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मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

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-CORRIGENDUM-

Please read in Part III of February, 2003 issue at page 4 in the table in first line '490.00' in place of '90.00' and in Part I of June, 2003 issue at page 102 in the eleventh line under pay '2300' in place of '2100'.

The inconvenience caused to our readers is hereby regretted.

We are thankful to publishers of MPLJ, JLJ, MPHT, MPJR, MPWN, RN, ANJ, SCC and Vidhi Bhasvar for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

A.K. SAXENA
Director

Judicial Officers Training & Research Institute has been publishing this bimonthly Journal since October, 1995 for the benefit of the Judicial Officers of the State. One of the objects of publishing it, is to make available all important material of the legal field to all the Judicial Officers so that they may have ready reference and solutions of various problems and may use it whenever needed. The Judicial Officers and other writers also express their views on various matters from time to time in this Journal. The standard of the Journal is gradually enhanced since its inception and we are incessantly at it and for that your valuable views and articles are very much solicited.

The very purpose of publishing the JOTI Journal is frustrated when I find during informal talks with the Judicial Officers that some of them are not reading it and they only use it as a showpiece. The beautification of the cover page of the Journal is not with an intention to keep it in the drawing room, but to appreciate the essential colour, the informative write-up and the legal contours for updating ones knowledge. This is not a figure out of my own imagination. I am receiving messages and suggestions regularly from every corner. Of course, some of them are in respect of its upgrading. I am writing all this because I want to impress upon those Judicial Officers who do not possess reading temperament. I felt pity when I enquired from some of the Judicial Officers whether they had gone through a particular speech or article or citation published in a particular issue of the Journal; or whether they read particular editorial; or what are the amendments of a particular Act published in the Journal, and their speechlessness shocked me. Also pained immensely. I was intending to write my editorial on another topic for this issue but the above situation forced me to write something on the bi-monthly training programme and the reading habit amongst Judicial Officers.

To express my views on the reading habit, I may be permitted to raise a question. What is the main difference between the makind and the animal? I myself should try to answer it. There are lots of similarities between the mankind and the animal but there is a grave difference between them, i.e. the quality and the magnitude of application of mind. Both have mind but the animals have a limited use of it. They cannot go beyond a certain limit, but for the mankind, sky is the limit, though it is said that we ordinarily use our brain to a limited extent because of inhibitions. Our mind has unlimited capacity to think over. But, God has not gifted us the power to use its full capacity. The percentage of utilisation of mind is very low, even then there is a great difference between the mankind and the animal in respect of its utilisation. The animals cannot compete with the mankind.

We are Judicial Officers. We have been selected for a noble cause, i.e. dispensation of justice. We have to deal with almost all type of cases during our service life. If we do not possess reading temperament, how can we decide the cases of different nature correctly? Knowledge is the soul of the life of a judge and it is utmost necessary to read the books regularly to have sufficient knowledge and

our JOTI Journal is also one of them because it has a precious connectivity with our regular work.

It cannot be ruled out that some of us may not take pains to read this issue also and instead of reading it, may keep it along with other books in their home library as showpiece. It is also quite possible that some of us may continue to decide the cases only on the basis of books or Journals provided by the advocates at the time of arguments and avoid to search correct legal position on our own. It is a matter of great concern. Though, we had training programmes at district and institutional level but these were not working very effectively, therefore, Hon'ble the High Court has changed the whole scenario of training and apart from other training programmes, now a programme of bi-monthly training at district level is also introduced with a view to have more and more participation of the Judicial Officers of each cadre in deliberations on legal issues so that they may have in-depth knowledge on various issues and may be compelled to study the relevant matter from different angles. This exercise will certainly help them to cultivate the reading habit.

As we know, no programme would be successful without the active support and participation of the participants. When a programme is implemented with a certain aim, it may fizzle out if the partakers are not sincere. The quality of the programme is less important than the true participation of the partakers and above all, sincerity of the Head of the Institution at lower level is most important for the success of any programme. The success of the programme for the subordinate Courts depends upon the District Judges. Only they can guide other Judicial Officers properly from time to time and can also check the seriousness and sincerity of them. They are the key persons and, therefore, it casts a heavy duty on their shoulders to run bi-monthly training programme at district level, successfully. But before achieving this goal, they have to set an example before their subordinates. They have to play the role of leader and inspirer then only they can ask their subordinates to cultivate reading habit.

Apart from that, we shall be monitoring the whole programme closely and will also take other steps for its success. We are inclined to implement this programme in its true sense so that every Judicial Officer may cultivate reading habit which is one of the aims of our training institute. Bi-monthly training programme at district level will not only help all the Judicial Officers to enrich their knowledge but also certainly uplift the standard of our District Judiciary. I hope all of you will take this programme seriously and sincerely.

In the end, I would like to say that the Judicial Officers should not be dependant on others. Self-study is the only way of success. Since, we represent a particular class of society, we must possess certain qualities in us and reading habit is a requisite one. To become a successful and respectable Judicial Officer, it is very necessary to cultivate reading habit. Not for nothing it has been said that one should be a voracious reader and eat less not to tax his mind and body.

Rest in the next issue.

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PART - I

COMMITMENT OF COUNTER CASE NOT EXCLUSIVELY TRIABLE BY COURT OF SESSION

A.K. SAXENA
Director

It is a general principle that two cases arising out of the same incident should be heard by the same Court to avoid conflicting decisions. I shall try to deal with the situation, where a Magistrate does not commit the counter case triable by him to the Sessions Court. In such a situation what should be the proper course of action so that the above mentioned general principle may be complied with.

In case of *Sudhir and others Vs. State of Madhya Pradesh, AIR 2001 SC 826* the reasons for adopting a procedure that cross-cases should be heard and decided by the same Court, have been enunciated as follows :

> "The practical reasons for adopting a procedure that such cross cases shall be tried by the same Court, can be summarised thus : (1) It staves off the danger of an accused being convicted before his whole case is before the Court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident."

It is thus clear that all the counter cases should be heard and decided by the same Court irrespective of the fact that any of the counter case is triable by the Magistrate. Where two cases arising out of one incident and out of these cases one is exclusively triable by the Sessions Court and the other one is triable by the Court of Magistrate, the case which is triable by the Magistrate should be committed to the Court of Session in the light of above principle.

A situation may often arise where out of two cross-cases, the case triable by Sessions Court is committed to Sessions Court by the Magistrate and the other one which is triable by Magistrate remains in his Court and in the opinion of the Magistrate, only he is empowered to try the other case which is pending in his Court or the case does not come in the definition of counter case. If this case is really a counter case, the above situation would be against the settled legal position.

There cannot be two opinion in respect of trial of counter cases in same Court. Section 26 of the Code of Ciminal Procedure gives a wide power to the Sessions Court to try any offence under Indian Penal Code. It would be profitable to reproduce the provisions of Section 26 of the Code of Criminal Procedure here which runs as follows :

"26. *Courts by which offences are triable.* Subject to the other privisions of this Code -

(a) any offence under the Indian Penal Code (45 of 1860) may be tried by-

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable,

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by -

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable."

Thus it is amply clear from the above provisions that subject to the other provisions of the Indian Penal Code, the Court of Session is empowered to try any offence under the I.P.C. irrespective of the fact that all the offences of a particular counter case are triable by the Magistrate.

In the case of *Ananda Shetty and another Vs. Aithu Poojary and others, 1999 Cri.L.J. 177,* it was observed thus :

> "....In a trial having case and counter case arising from same incident and the one is exclusively triable by the Court of Session, the Magistrate cannot try both the cases. The one which is exclusively triable by the Court of Session ought to be committed under S. 209 and therefore, it follows that the case which could be tried by the Magistrate Court should also be committed to the Sessions Court which has the power to try both the cases in view of S. 26 of the Cr.P.C."

When the Magistrate does not think it proper to commit the case and in the opinion of the Court of Session, the case which is pending in the Court of Magistrate, is a cross-case of a case which is pending in the Court of Session, then in such a situation a direction can be issued by the Sessions Judge to the Magistrate to commit the cross-case. Where on a revision, the Sessions Court advises the committal of the other case and the Magistrate commits the other case in view of such advise, the committal order is wrong as the Magistrate could commit the case to the Sessions Court only if he is satisfied that it was a case fit for commitment. (*Please see Chhotey Lal and others v. State, AIR 1951 Allahabad 714*). No doubt that no Sessions Court can advise the Magistrate to commit the case but there is a big difference between "advise" and "directions". The Sessions Court is duly empowered to direct the Magistrate to commit the case to Sessions Court and the Magistrate has to comply with the order of the superior court and the question of advise does not arise in such directions. The Court of Session is not powerless. If it is found by the Sessions Court during the trial of a sessions

case that the counter case arising from same incident though triable by Magistrate, has not been committed, the Sessions Court is fully empowered to direct the Magistrate to commit the cross-case and there is no error or illegality on the part of the Sessions Court to pass such an order. This principle has been laid down in *Narendra and others Vs. State of M.P., 1998 Cr.L.R. (M.P.) 228 (Notes Section)* that the Sessions Court can direct a Magistrate to commit the cross-case for trial. In the above mentioned case, the Additional Sessions Judge, on perusal of the record of other case and the record of sessions trial pending in his Court passed an order that both the cases are counter cases arising out of the same incident and required to be tried by the same Court and directed that the counter case may be committed to the Court of Session so that both the cases could be tried and disposed of by the same Court.

Since, it is a general principle that the counter cases should be tried by the same Court, therefore, where a counter case which is triable by the Magistrate, is not committed to the Sessions Court, the Court of Session is empowered to direct the Magistrate so that the counter case may be committed to the Sessions Court and both the cases can be heard and disposed of by the same Court. But before doing so, the record of both the cases should be perused by the Court of Session and there should be specific findings that both the cases are cross-cases arising out of the same incident and require to be tried by the same Court.

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A judge is a leader whether he wants to be or not. He cannot escape responsibility in his jurisdiction, for setting the level of the administration of justice and of the practice of law.

- CONTRAIL, Arch M.

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Judgment can be acquired only by acute observation; by actual experience in the school of life; by ceaseless alertness to learn from others; by study of the activities of men who have made notable marks; by striving to analyse the everyday play of causes and effects; by constant study of human nature; by cultivation of a spirit of fairness, even generosity, to all.

- FORBES, B.C.

LEGAL AID

K.D. KHAN
M.Sc., LL.M.,
Secretary,
High Court Legal Services Committee

The ancient Roman world, the catholic world of the middle ages and the 19th century recognised the problem of legal aid to the poor. These eras produced institutional solutions to the problem of legal aid.

At the turn of 20th century, the nations have rejected the old concept and in its place a new concept was emerged under which the State has to work for composite social and economic advancement of its people. The State is supposed to eliminate social and economical wrongs done to its people in a genuine and effective manner instead of providing merely legal institutions as remedy.

Legal aid earlier was considered to be hybrid in some form of political right or charity from rich to the poor. In the fast changing socio-economic conditions, this view was not acceptable. Legal aid as a right, needs to be protected by positive legislations with affirmative state action. In a democratic order, if law has to play a purposeful and significant role in the socio-economic reconstruction of the country, Legal Aid must give meaningful education to the poor about the law and their legal problems.

At the 75th Anniversary dinner of the Legal Aid Society of New York, February 16, 1951, Judge Learned Hand said :

> "If we are to keep our democracy there must be one commandment : Thou Shalt not ration justice."

Equality of justice is recognised as a basic fundamental right in every democratic Constitution and Universal Declaration of Human Rights and International Covenants. Now everyone has the right to be tried in his presence and to defend himself in person or through a counsel of his choice.

The Constitution of India under Articles 14, 38, 39-A visualises and attempts to provide for a society, in which, justice is equally and evenhandedly assured for all. This is indeed a basic requirement of every democratic society governed by the rule of law. Today, law is intimately interwoven in the day to day life of a man.

There are number of Central and State welfare legislations to remove social and economic inequalities and to improve the miserable conditions of the poor and backward people. Rule of law is very important for the well-being of man and his progress, but there cannot be any rule of law unless common man, irrespective of the fact whether rich or poor, is able to assert and vindicate the rights given to him by law. Law is inoperative, a futile exercise of legislative power, unless the machinery of justice provides life to the law and makes it potent by active implementation. Therefore, the machinery of justice must be easily available to all. But the high cost of justice and delay prevents the poor man approaching the court for his rights or redressal of his grievances. With no alterna-

tive but to bear with injustice due to economic or other disabilities, the poor people lost faith in democracy and the rule of law and think that law is only for the benefit of the rich people. If the poor cannot get equality before the law and equl protection of law, it will certainly pose danger to the rule of law and a grave threat to constitutional democracy. Injustice makes us want to pull things down. Democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefitted by its impartiality and fairness.

In India the legal aid movement is of recent origin so to say less than six decades old. Government of India has been paying much attention in providing the legal aid to the economically disadvantaged citizens. After Independance the first and most important study was made by "The Committee on Legal Aid and Legal Advice in the State of Bombay" under the Chairmanship of Hon'ble Mr. Justice N.H. Bhagwati, the Judge of Bombay High Court, in the year 1949. This Committee recommended legal aid to poor and backward classes as a Governmental responsibility, as under Article 14 of the Constitution of India the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This Committee also recommended a four-tier system, namely, Taluka, District, Greater Bombay and State levels.

In the year 1949 the Government of West Bengal appointed a Committee under the Chairmanship of Sir Arthur Trexour Harries, the Chief Justice of Calcutta High Court. This Committee recommended judicial reforms in the state and granting state aid to indigent litigants which could not be implemented due to lack of funds. In the Five Year Plan, the Government of India wanted to include the provisions for legal aid but the states expressed inability due to funds. As per 14th Report of the Law Commission of India (1958) the facilities for legal aid were very meagre in India. There were some voluntary organisations doing some work in the field of legal aid in Calcutta, Bombay and Bangalore. The Law Commission in its 14th Report strongly recommended to provide legal aid to poor persons and representations by lawyers at the government expense to the accused persons having no means in criminal proceedings.

Again in the year 1960 states expressed their inability to allocate funds to take up any legal aid scheme. Then again in the year 1962, State Law Ministers Conference was called but no progress was made in this field. The question of legal aid was again considered at the 3rd All India Lawyers Conference held in 1962. The Conference made a number of recommendations and urged the active involvement of the Bar Association of India to make the legal aid a worthwhile movement in all the States of India.

In the year 1970 a National Conference on Legal Aid was held in New Delhi. The Conference insisted for legislation to make it statutory obligations of the States. The National Conference stressed the need for statutory legal aid programme and financial assistance from the Union Government, cooperation of the Bar, Law Schools and other Institutions and to do concentrated efforts to mobilise support of voluntary organisations in the task of rendering legal aid to the poor and thereby created climate throughout the country. In the year 1970

the Government of Gujarat appointed a Committee to consider the question of legal aid to the poor persons and backward classes under the Chairmanship of Hon'ble Mr. Justice P.N. Bhagwati, the then Chief Justice of Gujarat High Court The Bhagwati Committee in its report said :

> "That an effective legal assistance programme is not only essential to the maintenance of the democratic way of life and the rule of law but is also in a poor country like ours a socio-economic necessity."

Government of India appointed an expert Committee on legal aid under the Chairmanship of Hon'ble Mr. Justice V.R. Krishna Iyer, the then Member, Law Commission to consider the question of making available legal aid and advice to the weaker section of the society and persons of limited means in general and citizens belonging to socially and educationally backward classes in particular. The Committee in its conclusion said :

> "That the vital need for a comprehensive scheme on legal aid as it is an indispensable instrument on social transformation of our country in the direction indicated by the Constitution. A properly organised and implemented scheme of legal aid would serve to spread among the people at large and consciousness of their rights and duties and act as a shield against exploitation and as a means of spreading justice by making available justice within the frame-work of law. It would, besides, discourage resort to extra-legal methods of obtaining redress and thus, tend to enhance regard for the rule of law."

The Government of M.P. in the year 1973 appointed "The Preparatory Committee for Legal Aid Scheme" under the Chairmanship of Shri R.K. Nayak, General Secretary, National Forum of Lawyers and Legal Aid. The Committee submitted its report in March 1975. On the basis of this report, Government of Madhya Pradesh enacted legislation known as "Madhya Pradesh Legal Aid and Legal Advice Act, 1976." The State of Rajasthan under the Chairmanship of Dr. L.M. Singhvi, Advocate General of Rajasthan appointed "Law Reforms and Legal Services Committee" in the year 1973. The Committee submitted its report in May 1975. In Tamil Nadu a comprehensive report on legal aid to poor was submitted in the year 1973 by its Chairman Hon'ble Shri Justice P. Ramakrishnan, a retired Judge of Madras High Court.

By Act No. 104 of 1976 Rule 9-A was added to Rule 33 of the Civil Procedure Code to provide pleader by the Court to an unrepresented indigent person. Section 304 of the Code of Criminal Procedure, 1973 mandates the Court of Session to assign a pleader to the accused not represented by pleader due to non-availability of sufficient means, at the expenses of the State.

A country wide organisation "National Forum of Lawyers and Legal Aid" was created to formulate, implement and coordinate nationwide legal aid programme. Government of India appointed a "Committee on Juridicare" under the Chairmanship of Hon'ble Justice Shri P.N. Bhagwati, Judge, Supreme Court of India in May 1976 to draw up uniform legal services programme for all the States. This Committee submitted its recommendations in August 1977.

A Committee on Constitutional amendments under the Chairmanship of Shri Swarn Singh, Former Union Minister, submitted its report in 1976 recommending the idea of making legal aid a constitutional imperative through a new Article in the Directive Principles of State Policy. On the basis of this recommendation a new Article 39-A was inserted by 42nd Amendment Act in the year 1976. Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In the case of *Hussain Ara Khatoon vs. State of Bihar, AIR 1979 SC 1371,* Hon'ble Justice Shri P.N. Bhagwati held that the right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. Para 9 of the judgment is quoted herein below :

> "We would strongly recommended to the Government of India and State Government that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and to right to life and liberty conferred in Article 21, but also the compulsion of the Constitutional directive embodied in Article 39-A."

With the object of providing free legal aid, the Government of India appointed a Committee known as "Committee for Implementing Legal Aid Scheme" (CILAS) in the year 1980 under the Chairmanship of Hon'ble Mr. Justice P.N. Bhagwati. This Committee evolved a model scheme for legal aid programmes applicable throughout the country, by which several legal aid and advice boards were set up in the States and Union Territories.

In the case of *Khatri Vs. State of Bihar, AIR 1981 SC 926* Hon'ble Mr. Justice Bhagwati again criticised the State for not providing free legal services to the accused persons. According to Hon'ble Mr. Justice P.N. Bhagwati, the State may have its financial constraints and its priorities in expenditure but the law does not permit any Government to deprive its citizens of Constitutional rights on the plea of poverty.

Once again, referring the earlier decision of *Hussain Ara Khatoon's* case, Hon'ble Mr. Justice P.N. Bhagwati, while deciding the case of *Sukdas Vs. Union Territory of Arunachal Pradesh, AIR 1986 SC 991* observed that :

> "About 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land."

The impact of legal aid movement in India was so that many States constituted Legal Aid Boards, framed, the rules to provide help to poor in legal matters. Most of the States have some kind of means tests and some have prima facie and reasonableness tests.

According to the mandate of Article 39-A, the Parliament enacted the law on Legal Services which is called "The Legal Services Authorities Act, 1987". The Act was further amended by Act No. 59 of 1994 and Act No. 37 of 2002. By this Act Statutory Legal Services Authorities/Committees at the National, State, District and Taluka levels are constituted for the effective monitoring of legal aid programmes. Prior to this, Lok Adalat were functioning as voluntary and conciliatory agencies without any statutory backing for its decision.

As per the provisions of this Act, at the National level the Central Government constituted "The National Legal Services Authority" and the Chief Justice of India is the Patron-in-chief of the Central Authority. At the Supreme Court level "Supreme Court Legal Services Committee" is constituted by the Central Authority and sitting Judge of the Supreme Court is Chairman of the Committee. The Central Authority lays down policies and principles for making legal services available under the provisions of this Act, frames the schemes regarding legal services, allocates the funds to the State and District Authorities, organises legal aid camps.

At the State level the Government of M.P. constituted "The M.P. State Legal Services Authority". The functions of the State Authority are to give effect to the policy and directions of the Central Authority, to provide legal services, to conduct Lok Adalats and undertake legal aid programmes. The M.P. State Authority constituted "The High Court Legal Services Committee" under the Chairmanship of sitting Judge of High Court. At the district level, the State Authority constituted "The District Legal Services Authority" for every district. The District Judge is the Chairman of the District Authority. At the Taluka level, the State Authority constituted "The Taluka Legal Services Committee". The senior most Judicial Officers of Taluka/Tehsil is the ex-officio Chairman of the Committee.

Legal Services may be provided for (i) payment of court-fees, process fees and all other charges payable or incurred in connection with any legal proceeding (ii) charges for drafting and preparing and filing of any legal proceedings (iii) representation by a legal practitioner in legal proceedings (iv) cost of obtaining and supply of certified copies of judgments, orders and other documents in legal proceedings (v) cost of preparation of paper book in legal proceedings and (vi) expenses incidental thereto.

On receipt of any application for legal aid, the Secretary shall first examine and determine or cause to be examined and determined the eligibility of the applicant as per the provisions of the Act and the Rules. If the application is not found meritorious, the same may be rejected by the Secretary for the reasons to be recorded in writing. In case of refusal, the applicant may prefer an appeal to the Chairman for a decision.

Legal services shall not be given in the proceedings for (i) defamations (ii) malicious prosecution (iii) contempt of Court (iv) perjury (v) election (vi) economic offence (vii) offences relating to Protection of Civil Rights Act and Immoral Traffic Act, etc.

Irrespective of this means test, legal services may be granted in cases of great public importance or in special cases reasons for which to be recorded in writing which is considered otherwise deserving of legal services.

