* and *B* partitioned their properties through a partition deed. They did not get the partition deed registered. Afterwards, litigation began in respect of the properties. It is alleged by *A* and *B* that the properties were partitioned by means of an unregistered deed. The deed would be inadmissible. At the same time, oral evidence to prove partition deed will also be shut. But unregistered partitioned deed can be proved to establish the nature of the possession.

In *Krishna Bai v. Shivnath Singh, AIR 1993 MP 65,* joint Hindu family was partitioned. It was held that the memorandum of partition is admissible in absence of registration. Inspite of this, the memorandum of partition can be used to prove the intention of coparceners of partition. This can be admitted to prove that after the date of partition, the coparceners had not been the members of the joint Hindu family. The oral evidence can be admitted to prove the condition of coparceners and the intention of the coparceners to use the property separately. The oral evidence will not be effected by the prohibition imposed u/s 91 of the Evidence Act.

DEED NOT CONTRACT ETC.

In *Jahuri Shal v. Dwarika Prasad Jhunjhunwala, AIR 1967 SC 109,* Hon'ble the Supreme Court held that adoption of person is not required by law to be in writing. A deed of adoption merely records the facts that an adoption has taken place. It does not create any right. It is no more a piece of evidence and failure of a party to produce it, does not bar him from adducing oral evidence.

ANY MATTER REQUIRED TO BE IN WRITING

When the law requires that a particular matter must be in writing, oral evidence cannot be substituted for that writing. The matters required to be in

writing are – public and judicial records such as judgments, examination of witness in civil and criminal cases, deed of conveyance of lands such as sale deed or mortgage deeds of ₹ 100 or more, a partition deed, a *Will* and so on.

Exception 1 – When it is required that a public officer should be appointed by some writing, and when it is shown that any particular person has acted as such officer, the writing by which he has been appointed need not be proved.

For example – *A* appears before a court as a witness and says that he is a civil surgeon. To establish that, he is not required to produce the appointment order.

Exception 2 –When probate has been obtained on the basis of a bill and afterwards question arises about the existence of that bill, mere production of the probate will prove the existence of the *Will*. The original *Will* need not be proved. The word 'probate' means the copy of a *Will* certified under the seal of the court of competent jurisdiction with a grant of administration to the estate of the testator. The probate copy of the *Will* though technically secondary evidence of the contents of the original *Will*, ranks primary evidence. The executors acquire from the probate their title to administer the estate of the testator and it records the act of the Court as to the due execution of the *Will*. It is, therefore, more valuable than the *Will* itself.

Explanation 1 - Explanation 1 requires that Section 91 applies equally to a contract, grant or any other disposition of property which is comprised in a single document or in more than one document. If the terms of the contract, grant or other disposition of the property is contained in more than one document, then all the documents are to be produced before the court to prove the terms of the contract.

For example – *A*, a resident of Kolkata proposes to sell a house to *B*, a resident of Delhi. The terms of the sale are settled between them by letters. Five letters on each side comprised the terms of the contract. To prove the terms of the contract, all the ten letters are to be produced before the court.

Explanation 2– Explanation 2 lays down that when there are more originals than one, only one of them is to be proved before the court. A common instance is that of Bills of Exchange of which three are usually executed called the first, second and third of exchange.

Explanation 3 – Section 91 of Evidence Act, shuts up any other kind of evidence except the original documents in cases where the terms of a contract or of a grant or of any other disposition of property had been reduced to a form of a document by the agreement of the parties or by the requirement of law. Therefore, if in any document there are statements of fact other than those referred to above i.e., if any document does not relate to any of the three classes of facts mentioned in the section, oral evidence is not excluded by it. Illustrations *(d)* and *(e)* are to be read in this connection. Payment of money may be proved by oral testimony although receipt has been given for the same.

FACTUM OF CONTRACT

Section 91 of the Evidence Act does not prohibit the reception of the evidence to prove mere existence of the contract, grant or any other disposition of the property.

For example – *A* and *B* partitioned properties by an unregistered partition deed. No oral evidence can be given to prove as to which property fell to the share of *A* or *B*. But this section does not prohibit the reception of evidence to prove the fact that there has been partition between *A* and *B* (*Ramchati v. Panchammal, AIR 1926 Mad. 402*).

Section 92 of the Evidence Act, 1872 reads as under:

> **Section 92 :** *Exclusion of Evidence of Oral Agreement.* – When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for purpose of contradicting, varying, adding to, or subtracting from, its terms :
>
> **Proviso (1) :** Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.
>
> **Proviso (2) :** The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.
>
> **Proviso (3) :** The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> **Proviso (4) :** The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered

according to the law in force for the time being as to the registration of documents.

Proviso (5) : Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract.

Proviso (6) : Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b) *A* agrees absolutely in writing to pay *B*, ₹ 1,000 on the 1st March, 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(c) An estate called "the Rampur tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) *A* enters into a written contract with *B* to work in certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B's* as to their value. The fact may be proved.

(e) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would be law entitled him to have the contract reformed.

(f) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words "Bought of *A* horse for ₹ 500". *B* may prove the verbal warranty.

(h) *A* hires lodging of *B*, and gives *B* a car on which it is written – "Rooms, ₹ 200 a month". A may prove a verbal agreement that these terms were to include partial board. *A* hires lodging of *B* for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

(i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount, *A* may prove this.

(j) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

Section 91 lays down that when the terms of a contract has been reduced to writing, the writing itself should be produced and no other evidence would be admissible. Section 92 lays down that when the terms of a contract, grant or other disposition of property or any matter required by law to be in writing have been proved by filing the document (as laid down in Section 91), the parties to the contract or their legal representatives cannot be allowed to lead oral evidence for the purpose of contradicting, varying, adding to or subtracting from the contract. Hon'ble the Supreme Court in *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1,* held that Section 92 precludes the parties to the document and their representative-in-interest from giving oral evidence concerning the contents of the document. Other parties are left free to give such evidence.

In *Raj Kumar Rajendra Singh v. State of Himachal Pradesh, AIR 1990 SC 1833,* Hon'ble the Supreme Court held that if the terms of the documents are clear and unambiguous, extrinsic aid to ascertain the true intention of the parties are inadmissible because Section 92 mandates that in such cases the intention must be gathered from the language employed in the document. But if the knowledge employed, as given, admits verity of meaning, Proviso 6 to the section must be invoked which permits the tendering of extrinsic evidence as to act, conduct and surrounding circumstances, to enable the court to ascertain the real intention of the parties. In such a case, oral evidence may guide the court in unravelling the true intention of the parties. The object of admissibility of such evidence in such circumstances under Proviso 6 is to assist the court to get the real intention of the parties and thereby overcome the difficulty caused by the ambiguity.

In *Gurdial Singh v. Rajkumar Aneja, AIR 2002 SC 1003,* the question was to the validity of lease deed. The question was as to whether occupants were tenants or sub-tenants. Occupant can raise the plea that transaction between owner and tenant is not what it appears to be just by reading the lease deed. They however, neither raised the plea nor adduced other evidence for contradicting, varying, addition, subtraction or substituting the terms of lease deed. They were not parties to the lease deed. In these circumstances provisions of Sections 91 and 92 would not be attracted.

PARTIES TO THE INSTRUMENT

Section 92 applies only between parties to a transaction and those claiming under them. A person who is not a party to a contract can adduce to contradict,

vary, add to, or subtract from the terms of the contract. In *Bai Hira Devi v. Official Assignee of Bombay, AIR 1958 SC 448*, Hon'ble the Supreme Court laid down that Section 92 comes into operation only when both the parties of suit or proceedings or the parties to the document or their representative-in-interest. If any one of them stands in this character, oral evidence to contradict, vary, add to, or subtract from the terms of the documents can be given.

Proviso (1) : *The fact invalidating the documents*– No man will be debarred from proving a fact which will invalidate the contract. A contract created by fraud, undue influence is invalid and not enforceable. So a man can easily prove such facts, though the contract has been reduced to writing and that deed has been filed and proved under Section 91 of the Indian Evidence Act, 1872.

In *Iswar Das (dead) through LRs. v. Sohan Das (dead) through LRs., AIR 2000 SC 426*, Hon'ble the Supreme Court held that where document was alleged to be sham, the oral evidence to prove that the document was sham is admissible.

Proviso (2) : *Separate oral agreement* – When there is a prior contemporaneous oral agreement about a matter on which the document is silent, proof of it can be given only when such oral agreement is not inconsistent with or does not contradict terms of contract. The proviso requires (i) the separate oral agreement should relate to the matter in which the document is silent; and (ii) that it is not inconsistent with the terms. For example, *A* borrowed ₹ 2000 bearing interest of 6% per annum from *B* and executed a simple mortgage. *B* cultivated some fields from *A* as his tenant in the suit for account of debt. *A* pleaded that *B* was not entitled to any interest as it was agreed between them that interest of the debt would be set off against the rents of the fields. As the mortgage was silent on this point and it was not inconsistent with the terms of the contract, it was held to be admissible.

Proviso (3) : *Separate oral evidence as condition precedent*– This proviso lays down that where there is separate oral agreement to the effect that the terms of written contract will not take effect or will be of no force until a condition precedent has been fulfilled or a certain event has happened, oral evidence is admissible to show that the condition not having been performed, the contract did not mature and so was not enforceable.

In *Narandas Morar Das Galiwala v. S. P. A. M. Papamal, AIR 1967 SC 333* a pronote was executed for ₹ 7500 and was payable on demand. A suit was filed on the basis of this. The defendant pleaded that there was collateral oral agreement not to enforce the pronote for 5 years. The oral evidence was allowed.

Proviso (4) : *Distinct oral subsequent agreement to rescind, renew or modify contract* – Evidence can be given to prove any subsequent oral agreement rescinding or altering the terms of all the written contracts except the contracts which are required by law to be in writing or which have been registered. In *S. Saktivel (Dead) Rep. By L.R. v. M. Venugopal Pillai, AIR 2000 SC 2633*, Hon'ble

the Supreme Court held that Proviso (4) of Section 92 provides that where contract or disposition not required by law to be in writing had been arrived at orally, then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by oral evidence and such evidence is admissible.

Proviso (5) : *Any usage or custom by which incidents not mentioned in any contract are usually annexed to contract* – Parole evidence of usage or custom is always admissible. Where the object is to make intelligible to the court, the meaning in which the parties have used language, the parole evidence may be given to prove any local custom of the general application so that it may be applied to the subject-matter and bind the parties to a written contract, unless it is inconsistent with the writing.

Proviso (6) : *Extrinsic evidence of surrounding circumstances* – Proviso 6 of Section 92 says that "any fact may be proved which shows in what manner the language of a document is related to the existing facts." The object of the admissibility of surrounding circumstances is to ascertain the real intention of the parties but those intentions of the parties must be gathered from the language of the documents as explained by extrinsic evidence. No evidence of any intention inconsistent with the plain meaning of the words used will be permitted for the object not to vary the language used but only to explain the clause in which the words are used by the parties to the deed.

For example : *A* makes will of his property to his children. He does not name them. Evidence may be given to prove as to who are his children.

In *Ramkumar Rajendra Singh v. State of Himachal Pradesh, AIR 1990 SC 1833* it was held that if some condition of a document is unambiguous, then to determine the real intention of the parties, extrinsic evidence is not allowed because Section 92 provides that the real intention of parties to the agreement should be gathered from the language used in the document. But if the document is ambiguous and there is more than one meaning of the language used in the document, then the Proviso (6) of Section 92 should be looked into which gives permission to the court to take into consideration the conduct of the parties and surrounding circumstances in order to ascertain the real meaning of the document. In cases of this type, the oral evidence can give direction to the court to ascertain the real intention of the parties to the document. In these cases, the subsequent conduct of the parties provides the evidence to ascertain the real intention of the parties and to remove the ambiguity in the language of the document.

Hon'ble the Supreme Court in the case of *Roop Kumar v. Mohan Thedani, AIR 2003 SC 2418* has held:

> "Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section

92, and similarly Section 92 would be inoperative without the aid of Section 91. The two sections however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Both these provisions are based on 'best evidence rule'. It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory".

Their Lordships further observed that :

> "the grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law; (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory".

Thus, exclusion of oral evidence is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.

Thus, in conclusion what Sections 91 and 92 declare is that the nature and intent of transactions are to be gathered from the terms of the document itself and no evidence of any oral agreement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. However, the exclusion of evidence of oral agreement is not absolute and Section 92 itself carves out certain exceptions in the form of Proviso (6), as indicated hereinabove which makes the evidence of any oral agreement admissible. Although, the conditions as contained in Provisos appended to Section 92 appear to be somewhat contradictory to the principle enunciated in Section 91. However, it is clear from the above discussion that both the provisions are not contradictory to each other but in effect, supplement each other.

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विधिक समस्याएं 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 स्तंभ 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)

समस्याः घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 की धारा–29 के अधीन कौन से आदेश सत्र न्यायालय में अपील योग्य हैं?

समाधान : इस समस्या के समाधान हेतु घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 की धारा–29 सुसंगत है जो निम्नवत है–

"29. Appeal. – There shall lie an appeal to the Court of Session within thirty days from the date on which **the order made by the Magistrate is served** on the aggrieved person or the respondent, as the case may be, whichever is later."

उक्त प्रावधान के अधीन आदेश के अपील योग्य होने की दो अपेक्षाएं हैं– प्रथम यह कि आदेश मजिस्ट्रेट द्वारा पारित किया गया हो तथा द्वितीय वह इस अध्याय एवं इस धारा के पूर्व के प्रावधानों के अधीन पारित किया गया हो जैसा कि इस प्रावधान में शब्द "Order" के पूर्व प्रयुक्त शब्द "the" से स्पष्ट है।

अधिनियम के अध्याय 4 की धारा 18 से 23 के अधीन मजिस्ट्रेट विभिन्न प्रकार के आदेश पारित करने हेतु सक्षम है । धारा 26 के अधीन सिविल कुटुम्ब या दाण्डिक न्यायालय को उनके यहां लंबित किसी विधिक कार्यवाही में धारा–18 से 22 के अधीन दी जाने वाली सहायता प्रदान करने हेतु अधिकृत किया गया है।

अधिनियम के अधीन पारित किये जाने वाले आदेशों को तीन श्रेणियों में विभाजित किया जा सकता है –

(i) **अधिनियम की धारा–18 से 22 के अधीन पारित किये जाने वाले अंतिम आदेश** अर्थात् संरक्षण आदेश, निवास आदेश, आर्थिक अनुतोष अभिरक्षा आदेश तथा प्रतिकर आदेश।

(ii) **अधिनियम की धारा–23(2) के अधीन पारित किए जाने वाले एक पक्षीय अंतरिम आदेश** अर्थात् एक पक्षीय अंतरिम संरक्षण आदेश, एकपक्षीय अंतरिम निवास आदेश, एकपक्षीय अंतरिम आर्थिक अनुतोष तथा एकपक्षीय अंतरिम प्रतिकर आदेश।

(iii) **अधिनियम की धारा–23(1) के अधीन पारित किए जाने वाले अंतरिम आदेश।** धारा–23(1) के अधीन मजिस्ट्रेट अपने समक्ष की किसी कार्यवाही में ऐसा अंतरिम आदेश पारित कर सकता है जैसा वह न्यायसंगत तथा उचित समझता है।

उपर्युक्त श्रेणियों में से जहां तक प्रथम श्रेणी अर्थात् धारा–18 से 22 के अधीन पारित किए जाने वाले अंतिम आदेशों का संबंध है, इस बिंदु पर कोई विवाद नहीं है कि यह सभी आदेश अधिनियम की धारा–29 के अधीन अपील योग्य हैं ।

जहां तक दूसरी श्रेणी अर्थात् धारा–23(2) के अधीन पारित किये जाने वाले एक पक्षीय अंतरिम आदेशों का संबंध है, ऐसे आदेश चूंकि पक्षकारों के अधिकारों को विचारण के किसी बिंदु पर न्यायनिर्णीत या प्रभावित करते हैं अतएव ऐसे आदेश अधिनियम की धारा–29 के अधीन अपील योग्य होंगे।

जहां तक तीसरी श्रेणी अर्थात् धारा–23(1) के अधीन पारित किए जाने वाले अंतरिम आदेशों का संबंध है, यदि ऐसे आदेश पूर्णतः प्रक्रियात्मक हैं तो वह अधिनियम की धारा–29 के अधीन अपील योग्य नहीं होंगे। अर्थात् आवेदन के प्रकथनों में संशोधन के आवेदन पर आदेश, स्थगन स्वीकार या अस्वीकार करने संबंधी आदेश, साक्षियों को आहूत करने हेतु समंस जारी करने का आदेश या अधिनियम के अधीन पारित आदेशों के निष्पादन हेतु पारित आदेश पूर्णतः प्रक्रियात्मक आदेश होने से धारा–29 के अधीन अपील योग्य नहीं होंगे।

यहां यह भी उल्लेख किया जाना अपेक्षित है कि सिविल न्यायालय, कुटुम्ब न्यायालय या मजिस्ट्रेट के न्यायालय से भिन्न किसी दाण्डिक न्यायालय ने अधिनियम की धारा–26 के अधीन कोई आदेश पारित किया है तो वह अधिनियम की धारा 29 के अधीन अपील योग्य नहीं होगा क्योंकि ऐसा आदेश मजिस्ट्रेट द्वारा पारित नहीं किया गया है।

इस समस्या के संबंध में *Abhijit Bhaikaseth Auti v. State of Maharashtra, 2009 Cri. L. J. 889* (Bombay High Court) के न्याय दृष्टांत में प्रतिपादित निम्नलिखित विधि अवलोकनीय है –

"As held by the Apex Court in the case of *Central Bank of*

India V. Gokul Chand, AIR 1976 SC 799 and Shankarlal Aggarwal V. Shankarlal Poddar, AIR 1965 SC 507 an appeal under Section 29 will not be maintainable against the purely procedural orders such as orders on application for amendment of pleadings, orders refusing or granting adjournments, order issuing witness summons or orders passed for executing the orders passed under the said Act etc.

My attention was also invited to Section 26 of the said Act. If relief under the provision of Sections 18 to 22 of the said Act is granted by a Civil Court or Family Court, an appeal will not lie under Section 29 in as much as an appeal under Section 29 will lie only against an order of the learned Magistrate.

Thus, the conclusions which can be summarized are as under:

(i) An appeal will lie under Section 29 of the said Act against the final order passed by the learned Magistrate under sub-section (1) of Section 12 of the said Act:

(ii) *** *** ***

(iii) An appeal will also lie against orders passed under sub-section (1) and sub-section (2) of the Section 23 of the said Act which are passed by the learned Magistrate. However, while dealing with an appeal against the order passed under Section 23 of the said Act, the Appellate Court will usually not interfere with the exercise of discretion by the learned magistrate. The appellate Court will interfere only if it is found that the discretion has been exercised arbitrarily, capriciously, perversely or if it is found that the Court has ignored settled principles of law regulating grant or refusal of interim relief.

(iv) An appeal under Section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties."

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समस्याः क्या सत्र न्यायालय दण्ड प्रक्रिया संहिता की धारा–438 के अधीन अभियुक्त को सम्पूर्ण विचारण अवधि के लिये अग्रिम प्रतिभूति प्रदान करने के लिये सशक्त है? यदि किसी अभियुक्त को ऐसे आदेश के अधीन विचारण के समापन तक आरक्षी केन्द्र से स्वतंत्र किया गया है तो क्या उसे अभियोग पत्र की प्रस्तुति के समय विचारण न्यायालय में पुनः प्रतिभूति प्रस्तुत करनी होगी?

समाधानः माननीय उच्चतम न्यायालय ने *Sidharam Satlingappa Mhetre v. State of Maharashtra AIR 2011 SC 312* के न्यायदृष्टांत में, *Gurubaksh Singh V. State of Punjab 1980 SCC (2) 565=AIR 1980 SC 1632* के न्यायदृष्टांत में संविधान पीठ द्वारा प्रतिपादित विधि का अनुसरण करते हुए यह अवधारित किया है कि अग्रिम प्रतिभूति परिमित/सीमित समय तक के लिये प्रदान नहीं की जा सकती है। इस न्याय दृष्टांत में माननीय उच्चतम न्यायालय ने स्वयं द्वारा *Naresh v. Ravindra Kumar, 2008 AIR SC 218, Salahuddin Abdul Samed Saikh v. State of Maharashtra 1996 SC 1042, Adri Dharam v. State of West Bangal, AIR 2005 SC 1057* आदि के न्याय दृष्टांतों में प्रतिपादित विधि कि, अग्रिम जमानत सीमित अवधि के लिये ही प्रदान की जा सकती है, को *Per incuriam* घोषित किया है। स्पष्ट है कि दण्ड प्रक्रिया संहिता की धारा–438 के अधीन अभियुक्त को अजमानतीय अपराध में गिरतारी की प्रत्याशंका होने पर उसे विचारण के समापन तक अग्रिम प्रतिभूति पर छोड़ा जायेगा।

यह भी कि यदि अभियुक्त ने अग्रिम जमानत के ऐसे आदेश के अनुसरण में आरक्षी केन्द्र में दण्ड प्रक्रिया संहिता की द्वितीय अनुसूची के प्रारूप संख्या 45 के अधीन अन्वेषण एवं विचारण में उपस्थित रहने की शर्त के अधीन प्रतिभूति एवं बंधपत्र प्रस्तुत कर दिये हैं तो उसे विचारण न्यायालय के समक्ष अभियोग पत्र प्रस्तुत किए जाते समय पुनः प्रतिभूति प्रस्तुत करने की कोई आवश्यकता नहीं होगी । इस संबंध में माननीय मध्यप्रदेश उच्च न्यायालय, जबलपुर द्वारा *Smt. Gajra Devi V. State of M.P. M.Cr. C. No. 3036/2011* दिनांक 18.04.2011 में प्रतिपादित किया गया है कि–

> "It is made clear that if no time limit has been fixed in the order passed under Section 438 of Cr. P.C., then in view of the ratio laid down by the Hon'ble Apex Court in the case of *Sidharam Satlingappa Mhetre* (supra), such order shall remain in force till the end of the trail. Therefore, it is the duty of the Court before whom challan is filed in such a

case, that the applicant/accused should be enlarged on bail with such terms and conditions, mentioned for compliance of the Arresting Authority, even if there is no specific direction in the bail order."

परंतु यदि आरक्षी केन्द्र में मात्र अन्वेषण के प्रक्रम पर उपस्थिति बाबत् प्रतिभूति एवं बंध ापत्र प्राप्त किये हैं तो अभियुक्त से विचारण न्यायालय अग्रिम प्रतिभूति के ऐसे आदेश के अनुसरण में विचारण के प्रक्रम पर उपस्थिति बाबत् नवीन प्रतिभूति एवं बंधपत्र प्रस्तुत किये जाने की अपेक्षा कर सकता है। अतएव यह विचारण न्यायालय का कर्त्तव्य है कि वह अभियोग पत्र प्रस्तुत किए जाते समय यह सुनिश्चित कर ले कि क्या अभियुक्त से ऐसे अग्रिम प्रतिभूति के आदेश के अनुसरण में आरक्षी केन्द्र के भारसाधक अधिकारी ने उपर्युक्त प्ररूप पर विचारण के समय उपस्थित रहने बाबत् प्रतिभूति एवं बंधपत्र प्राप्त किए हैं अथवा नहीं।

मुख्य न्यायिक दण्डाधिकारी इस संबंध में संबंधित पुलिस अधीक्षक को पत्र लिखकर सूचित कर सकते हैं कि वह अपने अधीनस्थ समस्त आरक्षी केंद्रों के भारसाधक अधिकारियों को निर्देशित करें कि अग्रिम प्रतिभूति के ऐसे आदेश के अनुसरण में अभियुक्त से प्रतिभूति एवं बंधपत्र दण्ड प्रक्रिया संहिता की द्वितीय अनुसूची के प्ररूप–45 के अनुसार अन्वेषण एवं विचारण में उपस्थिति की शर्त के अधीन निष्पादित कराए जायें।

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Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.

— MARTIN LUTHER KING, JR.

PART - II

NOTES ON IMPORTANT JUDGMENTS

63. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 3(2) and 20 TRANSFER OF PROPERTY ACT, 1882 – Section 106
Where property belonging to registered and charitable trust – Tenancy can be terminated straightway by issuing notice under Section 106 of T.P. Act.
It is not necessary for the Court to examine whether the income of the trust is being utilized for the welfare of the trust in connection with exemption u/s 3 of the Accommodation Control Act and for this purpose, Registrar of public trust is competent authority – Provisions of Section 20 of the Act apply in this case.

Shrimal and others v. Shri Achal Gachh Kachhi Visa Oswal Jain Shwetambar Dharmik Parmarthik Nyas and others
Judgment dated 17-08-2010, passed by the M.P. High Court in S.A. No. 869/2009, reported in 2011 (1) MPHT 40

Held :

In the present case, no specific plea was raised by the respondent/ trust that the income of the trust is not being utilised for carrying on the activities of the trust. Exh. P-4 is the balance-sheet for the year 2004-05. From perusal of the balance-sheet it is evident that the respondent/trust is having different accounts from where the trust activities are being carried out. There is nothing on record on the basis of which it can be said that the income of the trust is not being utilised for carrying out the trust activities. Apart from this when the notification has been issued by the State Government whereby all the trusts have been exempted and the validity of the notification has been upheld by the Hon'ble Apex Court, therefore, it is not necessary for this Court to examine that the income of the trust is being utilised for the welfare of the trust. Otherwise also for this purpose Registrar of Public Trust is the Competent Authority.

Apart from this even for the sake of arguments it is assumed that for getting the benefit of exemption it is necessary to prove that the income of the trust is being utilised for carrying on the activities of the trust and the burden is on the trust, then too, the provisions of Section 12 of the Act will not apply in that case, as in that situation it is Section 20 of the Act which governs the case. Section 20 of the Act deals with special provisions for recovery of possession for the accommodations of which landlord is public institution and the accommodation is required for the furtherance of its activities. Undisputedly the respondent No. 1 is public institution.

In the matter of *Anantrao v. Shri Achal Gachh Kachhi Bisa passed in S.A. No. 258/08* and also in the matter of *Madanlal v. Shri Achal Gachh Kachhi Bisa*

Passed in S.A. No. 974/07 this Court vide judgment dated 18-12-09 and 21-11-08 respectively has taken the view that the only requirement to obtain decree of eviction is to terminate the tenancy under Section 106 of Transfer of Property Act. In the matter of *Betibai v. Nathooram, AIR 1999 SC 1767,* Hon'ble Apex Court has taken into consideration the notification dated 7-9-89 and has held that in view of the notification property belonging to registered and Charitable Trust exempted from the provisions of M.P. Public Trust Act, tenancy can be terminated straightway by issuing notice under Section 106 of Transfer of Property Act. In the facts and circumstances of the case, this Court is of the view that the learned Appellate Court committed no error in holding that the respondent/ trust was entitled to claim exemption under Section 3 of the Act. Hence, appeal filed by the appellants has no merits and is hereby dismissed.

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***64. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12**

(i) Suit for eviction – Partition – Appellant inducted as tenant by the father of respondent – Respondent/Plaintiff filed suit for eviction on the ground of Section 12 (1)(a) & (f) with a claim that suit shop has fallen to his share in family partition – Held, it is always open to tenant to show that partition was not *bona fide* and was a sham transaction to overcome rigours of rent control laws.

(ii) Suit for eviction – Partition – There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation amongst themselves – It is the exclusive right of lessor that whether the tenanted premises shall be retained jointly by all the lessors or they would partition it amongst themselves – No objection can be raised by the tenant particularly when from the very beginning the property was jointly owned by several persons.

Mohanlal v. Subhash & ors.

Judgment dated 20.07.2010 passed by the High Court of M.P. in S.A. No. 316 of 2009, reported in ILR (2011) M.P. 159

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65. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 18 (3)

Eviction suit of the applicant was decreed by the Court on the ground enumerated under Section 12 (1) (h) of the M.P. Accommodation Control Act, 1961, subject to provision of Section 18 of the said Act – In compliance of such decree, the premises was vacated by the respondents – But newly constructed premises was not handed over to the respondent by plaintiff – Respondent filed an application under Section 18 (3) of the Act and after holding the inquiry, the executing Court came to the conclusion that the respondents are entitled to get possession of the premises – The warrant of possession rightly issued.

Pratap Raghavji Bhagwan Virajman Mandir v. Krishna and others

Judgment dated 06.12.2010, passed by the M.P. High Court in Civil revision No. 474 of 2010, reported in 2011 (1) MPLJ 200

Held:

Having heard the counsel, in order to consider his submission, I have carefully gone through the averments of the revision memo as well as the papers placed on the record. Undisputedly, the eviction suit of the applicant herein was decreed by the trial Court on the grounds enumerated under section 12 (1) (a) and (h) of the Act. On filing the appeal at the instance of the respondents, the same was allowed in part and the decree passed under section 12 (1) (a) of the Act was set aside while the decree passed under section 12 (1) (h) of the Act, subject to provision of section 18 (3) of the Act, with some direction, has been affirmed by the appellate Court vide judgment dated 31-07-2007 in Civil Appeal No. 38-A/06 as evident from Annexure A-3. It also appears from the papers placed on the record that in compliance of such decree, the premises was vacated by the respondents herein thereafter, the same has been constructed by the applicant. But in compliance of the decree, in accordance with provision of section 18 (3) of the Act when the possession of newly constructed premises was not handed-over to the respondents then they filed the impugned application under section 18 (3) of the Act and after holding the inquiry, the executing Court has come to this conclusion that the respondent herein complied with the terms of the decree and, in such premises, they are entitled to get the possession of the premises in the reconstructed house from the applicant and in such premises, the warrant of possession has been directed to be issued against the applicant with respect of the alleged premises.

In the aforesaid premises, it is apparent that the respondents herein filed an application under section 18 (3) of the Act in compliance of the decree and as per findings of the executing Court, in the impugned order, the requisite sum of the rent has also been deposited by the respondents and, in such premises, I am of the considered view that the executing Court has not committed any error in allowing the aforesaid application of the respondents and in directing the warrant of possession to make available the alleged premises to the respondents from the applicant.

Besides the above, I am of the considered view that in any case after passing the decree at the stage of its execution, the executing Court cannot go behind the terms of the decree as laid down by the Apex Court in the matter of *V. Ramaswami Aiyengar and others v. T.N. V. Kailasa Thevar, AIR (38) 1951 SC and Onkar v. Heeralal, 1982 MPWN 225.* In such premises also the applicant did not have any authority or right to deprive the respondents from getting the fruits of the impugned decree thereby the right of re-entry in the premises has been extended in their favour.

In the aforesaid premises, I have not found any perversity, infirmity or irregularity in the order impugned requiring any interference under the revisional jurisdiction of this Court.

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66. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7, 11 & 34
A guarantor of loan, who is not a party to loan agreements containing the arbitration agreement executed between the landlord and the borrower, cannot be a party to a reference to arbitration in regard to dispute relating to repayment of such loan and subjected to arbitration award.
The scope of Section 7 (4) (c) of the Act relating to phrase "statements of claim and defence", explained.

S.N. Prasad, Hitek Industries (Bihar) Limited v. Monnet Finance Limited and others

Judgment dated 22.10.2010 passed by the Supreme Court in Civil Appeal No. 9224 of 2010, reported in (2011) 1 SCC 320

Held:

There can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an Arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.

There is no dispute that the loan agreements among the first respondent (lender), the second respondent (borrower) and the third respondent (guarantor) contained a provision for arbitration. But the appellant was not a party to the same.

An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under Section 7(4)(a) or (b) of the Act, in so far as appellant was concerned, though there was an arbitration agreement as defined under section 7(4)(a) of the Act in regard to the second and third respondents. As the letter dated 27.10.1995 does not refer to any document containing an arbitration clause, there is also no arbitration agreement between first respondent and appellant as contemplated under Section 7(5) of the Act.

What therefore remains to be considered is whether there is an arbitration agreement as contemplated under section 7(4)(c) of the Act, which provides that an arbitration agreement in writing can be said to exist, if it is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. The

statement of claim filed by the first respondent before the arbitrator does not contain an allegation or assertion of an arbitration agreement between the first respondent and appellant. Nor has the appellant accepted the existence of any arbitration agreement by not denying such arbitration agreement in the defence filed before the arbitrator. On the other hand, the appellant specifically contended before the arbitrator that there was no arbitration agreement between them (first respondent and appellant) and therefore the arbitrator did not have jurisdiction.

But the words, 'statements of claim and defence' occurring in Section 7(4)(c) of the Act, are not restricted to the statements of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) of the Act. It follows that if in the application filed under Section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.

To constitute an arbitration agreement under Section 7(4)(c) of the Act, what is required is a statement of claim containing a specific allegation about the existence of an arbitration agreement by the applicant and 'non-denial' thereof by the other party. An 'allegation' is an assertion or declaration about a fact and also refers to the narration of a transaction. As noticed above, in the entire application under Section 11 of the Act, there was no allegation as to the existence of any arbitration agreement between first respondent and the appellant. Column (3) containing "Names of other parties to arbitration agreement with addresses" cannot be considered to be an assertion or declaration about the existence of an arbitration agreement between the first respondent and appellant. Section 7(4)(c) of the Act cannot therefore be relied upon to prove the existence of an Arbitration agreement.

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***67. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 (3) LIMITATION ACT, 1963 – Section 14**

The provisions of Section 14 of the Limitation Act would apply to an application under Section 34 of the Arbitration and Conciliation Act, 1996 even though the period of limitation will continue to be three months (subject to extension under the proviso to sub-section (3) of Section 34 of 1996 Act) but in computing the limitation period of three months for the application under Section 34 (1) of 1996 Act, the time during which the applicant was prosecuting the matter bonafidely and with due diligence before the wrong court will have to be excluded.

Coal India Ltd. and another v. UjjalTransport Agency and others
Judgment dated 21.10.2010, passed by the Supreme Court in Civil Appeal No. 8703 of 2010, reported in AIR 2011 SC 503

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68. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Sections 3 and 4 EVIDENCE ACT, 1872 – Sections 16 and 114

(i) Whether the suit for recovery of house property filed prior to the Act of 1988 coming into force is prohibited by Section 4 of that Act? Held, No.

(ii) Bonafide purchaser for value without notice – Presumption of service of notice – If a letter properly directed containing the notice to informing that the sender is the real owner of the property, was proved to have been put into the post office, it could be presumed that the letter reached its destination at the proper time by the regular course of business of the post office and was received by the person to whom it was addressed .

Samittri Devi and another v. Sampuran Singh and another
Judgment dated 21.01.2011, passed by the Supreme Court in Civil Appeal No. 846 of 2011, reported in AIR 2011 SC 773

Held:

The High Court has clearly erred in ignoring the binding judgment of a Bench of three Judges of this Court in *R. Rajagopal Reddy v. Padmini Chandrasekharan, AIR 1996 SC 238 = (1995) 2 SCC 630.* By this decision, this Court had reversed its earlier judgment in *Mithilesh Kumari and Anr. v. Prem Behari Khare, AIR 1987 SC 1247 = (1989) 2 SCC 95* and had held in terms that suits filed prior to the application of the Act would not be hit by the prohibition under Section 4 of that Act. Section 4 (1) of the Benami Transactions (Prohibition) Act, 1988 reads as follows:

> "*Prohibition of the right to recover property held benami.*– (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property".

While reversing the earlier decision of this Court in *Mithilesh Kumar* (supra), a bench of three Judges observed in para 11 of *R. Rajagopal Reddy* (supra) as follows: –

> "Before we deal with these six considerations which weighed with the Division Bench for taking the view that Section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, howsoever earlier they might have been filed, if they were pending at different

stages in the hierarchy of the proceeding even up to this Court, when Section 4 came into operation, it would be apposite to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing right of the real owners of properties held by others benami. Such an Act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualize that sub-section (1) of Section 4 states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4 (1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4 (1) that is 19.05.1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4 (1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4 (1)."

In the impugned judgment, the High Court nowhere refers to the judgments in *R. Rajagopal Reddy's case* (supra) although the same was very much referred to and relied upon by the appellant to counter the contrary submission of the respondent No. 1. The High Court has, therefore, committed a serious error of law in holding that the Additional District Judge has misread the evidence on record while coming to the conclusion that the suit property was the Benami Property of the plaintiff-appellant No. 1 herein and that her suit to enforce the right concerning the same shall not lie. In fact there was no such misreading of evidence on the part of the first appellate court, and hence there was no occasion for the High Court to frame such a question of law in view of the prevailing judgment in *R. Rajagopal Reddy* which had been rightly followed by the first appellate court.

The High Court has held that there is nothing on record to suggest that respondent No. 1 herein had, in fact, been served with the notice dated 8.4.1987 and thereby reversed the finding rendered by the first appellate court. It is

material to note in this behalf that it was canvassed by respondent No. 1 before the first appellate court that a certificate of posting is very easy to procure and it does not inspire confidence. The Additional District Judge observed that there was no dispute with this proposition of law, but there was no such averment or even allegation against appellant No. 1 herein, that she had procured the certificate of posting nor was there any such pleading to that effect. It is no this background that the first appellate court has drawn the inference that the notice must be deemed to have been served within the period of five days thereafter i.e. before 13.4.1987, the date on which the respondent No. 1 herein entered into an agreement to purchase the suit property. It is also material to note that the appellant's premises are situated on College Road, Pathankot and so also the residence of the first respondent where the notice was sent. Therefore, there was nothing wrong in drawing the inference which was permissible under Section 114 of the Evidence Act that such notice must have been duly served in the normal course of business before 13.4.1987.

We may fruitfully refer to a few judgments laying down the propositions relating to service of notice. To begin with, we may note two judgments in the context of the notice to quit, sent to the tenants under Section 106 of the Transfer of Property Act, 1882, though both the judgments are concerning the notices sent by registered post. Firstly, the judgment in the case of *Harihar Banerji v. Ramshashi Roy, AIR 1918 PC 102,* wherein the Privy Council quoted with approval the following observations in *Gresham House Estate Co. v. Rossa Grande Gold Mining Co., 1870 Weekly Notes 119* to the following effect:

> ".....if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself."

Secondly, we may refer to the judgment of a Full Bench of the Allahabad High Court in the case of *Ganga Ram v. Smt. Phulwati, AIR 1970 Allahabad 446,* wherein the Court observed in paragraphs 12 and 13 as follows:

> "12. When a registered article or a registered letter is handed over to an accepting or receiving post office, it is the official duty of the postal authorities to make delivery of it to the addressee. Human experience shows that except in a few exceptional cases letters or articles received by the post office are duly, regularly and properly taken to the addressee. Consequently as a proposition it cannot be

disputed that when a letter is delivered to an accepting or receiving post office it is reasonably expected that in the normal course it would be delivered to the addressee. That is the official and the normal function of the post office.

13. Help can also be taken from Section 16 of the Indian Evidence Act which reads as follows: –

"When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations:

(a) The question is, whether a particular letter was dispatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant."

Having seen the factual and the legal position, we may note that in the present case it has already been established that the appellant had purchased the property out of her own funds. Therefore, it could certainly be expected that when she came to know about the clandestine sale of her property to respondent No.1, she would send him a notice, which she sent on 08.04.1987. As noted earlier, the notice is sent from one house on the College Road to another house on the same road in the city of Pathankot. The agreement of purchase is signed by the defendant No. 3 five days thereafter i.e. 13.04.1987. The appellant had produced a copy of the notice along with postal certificate in evidence. There was no allegation that the postal certificate was procured. In the circumstances, it could certainly be presumed that the notice was duly served on respondent No. 1 before 13.04.1987. The High Court, therefore, erred in interfering in the finding rendered by the Additional District Judge that respondent No. 1 did receive the notice and, therefore, was not a bona fide purchaser for value without a notice.

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69. CHARTERED ACCOUNTANTS ACT, 1949 – Sections 24, 24-A, 26 and 28 INDIAN PENAL CODE, 1860 – Sections 419, 420, 465, 468, 472 and 473 Offence under Sections 24, 24-A and 26 of the Chartered Accountants Act, 1949 as well as offence under the Indian Penal Code or any other law – Prosecution thereof – The accused cannot be prosecuted for offence under the 1949 Act without complaint as required under Section 28 of that Act – However, prosecution can be commenced for offence under Indian Penal Code or any other law even in absence of such complaint – Position explained.

Institute of Chartered Accountants of India v. Vimal Kumar Surana and another

Judgment dated 01.12.2010 passed by the Supreme Court in Criminal Appeal No. 2263 of 2010, reported in (2011) 1 SCC 534

Held:

What is most significant to note is that prohibition contained in Section 28 against prosecution of a person except on a complaint made by or under the order of the Council or of the Central Government is attracted only when such person is sought to be prosecuted for contravention of the provisions contained in Section 24 or sub-section (1) of Sections 24A, 25 or 26 and not for any act or omission which constitutes an offence under the IPC.

The use of expression 'without prejudice to any other proceedings which may be taken against him' in sub-section (2) of Sections 24-A and 26 and somewhat similar expression in sub-section (2) of Section 25 show that contravention of the provisions contained in sub-section (1) of those sections can lead to filing of complaint under Section 28 of the Act and if the particular act also amounts to an offence under the IPC or any other law, then a complaint can also be filed under Section 200 Cr.P.C. or a first information report lodged with the police under Section 156 Cr.P.C. The said expression cannot be given a restricted meaning in the context of professional and other misconducts which may be committed by a member of the Institute and for which he may be punished under Section 21-B(3) because the violation of Sections 24 to 26 can be committed by a person who may or may not be a chartered accountant as defined in Section 2(b).

In other words, if the particular act of a member of the Institute or a non-member or a company results in contravention of the provisions contained in Section 24 or subsection (1) of Sections 24A, 25 or 26 and such act also amounts criminal misconduct which is defined as an offence under the IPC, then a complaint can be filed by or under the order of the Council or of the Central Government under Section 28, which may ultimately result in imposition of the punishment prescribed under Section 24 or sub-section (2) of Sections 24-A, 25 or 26 and such member or non member or company can also be prosecuted for any identified offence under the IPC.

The object underlying the prohibition contained in Section 28 is to protect the persons engaged in profession of chartered accountants against false and untenable complaints from dissatisfied litigants and others. However, there is nothing in the language of the provisions contained in Chapter VII from which it can be inferred that Parliament wanted to confer immunity upon the members and non-members from prosecution and punishment if the action of such member or non-member amounts to an offence under the IPC or any other law.

The issue deserves to be considered from another angle. If a person cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is (Section 416 IPC), then he can be charged

with the allegation of cheating by personation and punished under Section 419 for a term which may extend to 3 years or with fine or both. If a person makes any false document with the intent to cause damage or injury to the public or to any person, or to support any claim or title, then he can be prosecuted for an offence of forgery (Section 463) and can be punished under Section 465 with imprisonment which may extend to 2 years or with fine or with both. If a person commits forgery for the purpose of intending that the document forged by him shall be used for the purpose of cheating then he can be punished with imprisonment for a term which may extend to 7 years and fine (Section 468). If a person makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for committing any forgery which would be punishable under Section 467 or with such intent, in his possession any such seal, plate or other instrument, knowing the same to be counterfeit then he is liable to be punished with imprisonment for life or with imprisonment which may extend to 7 years. He shall also be liable to fine.

The provisions contained in Chapter VII of the Act neither define cheating by personation or forgery or counterfeiting of seal, etc. nor provide for punishment for such offences. If it is held that a person acting in violation of Section 24 or contravening sub-section (1) of Sections 24-A and 26 of the Act can be punished only under the Act even though his act also amounts to one or more offence(s) defined under the IPC and that too on a complaint made in accordance with Section 28, then the provisions of Chapter VII will become discriminatory and may have to be struck down on the ground of violation of Article 14.

Such an unintended consequence can be and deserves to be avoided in interpreting Sections 24-A, 25 and 26 keeping in view the settled law that if there are two possible constructions of a statute, then the one which leads to anomaly or absurdity and makes the statute vulnerable to the attack of unconstitutionality should be avoided in preference to the other which makes it rational and immune from the charge of unconstitutionality. That apart, the Court cannot interpret the provisions of the Act in a manner which will deprive the victim of the offences defined in Sections 416, 463, 464, 468 and 471 of his right to prosecute the wrong doer by filing the first information report or complaint under the relevant provisions of Cr.P.C.

We may add that the respondent could have been simultaneously prosecuted for contravention of Sections 24, 24-A and 26 of the Act and for the offences defined under the IPC but in view of the bar contained in Article 20(2) of the Constitution read with Section 26 of the General Clauses Act, 1897 and Section 300 Cr.P.C., he could not have been punished twice for the same offence.

In view of the above discussion, the argument of the learned senior counsel appearing for the respondent that the Act is a special legislation *vis-à-vis* IPC and a person who is said to have contravened the provisions of sub-section (1) of Sections 24, 24-A, 25 and 26 cannot be prosecuted for an offence defined under the IPC, which found favour with the High Court does not commend acceptance.

In the result, the appeals are allowed. The impugned order is set aside and the matter is remitted to the trial Court for considering whether the allegations contained in the complaint lodged by Brij Kishor Saxena constitute any offence under the IPC. If the trial Court comes to the conclusion that the allegations do constitute one or more offence(s), then it shall proceed against the respondent in accordance with law. However, it is made clear that in the absence of a complaint having been filed under Section 28, no charges be framed against the respondent for the alleged contravention of Sections 24, 24-A or 26 of the Act.

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70. CIVIL PROCEDURE CODE, 1908 – Section 9
LAW OF TORTS:
Premature suit disclosing cause of action, not required to be dismissed in every case because it does not go to the root of jurisdiction of the Court – However, Court has to examine whether any irreparable prejudice or manifest injustice is caused to the defendant.

Raghbinder Singh v. Bant Kaur and others

Judgment dated 22.09.2010 passed by the Supreme Court in Civil Appeal No. 4017 of 2003, reported in (2011) 1 SCC 106

Held:

The learned counsel appearing for the appellant submitted that the suit, when it was filed was quite premature and the defect was such that it could not be cured by any developments after the filing of the suit. Learned counsel stated that the occurrence took place on 7.08.1994 and the suit was filed on 20.12.1994 when even the charge sheet might not have been filed. The date on which the suit was filed, the culpability of the defendants was yet to be judged in a criminal trial and, therefore, the suit, according to him, was premature. The judgment in the criminal trial was pronounced on 17.08.1996 and, in the criminal appeal, by the High Court on 20.11.2004. Their SLP was dismissed by this Court on 18.08.2005. The learned counsel appearing for the appellant contended that all these developments would not cure the defect in the suit which was not maintainable on the date it was filed.

At this stage appellant's counsel has brought to our notice a decision of this Court in *Vithalbai (P) Ltd. v. Union of India, (2005) 4 SCC 315.* In para 22 of that judgment, it has been observed that:

> "22. We may now briefly sum up the correct position of law which is as follows:
>
> A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the

root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases : (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See *Samar Singh v. Kedar Nath, 1987 Supp SCC 663*) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained."

This decision gives complete answer to the aforesaid point. Therefore, appeal is dismissed.

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71. CIVIL PROCEDURE CODE, 1908 – Section 11
EVIDENCE ACT, 1872 – Sections 40 and 44

(i) Whether compromise decree operates as *res judicata* ? Held, No – Compromise decree is not a decision by the Court – It merely sets the seal of the Court on the agreement of the parties – The Court does not decide anything – Hence, it does not operate as *res judicata*.

(ii) Whether decree or order obtained by fraud operates as *res judicata*? Held, No – Such decree or order is a nullity and *non est* in the eye of law – Any Court at any time and in any proceeding can consider and decide the question whether a prior adjudication is vitiated by fraud.

Ramnivas Sharma v. Dinesh Sharma & ors.

Judgment dated 14.10.2010 passed by the High Court of M.P. in Civil Revision No. 125 of 2008, reported in 2011(I) MPJR 156

Held :

Plea of res judicata on the basis of dismissal of F.A. No. 565/05 by this Court vide order dated 15.11.06 is not available to the revisionist because the said order is not on merits but is on the basis of compromise. Section 11 of CPC is not strictly applicable to the compromise decree as it applies in terms only to what has been heard and finally decided by the Court, This being so, a compromise decree does not operate as res judicata. I may successfully refer for this purpose on the following passage from the decision of Supreme Court of India in the case of *Pulvarthi Venkata Subba Rao and others v. Valluri Jagannadha Rao (deceased) by his heirs and legal representatives and others, AIR 1967 SC 591*:

> 10.....The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties, The court did not decide anything. Nor can it be said that a decision of the Court was implicit in it.....

Section 44 of the Evidence Act enables a plaintiff to avoid the effect of res judicata by establishing fraud or collusion. This provision reads as under:

> "**S.44** Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 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."

Hon. Apex Court in the case of *A. V. Papayya Sastry and others v. Govt. of A.P. and others, (2007) 4 SCC 221,* has observed as under:

> "22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order by the first court or by the final court – has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."
>
> 26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one grains at the loss of another. Even most solemn proceedings, stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam....."

It has also been observed, in paragraph 15, by the Apex Court in the case of *Hamza Haji v. State of Kerala and another, (2006) 7 SCC 416:*

> "15.....Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a court to consider and decide the question whether a prior adjudication is vitiated by fraud."