By the Amendment Act No. 37 of 2002, in respect of certain public utility services which includes (i) Transport services, both passengers or goods by air, road or water (ii) postal, telegraph or telephone services (iii) supply of power, light or water to the public by any establishment (iv) system of public conservancy or sanitation (v) services in hospital or dispensary and (vi) insurance services, Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services has to be established by the concerned authority. Any party to a dispute in relation to above public utility services, before the dispute is brought before any Court, may make an application to the Permanent Lok Adalat for the settlement of dispute. The Permanent Lok Adalat shall make every endeavour to settle the dispute amicably but in case where the parties fail to reach at an agreement, the Permanent Lok Adalat shall decide the dispute on merit. Every award of Permanent Lok Adalat shall be deemed to be a decree of the civil Court and shall be by a majority of the persons constituting the Permanent Lok Adalat. The award so passed shall be final and shall not be called in question in any original suit, application or execution proceeding. The Permanent Lok Adalat may transmit any award made by it to a civil Court having local jurisdiction for execution.

Keeping in view the importance and necessity of Lok Adalat, the Parliament reincorporated Section 89 in the Code of Civil Procedure by Amending Act of 1999. As per Section 89, where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the Court may reformulate the terms of a possible settlement and refer the same for (i) Arbitration (ii) Conciliation (iii) Judicial Settlement including settlement through Lok Adalat or (iv) Mediation. As per the provisions of Section 89, where a dispute had been referred to Lok Adalat, the Court shall refer the same in accordance with the provisions of sub-section (i) of Section 20 of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of dispute so referred to the Lok Adalat.

So we can say that the idea of legal aid which is said to be originated in the medieval period, when a girl named Alice, appeared and cried for justice before the Royal Court, that she has no one who could plead her case except God, is the foundation for enactment of the Legal Service Legislations throughout the world.

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SECTION 167 Cr.P.C. PRE-COGNIZANCE REMAND AND COMPULSIVE BAIL

VED PRAKASH
Addl. Director,
J.O.T.R.I.

Liberty of an individual is the very foundation of a true democratic policy. Art. 21 of our Constitution, therefore, unequivocally ordains that no person shall be deprived of his life or personal liberty except according to procedure established by law. As a corollary to it Art. 22 (2) mandates that subject to the exceptions contained in sub-clause (3), an arrested person cannot be detained in custody beyond 24 hours of his arrest without the authority of a Magistrate. This constitutional mandate finds place in our procedural law in the shape of Section 57 and 167 of the Criminal Procedure Code, 1973. Both these sections are complementary to each other. While section 57 simply stipulates the mandate of Art. 22 (2) of the Constitution, Section 167, which is a Code within the Code, as far as pre-cognizance remand is concerned, not only prescribes the outer limit of time period to which a person accused of an offence may be remanded to police/judicial custody and within which challan should be filed, but also the consequence of default in this respect in the form of compulsive bail. This article attempts to explore and ascertain the object, ambit and scope of Section 167 regarding its applicability.

OBJECT :

The provisions contained in Section 167 aim at maintaining a balance between individual liberty and interest of the society. The basic object of the Section is that an important matter like liberty of a person cannot be fully left at the discretion of the police, therefore, the discretion of Magistrate acts as a rider over the apprehended arbitrariness of police so as to prevent abuse of power. The Apex Court in *Chaganti Satyanarayana and others Vs. State of A.P. AIR 1986 SC 2130* while considering the object of Section 167, in the historical background of the legislative changes which took place in Section 167, observed that Proviso (a) to Section 167 (2) has been enacted not only to safeguard the liberty of the citizens but also to safeguard the interests of the State or in other words the public. The right of bail granted to remand prisoners at the end of 90 days or 60 days as the case may be does not have the effect of rendering the subsequent period of detention ipso facto illegal or unlawful. Explanation-1 to the Proviso obligates the accused being detained in custody in spite of the expiry of the prescribed period of 90 days or 60 days as the case may be so long as he does not furnish bail.

COMPUTATION OF PERIOD :

Prescribing the outer limit of detention in police custody/judicial custody, Section 167 (2) provides that the Magistrate may authorise the deten-

tion of an accused in such custody (i.e. either police or Judicial) as the Magistrate deems fit for a term not exceeding 15 days in the whole and detention beyond the period of 15 days in Judicial custody may be authorised up to a period for 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years and 60 days where the investigation relates to any other offence.

The question arises whether the period of 60/90 days should be reckoned from the date of arrest or from the date of remand and further whether the date of remand should also be included while ascertaining the total period. In the case of Chaganti Satyanarayana (supra) the Apex Court made it very clear that total period of 90 days or 60 days begins to run only from the date of order of remand and not from the date of arrest of the accused. The Apex Court observed that if the period of custody is to be reckoned from the date of arrest, then the Magistrate will be disentitled in placing an accused in police custody/judicial custody for a period of 15 days. As regards the inclusion or exclusion of first day of remand in the period of 60/90 days the Apex Court laid down in *State of M.P. Vs. Rustam and others, 1995 SCC Supp. (3) 221* that while calculating the period of limitation, the day accused was remanded to judicial custody should be excluded and the day on which challan was filed in the Court should be included. Again a question may come before the Court that where the 60th or 90th day is holiday, then whether provisions of Section 10 (2) of the General Clauses Act, 1897 will come into play and the challan filed on the next day shall be in the prescribed limit? This question was answered in negative by our own High Court in *Ashok Sharma Vs. State of M.P., 1993 JLJ 99,* wherein it was held that the prosecution cannot claim the benefit of 90th day being a holiday because challan need not be filed in Court and it could be filed before the Magistrate, therefore, Section 10 (2) of General Clause Act, 1897 was inapplicable while computing the total period of 60/90 days under Section 167 (2). However, it is noteworthy that the period of interim or temporary bail may well be excluded while computing the period of 60/90 days, refer : *Devendra Kumar Vs. State of M.P., 1991 (II) MPJR 338.*

PERSONAL PRESENCE OF ACCUSED :

The mandate of law as incorporated in proviso (b) of Section 167 (2) is very clear that detention in any custody cannot be authorised by a Magistrate unless the accused is produced before him. However, there may arise contingencies where it may not be possible for the state to physically produce the accused in person before the Magistrate. Dealing with the issue, a Divison Bench of our own High Court in *Raju and others Vs. State of M.P. and others, 1990 Cr.L.J. NOC 159* held that the principle and requirement regarding physical production of the accused before the Magistrate cannot be stretched to such an extent as to cover even those cases and circumstances where it is almost practically impossible to physically produce the accused

in person before the Magistrate. The Court observed that there may be situations and contingencies where inspite of all due deligence, bona fide intention and precautions, it may not be possible for the state to physically produce the accused before the Magistrate and in such a situation due to the absence of the accused the order of remand will not stand vitiated.

POLICE CUSTODY AFTER 15 DAYS :

There may not be any doubt regarding the legal position that the Magistrate has full-fledged and un fettered discretion to authorise police custody for a term not exceeding 15 days in full. The question, however, is whether after initial period of 15 days the Magistrate has jurisdiction to authorise police custody. The Apex Court examined this issue in *Central Bureau of Investigation. Special Investigation, New Delhi Vs. Anupam J. Kulkarni, AIR 1992 SC 1768.* The Court laid down that police custody of an accused after expiry of first 15 days cannot be permitted by the Magistrate and the subsequent detention could only be in judicial custody. Even if during the investigation the complicity of the accused in more serious offence in the same occurrence is disclosed that will not cloth the Magistrate with the jurisdiction to authorise police custody for any further period. The Apex Court clarified that this limitation shall not apply when the complicity of the accused is disclosed in different occurrence.

From the above it is amply clear that in one occurrence police remand may not be authorised after initial period of 15 days irrespective of the fact that initially the police remand was not for full 15 days.

APPLICABILITY OF SECTION 167 IN SPECIAL CASES LIKE N.D.P.S/ T.A.D.A. :-

Earlier a Full Bench of our own High Court in *Ram Dayal Vs. Central Narcotics Bureau, Gwalior, 1992 (II) MPJR 250 (FB)* took the view that Section 167 (2) regarding compulsive bail on default of submission of charge-sheet within stipulated period is not applicable in cases arising under the N.D.P.S. Act, 1985. This view was however, overruled by the Apex Court and it was laid down in *Union of India Vs. Thanisharasi, 1995 AIR SCW 2543* and re-affirmed in *Dr. Vipin Shantilal Panchal Vs. State of Gujarat, AIR 1996 SC 2897* that Section 37 of the N.D.P.S. Act does not exclude application of proviso to sub-section (2) of Section 167 of the Code As regards the cases arising under T.A.D.A. The Apex Court in *Hitendra Vishnu Thakur and others Vs. State of Maharashtra and others, AIR 1994 SC* 2623 made it clear that the provisions of Section 167 (2) are equally applicable to cases arising under Terrorist and Disruptive Activities (Prevention) Act, 1987

ARREST BY A PERSON OTHER THAN A POLICE OFFICER/SURRENDER BEFORE A MAGISTRATE :

Section 167 speaks about the production of arrested persons by officer-in-charge of the police station or the investigating officer, if he is not

below the rank of Sub-Inspector before the Magistrate. Sometimes a question is posed as to whether the provisions of Section 167 shall apply when a person is arrested by an officer other than a police officer or when an accused person surrenders before a Magistrate? In *Bijan Holder Vs. State 1993 Cr.L.J. 3082 (Cal)* it was held that Section 167 will not apply to an enquiry or proceeding under the Customs Act because there is no scope of reading "Customs Officer" in place of "Officer-in-charge of the police station" or the "police officer making the investigation." This view, however, did not found favour with the Apex Court and in *Directorate of Enforcement Vs. Deepak Mahajan and another, AIR 1994 SC 1775* the Apex Court laid down that to invoke Section 167 (1), it is not an indispensable pre-requisite condition that in all circumstances, the arrest should have been effected only by a police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it follows that a mere production of an arrestee before a competent Magistrate by an authorised officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its strict sense) on a reasonable belief that the arrestee "has been guilty of an offence punishable" under the provisions of the special Act is sufficient for the Magistrate to take the person into his custody on his being satisfied of the three preliminary conditions, namely (1) arresting officer is legally competent to make the arrest, (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and the production of the arrestee serve the purpose of Section 167 (1) of the Code.

In some case *(State of Gujarat Vs. Patel Pramukhlal Gordhan Das, 1975 Cr.L.J. 324 (Guj.) and Kedar Vs. State. 1977 Cr.L.J. 1230 (All)* it has been held that Section 167 applies only when a person has been arrested by police and where the accused has surrendered before the Court the section is not applicable. However, the view is erroneous because the Apex Court in the case of *Deepak Mahajan (supra)* has clearly laid down that if a case is registered against an offender arested by the Magistrate and a follow up investigation is initiated, or if an investigation is emanated qua the accusations levelled against the persons appeared, surrendered or being brought before the Magistrate, the Magistrate can in exercise of the powers conferred upon him by Section 167 (2) keep such offender under judicial custody.

FILING OF CHARGE SHEET AFTER PERIOD OF 60/90 DAYS :-

There may arise three different fact situations in respect of a person detained in custody where chargesheet has been filed after the prescribed period of 60/90 days and a prayer has been made for release on bail u/s 167 (2) on the ground of default in submission of charge sheet within the prescribed time limit.

Firstly, the case may be that after the prescribed period of 60/90 days the charge sheet is filed by the prosecution and thereafter accused person files an application seeking bail under section 167 (2) for default in submission of charge sheet within the prescribed time limit. This fact situation stands exclusively covered by the pronouncement of the Apex Court in *Sanjay Datt Vs. State through C.B.I., (1994) 5 SCC 410,* wherein the Constitution Bench ordained that the indefeasible right accruing to the accused in such a situation is enforceable only prior to the challan and it does not survive or remain enforceable on the challan being filed *if already not availed of.* Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to the grant of bail to an accused after filing of the challan because the custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the code of Criminal Procedure. The Court observed that if the right had accrued but it remained unenforced till the filing of challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed.

In another case the fact situation may be that after the period of 60/90 days the accused prays for the compulsive bail and chargesheet is submitted after the accused has already availed of the facility of compulsive bail. In such a case the filing of the charge sheet will not alter the situation and the order for release on bail of such a person made under the proviso to Section 167 (2) would not be defeated, however, such an order may be cancelled under Section 437 (5) or under Section 439 (2) Cr.P.C. if the requisite conditions do exist, refer : *Simranjit Singh Mann Vs. State of Bihar, AIR 1987 SC 149.*

Thirdly, a situation may arise where after the completion of 60/90 days the accused submits application for release on bail under Section 167 (2) and pending such application a charge sheet is filed. In such a case the question which crops up before Court is as to whether mere filling of the application by the accused amounts to availing of the indefeasible right accruing in his/her favour on default in filing of charge sheet within prescribed time limit. The Apex Court in *Uday Mohan Lal Acharya Vs. State of Maharashtra, 2001 SCC (Cri) 760* considered this issue and after referring to various authorities held that on the expiry of period of 90/60 days as the case may be indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigation agency in completition of investigation within the period prescribed and the accused is entitled for release on bail if he is prepared to furnish the bail as proposed by the Magistrate. The Court further laid down that when an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have accrued in his favour in default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/

Court must dispose of it forthwith. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of default on the part of investigating agency in not completing the investigation within the period stipulated. The Court while referring to the expression "if not already availed of" used in Sanjay Datt's case (supra) observed that if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate, erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. The Apex Court overruled its own contrary view expressed in *State of M.P. Vs. Rustam, 1995 SCC (Cri) 830*, wherein it was held that the Court is required to examine the availability of right to compulsive bail on the date it is considering the question of bail and not barely on the date of presentation of petition for bail.

APPLICATION FOR BAIL- NECESSITY OF :-

Earlier in *Uma Shankar Vs. State of M.P., 1982 MPLJ 291* the view was taken by our own High Court that proviso (a) to Section 167 (2) does not require any application from the accused for being released on bail and all that he has to do is to intimate the Court that he is prepared to furnish bail as may be ordered. This view was virtually based on the pronouncement of the Apex Court in *Hussainara Khatoon Vs. Home Secretary, State of Bihar, AIR 1979 SC 1371* wherein it was ordained that on the completion of 60/90 days the Magistrate has a duty to inform the undertrial that he is entitled to be released on bail. However, in view of the latest pronouncement of the Apex Court in *Hitendra Vishnu Thakur* (supra) the aforesaid view no more holds the field and the accused person desirous of availing the benefit of Section 167 (2) is required to make an application for being released on bail.

IMPRISONMENT FOR A TERM OF NOT LESS THAN 10 YEARS - MEANING:

Section 167 (2) (a) (i) provides that 90 days shall be the maximum permissible period of custody where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than a period of 10 years. There may not be any difficulty where the offence is punishable either with death penalty or with imprisonment for life. However, the phase, "imprisonment for a term of not less than 10 years" has been interpreted differently by various High Courts. In *Om Prakash Gabbar Vs. State of Punjab, 1997 Cr.L.J. 2974 (P & H)* the Punjab High Court and in

Babu Vs. State of Karnataka, 1998 Cr.L.J. 16 (Kant) the Karnataka High Court have taken the view that the aforesaid phrase does imply that for authorising custody up to 90 days the offence must be punishable with imprisonment for a minimum term of 10 years, therefore, the time limit of 90 days will not apply in a case like one punishable under Section 306 Indian Penal Code where the sentence is up to 10 years.

Taking almost a contrary view Rajasthan High Court in *Mohan Singh Vs. State of Rajasthan, 1998 Cr.L.J. 3258 (Raj)*, Bombay High Court in *Mohammad Aarif Vs. State of Maharashtra, 1999 Cr.L.J. 2645 (Bom)* and Delhi High Court in *Rajeev Choudhary Vs. State, 2001 Cr.L.J. 2023 (Del)* have held that the phrase "imprisonment for a term for not less than 10 years" includes offences in which imprisonment is up to 10 years and that to bring an offence within this phrase it is not necessary that the prescribed punishment should be minimum 10 years. The decision of the Delhi High Court in *Rajeev Choudhary* (supra) was challenged before the Apex Court. The Apex Court in its decision reported in *(2001) 5 SCC 34 (Rajeev Choudhary Vs. State)* has interpreted the aforesaid phrase and has laid down that Section 167 (2) (a) (i) prescribing a period of 90 days would apply in case of offence where miniumum sentence would be 10 years or more. It would not cover the offence where punishment could be imprisonment for less than 10 years. The aforesaid view of the Apex Court no doubt places the controversy on the point at rest. Here it is interesting to note that when the period of 90 days was fixed by Amending Act No. 45 of 1978 at that time either in I.P.C. or in any other Special Act there was no offence which was punishable with imprisonment for a minimum term of 10 years and it could not be reasonably though that the parliament was not aware of this situation and just enacted the aforesaid provision to become redundant one. This peculiar feature has been taken note of by the Delhi High Court in *Rajeev Choudhary Vs. State, 2001 Cr.L.J. 2023 (Delhi).*

NON- SUPPLY OF COPIES OF CHALLAN/NON-FILING OF F.S.L. REPORT :-

The position of law is almost settled that non-supply of copies of challan to the accused within the prescribed limit of 60/90 days will not confer any benefit on the accused so as to become entitled for bail under Section 167 (2) (a) because provisions of Section 167 (2) (a) do not provide for the supply of copies of challan to the accused, refer : *Neetu @ Neetu Sharma Vs. State, 1994 (II) MPJR 3242.* Similary it has also been clearly held that failure to file the report of F.S.L. along with the challan will itself not amount to non-presentation of challan thereby conferring any benefit on the accused under Section 167 (2), Refer : *Kaniram Vs. State of M.P., 1991 (1) MPJR Note 30.*

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SALE OF IMMOVABLE PROPERTY WORTH LESS THAN RUPEES ONE HUNDRED- ITS REGISTRATION ?

RAJEEV KUMAR SHRIVASTAVA
Officer on Special Duty

Object and purpose of the Registration Act, amongst other things, is to provide a method of public registration of documents so as to give information to people regarding legal rights and obligations affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Registration lends inviolability and importance to certain classes of documents.

Under the Registration Act (1908)- immovable property includes lands, buildings, hereditary allowances, right to ways, rights, ferries, fisheries or any other benefits to arise out of land and things attached to the earth, but not standing timber, growing crops nor grass.

Section 17 (1) (b) of Registration Act says- "Other non- testamentary instruments when purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of hundred Rs. and upwards, to or in immovable property, should be registered".

The real purpose of registration is to secure that every person dealing with the property, where such document requires registration, may rely with confidence upon statements contained in the register as a full and complete account of all transactions by which title may be affected. Section 17 of the said act being a disabling section, must be construed strictly.

Section 2 (10) of the Indians Stamp Act defines conveyance-Conveyance includes a conveyance of sale and every instrument by which property, whether immovable or movable, is transferred vivos and which is not otherwise specifically provided for, by schedule one. Instrument has been defined under section 2 (14) of the said Act which includes every document by which any right or liability is or purports to be, created, transferred, limited, extended, extinguished or recorded. The agreement is, therefore, an instrument within the meaning of section 2 (14) of the Act.

Now we have to see whether sale of immovable property of value less than hundred Rs. can be effected by delivery of property under an unregistered document? The first point for consideration is the nature of the transaction under which possession is delivered. Being unregistered, it is of course inoperative as a sale deed, but may be used as proof of the oral agreement between the parties which together with delivery of property is admissible under section 91 of Indian Evidence Act.

What is material for the purpose of compulsory registration under section 17 (1) of Registration Act is that the document must create, declare, assign, limit

or extinguish whether in present or in future any right, title or interest, whether vested or contingent, of the value of Rs. hundred upwards, to or in immovable property. These two conditions should be satisfied before insisting upon instrument compulsorily registrable under section 17 (1) (b) of the Act. Section 49 or section 50 of the said Act prohibits, use of the terms in the documents, which was not registered for any purpose under law. The only question is whether the document is capable of valuation?

It is not absolutely necessary that in sale of immovable property of the value of less than Rs. hundred where the vendee is already in possession of the property sought to be sold in their different capacity, can only be made by a registered instrument. In such cases, transfer of property by sale can be effected by deliver of possession and where the vendee is already in actual physical possession of the property sought to be sold, it is not possible to transfer actual physical possession to him and further is not desirable that a mere formality should be undergone that the vendee should hand over possession back to the vendor for one moment who may again put the vendee into possession in pursuance of the sale, the very next moment, still delivery of the property in such cases may be effected by bringing about a change in the nature or character of possession of the vendee by declaration and such other acts on the part of the vendee for making his title absolute. Therefore there can be an oral sale of immovable property of the value less than Rs. hundred coupled with delivery of the property and if the property is already in possession of the purchaser, then by making such declarations and overt acts which may be necessary for vesting the rights of ownership of the sold property in the vendee. Such overt acts may be either in the form of getting mutation entry made in favour of the vendee in the revenue records or the vendor may make declaration before the settlement authorities or other competent authorities that he has relinquished his rights in the property and that thereafter the vendee will be an absolute owner of the property. The conversion of the nature and character of possession may also be effected by the handing over of the earlier documents of title by the vendor to the vendee. Further, so for as the question of delivery of possession is concerned which is the essence of the transaction of sale within the meaning of section-54 of Transfer of Property Act, no distinction can be made between an unauthorised occupant or a person in permissive possession.

Section- 54 of the Transfer Property Act defines sale as a transfer of ownership, in exchange for price paid or promised or part paid and part promised. The aforesaid section further proceeds to lay down in the following terms, as to how a sale can be made :-

"Such transfer, in the case of tangible immovable property of the value of Rs. hundred and upwards, or in the case of reversion or other intangible thing, can be made only by a registered instrument". In the case of tangible immovable property of a value less than Rs. hundred, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible im-

movable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Thus, real delivery of the property is essential for a valid sale. In Mathura Prasad's case (A.I.R. 1921 PC 8), their Lordships of the Privy Council found as a fact that the property was neither in possession of the alleged vendee, Udit Narayanan, nor the possession of the said property was delivered to him as a result of the same. Undoubtedly, if there is a sale of tangible immovable property of the value of less than Rs. hundred, one mode of making an effective sale is of executing a registered sale deed, but if a registered instrument is not executed by the vendor, the other mode of transfer by way of sale of such immovable property of the value of less than Rs. hundred is by an oral sale accompained by delivery of the property. Section 54 of Transfer Property Act itself provides that the delivery of tangible immovable property, takes place when the seller places the buyer or such person as he may direct in possession of the property. In cases where the buyer was not in earlier possession of the property, which was the subject matter of sale, there can be no doubt that either a registered instrument should be executed by the vendor or their may be an oral sale accompanied by delivery of the property.