Admittedly, present plaintiffs were not parties to Civil Suit No. 5A/01 and they cannot be blamed for non-production of said registered sale deed. However, in order to avoid the rigour of Section 11 of CPC they have every right to show that important document like registered sale deed dated 30-12-65 was deliberately suppressed in fraudulent and collusive manner in order to extend undue benefit to defendant/petitioner. Division Bench of Allahabad High Court in the case of *Ibne Hasan v. Smt. Hasina Bibi and others, AIR 1984 Allahabad 216* has observed:

> "8. Section 40 of the Evidence Act even without using the terms 'Res judicata' refers to the consequences of res judicata. It is because of Section 40 that judgment, which is relied on by a party in a subsequent suit in support of its plea of res judiciata, becomes relevant and can be read in evidence, A previous judgment operates as res judicata between the parties to the earlier suit as also to persons claiming title through any such party. When Section 44 of the Evidence Act permits a party to a subsequent suit to prove that any of the ingredients of the said section is made out even in respect of a judgment which is relevant under Section 40 there seems to be no escape from the conclusion

that even such judgment, which would otherwise operate as res judiciata and would not be possible to be avoided by the parties to the suit in which such judgment was delivered or by persons claiming through any such party, can be avoided by them if any of the ingredients of Section 44 is made out. In that event such judgment would not be relevant and cannot form the basis of the plea of res judiciata..... "

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72. **CIVIL PROCEDURE CODE, 1908 – Sections 11 & 47 and Order 21 Rule 10** *Res judicata* **– Maintainability of second execution – Decree-holder has objected to the report of Revenue Inspector – Executing Court could not have passed the final order on merits – In absence of decree-holder, in that case, execution could be dismissed for want of prosecution – Further, liberty to file another application for execution was granted by High Court – Subsequent application not barred by principle of** *res judicata* **or by limitation – It is in continuation of earlier execution proceeding.**
Application for execution – Limitation – Application for execution filed within 12 years from the date of decree passed by last appellate Court is within limitation, as appeal is continuation of suit.

Manrakhan v. Jayveer and others

Judgment dated 13.10.2010, passed by the M.P. High Court in Civil Revision No. 345/2009, reported in 2011 (1) MPLJ 274

Held :

Initially the suit of the respondents was decreed by the trial Court, vide order dated 20.08.1991 and in continuation of such suit second appeal was dismissed by this Court, vide order dated 01.10.1996 and subsequent to that the respondents herein filed the execution proceeding firstly on dated 06.01.1997 well within limitation from the date of judgments by the trial Court as well as of the second appeal. Undisputedly on issuing the warrant of possession under such execution, it's service report was received. On disputing the same by decree holder, vide order dated 11.05.1999 in that regard, on some points the report from Tahsildar was requisitioned. When it was not received on a date fixed for the same, then again some order in this regard was passed on dated 13.08.1999. Inspite that because of non-payment of PF on behalf of the respondents the requisite report was not received, on which again vide order dated 16.08.19999 such report was requisitioned and case was fixed on 28.08.1999. On such date without receiving such report of the Tahsildar and also without assigning any specific reasons to rely on such disputed report of the Revenue Inspector on that basis after recording full and final satisfaction of the decree in the absence of the decree holders the execution was dismissed. In the civil proceeding of the plaintiff-applicant or the decree holders are not present, then no order could be passed on merits. In such premises, such

execution would have been dismissed for want of prosecution and not on merits or in any case on the basis of disputed service report of warrant the executing Court did not have any authority to record the full and final satisfaction of the decree. Subsequent to it, such order was challenged at the instance of the respondents before this Court by way of Revision No. 2237/99. On hearing the same on dated 02.02.2000, the respondents' counsel sought permission to withdraw the same with liberty to move the executing Court by an appropriate application and on consideration after granting such liberty the revision petition was dismissed as withdrawn, as evident from Annexure A-7 with this revision.

The impugned execution proceeding was filed on behalf of the respondents under the aforesaid liberty, which was given by this Court in the aforesaid revision filed in continuation of the earlier execution proceeding/ application. Therefore, such application shall be deemed to be filed in continuation of the earlier execution proceeding. So same could not be dismissed either by holding to be barred by the principle of res-judicata or by holding the same to be barred by limitation from the date of decree passed by the trial Court. So in such premises, I have not found any perversity, infirmity or illegality or anything against the propriety of law in the order impugned rejecting the objections of the applicant.

Apart from the above for the sake of arguments, if it is deemed that subsequent to passing the order by this Court in Civil Revision No. 2237/99, vide dated 2-2-2000 under such liberty, second execution proceeding was filed on behalf of the respondents in the executing Court on dated 16-4-2004, even then the same could not be thrown away holding the same to be filed after twelve years from the date of decree of the trial Court as such on taking into consideration the spirit of the provision of Article 136 of the Limitation Act, it can be said safely that appeal being continuation of the suit, the judgment and decree of the subordinate Court merged in the decree of the appeal and pursuant to that the limitation to file the execution proceeding shall be deemed from the date of passing the judgment, decree by the last Appellate Court irrespective of the circumstance whether any interim stay order or interim injunction was passed against the judgment and decree appealed with some conditions and such conditions were not complied with by the party. So in such premises, the aforesaid execution filed on 16-4-2004 being filed within twelve years from the date of judgment passed in second appeal is within limitation. My aforesaid view is fully fortified by the decision of Rajasthan High Court in the matter of *Sayed Abdul Rauf v. Nurul Hussain and others, AIR 1992 Rajasthan 3,* in which it was held as under :–

> 10. As I have already observed, on the recommendation of the Law Commission, the Parliament enacted the present Art. 136 which substantially re-produces the repealed section 48, Civil Procedure Code view to overcome the difficulty which used to be faced by the litigants and the Courts. Enactment of Art. 136 has simplified the controversy

and has provided that for the execution of any decree or order of any Civil Court, the period of limitation would be twelve years. This period of limitation begins to run "when the decree or order becomes enforceable". Whether there was a stay order or not, that was not material for the purposes of calculating the period of limitation and giving effect to the phrase 'when it becomes enforceable'.

11. It is settled law that the decree of the trial Court gets merged with the decree of the Appellate Court and the letter supersedes the decree of the trial Court. This merger takes place irrespective of the fact that the Appellate Court affirms, modifies or reverses the lower Court's decree....."

Aforesaid case was decided by such High Court taking into consideration earlier decision of the Apex Court in the matter of *Gojer Brothers (P) Ltd. M/s v. Ratan Lal Singh, AIR 1974 SC 1380.*

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***73. CIVIL PROCEDURE CODE, 1908 – Section 20**
CONTRACT ACT, 1872 – Section 28
Ouster of jurisdiction – Head Office of respondent situated at Bombay and Branch Office at Indore – Agreement entered into between parties at Bombay and contract was to be performed at Indore – Agreement containing clause that "agreement shall be subject to jurisdiction of Court at Bombay" – Ouster of jurisdiction of Court at Indore – Held – Intention to exclude Court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms – Import of use of words 'only', 'alone', 'exclusive' in exclusion clause would reflect the intention to exclude the jurisdiction – There was no ouster clause in the agreement such as words 'alone', 'only', 'exclusive' – Court at Indore has jurisdiction – Appeal allowed.

Life Care International v. Mahindra & Mahindra Ltd.
Judgment dated 28.09.2010 passed by the High Court of M.P. in M. A. No. 2206 of 2008, reported in ILR (2011) M.P. 175

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***74. CIVIL PROCEDURE CODE, 1908 – Order 2 Rule 2 and Order 6 Rule 17**
SPECIFIC RELIEF ACT, 1963 – Sections 20 and 34
LIMITATION ACT, 1963 – Article 54

(i) Where appellant (plaintiff) filed the suit for declaration of title and injunction and omitted to include relief of specific performance, even cause of action also accrued therefor on specific refusal and cancellation of agreement for sale by respondent (defendant) – It would amount to relinquishment of claim of specific performance as the principles of Order 2

Rule 2 CPC which are based on public policy would be attracted in the facts of this case.

(ii) The subsequent inclusion of the plea of specific performance by way of amendment, after lapse of 11 years, having regard to Article 54 of the Limitation Act cannot be allowed, being barred by limitation.

Van Vibhag Karmachari Griha Nirman Sahakari Sanstha Maryadit (Regd.) v. Ramesh Chander & Ors.

Judgment dated 19.10.2010, passed by the Supreme Court in Civil Appeal No. 8982 of 2010, reported in AIR 2011 SC 41

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75. **CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**

Amendment of written statement – Defendant filed application seeking replacement of entire written statement on the ground that the same was filed by his counsel without his knowledge and pleadings are contrary to fact – Held, there is no allegation of fraud being committed on him – Each page of written statement bear signatures of petitioner – Petitioner cannot withdraw the admission which he had tendered in written statement by substituting such written statement with a fresh one.

Dilip Bharti v. Smt. Meerabai & anr.

Judgment dated 12.10.2010 passed by the High Court of M.P. in W.P. No. 7931 of 2010, reported in ILR (2011) M.P. 406 (DB)

Held:

True it is that, the defendants are at liberty to take inconsistent plea in the written statement which can also be brought by way of an amendment as is observed in *Baldev Singh and others v. Monohar Singh and another, (2006) 6 SCC 498,* wherein it is held that "inconsistent pleas can be raised by the defendants" (paragraphs 15 and 16). However, whether the said proposition would also be true in case where the defendant intends to withdraw the admission which he had tendered in written statement by substituting such written statement with a fresh one has been answered in negative by three Judges Bench of the Supreme Court in *M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v. M/s. Ladha Ram and Co., (1976) 4 SCC 320* wherein their Lordships were pleased to observe:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High

Court rightly rejected the application for amendment and agreed with the trial court."

In view of the law above and the facts of the present case we are of the considered opinion that the trial court did not falter in rejecting the application preferred by the petitioner/defendant No. 2 seeking replacement of written statement with entire new facts.

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76. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 and Order 8 Rule 6-A Amendment of written statement at appellate stage sought to incorporate relief of possession by way of counter claim – Amendment cannot be allowed.

Gayathri Women's Welfare Association v. Gowramma and another

Judgment dated 11.01.2011, passed by the Supreme Court in Civil Appeal No. 6344 of 2009, reported in AIR 2011 SC 785

Held:

During the pendency of the appeal before the High Court, the respondents filed an application seeking amendment of the written statement to include the additional prayer in the counter claim for recovery of possession of the suit schedule property falling within Survey No.110/1. The High Court noticed that in the normal course an application for amendment of the written statement at the stage of appeal from the original decree was not entertainable. However, since the dispute was pending between the parties from the year 1981 and the suit was pending since 1999, no injustice would be caused to the appellant if the prayer for possession was also permitted to be incorporated in the counter claim. Justification given for taking such a view was to avoid multiplicity of proceedings. To buttress its conclusion, the High Court relied on a judgment of this Court in the case of *Sant Lal Jain v. Avtar Singh, AIR 1985 SC 857.*

We have considered the submissions made by the learned counsel for the parties. The trial court upon a detailed appreciation of the evidence led by the parties concluded that on the basis of the material on record, it can be said that the possession of the appellant in respect of the plaint schedule property as against the respondents was long, settled and uninterrupted. On the basis of the aforesaid conclusion, the trial court proceeded to decide the issue with regard to the counter claim of the respondents.

It was noticed that the respondents wanted a direction in the nature of the Mandatory Injunction, to be given to the appellant to demolish the illegal construction, which came subsequent to the passing of the status quo order. We may notice here that the status quo order referred to by the trial court had been passed on 7th January, 1999. The trial court, however, observed that "the order of status quo was granted in respect to disputed property. The disputed property is what is described in the plaint schedule and not in the schedule to

the written statement." Therefore, it was observed that the respondents would have the cause of action available to seek possession based on title and not on the basis of mandatory injunction on account of violation of status quo order. In these circumstances, the trial court observed that the appropriate remedy available to the respondents is to sue for possession.

In our opinion, the High court, while allowing the claims of the respondent to include the prayer for possession in the counter claim, failed to appreciate that the order passed by the trial court did not cause any prejudice to the respondents. The trial court had merely held that the remedy of an independent suit was available to the respondents.

The trial court has clearly held that the cause of action for the relief of possession arose to the respondents many years ago. They may, therefore, have a cause of action, if any, for an independent suit. In the aforesaid case, the Court further reiterated the principle in *Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393 = AIR 1974 SC 1126* wherein it was rightly observed:

> "The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

We may notice here the observations made by this Court in the case of *Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508* which may be of some relevance. Upon considering the ratio of earlier cases in the case of *Sangaram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425, Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993* and *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala, AIR 1964 SC 11,* it was held that a right to make a counter claim is statutory and a counter claim is not admissible in a case which is admittedly not within the statutory provisions.

These observations make it clear that generally speaking the counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed. In the present case, the counter claim is sought to be introduced at the stage of appeal before the High Court.

In such circumstances, we are unable to accept the conclusions of the High Court that the discretion exercised by the trial court was in any manner, illegal or arbitrary in rejecting the counter claim of the respondents. We may notice here the observations of this Court in the case of *Rohit Singh and ors. v. State of Bihar (now State of Jharkhand), AIR 2007 SC 10* which are as follows :-

> "A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a

counterclaim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counterclaim of Respondents 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction."

These observations would show that the dismissal of the counter claim by the trial court was neither illegal nor without jurisdiction. In fact the direction issued by the High Court would clearly run counter to the aforesaid observations. In the aforesaid case, this Court was considering a situation where the evidence had been closed, arguments on behalf of the respondents had been concluded, the suit was adjourned for arguments of the appellants, the suit was dismissed for default. Subsequently, it was restored. Thereafter the respondents filed an application for amending the written statement. The counter claim was filed by the intervener. In these circumstances, it was observed that at this stage no counter claim could be entertained.

In the present case, after the matter had been remanded back, the trial court again decreed the suit of the appellants, the counter claim was dismissed for the reasons stated in the judgment of the trial court. We may restate here that the prayer in the original counter claim was only for a mandatory injunction to demolish the illegal structures in Sy.No. 110/1. It was only when the Regular First Appeal was filed for challenging the original decree that the respondents made an application under Order VI, Rule 17 for amendment of the original written statement to incorporate the counter claim with a prayer for possession of the land in dispute in Survey No. 110/1. In such circumstances, the High Court erred in disturbing the findings recorded by the trial court.

The matter herein symbolizes the concern highlighted by this Court in the case of *Ramesh Chand* (supra). Permitting a counter claim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court.

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***77. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 18**

Extension of time to incorporate amendment – Plaintiff could not amend his plaint as per Court's is order on account of demise of family member of the counsel for the plaintiff and thereafter closing of Courts during summer vacation – Afterwards, he filed an application under Order 6 Rule 18 of CPC to permit him to incorporate amendment in the plaint – Trial Court dismissed the application and also the suit – Held, procedural laws are enacted to provide justice to the parties and not to stall the process of law – Sufficient and good cause was made out for extending time to incorporate amendment – The suit could not have dismissed on account of failure to incorporate the amendment in the plaint – The Trial Court's Order was set aside and

suit was restored and plaintiff/petitioner directed to incorporate the proposed amendment in the plaint within a period of three weeks.

Rambabu Bhagel v. Shrikrishna and others

Judgment dated 06.10.2010 passed by the High Court of M.P. in W.P. (I) No. 4057 of 2010, reported in 2011(1) MPHT 281 (DB)

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78. **CIVIL PROCEDURE CODE, 1908 – Order 11 Rule 12**

Discovery of document – Scope of Rule 12 – Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein – However, it is not necessary to specify a particular document.

Narendra v. Ram Krishna Sharma

Judgment dated 13-10-2010, passed by the M.P. High Court in W.P. No. 5857/2010, reported in 2011 (1) MPLJ 127

Held :

On bare perusal of the provisions of Order XI, Rule 12 of the Code of Civil Procedure, we find that any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein.

Nowhere it is gathered that any party is required to pray for any specific document although he may specify a particular document to be discovered.

The Supreme Court in *M.L. Sethi v. R.P. Kapur, AIR 1972 SC 2379,* in para 5 has categorically held that generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? Hence, the Supreme Court has categorically laid down the law of the land that unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents?

On bare perusal of the provision of Order XI, Rule 12 of the Code of Civil Procedure, we find that every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly

enable the party, seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences.

By placing reliance on the aforesaid dictum of the Supreme Court, we are of the view that the learned trial Court rejected the application *de hors* to the provisions of Order XI, Rule 12 of the Code of Civil Procedure and hence the order cannot be allowed to remain stand.

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79. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 4
Proceedings of trial Court can be stayed by the order of High Court – Even then, an application for substitution of L.R. of deceased may be filed in the trial Court and being collateral proceeding, the trial court is free to pass necessary order on that application.

Billan Khan and another v. Sardar Khan and others
Judgment dated 04-10-2010, passed by the M.P. High Court in W.P. No. 2507 of 2009, reported in 2011 (1) MPHT 46

Held :

On being asked by us that as to whether the plaintiffs/petitioners have moved any application for substitution in the Trial Court, learned Counsel submits that there is stay of further proceedings of Trial Court vide order dated 13-7-2009 passed by this Court and, hence, even if any application is filed, it will be a futile exercise on account of stay order. According to us, the argument appears to be misconceived for the simple reason that even if there is an order of this Court staying the further proceedings of the Trial Court, for collateral purpose an application could have been filed in the Trial Court and order could have been passed. In this context, it would be profitable to place reliance on the Division Bench decision of this Court in *Madanlal Agrawal v. Kamlesh Nigam, 1975 JLJ 323,* in which in paras 5 and 6 the Division Bench has held thus : –

> "5. Usually, stay order are passed by the Appellate Court or by the Revisional Court. In some kinds of stay orders, there is partial stay. Or, in some other types of stay orders, the stay is complete. But, it is to be noted that the stay may be regarding execution of decree or in respect of further proceedings in the Trial Court. The stay order passed by this Court on 21-1-1972 was in respect of further trial of the suit. It is, therefore, necessary to ascertain as to what the phrase exactly implies. There can be no doubt that when further trial of the suit or further proceedings in the Trial Court are stayed, the Court of original jurisdiction or the Court below, as the case may be, would have no jurisdiction to take any steps which would be in furtherance of the trial on merits. Can it be said that the Trial Court loses all jurisdiction to take any collateral action which may, in a

sense, be towards the progress of the suit, but which is not in furtherance of the trial of the suit on merits? For instance, if the Appellate or the Revisional Court has passed a stay order, can it be said that the Trial Court cannot, on a request made by the parties, refer the dispute to arbitration. In *Chindambaram v. Subramanian, AIR 1953 Mad. 492,* a preliminary decree had been passed, against which an appeal had been filed in the High Court. The High Court had passed a stay order staying the passing of a final decree. During the pendency of the stay order, an application was made in the Trial Court by both the parties to refer the dispute to arbitration. The Division Bench of the High Court laid down that merely because of the pendency of the stay order, the parties would not be debarred from moving the Trial Court for referring the dispute to arbitration. In that case, there was an additional reason given by the Division Bench, namely, that a stay order being for the benefit of one of the parties, such benefit could be waived. Even apart from that, the basic reason, we think, was that the Trial Court would not lose jurisdiction to deal with collateral matters which would not be towards further trial of the suit on merits, but which would only be collateral or incidental to the suit being kept alive. We may illustrate the said point as under.

6. For instance, if an appeal or a revision is pending in the Appellate or the Revisional Court and if one of the parties dies in the meantime and if the Appellate or the Revisional Court happens to pass a stay order, that would not oust the jurisdiction of the Trial Court to entertain an application for substitution of legal representatives under Order 22 Rule 3 or Rule 4, of the Code of Civil Procedure. Of course, an application can as well be made in the appeal or the revision pending before the Appellate or the Revisional Court. Similarly, we do not see any reason why proceedings under Order 39, Rule 1 or 2, or Order 40, Rule 1, of the Code of Civil Procedure cannot be taken in the Trial Court during the pendency of a stay order passed by the Appellate or the Revisional Court. The proceeding relating to grant of injunction or appointment of a receiver may be proceeding in the suit, but this would not be a proceeding in further trial of the suit on merits. Suppose, if a party is trying to damage the property, we do not see any reason why the party aggrieved cannot approach the Trial Court for appointment of a receiver or for an injuction. Similarly, if

one of the parties tries to take steps which would ultimately result in defeating the decree that might be passed, we do not see any reason why the party aggrieved cannot be allowed to approach the Trial Judge for an order of attachment before judgment under Order 38, Rule 5, of the Code of Civil Procedure, which although may be a proceeding in the suit will not be in furtherance of the trial of the suit on merits, but it would only be a protective step so as to ensure that the defendant may not be able to defeat any ultimate decree that might be passed in the suit. Looked at from this point of view, we are of the opinion that during the pendency of a stay order passed by the Appellate or the Revisional Court, although the Trial Court or the Court below may not have any jurisdiction to proceed with the trial of the suit on merits, it can certainly take such other steps which are collateral or which may be protective or which would be for the purpose of keeping the lis alive and all such steps, in our opinion, such as any application under Order 22, Rule 3 or Rule 4, of the Code of Civil Procedure or an application under Order 39, Rule 1 or Rule 2 or an application under Order 40, Rule 1, or an application under Order 38, Rule 5, would be maintainable in the Trial Court in spite of such stay order."

By placing reliance on the aforesaid Division Bench decision, even if this Court has directed that the further proceedings of the Trial Court be stayed, according to us, there is no bar in filing the relevant application for substitution in the Trial Court and/ or necessary application under Order 22 Rule 4 (iv) of CPC.

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80. CIVIL PROCEDURE CODE, 1908 – Order 40 Rule 1
Suit by or against the receiver, who was appointed by the Court, filed without prior permission of the Court – Is not maintainable.

Shivkumar Dwivedi v. Bhogilal Shah (dead) through L.R. Dr. Diwakar

Judgment dated 22-01-2010, passed by the M.P. High Court in S.A. No. 437/1999, reported in 2011 (1) MPHT 356

Held :

In the matter of *Narishingha Charan Nandi Choudhry v. Thakur Ashutosh Deo Ghatwal, AIR 1938 Patna 487,* wherein a Division Bench of Patna High Court has held that before a suit for possession of property which is in possession of a Receiver appointed by the Court can be instituted against him, it is necessary to apply for and obtain sanction of the Court to bring the action. In the matter of *Shyam Lal v. Nand Lal, AIR (31) 1944 Allahabad 220* wherein Division Bench of

Allahabad High Court in a case where Receiver is appointed under Order 40 Rule 1 of CPC permission of Court is absolutely necessary for the institution of a suit against him, the property does not vest in the Receiver and it remains with the Court but in the actual custody of the Receiver. In the matter of Everest Coal Company *Pvt. Ltd. v. State of Bihar, AIR 1977 SC 2304,* wherein a suit was filed against Receiver Hon'ble Apex Court has held that leave must be obtained either prior to filing of suit or during its pendency. It was further held that grant of leave is rule, refusal exception, rule is merely to prevent contempt. In the matter of *Babulal v. Prakash Chandra Jain, 1984 MPWN 426,* wherein this Court has held that Receiver appointed by Court is an Officer of the Court and Court takes upon itself the management of property through Receiver. In the matter of *Mahendra v. Padmakar Jagannath Dongare, 1995 Supp. (4) SCC 676,* wherein in a suit filed by the Bank against the landlord company for sale of pledged and hypothecated goods, the Court appointing a Receiver of moveable and immovable properties of the company, including the premises leased to certain tenants, at the creditor Bank's instance and suit decreed in respect of moveable properties only and not in respect of immovable property, in such circumstances, even assuming that the Receiver's appointment continued after the disposal of the suit, he could not exercise powers with regard to the immovable property, hence could not file a suit against the tenants of the company's premises on the ground of arrears of rent.

Keeping in view of the aforesaid position of law, this Court is of the opinion that the suit filed by the appellant was not maintainable without obtaining permission of the Court. It is held that it is necessary for the appellant to seek prior permission from the Court appointing him as Receiver to institute the suit for ejectment. In view of this, the appeal filed by the appellant has no force and is hereby dismissed.

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***81. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27**

Under Order 41 Rule 27, additional evidence could be adduced in one of the three situations, namely – Whether the trial Court has illegally refused the evidence although it ought to have been permitted; whether the evidence sought to be adduced by the party was not available to it despite exercise of due diligence; whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature.

If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the Appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevant/ bearing in the issues involved – It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case – It is for

the Appellate Court to consider and take a decision one way or the other as to the applicability of the same and decide the appeal with reference to the said conclusion.

Malayalam Plantations Ltd. v. State of Kerala and another
Judgment dated 09.11.2010, passed by the Supreme Court in Civil Appeal No. 309 of 2003, reported in AIR 2011 SC 559

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82. **CONSTITUTION OF INDIA – Article 20 (2)**
INDIAN PENAL CODE, 1860 – Sections 120-B, 419 and 420

(i) **Inspite of provision under Article 20 (2) of the Constitution of India, a person can be prosecuted and punished more than once even on substantially same facts, provided the ingredients of both the offences are totally different and they do not form the same offence – Furthermore, to avail the protection afforded by Article 20 (2), the initial burden is upon the accused to take the necessary plea and establish the same.**

(ii) **Accused, Monica Bedi, obtained a fake passport by submitting false documents and used to travel to Lisbon, Portugal – In this matter for possession of fake passport, she was convicted at Portugal – It would not bar her conviction under Sections 120-B, 419 and 420 of IPC in India as conviction in Portugal was not for the same offence.**

Monica Bedi v. State of Andhra Pradesh
Judgment dated 09.11.2010 passed by the Supreme Court in Criminal Appeal No. 782 of 2007, reported in (2011) 1 SCC 284

Learned counsel for the appellant has submitted that the appellant has been tried and convicted by a competent court of jurisdiction at Lisbon, Portugal for being in possession of fake passport and, therefore, her trial and conviction for possessing the same passport before the C.B.I. Court at Hyderabad amounts to double jeopardy and in violation of Article 20(2) of the Constitution of India and as well as under Section 300 Cr.P.C.