Means, the sale of immovable property of the value of less than Rs. hundred there are only two modes in which the sale can be effected, in order to pass the valid title under section-54 of the Transfer of Property Act, namely, that there should be a registered instrument evidencing the sale or there should be an oral sale accompanied by delivery of possession. In cases where delivery of possession is not possible because the vendee is already in possession of the property sought to be sold, the only possible mode by which the sale of tangible immovable property of the value of less than Rs. hundred can be effected, is by a registered instrument.

On the basis of above discussion, it is clear that in case of sale of immovable property worth less than Rs. hundred by transfer of possession, registration of sale deed is not necessary. Sale of immovable property worth less than Rs. hundred by mere unregistered sale deed without transferring the possession, does not transfer title but the deed is admissible to prove nature and quality of vendee's possession. Hence such sale must be performed by registered sale deed.

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अंधकार को कोसने की बजाय
एक छोटा दीपक जलाना बेहतर है।
- कहावत

न्यायालय द्वारा अदावाकृत सम्पत्ति का व्ययन

श्यामकांत कुलकर्णी
अतिरिक्त जिला न्यायाधीश
देवास

वर्तमान समय में यदि देश भर के न्यायालय एवं पुलिस थानों में आपराधिक प्रकरणों में जप्त संपत्ति एवं वाहनों की कुल संख्या को विचार में लेवे, तो वह लाखों में हो सकती है। अदालतों व थानों के मालखाने ऐसे मूल्यवान संपत्ति व वाहनों से अटे पड़े हैं, उन्हें रखने तंक की जगह नहीं है। यह संपत्ति अथवा वाहन मूल स्वामी की प्रतिक्षा में मालखाने में पड़े होकर खराब हो गये हैं, मूल्यहीन हो गये हैं या फिर ऐसी संपत्ति या वाहन के अफरातफरी होने या अमानत में खयानत की शिकायतें समय–समय पर होती रहती हैं। आखिर क्या कारण है कि इन जप्त संपत्ति या वाहनों को उनके उचित स्वामी को सुपुर्द करने में विलम्ब हो रहा है एवं संपत्ति का निराकरण दंड प्रक्रिया संहिता के प्रावधानों के अनुसार नहीं हो रहा है।

माननीय सर्वोच्च न्यायालय ने SLP (Cri) No. 2745/2002, Sunderbhai Ambalal Desai Vs. State, SLP (Cri) 2755/2002 (M. Mudaliar Vs State of Gujarat) निर्णय दिनांक 01.10. 2002 में आपराधिक मामलों में जप्त संपत्ति के निराकरण में विलम्ब के प्रति चिन्ता जताई है एवं अंतिम पैरा में निर्देशित किया है कि :

"However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under section 451 Cr.P.C. are properply and promptly exercised and articles are not kept for long time at the police station in any case for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly;

आपराधिक मामलों में पुलिस या अनुसंधान अधिकारी द्वारा जप्त संपत्ति के निराकरण के संबंध में दण्ड प्रक्रिया संहिता में धारा 451 से 459 तक के प्रावधानों के अनुसार जप्त संपत्ति चाहे न्यायालय में पेश की गई हो या नहीं, अनुसंधान या विचारण की स्थिति हो या विचारण पूर्ण हो गया हो, जप्त संपत्ति का निराकरण न्यायालय द्वारा ही कियां जाना है। दंड प्रक्रिया संहिता एवं माननीय सर्वोच्च न्यायालय के न्यायदृष्टांत के अनुसार जप्त संपत्ति न्यायालय में ही भेजी जानी चाहिये और उसका निराकरण न्यायालय द्वारा ही किया जाना चाहिये, वह भी त्वरित।

जिन मामलों में फरियादी या संपत्ति का स्वामी ज्ञात होता है या फरियादी (संपत्ति का स्वामी) को संपत्ति जप्ती की जानकारी होती है, वह विधि प्रक्रिया के अनुसार संपत्ति न्यायालय से प्राप्त कर लेता है, किन्तु जहां पुलिस या न्यायालय को जप्त संपत्ति या वाहन के स्वामी के बारे में जानकारी नहीं है या संपत्ति के स्वामी (फरियादी) को संपत्ति जप्ती की जानकारी नहीं है, वहीं जप्त संपत्ति या वाहन के निराकरण में विलम्ब होता है क्योंकि संपत्ति या वाहन चोरी के मामलों में संपत्ति की

चोरी का पता कई दिन, महिनों यहां तक कि वर्षों बाद भी चलता है। जहां चोरी हुई है, वह संपत्ति उस थाना क्षेत्राधिकार जिला या राज्य के बाहर कहीं भी जप्त हो सकती है। पुलिस मानवीय दक्षता से चोरी की रिपोर्ट एवं चोरी की जप्त संपत्ति के संबंध में तालमेल नहीं बैठा पाती है और कई जप्त संपत्ति वास्तविक स्वामी की प्रतीक्षा में मालखाने में पड़ी रहती है। फरियादी या संपत्ति का स्वामी पुलिस के भरोसे रहता है। वह रिपोर्ट कर अपने कर्तव्य की इतिश्री कर लेता है तथा बीमा कम्पनी भी सर्वेयर के द्वारा एक प्रतिशत मामलों में ही जप्त संपत्ति का पता लगा पाती है।

ऐसे मामलों में, जिनमें पुलिस या अनुसंधान अधिकारी द्वारा अपराध या संदेह में संपत्ति जप्त की जाती है और उसे प्राप्त करने के लिए कोई व्यक्ति न्यायालय के समक्ष नहीं आता, उसमें वर्तमान समय में 'प्रक्रिया', दंड प्रक्रिया संहिता के प्रावधान 451 से 459 तथा नियम एवं आदेश (आपराधिक) 422 से 433 में दी हुई है, जिसके अनुसार ऐसी संपत्ति न्यायालय में पेश करने पर या संपत्ति के संबंध में न्यायालय को जानकारी मिलने पर न्यायालय ऐसी संपत्ति के संबंध में फार्म A में विशिष्ठियां बताते हुए फार्म B में उद्घोषणा 6 माह के लिये जारी करती है। यह उद्घोषणा न्यायालय के फलक पर एवं सार्वजनिक स्थान पर जारी की जाती है। फार्म A एवं फार्म B निम्नानुसार है –

A

Inventory of Unclaimed Property

Property taken possessions of by police								
Serial No. of articles	On What date	By which station house with date of roznamcha	In what town or village	In what manner whether from possession of a person unoccupied house etc.	Description with the mark A,B,C etc. as per roznamcha	Value	Whether produced before Magistrate, made over to supratdar or retained in police custody	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8) Rs.	(9)

B

Proclamation in respect of Unclaimed Property
(The Police Act (V of 1961) section 26 and section 523 Code of Criminal Procedure 1898)

COURT OF THE MAGISTRATE OF THE DISTRICT

Proclamation is hereby made that unclaimed property consisting of the articles specified in the subjoined list, has been detained by the magistrate to the district of..... Any person who has any claim thereto, is hereby required to appear and establish his right to the same within six months from this date

Dated the day of 200

Magistrate of the District

List of articles

Articles	Note of the circumstances under which the articles came into the possession of the police and are detained by the magistrate.

उद्घोषणा जारी होने के 6 माह के समाप्त होने पर जप्त संपत्ति का वास्तविक हकदार न्यायालय में उपस्थित नहीं होता है या क्लेम नहीं करता है, तो उस संपत्ति का विक्रय नीलाम द्वारा कर उसका मूल्य शासन में जमा कर दिया जाता है।

जैसा कि पूर्व में बताया है कि चोरी की रिपोर्ट के महिनों या वर्षों बाद संपत्ति जप्त हो सकती है, वह भी अन्य जिले एवं राज्य में भी। इस स्थिति में अन्य जिले या राज्य में जारी उद्घोषणा की जानकारी जप्त संपत्ति के स्वामी को होना संभव नहीं है।

जहां तक इन्श्योरेन्स कम्पनी का प्रश्न है, जप्त वाहन को देखकर यह नहीं कहा जा सकता कि वाहन बीमित है अथवा नहीं और बीमित है तो किस इन्श्योरेन्स कम्पनी के पास। ऐसी स्थिति में बीमा कम्पनी भी वाहन केवल उद्घोषणा के आधार पर प्राप्त नहीं कर सकती।

उद्घोषणा जारी करने के पीछे मूल भावना के संबंध में AIR 1953 पंजाब 222 में माननीय उच्च न्यायालय ने अवधारित किया है कि "उद्घोषणा जारी करने के पीछे उद्देश्य जप्त संपत्ति के संबंध में सूचना उसके वास्तविक हक़दार को देने की होती है, तो उद्घोषणा का स्वरूप ऐसा किस प्रकार से हो कि देश के किसी भी जगह पर बैठे संपत्ति के स्वामी को वास्तविक अर्थों में सूचना हो और वह अपनी संपत्ति को प्राप्त कर ले। यह सूचना न्यायालय के द्वारा संपत्ति के स्वामी को कम्प्युटर द्वारा इंटरनेट के माध्यम से उपलब्ध कराई जा सकती है।

आपराधिक मामलों में संपत्ति या वाहन पुलिस या अनुसंधान अधिकारी द्वारा जप्त किये जाते हैं। अब तक जप्त संपत्ति व वाहनों की सूची जिला स्तर पर जिला पुलिस मुख्यालय द्वारा जिला न्यायालय में भेजी जावे। जिला न्यायालय में उपलब्ध संपत्ति या वाहन (जिनके स्वामी अज्ञात है) की सूची तैयार कर NIC की राज्य इकाई को प्रत्येक जिले से भेजी जावे, जो NIC के राज्य ईकाई (सर्वर) द्वारा वेबसाईड के माध्यम से इंटरनेट पर उपलब्ध कराई जावे। इस तरह देश के सभी थानों एवं न्यायालय में जप्त संपत्ति (जिनके स्वामी अज्ञात है) की सूची इन्टरनेट पर उपलब्ध हो सकेगी। जिला पुलिस मुख्यालय एवं जिला न्यायालय द्वारा NIC की राज्य इकाई की सूची को प्रत्येक माह में एक बार अपडेट करना होगा। अर्थात सूची में से वे संपत्ति या वाहन, जिनका निराकरण हो गया है, कम करना होगा तथा वह संपत्ति जो पूर्व माह में जप्त हुई है, शामिल करना होगा। जिला पुलिस मुख्यालय एवं जिला न्यायालय द्वारा जो संपत्ति या वाहनों की सूची NIC के राज्य इकाई को भेजी जानी है, वह उद्घोषणा (Inventory) फार्म A में जानकारी के मुताबिक भेजी जानी चाहिये, ताकि वाहन स्वामी को अपनी संपत्ति के बारे में स्पष्ट जानकारी हो सके और यह भी मालूम हो सके कि वह संपत्ति किस थाने में, किस अपराध क्रमांक में जप्त है। फार्म नं. A में जप्त वाहन के मॉडल, रजिस्ट्रेशन, इंजन नम्बर, चेसिस नम्बर का उल्लेख अवश्य करना चाहिये ताकि यदि रजिस्ट्रेशन पूर्ति न हो तो वास्तविक की जानकारी इंजन व चेसिस नम्बर से हो सके।

जप्त संपत्ति की सूची को वर्गों में विभेदित करना उचित होगा। जैसे वाहन, स्वर्ण, चांदी के आभूषण या अन्य वाहन में टू व्हीलर या फोर व्हीलर तथा इन वर्गों को उपवर्गों में टू व्हीलर में स्कूटर, मोटर सायकल, फोर व्हीलर में जीप, कार एवं पुनः उन्हें मॉडल के आधार पर भी विभेदित किया जा सकता है। इससे संपत्ति स्वामी को संपूर्ण सूची का परीक्षण न कर केवल अपने से संबंधित सूची को देखना पर्याप्त होगा।

जप्त संपत्ति या वाहन की ऐसी सूची इन्टरनेट पर उपलब्ध है, की जांच या परीक्षण तीन स्तरों पर हो सकेगा। प्रथम पुलिस थाने द्वारा, जिसके पास रिपोर्ट दर्ज है। फरियादी या संपत्ति के स्वामी द्वारा एवं इन्श्योरेंस कम्पनी द्वारा जिसने संपत्ति के मूल्य का भुगतान कर दिया है। इस प्रकार सूची 6 माह तक इन्टरनेट पर उपलब्ध होने के बाद भी यदि जप्त संपत्ति का स्वामी उसे प्राप्त करने के लिए नहीं आता है, तो उद्घोषणा का समय समाप्त मानकर उसे नीलामी की कार्यवाही की जा सकती है।

इस प्रक्रिया का क्रियान्वयन करने से जो लाभ हैं, वह निम्नानुसार है –

1. अधिकांश चोरी की रिपोर्ट में माल की बरामदगी होगी एवं अभियुक्त के विरूद्ध सार्थक कार्यवाही होगी।
2. संपत्ति एवं वाहन के वास्तविक स्वामी को न्यूनतम प्रयत्न से घर बैठे अपनी संपत्ति की जप्ती की जानकारी होगी।
3. न्यायालय व पुलिस थानों में पड़ी संपत्ति वाहनों का त्वरित निराकरण होगा।
4. माननीय सर्वोच्च न्यायालय की उपरोक्त मूल भावना का पालन होगा। राष्ट्रीय संपत्ति या संरक्षण होगा, समाज का हित होगा, आम जनता की न्याय प्रक्रिया में आस्था बढ़ेगी।

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CAUSES & REMEDIES OF CRIMES

SANJEEV DATTA
Additional District Judge
Indore

Increasing rate of crimes has compelled all right thinking persons to ponder over this problem seriously. It is essential to pinpoint the causes of crimes scientifically. After probing the causes, we can evolve effective remedies. Minor cosmetic changes are not sufficient to cut short the crimes. Major surgery is sine qua non to build healthy society, which would be free from crimes.

First of all, efforts should be made to peep into history to know what efforts have been made in past to search the causes of crimes. During 18th century, classical school of criminology emerged. Beccaria from Italy & Bentnam from England were main exponents of this theory. Rationalism was the basis of this theory. A man enters into certain relationship with fellows. He is presumed to have power to choose right or wrong. Pleasure-pain theory was also included within sphere of classical school.

Geographers in 19th century evolved "thermal theory" according to which crimes against the person were considered as result of hotter climate and crimes against property were induced by colder climate.

In late 19th century, school of Criminal Anthropology succeeded in replacing rationalistic school. Lombroso from Italy was the champion of this school. Darwin's theory of biological evolution was gaining ground. According to Lombroso, physical & mental characters are atavistic. According to Lombroso, bad environment & hereditary criminality are root causes of crimes. Darwin was evolving theory of biological evolution, while anthropologists were evolving scheme of social evolution. Criminologists in Germany & Western Europe have evolved new theory near 1920, which is modified theory of criminal anthropology. This theory was called as "School of Criminal Biology". Emphasis of this theory was on studies of mental & physical features of person. Studies of Enrico Ferri gave birth to a new school of criminal sociology. He contended that criminal law & imprisonment had no effect on crime. Individual anomalies & physical environment can explain causes of crimes. Bonger, a Dutch Socialist contended that the pressures of capitalistic system on the 'have nots' class are major causes of crimes. The pressure operate through such conditions as poverty, unemployment, insecurity, bad housing and lack of education. Gabriel Tarde's view were given name of Imitation-Suggestion-Theory. According to Tarde, crimes are adopted like fashion. Studies made on past have shown clearly that our ancestors were quite alive towards problem of crimes. Wide researches were undertaken in various countries over the subject. Now taking benefit from past studies, we can

evolve comprehensive theory to solve the problem. Industrial & technological revolution has changed socio-economic structure of society. Literacy is increasing, but material comforts are also increasing. In spite of all industrial & technological progress, we have failed to check menace of crimes. The basic cause, according to me, is that way of thinking has totally changed these days - everyone is in race of materialism. Everybody wants material comforts and wealth. Due to defective social & economic structure of society, gap between rich & poor is increasing, majority of masses live miserable life, while few enjoy all luxuries of life.

The economic inequality causes frustration among masses. Increasing economic crimes are result of this frustration. In past there was high regard for idealism. In each field, ideal & honest persons were given high respect. Now-a-days 'end justifies means'- nobody bothers about means. Everybody wants to earn wealth by hook or crook. If we want to control crimes, then efforts should he made to build ideal society. Another important point is that there is general impression among masses that they can escape easily after violating law. Our legal system in also defective. There are various serious lacunas in system, due to which criminals are escaping from clutches of law. Adversary system of trial is totally wrong so far as Indian social conditions are concerned. Witnesses are generally layman. They are not legal experts. Witnesses fail to face competent lawyer in cross-examination. Although there are provisions in law, that courts should help witneses during their examination/cross-examination, where witnesses feel problem in understanding questions. Role of Judge is not that of umpire. Inspite of the provision, role of court is still limited in adversary system of trial.

Hence, time has come to take practical steps to solve the problem. State should make sincere efforts to build ideal society. Gap between rich & poor should be reduced. India is a socialist country. Socialism should be in reality, not only on papers. 'Roti', 'Kapda' & Housing should be provided to each citizen. Adversary system of trial should be abolished. Inquisitorial system should be adopted. Speedy trial according to new pattern would restore the faith of mass in the system.

Increasing criminality is 'hydra headed problem'. It should be tackled by taking practical steps on all fronts. Poverty should be removed by implementing various economic programmes sincerely. Gap between rich & poor should be decreased taking in view socialistic goal of Constitution. Judicial system should be reshaped according to needs of present social structure. Researches should be undertaken to make law more effective & vibrant. Steps should be taken timely, otherwise there would be anarchy in society.

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APPLICATION OF INFORMATION TECHNOLOGY IN JUDICIARY-LEARN IT YOURSELF

(CONTINUED FROM PREVIOUS ISSUE)

The systems unit, a tower like box, usually kept along side T.V. look alike Monitor is called the Systems Unit. The Systems Unit contains Computer memories, circuit boards, expansion slots, power supply and all important Central Processing Unit (C.P.U.). Technically speaking the C.P.U. (A Microprocessor) is the actual computer and everything else that makes up your personal computer helps the C.P.U. get data and send output to other places. It is the C.P.U. that processes and analyses all the data that flows through the computer, therefore, it is the brain of the computer. Its main function is to interpret and carry out instructions. A personal computer's memories and C.P.U. are in fact integrated circuit (I.C.) chips.....

EVERY C.P.U. HAS THREE BASIC PARTS :-

1. Control Unit (C.U.)
2. Arithmetic Logic Unit (A.L.U.)
3. Registers.

1. Control Unit (C.U.) :-

The control unit of a C.P.U. performs the role of a traffic police men, directing the flow of data around the C.P.U. and around the computer. The control unit manages all the computer resources and coordinates the activities of a computer. It contains the basic instructions for execution of programs.

2. Arithmetic Logic Unit (A.L.U.) :-

When control unit encounters an instruction that involves mathematical calculation or logic, it passes such an instruction to the Arithmetic Logic Unit.

3. Registers :-

Register is a small high speed storage area inside the C.P.U. All data must be represented in a register, before it can be processed.

Needless to emphasis the C.P.U. is the most crucial components of a P.C. The faster your C.P.U. is and the more computing power it has, the better (and of course the more expensive), your computer is. You might have come across myriad advertisements issued by companies like Intel or AMD. These are brand names of two of the leading manufacturers of processors. A layman might often wonder as to what Pentium-III or Pentium-IV are? These are nothing but brand names of the most popular models of computer processors manufactured by the Intel Corporation. The speed of a C.P.U. is measured in Units called Megahertz. It indicates the number of instructions cycle a C.P.U. can process in a single second. 1000 Megahertz constitute one Gigahertz. A processors with a speed of 1000 Magahertz can process one thousand million instructions per second. Nowa-

days processors with a speed of 2.4 GHz. are common in the market. It would be interesting to note that the First P.C. introduced by IBM had a speed of all of 1.7 MHz. The world has come a long way since. Indeed.

2. The Memory :-

The computer needs memory to store data and run programs. A computer contains several types of memories some are integrated circuits, whereas others are physical devices. As we have already seen in the earlier issue, 8 bits constitute one byte which represents one character which may be an alphabet, a digit, a punctuation mark or even space between 2 characters. So, the smallest unit for measuring the memory of a computer is byte. 1024 bytes constitute one Kilobyte and 1024 Kilobytes constitute one Megabyte. 1024 Megabytes constitute one Gigabyte. Thus, when we say that memory of a particular device is one Gigabyte, we mean that it can store 1024x1024x1024 characters.

FOLLOWING ARE 2 OF THE MAIN MEMORIES FOUND INSIDE A C.P.U. :

1. Random Access Memory.
2. Read Only Memory.

1. RANDOM ACCESS MEMORY :- This type of memory holds running programs and data on the computer during its use. The C.P.U. does not have sufficient storage space for the entire program as well as for the data being manipulated by those programs. Therefore, the control unit stores the data and instructions received from input devices in Random Access Memory (RAM). The RAM can hold information only as long as the computer is on. When the computer is turned off, the information, unless saved on a storage device, disappears. Hence, this type of memory is sometime referred to as volatile memory.

It goes without saying that more memory you have the more your PC can process at one time and faster it works. A typical PC nowadays has Random Access Memory of 128 Megabytes. Though PCs with RAM extending up to 256 Megabytes are not uncommon. So while purchasing a computer one should go in for a computer with highest RAM, one can afford.

2. READ ONLY MEMORY (ROM) :- Some of the data and instructions remain permanently stored in memory. Today's PCs usually do not utilize ROM except for start up testing. Since, this memory does not disappear it is sometime referred to as non-volatile memory.