Held:

Article 20 (2) embodies a protection against a second trial and conviction for the same offence. The fundamental right guaranteed is the manifestation of a long struggle by the mankind for human rights. A similar guarantee is to be found in almost all civilized societies governed by rule of law. The well-known maxim *nemo debet bis vexari pro una et eadem causa* embodies the well-established common law rule that no one should be put on peril twice for the same offence. *Blackstone* referred to this universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence.

The fundamental right guaranteed under Article 20 (2) has its roots in common law maxim *nemo debet bis vexari* – a man shall not be brought into danger for one and the same offence more than once. If a person is charged again for the same offence, he can plead, as a complete defence, his former conviction, or as it is technically expressed, take the plea of *autrefois convict.* This in essence is the common law principle. The corresponding provision in the American Constitution is enshrined in that part of the Fifth Amendment which declares that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. The principle has been recognized in the existing law in India and is enacted in Section 26 of the General Clauses Act, 1897 and Section 300 of the Criminal Procedure Code, 1973. This was the inspiration and background for incorporating sub-clause (2) into Article 20 of the Constitution. But the ambit and content of the guaranteed fundamental right are much narrower than those of the common law in England or the doctrine of "double jeopardy" in the American Constitution.

The same set of facts can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time constitute an offence under any other law. It needs no restatement that the bar to the punishment to the offender twice over for the same offence would arise only where the ingredients of both the offences are the same. That the test is to ascertain whether two offences are the same and not the identity of the allegations but the identity of the ingredients of the offences.

The question that falls for our consideration is, whether the appellant can be said to have satisfied all the conditions that are necessary to enable her to claim the protection of Article 20(2) of the Constitution. The charges upon which the appellant has been convicted now, for the charges under the Penal Code, we will presume for our present purpose that the allegations upon which these charges are based, proved, resulting in conviction and punishment of the appellant are substantially the same which formed the subject-matter of prosecution and conviction under the penal provisions of Portuguese law. But we have no doubt to hold that the punishment of the appellant is not for the same offence.

Be that as it may, there is no factual foundation laid as such by the appellant taking this plea before the trial court. Nothing is suggested to the investigating officer or to any of the witnesses that she is sought to be prosecuted and punished for the same offence for which she has been charged and convicted by a competent court of jurisdiction at Lisbon. She did not even make any such statement in her examination under Section 313 Cr.P.C. It is true that the fundamental right guaranteed under Article 20 (2) of the Constitution is in the nature of an injunction against the State prohibiting it to prosecute and punish any person for the same offence more than once but the initial burden is upon the accused to take the necessary plea and establish the same.

So far as the appellant, Monica Bedi, is concerned she is involved in the conspiracy as proved at both stages i.e. pre-passport application stage and post-passport application stage. The conspiracy itself has been hatched only with a view to secure a passport for Monica Bedi in the assumed name of Sana Malik Kamal. We do not find any merit in the submission of the learned senior counsel for the appellant that there is no evidence whatsoever against Monica Bedi to prove her involvement for the offence punishable under Sections 120B, 419 and 420 IPC. The sequence of events as unfolded by the evidence clearly prove the charges levelled against Monica Bedi. It is for her benefit that the entire conspiracy has been hatched involving more than one individual in order to secure a passport for her benefit enabling her to travel abroad in the assumed name of Sana Malik Kamal. There is no material based on which this Court is to differ with the findings and conclusions concurrently arrived at by the courts below.

Learned counsel for the appellant, however, reiterated the submission which he made before the High Court that exhibit P50 is a Photostat copy of the passport in the name of Sana Malik Kamal and the same is an inadmissible document as it is not authenticated by legal keeper as provided under Section 78 (6) of the Evidence Act. The submission was that based on such inadmissible document no prosecution could be launched and once it is to be held that the said document is not admissible the whole case of the prosecution collapses like a pack of cards.

The High Court after elaborate consideration of the matter came to the right conclusion that Section 78 (6) of the Evidence Act, 1872 deals with public document of any other class in a foreign country. In the present case, the original of exhibit P50 is the passport issued by the competent authorities in this country and, therefore, Section 78 (6) has no application whatsoever to the facts of this case. The issuance of original of exhibit P50, passport is clearly proved. It is based on that passport Monica Bedi travelled abroad and entered Portugal for which she had to face a prosecution and suffer conviction and sentence. The prosecution cannot be held to be vitiated. We accordingly reject the contention and uphold the conviction of the appellant for the offence punishable under Sections 120B, 419 and 420 IPC.

That so far as D. Gokari Saheb (Postman, Head Post Office, Karnool) (A-8) is concerned, there is a clear evidence which has been properly appreciated by the courts below that it was he who took the article (envelop contained the passport) addressed to Sana Malik Kamal from PW-11 representing that he knew the addressee and would deliver the same. The said article was actually entrusted to PW-11 for its delivery but D. Gokari Saheb (A- 8) took the same from PW-11 for delivery to Sana Malik Kamal - assumed name of Monica Bedi (A-3). The courts below found that D. Gokari Saheb (A-8) was aware of the contents of the article. It is under those circumstances the courts below came to the right conclusion that evidence available on record clearly establish that he participated in the conspiracy in securing the passport for Monica Bedi in

the assumed name of Sana Malik Kamal. Thus the conviction of D. Gokari Saheb (A-8) for the charged offences is accordingly upheld. We do not find any reason whatsoever to interfere with the view taken by the High Court. However, the sentence of one year rigorous imprisonment under each count awarded while maintaining the fine imposed by the trial court is reduced to that of 6 months' rigorous imprisonment under each count while maintaining the fine amount.

There cannot be any doubt whatsoever that A-5 submitted a false report in order to enable Monica Bedi to secure a passport for herself in the assumed name of Sana Malik Kamal. His conviction for the charged offences is accordingly upheld. The High Court however, reduced the sentence awarded by the trial court to one year rigorous imprisonment under each count while maintaining the fine imposed by the trial court. The sentence awarded under Section 13 (1) (d) r/w/s 13 (2) of Prevention of Corruption Act has been confirmed. Having regard to the facts and circumstances of the present case, we however, reduce the sentence to that of six months rigorous imprisonment under each count while maintaining the fine imposed by the trial court and the sentence to suffer imprisonment, in default, of payment of fine. Sentences are directed to run concurrently.

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83. CONSTITUTION OF INDIA – Article 20 (3)

Protection against self-incrimination – Whether a witness, whose statement is recorded u/s 161 Cr.P.C. in police case and who is an accused in the complaint case relating to the same incident, can refuse examination on the ground of protection against self-incrimination under Article 20 (3) of the Constitution of India? Held, simply because a witness in a police case figures as an accused in complaint case, he is not entitled for blanket protection under Article 20 (3) of the Constitution of India as there is no formal accusation in the police case, which is must – He can seek such protection at the time of trial in the police case if answer to any question is likely to incriminate him, subject to order of the Court when it is put to him.

Balasaheb alias Ramesh Laxman Deshmukh v. State of Maharashtra and another

Judgment dated 07.12.2010 passed by the Supreme Court in Criminal Appeal No. 1043 of 2002, reported in (2011) 1 SCC 364

Held:

Protection under Article 20(3) of the Constitution does not extend to any kind of evidence but only to self-incriminating statements relating to the charges brought against an accused. In order to bring the testimony of an accused within the prohibition of constitutional protection, it must be of such character that by itself it tends to incriminate the accused.

Reference in this connection can be made to a decision of this Court in the case of *State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808,* wherein it has been held as follows:

> "In order that a testimony by an accused person may be said to have been self-incriminatory the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

We are of the opinion that for invoking the constitutional right under Article 20(3) a formal accusation against the person claiming the protection must exist. Simply because the appellant figures as the accused in the complaint case, a blanket protection as claimed by him cannot be granted. Reference in this connection can be made to a decision of this Court in the case of *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry and Another, AIR 1961 SC 29,* wherein it has been held as follows: (AIR p. 38, para 21)

> "21.....The effect of this decision thus appears to be that one of the essential conditions for invoking the constitutional guarantee enshrined in Article 20(3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against himself; and this conclusion, in our opinion, is fully consistent with the two other decisions of this Court to which we have already referred."

As observed earlier the appellant is not an accused in the Police case and in fact a witness whose statement was recorded during the course of investigation under Section 161 of the Code of Criminal Procedure. In the Police case he utmost can be asked to support the case of the prosecution but no question intended to incriminate him can be asked and in case it is done the protection under Article 20(3) of the Constitution shall spring into action. What question shall be put to this appellant when he appears as a witness is a matter of guess and on that basis he does not deserve the blanket protection under Article 20(3) of the Constitution. Even at the cost of the repetition we may observe that in the Police case when he appears and asked to answer question, the answer whereof tends to incriminate him, he can refuse to answer the same pleading protection under Article 20(3) of the Constitution. In such eventuality the Court would decide the same. Therefore, at this stage the blanket protection sought by the appellant is not fit to be granted.

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84. CONSTITUTION OF INDIA – Article 22(1)
BAR COUNCIL OF INDIA RULES – Ch. II
Bar Association passing resolution not to defend a particular accused in criminal cases, such resolution violates right to be defended under Article 22 (1) of the Constitution – Therefore, it is the duty of the lawyer to defend him – Right-minded lawyers should ignore and defy such resolutions if they want democracy and the rule of law to be upheld in this country.

A.S. Mohammed Rafi v. State of Tamil Nadu & Ors.

Judgment dated 06.12.2010 passed by the Supreme Court in Criminal Appeal No. 2310 of 2010, reported in (2011) 1 SCC 688

Held:

Several Bar Association all over India, whether High Court Bar Associations or District Court Bar Associations have passed resolutions that they will not defend a particular person or persons in a particular criminal case. Sometimes there are clashes between policemen and lawyers, and the Bar Association passes a resolution that no one will defend the policemen in the criminal case in court. Similarly, sometimes the Bar Association passes a resolution that they will not defend a person who is alleged to be a terrorist or a person accused of a brutal or heinous crime or involved in a rape case. In our opinion, such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him.

In our own country, Article 22(1) of the Constitution states:

> "*22. Protection against arrest and detention in certain cases.* – (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice".

Chapter II of the Rules framed by the Bar Council of India states about 'Standards of Professional Conduct and Etiquette', as follows:

> "11. An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief".

Professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is

a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

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85. CONSUMER PROTECTION ACT, 1986 – Sections 12 (3), 18, 22 and 24-A

(i) Admission of complaint filed under Section 12 (3) or 18 or 22 of the Act, as the case may be, should be rule and dismissal thereof should be exception – But if complaint is barred by time, Consumer Forum is bound to dismiss the same unless the consumer makes out case for condonation of delay under Section 24A (2).

(ii) Complaint of medical negligence – Accrual of cause of action to the consumer depends upon the effect of negligence – If the effect is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done – On the other hand, if the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative-complainant discovers the harm/injury caused due to such act or by the exercise of reasonable diligence he should have discovered the act constituting negligence.

Dr. V.N. Shrikhande v. Mrs. Anita Sena Fernandes

Judgment dated 20.10.2010 passed by the Supreme Court in Civil Appeal No. 8983 of 2010, reported in AIR 2011 SC 212

Held:

A reading of the provisions of Sections 12, 18, 22 and 24-A of the Consumer Protection Act makes it clear that the District Forum, the State Commission and the National Commission are not bound to admit each and every complaint. Under Section 12(3), the District Forum is empowered to decide the issue of admissibility of the complaint. The District Forum can either allow the complaint to be proceeded with which implies that the complaint is admitted or reject the same. Similar power is vested with the State Commission under Section 18 and the National Commission under Section 22. If the concerned forum is prima facie satisfied that the complainant is a 'consumer' as defined in Section 2(d) and there is a 'defect', as defined in Section 2(f) in relation to any goods or there is 'deficiency in service' as defined in Section 2(g) read with Section 2(o) and the complaint has been filed within the prescribed period of

limitation then it can direct that the complaint may be proceeded with. On the other hand, if the concerned forum is satisfied that the complaint does not disclose any grievance which can be redressed under the Act then it can reject the complaint at the threshold after recording reasons for doing so. Section 24A(1) contains a negative legislative mandate against admission of a complaint which has been filed after 2 years from the date of accrual of cause of action. In other words the Consumer Forums do not have the jurisdiction to entertain a complaint if the same is not filed within 2 years from the date on which the cause of action has arisen. This power is required to be exercised after giving opportunity of hearing to the complainant, who can seek condonation of delay under Section24A(2) by showing that there was sufficient cause for not filing the complaint within the period prescribed under Section 24A(1). If the complaint is per se barred by time and the complainant does not seek condonation of delay under Section 24A(2), he Consumer Forums will have no option but to dismiss the same. Reference in this connection can usefully be made to the recent judgments in *State Bank of India v. B.S. Agricultural Industries (I), (2009) 5 SCC 121 : (AIR 2009 SC 2210) and Kandimalla Raghavaiah and Company v. National Insurance Company and another (2009) 7 SCC 768 : (2010AIR SCW 2528)*. Section 26 is another provision which empowers the Consumer Forums to dismiss the complaint if it is found that the same is frivolous and vexatious. The exercise of this power is hedged with the condition that the concerned Consumer Forum must record reasons for dismissal of the complaint.

We may hasten to add that the power conferred upon the Consumer Forums under Sections 12(3), 18 or 22 to reject the complaint at the stage of admission should not be exercised lightly because the Act has been enacted to provide for better protection of the interest of consumers and the speedy and inexpensive redressal mechanism enshrined therein is in addition to other remedies which may be available to the consumer under the ordinary law of land. Therefore, admission of the complaint filed under the Act should be the rule and dismissal thereof should be an exception. Of course, if the complaint is barred by time, the consumer forum is bound to dismiss the same unless the consumer makes out a case for condonation of delay under Section 24A(2).

Since, the term 'cause of action' has not been defined in the Act, the same has to be interpreted keeping in view the context in which it has been used in Section 24A(1) and object of the legislation. In his famous work on statutory interpretation, Justice G.P. Singh has quoted Professor H.A. Smith in the following words:

> " 'No word', say Professor H.A. Smith 'has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there is a 'basic fallacy' in saying 'that words have meaning in and of themselves', and 'reference to the abstract meaning of words', states Craies, 'if there be any such thing, is of little value in interpreting statutes'. ...in determining the

meaning of any word or phrase in a statute the first question to be asked is – 'What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase.' The Context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari material, the general scope of the statute and the mischief that it was intended to remedy."

In *RBI v. Peerless General Finance and Investment Co. Ltd. (1987) 1 SCC 424 : (AIR 1987 SC 1023),* Chinnappa Reddy, J. referred to the rule of contextuam interpretation and observed:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation."

In cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative-complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.

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86. CONTRACT ACT, 1872 – Sections 37 and 63
"No due certificate" submitted by a contractor – It is not an absolute bar to a contractor raising genuine claim at a later stage – Execution of full and final discharge voucher/receipt does not bar a contractor from claiming acceptable amount – Position explained.

R.L. Kalathia and Co. v. State of Gujarat
Judgment dated 14.01.2011, passed by the Supreme Court in Civil Appeal No. 3245 of 2003, reported in AIR 2011 SC 754

Held:

Though the trial Court after accepting the claim of the plaintiff granted a decree to the extent of ₹ 2,27,758/- with proportionate costs and interest @ 6 percent, per annum from the date of suit till the realization, in the appeal filed by the State after finding that the plaintiff was estopped from claiming damages against the Department as the final bill was accepted, the High Court allowed the appeal of the State and dismissed the suit of the plaintiff. It is the stand of the State and accepted by the High Court that the plaintiff-Firm has not fully complied with Clauses 8 and 10 of the Agreement. It is also their stand that mere endorsement to the effect that the plaintiff has been accepting the amount as per final bill "under protest" without disclosing real grievance on merits is not sufficient and it amounts to accepting the final bill without any valid objection and grievance on merits by the plaintiff. The High Court has also accepted the claim of the State that by the conduct of the plaintiff in accepting the final bill and the Department has made full payment to the plaintiff, sending statutory notice and filing suit for recovery of the differential amount was barred by the principle of estoppel. On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the plaintiff.

It is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials.

Before going into the factual matrix on this aspect, it is useful to refer the decisions of this Court relied on by learned counsel for the appelant. In the case of *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663 = AIR 2004 SC 1330,* which relates to termination of a contract, one of the questions that arose for consideration was "Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuance a 'No

Due Certificate' by the contractor, can any party to the contract raise any dispute for reference to arbitration? While answering the said issue this Court held: –

> "27. Even when rights and obligations of the parties are worked out, the contract does not come to an end *inter alia* for the purpose of determination of the disputes arising thereunder, and thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.
>
> 28. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

In *Ambica Construction v. Union of India, (2006) 13 SCC 475,* which also deals with issuance of "No-claim Certificate" by the contractor. The following conclusions are relevant which read as under:–

> "16. Since we are called upon to consider the efficacy of Clause 43 (2) of the General Conditions of Contract with reference to the subject-matter of the present appeals, the same is set out hereinbelow:
>
> > "43. (2) *Signing of 'no claim' certificate.* – The contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a 'no-claim' certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by 'no-claim certificate' or demanding a reference to arbitration in respect thereof."

17. A glance at the said clause will immediately indicate that a no-claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor had been finally measured and on the basis of the same a no-claim certificate had been issued by the appellant. On the other hand, even the first arbitrator, who had been appointed, had come to a finding that no-claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no-claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43 (2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in *Reshmi Constructions* it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate.

19. We are convinced from the materials on record that in the instant case the appellant also has a genuine claim which was considered in great detail by the arbitrator who was none other than the counsel of the respondent Railways."

In *National Insurance Company Limited v. Boghara Polyfab Private Ltd., (2009) 1 SCC 267 = AIR 2009 SC 170,* the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant: –

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practiced by the other party and is able to establish the

same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/ receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is he having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioned "without prejudice" or by issuing "No Due Certificate".

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87. CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970 – Sections 2 (1) (b) and 10
INDUSTRIAL RELATIONS ACT, 1960 (M.P.) – Sections 31 (3) and 65 (3)

(i) Whether contract labourer is direct employee of principal employer or contractor? Determination of – Where principal employer pays salary to the labourer instead of the contractor and controls and supervises the work of the labourer, the labourer would be deemed to be direct employee of the principal employer

(ii) Payment of wages under Section 65 (3) of the M.P. Industrial Relations Act, 1960 – If the employee had been otherwise employed and receiving adequate remuneration during the pendency of appeal or subsequent periods, the Court shall not order to pay wages under Section 65 (3).

General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and another

Judgment dated 14.12.2010 passed by the Supreme Court in Civil Appeal No. 10605 of 2010, reported in (2011) 1 SCC 635

Held:

It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning of the terms 'control and supervision' and held that as the officers of appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant.

The expression 'control and supervision' in the context of contract labour was explained by this court in *International Airport Authority of India v. International Air Cargo Workers Union, (2009) 13 SCC 374* thus:

> "38. ... If the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.
>
> 39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work

under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

Therefore we are of the view that the Industrial Court ought to have held that first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.

The proviso to Section 65 (3) of the MPIR Act makes it clear that if the employee had been otherwise employed and receiving adequate remuneration during the pendency of the appeal or subsequent periods, the court shall order that no wages shall be payable under Section 65 (3). As noticed above the first respondent approached the Labour Court only in the year 1987, five years after his disengagement by the second respondent. After he was disengaged in July, 1982, the first respondent took up employment with Western Coalfields on 5.6.1985 and has been earning a far larger amount than what he was earning earlier. Two years thereafter he approached the Labour Court. He continues to be employed with Western Coalfields Ltd. during the pendency of this appeal. That is an additional ground to deny any backwages or direction to pay wages during the pendency of the litigation. It is also a ground to reject the claim on account of the deliberate suppression and misrepresentation.

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88. COURT FEES ACT, 1870 – Section 7 (iv) (c)

***Ad valorem* court fee – Where the executant of the sale deed wants it to be annulled, he has to seek cancellation of that deed for which *ad valorem* court fee on the consideration stated in the sale deed is payable.**

Ambika Prasad & ors. v. Shri Ram Shiromani @ Chandrika Prasad Dwivedi & anr.

Judgment dated 09.11.2010 passed by the High Court of M.P. in W. P. No. 2431 of 2004, reported in ILR (2011) M.P. 154 (DB)

Held:

The question required to be addressed in this petition is that whether the plaintiffs are liable to pay ad-valorem court-fee on the sale consideration stated in the sale deed of which plaintiff no. 1 is the executant when they have made an allegation in the plaint that it is void.

In *Suhrid Singh v. Randhir Singh, 2010 AIR SCW 3308,* the Supreme Court dealt with an identical issue and resolved the same by giving an illustration of two brothers. We find it useful to reproduce the relevant portion of para 6 of the order. It is as under:

"6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a

non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non set, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' – two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently, 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court-fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court-fee on the consideration stated in the sale deed, If 'B', who is a non-executatnt, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court-fee of Rs. 19.50 under Article 17 (iii) of Second Schedule of the Act."

Thus, by the above illustration of 'A' and 'B' brothers the Supreme Court has answered the issue in a very simple manner that where the executant of the sale deed wants it to be annulled, he has to seek cancellation of that deed for which ad valorem court-fee on the consideration stated in the sale deed is payable.

The Supreme Court earlier in *Government of Orissa v. Ashok Transport Agency, (2002) 9 SCC 28* explained the distinction between the meaning of void and voidable acts. In this case, it held that one type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab-initio void and for avoiding the same, no declaration is necessary as law does not take any notice of the same and they can be disregarded in collateral proceeding. According to the Supreme Court, the other type of void act like transaction against a minor without being represented by a next friend is a good transaction against the whole world but if the minor decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding, the transaction becomes void from the very beginning. In this case, the Supreme Court referred to yet another type of void act which may be not a nullity but for avoiding the same a declaration has to be made. It observed that voidable act is that which is a good act unless avoided for instance if a suit is filed for declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it.

In the case at hand, plaintiff no. 1 was admittedly an executant of the sale deed sought to be declared as void. The sale deed also bears his thumb

impression and the sale consideration is clearly mentioned therein. The plaintiffs in their suit for declaration have prayed that the sale deed be declared as void by alleging that it was executed by playing fraud and misrepresentation. The relief claimed implies a relief for cancellation of sale deed because plaintiff no. 1 (now dead) was an executant of the same. The sale deed, in our considered opinion, is voidable as the apparent state of affairs is a real state of affairs and the plaintiffs, who have alleged otherwise, are obliged to prove it as void, The plaintiffs, therefore, have to pay ad-valorem court-fee on the consideration stated in the sale deed, As held by the Supreme Court in *Suhrid Singh* (supra) had plaintiff no. 1 been a non-executant the plaintiffs could have merely paid a fixed court fee provided in Entry 17(iii) of second schedule of the Act.

It is true that in *Sunil Radhelia v. Randhir Singh, 2010 AIR SCW 3308* the Full Bench has held that ad-valorem court-fee is not payable when the plaintiff makes an allegation that the instrument is void and not binding on him even if he be the executant of the document. But it is equally true that the decision of the Supreme Court in *Suhrid Singh* (supra) was not placed before the Full Bench and, therefore, it is not referred therein. Had the decision of *Suhrid Singh* been brought to the notice of the Judges of Full Bench, in all probability they too would have taken the same view which we have taken.

For these reasons, we decline to interfere with the impugned order of the trial court. The petition fails and is dismissed. No order as to costs.

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89. CRIMINAL PROCEDURE CODE, 1973 – SECTION 156 (3)

(i) Investigation of offence – *Locus Standi* – Special Judge directed S.P.E. to file a report of an enquiry on an application of complainant – Another application filed by applicant who was stranger to the earlier proceedings requesting that S.P.E. to conclude the investigation within reasonable time – Held, as criminal proceedings have already been set in motion and applicant was stranger to said proceedings – Cannot be allowed to intervene by filing an application u/s 156(3)

(ii) Magistrate/Special Judge in exercise of jurisdiction u/s 156 (3), can monitor the investigation and issue direction for proper investigation.

Kishor Samrite v. Shivraj Singh Chauhan & Ors.