A Systems Unit Tower typically contains some other devices as well. The most significant of them are Hard Disk, Mother Board, CD- ROM Drive and Floppy Disk Drive. Hard Disk is permanent memory of a computer. The data, whether in text or graphic form or in musical form is stored in the hard disk. The capacity of a hard disk is measured in Gigabyte. The higher the capacity of a hard disk, costlier the computer would be. The computers available in the market nowadays typically have a hard disk with storage capacity of 40 Gigabytes. Computers with a storage capacity as much as 80 Gigabytes are also available. Data in voice or

graphic (Visuals) form consumes much greater storage space then data in text form. You will be surprised to learn that till recently the entire work of Main Seat of the High Court of Madhya Pradesh was being performed on a computer with a storage capacity of only 1.4 Gigabytes. The reason being, no graphics were required to be stored.

Mother Board is the platform on which different components of a CPU are fixed. It affords inter-connectivity to these components. Compact Disk, Floppy Disk and Magnetic Tape are secondary storage devices. These devices serve a two fold purpose. They provide additional memory as well as portability. These devices can be conveniently used to transfer data from one computer to another where they are not interconnected. More of the secondary storage devices will be discussed later. At present we are concerned with mechanisms which can be used to read data stored on these secondary storage devices.

The mechanism that reads data from a CD- ROM is called CD- ROM drive. Likewise, mechanisms that read data from a magnetic tape or a floppy disk are called tape drive and floppy disk drive respectively. Tape drive being expensive, can be found only in high end or custom made computers. However, CD- ROM drive and Floppy disk drive are to be found in all the personal computers. Some costlier computers have DVD-ROM drive and even a CD writer. A digital versatile disk (DVD) is a storage device with larger storage capacity. CD Writer is a mechanism that can not only read data for a CD but also write desired data on one.

Most of the computers currently available in the market have systems units with internal modems. Name modem stands for modulate and demodulate. This device provides connectivity with other computer networks through a telephone line. You can not enter the wonder world of internet or Cyber space without a modem. The capacity of a modem is measured in Kilobytes per second (KBPS). A digital modem available in the market may have a capacity of 56.6 KBPS. In addition to aforementioned devise a systems unit tower may also contain AGP Cards and Sounds Cards. These are required for creating images and sounds.

(To be continued in next issue)

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Our courts must advance with the times. They must adjust to the setting in which they function. They must fashion new tools to repair the dislocations of a changing, burgeoning and increasingly complicated social order. The techniques of a more leisurely past are not adequate to the future or even to the present.

-WARREN. Earl.

PART - II

NOTES ON IMPORTANT JUDGMENTS

192. ACCOMMODATION CONTROL ACT, 1961- Section 12 (1) (f)
Bona fide need - Word 'bona fide' not stated by plaintiff in his statement- This itself no ground to non-suit plaintiff.
Pawan Kumar Vs. Hajarilal
Reported in 2003 (2) MPHT 188

Held :

Merely that the plaintiff in his statement not stated the word *"bona fide"* by itself will not be a sufficient ground to non-suit the plaintiff. The *bona fideness* of the plaintiff has to be judged from all the facts and circumstances. Plaintiff is not a judge of his need. The Court on the basis of the facts, circumstances and the evidence has to consider objectively whether the need is *bond fide.* In the circumstances, merely plaintiff has not stated the word *"bona fide"* in his evidence by itself will not be sufficient to non-suit him. It is not necessary for the plaintiff to say in the evidence that he needs bona *fidely* the suit accommodation. Even if plaintiff states the aforesaid word in the evidence, even then Court has to judge all the facts, circumstances and evidence to ascertain whether the need is *bona fide.* In the circumstances, it is immaterial whether the plaintiff has stated in his statement that he needs the accommodation *bona fidely* or not.

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193. ADVOCATES :
Right of free expression cannot be equated with licence to make unfounded allegation- Duties of an advocate explained.
Radha Mohan Lal Vs. Rajasthan High Court (Jaipur Bench)
Judgment dt. 11.2.2003 by the Supreme Court in Criminal Appeal No. 445 of 1993, reported in (2003) 3 SCC 427

Held :

The liberty of free expression as was sought to be contended by Mr. Sualal Yadav cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary. The imputation that was made was clearly contemptuous. The effect is lowering of the dignity and authority of the court and an affront to the majesty of justice.

In *Shamsher Singh Bedi v. High Court of Punjab & Haryana, (1996) 7 SCC 99* this Court held that an advocate cannot escape his responsibility for drafting a scandalous notice to a Magistrate on the ground that he did so in his professional capacity.

An advocate is not merely an agent or servant of his client. He is an officer of the Court. He owes a duty towards the court. There can be nothing more serious than an act of an advocate if it tends to impede, obstruct or prevent the

administration of law or it destroys the confidence of the people in such administration. In *M.B. Sanghi, Advocate v. High Court of Punjab & Haryana, (1991) 3 SCC 600* while deciding a criminal appeal filed by an advocate against an order of the High Court, this Court said : (SCC pp. 602-03, para 2)

> "The tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the Judge into submission, it is all the more painful. When there is a deliberate attempt to scandalise which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the Judge concerned but also to the fair name of the judiciary. Veiled threats, abrasive behaviour, use of disrespectful language and times blatant condemnatory attacks like the present one are often designedly employed with a view to taming a Judge into submission to secure a desired order. Such cases raise larger issues touching the independence of not only the Judge concerned but the entire institution. The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society. Judicial independence was not achieved overnight. Since we have inherited this concept from the British, it would not be out of place to mention the struggle strong-willed Judges like Sir Edward Coke, Chief Justice of the Common Pleas, and many others had to put up with the Crown as well as Parliament at considerable personal risk. And when a member of the profession like the appellant who should know better so lightly trifles with the much-endeared concept of judicial independence to secure small gains it only betrays a lack of respect for the martyrs of judicial independence and for the institution itself. Their sacrifice would go waste if we are not jealous to protect the fair name of the judiciary from unwarranted attacks on its independence."

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194. ARBITRATION AND CONCILIATION ACT, 1996 - Section 7
Arbitration agreement- Essentials of- No requirement that words 'arbitrator' or 'arbitration' be mentioned in arbitration clause.
M.P. Housing Board, Bhopal Vs. Satish Kumar Raizada
Reported in 2003 (2) MPLJ 346

Held :

It is well settled that the "arbitration agreement" is required to be interpreted liberally. The meaning of such a clause in the contract must be gathered by adopt-

ing a common approach and it must not be allowed to be thwarted by a pedantic or legalistic interpretation. One of the essential ingredients of a submission to arbitration is that the parties should intend that the dispute intended to be referred should be determined in a quasi-judicial manner. The existence of a dispute, the *reference* of the case to the authority and the express unequivocal intention to attach finality to the order of the authority are extremely significant factors. Where the relevant clause in the contract contemplates of parties, disputes and finality of decision which are essential ingredients to bring in the provision of arbitration, the clause constitutes an arbitration clause. There is no requirement of the words "arbitrator" or "arbitration" to be mentioned in the clause to make it an arbitration clause. There is no doubt a distinction between "arbitration", "expert determination" and "finality clause"

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195. ARBITRATION AND CONCILIATION ACT, 1996 - Section 8
Court's power to refer matter to arbitration- Conditions for exercise of such power explained.
Lahar Publicity Service, Allahabad Vs. Union of India
Reported in 2003 (2) MPLJ 307

Held :

In *Wellington Associates Ltd. Vs. Kirit Mehta, AIR 2000 SC 1379* it has been laid down by the Supreme Court that the conditions which are required to be satisfied under sections 8 (1) and 8 (2) of the New Act before the Court can exercise its powers are :

(1) There is an arbitration agreement;

(2) A party to the agreement brings an action in the court against the other party;

(3) Subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) The other party moved the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

It is clear from the words of section 8 of the New Act that sub-section (1) uses the word "shall" and thus makes it obligatory on the part of the judicial authority to refer the parties to arbitration if action brought before it is a matter which is covered by the arbitration agreement, provided such request is not later than submitting to the Court the first statement on the substance of the dispute.

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196. ARBITRATION AND CONCILIATION ACT, 1996 - Section 16
Jurisdiction of Arbitral Tribunal- Tribunal has to rule on its own jurisdiction as well as regarding existence/non- existence of dispute and question of limitation.
Engineering Systems Limited Vs. Madhya Pradesh Electricity Board, Jabalpur.
Reported in 2003 (2) MPLJ 338

Held :

After hearing the learned counsel for the parties I am of the opinion that the issues raised by the non-applicant can be decided by the arbitrators as per section 16 of the Act. The questions raised by the non-applicant cannot be decided under section 11 of the Act. *In Konkan Railway Corporation Ltd. vs. Mehul Construction, 2000 (3) MPLJ (SC) 543 = AIR 2000 SC 2821* it has been held that when the matter is placed before the Chief Justice or his nominee under section 11 of the Act it is imperative to bear in mind that the objective of the legislation is "to minimize the supervisory role of the Courts in the Arbitral process". At this stage it would not be appropriate to entertain any "contentious issue" between the parties and decide the same. A bare reading of sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same. Section 16 empowers to Arbitral tribunal to rule on its own jurisdiction as well as on objections with respect to the existence or validity of the arbitration agreement. Therefore, it would be proper to appoint an arbitrator without wasting any time. If this approach is adhered to, then there would be no grievance to any party and in the Arbitral proceeding, it would be open to raise any objection as provided under the Act. The order passed by the Chief Justice or his nominee is an administrative order. The same view has been taken by the Constitution Bench of the Supreme Court in *Konkan Railway Corporation Ltd. vs. Rani Construction P. Ltd., AIR 2002 SC 778.* In view of these decisions the questions of arbitrability, the existence or non-existence of dispute, the limitation and other matters are to be decided by the Arbitral tribunal after reference is made to it. These question cannot be decided by the nominee of the Chief Justice in administrative capacity. This is the view which has been taken by this Court also in *National Dairy Development Board vs. Suraj Singh, 2002 (2) MPLJ 72.*

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197. CIVIL PROCEDURE CODE, 1908 - Section 115 and O.43 R. 1 (r)
Order passed in appeal under O. 43 R. 1 deciding an application under O. 39 R. 1 and 2 is not revisable.
Surajmal Vs. Sunderalal and others
Reported in 2003 (2) MPLJ 408

Held :

For what we have said above, it must be held that no revision (w.e.f. 1-7-2002) shall lie against an order passed in appeal under Order 43, Rule 1 of Civil Procedure Code in affirmance or otherwise of the order passed in the course of suit or other proceeding on an application for temporary injunction under Order 39, Rule 1, 2 of Civil Procedure Code. The view taken in *Sawal Singh 2003 (1) MPLJ 31* and *Narsingh 2002 (II) MPJR 165*, in our opinion, therefore, is correct. It must, however, be said with great respect that *Hanuman Datt's* case 2002 (4) MPLJ 354 was not correctly decided. The reference is answered accordingly.

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198. CIVIL PROCEDURE CODE, 1908- Section 151 and O. 41
LIMITATION ACT, 1963- Article 137
Restoration of appeal- Appeal dismissed after death of some appellants for non-prosecution by persons interested- Such dismissal is under Section 151 and not under O. 41-Application for restoration of appeal- Limitation- Art. 137 and not 122 applicable.
G. Christhudas and another Vs. Anbiah (Dead) and others
Judgment dt. 19.2.2003 by the Supreme Court in Civil Appeal No. 3292 of 1993, reported in (2003) 3 SCC 502

Held :

We may notice that Appellant 4 died on 25-10-1970, Appellant 3 died on 1-12-1971 and Appellant 1 died on 7-10-1973. The appeal was ordered to be dismissed on the ground that the persons interested to prosecute the appeal had not moved within time. The dismissal for non-prosecution of the appeal by persons interested in the matter could only be under Section 151 CPC and not under any other provision of Order 41 CPC. If an appeal is dismissed under Section 151 CPC, Article 122 of the Limitation Act would have no application because when a court makes an order under Section 151 CPC it is implicit that such a court has the power to entertain an application to set aside its order made under Section 151 CPC. The power exercised under Section 151 CPC is *ex debit justitiae*. An application invoking the inherent power of the court under Section 151 CPC is not one which a party is required to make under any provisions of the Civil Procedure Code for setting in motion the machinery of the court. Thus Article 122 of the Limitation Act has no application to such an application.

If that be the correct position, an application for restoration of the appeal would be not by a party to the proceedings and will not fall within the scope of Article 122 but under Article 137 of the Limitation Act. CMP No. 3180 of 1984 was filed on 12-12-1978. Therefore, the application for setting aside the order of dismissal of appeal and for impleadment is filed within three years from the date of order of dismissal for non-prosecution and is thus within time.

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199. CIVIL PROCEDURE CODE, 1908- O. 22 Rr. 2, 3

(i) Appeal against joint decree- Death of the appellant and failure to bring L.Rs.- Question of abetment will depend upon whether decree is inseverable or severable- Principles stated.

(ii) O. 22, Provisions of - Should not be interpreted in a rigid manner.
Sardar Amarjit Singh Kalra (dead) by L. Rs. and others Vs. Pramod Gupta (Smt.) (Dead) by L. Rs. and others
Judgment dt. 17.12.2002 by the Supreme Court in Civil Appeals Nos. 1027- 28 of 1992 reported in (2003) 3 SCC 272

Held :

(i) In the light of the above discussion, we hold :

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For the reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

(ii) Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmade of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact

and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

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200. CIVIL PROCEDURE CODE, 1908 - O. 41 Rr. 4 and 33
Decree on a ground common to all plaintiffs- Appeal only by some of the plaintiffs- Court may reverse or vary the decree in favour of all the parties.
Chandramohan Ramchandra Patil and others Vs. Bapu Koyappa Patil (Dead) through L Rs. and others
Judgment dt. 19.2.2003 by the Supreme Court in Civil Appeal No. 9393 of 1995, reported in (2003) 3 SCC 552

Held :

Lastly, it is urged that not all the legal representatives of the original plaintiff had preferred appeal against the dismissal of suit by the trial court. In accordance with Order 41 of Rule 4 of the Code of Civil Procedure, the appellate court could not have varied the judgment of the trial court against the defendants at the instance of only some of the plaintiffs appealing against the decree.

This argument has no merit. In a suit for partition, plaintiff and defendants are parties of equal status. If the right of partition has been recognised and upheld by the court, merely because only some of the plaintiffs had appealed and not all, the court was not powerless. It could invoke provisions of Order 41 of Rule 4 read with Order 41 of Rule 33 of the Code of Civil Procedure. The object of Order 41 of Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. (See *Ratan Lal Shah v. Firm Lalmandas Chhadammalal, (1969) 2 SCC 70 : AIR 1970 SC 108* and *Mahabir Prasad v. Jage Ram, (1971) 1 SCC 265 : AIR 1971 SC 742*

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201. CIVIL PROCEDURE CODE, 1908 - O. 47 R. 1 and Section 114
Revision- Scope of-Phrase "mistake or error apparent on the record" meaning of.
Ratanlal Vs. Bardi Bai and others
Reported in 2003 (2) MPHT 295 (FB) ≒ 2003 (2) MPLJ 499

Held :

This Rule should be read with Section 114. Scope of an application for review is much more restricted than that of an appeal. The Court of Review has only a limited jurisdiction circumscribed of the definitive limits fixed by the language used in Order 47 Rule 1. It may allow a review on three specified grounds, namely *: one :* discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could

not be produced by him at the time when the decree was passed or order was made; *two :* mistake or error apparent on the face of the record; or *three :* or any other sufficient reason. Needless to add that the words "any other sufficient reason mean a reason sufficient on grounds at least analogous to those specified immediately previously. The error apparent on the face of the record could not be and has not been defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature and so it has always been left to be determined judicially on the facts of each case. [See: *Hari Vishnu (AIR 1955 SC 233)*]. Such an error may be of fact or of law or of both, but the same ought to be apparent on the face of the record and should have been a reason for passing of the order sought to be reviewed. In other words, the Court undertaking review of the order passed by it, should be satisfied that but for the said error the order in question could not have been passed. One has to distinguish "error apparent" from mere erroneous decision. Hon'ble the Supreme Court in *Thungabhadra* (AIR 1964 SC 1372), has made the legal position on the point luculent, in following terms:-

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out"

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202. CONSTITUTION OF INDIA - Article 226
Quo warranto, writ of - Object and scope.
Ashok Jayant Vs. State of M.P. and others
Reported in 2003 (2) MPHT 153

Held :

The object of issuing a writ of *quo warranto* is to prevent a person who has wrongfully usurped an office from continuing in the service. Such writs are issued to call upon the holder of the post to show as to how and on what basis he is entitled to continue in office and he is required to establish before the Court as to under what authority he is holding the office. One of the criteria which is essential before claiming the aforesaid writ is to satisfy that the office in question is a public office and the appointment of the alleged usurper is not made in accordance with law. In cases of appointment to ministerial staff and other lower posts which are made in accordance with law, a writ of quo warranto cannot be issued to such an occupant merely on the ground that he is holding the office in a wrongful manner. In this regard, law laid down by the Supreme Court in the case of *Chandra Mohan Vs. State of U.P., AIR 1966 SC 1987,* is very relevant.

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203. CONSUMER PROTECTION ACT, 1986 - Section 24

Claim adjudicated by forum on merits- Such adjudication is final subject to appeal etc.- Arbitrator cannot sit over the order of District Forum.

Basant Kumar Vs. United India Insurance Company Limited and others

Reported in 2003 (2) MPLJ 257= 2003 (2) MPHT 5

Held :

Section 24 of the Consumer Protection Act, 1986 attaches finality to the orders of District Forum, State Commission or the National Commission if no appeal has been preferred against such an order under the provisions of its Act. It is not a case where lack of jurisdiction is alleged; petitioner has been benefited by the award made by the Consumer Forum; by enacting section 23 any person if aggrieved by an order made by National Commission in exercise of its power conferred by sub-clause (i) of clause (a) of section 21, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order. The intention of the Act is to make the order final as provided in section 24 of the Act. Section 24 of the Act read as under :-

> *"24. Finality of orders* - Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final."

An arbitrator cannot be allowed to sit over the order of the District Forum and State Commission particularly when the matter has been adjudicated on merits.

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204. CONTEMPT OF COURTS ACT, 1971 - Section 19

Order of Court - Flouting of - Public should not feel helpless when such order is flouted - Action under contempt law may be taken to remedy such conduct.

Bijay Kumar Mahanty vs. Jadu @Ram Chandra Sahoo

Reported in 2003 (1) ANJ (SC) 430

Held :

It is of paramount public interest that the people, after obtaining an order of the Court, should not feel helpless or without any remedy when such order is flouted.

In *Advocate Genera, Bihar vs. M.P. Khari Industries [1980(3) SCC 311],* this Court said that "....It may be necessary to punish as a contempt a course of conduct, which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest and vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the

peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice and so it is contempt of Court not in order to protect the dignity of the court against 'Contempt of Court' may seem to suggest, but to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."

The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the court are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.

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205. COURT- FEES ACT, 1870- Section 7 (xi)

Suit for eviction on the basis of relationship of landlord and tenant- Ground of encroachment under Section 12 (1) (o) of M.P. Accommodation Control Act also taken- Court fees on annual rental value sufficient and ad valorem court fees not required.

Pradeep Kumar Badsar Vs. Jagganath

Reported in 2003 (2) MPHT 230

Held :

Under Section 7 (xi) of the Court Fees Act, 1870, if a suit is filed on the basis of the relationship of landlord and tenant, the Court-fee is required to be paid according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint. The Division Bench of this Court in the case of *Madak Chand Jain Vs. Ms. Fatima Bi, 2000 (1) M.P.H.T. 46= 1999 (2) JLJ 254,* has held that in an eviction suit filed on the basis of relationship of landlord and tenant on the ground of encroachment, i.e., 12 (1) (o) of the said Act, no separate Court fee is payable encroached area. The Court-fee paid on annual rental value is sufficient.

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206. CRIMINAL PROCEDURE CODE, 1973 - Section 125

Marriage annulled by mutual agreement between the parties- Divorced wife still has right to get maintenance if she is unable to maintain herself.

Yashwant Shilpkar Vs. Samta Shilpkar and another

Reported in 2003 (2) MPHT 286

Held :

While not resisting the grant of maintenance to respondent No. 2 it is submitted on behalf of the petitioner that by mutual agreement marriage between the petitioner and respondent No. 1 stood annulled on 5-11-97 in C.S. No. 23-A/97, therefore, she is not entitled for maintenance. But relying on *Bhagwandutt Vs. Kamladevi, AIR 1975 SC 83,* it is dictated by Their Lordships of the Supreme

Court in *Savitri Vs. Govind,* reported in 1986 Cr.L.J. 48, that even if the earlier decree for restitution of conjugal rights is not complied with by the wife, a divorced wife has right to claim maintenance from the husband. By divorce the wife gets a new status as divorced wife and as such she is under no obligation to live under the roof of the husband. Thus when a husband refuses to pay maintenance to the divorced wife, unable to maintain herself, she is entitled to claim maintenance under Section125, Cr. P.C.

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207. CRIMINAL PROCEDURE CODE, 1973 - Section 127
Order of maintenance unless modified, cancelled, varied or vacated under Section 125 (4), 125 (5) or 127, remains valid despite compromise between the parties.
Ram Singh Vs. Somat Bai and others
Reported in 2003 (2) MPHT 180

Held :

But affirming the view taken in the case reported in AIR 1932 Lahore 115, it is found dictated by Their Lordships of the Supreme Court in *Bhupindra Singh Vs. Daljit Kaur,* reported in AIR 1979 SC 442, that-

> "7. We are concerned with a Code which is complete on the topic and any defence against an order passed under Section 125, Cr.P.C., must be founded on a provision in the Code. Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms of the provisions of the Code itself. If the husband has a case under Section 125 (4), (5) or Section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a Higher Court or is varied or vacated in terms of Section 125 (4) or (5) or Section 127, its validity survives. It is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence."

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208. CRIMINAL PROCEDURE CODE, 1973 - Sections 438 and 439
Concurrent jurisdiction of High Court and Sessions Court regarding grant of bail- Practice- Applicant in the first instance should approach the Court of Session.
Smt. Manisha Neema Vs. State of M.P.
Reported in 2003 (2) MPHT 303 = 2003 (2) MPLJ 587

Held :

Long back, this Court, in the case of *Dainy alias Raju Vs. State of M.P. (1989 JLJ 232)* Hon. Justice R.C. Lahoti (now Judge of the Supreme Court) has held that though under Sections 438 and 439 of the Cr.PC there is concurrent juris-

diction, but the application should be filed first before the Court of Session and on failure before that Court, the application should be filed before the High Court accompanied with the first order of Sessions Court and also mentioning all the relevant facts.

The view taken in the case of *Dany alias Raju* (supra) by this Court has also been taken in the case of *Abdul Rashid Khan Vs. State of M.P.* [1993 (1) MPWN Note 35]. It is held in this case that "though this Court has concurrent jurisdiction with the Court of Session under Section 438 and 439, Cr.PC yet the petitioner ought to have approached the Court of Session at the first instance which could have examined the facts and passed a suitable order and may be that in case the petitioner was not required to apply to this Court". But, this application was finally heard by this Court, because the same was admitted for final hearing.

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209. CRIMINAL PROCEDURE CODE, 1973 - Section 451
Vehicle seized by forest officials in connection with an offence under Wild Life (Protection) Act - The Court of competent Magistrate has jurisdiction to release vehicle on interim supurdgi under Section 451.
Deevan Arjun Singh Vs. State of M.P. & Anr.
Reported in 2003 (I) MPJR 377

Held :

The petitioner who is the registered owner of the jeep, claims the interim custody on the strength of *Madhukar Rao vs. State of M.P. and others, reported in 2000 (1) M.P.L.J. page 289,* wherein, it is dictated by a Full Bench of this Court in para 23 at page 299 that "we hold that any property including vehicle seized on accusation or suspicion of commission of an offence under the Act can, on relevant grounds and circumstances be released by the Magistrate pending trial in accordance with section 50(4) read with section 451 of the Code of Criminal Procedure, 1973. We also hold that mere seizure of any property including vehicle on the charge of commission of an offence would not make the property to be of the State Government under section 39(1)(d) of the Act."

It is also found explained by the Full Bench that -

> "In order that the seized property may be treated as property of the State, there should be a finding by the competent Court that vehicle seized has been used for committing an offence. The property seized under Section 50 of the Wild Life (Protection) Act for an alleged offender cannot become property of the State under Clause(d) of section 39(1) unless there is a trial and a finding reached by the competent Court that the Property was used for committing an offence under the Act."

Since the criminal case in respect of aforesaid P.O.R. is not disposed of, therefore, so far there is no finding of Competent Court on the fact that the vehicle seized has been used for committing an offence, therefore, on mere conclu-

sion of confiscation proceeding by D.F.O. Narsinghpur, on 18.10.99, which is stated to have resulted in forefeiture of petitioner's jeep, does not by itself take away the jurisdiction of learned C.J.M.

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210. CRIMINAL PROCEDURE CODE, 1973 - Section 204

Issue of process under Section 204 in a complaint case - Court is not required to record reasons by passing a detailed order.

Dy. Chief Controller of Imports & Exports Vs. Roshanlal Agrawal and others

Judgment dt. 5-3-2003 by the Supreme Court in Criminal Appeal Nos. 1656-63 of 1995, reported in (2003) 4 SCC 139

Held :

In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in *U.P. Pollution Control Board v. Mohan Meakins Ltd.*, (2000) 3 SCC 745 and after noticing the law laid down in *Kanti Bhadra Shah v. State of W.B., (2000) 35 SCC 745* it was held as follows: (SCC p. 749, para 6)

The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order.

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211. CIVIL PROCEDURE CODE, 1908- O. 39 Rr. 1 and 2

Temporary mandatory injunction- It should have been issued in rare cases that too in compelling circumstances- Can be granted to restore status quo and not to establish new state of things.

Badrilal Vs. Radheshyam and others

Reported in 2003 RN 107 (HC)

Held :

The purpose of granting of mandatory injunction is to restore *status quo* ante as on the day of the suit and in proper cases where it is found that the defendant with a view to defeat the rights of the plaintiff and to prejudice his case has raised illegal construction, then the Court under its discretionary powers can always remove the illegal construction and restore the position of the day on which the suit is filled. It is true that the circumstances which apply to the grant of *ad interim* mandatory injunction are some what different from the considerations which covered the grant of prohibitory injunction. Although the general principles

for the grant of both types of injunctions are the same. It is also true that a temporary mandatory injunction can be issued only in a case of extreme hardship and under compelling circumstances and mostly in those cases when status quo on the date of the institution of the suit is to be restored. In such cases for grant of mandatory injunction, plaintiff has to prove special injury or substantial damages and that too far the purposes of maintaining *status quo* as on the day of the suit.

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212. CRIMINAL PROCEDURE CODE, 1973- Section 125
Obligation of a muslim father having sufficient means to maintain minor children till they attain majority or are able to maintain themselves or in case of females, till they are married.
Abdul Hamid Vs. Ku. Gazala Parveen
Reported in 2003 (I) MPWN 106

Held :

The learned counsel for the petitioner argued that Clause (b) of section 125 of the Code applies to minor children and Clause (C) applies to children who have attained majority but who by reason of any physical or mental abnormality or injury are unable to maintain themselves and that neither Clause (b) nor Clause (c) entitles a major child, whether a son or daughter, to obtain maintenance from the father unless suffering from any physical or mental abnormality or injury and for that reason unable to maintain themselves. It is also submitted that in the present case the respondent for whom maintenance has been allowed is major and not suffering from any physical or mental abnormality or injury and, therefore, she is not entitled for maintenance after becoming major for any period thereafter.

Argument of the learned counsel at the first sight appears plausible but the point is really concluded against him by the decision of the Supreme Court in the case of Noor Saba Khatoon (supra) where it has been held as follows :

> "10. Thus, both under the personal law and the statutory law (Sec. 125 CrPC) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in *case of females till they get married,* is absolute, notwithstanding the fact that the minor children are living with the divorced wife.
>
> 11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance, under section 125, CrPC, for the period till they attain majority or are able to maintain themselves, whichever is earlier, and *in case of females, till they get married,* and this right is not restricted, affected or controlled by divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years

from the date of birth of the child concerned under section 3 (1) (b) of the 1986 Act. In other words, section 3 (1) (b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under section 125, CrPC, till they attain majority or are able to maintain themselves, or *in the case of females, till they are married."*

(emphasis supplied)

Further, the Supreme Court in the operative part of the order (para 13) allowed maintenance to the daughters, till they "get married". The entire proceedings which reached the Supreme Court were taken under section 125 of the Code.

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213. CRIMINAL PROCEDURE CODE, 1973 - Sections 125 and 127
MUSLIM WOMEN (PROTECTION OF RIGHT ON DIVORCE) ACT, 1986- Sections 3 (1), 5 and 7
Muslim Women (Protection of Rights on Divorce) Act, 1986 is neither retrospective in operation nor it will have effect to nullify the orders already made under Section 125 or 127 of Cr.P.C. ordering a muslim husband to pay maintenance prior to coming into force of the Act.
Wali Mohammed and others Vs. Batulbai and others
Reported in 2003 (2) MPLJ 513 (FB)

Held :

7. In the backdrop of the aforesaid provisions when we take up the question of the Act being or not retrospective in its operation and its effect on the orders already passed under section 125 or 127 of Criminal Procedure Code before coming into force of the Act, it may be stated at the outset that no provision is contained in the Act so as to give even slightest indication of it being retrospective in operation. There is also no provision in the Act which may have the effect of nullifying the orders already passed by the Magistrate under section 125 or 127 of Criminal Procedure Code against the former husband of a divorced Muslim woman or even the orders passed during subsistence of the marriage the same having been dissolved subsequent to the coming into force of the Act. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. It is more so when the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. So unless there are words in the statute sufficient to show intention of the legislature to affect existing rights, it is "deemed to be prospective" only, (See : Principles of Statutory Interpretation by justice G.P. Singh, VIth Edition Page 315). Right to get maintenance from her husband is a vested right of a woman of any religion and as already pointed out, there is absolutely nothing

in the Act of 1986 which tends to take away this right. On the contrary, the Act recognises the said right available to a Muslim woman even under the Personal Law. Needless to say that the Act of 1986 is a substantive law relating to vested rights and such laws are normally treated as prospective.

It will be thus, seen that the Muslim Women (Protection of Rights on Divorce) Act, 1986 is neither retrospective in operation nor it will have effect of nullifying the orders already made under section 125 or 127 of Criminal Procedure Code ordering a Muslim husband to pay maintenance to his divorced wife prior to the coming into force of the Act of 1986. We may, however, clarify that any such husband may seek cancellation of such an order by taking recourse to sub-section (3) of section 127 of Criminal Procedure Code, on his showing that he within the iddat period, has made reasonable and fair provision for the future of his divorced wife in terms of section 3 (1) (a) of the Act and has also paid the amount of Mahr and returned the properties as contemplated in clauses (c) and (d) of section 3 (1) and as interpreted by the Apex Court in *Danial Latifi, (2001) 7 SCC 740.*

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214. CRIMINAL PROCEDURE CODE, 1973 - Section 210 (2)
Allegations and date of occurrence differently stated in private complaint and police report- Both cases cannot be tried together.
Vishnu Kumar Mehta Vs. Rashmi Mehta
Reported in 2003 (I) MPWN 119

Held :

That the FIR was lodged in respect of offence dt. 16.3.1994, while the private complaint filed by respondent No. 1 was relating to another offence date 15.3.1994 and prior to it. In the circumstances, both the offences were separate and cannot be tried together.

Learned counsel appearing for respondents have not disputed the aforesaid factual position that police case was filed in respect of alleged offence date 16.3.1994, while the private complaint was filed in respect of offence occurred on 15.3.1994 and prior to it.

In view of aforesaid undisputed position, Judicial Magistrate First Class has committed an error by directing that both the cases be tried together, as both the cases arise out of incident occurred on separate dates, in which the allegations were different and complaint case was in respect of three accused persons, while the FIR was lodged against Vishnu Kumar Mehta.

In view of aforesaid, it is directed that the trial Court will separate both the cases; one filed on the basis of police report and another on the basis of private complaint filed by Rashmi Mehta.

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215. CRIMINAL PROCEDURE CODE, 1973 - Section 211
PREVENTION OF FOOD ADULTERATION ACT, 1954- Sections 7/16, 16 (1) (a) (i), 13 (2), 13(3), 13 (2C) 13(2D) and 13(3)
Central Food Laboratory found the sample not fit for tests-Valuable right of accused defeated- Charge cannot be framed.
Suresh Narain Vs. Food Inspector and another
Reported in 2002 (2) Vidhi Bhasvar 306

Held :

Learned senior counsel appearing for the applicant, amongst others, submits that on account of the samples being in a condition, not fit for carving out tests/analysis, the certificate envisaged under the provisions of section 13 (3) of the Act to be issued by the Central Food Laboratory in terms of the said provision could not be issued and, thus, an important right of the applicant thereunder read with section 13 (2) has been defeated. He further submits that in the absence of a report from the Central Food Laboratory confirming the test of the Public Analyst, the later has no meaning. Mr. Singh further submits that testing of a sample by the Central Food Laboratory was the only material which could have inculpated the applicant for the charge framed against. Thus, it is a case of no evidence and, therefore, to allow the proceedings to go on would amount to an abuse of the process of the Court. Mr. Singh to substantiate his submissions refers to, and places his reliance on a judgment of the Hon'ble Apex Court in the matter of *Calcutta Municipal Corporation v. Pawan K. Saraf and another (1999 (1) FAC 8).* Para-16 being the relevant part of the judgment on reproduction reads as under :

> "If the argument of the learned counsel for the Corporation is upheld and the certificate of the Director of Central Food Laboratory is sidelined as pleaded by him, the consequence is that there will not be anything surviving so show the quality or standard of the food articles involved in the case. Even that apart, the accused will be deprived of his statutory right to disprove the report of the Public Analyst."

Mr. Singh also places reliance on a judgment of this Court in the matter of *Standard Agency and others v. State of M.P. , reported as 1998 (1) FAC 188.* Para 5 being the relevant part of the judgment on reproduction reads as under :

> "The contention appears to be justified. It appears that the samples were not taken in proper containers of adequate strength but were sent highly belatedly for analysis. Thus, the samples could not be subjected to analysis by the Central Food Laboratory. It is settled law that the right conferred on the accused petitioners under section 13 (2) is a valuable right and having been deprived of the same, they cannot be held guilty for the alleged offence."

That apart, Mr. Singh also refers, to sections 13 (2C), 13 (2D) and 13 (3) of the Act, which read as under :

"13 (2C). Where two parts of the sample have been sent to the Court and only one part of the sample has been sent by the Court to the Director of the Central Food Laboratory under sub-section (2B), the Court shall, as soon as, practicable return the remaining part to the local (Health) Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the Court:

Provided that where the part of the sample sent by the Court to the Director of the Central Food Laboratory is lost or damaged, the Court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the Court and on receipt thereof, the Court shall proceed in the manner provided in sub-section (2B)."

"13 (2D). Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution."

"13 (3). The certificate issued, by the Director of the Central Food Laboratory under sub-section (2B) shall supersede the report given by the Public Analyst under sub-section (1)."

Thus, according to Mr. Singh, the sum and substance of the provisions reproduced hereinabove so also the cases referred to, is that in the absence of a report from the Central Food Laboratory, on account of samples being in a condition, not fit for analysis, neither a valuable right of the applicant under section 13 (2) of the Act could be exercised nor could the provisions of the section 13 (3) come into play.

"On a due consideration of rival submissions so also from perusal of the citations and the provisions of law, I am of the opinion that it is a case of no evidence and therefore, it would be a futile exercise to allow the trial for the charges under sections 7/16, 16 (1) (a) (i) of the Act, to continue. Accordingly, the said charges not being supported by necessary materials would lead to a trial in void.

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216. CRIMINAL TRIAL :

Child witness - Evidence of child witness- Evaluation of- Court should normally look for corroboration.

Bhagwan Singh and others Vs. State of M.P.

Judgment dt. 23.1.2003 by the Supreme Court in Criminal Appeal No. 789 of 2002, reported in (2003) 3 SCC 21

Held :

The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not consid-

ered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P. (1998) 7 SCC 177)

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217. CRIMINAL TRIAL :

Standard of proof for establishing guilt of accused - Principles restated.
Jagannath & Ors. Vs. State of M.P.
Reported in 2003 (I) MPJR 490

Held :

In a criminal trial, an accused is presumed to be innocent until the contrary is proved except in cases in which the burden is cast on the accused by law. Otherwise the burden of proving the offence in all its ingredients against him beyond reasonable doubt, rests on the prosecution. Therefore, where the proof by the prosecution is not of the requisite standard and there is a penetrating touching sate of 'may be guilty', the accused, as of right, is entitled to an acquittal. In this context we may refer to the decision of the Supreme Court in the case of *Himachal Pradesh Administration V. Omprakash AIR 1972 SC 975* in which their Lordships have held that the benefit of doubt, which the accused is entitled, is reasonable doubt, the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind. The Apex Court in another case *Khem Karan and others vs. The State of U.P. and another 1974 SC 1567,* has held that neither mere possibilities nor remote probabilities nor mere doubts, which are not reasonable, can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony. It has to be remembered that the phrase 'benefit of doubt' is to be used only when there is some evidence towards the proof of the charge but a reasonable doubt lurks in the mind regarding its worth for being accepted as the foundation for the conclusion of the guilt.

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218. CRIMINAL TRIAL :

Appreciation of evidence - Effect of variations in oral testimony - Unless variations are very abnormal or unnatural, witness not to be disbelieved.
Shyam Sunder Vs. State of Chhattisgarh
Reported in 2003 (I) MPJR 463 (SC)

Held :

We have cautioulsy examined all such contradictions and inconsistencies and we find none of them to be material. When an incident is narrated by the same person to different persons on different occassions some difference in the mode of narrating the incident is bound to arise. However, such differences do not militate against the trustworthiness of the narration unless the variations can

be held to be so abnormal or unnatural as would not occur if the witness would have really witnessed what it was narrating.

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219. CRIMINAL TRIAL :

Appreciation of evidence - Evidence of rape victim, if found trustworthy may be sole basis of conviction - Evidence must be examined in the light of broad probabilities of the case.
Sudhansu Sekhar Sahoo Vs. State of Orissa
Reported in 2003 (1) ANJ (SC) 378

Held :

It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material.

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220. CRIMINAL TRIAL :

Stains of human blood found over articles recovered from accused of murder - Case based on circumstantial evidence - Blood group not ascertained due to disintegration of blood - Case otherwise established cannot be rejected on this ground.
Motiram Gaman Pawar Vs. State of Maharashtra
Reported in 2003 (1) ANJ (SC) 76

Held :

Learned counsel appearing for the appellant has taken us through the whole evidence and urged that the circumstances held to have been proved were not sufficient to connect the accused with the commission of crime, as according to him, there were some missing chains, the benefit of which should be given to the accused. One of such circumstance explained is that the bloodstained clothes of the appellant and the knife recovered at his instance has not been proved to be having the bloodstains of groud 'B' - the blood group of the deceased. The report of the forensic science laboratory indicated that the clothes of the appellant and the knife recovered at his instance were having human blood, the group of which could not be ascertained on account of disintegration of the blood spots. Merely because the blood group on the clothes and the blood on the knife was not ascertained, could not be a reason to hold that any chain of the circumstance was missing, as argued. Only because the blood group could not be ascertained, the recovery made at the instance of the accused, cannot be discarded as held by

this Court in *State of Rajasthan vs. Teja Ram and Others [1999 (3) SCC 507]* and *State through Superintendent of Police, CBI/SIT vs. Nalini and Others [JT 1999 (4) SC 106].*

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221. CRIMINAL TRIAL :

A quarrel started between the accused and the deceased on snatching some amount by the complainant from accused-No blow was aimed at any of the vital parts of the body-The deceased also dealt stick blow on the head region of the accused- Offence under Section 302 I.P.C. not made out, the act of accused amounts to the offence of culpable homicide not amounting to murder punishable under Section 304 (I) I.P.C.

Prem Nepali @ Prem Bahadur Vs. State of M.P.

Reported in 2003 (2) MPLJ 600

Held :

It was on account of the act of the deceased himself of snatching some amount from the appellant that a quarrel took place between the two. The appellant is said to have dealt knife blows on the thigh (a non-vital part of the body) of the deceased during this sudden quarrel. Admittedly, no blow was aimed at any of the vital parts of the body. In the same incident, the deceased also dealt a stick blow on the head region of the accused resulting in grievous injury. On a cumulative consideration of the above mentioned broad features of the case, we find it difficult to hold that appellant Prem Nepali @ Prem Bahadur while dealing knife blows on the thigh of the deceased had intended to cause his death. Thus, the above act of the appellant in our considered view would not amount to the offence of 'murder' punishable under section 302 Indian Penal Code. Nevertheless, the appellant cannot escape from the liability of his above act altogether. In the fact situation of the present case, the act of the appellant of causing knife blows on the thigh resulting in his death would certainly amount to the offence of 'culpable homicide not amounting to murder' and in the fact situation of the present case would be punishable under section 304 (I), Indian Penal Code.

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222. CRIMINAL TRIAL :

Age of prosecutrix proved from school record, birth register and the statement of parents- Tentative age of the prosecutrix referred in FIR not material.

Rajesh Gupta Vs. State of M.P.

Reported in 2002 (2) Vidhi Bhasvar 317

Held :

The prosecution has examined Usha David (PW 17), a Head Mistress of Primary Girls School, Gopalganj, in which Ku. Maya (PW6) had studied upto Class V. Usha David (PW 17) has produced the admission register Ex. P-15, of the school in which the date of birth of Ku. Maya (PW6) is recorded as 1.7.1985.

Ex. P-17 is the mark sheet issued from the said school in which also her date of birth is recorded as 1.7.1985. Not only this, even the birth register, Ex. P-16, of the Municipal Council, Sagar, also shows her date of birth as 1.7.1985. The said documents and the entries made therein regarding the date of birth of Ku. Maya (PW6) have not been challenged by the accused persons in the cross-examination of Usha David (PW 17). Further both, Paramlal Raikwar (PW2) and Smt. Guddi Raikwar (PW3), have deposed that on the date of incident the age of their daughter was 15 years. Merely because in the First Information Report, Ex. P-2, the tentative age of the prosecutrix Ku. Maya (PW 6) was shown as 16 years and that she was not referred for Ossification Test in my opinion, would not mean that her date of birth is not 1.7.1985. The age mentioned in the First Information Report is only tentative.

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223. CRIMINAL TRIAL :

Non-mentioning of name of eye-witness in FIR is of no consequence as he received injuries in the same incident- Prosecution case is proved beyond reasonable doubt then delay in sending FIR to Magistrate or recording of statement after long delay or non-corroboration of one injury to deceased by medical evidence are of no consequence.
Kiledar Singh and others Vs. State of M.P.
2003 (1) JLJ 383

Held :

The first ground urged was that there was delay in sending the FIR to the Magistrate. It was pointed out that the first information report was supposed to have been written on 22nd of February, 1996 but it only reached the Magistrate on 26th of February, 1996. It was submitted that no explanation has been given for the delay in sending the FIR to the Magistrate and this circumstance would show that the prosecution has created a false case. We find that there is no real explanation for the delay. However, this by itself would not be sufficient to disbelieve the credible evidence given by the prosecution witnesses. This may have been a relevant circumstance which could have been utilised if there was no other credible evidence.

The third ground urged was that in the FIR the names of PWs.3 and 4 have not been mentioned. We find that PW3 is also a injured witness. The injuries received by him are also firearm injuries. PW3 had, in fact, been sent by the police on 22nd of February, 1996 itself for examination by the doctor, Dr. Rakesh Sharma, (PW1). The doctor had examined the injuries on PW3 and found that PW3 had, in fact, received a number of injuries. Thus, even though the name of PW3 has not been mentioned in the FIR, his presence at the place of incident cannot be doubted.

The next ground urged was that the statement of PW3 was recorded by the police after a delay of 77 days. It was submitted that the explanation given for recording the statement so belatedly could not be believed. Undoubtedly, the

statement has been recorded after considerable delay. However, considering the fact that the presence of PW3 at the place of incident cannot be doubted, we seen no reason to disbelieve the explanation that the statement was recorded belatedly as PW3 had gone away to some other place.