Judgment dated 13.10.2010 passed by the High Court of M.P. in Cr.R. No. 1126 of 2010, reported in 2011 (1) MPJR 114

Held:

Criminal Proceeding in the case has already been instituted by the complainant Ramesh K. Sahu, and the petitioner who is a stranger to said proceeding has sought intervention by filling an application under Section 156(3) the Code of Criminal Procedure, which in our opinion cannot be permitted. He

cannot be held to be an aggrieved person. There is vast difference between the term "setting the Criminal law in motion" and "intervention" in the pending proceedings. In these circumstances, decision cited by the learned counsel which pertain to locus-standi of a person to set the criminal law in motion render no help to petitioner. Apex Court in number of cases held that every judgment must be read as applicable to particular facts proved, or assumed to be proved, since generality of expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. (See *Bank of India v. Mohandas (2009) 5 SCC 313 and State of Bihar v. Suresh Prasad Sinha, AIR 2010 SC 93*)

In *K. Anbazhagan v. Superintendent of Police and others, AIR 2004 SC 524* Supreme Court while, dealing with the petition filed under Section 406 of the Code of Criminal Procedure for transfer of case from one High Court to another High Court explained these meaning of ward "party interested" with reference to the provisions of sub-section (2) of Section 406 of the Code of Criminal Procedure, when an objection about locus-Standi of the petitioner was raised. According to counsel for respondent in that case, it was the "Party interested" and not the 'person interested' and, therefore only a "Attorney General" or a "party interested" had locus-stantdi to file application and the petitioner not being a party to the proceeding was not a "party interested" and had no locus-standi to file the transfer petition. The Apex Court held that the word "party interested" was not defined under Cr.P.C. The word "party interested" is of wide import and, therefore it has to be given a wider meaning. If it was the intendment of the Legislature to give restricted meaning then they would have used the word to the effect, "party to the proceedings". The legislature, keeping in view the larger public interest involved in a criminal justice system, purposely used the word of wider import in Section 406. It was held that the petitioner being political opponent, was vitally interested in administration of justice in the State and was, therefore, a "party interested" within the meaning of sub-section (2) of Section 406 of Cr.P.C., It was also observed that Mr. Subramanium Swami, who was the original complainant, also supported the transfer petitions. In our opinion, the factual position in the case in hand is different. The Apex Court interpreted the scope of word "party interested" in reference the provisions of Section 406 (2) Of Cr.P.C. In the present case, the aggrieved person Ramesh K. Sahu, who filed the private complaint, did not raise any objection about the investigation. In our view if a stranger is allowed to intervene and file application in the criminal proceedings in which he is not a party, it may create complications and affect the interests of aggrieved person as well as accused. It will, in fact render a criminal case to become a private combat between any number of persons. In *Rajiv Ranjan Singh 'Lalan' v. Union of India*, Apex Court while considering the scope of interference at the instance of strangers, observed that:

> "25.....It is already notice that the petitioner had no direct connection with the case. They were absolutely strangers

> as regards the criminal cases against respondent 4 and 5 which were pending before the special judge. This unnecessary interference in the criminal case may cause, sometimes, damage to the prosecution case and at times may cause serious prejudice to the accused also. In any view of the matter, this sort of interference in the criminal prosecution would only deny a fair trial to accused."

It is undisputedly true that anyone can set the criminal law into motion except where there is statutory bar in the case in hand also the case before the Special Court was instituted on a private complaint by complainant Ramesh K Sahu, and an order under Section 156 (3) of the Code of Criminal Procedure was passed. In compliance of the said order, first information was registered, but the petitioner before us, was neither the complainant not an aggrieved party in the criminal case pending before the Special Court. The Criminal Law Machinery has already been set in motion by the complainant. Permitting anybody, who is stranger to a criminal case to intervene and interfere in the proceedings, may adversely affect to the parties to the criminal proceedings. There was no bar for the petitioner to have filed a complaint or lodged a report with the police against the accused persons, if he felt that an offence was committed by the accused persons and he was aggrieved, but when already a complaint was filed and the police and already registered a FIR, It would be against the procedure provided under law to permit him to Intervene like a public interest litigation in the investigation into the allegations. Apart from it once an application under Section 156 (3) of the Code of Criminal Procedure was filed before the Court by the Complainant and on the order of Magistrate the first information report was registered, no further application under Section 156(3) of the Code of Criminal Procedure would be maintainable because the effect of an order being passed under Section 156(3) of the Code of Criminal Procedure would only be the registration of first information report and Investigation into the allegations.

The next question before us is whether Magistrate/ Special Judge, in the exercise of jurisdiction under Section 156(3)of the Code of Criminal Procedure, could monitor the investigation and/ or issue direction for proper investigation. In case of *Sakiri Vashu v. State of Uttar Pradesh and others, (2008) 2 SCC 409* Hon'ble Supreme Court observed:

> "11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under

Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation."

"15. Section 156 (3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same."

"16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence, the magistrate can order reopening of the investigation even after the police submits the final report, vide *State of Bihar v. J.A.C. Saladanha (AIR 1980 SC 326)*.

"17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done or is not being done by the police Section 156 (3) Cr.P.C., Though briefly worded, in our opinion, is very vide and it will include all such incidental powers as are necessary for ensuring a proper investigation."

"29. In *Union of India v. Prakash P. Hinduja* (SCC vide para 13) it has been observed by this court that a magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156 (3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer in charge of the police station concerned, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not him self investigate himself)."

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90. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) and 200 Private complaint was submitted by the complainant before the Court/ Magistrate – Statement of complainant under Section 200 Cr.P.C. was recorded by the Court/ Magistrate on the same day – It would mean that cognizance has been taken – Court/ Magistrate could not have directed Police to investigate the matter under Section 156 (3) of Cr.P.C.

Jagdish Prasad Gupta v. State of M.P. and another

Judgment dated 09-07-2010, passed by the M.P. High Court in Criminal Revision No. 785/2009, reported in 2011 (1) MPLJ 255

Held :

Chapter XV of the Code which includes section 200 relates to complaints to Magistrates and according to us, this Chapter lays down the procedure empowering Magistrates to take cognizance of an offence. Chapter XIV of the Code deals with the conditions requisite for intimation of proceedings. On going through section 190 of the Code which is in Chapter XIV, we find that it speaks about taking of the cognizance of an offence by Magistrates. According to sub-section (1) of this section subject to the provisions of this XIV Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –

(a) upon receiving a complaint of facts which constitutes such offence;

(b) upon a police report such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

According to us, cognizance indicates the point when a Magistrate or a Judge takes judicial notice of an offence. It is entirely different thing from initiation of proceedings rather it is the condition to the initiation of the proceedings by the said Magistrate or Judge, indeed, cognizance is taken of a case and not of a person. The term "cognizable offence" although has been defined in the Code, but the word "cognizance" has not been defined. In broader spectrum we may say that the word "cognizance" would mean to become aware of and when it is used in context to a Court or Judge, it would mean to take notice of judiciary. Under the Code it would mean and indicate the point when a Magistrate or a Judge takes judicial notice of an offence. We may also rely the meaning of the word "cognizance" from Corpus Juris Secundum, which reads thus: –

> "COGNIZANCE, COGNISANCE, or CONUSANCE.
>
> In its ordinary meaning, the word has been defined as apprehension by the understanding, conscious recognition or identification, knowledge or notice. It has been said that while in ordinary parlance, to "have cognizance of means to have knowledge of, the legal meaning of the word "cognizance" is broader than its ordinary meaning; it not

only implies knowledge of the subject-matter, but also the power to deal with it. In its broader sense, the word has been defined as meaning judicial knowledge, or jurisdiction; the right to take notice of and determine a cause."

Section 156 of the Code which is in Chapter XII pertains to police officer's power to investigate cognizable offence.

By keeping the abovesaid provisions, namely, sections 190(1)(a), 200 and 156(3) of the Code in juxtaposition to each other as well as by reading these provisions *vis a vis* to each other, it emerges that when a Magistrate or a Judge at pre-cognizance stage orders for investigation under section 156(3) of the Code, he is not bound to record the statement of complainant. We have no scintilla of doubt by taking a view that the action of a Magistrate after examination of complainant on oath amounts to taking cognizance as envisaged under section 200 of the Code. We may further add that once the Magistrate after scrutinizing the complaint, the sworn statements and other material comes to the conclusion that he can take cognizance of an offence, there is no need to have resort to section 156(3) of the Code. By visualizing the scope of these three provisions we are of the firm view that whether a Magistrate or a Judge at pre-cognizance stage orders for investigation under section 156(3) of the Code, he is not bound to record the statement of complainant, but after taking cognizance and examining the complainant administering him oath under section 200 of the Code, the Magistrate or Judge cannot direct the concerning police to investigate the matter under section 156(3) of the Code because the object of the examination of complainant under section 200 of the Code is to find out whether the complaint is justifiable or whether it is frivolous or vexatious and in that situation, the Magistrate or Judge must not refer the complaint to a police officer and after examining the complainant he is required to proceed according to law as provided under Chapter XV of the Code. According to us, the Magistrate or Judge before taking cognizance or we may say at pre-cognizance stage may order for investigation under section 156(3) of the Code and in that situation, he is not required to record the statement of complainant, but once the complainant has been examined and the cognizance has been taken, the Magistrate or Judge cannot direct investigation provided under section 156(3) of the Code.

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91. CRIMINAL PROCEDURE CODE, 1973 – Sections 177, 200 and 202
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Enquiry – Status of persons arrayed as accused – Whenever Magistrate accepts the complaint and starts inquiry, it means he has considered the complaint and decided to proceed – At this stage, it cannot be said that person who has been mentioned in the complaint as accused acquires the status of accused.
Statement of complainant – Statements of witnesses recorded prior to the statement of complainant – It is mere irregularity and not illegality – Not a ground to quash or hold the proceedings void *ab initio.*

Jurisdiction – Cheque handed over to complainant at Gwalior – Gwalior Court has jurisdiction.

Mohan Mandelia v. State of M.P. & anr.

Judgment dated 22.10.2010 passed by the High Court of M.P. in M.Cr.C. No. 2853 of 2008, reported in ILR (2011) M.P. 562

Held:

It is apparent on bare reading of Sections 202 and 2(g) of Cr.P.C. that when Magistrate takes a cognizance of a complaint presented before him, a person mentioned in the array of accused does not assume status of "accused". Whenever he accepts the complaint and starts the inquiry, it means he has considered the complaint and decided to proceed further, that does not mean any legal parlance "taking cognizance". At this stage it cannot be said that a person who has been mentioned in the complaint as an accused acquires the status of "accused". That takes me to further inference that Magistrate is competent to examine any person deemed fit for unfolding the issue and providing him sufficient information to conclude whether really that person or proposed accused need to be proceeded against by issuing process. For his inquiry he can examine such person who has not acquired the status of an "accused", though it may not pleasant to the test. The action of the Magistrate which has been challenged in this petition by learned Counsel on behalf of petitioner Mohan is improper keeping in view the provisions of Sections 2(g) and 202 of CrPC though the Magistrate has not given the reason supporting his action, his action, cannot be treated to be giving pardon to an accused as indicated by Section 306 of CrPC. Therefore, I have no hesitation in coming to a conclusion that provisions of Code of Criminal Procedure have not been throttled and such an action cannot be treated to be something else than inquiry started by Magistrate for collecting the information enabling him to come to a correct conclusion in the spirit of relevant provisions of Code of Criminal Procedure. It is also apparent that when Shri J.P. Sharma was examined before the learned trial Court, the trial court has not taken cognizance against him and he was only proposed accused mentioned in the complaint. Hence, submission of learned counsel for the petitioners that proper procedure has not been adopted by learned Magistrate and proceedings are *void ab initio*, is worthless and cannot be accepted.

So far as contention that the learned trial court has erred in recording the statement of witnesses of complainant first and then recorded the statement of complainant is concerned, it is mere an irregularity and not illegality, hence it is not a ground to quash or hold that all the proceedings are *void ab initio*.

So far as the point of jurisdiction is concerned, it is apparent that in the statement recorded under Section 202 CrPC complainant in paragraph 4 has specifically stated that Cheque of Rs. 39 lac was handed-over by petitioner Mohan at Gwalior in his house, hence Gwalior court has jurisdiction.

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92. CRIMINAL PROCEDURE CODE, 1973 – Sections 205 and 313

(i) Dispensation with personal appearance – Discretionary powers – Guidelines which are to be borne in mind while dealing with an application seeking dispensation with personal appearance of an accused restated.

(ii) Personal examination of an accused in terms of Section 313 CrPC in a summons case – Is within the Court's discretion which is to be exercised keeping in view certain parameters enumerated in *Basavaraj R. Patil & Ors v. State of Karnataka & Ors, AIR 2000 SC 3214* and not as a matter of course – Position restated.

TGN Kumar v. State of Kerala and others

Judgment dated 14.01.2011, passed by the Supreme Court in Criminal Appeal No. 1854 of 2008, reported in AIR 2011 708

Held:

Section 205 of the Criminal Procedure Code, which clothes the Magistrate with the discretion to dispense with the personal appearance of the accused, reads as follows:

> "205. *Magistrate may dispense with personal attendance of accused:* – (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
>
> (2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

The Section confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is concerned by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application under Section 205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence. [See: *S.V. Muzumdar & Ors. v. Gujarat State Fertilizer Co. & Anr., (2005) 4 SCC 173 = AIR 2005 SC 2436*]. Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and none else.

In *Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd. & Ors, (2001) 7 SCC 401 = AIR 2001 SC 3625,* this Court had laid down the following guidelines, which are to be borne in mind while dealing with an application seeking

dispensation with personal appearance of an accused in a case under Section 138 of the N.I. Act:

> "19. ....it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course."

We respectfully concur with the above guidelines and while re-affirming the same, we would add that the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial.

Section 313 of the Code deals with the personal examination of the accused, and provides that:

> "313. Power to examine the accused.–
>
> (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court–
>
> (a) may at any stage, without previously warning the accused, put such question to him as the Court considers necessary;
>
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b)...."

On the plain language of Section 313, it is evident that in a summons case, when the personal appearance of the accused has been dispensed with under Section 205 of the Code, a discretion is vested in the Magistrate to dispense

with the rigour of personal examination of the accused under Section 313 of the Code as well.

In *Basavaraj R. Patil & Ors. v. State of Karnataka & Ors., AIR 2000 SC 3214* while advocating a pragmatic and humanistic approach in less serious offences. Thomas, J. speaking for the majority in a Bench of three learned Judges, explained the scope of clause (b) to Section 313 (1) of the Code as follows:

> "The word "shall" in clause (b) to Section 313 (1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?
>
> If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:
>
> (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
>
> (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
>
> (c) An undertaking that he would not raise any grievance on that score at any stage of the case."

It is manifest from the afore-extracted passage that dispensation with the personal examination of an accused in terms of the said provision is within the trial court's discretion, to be exercised keeping in view certain parameters, enumerated therein and not as a matter of course.

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93. CRIMINAL PROCEDURE CODE, 1973 – Section 300 (1)
CONSTITUTION OF INDIA – Article 20 (2)
Double jeopardy – Appellant/accused already convicted under Section 138 of the Negotiable Instruments Act, he could not be again tried or punished on the same facts under Section 420 or any other provision of IPC or any other statute – The scope of Section 300 of CrPC is much wider than the provision of Article 20 (2) of the Constitution.

Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Anr.
Judgment dated 01.02.2011, passed by the Supreme Court in Criminal Appeal No. 1160 of 2006, reported in AIR 2011 SC 641

Held:

Learned counsel for the appellant submitted that the appellant was already convicted under Section 138 of the Negotiable Instruments Act, 1881 and hence he could not be again tried or punished on the same facts under Section 420 or any other provision of IPC or any other statute. We find force in this submission.

It may be noticed that there is a difference between the language used in Article 20 (2) of the Constitution of India and Section 300(1) of CrPC. Article 20 (2) states:

> "no person shall be prosecuted and punished for the same offence more than once."

On the other hand, Section 300 (1) of CrPC states:

> "300. *Person once convicted or acquitted not to be tried for same offence–*
>
> (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221 or for which he might have been convicted under sub-section (2) thereof."

Thus, it can be seen that Section 300 (1) of CrPC is wider than Article 20 (2) of the Constitution. While, Article 20 (2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once', Section 300 (1) of CrPC states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts.

In the present case, although the offences are different but the facts are the same. Hence, Section 300 (1) of CrPC applies. Consequently, the prosecution under Section 420 IPC was barred by Section 300 (1) of CrPC.

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94. CRIMINAL PROCEDURE CODE, 1973 – Section 397
Interlocutory Order – Where cognizance has been taken by the trial Court and order of issuance of process has passed, such order is not an interlocutory order, but is intermediate or quasi final order – Bar of sub-section (2) of Section 397 of Cr.P.C. is not applicable – Revision maintainable.

Yashwant Singh and others v. State of M.P. and Another
Judgment dated 14.09.2010 passed by the High Court of M.P. in M. Cr. C. No. 466 of 2010, reported in 2011 (1) MPLJ 350

Held :

In the case of *Madhu Limaye v. State of Maharashtra, 1978 MPLJ (SC) 24 = AIR 1978 SC 47,* the Hon'ble Apex Court has held that ordinary and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term "final order". But and interpretation and the universal application of the principle that what is not a final order, must be an interlocutory order, is neither warranted not justified, If it were so, it will render almost nugatory the revisional power of the Sections Court or the High Court conferred on it by Section 397(1). On such strict interpretation only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seen to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1989 Code.

Similar is in the case of *V.C. Shukla v. State, 1980 SCC (Cri) 695,* wherein the Hon'ble Apex Court has held that the term "interlocutory order" used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final. This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore the bar under sub-Section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate or quasi-final and, therefore, the revisional jurisdiction under Section 397 could be exercised against the same. The High Court therefore, was not justified in coming to the conclusion that the Session Judge had no jurisdiction to interfere with the order in view of the bar under sub-section (2) of Section 397 of the Code.

Considering the above legal position, the order of issuance of process and taking cognizance cannot be treated as interlocutory order.

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*95. **CRIMINAL PROCEDURE CODE, 1973 – Section 398**

(i) **'Further enquiry' – Direction to the CJM to hold a further enquiry does not necessarily oblige the Magistrate to record any further evidence in the case – The nature of the inquiry is in the discretion of the Magistrate which may or may not have included recording of further evidence on behalf of the complainant – The Magistrate could without recording any further evidence in the matter re-appraise the averments made in the complaint and the material already on record to determine whether a *prima facie* case was made out against the accused persons.**

(ii) **In as much as the Magistrate in the instant case summoned the witnesses and examined them afresh, he may have gone beyond what was legally necessary to do but that is no reason to hold that the recording of evidence by the Magistrate as a part of the further enquiry directed by the High Court would vitiate the proceedings before him or the conclusion drawn on the basis of any such enquiry – So long as the Magistrate was satisfied that a *prima facie* case had been made out, he was competent to issue summons to the accused.**

Subrata Das v. State of Jharkhand & Anr.

Judgment dated 22.10.2010 passed by the Supreme Court in Criminal Appeal No. 1153 of 2004, reported in AIR 2011 SC 177

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96. **CRIMINAL PROCEDURE CODE, 1973 – Section 438**
CONSTITUTION OF INDIA – Article 21

(i) **Anticipatory bail – Purpose of incorporating Section 438 in the CrPC was to recognize importance of personal liberty and freedom in a free and democratic country – An individual is presumed to be innocent till he is found guilty by the Court.**

(ii) **Ambit, scope and object of the concept of anticipatory bail enumerated under Section 438 have been dealt with by the Constitution Bench of the Apex Court in *Gurbaksh Singh Sibbia and others v. State of Punjab, (1980) 2 SCC 565 = AIR 1980 SC 1632* – The controversy is no longer *res integra*.**

(iii) **Anticipatory bail cannot be granted for a limited period as it is contrary to the legislative intention and spirit of Section 438 CrPC – It is also contrary to Article 21 of the Constitution – Ordinarily, benefit of granting anticipatory bail should continue till the end of the trial of that case unless bail is cancelled on fresh circumstances or on the ground of abuse of the indulgence by the accused.**

(iv) **No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail – Factors and parameters**

to be taken into consideration while dealing with anticipatory bail stated.

(v) Suggestions to the State and some guidelines in this regard to the arresting Police Officers, Sessions Judges, State Judicial Academies through High Courts also given to strengthen the concept of personal liberty.

(vi) The judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength – Judgment delivered in ignorance of the previous binding precedent would be decision rendered in *per incurium*.

Siddharam Satlingappa Mhetre v. State of Maharashtra

Judgment dated 02.12.2010, passed by the Supreme Court in Criminal Appeal No. 2271 of 2010, reported in AIR 2011 SC 312

Held:

(i) The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

The purpose of incorporating Section 438 in the Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

(ii) The Constitution Bench of this Court in *Gurbaksh Singh Sibbia and others v. State of Punjab (1980) 2 SCC 565 = AIR 1980 SC 1632* had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under:

> ".....A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is

required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

A good deal of misunderstanding with regard to the ambit and scope of Section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in *Sibbia's case* (supra) was correctly understood, appreciated and applied.

The Constitution Bench of this Court in the *Sibbia' case* (supra) observed as under:

> "The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.
>
> xxx xxx xxx
>
> Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute, restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence."
>
> xxx xxx xxx
>
> "I desire in the first instance to point out that the discretion given by the section is very wide. Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by

the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

xxx xxx xxx

"The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

This Court in the *Sibbia's case* (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under Section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in Section 437 cannot be read into Section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character, this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

(iii) The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the

public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.

The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia's case* (supra).

In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia's case* (supra), it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of Section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in *Sibbia's case* (supra) clearly observed that it is not necessary to re-write Section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 Cr.P.C. granting bail cannot be curtailed.

In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so.

The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of Section 438 Cr.P.C. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

It is a settled legal position crystallized by the Constitution Bench of this court in *Sibbia's case* (supra) that the courts should not impose restrictions on the ambit and scope of Section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot re-write the provision of the statute in the garb of interpreting it.

(iv) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia's case* (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

(v) It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because Section 438 Cr.P.C. has not been allowed its full play. The Constitution Bench in *Sibbia's case* (supra) clearly mentioned that Section 438 Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were Sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that Section 438 Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in *Sibbia's case* (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest *vis-à-vis* personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is

any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.
2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.
3) Direct the accused to execute bonds;
4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.
5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.
6) Bank accounts be frozen for small duration during investigation.

In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

Exercise of jurisdiction under Section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-à-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

(vi) The ratio of the judgment of the Constitution Bench in *Sibbia's case* (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of *Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 = AIR 1996 SC 1042 , K.L. Verma v. State and another, (1998) 9 SCC 348, Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303 = AIR 2005 SC 1057* and *Sunita Devi v. State of Bihar and another, (2005) 1 SCC 608 = AIR 2005 SC 498.*

In *Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632,* a two-Judge Bench of this Court observed "the power exercisable under Section 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in *Sibbia's case* (supra).

The judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. The aforesaid judgments have clearly ignored a Constitution Bench judgment of this court in *Sibbia's case* (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Cr.P.C.. Consequently, the aforesaid judgment are per incuriam.

In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

In the instant case there is a direct judgment of the Constitution Bench of this court in *Sibbia's case* (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under

Section 438 Cr.P.C. The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.

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***97. CRIMINAL TRIAL:**

Crimes of intent – Liability of Corporate Bodies

(i) The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizen – Large-scale financial irregularities are done by various corporations – The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy – The companies and corporations can no longer claim immunity from criminal prosecution on ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences – *Mens rea* is attributed to Corporations on principle of 'alter ego' of company i.e the person or group of persons that guide the business of the company, would be imputed to the corporation – The degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

(ii) A company/corporation also cannot escape liability for a criminal offence, merely because the punishment prescribed is that of imprisonment and fine – In such cases, the Court can impose the punishment of fine which could be enforced against the company and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company – Such a discretion is to be read into the section so far as the juristic person is concerned.

Note: Standard Chartered Bank v. Directorate of Enforcement, AIR 2005 SC 2622 referred.

Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.
Judgment dated 20.10.2010, passed by the Supreme Court in Criminal Appeal No. 688 of 2005, reported in AIR 2011 SC 20

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***98. CRIMINAL TRIAL:**

EVIDENCE ACT, 1872 – Sections 3 and 134
INDIAN PENAL CODE, 1860 – Section 149

(i) The doctrine of *'falsus in uno, falsus in omnibus'* has no application in India and the Court has to assess to what extent the deposition of a witness can be relied upon – The Court has to separate the falsehood from the truth and it is only in

exceptional circumstances when it is not possible to separate the grain from the chaff because they are inextricably mixed up, that the whole evidence of such a witness can be discarded.

(ii) In a case involving an unlawful assembly with a very large number of persons, there is no rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless that the Court is of the view that the testimony of such sole eye-witness is not reliable – Though, generally it is a rule of prudence followed by the Courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident – In a fit case the Court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident – The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot.

Ranjit Singh & Ors. v. State of Madhya Pradesh
Judgment dated 27.10.2010 passed by the Supreme Court in Criminal Appeal No. 1072 of 2006, reported in AIR 2011 SC 255

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99. CRIMINAL TRIAL:

(i) Victim belonging to Bhil community (ST) – Horrible oppression on the tribals of India noticed and sensitized the Courts and other concerned to undo the historical injustice to them.

(ii) The parade of a tribal woman in naked condition on the village road in broad daylight is shameful, shocking and outrageous – The dishonour of the victim called for harsher punishment.

Kailas & others v. State of Maharashtra TR. Taluka P.S.
Judgment dated 05.01.2011, passed by the Supreme Court in Criminal Appeal No. 11 of 2011, reported in AIR 2011 SC 598

Held:

It is alleged by the appellants that the people belonging to the Bhil community live in torn clothes as they do not have proper clothes to wear. This itself shows the mentality of the accused who regard tribal people as inferior or sub-humans. This is totally unacceptable in modern India.

The Bhils are probably the descendants of some of the original inhabitants of India living in various parts of the country particularly southern Rajasthan, Maharashtra, Madhya Pradesh etc. They are mostly tribal people and have managed to preserve many of their tribal customs despite many oppressions and atrocities from other communities.

Since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all

communities and sects. It was due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.

Thus it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects, lingual and ethnic groups, etc. in the country. The Constitution guarantees to all citizens freedom of speech (Article 19), freedom of religion (Article 25), equality (Articles 14 to 17), liberty (Article 21), etc.

Special provisions have been made in our Constitution in Articles 15(4), 15(5), 16(4), 16(4A), 46, etc. for the upliftment of these groups. Among these disadvantaged groups, the most disadvantaged and marginalized in India are the Adivasis (STs), who, as already mentioned, are the descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early mortality etc. Their plight has been described by this Court in *Samatha v. State of Andhra Pradesh and Ors., AIR 1997 SC 3297* (vide paragraphs 12 to 15). Hence, it is the duty of all people who love our country to see that no harm is done to the Scheduled Tribes and that they are given all help to bring them up in their economic and social status, since they have been victimized for thousands of years by terrible oppression and atrocities. The mentality of our countrymen towards these tribals must change, and they must be given the respect they deserve as the original inhabitants of India.

The injustice done to the tribal people of India is a shameful chapter in our country's history. They were slaughtered in large numbers, and the survivors and their descendants were degraded, humiliated, and all kinds of atrocities inflicted on them for centuries. They were deprived of their lands, and pushed into forests and hills where they eke out a miserable existence of poverty, illiteracy, disease, etc. And now efforts are being made by some people to deprive them even of their forest and hill land where they are living, and the forest produce on which they survive.

Despite horrible oppression on them, the tribals of India have generally (though not invariably) retained a higher level of ethics than the non-tribals in our country. They normally do not cheat, tell lies, and do other misdeeds which many non-tribals do. They are generally superior in character to the non-tribals. It is time now to undo the historical injustice to them.

The parade of a tribal woman in naked condition on the village road in broad day light is shameful, shocking and outrageous. The dishonour of the victim called for harsher punishment.

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100. ENVIRONMENT PROTECTION AND POLLUTION CONTROL FOREST (CONSERVATION) ACT, 1980 – Section 2

Environment protection and pollution control – Determination of forest land in terms of Section 2 of the Forest (Conservation) Act – Man-made forest and afforestation – Plantation for purpose of creating an urban park distinguished from afforestation.

State Government Project at Noida for building large-scale memorial with extensive stone-work diverting urban park land and felling of trees thereon – Legality – Held, project not illegal as it does not contravene Section 2 of the Act.

In Re: Construction of Park at Noida near Okhla Bird Sanctuary

Judgment dated 03.12.2010 passed by the Supreme Court in IA No. 2609 of 2009 in WP No. 202 of 1995, reported in (2011) 1 SCC 744

Held:

The center of the controversy in this case involved a very large project of Uttar Pradesh Government at Noida and the validity of the project was challenged on the ground that the project area was a forest area and violated Section 2 of the Forest (Conservation) Act, *inter alia.*

The State Government admits to felling of over 6000 tress in 2008. As per Government information on a large tract of land (33.45 ha in area) that was forever agricultural in character, trees were planted with the object of creating an urban park (and not for afforestation!). The trees, thus, planted were allowed to stand and grow for about 12-14 years when they were cut down to make the area clear for the project.

But trees planted in the project area cannot be branded as "forest". It is inconceivable that trees planted with the intent to set up an urban park would turn into forest within a span of 10 to 12 years and the land that was forever agricultural, would be converted into forest land. One may feel strongly about cutting trees in such large numbers and question the wisdom behind replacing a patch of trees by large stone columns and statutes but that would not change the trees into a forest or the land over which those trees were standing into forest land.

In the order dated 12-12-1996 in *T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267* the Court gave a very wide definition of "forest". But any definition howsoever wide relates to a context. There can hardly be a legal definition, in terms absolute, and totally independent of the context. The context may or may not find any articulation in the judgment or the order but it is always there and it is discernible by a careful analysis of the facts and circumstances in which the definition was rendered.

No doubt a man-made forest may equally be a forest as a naturally grown one and a non-forest land may also, with the passage of time, change its character and become forest land. But this also cannot be a rule of universal application and must be examined in the overall facts of the case. Otherwise it would lead to highly

anomalous conclusions. Almost all the relied on orders and judgments defining "forest" and "forest land" for the purpose of the FC Act were rendered in the context of mining or illegal felling of trees for timber or illegal removal or other forest produce or the protection of national parks and wildlife sanctuaries. In the case in hand the context is completely different. Hence, the decisions relied upon can be applied only to an extent and not in absolute terms.

In the light of the discussion made above, it must be held that the project site is not forest land and the construction of the project without the prior permission from the Central Government does not in any way contravene Section 2 of the FC Act.

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101. EVIDENCE ACT, 1872 – Section 60

Newspaper report – Evidentiary value there of – The reporters of newspaper publication have categorically stated that they had no personal knowledge of the events published in the newspaper – Therefore, what was reported in the newspapers could not have been regarded anything except hearsay and the same could not be used by the Court for the purpose of corroboration of testimony of a witness.

Joseph M. Puthussery v. T.S. John & Ors.

Judgment dated 01.12.2010, passed by the Supreme Court in Civil Appeal No. 5310 of 2005, reported in AIR 2011 SC 906

Held:

The finding that contemporaneous newspaper publications produced at Exts. P-5 and P-6 corroborate the testimony of the respondent No. 1, is also not supported by the evidence on record. If one examines newspaper publications produced at Exts. P-5 and P-6, it becomes at once clear that the reports were entirely hearsay. The reporters of Exts. P-5 and P-6 were examined in this case. They have categorically, and in no uncertain terms, stated that they had no personal knowledge of the events published in Exts. P-5 and P-6. Therefore, what was reported in the newspapers could not have been regarded anything except hearsay. There is no manner of doubt that the High Court has misdirected itself in placing reliance on the hearsay evidence, which was produced before the Court in the form of Exts. P-5 and P-6. In view of clear proposition of law laid down by this Court in *Quamarul Ismam v. S.K. Kanta and others, 1994 Supp. (3) SCC 5 = AIR 1974 SC 1733* and *Laxmi Raj Shetty and another v. State of Tamil Nadu, (1988) 3 SCC 319 = AIR 1988 SC 1274,* the hearsay evidence could not have been used by the learned Judge for coming to the conclusion that contemporaneous newspapers publications Exts. P-5 and P-6 corroborate the testimony of the respondent No. 1.

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102. EVIDENCE ACT, 1872 – Section 112

(i) When a child is born from a wedlock, there is a presumption in favour of legitimacy of child.

(ii) DNA Test – In matrimonial proceedings – Order of blood test (DNA Test) – Does not offend Article 21 of the constitution of India – Hence, such power has to be exercised only when the applicant has strong *prima facie* case.

Reena v. Ishwar

Judgment dated 11-05-2010, passed by the M.P. High Court in W.P. No. 3656/2010, reported in 2011 (I) MPJR 64

Held :

In the matter of *Goutam Kundu v. State of West Bengal, AIR 1993 SC 2295* wherein father disputing paternity of child and seeking blood test of child, Hon'ble Apex Court held that purpose of application is nothing more than to avid payment of maintenance. While deciding the case Hon'ble Apex Court has also laid down certain principles which reads as under : –

1. That courts in India cannot order blood test as a matter of course;
2. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
3. There must be a strong prima facie case in that the husband must establish non access in order to dispel the presumption arising under Section 112 of the Evidence Act.
4. The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
5. No one can be compelled to give sample of blood for analysis.

Learned counsel for the petitioner further placed reliance on a decision in the matter of *Sharda v. Dharampal, AIR 2003 SC 3450* wherein Hon'ble Apex Court has held that in matrimonial proceedings, order to undergo medical test does not offend Article 21 of Constitution of India, however, such power has to be exercised only when applicant has strong prima facie case. On the strength of aforesaid position of law, learned counsel submits the petition filed by the petitioner be allowed and the impugned order passed by the learned Court below be set aside with a direction to the learned Court below to direct the respondent for DNA test.

From Perusal of the record which is available with the petition it is evident that number of photographs have been filed by the petitioner. Which to show that the marriage of the petitioner was solemnized with the respondent. Form perusal of the impugned order it is evident that the Court has not closed the right of the petitioner for DNA test, but has only observed that it has been made

clear to the respondent that if the respondent denied for DNA test, then presumption can be drawn against the respondent. Learned Court below has also observed that after recording of evidence if the Court is of the view that DNA test is necessary, then it will be preformed at the cost of respondent.

In the matter of *Ramkanya Bai v. Bharatram 2010 (2) MPLJ 1* Hon'ble Apex Court has held that when a child is born from a wedlock, there is a presumption in favour of legitimacy of child.

In the facts and circumstances of the case, this Court is of the view that only because the respondent has denied the solemnization of marriage and also paternity of the son of the Petitioner, it was not necessary for the petitioner to compel the respondent for DNA test. Even otherwise the learned trial Court has not closed that door of the petitioner for all times to come. Application filed by the petitioner was at the initial stage. After recording of evidence if the petitioner is of the view that DNA test is necessary for determination of the paternity of the Son, then the petitioner shall be at liberty to move an appropriate application. At that stage if such an application is filed and the Court is also of the view that in the interest of child and the mother it is necessary that respondent be directed for DNA test, then the learned Court below shall after hearing the respondent pass an appropriate order on the said application. It is also made clear that in case the learned Court below direct the respondent for DNA test and the respondent refuses, then obviously adverse inference can be drawn against the respondent.

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103. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Proviso to Section 7

Adoption by husband with the consent of wife – Proof of – Held, this can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption – Further held, the presence of wife as a spectator in the assembly of people who gathered at the place where ceremonies of adoption are performed, cannot be treated as her consent.

Ghisalal v. Dhapubai (dead) by LRs and others

Judgment dated 12.01.2011, passed by the Supreme Court in Civil Appeal No. 6373 of 2002, reported in AIR 2011 SC 644

Held:

The Hindu Adoptions and Maintenance Act, 1956 now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision-making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not

in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption. [Sections 8, 11 (1) and 11 (2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

The term 'consent' used in the proviso to Section 7 and the Explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject-matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

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104. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)

Cruelty – No prior assumptions can be made in such matters – The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty – The concept of cruelty differs from person to person depending upon his up-bringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system – Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty.

Gurbux Singh v. Harminder Kaur

Judgment dated 08.10.2010, passed by the Supreme Court in Civil Appeal No. 5010 of 2007, reported in AIR 2011 SC 114

Held:

Cruelty has not been defined under the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors, in different set of circumstances. Even a single act of violence, which is of grievous and inexcusable nature satisfied the test of cruelty. Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse.

In *Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511,* a three-Judge Bench of this Court while considering Section 13 (1) (I-a) of the Act laid down certain guidelines. The analysis and ultimate conclusion are relevant which reads as under:-

> "98. Proper analysis and scrutiny of the judgments of this Court and other courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.
>
> 99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to persons depending upon his up-brining, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.
>
> 100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.'

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the marred life which happens in day-to-day life would not

be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consider or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapability or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. The ill-conduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty. Making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty. Sustained unjustifiable and reprehensible conduct affecting physical and mental health of the other spouse would lead to mental cruelty.

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105. HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937 (Since repealed) – Sections 3 and 4
HINDU SUCCESSION ACT, 1956 – Section 14

(i) Maintenance to widow – Husband died in 1922 – Benefit under the Act was not available to wife – However, she had a right of maintenance out of property of her late husband.

(ii) Property of female Hindu – A Hindu widow has a pre-existing right of maintenance in property left by her husband and any instrument executed afterwards in her favour in which her right shown as limited right would be in recognition of her pre-existing right, and not as a new right created for the first time.

(iii) Conditions required for applicability of Section 14 – Two conditions must exist; (i) Concerning female Hindu must be in possession of property (ii) Such property must be possessed by her as a limited owner.

(iv) Possession – Possession of a share of husband in joint family property in lieu of maintenance is sufficient to apply the provision of sub-clause (1) of Section 14.

Basant Kumar v. Indra Sen (Deceased) Throught Heirs & ors.
Judgment dated 25.11.2010 passed by the High Court of M.P. in F. A. No. 243 of 1997, reported in ILR (2011) M.P. 479

Held:

It is true that Moolchand had died in 1922 thus, succession opened in 1922 and the benefit of Hindu Women's Right to Property Act, 1937 was not available to Smt. Baijantibai but even then Baijantibai being a widow of late Moolchand, who had share in co-parcenery immovable property clearly had a right of maintenance out of the property of her late husband. Please see Section 559(1) of *Principles of Hindu Law* by Mulla which read as follows:-

(1) A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance –

(i) out of her husband's separate property,

(ii) out of property in which he was a co-parcener at the time of his death.

Under old Hindu Law the widow had at least a right to maintenance out of her husband's estate whether such estate was in the hands of his male issue or in the hands of his co-parceners. The co-paracener in possession of such estate was liable to maintain the widow "not because he was under an obligation to maintain her but because he has in his hands her husband's estate". Thus, obviously, even if Smt. Baijantibai did not succeed as a heir to her husband, she had a right to maintenance out of the property of her husband which was in the hands of Balmukund, father of the respondents, who afterward had executed a Gift Deed Ex. D/1 in her favour.

In *Vaddeboyina Tulasamma & ors. v. Vaddeboyina Sesha Reddi, AIR 1977 SC 1944,* Hon'ble Apex Court elaborately discussed the applicability of sub-clauses (1) and (2) of Section 14 of Hindu Succession Act that a Hindu widow has a pre-existing right of maintenance as an heir of her husband in the property left by her husband and if any instrument executed afterwards in her favour in which her right shown as limited right. In that circumstances, the property given to her was in recognization of her pre-existing right, and not as a new right created for first time. Same position is in the case in hand. In this case Balmukund, father of respondent, executed gift deed Ex. D/1 and gave possession of the disputed property, in lieu of her right of maintenance. In these circumstances, although Ex. D/1 gave a restricted right to Baijantibai in the property, but due to the pre-existing right of maintenance in the property of her husband, this document only recognizes her pre-existing right in her property. In other words no new right, title or interest was created by Ex. D/1. In these circumstances sub-clause (2) of Section 14 of Hindu Succession Act will not be applicable in this case.

As far as possession of Baijantibai is concerned, as discussed hereinabove Baijantibai had pre-existing right in the co-parcenery property. In these circumstances, she was in joint possession with her brother-in-law Balmukund before executing of Ex.D/1 and after execution of Ex.D/1, she acquired absolute possession on the disputed property. In these circumstances possession of a share of her husband in the joint family property in lieu of maintenance is sufficient to apply the provision of sub-Clause (1) of Section 14 of the Hindu Succession Act. For the applicability of the provisions, two conditions must co-exist namely (1) the concern female Hindu must be in possession of the property and (2) such property must be possessed by her as a limited owner. In this case both the conditions are fulfilled, therefore, Baijantibai became full owner of the property possessed by her at the time of commencement of Hindu Succession Act, 1956.

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106. INDIAN PENAL CODE, 1860 – Section 84

Unsoundness of mind – The accused seeking exoneration from liability of an act under Section 84 IPC is to prove legal insanity and not medical insanity – The accused is not required to prove the same beyond all reasonable doubt but merely satisfy the preponderance of probabilities.

Surendra Mishra v. State of Jharkhand

Judgment dated 06.11.2010, passed by the Supreme Court in Criminal Appeal No. 177 of 2006, reported in AIR 2011 SC 627 (3-Judge Bench)

Held:

The scope and ambit of Section 84 of the Indian Penal Code also came up for consideration before this Court in the case of *Hari Singh Gond v. State of Madhya Pradesh, (2008) 16 SCC 109 = AIR 2009 SC 31* in which it has been held as follows:

> "Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of `unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity."

In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code.

In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him. Reference in this connection can be made to a decision of this Court in the case of *T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219=AIR 2001 SC 3828* in which it has been held as follows:

"9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.

10. In *State of M.P. v. Ahmadull, AIR 1961 SC 998,* this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.

11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

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***107. INDIAN PENAL CODE, 1860 – Section 149**

(i) Common object of unlawful assembly has to be gathered from the nature of assembly, arms possessed by them and behaviour of assembly at or before occurrence – Each of accused need not commit some illegal overt act – An assembly, which is not unlawful, when assembled, may subsequently become an unlawful assembly – When the assembly is found to be unlawful and if offence is committed by any member of the unlawful assembly in prosecution of the common object, every member of the unlawful assembly shall be guilty of the offence committed by another member of the assembly.

(ii) **In the present case there is overwhelming material to show that the appellants variously armed, including the firearms assembled at one place and thereafter came to the place of occurrence and started assault together and when protested by the deceased, one of the members of the unlawful assembly shot him dead and some of them caused injury by firearm,** *gandasa, lathi,* **etc. to others – All of them have come and left the place of occurrence together – From what has been found above, there is no escape from the conclusion that appellants were the members of the unlawful assembly and offences have been committed in pursuance of the common object and hence, each of them shall be liable for the offence committed by any other member of the assembly.**

Ramesh and Ors. v. State of Haryana

Judgment dated 21.10.2010, passed by the Supreme Court in Criminal Appeal No. 628 of 2007, reported in AIR 2011 SC 169

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***108. INDIAN PENAL CODE, 1860 – Sections 304-B and 302**

Dowry death – Charge of murder should be framed.

Short facts:

Accused was charged, found guilty and sentenced under Section 304-B IPC for dowry death of his wife just after 6 months of their marriage.

Relevant evidence:

As per doctor's evidence, cause of death of pregnant wife of accused husband was due to smothering and throttling which was *ante mortem* **and was sufficient to cause death in ordinary course of nature –The above injuries** *prima facie* **indicate that the deceased's head was repeatedly struck and she was also throttled – It appears to be a case of barbaric and brutal murder.**

Courts should take a serious view in the matters of crime against women and give harsh punishment – It is directed that all Trial Courts in India should ordinarily add Section 302 to the charge of Section 304-B so that death sentences can be imposed in such heinous and barbaric crime against women.

Rajbir @ Raju & Anr. v. State of Haryana

Judgment dated 22.11.2010, passed by the Supreme Court in Petition for Special Leave to Appeal (Cri.) No. 9507 of 2010, reported in AIR 2011 SC 568

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109. INDIAN PENAL CODE, 1860 – Sections 363, 366, 375 and 376

(i) Offence of rape – Determination of age of prosecutrix – Held, there is no such rule much less an absolute one that two years have to be added to the age determined by the doctor.

(ii) Expressions "against her will" and "without her consent" – Connotation there of – The expression "against her will" would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition – On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation.

(iii) Evidence of prosecutrix, requirement of corroboration – Held, the testimony of prosecutrix, if found to be reliable by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary – Position reiterated.

(iv) Absence of injuries on the person of the prosecutrix – Is not sufficient to discredit her evidence.

State of U.P. v. Chhoteylal

Judgment dated 14.01.2011, passed by the Supreme Court in Criminal Appeal No. 769 of 2006, reported in AIR 2011 SC 697

Held:

There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a 3-Judge Bench decision of this Court in *State of Karnataka v. Bantara Sudhakara @ Sudha & Anr., (2008) 11 SCC 38* wherein this Court at page 41 of the Report stated as under:

> "Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation."

In the facts of the case what is crucial to be considered is whether clause First or clause Secondly of Section 375 IPC is attracted. The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation.

A woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice to the crime. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a

conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by belies in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rule out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge. This Court has repeatedly laid down the guidelines as to how the evidence of the prosecutrix in the crime of rape should be evaluated by the court.

Although the lady doctor PW-5 did not find any injury on the external or internal part of body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse, we are afraid that does not make the testimony of the prosectrix unreliable. The fact of the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long period. It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would some injury on the external or internal part of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim. She did not and could not inform the neighbours where she was kept due to fear.

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***110. LAND ACQUISITION ACT, 1894 – Sections 3 (b), 18 and 50**

(i) "Person interested" – Where land is acquired at the instance and cost of the DDA (local authority), it would be termed as "person interested" within the meaning of Section 3 (b) and therefore, entitled to participate in proceedings held before Land Acquisition Collector and also entitled to notice and opportunity to adduce the evidence before Reference Court.

(ii) The failure of Land Acquisition Collector to issue notice to the DDA and give an opportunity to it to adduce evidence for the purpose of determining the amount of compensation payable to the land owners would be fatal to the award passed by him.

(iii) **Further since the DDA was entitled to notice and opportunity to adduce evidence before the Reference Court and, as no notice or opportunity was given to the DDA by the Reference Court, the judgment rendered by it would be liable to be treated as nullity.**

Delhi Development Authority v. Bhola Nath Sharma (Dead) by LRs and Ors.

Judgment dated 08.12.2010, passed by the Supreme Court in Civil Appeal No. 10326 of 2010, reported in AIR 2011 SC 428

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111. **LAND ACQUISITION ACT, 1894 – Section 23**

Determination of market value of an acquired land – Consideration of auction sale transaction – Element of competition in auction sale makes them unsafe guide for determining the market value, but, where an open auction sale is the only comparable sale transaction available, the Court may have to, with caution, rely upon the price disclosed by such auction sale by providing an appropriate deduction to off-set the competitive-hike in value.

Executive Engineer, Karnataka Housing Board v. Land Acquisition Officer and others

Judgment dated 04.01.2011, passed by the Supreme Court in Civil Appeal No. 51 of 2011, reported in AIR 2011 SC 781

Held:

The standard method of determination of market value of any acquired land is by the valuer evaluating the land on the date of valuation [publication of notification under Section 4 (1) of the Land Acquisition Act, 1894 – 'Act' for short] notification, acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price. Thus, the market value is determined with reference to the open market sale of comparable land in the neighbourhood, by a willing seller to a willing buyer, on or before the date of preliminary notification, as that would give a fair indication of the market value. A 'willing seller' refers to a person who is not acting under any pressure to sell the property, that is, where the sale is not a distress sale. A willing seller is a person who knowing the advantages and disadvantages of his property, sells the property after ascertaining the prevailing market prices at the fair and reasonable value. Similarly, a willing purchaser refers to a person who is not under any pressure or compulsion to purchase the property, and who, having the choice of different properties, voluntarily decides to buy a particular property by assessing its advantages and disadvantages and the prevailing market value thereof. Of course, unless there are indications to hold otherwise, all sale transactions under registered sale deeds will be assumed to be normal sales by willing sellers to willing purchasers. Where however there is evidence or indications that the sale was not at prevailing

fair market value, it has to be ignored. But auction sales stand on a different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction, Human ego, and desire to do better and excel other competitors, leads to competitive bidding, each trying to outbid the others. Thus in a well advertised open auction sale, where a large number of bidders participate, there is always a tendency for the price of the auctioned property to go up considerably. On the other hand, where the auction sale is by banks or financial institutions, courts, etc. to recover dues, there is an element of distress, a cloud regarding title, and a chance of litigation, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. There is therefore, every likelihood of auction price being either higher or lower than the real market price, depending upon the nature of sale. As a result, courts are wary of relying upon auction sale transactions when other regular traditional sale transactions are available while determining the market value of the acquired land. This Court in *Raj Kumar v. Haryana State, (2007) 6 SCC 609 = AIR 2007 SC 3124* observed that the element of competition in auction sales makes them unsafe guides for determining the market value.

But where an open auction sale is the only comparable sale transaction available (on account of proximity in situation and proximity in time to the acquired land), the court may have to, with caution, rely upon the price disclosed by such auction sales, by providing an appropriate deduction or cut to off-set the competitive-hike in value. In this case, the Reference Court and High Court, after referring to the evidence relating to other sale transactions, found them to be inapplicable as they related to far away properties. Therefore, we are left with only the auction sale transactions. On the facts and circumstances, we are of the view that a deduction or cut of 20% in the auction price disclosed by the relied upon auction transaction towards the factor of 'competitive-price hike' would enable us to arrive at the fair market price.

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***112. LAND ACQUISITION ACT, 1894 – Section 23**

The relevant date of determination of market value – The State Government had abandoned the earlier notification by issuing the subsequent notification – The market value of the acquired land should be fixed with reference to the date of publication of the second preliminary notification.

Land Acquisition Officer-cum-RDO, Chevella Division, Ranga Reddy District v. A. Ramachandra Reddy and others

Judgment dated 12.01.2011, passed by the Supreme Court in Civil Appeal No. 438 of 2011, reported in AIR 2011 SC 662

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113. LIMITATION ACT, 1963 – Section 22
CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 8

(i) Cause of action against encroachment – An act of encroachment made to a public street is a continuous source of wrong and injury – Thus, cause of action is created as long as such wrong continues.