The next circumstance which was urged on behalf of the accused was that PWs 3 and 4 have stated in their evidence before the Court that Barelal had inflicted *ballam* injuries on the deceased Vakil Singh. It was pointed out from the evidence of the doctor (PW1) and the post mortem report that Vakil Singh did not have *ballam* injuries on his body. It was pointed out that the injuries on his head which injuries were attributable to the *farsha* blow allegedly given by Preetam Singh. It was submitted, that this showed that the witnesses were giving false evidence. It was submitted that their evidence could not be believed. Undoubtedly, the case that *ballam* injuries were inflicted on Vakil Singh is not supported by the medical evidence. However, we find that this statement is merely made in Court by these witnesses. Merely because this portion of the testimony cannot be accepted does not mean that the entire testimony has to be discarded. The rest of the testimony of the witnesses is consistent and borne out by the circumstances and the injuries on the deceased persons as well as the injuries on PWs2 and 3. In this view of the matter, we see no infirmity in the judgment of the trial Court so far as the conviction of the accused is concerned.

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224. CRIMINAL TRIAL :

Motive established- Only motive not sufficient to base a conviction.
Subimal Sarkar Vs. Sachindra Nath Mandal
Reported in 2003 (I) MPWN 90 (SC)

Held :

It is true that the prosecution has been able to establish motive but then that by itself is not sufficient to base a conviction. The other circumstantial evidence that is established beyond reasonable doubt is the fact that the deceased died of strangulation. There is no material produced by the prosecution to show who actually committed this crime but there being no eye-witnesses to the incident the prosecution will have to establish all the links in the chain of circumstances which would have to show that in all probability it is only the accused persons who could have committed this crime. This, the prosecution has failed to establish. It is an admitted fact that apart from the accused persons there were others also staying in the house of A-1 which included the husband of the deceased. No case is made out by the prosecution why others including the husband could not have been a party to this crime. In the absence of any such material, the trial Court relied on a statement made in section 313 CrPC by A-3 which the trial Court construed as a confession. We have carefully examined this statement of A-3 wherein he had stated that when he came to know that the deceased had swallowed poison he went to the room where the deceased was and found her husband Nakul pressing her neck. With a view to prevent the poison from going

down the throat at this stage. A-3 put his fingers in the throat of the deceased to make her vomit the poison. In the said process, he injured his fingers. This statement, if it is to be accepted in its entirety, shows it was the husband of the deceased who pressed the throat which could have caused the suffocation. The role of A-3 as stated in the statement does not implicate A-3 of having been a party to any crime but the trial Court though otherwise. In this regard, we agree with the High Court that this statement cannot be made use of by the prosecution to prove the guilt of the accused.

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225. EVIDENCE ACT, 1872- Section 9

Test Identification parade- Delay in holding such parade when not fatal - 47 days delay not treated fatal.

Anil Kumar Vs. State of U.P.

Judgment dt. 13.2.2003 by the Supreme Court in Criminal Appeal No. 139 of 1996, reported in (2003) 3 SCC 569

Held :

It was submitted that the law, as laid down by this Court is that if there is delay in holding the test identification parade then it is difficult to believe that the witnesses would remember the facial expressions of the accused. It was submitted that the law is that such identification becomes suspicious and the accused must be given the benefit of doubt.

We are unable to accept these submissions. In the case of *Brij Mohan v. State of Rajasthan, (1994) 1 SCC 413* the test identification parade was held after 3 months. The argument was that it was not possible for the witnesses to remember, after a lapse of such time, the facial expressions of the accused. It was held that generally with lapse of time memory of witnesses would get dimmer and therefore the earlier the test identification parade is held it inspires more faith. It is held that no time- limit could be fixed for holding a test identification parade. It is held that sometimes the crime itself is such that it would create a deep impression on the minds of the witnesses who had an occasion to see the culprits. It was held that this impression would include the facial impression of the culprits. It was held that such a deep impression would not be erased within a period of 3 months.

In the case of *Daya Singh Vs. State of Haryana, AIR 2001 SC 1188* the test identification parade was held after a period of almost 8 years inasmuch as the accused could not be arrested for a period of 7 1/2 years and after the arrest the test identification parade was held after a period of 6 months. The cases of *Hari Nath, (1988) 1 SCC 14 as well as Soni, (1982) 3 SCC 368 (1)* were relied upon on behalf of the accused in that case. Both these cases were considered by this Court. The injured witnesses had lost their son and daughter-in-law in the incident. It was pointed out that the purpose of the test identification parade is to have the corroboration to the evidence of the eyewitnesses in the form of earlier identification. It was held that the substantive evidence is the evidence given by

the witness in the court. It was held that if that evidence is found to be reliable then the absence of corroboration by the test identification is not material. It was further held that the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses.

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226. EVIDENCE ACT, 1872 - Sections 45, 47 and 73
Hand writing expert, evidence of- Value- It need not be invariably corroborated- Court itself may compare the writings.
Lalit Popli Vs. Canara Bank and others
Judgment dt. 18.2.2003 by the Supreme Court in Civil Appeal No. 3961 of 2001, reported in (2003) 3 SCC 583

Held :

Sections 45 and 73 of the Indian Evidence Act, 1872 (in short "the Evidence Act") deal with opinion of experts and comparison of signature, writing or seal with others admitted or proved. Section 45 itself provides that the opinions are relevant facts. It is a general rule that the opinion of witnesses possessing peculiar skill is admissible.

It is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. It is clear that even when an expert's evidence is not there, the court has power to compare the writings and decide the matter. (See *Murari Lal v. State of M.P., (1980) 1 SCC 704.*)

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227. EVIDENCE ACT, 1872 - Section 32 (1)
Case under Section 498-A I.P.C. disjuncted from the offence under Section 306 I.P.C. - Question of death of deceased not in issue - Previous statement of the deceased not relevant.
Satya Narayan (Dead) & Anr. Vs. State of M.P.
Reported in 2003 (I) MPJR 371

Held :

When we are dealing with an offence under Section 498-A, IPC disjuncted from the offence under 306, IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned.

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228. EVIDENCE ACT, 1872- Section 3
CRIMINAL PROCEDURE CODE, 1973- Section 273

(i) Evidence in criminal trial by way of video-conferencing- Admissibility.

(ii) Recording of evidence by video conferencing in the presence of accused and/or his pleader-No prejudice caused to the accused.

State of Maharashtra Vs. Dr. Praful B. Desai
Reported in 2003 (2) MPLJ 434 (SC)

Held :

One Must also take note of the definition of the term 'Evidence' as defined in the Indian Evidence Act. Section 3 of the Indian Evidence Act reads as follows:

"Evidence- Evidence means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.

(2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence"

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing.

Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video- conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code. Recording of such evidence would be as per-"procedure established by law".

Recording of evidence by video-conferencing also satisfies the object of providing, in section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be also to see the witness better than he may have been able to if he was sitting in the dock in a crowded court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and

rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.

The advancement of science and technology is such that now it is possible to set up video-conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these sections would be fully met. To this method there is however a drawback. As the witness is now in Court there may be difficulties if he commits Contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable.

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229. EVIDENCE ACT, 1872- Section 134
Evidence is to weigh, not counted- Testimony of a single witness, if truthful or believable, is sufficient for conviction.
State of M.P. Vs. Chhagan
Reported in 2003 (1) JLJ 362

Held :

Section 134 of the Evidence Act clearly mandates that no particular number of witnesses shall in any case be required for the proof of any fact. Needless to say that the testimony of a single witness, if believed, is sufficient to establish any fact. It is aptly said "Evidence is to be weighed, not counted". Dealing with same principle and departing from English Law, the Privy Council in the case of *Mohammad Suqal Esa* (AIR 1946 PC 3), held:

> "In England ..... it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But, in India, there is no such provision and the evidence is made admissible whether corroborated or not. Corroboration is a rule of prudence not of law".
>
> The aforesaid decision was considered by the Apex Court in *Vadi Velu* (AIR 1957 SC 614) and it was observed:
>
> "On consideration of relevant authorities and the provisions of the Evidence Act, the following provisions may be safely stated as firmly established:

(1) As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweights the testimony of a number of other witnesses of indifferent character;

(2) Unless corroboration is insisted upon by statute, Courts should not insist on corroboration except in cases where the nature of testimony of single witness itself requires as a rule of prudence that corroboration should be insisted upon....;

(3) Whether corroboration of the testimony of a single witness is or not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down..."

The above position is followed consistently in *Ramratan* (AIR 1962 SC 424), *Badri* (AIR 1974 SC 276), *Vahula* (AIR 1989 SC 236), *Jagdish* (AIR 1994 SC 1251) and finally in *Kartik* (1996) 1 SCC 614. In *Kartik* (supra), it was held:

"On a conspectus of these discussions it clearly comes out that there has been no departure from the principles in *Vadivelu Thevar* case and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the Court, at the same time, is convinced that he is a truthful witness."

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230. EXCISE ACT, 1915 (M.P.) - Sections 47-A, 47-B, 47-C and 47-D Confiscated articles, disposal of - Under Section 47-A Collector has discretion to order confiscation or not - Collector may pass order for interim custody etc. - Appellate Authority, powers of - May pass orders of interim custody etc. - Revisional Court can also pass interim order for preservation/custody of the property till disposal of revision - Section 47-A to 47-D are not ultra vires.
Shrish Agrawal Vs. State of M.P. and another
Reported in 2003 (2) MPHT 97 (FB)

Held :

The Collector also while considering the question of confiscation under Section 47-A(2) of the Act would keep in mind that the confiscation is not obligatory in all cases but the judicial discretion conferred on him is to be exercised keeping in view all the facts and circumstances of the case.

Section 47-C of the Act, as reproduced above, provides in sub-section (2) that the Court of Session may if it finds any illegality in the order of the appellate authority confirm, reverse or modify the order passed by the appellate authority. This revisional power has been conferred on the Court of Session qua the Court and, therefore, this Court would have all the powers conferred upon it under the Code to deal with the revision petition. Section 397 of the Code empowers the Sessions Judge to call for the record of the case and to direct that the execution of any "order" be suspended. This power of suspending the execution of the

order of appellate authority under Section 47-B of the Act would not be available to the Court of Session "to stay the order of confiscation" of the appellate authority as the statutory provision in the proviso to Section 47-C of the Act would supersede the general provision in Section 397 of the Code. But the Court of Session being in seisin of the matter can pass any other "incidental or ancillary order" including the order for custody, disposal etc. of the confiscated articles during the pendency of the revision as has been conferred on the appellate authority. It is true that the proviso to sub-section (2) of the Section 47-C does not specifically confer on the Court of Session the power to pass the order of interim nature for custody and disposal of the confiscated articles during the pendency of revision as has been conferred specifically on the appellate authoriy, but, as already stated the Court of Session can pass an interim order for the purpose of preservation and custody of the property till the disposal of the revision in exercise of its general power except that it cannot stay the order of confiscation. Section 399 of the Code provides that the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401. Section 401 of the Code provides that in the case of any proceeding the record of which has been called, the Court may exercise any of the powers conferred on a Court of appeal by Section 386 of the Code. Now adverting to Section 386 of the Code it is found that clause (e) of the Section empowers the Court to make any "incidental order that may be just or proper". It is under this provision and also in exercise of its general power stated above, the Revisional Court can pass an interim order of the nature specified in the proviso to sub-section (3) of Section 47-B of the Act. As the revisional power was being conferred on a Court of Session qua the Court it was unnecessary to provide in the proviso to sub-section (2) of Section 47-C that the Court of Session would have the power to pass an order of interim nature of the kind specified in the proviso to sub-section (3) of Section 47-B of the Act. There is no prohibition in the proviso to sub-section (2) of Section 47-C to pass an order of interim custody or disposal of the confiscated property and the Court of Session can legitimately direct interim custody or disposal in exercise of its incidental and ancillary power.

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231. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 - Section 12

Adoption - Adoption before or after the death of sole surviving coparcener - Difference - Adoption may not have the effect of divesting any person where property has vested before adoption - Law explained.

Namdev Vyankat Ghadge and another Vs. Chandrakant Ganpat Ghadge and others

Judgment dt. 25-2-2003 by the Supreme Court in Civil Appeal No. 11632 of 1995, reported in (2003) 4 SCC 71=2003 (2) MPLJ 542 (SC)

Held :

Learned counsel for the appellants was not in a position to dispute the va-

lidity and factum of adoption of Defendant 6 Dattatraya by Defendant 2 Krishnabai. It is useful to notice a few important dates having bearing on the decision in this appeal. Anand Rao, the husband of Defendant 2, died in 1930. Vyankat, his only brother, died on 8-2-1978. Defendant 2, the widow, adopted Dattatraya (Defendant 6) on 10-6-1978. Relationship between the parties is also not disputed. In these circumstances the only question that arises for consideration is whether the adopted son Dattatraya could divest the property, which devolved on the heirs of Vyankat and vested in them prior to his adoption so as to claim share in the suit property. Vyankat died on 8-2-1978. Adoption of Defendant 6 by Defendant 2 took place on 10-6-1978 i.e. about four months after the death of Vyankat.

Whether adoption of Defendant 6, after the death of the sole surviving coparcener, makes any difference in determining the rights of the adopted son in relation to the family properties. If the adoption had taken place during the lifetime of Vyankat, there would have been no difficulty whatsoever in confirming the judgment under challenge in the light of the decision of this Court in *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe, (1988) 2 SCC 126* aforementioned.

In the case of *Dharma Shamrao* the question that came up for consideration was whether a person adopted by a Hindu widow after coming into force of the Hindu Adoptions and Maintenance Act, 1956 (for short "the Act"), can claim a share in the property which had devolved on a sole surviving coparcener on the death of the husband of the widow, who took him in adoption. The facts in that case were that one Shamrao, who was governed by the Mitakshara Hindu law, died leaving behind him two sons Dharma and Miragu. Miragu died issueless in the year 1928 leaving behind him his widow Champabai. The joint family properties of Dharma and Miragu passed on to the hands of Dharma, the sole surviving coparcener on the death of Miragu. Champabai had only right of maintenance in the joint family properties under the law, as it stood then. She took Pandurang in adoption on 9-8-1968, long after the Act came into force. Immediately thereafter the adopted son Pandurang and Champabai filed a regular civil suit for partition and separate possession of one-half share in the properties of the joint family. Before the adoption took place two items of the joint family properties had been sold in favour of others for consideration. Dharma resisted the suit on the ground that the adopted son Pandurang was not entitled to claim any share in the properties, which originally belonged to the joint family in view of clause (c) of the proviso to Section 12 of the Act.

In *Vasant v. Dattu, (1987) 1 SCC 160* interpreting clause (c) of the proviso to Section 12 of the Act, Chinnappa Reddy, J., speaking for the Bench, observed that where the joint family properties had passed on to the hands of the remaining members of the coparcenary on the death of one of the coparceners no vesting of the property actually took place in the remaining coparceners while their share in the joint family properties might have increased on the death of one of the coparceners, which could decrease on the introduction of one more member into

the family either by birth or by adoption. It did not involve any question of divesting any person of any estate vested in him and that the joint family continued to hold the estate, but, with more members than before with introduction of a member into the joint family by adoption; there was no fresh vesting or divesting of the estate in any way.

This Court in the case of *Dharma,* aforementioned respectfully agreed with the above observations made in *Vasant v. Dattu* as stated in para 9 of the said judgment thus: (SCC pp. 133-34)

> "9. We respectfully agree with the above observations of this Court in *Vasant case.* The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted."

Finally, this Court concluded that the joint family property continued to remain in the hands of Dharma, the appellant, as joint family properties and that on his adoption Pandurang, the first respondent, became a member of the coparcenary entitled to claim one-half share in them except the items, which had been sold by Dharma, the appellant.

From the facts in Dharma case it is clear that adoption of Pandurang took place during the lifetime of Dharma and as such Pandurang became a member of the coparcenary to claim the share.

In the present case with which we are concerned now, it is not disputed that adoption of Dattatraya took place after the death of Vyankat, the sole surviving coparcener. In our view this makes all the difference for the reasons to be stated hereinafter.

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232. HINDU MARRIAGE ACT, 1955 - Section 13 (1)(ia)
Cruelty-False and baseless allegations by one spouse against other regarding his/her character-It amounts to cruelty.
Mahila Ramjanki Vs. Pavan Sharma
Reported in 2003 (2) MPHT 267

Held :

In the case of *R. Balasubramanian Vs. Smt. Vijayalakshmi Balasubramanian,* reported in AIR 1999 SC 3070, where husband alleging that wife all through out suspected that he had extra marital affairs and husband's allegations are that wife had sexual intercourse with other person. It was held that such a false allegations amount to cruelty. In the present case also, it has been found proved from the evidence on record, that the wife was suspecting illicit connection of husband with his *Bhabhi.* Admittedly, allegations were not raised as specific plea in the written statement nor the allegations were proved by any evidence, therefore, the allegations are certainly false to the knowledge of wife and therefore, very well amounts to cruelty also on their part.

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233. HINDU MARRIAGE ACT, 1955 - Section 25
Dismissal of divorce application - It cannot be regarded as decree for the purpose of making an order of permanent alimony under Section25.
Prakash Chandra Vs. Rajkumari@ Jyoti
Reported in 2003 (2) MPLJ 324

Held :

It is true that under section 25 of the Act permanent alimony and maintenance can only be granted at the time of passing of any decree and this word "at the time of passing of any decree or at any time subsequent thereto" has been interpreted by the various High Courts that the expression "any decree" does not include an order of dismissal and it has been consistently held that the passing of an order of dismissal of a petition cannot be regarded as the passing of a decree within the meaning of this section.

The object of section 24 of the Act is to provide maintenance pendente lite to a party. Under section 24 of the Act the Court can grant maintenance and expenses of the proceedings to the wife or the husband during pendente lite of proceedings/petition, but section 25 of the Act makes provision for grant of permanent alimony and maintenance for future after decree. The word appearing in section 25 of the Act "at any time of passing any decree", have been interpreted by the various High Courts to the extent where decree, either for divorce or for restitution of conjugal rights or judicial separation if passed, then application for permanent alimony can be allowed and a decree for dismissal of the petition has not been regarded as passing of a decree within the meaning of this section. The expression "any decree" does not include an order of dismissal.

The Supreme Court in the case of *Chand Dhawan vs. Jawaharlal Dhawan, 1994 MPLJ 1* has held as under :-

"Under the Hindu Marriage Act, 1955 the claim of a Hindu wife to permanent alimony or maintenance is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. When her marital status is to be affected or disrupted, the Court does so by passing a decree for or against her. On or at the time of the happening of that event, the Court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. The Court also retains the jurisdiction as subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The Court further retains the power to change or alter the order in view of the changed circumstances. The whole exercise is within the ambit of a diseased or a broken marriage. In order to avoid conflict of perceptions the Legislature while condifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under sections 9 to 14 of the Act. Without the marital status being affected or disrupted by the matrimonial Court under the Hindu Marriage Act, the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus".

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234. HINDU SUCCESSION ACT, 1956 - Section 14
Coparcener gets right by birth in ancestral properties- Other coparcener cannot be declared owner of entire property and he cannot give entire property in maintenance to wife.
Gulabrao Vs. Chhabubai
Reported in 2003 (I) MPWN 100 (SC)

Held :

Counsel for the appellants vehemently argued that in the absence of any pleadings and evidence to the effect that Balwantrao Shinde had given the property to Chhabubai in lieu of maintenance, the High Court has erred in recording a finding that the property in possession of Chhabubai was in lieu of maintenance which could be enlarged into full ownership rights on her. Counsel for the respondents virtually conceded that Chhabubai did not either raise the plea nor lead any evidence to prove that the properties were given to her by way of maintenance by Balwantrao Shinde. It is also not disputed that properties in the hands

of Balwantrao Shinde were ancestral in nature. We agree with the plea raised by the counsel for the appellants that in the absence of any pleadings to the effect that Balwantrao Shinde had given the properties to Chhabubai by way of maintenance and in the absence of any evidence to that effect, the finding that the properties were given in lieu of maintenance to Chabubai which right could be enlarged into full ownership right could not be recorded. The High Court clearly fell in error in recording a finding to the effect that Chhabubai had become absolute owner of the properties left by Balwantrao Shinde. Another factor which persuades us to take this view is that the properties were ancestral lands of Balwantrao Shinde in which Plaintiff 1 had a right by birth. The entire property therefore could not have been given to Chhabubai by way of maintenance.

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235. INDIAN PENAL CODE, 1860 - Section 120-B, 409 and 463

(i) Criminal conspiracy-Essential ingredients - Agreement to commit unlawful act or a lawful act by unlawful means essential-Overt act not necessary - Proof of criminal conspiracy - May be proved by circumstantial evidence.

(ii) Criminal breach of trust - Scope and applicability - Law explained.

(iii) Forgery - Essentials - Expression intend to defraud - Connotation of.

Ram Narayan Popli Vs. Central Bureau of Investigation
Judgment dt. 14.1.2003 by the Supreme Court in Criminal Appeal No. 1097 of 1999, reported in (2003) 3 SCC 641

Held :

(i) As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120-B. (See : *Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80)*

The conspirators are not hatched in the open, by their nature, they are se-

cretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. (See: *E.K. Chandraseman v. State of Kerala, (1995) 2 SCC 99)*

It was noticed that Sections 120-A and 120-B IPC have brought the law of conspiracy in India in line with the English law by making an overt act inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence, wherever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the Indian Penal Code.

(ii) Section 409 deals with criminal breach of trust by a public servant or by a banker, merchant or agent. Section 405 defines criminal breach of trust. The offence like the offence of criminal misappropriation is characterized by an actual fraudulent appropriation of property. There is not originally wrongful taking or moving as in the case of theft but the offence consists an wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because the subject of it is not the property which by some casual act or otherwise, but without criminal means, comes into the offender's possession; but the property which is entrusted to the offender by the owner or by others lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust.

Sections 407 to 409 make special provisions for various cases in which property is entrusted to the enumerated categories of persons who commit the offence. The offence of breach of trust and dishonest misappropriation are sufficient to constitute an offence under the relevant provisions.