(ii) Representative suit – Non-compliance of the provisions of Order 1 Rule 8 CPC – Any member of a community may bring a suit to assert his right in the community property or for protecting such property and that in such a suit the plaintiff need not comply with the requirements of Order 1 Rule 8 CPC – Position explained.

Hari Ram v. Jyoti Prasad & Anr.

Judgment dated 27.01.2011, passed by the Supreme Court in Civil Appeal No. 1042 of 2011, reported in AIR 2011 SC 952

Held:

Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury cause of action is created as long as such injury continues and as long as the doer is responsible for causing such injury.

At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows:

> "In case of a continuing breach of contract or in case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."

This court had the occasion to deal with Section 22 of the Limitation Act, 1963, in the case of *Shankar Dastidar v. Shrimati Banjula Dastidar and Anr.* reported in *AIR 2007 SC 514,* in which the Supreme Court held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered opinion the plea that the suit is barred by limitation has no merit at all.

The next plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order 1, Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a

representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order 1, Rule 8 of the CPC.

In this connection, we may appropriately refer to a judgment of the Supreme Court in *Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur v. Smt. Chhoti and Ors.,* reported in *AIR 1990 SC 396.* In paragraph 13 of the said judgment, this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order 1, Rule 8 of the CPC is mandatory.

In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order 1, Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.

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114. MOTOR VEHICLES ACT, 1988 – Sections 2 (30), 50 and 168
Liability of transferor-owner of the vehicle – Neither the transferor nor the transferee took any step to change the name of the owner in the certificate of registration of the vehicle – Transferor must be deemed to continue as the owner of the vehicle for the purpose of the Motor Vehicles Act – Thus, transferor whose name continues in the records of the Registering Authority as the owner of the vehicle is equally liable for payment of compensation amount – Position explained.

Pushpa alias Leela and others v. Shakuntala and others
Judgment dated 12.01.2011, passed by the Supreme Court in Civil Appeal No. 6924 of 2005, reported in AIR 2011 SC 682

Held:

The question of the liability of the recorded owner of the vehicle has to be examined under different provisions of the Act. Section 2 (30) of the Act defines "owner" in the following terms:

> "2(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

Then, Section 50 of the Act lays down the procedure for transfer of ownership. It is a long section and insofar as relevant it is reproduced below:

"*50. Transfer of ownership.*

(1) Where the ownership of any motor vehicle registered under this Chapter is transferred, –

(a) the transferor shall, –

(i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee: and

(ii) xxx

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2) xxx

(3) xxx

(4) xxx

(5) xxx

(6) On receipt of a report under sub-section (1), or an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.

(7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner of the certificate of registration of the vehicle.

In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on February 2, 1993.

The question of the liability of the recorded owner of a vehicle after its sale to another person was considered by this Court in *Dr. T.V. Jose v. Chacko P.M., (2001) 8 SCC 748 = AIR 2001 SC 3939.*

Again, in *P.P. Mohammed v. K. Rajappan & Ors., (2008) 17 SCC 624,* this Court examined the same issue under somewhat similar set of facts as in the present case.

The decision in *T.V. Jose (Dr.)* (Supra) was rendered under the Motor Vehicles Act, 1939. But having regard to the provisions of Section 2 (30) and Section 50 of the Act, as noted above, the ratio of the decision shall apply with equal force to the facts of the case arising under the 1988 Act. On the basis of these decisions, the inescapable conclusion is that Jitender Gupta, whose name continued in the records of the registering authority as the owner of the truck was equally liable for payment of the compensation amount. Further, since an insurance policy in respect of the truck was taken out in his name he was indemnified and the claim will be shifted to the insurer, Oriental Insurance Company Ltd.

Learned Counsel for the Insurance Company submitted that even though the registered owner of the vehicle was Jitender Gupta, after the sale of the truck he had no control over it and the possession and control of the truck were in the hands of the transferee, Salig Ram. No liability can, therefore, be fastened on Jitender Gupta, the transferor of the truck. In support of this submission he relied upon a decision of this Court in *National Insurance Company Ltd. v. Deepa Devi & Ors, (2008) 1 SCC 414 = AIR 2008 SC 735.* The facts of the case in *Deepa Devi* are entirely different. In that case the vehicle was requisitioned by the District Magistrate in exercise of the powers conferred upon him under the Representation of the People Act, 1951. In that circumstance, this Court observed that the owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remained under requisition, the owner did not exercise any control over it: the driver might still be the employee of the owner of the vehicle but he had to drive the vehicle according to the direction of the officer of the State, in whose charge the vehicle was given. Save and except the legal ownership, the registered owner of the vehicle had lost all control over the vehicle. The decision in *Deepa Devi* was rendered on the special facts of that case and it has no application to the facts of the case in hand.

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***115. MOTOR VEHICLES ACT, 1988 – Section 110-A**

"Accident arising out of use of motor vehicle" – Whether the fire and explosion in the ill-fated petrol tanker which occurred nearly 4½ hours after the collusion involving the petrol tanker and the other truck can be said to have resulted from the accident arising out of the use of motor vehicle? Held, Yes. The case of *Shivaji Dayanu Patil & anr. v. Vatschala Uttam More, AIR 1991 SC 1769 = (1991) 3 SCC 530* **approved.**

New India Assurance Co. Ltd. v. Yadu Sambhaji More & Ors.

Judgment dated 07.01.2011, passed by the Supreme Court in Civil Appeal No. 3744 of 2005, reported in AIR 2011 SC 666

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116. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168

Determination of compensation – Loss of earnings – Payment of daily allowance apart from salary, if proved by evidence, such allowance will be part of income.

Deceased aged 20 years and his mother aged 40 years was the only dependant – Proper multiplier would be 15.

Mohd. Ameeruddin and another v. United India Insurance Company Limited and another

Judgment dated 18.11.2010 passed by the Supreme Court in Civil Appeal No. 4762 of 2006, reported in (2011) 1 SCC 304

Held:

The High Court observed that the proper multiplier, appropriate to the age of the mother of the deceased in terms of the ratio laid down by this Court in *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176,* is 13. Thus, multiplying ₹ 30,000 by 13, the High Court arrived at the figure of ₹ 3,90,000/- and taking away from it 1/3rd towards the personal expenses of the deceased held that the loss of dependency of the claimants would be not more than ₹ 2,60,000/- under the head "loss of future earnings".

We are unable to appreciate the view taken by the High Court on both counts. First, there was no evidence that the daily allowance of Rs.50/- was not paid to the deceased every day or even that he was not on work on every day of the month. On the contrary, there is evidence on record that apart from the monthly salary of ₹ 2500/- he was getting ₹ 50/- as daily allowance. We, therefore, hold that the Tribunal was right in assessing the monthly income of the deceased at ₹ 4,000/-.

Coming now to the question of multiplier, in the light of the decision of this Court in *Sarla Verma v. DTC, (2009) 6 SCC 121, 18* would be the proper multiplier where the age of the deceased is between 15 and 25 years and 15 where the age is between 36 and 40 years. The Tribunal has taken the age of the mother for determining the amount of compensation, and, therefore, the proper multiplier in this case would be 15 and on applying the said multiplier, the figure would

come to ₹ 4,50,000/-. We, accordingly, fix the amount of compensation receivable by the appellants under the head "loss of earnings" at ₹ 4,50,000/-. The rest of the award made by the Tribunal and affirmed by the High Court remains unmodified. Needless to say that the differential amount would carry interest at the rate of 9% per annum from the date of the application till the date of payment.

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117. MOTOR VEHICLES ACT, 1988 – Sections 166, 163-A and Sch. II
General principle relating to compensation in injury cases – Reiterated.
Permanent disability – Compensation – Assessment of loss of future earnings on account of permanent disability – Disability of limb (or any part of body) is not equal to disability of whole body – Assessment of permanent functional disability must assess percentage of loss of his earning capacity – In such case, no need to deduct any amount towards personal and living expenses.
If claim is under Sch-II of Section 163-A of M.V. Act, then compensation is to be determined on principles laid down in Note (5) of Sch.II.
To ensure availability of Expert/Medical evidence some important measures suggested including that oral evidence may be dispensed with where the certificates are not contested by the other party.

Raj Kumar v. Ajay Kumar and another

Judgment dated 18.10.2010 passed by the Supreme Court in Civil Appeal No. 8981 of 2010, reported in (2011) 1 SCC 343

Held:

The provision of the Motor Vehicles Act, 1988 ('Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See *C. K. Subramonia Iyer v T. Kunhikuttan Nair, AIR 1970 SC 376, R. D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 and Baker v. Willoughby, 1970 AC 467*).

The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

  (a) Loss of earning during the period of treatment;

  (b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) – depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) – involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case.

Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can

be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('Disabilities Act' for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however

note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in *Arvind Kumar Mishra v. New India Assurance Co. Ltd., (2010) 10 SCC 254 and Yadava Kumar v. National Insurance Co. Ltd., (2010) 10 SCC 341).*

Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning

capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.

The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to 'hold an enquiry into the claim' for determining the 'just compensation'. The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the 'just compensation'. While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Handbook for evaluation of permanent physical impairment (for example the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic Surgeons or its Indian equivalent or other authorized texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the first schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

After the insertion of Section 163A in the Act (with effect from 14.11.1994), if a claim for compensation is made under that section by an injured alleging disability, and if the quantum of loss of future earning claimed, falls under the second schedule to the Act, the Tribunal may have to apply the principles laid down in Note (5) of the Second Schedule to the Act to determine compensation.

Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show concern for litigants and witnesses.

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118. N.D.P.S. ACT, 1985 – Section 50

(i) Search and seizure – Under sub-section (1) of Section 50 of the NDPS Act, it is mandatory on the part of the empowered officer to apprise the 'person' intended to be searched of his right to be searched before the Gazetted Officer or a Magistrate.

(ii) Mere enquiry by empowered officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazzetted Officer cannot be said to be due compliance with the mandate of the Section.

(iii) Although by the insertion of sub-sections (5) and (6) of Section 50 the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned therein but these sub-sections does not obliterate the mandate of sub-section (1) of Section 50 to inform the person to be searched of his right to be taken before a Gazzetted Officer or a Magistrate.

(iv) Though Section 50 gives an option to the empowered officer to take suspect either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer – It would not only add legitimacy to search proceedings, it may verify and strengthen the prosecution as well.

Vijaysinh Chandubha Jadeja v. State of Gujarat

Judgment dated 29.10.2010, passed by the Supreme Court in Criminal Appeal No. 943 of 2005, reported in AIR 2011 SC 77 (5-Judge Bench)

Held:

Matter – Why before the Constitution Bench :

When this matter came up for consideration before a bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in the case of *Joseph Fernandez v. Sate of Goa, (2000) 1 SCC 707 = AIR 2000 SC 3502, Prabha Shankar Dubey v. State of M.P., (2004) 2 SCC 56 = AIR 2004 SC 486 on the one hand and Krishna Kanwar (Smt) alias Thakuraeen v. State of Rajashtan, (2004) 2 SCC 608 = AIR 2004 SC 2735 on the other, with regard to the dictum laid down by the Constitution Bench of this Court in State of Punjab v. Baldev Singh, (1999) 6 SCC 172 =1999 CrLJ 3672,* in particular regarding the question whether before conducting search, the concerned police officer is merely required to ask the suspect whether he would like to be produced before the Magistrate or a Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law.

Legal Position – Discussed and settled as under:

Section 50 of the NDPS Act prescribes the conditions under which personal search of a person is required to be conducted.

Sub-section (1) of the said Section provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the Magistrate for the purpose. Under sub-section (2), it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. It is manifest that if the suspect expresses the desire to be taken to the gazetted officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the gazetted officer or the Magistrate, as the case may be. Sub-section (3) lays down that when the person to be searched is brought before such gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct the search to be made. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

The Constitution Bench in *Baldev Singh's case* (supra) concluded the matter as under.

"57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

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(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards

provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterates the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in *Karnail Singh v. State of Haryana, (2009) 8 SCC 539.* Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in *Baldev Singh's case* (supra) is diluted but the

Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed:–

> "Through this amendment the strict procedural requirement as mandated by *Baldev Singh case* was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by *Baldev Singh case* was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in *Baldev Singh case* is diluted."

It can, thus, be seen that apart from the fact that in *Karnail Singh* (supra), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh's case* (supra) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* (supra), a two Judge bench of this Court culled out the ratio of *Baldev Singh's case* (supra), on the issue before us, as follows:

> "What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though

there is no specific form. The use of the word "right" at relevant places in the decision of *Baldev Singh case* seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and *Joseph Fernandez* (supra), the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words:

> "The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh case.* A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that *Joseph Fernandez* (supra) does not notice the ratio of *Baldev Singh* (supra) and in *Prabha Shankar Dubey* (supra), *Joseph Fernandez* (supra) is followed ignoring the dictum laid down in *Baldev Singh's case* (supra).

In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll, (1974) 2 SCC 33* it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole

scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the *animus imponentis*, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez* (supra) and *Prabha Shankar Dubey* (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's case* (supra).

We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verify strengthen the prosecution as well.

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***119. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13**
EVIDENCE ACT, 1872 – Section 133

(i) A witness forced to pay on promise of doing or forbearing to do any official act by a public servant, is not a partner in crime and associate in guilt and therefore, can not be said to be accomplice – Contractor who gave bribe, therefore, can not be said to be an accomplice as the same was extorted from him – Corroboration of evidence of a witness is required when his evidence is not wholly reliable – However, in a case in which a witness is wholly reliable, no corroboration is necessary – Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result.

(ii) Demand of illegal gratification is *sine qua non* to constitute the offence under the Act – Further, mere recovery of currency notes itself does not constitute the offence under the P.C. Act, unless it is proved beyond all reasonable doubts that the accused voluntarily accepted the money knowing it to be bribe – For arriving at the conclusion as to whether all the ingredients of an offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety.

C.M. Sharma v. State of A.P. Th. I.P.

Judgment dated 25.11.2010, passed by the Supreme Court in Criminal Appeal No. 232 of 2006, reported in AIR 2011 SC 608

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120. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction order for prosecution – Validity thereof – The sanctioning authority has duly recorded its satisfaction having examined the statements of witnesses as also the material on record the appellant/ accused should be prosecuted for the offence – Sanctioning order is in accordance with law.

Kootha Perumal v. State through Inspector of Police, Vigilance and Anti-Corruption

Judgment dated 15.12.2010 passed by the Supreme Court in Criminal Appeal No. 1923 of 2008, reported in (2011) 1 SCC 491

Held:

We may first consider the issue as to whether sanction was duly obtained prior to the prosecution of the appellant. It is the case of the appellant that the order for sanction of the prosecution produced in this case is signed by the Municipal Commissioner of Pudukottai. According to him, a perusal of the same would show that it suffers from non-application of mind. According to the learned counsel, the sanction order must disclose that the sanctioning authority has duly applied its mind and the same must be stated in the sanction order. In support of this submission, the learned counsel has relied on a judgment of this Court in *Jaswant Singh v. State of Punjab, AIR 1958 SC 124.*

Undoubtedly, in the aforesaid judgment in *Jaswant Singh* (supra), this Court observed as follows: (AIR pp. 126-27, para 4)

> "4. The sanction under the Act is not intended to be nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness [*Basdeo Agarwala v. King Emperor, (1945) 7 FCR 93*]. The object of the provision for sanctions is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. In *Gokulchand Dwarkadas Morarka v. R., (1947-48) 75 IA 30,* the Judicial Committee of the Privy Council also took a similar view when it observed: (IA pp. 37-38)
>
> > '....In Their Lordship's view, to comply with the provisions of clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the

> prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter: it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction.'
>
> It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence. In the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case. In *Yusofalli Mulla Noorbhoy v. R., (1948-49) 76 IA 158* it was held that a valid sanction on separate charges of boarding and profiteering was essential to give the court jurisdiction to try the charge. Without such sanction the prosecution would be a nullity and the trial without jurisdiction.

Keeping in view the aforesaid statement of law, it would not be possible to conclude that the sanction order in the present case was not valid. Ext. P-2 with the present appeal is the copy of the sanction order. A perusal of the same would show that the sanctioning authority has adverted to all the necessary facts which have been actually proved by the prosecution in the trial. Upon examination of the material facts, the sanctioning authority has certified that it is the authority competent to remove the appellant from the office. It is specifically stated that the statements of the witnesses have been duly examined. Sanction order also states that the other materials such as copy of the FIR as well as the other official documents such as the different mahazars were carefully examined. Upon examination of the statements of the witnesses as also the material on record, the sanctioning authority has duly recorded its satisfaction that the appellant should be prosecuted for the offences, as noticed above. We, therefore, find no merit in the submissions of the learned counsel that the sanctioning order to prosecute the appellant was not legal.

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***121. PREVENTION OF CORRUPTION ACT, 1988 – Section 19**
CRIMINAL PROCEDURE CODE, 1973 – Section 197
Scope for review of order granting or refusing sanction to prosecution – The power to review is not unbridled or unrestricted – It is not permissible for the sanctioning authority to review or reconsider the matter on the same materials – A change of opinion *per se* on the same materials cannot be ground for reviewing or reconsidering the earlier order refusing to grant sanction – However, in a case where

fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course.

State of Himachal Pradesh v. Nishant Sareen
Judgment dated 09.12.2010, passed by the Supreme Court in Criminal Appeal No. 2353 of 2010, reported in AIR 2011 SC 404

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122. SPECIFIC RELIEF ACT, 1963 – Section 16 (c)
CONTRACT ACT, 1872 – Sections 31 and 32
TRANSFER OF PROPERTY ACT, 1882 – Section 56

(i) "Readiness" and "willingness", averment and proof of – Must be established throughout the relevant points of time – 'Readiness' refers to financial capacity and 'willingness' to conduct of the plaintiff wanting performance.

(ii) Contingent contract – The contract insists on settlement of loan of the Bank and handover of the title deeds to the purchaser/ plaintiff from the Bank are not impossible events – In the light of the performance made by the plaintiff, the contract in question had not come to an end on this account and such contract is not a contingent contract – Position explained.

(iii) Marshalling by subsequent purchaser, scope of – In view of the agreement which results into decree for specific performance, the purchaser/plaintiff is entitled to insist upon defendants to have the mortgage debt satisfied out of the properties not sold to the plaintiff and in any case if the sale proceeds are not sufficient then to proceed against the said suit properties – Position explained.

J.P. Builders and another v. A. Ramadas Rao and another
Judgment dated 22.11.2010 passed by the Supreme Court in Civil Appeal No. 9821 of 2010, reported in (2011) 1 SCC 429

Held:

The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific

performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal, (1970) 3 SCC 140* that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ ascertained from the conduct of the parties.

With the materials placed, specific assertion in the plaint, oral and documentary evidence as to execution of agreement, part-payment of sale consideration, having sufficient cash and financial capacity to execute the sale deed, bank statements as to the moneys in fixed deposits and saving accounts, we are of the view that the plaintiff has proved his "readiness" and "willingness" to perform his part of obligation under the contract.

Chapter III of the Contract Act, 1872 deals with contingent contracts. Contingent contract has been defined in Section 31 and method of enforcement is stated in Section 32 which reads as under:

> "31. *"Contingent contract" defined.*– A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> 32. *Enforcement of contracts contingent on an event happening.*– Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible, such contracts become void."

It is clear that if the condition prescribed or even described in the contract is impossible, undoubtedly, such contracts become void and not enforceable in terms of Section 32.

As stated earlier, merely because the contract insist settlement of a loan of the bank and handover of the title deeds to the plaintiff from the bank are not impossible events in the light of the performance made by the plaintiff, the contract in question did not come to an end on this ground and such contract is not a contingent contract and undoubtedly, the Court has jurisdiction to grant

relief in terms of the contract. Obtaining No Objection Certificate (NOC) from the authority concerned, clearance of NOC from Income Tax Department or any other State/Central authority, securing title deeds after clearing certain loans are incidental and implied covenant on the part of the vendors to do the needful to give effect to the agreement.

We are satisfied that the contract in question is capable of performance and the contention of the learned senior counsel for the appellants that it is a contingent contract and is incapable of performance cannot be accepted. We have already pointed out that this was not an issue before the trial Court and such plea was not raised in the written statement. We have also pointed out that Defendant Nos. 1 and 2 did not bother to explain all salient features by entering the witness box in support of their claim. We have already highlighted that the plaintiff has established that he has partially performed his part of obligations by paying the advance amount of ₹ 25 lakhs and another ₹ 50 lakhs in addition to the initial deposit of ₹ 1 Lakh. We also hold that plaintiff has proved his readiness and willingness and financial ability to complete the sale transaction.

It is the claim of the plaintiff before the High Court that having secured a decree for specific performance as per Section 56 of the T.P. Act, 1882, by applying the principles of Marshalling, directions may be issued to the Bank to exhaust its remedy from other items of property which are located in the prime places in Chennai before bringing the properties covered in the agreement of sale.

In order to understand the claim of the plaintiff and the stand taken by the Defendant Nos. 1 and 2, it is useful to refer Section 56 of the T. P. Act.

> "56. *Marshalling by subsequent purchaser.*—If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgaged-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

Similar to this is Section 81 of the T.P. Act which speaks about marshalling securities.

The High Court after noting that the plaintiff had paid substantial amount as advance and secured decree for specific performance, came to the conclusion that the right of marshalling is available to the plaintiff. Section 56 deals with the right of subsequent purchaser to claim marshalling. It should be contrasted with Section 81 which refers to marshalling by a subsequent mortgage. The concept as in Section 56 applies to sales in a manner similar to Section 81 which applies to mortgages alone.

The concept of marshalling by subsequent purchaser can be explained by the following illustration. Suppose A owns properties X and Y. Both these properties are mortgaged to C. Later, A sells property X to B. Now, B will be entitled to insist that his vendor A, shall satisfy his mortgage debt out of property Y (unsold) in the first instance as far as possible. If after property Y is exhausted there still remains balance of debt, only then property X will be drawn upon. As stated earlier, Section 56 deals with the concept of marshalling in a transaction involved in subsequent sale, on the other hand, Section 81 is applicable only to mortgages. The doctrine of marshalling rests upon the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds.

As rightly pointed out, in view of the sale agreement which results into decree for specific performance, the plaintiff is entitled to insist upon Defendant Nos. 1 to 3 to have the mortgage debt satisfied out of the properties not sold to the plaintiff and in any case if the sale proceeds are not sufficient then to proceed against the said suit properties. Learned senior counsel for the appellants strongly objected the application of the principle of marshalling by subsequent purchaser by the High Court when the plea of marshalling was not taken by the plaintiff in the trial Court. In other words, according to them, without taking such plea before the trial court, the same cannot be taken for the first time before the Appellate Court. It is not in dispute that the plea of marshalling and applicability of Section 56 of the T.P. Act was not raised before the trial Court. However, if we consider the entire plaint, which is available in the appeal paper-book, the plaintiff has claimed a larger relief.

As observed by the High Court, the plaintiff was under an impression that the trial Court would grant the entire relief as claimed and he did not anticipate that he could get a part of relief sought for by him. In this circumstance, learned senior counsel appearing for the plaintiff was right in highlighting that there was no occasion for the plaintiff to raise the plea of marshalling at the time of filing of the suit. Even otherwise, as rightly observed by the High Court, the plea of marshalling being pure question of law based upon the decree obtained for specific performance, cannot simply be thrown out merely because the same was not specifically pleaded.

We have already demonstrated the relief prayed in the plaint by paying substantial court fee of ₹ 41,66,326.50. In such circumstance, when a party is able to secure substantial relief, namely, decree for specific performance with clearance of mortgage amount, it is the duty of the Court to mould the relief so as to render substantial justice between the parties. In this regard, we accept the course adopted by the High Court in granting relief to the plaintiff.

We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, Recovery of Debts due to Banks and Financial Institutions Act, 1993 has been enacted which is not a bar for the civil Court to

apply to other relief such as Section 56 of the T.P. Act. We are also satisfied that by issuing such direction on the application of Section 56 of the T.P. Act, the Division Bench has not modified or eroded the order passed by the DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties for sale first to satisfy the mortgage debt payable by defendant Nos. 1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by Defendant Nos. 1 and 2, in that event, Bank can proceed against the suit properties.

We are also conscious of the fact that the said doctrine cannot be permitted to become a device for destructing the sanctity of contract. The court will also not apply the doctrine of impossibility to assist a party which does not want to fulfil its obligations under the contract.

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***123. STAMP ACT, 1899 – Section 11**
STAMP RULES, 1942 (M.P.) – Rules 15 and 17
Admissibility of document – Affixation of adhesive stamp in addition to the requisite revenue stamp – Held, apart from requisite revenue stamp, even if an adhesive stamp was additionally affixed, it can not be said that even if the document is inadmissible in evidence.

Khamir Singh v. Radheshyam Bansal
Judgment dated 15.09.2010 passed by the High Court of M.P. in W.P. No. 4755 of 2009(I), reported in ILR (2011) M.P. 387 (DB)

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124. INDIAN SUCCESSION ACT, 1925 – Section 82
Interpretation of Will – Where the intention of the testatrix to make an absolute bequest in favour of her daughters in earlier part of Will was unequivocal, use of expression "after demise of my daughters the retained and remaining properties shall devolve on their female children only", in subsequent part of Will would not in the least affect the legatees being the absolute owners of the property bequeathed to them – Corollary would be that upon their demise, estate owned by them would devolve by the ordinary law of succession on their heirs and not in terms of the Will executed by the testatrix.

Sadaram Suryanarayana & Anr. v. Kalla Surya Kantham & Anr.
Judgment dated 22.10.2010 passed by the Supreme Court in Civil Appeal No. 2758 of 2004, reported in AIR 2011 SC 294

Held:

In this case inference of para 6 of the disputed Will was under consideration which reads as under:

> "6) 2nd item Tiled house situated in New colony out of which Eastern wing 2 rooms shall devolves to my 2nd daughter Chandaram Appalanarasamma and the Western wing 2 rooms shall devolve upon my elder daughter Chandaram Ramanamma with absolute right of Sale, Gift, Mortgage, etc. and this will come into force after my demise. After demise of my daughters the retained and remaining property shall devolve upon their female children only."

In *(Kunwar) Rameshwar Baksh Singh and Ors. v. (Thakurain) Balraj Kaur and Ors., AIR 1935 PC 187,* the Privy Council held that where an absolute estate is created by a Will in favour of the devisee, other causes in the Will which are repugnant to such absolute estate cannot cut down the estate; but must be held to be invalid.

The issue came up for consideration once again before a Constitutional Bench of this Court in *Ramkishore Lal v. Kamal Narain, AIR 1963 SC 890.* In that case too the Court was concerned with the approach to be adopted in a matter where a conflict arises between what is said in one part of the testament vis-à-vis what is stated in another part of the same document especially when in the earlier part of the bequest is absolute but the latter part of the document gives a contrary direction about the very same property. This Court held that in the event of such a conflict the absolute title conferred upon the legatee by the earlier clause appearing in the Will cannot be diluted or taken away and shall prevail over directions contained in the latter part of the disposition.

To the same effect is the decision of this Court in *Mauleshwar Mani and Ors. v. Jagdish Prasad and Ors., AIR 2002 SC 727* where the question once again was whether an absolute interest created in the property by the Testatrix in the earlier part of the Will can be taken away or rendered ineffective by the subsequent bequest which is repugnant to the first bequest. Answering the question in the negative, this Court held that once the testator has given an absolute right and interest in his entire property to a devise it is not open to him to further bequeath the very same property in favour of the second set of persons.

In *Pearey Lal v. Rameshwar Das, AIR 1963 SC 1703,* this Court held that while interpreting a Will the Court must take the document as a whole with a view to harmonizing apparently conflicting stipulations. This Court recognized the following guiding principles in the matter of interpretation of Wills:

> "(1) the intention of the testator by reading the Will as a whole and if possible, such construction as would give to every expression some effect rather than that which could render any of the expression inoperative must be accepted; (ii) another rule is that the words occurring more than once in a Will shall be presumed to be used always in the same sense unless a contrary intention appears from the Will; (iii) all parts of a Will should be construed in relation to

each other; (iv) the Court will look at the circumstances under which the testator makes his Will, such as the state of his property, of his family and the like; (v) where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator; (vi) where one of the two reasonable construction would lead to intestacy, that should be discarded in favour of construction which does not create any such hiatus."

While interpreting a Will, the Courts would as far as possible place an interpretation that would avoid any part of a testament becoming redundant. So also the Courts will interpret a Will to give effect to the intention of the Testator as far as the same is possible. Having said so, we must hasten to add that the decision rendered by Courts touching interpretation of the Wills are seldom helpful except to the extent the same recognize or lay down a proposition of law of general application. That is so because each document has to be interpreted in the peculiar circumstance in which the same has been executed and keeping in view the language employed by the Testator. That indeed is the requirement of Section 82 of Succession Act also inasmuch it provided that meaning of any clause in a Will must be collected from the entire instrument and all parts shall be construed with reference to each other.

Coming then to then to the facts of the case at hand it is evident from a careful reading of clause 6 of the Will extracted above that the same makes an unequivocal and absolute bequest in favour of daughters of Testatrix. The use of words like "absolute rights of sale, gift, mortgage, etc." employed by the Testatrix make the intention of the Testatrix abundantly clear. Learned counsel for the plaintiffs-respondents herein also did not have any quarrel with the proposition that the Testatrix had in no uncertain terms made an absolute bequest in favour of her daughters. What was argued by him was that the bequest so made could be treated as a life estate nor because the testament stated so but because unless it is so construed the second part of clause 6 by which the female offsprings of the legatees would get the property cannot take effect. It was on that premise contended that the absolute estate of Smt. Sadarm Appalanarasamma ought to be treated only as a life estate. The contention thought attractive on first blush, does not stand closer scrutiny. We say so because the ultimate purpose of interpretation of any document is to discover and give effect to the true intention of the executor in the present case the Testatrix. We are not here dealing with a case where the Testatrix has in one part of the Will bequeathed the property to 'A' while the same property has been bequeathed to 'B' in another part. Had there been such a conflict, it may have been possible for the plaintiff-respondent to argue that the latter bequest ought take effect in preference to the former. We are on the contrary dealing

with a case where the intention of the Testatrix to make an absolute bequest in favour of her daughters is unequivocal. Secondly, the expression "after demise of my daughters the retained and remaining properties shall devolve on their female children only" does not *stricto sensu* amount to a bequest contrary to the one made earlier in favour of the daughters of the Testatrix. The expression extracted above does not detract from the absolute nature of the bequest in favour of the daughters. All that the Testatrix intended to achieve by the latter part of clause 6 was the devolution upon their female offsprings all such property as remained available in the hands of the legatees at the time of their demise. There would obviously be no devolution of any such property upon the female offsprings in terms of the said clause if the legatees decided to sell or gift the property bequeathed to them as indeed they had every right to do under the terms of the bequest. Seen thus, there is no real conflict between the absolute bequest which the first part of clause 6 of the Will makes and the second part of the said clause which deals with devolution of what and if at all anything that remains in the hands of the legatees. The two parts of clause 6 operate in different spheres, namely, one vesting absolute title upon the legatees with rights to sell, gift, mortgage etc. and the other regulating devolution of what may escape such sale, gift or transfer by them. The latter part is redundant by reason of the fact that the same was repugnant to the clear intention of the Testatrix in making an absolute bequest in favour of her daughters. It could be redundant also because the legatees exercised their rights of absolute ownership and sale thereby leaving nothing that could fall to the lot of the next generation females or otherwise. All told the stipulation made in the second part of clause 6 did not in the least affect the legatees being the absolute owners of the property bequeathed to them. The corollary would be that upon their demise the estate owned by them would devolve by the ordinary law of succession on their heirs and not in terms of the Will executed by the Testatrix.

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125. TRANSFER OF PROPERTY ACT, 1882 – Sections 58 (c) Proviso and 58 (e)

(i) Mortgage by conditional sale – It is necessary that the condition is embodied in the document that purports to effect the sale – That requirement is stipulated by the proviso which admits of no exceptions.

(ii) English mortgage – Mortgagor must bind himself to repay the mortgage money on a certain date – The property mortgaged should be transferred absolutely to the mortgagee – Such absolute transfer should be made subject to proviso that the mortgagee shall re-convey the property to the mortgagor upon payment by him of the mortgaged money on the date the Mortgagor binds himself to pay the same.

(iii) General principle that time is not normally the essence of the contract in contracts relating to immovable property does not apply to contracts for re-conveyance of the immovable property.

Raj Kishore (dead) by L.Rs. v. Prem Singh & Ors.
Judgment dated 10.12.2010, passed by the Supreme Court in Civil Appeal No. 7471 of 2003, reported in AIR 2011 SC 382

Held:

(i) Mortgage by condition sale is described by Section 58 (c) as under:

Where the mortgagor ostensibly sells the mortgaged property–

> "*58 (c) Mortgage by conditional sale.*-Where, the mortgagor ostensibly sells the mortgaged property– on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

A bare reading of the above would show that for a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale. That requirement is stipulated by the proviso which admits of no exceptions.

That is also the view taken by this Court in *K. Simrathmull v. Nanjalingiah Gowder AIR 1963 SC 1182* where the plaintiff had borrowed a certain amount from the defendant and in lieu thereof executed a deed of conveyance of certain land together with the house standing thereon in favour of the defendant. Another deed of re-conveyance was executed by the defendant on the same date by which the defendant-purchaser of the property agreed to re-convey the house provided the exercise of the right of demanding re-conveyance took place within two years and rent payable by the plaintiff is not in arrears for more than six months at any time. On the breach of the second condition stipulated by the agreement for re-conveyance the defendant-purchaser refused to re-convey. In a suit for specific performance the plaintiff sought to invoke the equitable jurisdiction of the Court to give him relief against the forfeiture clause. This Court held that the sale-deed and the deed of conveyance and rent were no doubt parts of the same transaction yet the transaction did not constitute a mortgage by conditional sale. This Court observed:

> "The sale deed the deed of reconveyance Ext. A-1 and the rent note Ext. B-1 were undoubtedly parts of the same transaction. The plea of the plaintiff that the sale deed Ext. A-1 constituted a transaction of mortgage by conditional sale is inadmissible, because the sale deed and the

covenant for reconveyance are contained in separate documents".

(ii) A plain reading of Section 58 (e) of the Transfer of Property Act, 1882 would show that for a transaction to constitute an English mortgage the following essential conditions must be satisfied:

(1) The Mortgagor must bind himself to re-pay the mortgage money on a certain date.

(2) The property mortgaged should be transferred absolutely to the Mortgagee.

(3) Such absolute transfer should be made subject to proviso that the Mortgagee shall re-convey the property to the Mortgagor upon payment by him of the mortgage money on the date the Mortgagor binds himself to pay the same.

It is only in cases where all the three requirements indicated above are satisfied that the transaction constitutes an English mortgage and not otherwise. The case at hand does not satisfy all the three requirements mentioned above. In particular the first requirement where under the Mortgagor binds himself to re-pay the mortgage money on a certain date is not satisfied in the instant case. We say so because the sale-deed executed by the plaintiffs-appellants does not contain any such stipulation binding the seller to pay the amount of Rs.6,000/- on a certain date. As a matter of fact, the sale-deed does not even remotely suggest that the transaction is in the nature of a mortgage or that there is any understanding or agreement between the parties whereunder the property sold has to be re-transferred to the seller. The only other document which could possibly contain such a stipulation binding the Mortgagor to return the mortgage money is the agreement for re-conveyance. Significantly, this document is signed only by Prem Singh the purchaser and not by the seller. The document signed by Prem Singh is described as an agreement for re-conveyance. There is no doubt a stipulation that Prem Singh has agreed to re-transfer the property to the seller in case the plaintiff Raj Kishore returns the sum of Rs.6,000/- by 6th July, 1981 yet there is nothing in the document to suggest that the seller had bound himself to abide by that stipulation. What is important in terms of the requirement of Section 58 (e) is not that the purchaser has agreed or bound himself to transfer the property by a particular date but that seller has bound himself to pay the amount by a certain date. Since the seller is not a signatory to the agreement of re-conveyance it is difficult to see how he can be said to have bound himself to re-pay the mortgage money by the 6th July, 1981. We have, therefore, no difficulty in rejecting the contention urged on behalf of the appellants that the transaction was in the nature of an English Mortgage and the suit was in essence a suit for redemption of such a mortgage.

(iii) In a case where the parties have entered into a transaction of sale and also executed an agreement for re-conveyance of the property sold, time stipulated for re-conveyance is the essence of the contract. The law on the

subject is fairly well-settled by the decisions of this Court in *Chunchun Jha v. Ebadat Ali, AIR 1954 SC 345, Bismillah Begum (Smt) Dead by Lrs. v. Rahmtullah Khan (Dead) by Lrs. (1998) 2 SCC 226 and Gauri Shankar Prasad and Ors. v. Brahma Nand Singh (2008) 8 SCC 287. Relying upon the decision of Federal Court in Shanmugam Pillai v. Annalakshmi Ammal AIR 1950 FC 38, this Court in Caltex (India) Ltd. v. Bhagwan Devi Marodia AIR 1969 SC 405,* held that in contracts relating to re-conveyance of property time is always the essence of the contract. This Court observed:

> "At common law stipulation as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain"

This Court also held that the principle stated by the Federal Court in *Ardeshir H. Mama v. Flora Sassoon, AIR 1928 PC 208* to the effect that time is not normally the essence of the contract in contracts relating to immovable property did not apply to contracts for re-conveyance of the immovable property. This Court observed:

> "The above passage refers both to options for renewal and options to repurchase where, in regard to immovable property, as a matter of law time becomes the essence of the contract. Therefore in regard to contracts of reconveyance relating to immovable property the principle laid down in *A.H. Mama v. Flora* Sassoon - that time is not normally the essence of the contract in contracts relating to immovable property - does not apply. It is in fact, so observed in Caltex (India) Ltd. case. In view of the abovesaid decision of this Court relating to contract of reconveyance, and inasmuch as the amount was not paid within the stipulated time, the said option in favour of the plaintiff must be deemed to have "lapsed".

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126. TRANSFER OF PROPERTY ACT, 1882 – Section 106
CIVIL PROCEDURE CODE, 1908 – Order 29 Rule 1

(i) Notice of termination of tenancy – Corporate Body – Notice of suit to the Head Office is sufficient compliance of provision – Issuance of notice to Branch Office of appellant was not necessary.

(ii) Termination of lease – Waiver – Appellant deposited some of the money at the rate of existing rent in the account of respondent which was with the branch office of appellant – Held, it could not be deemed to be waiver of such right – Appellant after

termination of tenancy became statutory tenant and therefore, deposit of rent in the account of respondent could not be deemed to have created either a new tenancy or the respondent has waived its right of eviction.

(iii) Termination of lease – If the suit is filed under the provisions of the Transfer of Property Act, then after serving the quit notice on the tenant, the landlord is entitled to get the decree of eviction only on proving the service of such notice.

Dena Bank v. Municipal Corporation, Burhanpur

Judgment dated 30.09.2010 passed by the High Court of M.P. in S.A. No. 766 of 2005, reported in ILR (2011) M.P. 466

Held:

So far the arguments of the appellant's counsel regard service of notice on the appellant is concerned, as per the provision of Order 29 Rule 1 of the CPC, if the matter is relating to the Corporate body the notice of the suit to the Head Officer is a sufficient compliance of the provision. In such premises, no separate notice to Branch of the appellant is required and according to my opinion, such analogy could be adopted even for issuing the quit notice of termination of tenancy and, in such premises, the quit notice Ex. P/2 was duly served on the head office of the appellant. So, the branch of the appellant at Burhanpur or its official did not have any authority to say that the notice was not duly served on it. Even otherwise, it appears from the record that before inducting the appellant in the disputed premises, the respondent/institution with the Head Office of the appellant, entered into an agreement to create the alleged tenancy and, in such premises, if the notice of termination of tenancy Ex.P/2 was given to the Head Office then, in the lack of any notice to the branch office, it could not be said that the notice was not properly served. In such premises, the approach of the courts below in this regard does not appear to be contrary to the record or the existing legal position.

In the course of entire argument, I am not apprised by the appellant's counsel with any document or situation showing that after receiving the notice of termination of tenancy Ex. P/2 by the Head Office of the appellant, at any point of time, some agreement or compromise has been finalized between the parties and pursuant to that any enhanced rent was accepted by the respondent or its officials. So in the lack of it, it could not be deemed that the respondent has waived his right to evict the appellant from the premises under the provision of Sections 112, 113 read with Section 111 (g), (h) of the Transfer of Property Act. Mere on account of depositing some of the money at the rate of existing rent on the date of termination of tenancy in the account of the respondent which was with the branch office of the appellant, it could not be deemed to be waiver of such right. In any case, the appellant, after terminating its tenancy became the statutory tenant under the law and, being statutory tenant, if any, sum of the rent was paid by the appellant or deposited by it in the account of the respondent

then it could not be deemed that the same has created either a new tenancy between the parties or the respondent has waived its right of eviction. On arising the occasion, such question was answered by the Division Bench of this Court in the matter of *Nagar Palika Nigam, Gwalior v. Rajeshwar Dayal, 1996 (Vol. XLI) MPLJ- 97* in which it was held as under: -

> 20. In view of the conclusion arrived at the question of waiver of notice or its issuance by a person, who was not competent to issue the same becomes meaningless. It may, however, be observed that the question of waiver of notice would arrive only when there is express acceptance of rent by the landlord, i.e. the Nigam/appellant. Deposit of some amount with an employee of the Nigam, which is later on credited in the Municipal fund, would be of no consequence. The concept of acceptance of rent and waiver was considered in case of *Kai Khushroo v. B. Jerbai, AIR 1949 FC 124.* It was held thus :-
>
> > "On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub lessee under him continues in possession even after the determination of the lease, the landlord obviously has the right to eject him forthwith, but if he does not, and there is neither assent or dissent on him part of the continuance of occupation of such persons, the latter becomes in the language of English law a tenant at sufferance who had no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession a new tenancy comes into existence as is contemplated by Section 116, Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 106 of the Act"

In case of tenancies relating to dwelling house to which the Rent Restriction Act apply, it was observed by their Lordships of the Federal Court thus:-

> "....in cases of tenancies relating to dwelling house to which the Rent Restriction Acts apply, the tenant may enjoy the statutory immunity from eviction even after the lease has expired, The landlord cannot eject him except on specific

grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant whose lease has already expired could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge by way of defence in a suit for ejectment brought against him under the provisions of Rent Restriction Act that by acceptance of a rent a fresh tenancy was created which had to be determined by a fresh notice to quit. "

The aforesaid decision was followed by the Apex Court in *Ganga Dutt Murarka v. Kartick Chandra Das and others, AIR 1961 SC 1087,* and it was held thus: -

"The High Court was in our judgment right in holding that by merely accepting rent from the appellant and by failing to take action against him, the appellant did not acquire the rights of a tenant holding over. It is true that in the notice dated October, 10, 1950, the appellant is described as a 'monthly tenant' but that is not indicative of conduct justifying an inference that a fresh contractual tenancy had come into existence. Within the meaning of West Bengal Premises Rent Control Act, 1950, the appellant was 'tenant' and calling the appellant a tenant the respondent did not evince an intention to treat him as a contractual tenant. The use of the adjective 'monthly' also was not indicative of contractual relation. The tenancy of the appellant was determined by efflux of time subsequent occupation by him was not in pursuance of any contract express or implied, but was by virtue of the protection given by the successive statutes. This occupation did not confer any right upon the appellant and was not required to be determined by a notice prescribed by Section 106 of the Transfer of Property Act."

It is settled proposition of the law that in the matter of eviction if the suit is filed under the provision of Transfer of Property Act, after serving the quit notice on the tenant under Section 106 of the Transfer of Property Act then only on proving the service of such notice on the tenant like appellant, the landlord like the respondent is entitled to get the decree of eviction and in the aforesaid circumstances it has been proved and established tenancy of the appellant was terminated by the respondent by serving the notice dated 10.07.2000 Ex. P/2 under Section 106 of the Transfer of Property Act on the Head Office of the appellant.

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127. UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 – Sections 10, 3 and 13 CRIMINAL PROCEDURE CODE, 1973 – Section 439

(i) Membership of alleged illegal organization – Effect of – Distinction between an active "knowing" membership and passive, merely nominal membership in a subversive organization should be kept in mind, as all members of the organization cannot be held to be guilty.

(ii) Bail – Accused, as a dental surgeon applied stitches to an accused, who alongwith other accused, was involved in crime committed by them – But there is no *prima facie* proof that accused involved in the crime committed by injured accused or other accused and having spent 66 days in custody and yet no trial commenced – Therefore, he is entitled for bail – Delay in trial also one of the important factors for consideration of bail.

State of Kerala v. Raneef

Judgment dated 03.01.2011 passed by the Supreme Court in Criminal Appeal No. 3 of 2011, reported in (2011) 1 SCC 784

Held:

The respondent, being a doctor, was under the Hippocratic oath to attempt to heal a patient. Just as it is the duty of a lawyer to defend an accused, so also it is the duty of a doctor to heal. Even a dentist can apply stitches in an emergency. Prima facie we are of the opinion that the only offence that can be levelled against the respondent is that under Section 202 I.P.C., that is, of omitting to give information of the crime to the police, and this offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence.

As regards the allegation that the respondent belongs to the PFI, it is true that it has been held in *Redaul Husain Khan v. National Investigation Agency, (2010) 1 SCC 521* that merely because an organization has not been declared as an 'unlawful association' it cannot be said that the said organization could not have indulged in terrorist activities. However, in our opinion the said decision is distinguishable as in that case the accused was sending money to an extremist organization for purchasing arms and ammunition. That is not the allegation in the present case. The decision in *State of Maharashtra v. Dhanendra Shriram Bhurle, (2009) 11 SCC 541* is also distinguishable because good reasons have been given in the present case by the High Court for granting bail to the respondent. In the present case there is no evidence as yet to prove that the P.F.I. is a terrorist organization, and hence the respondent cannot be penalised merely for belonging to the P.F.I. Moreover, even assuming that the P.F.I. is an illegal organization, we have yet to consider whether all members of the organization can be automatically held to be guilty.

In *Scales v. United States, 367 U.S. 203 (1960) J.* Harlan, of the U.S. Supreme Court while dealing with the membership clause in the McCarran Act, 1950

distinguished between active 'knowing' membership and passive, merely nominal membership in a subversive organization, and observed :

> "The clause does not make criminal all association with an organization which has been shown to engage in illegal activity. A person may be foolish, deluded, or perhaps mere optimistic, but he is not by this statute made a criminal. *There must be clear proof that the defendant specifically intends to accomplish the aims of the organization by resort to violence.*"

In *Elfbrandt v. Russell, 384 US 11 (1965) at PP. 17 & 19 Douglas, J.* of the U.S. Supreme Court speaking for the majority observed :

> "Those who join an organization but do not share its unlawful purpose and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees..... A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

In *Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123 (1950) at 174* Mr. Douglas J. of the U.S. Supreme Court observed :

> "In days of great tension when feelings run high, it is a temptation to take shortcuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."

We respectfully agree with the above decisions of the U.S. Supreme Court, and are of the opinion that they apply in our country too. We are living in a democracy, and the above observations apply to all democracies.

In deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in paragraph 2 of his counter affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel *A Tale of Two Cities*, who forgot his profession and even his name in the Bastille.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

AMENDMENT IN NOTIFICATION REGARDING REDUCTION AND REMISSION IN COURT FEES

Notification No. 9-1-83-B-XXI dated the 14th February, 2011. – In exercise of the powers conferred by Section 35 of the **Court Fees Act, 1870 (No. 7 of 1870),** the State Government, hereby makes the following amendment in this Department's Notification F.No. 9-1-83-B-XXI, dated 1st April, 1983 which was published in the Madhya Pradesh Gazette (Extra-ordinary) on the same date, namely:-

AMENDMENT

In the said notification, for the words "rupees six thousand", the words "rupees twenty five thousand" shall be substituted.

[Published in M.P. Rajpatra (Asadharan) dated 15.02.2011 Page 117]

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Notification F.No. 9-1-83-B-XXI, dated 1st April, 1983 is reproduced for ready reference.

In exercise of the powers conferred by Section 35 of the Court Fees Act, 1870 (No. 7 of 1870), the State Government hereby remits in the whole of the State of Madhya Pradesh, the Court fees mentioned in Articles 1-A and 2 of the First Schedule and Articles 5, 17 and 21 of the Second Schedule to the said Act payable on plaint by the following categories of persons whose annual income immediately preceding the date of presentation of plaint from all sources does not exceed rupees six thousand, namely: —

(i) members of Scheduled Tribes;

(ii) member of Scheduled Castes;

(iii) minors;

(iv) women;

(v) artisan;

(vi) unskilled labourer;

(vii) landless labourer;

(viii) persons belonging to the weaker section of society.

Explanation. — For the purposes of this notification: —

(i) "Member of Scheduled Castes" means a member of any caste, race or tribe or part of or group within caste, race or tribe specified as such with respect to the State of Madhya Pradesh under Article 341 of the Constitution of India;

(ii) "Member of Scheduled Tribes" means a member of any tribe, tribal community or part of or group within a tribe or tribal community specified as such with respect to the State of Madhya Pradesh under Article 342 of the Constitution of India.

[Published in M.P. Rajpatra (Asadharan) dated 01.04.83, page 1062]

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The man of wisdom is never of two minds;
the man of benevolence never worries;
the man of courage is never afraid.

– CONFUCIUS

Values are not just words, values are what we live by. They're about the causes that we champion and the people we fight for.

– JOHN KERRY