(iii) As noted by this Court in *jaikrishnadas Manohardad Desai v. State of Bombay, AIR 1960 SC 889 : 1960 Cri L J 1250* to establish the charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted if proved, may, in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion.

In order to constitute forgery, the first essential is that the accused should have made a false document. The false document must be made with an intent to cause damage or injury to the public or to any class of public or to any community.

The expression "intent to defraud" implies conduct coupled with an intention to deceive or thereby to cause injury. In other words, defraud involves two conceptions, namely, the deceit and injury to the person deceived, that is infringement of some legal right possessed by him but not necessarily deprivation of property. The term "forgery" as used in the statute is used in its ordinary and popular acceptation.

The definition of the offence of forgery declares the offence to be completed when a false document or false part of a document is made with specified intention. The questions are (i) is the document false, (ii) is it made by the accused, and (iii) is it made with an intent to defraud. If at all the questions are answered in the affirmative, the accused is guilty.

In order to constitute an offence of forgery the documents must be made dishonestly or fraudulently. But dishonest or fraudulent are not tautological. Fraudulent does not imply the deprivation of property or an element of injury. In order to be fraudulent, there must be some advantage on the one side with a corresponding loss on the other. Every forgery postulates a false document either in whole or in part, however small.

The intent to commit forgery involves an intent to cause injury. A person makes a false document who dishonestly or fraudulently signs with an intent or cause to believe that the document was signed by a person whom he knows it was not signed.

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236. INDIAN PENAL CODE, 1860 - Section 300, Exceptions 4 and 1
Applicability of exception 4 to Section 300 - Distinction between exception 4 and exception 1.
Ghapoo Yadav and others Vs. State of M.P.
Judgment dt. 17.2.2003 by the Supreme Court in Criminal Appeal No. 229 of 2003, reported in (2003) 3 SCC 528

Held :

The question is about applicability of Exception 4 to Section 300 IPC. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-

control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceble to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occuring in Exception 4 to Section 300 IPC is not defined in the Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

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237. INDIAN PENAL CODE, 1860 - Section 302

Corpus delicti - Absence of - Murder can be established even in the absence of corpus deliciti.

State of Karnataka vs. M.V. Mahesh

Judgment dt. 4.3.2003 by the Supreme Court in Criminal Appeal No. 1678 of 1995, reported in (2003) 3 SCC 353

Held :

It is no doubt true that even in the absence of the *corpus deliciti* it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the court.

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238. INDIAN PENAL CODE, 1860- Section 378

Theft _ Factors to be proved to establish theft - No evidence that the property taken out of the possession of a person without his consent - Theft not made out.

Umashankar Namdev Vs. State of M.P.

Reported in 2003 (2) MPHT 237

Held :

This Court in the case of *Gulab* (supra) has laid down the five factors which require a strict proof so as to hold that the evidence of theft has been made out. They are :-

(i) dishonest intention to take property;

(ii) the property must be movable;

(iii) it should be taken out of possession of another person;

(iv) it should be taken without consent of that person; and

(v) there must be removal of the property in order to accomplish the taking of it.

On the basis of the anvil of the aforesaid ratio it was incumbent upon the prosecution to have established these essential ingredients on the basis of its evidence. It has been contended by Shri Datt that no evidence has been laid by the prosecution so as to prove that the impugned diamonds said to have been stolen were taken out of possession of another person, and therefore, unless and until this material and important ingredient is proved by adducing cogent evidence, the applicant cannot be convicted. I have considered this argument of learned Counsel and I find that there is sufficient merit in his contention. On going through the evidence of the prosecution, I find that the prosecution has utterly failed to adduce any evidence so as to prove that the said diamonds were the property of any other person and were taken out from the possesion of that person without his consent. There is no evidence that there was any dishonest intention to take away the impugned diamonds. The prosecution had failed to produce the material evidence so as to constitute the essential ingredients of Section 379 of the IPC.

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239. INDIAN PENAL CODE, 1860- Section 420

Cheating - A guilty intention is an essential ingredient of the offence.

Ajay Mitra Vs. State of M.P. and others

Judgment dt. 28.1.2003 by the Supreme Court in Criminal Appeal No. 129 of 2003, reported in (2003) 3 SCC 11

Held :

A guilty intention is an essential ingredient of the offence of cheating. In other words "mens rea" on the part of the accused must be established before he can be convicted of an offence of cheating. (See *Jaswantrai Manilal Akhaney v.*

State of Bombay, AIR 1956 SC 575:1956 CrLJ 1116) In Mahadeo Prasad v. State of W.B., AIR 1954 SC 724 it was held as follows: (AIR Paras 4-5)

> Where the charge against the accused is under Section 420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established.

In *Hari Prasad Chamaria v. Bishan Kumar Surekha, (1973) 2 SCC 823 : AIR 1974 SC 301* it was held that unless the complaint showed that the accused had dishonest or fraudulent intention at the time the complainant parted with the money, it would not amount to an offence under Section 420 IPC and it may only amount to breach of contract. In *G.V. Rao v. L.H.V. Prasad, (2000) 3 SCC 693 : 2000 SCC (Cri) 733* it was reiterated that guilty intention is an essential ingredient of the offence of cheating and, therefore, to secure conviction "mens rea" on the part of the accused must be established. It has been further held that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered.

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240. INDIAN PENAL CODE, 1860-Section 498

Long cohabitation gives rise to a presumption of valid marriage - Such presumption is rebuttable.

Sitaram Vs. Smt. Shyamadevi and another

Reported in 2003 (2) MPLJ 242

Held :

It is true that only admission made by the husband that he has married with second wife is not sufficient to constitute offence under section 494, Indian Penal Code but in the present case the admission is not limited to the fact that the husband has married with second wife. The admission further shows that there is long cohabitation between the present applicant Sitaram and Shyamadevi and three issues were born out of their relationship which itself gives arise to a presumption of a valid marriage. For this purpose reliance is placed upon the judgments of Apex Court in the case of *S.P.S. Balasubramanyam vs. Surattayam alias Andali Padayachi and others, AIR 1994 SC 133, Badri Prasad vs. Dy. Director of Consolidation and other, AIR 1978 SC 1557, Gokal Chand vs. Parvin Kumari, AIR 1952 SC 231 and Rameshwari Devi vs. State of Bihar and others, 2000(2) SCC 431.* It is true that this presumption is rebutable but that can be rebutted only by leading evidence to the contrary and the burden of rebutting the said presumption lies on the present applicant husband. Hence mere absence of allegations about the ceremony is not sufficient to hold that offence under section 494, Indian Pe-

nal Code is not made out in the present case as there is presumption that the marriage was solemnised in accordance with the customs of the society. The presumption of law is in favour of valid marriage and against concubinage.

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241. INDIAN PENAL CODE, 1860 - Section 375

Prosecutrix aged 19 years - Consenting to act of sexual intercourse - Accused promising her to marry on a later date - Accused failing to keep promise - Held, consent was not under misconception of fact - False promise is not a fact.

Uday Vs. State of Karnataka

Judgment dt. 19-2-2003 by the Supreme Court in Criminal Appeal No. 336 of 1996, reported in (2003) 4 SCC 46

Held :

It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considerng a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own pecular facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequences of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stifff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual inercourse with him only as a consequence of her belief, based on his promise, that they will get married in due

course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual inercourse with the appellant with whom she was deeply in love, not because he promised to marry her but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

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242. INDIAN PENAL CODE, 1860- Section 420

Intention to deceive should be in existence at the time of inducement for the offence punishable under Section 420 I.P.C.- Mere failure to keep up the promise subsequently is not sufficient for the offence of cheating.

Ajay Kumar Keshwani and another Vs. Smt. Helena D'Souza and others

Reported in 2003 (2) MPHT 78

Held :

Then It is found explained by their Lordships of the Supreme Court in *S.N. Palanitkar and others Vs. State of Bihar and another,* reported in AIR 2001 SC 2960, and the same view is found to have been taken in *State of Kerala Vs. A. Pareed Pillai and another, reported in 1972 Cr.L.J. 1243, Kiran Desai V. M/s. Napolean Chemicals (I) Pvt. Ltd., reported in 1999 (1) Mh.LJ 575,* and Bheru Singh Vs. The State of Rajasthan and another, also reported in (Crimes) 394, IX-1985 (2), that for offence punishable under Section 420, IPC, the intention to deceive should be in existence at the time when inducement was done and mere failure to keep up the promise subsequently, cannot be presumed as leading to cheating.

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243. INTERPRETATION OF STATUTES :

Legislation required to do something within a time frame - Whether mandatory on directory - Law explained.

Balwant Singh and others Vs. Anand Kumar Sharma and others

Judgment dt. 28.1.2003 by the Supreme Court in Civil Appeal No. 910 of 2001, reported in (2003) 3 SCC 433

Held :

It is a well-settled principle that if a thing is required to be done by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefore are specified. In *Sutherland's Statutory Construction,* 3rd Edn., Vol. 3, at p. 107, it is pointed out that a statutory direction to privante individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows :

> "As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

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244. M.P. EXCISE ACT, 1915- Section 47-A (3) (a) and 47-D

CRIMINAL PROCEDURE CODE, 1973- Sections 451 and 457

Non-compliance of Sections 47-A (3) (a) and 47-D-Notice not issued by the Collector for initiation of confiscation proceedings- Court has jurisdiction to release the vehicle on interim custody

Suresh Vs. State of M.P.

2003 (I) MPWN 118

Held

The legal position is that if the criminal Court has been given intimation as per provision under section 47D of the Act about initiation of confiscation proceedings by the Collector regarding confiscation then the Criminal Court is ceased of the matter and has no jurisdiction to pass any order for interim custody or confiscation of vehicle. But at the same time, the Collector has jurisdiction to pass order for interim custody of the vehicle or property looking to the facts and circumstances of the case and in the interest of safeguard of property as well as to protect the person suffering from financial loss. In the facts and circumstances of the present case, since there is no compliance of section 47A (3) (a) and 47D of the Act up-till now and no notice has been issued by the Collector-Authority to the applicant for initiation of confiscation proceedings, it would be just and proper

to release the vehicle on interim custody in favour of the applicant who is the Registered owner of the aforesaid vehicle.

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245. M.P. LAND REVENUE CODE, 1959- Sections 100 and 111
CIVIL PROCEDURE CODE, 1908- Sectio```n 11 Expl. (viii)
Mutation order not a judicial order and does not decide question of title- Mutation order does not operate as res judicata.
Bajrangi (Mahila) and others Vs. Badribai and another
Reported in 2003 RN 162 (SC)

Held :

Explanation (VIII) to Section 11 CPC on which strong reliance has been placed, in addition to certain judgments brought to our notice can be of no assistance whatsoever to the appellants in this regard. The said Explanation stipulates that an issue 'heard and finally' decided though by a court of limited jurisdiction, which the said 'Court' is competent to decide such an issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit in which such issue has been subsequently raised. Merely because in exercising powers under section 110 of the Code for mutation of acquisition of rights in the field books and other relevant land records, the Tahsildar was obligated to afford a reasonable opportunity of being heard to the persons interested and hold further inquiry as may deem necessary into the claim, before making necessary entries or that some witnesses were examined by such authority, though not substantiated that he had any power to administer oath or compel and enforce attendance of witnesses, it cannot be elevated to the status of 'court' and its orders credited with the force and efficacy of a decision of a court of justice in a judicial proceeding. Such entries made in land records even as per the Code, shall be presumed to be correct only until the contrary is proved, Section 111 of the Code provides that the civil court shall have jurisdiction to decide any dispute to which the State Government is not a party relating to any right, which is recorded in the record-of-rights. Consequently, it could not legitimately be claimed that the Tahsildar or authorities exercising powers of mutation (original, appellate or revisional) have been accorded the status of civil courts or courts of exclusive jurisdiction and for that matter, to use such orders as a basis or source for asserting a claim of *res judicata* before a competent civil court in a subsequent suit involving adjudication of title to the immovable property. That mutation proceedings before the Revenue Authorities are not judicial proceedings in any court of law and does not decide questions of title to immovable property is a trite position and principle of law vide *Thakur Nirman Singh v. thakur Lal Rudra Partab Narain Singh,* AIR 1926 PC 100=53 IA 220. The decision reported in *Raj Lakshmi Dasi v. Banamali Sen,* AIR 1953 SC 33=1953 SCR 154 rendered in the context of dealing with the efficacy of a decision relating to apportionment of compensation under the Land Acquisition Act among claimants can be of no assistance to the case on hand, viewed in the light

of the very observations contained in the said decision of this Court itself, that the claim to compensation made by the respective parties was founded on the assertion of their respective titles and that the Land Acquisition Court had thus jurisdiction to decide the question of title of the parties in the property acquired and that title could not be decided except by deciding the controversy between the parties about the ownership. *Per contra,* the Revenue Authority ordering mutation of revenue records cannot be *pro tanto* held to be a civil court of concurrent and competent jurisdiction to adjudicate questions of title to immovable property. That apart, it is always the decision on an issue that has been directly and substantially in issue in the former suit between the same parties which has been heard and finally decided that is considered to operate as res *judicata* and not merely any finding on every incident or collateral question to arrive at such a decision that would constitute *res judicata.*

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246. MOTOR VEHICLES ACT, 1939 - Section 2 (19)
Owner, definition of as given in Section 2 (19) not exhaustive - It includes hirer also who is in actual control and possession of the vehicle-Vehicle hired by bank - Bank is also owner.
Arun Kumar Thapar Vs. Yashwant Indapurkar and others
Reported in 2003 (2) MPLJ 273

Held :

While interpreting the scope of section 2(19) of the Motor Vehicles Act, 1939, the Apex Court held in para 17 of the judgment as under :-

> The definition of owner under section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case, Shri Sanjay Kumar the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete "control" to RSRTC, under whose directions, instructions and command the driver was to ply the ill-fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. Shri Sanjay Kumar was therefore not concerned with the passengers travelling in

that bus on the particular route on payment of fare to RSRTC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductors of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (supra) the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary enployer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebuted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 and 7 (supra), which go to slow that the owner had not merely transferred the services of the driver to the RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC.

Thus, from the entire evidence, it is clear that the vehicle was under the control of the Bank. Considering the conditions as contained in the agreement Ex. D/2 the Bank is also the owner being in actual possession and control of the vehicle and under the directions and command of the Bank, the driver was obliged to operate the vehicle. Apart from the owner, where the vehicle is in actual possession and control of the hirer, liability of the hirer is vicarious with the owner and therefore, the hirer is also liable for payment of compensation jointly and severally with the owner of the vehicle.

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247. MOTOR VEHICLS ACT, 1939 - Sections 94, 95 and 103-A
Third party risk - Transfer of vehicle - Liability of insurer - Liability does not come to an end even if intimation of transfer is not given to insurer.
Rikhi Ram and another Vs. Sukhrania (Smt.) and others
Judgment dt. 5.2.2003 by the Supreme Court in Civil Appeal No. 1578 of 1994, reported in (2003) 3 SCC 97

Held :

The question which arises in this appeal is whether in the absence of an intimation of transfer as required under Section 103-A of the Act, the liability of the insurer to pay compensation to the third party ceases. Earlier, there was a conflicting view of the High Courts as regards the question whether the insurance policy lapses and consequently the liability of the insurer ceases when the insured vehicle was transferred and no intimation as prescribed under Section 103-A of the Act was given to the insurer.

This Court in *G. Govindan v. New India Assurance Co. Ltd, (1999) 3 SCC 754* has settled the controversy as regards liability of an insurer to pay compensation to third party in the absence of any intimation of transfer of the vehicle to the transferee. It was held therein that since insurance against third party is compulsory, and once the insurance company had undertaken liability to third pary incurred by the persons specified in the policy, the third party's right to recover any amount is not affected by virtue of the provisions of the Act or by any condition in the policy. We are of the view that the said decision concludes the controversy in the present appeal. However, we would like to give further reasons that the liability of an insurer does not come to an end even if the owner of the vehicle does not give any intimation of transfer to the insurance company.

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248. MOTOR VEHICLES ACT, 1988 - Section 149
Fake driving licence - Insurer when can avoid liability regarding claim of third party on the ground of breach of policy - Law explained.
United India Insurance Co. Ltd. Vs. Lehru and others
Judgment dt. 28.2.2003 by the Supreme Court in Civil Appeal No. 1959 of 2003, reported in (2003) 3 SCC 338

Held :

When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that insurance companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving compe-

tently there would be no breach of Section 149(2)(a)(ii). The insurance company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insurance. This is the law which has been laid down in *Skandia, (1987) 2 SCC 654, Sohan Lal Passi, (1996) 5 SCC 21 and Kamla, (2001) 4 SCC 342* cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

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249. MOTOR VEHICLES ACT, 1988 - Section 171
Interest, award of - Rate of interest would depend upon facts and circumstances of the case - In the facts interest at the rate of 9% granted.
Abati Bezbaruah Vs. Dy. Director General, Geological Survey of India and another
Judgment dt. 14.2.2003 by the Supreme Court in Civil Appeal No. 5193 of 1997, reported in (2003) 3 SCC 148

Held :

The question as to what should be the rate of interest, in the opinion of this Court, would depend upon the facts and circumstances of each case. Award of interest would normally depend upon the bank rate prevailing at the relevant time.

In *R.L. Gupta, (1990) 1 SCC 356* interest at the rate of 12% was awarded. However, no reason has been assigned in support thereof.

In *Kaushnuma Begum, (2001) 2 SCC 9* the amount of compensation was directed to be paid with interest at the rate of 9 percent per annum from the date of claim. The same rate of interest was awarded, as noticed hereinbefore, in the case of United India Insurance Co. Ltd., (2002) 6 SCC 281.

We are of the opinion that the amount of interst should, having regard to the facts and circumstances of the case, be paid at the rate of 9% per annum.

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250. MOTOR VEHICLES ACT, 1939 - Section 95
Filing of insurance policy- Duty of insurer.
Lalta Bai Vs. Sanjay Kharvani
Reported in 2003 (I) MPWN 129

Held :

Moreover, it may not be possible for the claimant to file the insurance policy because she does not posses it nor it is within her power to procure it. Should it mean that the claim cannot be entertained and is liable to be dismissed and the claimant rendered without any remedy and relief and *fort-fessor* to go free? This cannot be the intention of the law nor can such a conclusion be drawn. The claimant asserted that the vehicle was insured. The Insurance Company should

have come forward to deny it, in case the vehicle was not insured with it. It has not been filed it with the written statement in the case. Therefore, we have said that the Claims Tribunal should have come to the conclusion that the vehicle was insured with the Insurance Company.

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251. MOTOR VEHICLES ACT, 1988 - Sections 149 (2) and 140
Driver having no valid licence- Breach committed was within the knowledge of owner- Vehicle was used for other than agricultural purposes in breach of the terms of the policy- Insurance company is not liable to pay any compensation.
Raja Beti and another Vs. Smt. Ramshri and others
2002 (2) Vidhi Bhasvar 284

Held :

The learned counsel for the appellants relied on the Division Bench Judgment in case of *Jagdish and another v. Rajkumar and another* reported in II (2001) ACC 68, in which the Insurance Company is held liable to pay compensation, even when the driver had not valid licence. After perusing the said judgment, particularly, para 4, it is clear that the High Court, in that case has given a clear finding that the Insurance Company has failed to prove that the driver had any invalid licence on the date of accident and in view of the said finding exonerated the Insurance Company. In the present case there is no such finding on the contrary the licence produced by the driver itself shows that it was not renewed on the date of the accident and was renewed subsequently. Thus, the facts of the case in the present case and in the case of the Division Bench Judgment are quite distinguishable. The other judgment cited by the learned counsel for the appellants is 1996 ACJ 1044 *[Sohan Lal Passi v.P. Sesh Reddy],* in that case, the Supreme Court has held that the Insurance Company is liable to pay compensation as the Apex Court has come to the conclusion that the Insurance Company has failed to prove that the breach was committed with the knowledge and consent of the owner, and, therefore, breach is not a wilful breach at the instance of the owner. But, in the present case, the statement of the owner Kraparam NA No. 1, clearly shows that he was sitting near the driver in that vehicle at the time of the accident, therefore, it cannot be safely inferred that any breach committed was without his knowledge and consent. Thus, the said judgment also do not support the case of the appellants.

On the other hand, the counsel for the Insurance Company has relied on various judgments in case of *New India Assurance Co. Ltd. v. Ajay and others* reported in *1994 JLJ 515, Gyasobai v. Mahendra Singh 1997 (II)* MPWN *44* in case of Harnam Singh v. Gajendra Singh reported in 1995 (II) MPWN 145, and in case of *Sajjan Singh Laxman Singh and others v. Phoolibai and others* reported in 1993 Part 1, ACJ 586. All these cases clearly lay down that the tractor is used for non-agriculture purpose and in that case, the Insurance Company is not liable to pay compensation. All these judgments consistently take a view that if a passenger is travelling in a tractor and meets with an accident then the Insurance Company

is not liable to pay compensation as the vehicle is used for non-agriculture purpose and this amounts to breach of the terms of the policy.

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252. MUSLIM LAW - Divorce

Divorce to be effective has to be pronounced - Peal of previous divorce taken in written statement not an effective pronouncement.
Shamim Ara Vs. State of U.P. & Anr.
Reported in 2003 (1) ANJ (SC) 166

Held :

We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically to declare, to utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot be itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife.

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253. N.D.P.S. ACT, 1985 - Section 50

Personal search - Compliance of Section 50 - Hypertechnical view should be avoided - Substantial compliance sufficient.
Kalusingh and another Vs. State of M.P.
Reported in 2003 (2) MPLJ 355

Held :

Learned counsel has cited several judgments regarding non-compliance of section 50 of the Act, but this Court does not feel it necessary to refer and discuss each and every judgment because it would make the judgment unnecessary and bulky. The evidence discussed in this case is clearly establishing the compliance of section 50 of the Act. The judgments cited by the learned counsel for the appellants are -

AIR 1994 SC 1872 *(State of Punjab vs. Balbirsingh), 1996(1) EFR 224 (State of Punjab vs. Jasbirsingh and others), 1995(2) Crimes 132 (Saiyad*

Mohd. And others vs. State of Gujarat), 1996(2) EFR 80 (R.P. Razak alias Nagappan Razak vs. State of Kerala), 2000 SCC (Cri) 1228 (K. Mohanan vs. State of Kerala)

The Supreme Court, in its judgment rendered in the case of *Joseph Fernades vs. State of Goa, 2000 SCC (Cri.) 300,* has held that if there is substantial compliance of section 50 of the Act, then the benefit will not be given to the accused and section 50 should not be construed hypertechnically. Hypertechnical view should not be taken.

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254. N.D.P.S. ACT, 1985 - Section 42
Search and seizure - Section 42, scope and applicability.
State of Orissa Vs. Laxman Jena
Reported in 2003 (1) ANJ (SC) 135

Held :

There is no dispute that Section 42 has two parts. The first part deals with the recording of the information and the second with the conduct of the search. Again first part of the section has two limbs, first dealing with the recording of the information received and the other relating to the belief of the officer based upon his personal knowledge. Any information recorded in terms of sub-section (1) of Section 42 is required to be sent to the superior officer of the person recording the information as mandated by sub-section (2) of Section 42. Second part of the Section 42(1) deals with the power of the officer regarding entry, search, seizure and arrest without warrant of authorisation. The authorised officer has the power to enter into and search any building, conveyance or place and in case of resistance, break open any door and remove any obstacle to such entry. He has power to seize the drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under the Act and to detain and search, if he thinks proper, and arrest any person whom he has reason to believe to have committed any offence punishable under chapter IV relating to such drug or substance.

However, in exercising a power under the second part of Section 42(1) the designated officer is under a legal obligation to comply with the mandate of the proviso to sub-section (1) providing for recording of grounds of his belief to make the search in terms of the powers conferred upon him.

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255. NEGOTIABLE INSTRUMENTS ACT, 1881 - Sections 138 and 139
Post-dated cheque - Instruction by drawer prior to the date of cheque to bank not to make payment - Cheque dishonoured - Section 138 becomes applicable.
Goaplast (P) Ltd. vs. Chico Ursula D'souza and another
Judgment dt. 7.3.2003 by the Supreme Court in Criminal Appeal No. 315 of 2003, reported in (2003) 3 SCC 232

Held :

In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For the purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said section provides that :

"139. It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provisions of Sections 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issed by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in *Modi Cements Ltd. v. Kuchil Kumar Nandi, (1998) 3 SCC 249.*

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256. PARTNERSHIP ACT, 1932 - Section 32

Retirement of a partner from firm - Retirement does not dissolve the firm - Law explained.

Pamuru Vishnu Vinodh Reddy Vs. Chillakuru Chandrashekhara Reddy and others

Judgment dt. 17.2.2003 by the Supreme Court in Civil Appeal No. 6519 of 1994, reported in (2003) 3 SCC 445

Held :

Use of the word "retire" in Section 32 of the Act is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. Where a partner withdraws from a firm by dissolving it, it shall be dissolution and not retirement. Retirement of a partner from a firm does not dissove it, in other words, it does not determine partnership inter se between all the partners. It only severs

the partnership between the retiring partner and continuing partners, leaving the partnership amongst the latter unaffected and the firm continues with the changed constitution comprising of the continuing partners.

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257. PREVENTION OF FOOD ADULTERATION RULES, 1955 - Rules 17 and18 Requirement of Rule 17 regarding sending of milk to Public Analyst is mandatory.
Dinesh Giri Vs. State of M.P.
Reported in 2003 (2) MPHT 318

Held :

This Court in the case of *Narmada Vs. State of Madhya Pradesh, 1994(2) Vibha 316,* by placing reliance upon the decision of the Apex Court in the case of *State of Maharashtra Vs. Raj Karan, 1989 All India PFAJ 12,* has held that provisions of Rules 17 and 18 are mandatory. In this context it would be profitable to refer another judgment of this Court reported in *Hiralal Vs. Food Inspector, Morena and another, 1995 (2) Vibha 84.*

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258. PRECEDENTS :
Prospective overruling - Principles of law relating to prospective overruling explained.
Sarwan Kumar and another Vs. Madan Lal Aggarwal
Judgment dt. 6-2-2003 by the Supreme Court in Civil Appeal No. 1058 of 2003, reported in (2003) 4 SCC 147

Held :

For the first time this Court in *Golak Nath v. State of Punjab, AIR 1967 SC 1643* accepted the doctrine of "prospective overruling". It was held: (AIR p. 1669, para 51)

> "51. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Contitution; (2) it can be applied only by the highest court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to

the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship on those who had trusted to its existence. Invocation of the doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court. This Court while deciding *Gian Devi Anand case, (1985) 2 SCC 683* did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in Gian Devi Anand case would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand case or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation, the finding recorded by the High Court that the rule laid down in Gian Devi Anand case by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous.

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259. PRECEDENT :

Conflicting decisions rendered by the benches of equal strength- Earlier shall hold the field unless it is referred and explained in later decision.

Wali Mohammed and others Vs. Batulbai and others
Reported in 2003 (2) MPLJ 513 (FB)

Held :

Taking the last question (No. iv) first, at the outset it may be stated that the answer to this question is contained in a recent Full Bench decision of this Court in the case of *Jabalpur Bus Operators' Association and another vs. State of Madhya Pradesh and another, 2003 (1) MPLJ 513=2003 (1) JLJ 105,* wherein it is held :

> "With regard to High Court, a Single Bench is bound by the decision of another Single Bench. In case he does not agree with the view of other Single Bench, he should refer the matter to Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conflict between the judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding. The decision of Larger Bench is binding on smaller Benches".

Needless to say that what is said about the decisions of Division Bench shall also apply in case of conflict between judgments of two Single Benches. So in case of conflict between two decisions of the High Court rendered by the Benches of equal strength (be it a Full Bench, Division Bench or Single Bench),

the decision earlier in time shall hold the field unless it is referred and explained in the latter decision in which case the latter one shall be binding.

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260. PREVENTION OF CORRUPTION ACT, 1988 - Sections 19, 13 (1) (d) and 13 (1) (2)
Accused acquitted of the charge as no sanction for prosecution was obtained- May be tried again after obtaining sanction.
Yeswant Kumar Mehta vs. State of M.P.
Reported in 2003 (I) MPWN 94

Held :

The Supreme Court in the cases of Baijnath Prasad Tripathi, Nagraj and N.R. Ghose (supra) has specifically held that the bar of section 300 (I) in old CrPC equivalent section 403 is no bar to subsequent trial. In the case of Baijnath Prasad Tripathi the Supreme Court held as under :-

> "The whole basis of S. 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal, if the Court is not so competent, as where the required sanction under S.6, Prevention of Corruption Act for the prosecution was not obtained, the whole trial is null and void and it cannot be said that there was any conviction or acquittal in force within the meaning of S. 403 (1) CrPC such a trial does not bar a subsequent trial of the accused under Prevention of Corruption Act read with S. 161 IPC after obtaining the proper sanction."

Similar view has been taken in the above mentioned subsequent Supreme Court judgments.

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261. PUBLIC TRUSTS ACT, 1951 - Sections 26 and 27
Removal and appointment of Trustees - Registrar has no power to remove or appoint a trustee.
Trust, Gora Khurd Vs. State & Ors.
Reported in 2003 (I) MPJR 470= 2003 (2) MPLJ 448 = 2003 (I) MPWN 116

Held :

In this writ petition short question arises for consideration whether the Registrar, Public Trust is having the right to remove the trustee. This matter has been considered by a Division Bench of this Court in *Dalludas v. Registrar of Public Trusts, Hoshangabad 1971 JLJ* Short Note 135 and another Division Bench decision of this court in *Sheoprasad Dubey v. Registrar, Public Trusts, Sagar and others 1972 JLJ* Short Note 6. It has been held by this Court that Registrar has no jurisdiction to remove the trustees and to appoint new; he has to seek direction from a Civil Court.

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262. REGISTRATION ACT, 1908 - Section 17(1)

Award distributing assets of the dissolved firm - Award not required compulsory registration.

N. Khadervali Saheb (dead) by L. Rs. and another Vs. N. Gudu Sahib (dead) and others

Judgment dt. 5.2.2003 by the Supreme Court in Civil Appeals Nos. 5680-81 of 1994, reported in (2003) 3 SCC 229

Held :

We have carefully perused the award in question. By the award the arbitrators have distributed the assets of the dissolved firm between the partners in accordance with their respective shares in the partnership. The real question for consideration is whether such an award amounts to creation of or transfer of any fresh rights in movable or immovable properties so as to bring it within the ambit of Section 17 of the Registration Act. A perusal of the award shows that it is simply a case of distribution of assets of the dissolved firm amongst the partners themselves. A partnership firm is not an independent legal entity, the patners are the real owners of the assets of the partnership firm. Actually the firm name is only a compendious name given to the partnership for the sake of convenience. The assets of the partnership belong to and are owned by the partners of the firm. So long as partnership continues each partner is interested in all the assets of the partnership firm as each partner is owner of the assets to the extent of his share in the partnership. On dissolution of the partnership firm, accounts are settled amongst the partners and the assets of the partnership are distributed amongst the partners as per their respective shares in the partnership firm. Thus, on dissolution of a partnership firm, the allotment of assets to individual partners is not a case of transfer of any assets of the firm. The assets which hereinbefore belonged to each partner, will after dissolution of the firm stand alloted to the partners individually. There is no transfer or assignment of ownership in any of the assets. This is the legal consequence of distribution of assets on dissolution of a partnership firm. The distribution of assets may be done either by way of an arbitration award or by mutual settlement between the partners themselves. The document which records the settlement in this case is an award which does not require registration under Section 17 of the Registration Act since the document does not transfer or assign interest in any asset. This question stands concluded by a decision of this Court in *S.V. Chandra Pandian v. S.V. Sivalinga Nadar, (1993) 1 SCC 589.*

●

263. SERVICE LAW :

M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 Rule 14(8) - Delinquent when entitled to engage legal practitioner.

M.P. Sharma Vs. District and Sessions Judge and others

Reported in 2003 (2) MPLJ 279

Held :

Sub-rule (8) of Rule 14 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 reads as under :

> "14.(8) The Government servant may take the assistance of any other Government servant to present the case on his behalf, but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits."

On a scrutiny of the aforesaid rule it is discernible that a delinquent employee can take the privilege of engaging a legal practitioner if the presenting officer appointed by the disciplinary authority is a legal parctitioner or the disciplinary authority having regard to the circumstances of the case so permits. The aforesaid rule can be dissected into two parts. If the presenting officer is legal practitioner the employee has a right to seek assistance of a legal practitioner. The choice rests with him. Other one is a discretion conferred on the disciplinary authority and he has power to permit the delinquent employee to have the assistance of the legal practitioner if the circumstances of the case so warrant.

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264. SERVICE LAW :

Unauthorised absence from duty - Dismissal order passed treating it as misconduct - Period of absence treated as leave without pay - Dismissal order not becomes invalid.

Maan Singh Vs. Union of India and others

Judgment dt. 18.2.2003 by the Supreme Court in Civil Appeal No. 2531 of 2001, reported in (2003) 3 SCC 464

Held :

In *Harihar Gopal case, 1969 SLR 274 (SC)* this Court noticed that the delinquent officer in failing to report for duty and remaining absent without obtaining leave had acted in a manner irresponsibly and unjustifiedly; that, on the finding of the enquiry officer, the charge was proved that he remained absent without obtaining leave in advance; that the order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service and adjustment of leave due to the delinquent officer and for regularising his absence from duty. This Court's attention was not invited to any rule governing the respondent's service conditions under which an order regularising absence from duty subsequent to termination of employment had the effect of invalidating termination. Thus, this Court concluded that it could not be held that the authority after terminating the employment of the delinquent officer intended to pass an order invalidating that earlier order by sanctioning leave so that he was to be deemed not to have remained absent from duty without leave duly granted.

●

265. SERVICE LAW

Disciplinary proceedings - Standard of proof - Difference of degree of proof in criminal proceeding and departmental proceedings.
Lalit Popli Vs. Canara Bank and others
Judgment dt. 18.2.2003 by the Supreme Court in Civil Appeal No. 3961 of 2001, reported in (2003) 3 SCC 583

Held :

It is fairly well settled that the approach and objective in criminal proceedings and the disciplinary proceedings are altogether distinct and different. In the disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him, whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentences should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial are conceptually different. (See *State of Rajasthan v. B.K. Meena, (1996) 6 SCC 417.*) In case of disciplinary enquiry the technical rules of evidence have no application. The doctrine of "proof beyond doubt" has no application. Preponderance of probabilities and some material on record are necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

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266. SERVICE LAW :

Compulsory retirement, order of - Scope of interference by Court - Unless totally perverse, Court should not interfere.
Jugal Chandra Saikia Vs. State of Assam and another
Judgment dt. 4-3-2003 by the Supreme Court in Civil Appeal No. 5111 of 2002, reported in (2003) 4 SCC 59

Held :

It cannot be disputed that the passing of an order of compulsory retirement depends on the subjective satisfaction of the competent authority, of course on objective consideration. Unless it is shown that the order of compulsory retirement was passed arbitrarily and without application of mind or that such formation of opinion to retire compulsorily was based on no evidence or that the order of compulsory retirement was totally perverse, the court cannot interfere.

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267. SERVICE LAW :

Suspension/Termination, order of - Should not ordinarily be interfered by interim order - Transfer is an incident of service - Court should not interfere unlesss transfer is vindicative - Law explained.
Public Services Tribunal Bar Association Vs. State of U.P. and another
Judgment dt. 29-1-2003 by the Supreme Court in Civil Appeal No. 3946 of 2001, reported in (2003) 4 SCC 104

Held :

In *U.P. Rajya Krishi Utpadan Mandi Parishad, 1993 Supp (3) SCC 483* it was

held by this Court that it was desirable that an order of suspension passed by a competent authority should not be ordinarily interfered with by an interlocutory order pending the proceeding. It was observed: (SCC p. 487, para 10)

> "Whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the authority concerned and ordinarily, the court should not interfere with the orders of suspension unless they are passed mala fide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question."

In *Suman Dutta case, (2000) 10 SCC 311* this Court set aside the order passed by the High Court staying the order of termination as an interim measure in the pending proceeding. It was observed: (SCC p. 311, para 2)

> "We are clearly of the opinion that the High Court erred in law in staying the order of termination as an interim measure in the pending writ petition. By such interim order it an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same."

Transfer is an incident of service and is made in administrative exigencies. Normally it is not to be interfered with by the courts. This Court consistently has been taking a view that orders of transfer should not be interfered with except in rare cases where the transfer has been made in a vindictive manner.

From the abovequoted decisions, it is evident that this Court has consistently been of the view that by way of an interim order the order of suspension, termination, dismissal and transfer etc. should not be stayed during the pendency of the proceedings in the court.

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268. SPECIFIC RELIEF ACT, 1963 - Section 16(c)
Readiness and willingness to perform obligation under contract - Proof of - It has to be ascertained from the conduct of the party and circumstances of the case.
Vijay Bahadur & Champalal Vs. Surendra Kumar
Reported in 2003 (I) MPJR 393

Held :

The Supreme Court in the case *His Holiness Achrya Swami Ganesh Dassji vs. Sita Ram Thapar,* (1996) 4 SCC 526 has held that suit for specfic performance of contract for sale, readiness and willingness of plaintiff to perfrom his part of contract is to be ascertained from the conduct of the party and attending circumstances. Their Lordship further held that where the plaintiff neither had sufficient funds to pay the consideration amount nor was he acting promptly within the stipulated time, where time was of the essence of the contract, the plaintiff was not entitled to decree for specific performance of the contract. It will be relevant to re-produce para 2 and 3 of the said decision which reads as under:

2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised.

●

269. TRANSFER OF PROPERTY ACT, 1882- Sections 54-A and 54
No person becomes owner on the strength of agreement of purchase of immovable property- Agreement to sale does not confer any right, title and interest in the property.
Sushila Bai and others Vs. Ismail Khan and others
Reported in 2003 RN 192 (HC)

Held :

In terms of agreement, the sale deed was to be executed within seven days from the date of agreement. It was not done. The plaintiff should have, therefore, filed a suit for specific performance of contract for enforcement of agreement in question on the expiry of seven days i.e. after 23.1.1964. Instead, he filed a suit in 1976 and that too not for specific performance but for declaration of ownership. No person becomes owner on the strength of agreement of purchase of immovable property for the simple reason that it does not convey any right, title and interest in the property but it only enables the purchaser to enforce the agreement to become the owner of the property by obtaining registered deed of sale, either voluntarily or with the aid of Court process. This was not done by the plaintiff. In view of this, the plaintiff could not have been declared to be the owner of suit land on the strength of mere agreement to purchase the land.

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270. WORDS AND PHRASES :
Interlocutory order - Meaning and connotation of.
Surajmal Vs. Sundarlal and others
Reported in 2003 (2) MPLJ 408

Held :

Generally speaking interlocutory order means an order made provisionally in the course of a suit or other proceeding. As per the Law Lexicon by P. Ramatha Aiyar (reprint Edition 1992 Page 611), the term "interlocutory" in Law means not that which decides the cause, but that which only settles some intervening matter relating to the cause". The expression 'interlocutory order' has been explained as follows :

"An interlocutory order is one which is made pending the cause and before a final hearing on merits.

An interlocutory order is made to secure some end and purpose necessary and essential to the progress of the suit and generally

collateral to the issues framed by the pleadings not connected with the final judgment".

The learned author quoting an English decision Smith vs. Cowell (6 QBD 75) further explained : "interlocutory order" is not necessarily confined to an order made between writ and final judgment but it means an order other than final order or judgment".

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271. WORDS & PHRASES :

"Subject to ratification" - Meaning and connotation of - Agreement subject to ratification by others - Such agreement is not enforceable.

M.V. Shankar Bhat and another Vs. Claude Pinto since (Deceased by LRs. and others)

Judgment dt. 14-2-2003 by the Supreme Court in Civil Appeal No. 2148 of 1998, reported in (2003) 4 SCC 86

Held :

When an agreement is entered into subject to ratification by others, a conclude contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.

The word "subject to" has been defined in *Black's Law Dictionary,* 5th Edn., at p. 1278, inter alia, as: "subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for". *In Collins English Dictionary* the words "subject to" have been stated to mean as "under the condition that: we accept, subject to her agreement".

The said agreement for sale, therefore, was not enforceable in a court of law.

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272. WORDS & PHRASES :

'Consent' as used in Section 375 Thirdly, I.P.C. - Meaning and connotation of.

Uday Vs. State of Karnataka

Judgment dt. 19-2-2003 by the Supreme Court in Criminal Appeal No. 336 of 1996, reported in (2003) 4 SCC 46

Held :

In Stroud's *Judicial Dictionary* (5th Edn.) p. 510 "consent" has been given the following meaning:

"Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side."

It refers to the case of *Holman v. R., 1970 WAR 2* wherein it was held that

"there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is consent".

Similar was the observation in *R. v. Olugboja, (1981) 3 WLR 585* wherein it was observed that "consent in rape covers states of mind ranging widely from actual desire to reluctant acquiescence, and the issue of consent should not be left to the jury without some further dirction". Stephen, *J. in R. v. Clarence, (1886-90) ALL ER Rep 133* observed: (All ER p. 144 C-D)

> "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true."

Wills, J. observed: (All ER p. 135 I)

> "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."

Some of the decisions referred to in *Words and Phrases,* Permanent Edition, Vol. 8A at p. 205 have held

> "that adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistence and assent. Legal consent, which will be held sufficient in a prosecution for rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it".

(See People v. Perry, 26 Cal. App 143)

The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh Sheoji Singh v. State, AIR 1958 Punj 123 it was observed: (AIR p. 126, para 7)

> "7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistence and asssent.
>
> Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every

consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

The same view was expressed by the High Court of Kerala in *Vijayan Pillai v. State of Kerala, (1989) 2 Ker LJ 234.* Balakrishnan, J., as he then was, observed: (Ker LJ pp. 238-39, para 10)

"10. The vital question to be decided is whether the above circumstances are sufficient to spell out consent on the part of PW 1. In order to prove that there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained possession of her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be 'consent'. Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. Every consent to act involves submission, but it by no means follows that a mere submission involves consent. In Jowitt's *Dictionary of English Law,* IInd Edn., Vol. 1 explains consent as follows:

'An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind'."

In *Anthony, In re AIR 1960 Mad 308 Ramaswami, J.* in his concurring opinion fully agreed with the principle laid down in *Rao Harnarain Singh case (supra)* and went on to observe: (AIR pp. 311-12, para 21)

"A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbit or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

●

PART - III

CIRCULARS / NOTIFICATIONS

Ministry of Road Transport and Highways Notification No. G.S.R. 699 (E) dated the 10th October, 2002. Published in the Gazette of India (Extraordinary) Part II Section 3(i) dated 10-10-2002 Pages 2-3.

In exercise of the powers conferred by clause (j) of sub-section (1) of section 110 of the *Motor Vehicles Act, 1988 (59 of 1988)* the Central Government hereby makes the following rules further to *amend the Central Motor Vehicles Rules, 1989,* namely :-

1. (1) These rules may be called the *Central Motor Vehicles (Fourth Amendment) Rules, 2002.*

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

2. In the Central Motor Vehicles Rules, 1989 in rule 138, for sub-rule (3), the following sub-rule shall be substituted, namely :-

"(3) In a motor vehicle, in which seat-belts have been provided under sub-rule (1) or sub-rule (1A) of rule 125 or rule 125A, as the case may be, it shall be ensured that the driver, and the person seated in the front seat or the persons occupying front facing rear seats, as the case may be, wear the seat belts while the vehicle is in motion."

●

Ministry of Environment and Forests Notification No. S.O. 1088 (E) dated the 11th October, 2002, Published in the Gazette of India (Extraordinary) Part II Section 3(ii) dated 11-10-2002 Page 2.

In exercise of the powers conferred by clause (ii) of sub-section (2) of section 3, sub-section (1) and clause (b) of sub-section (2) of section 6 and section 25 of the *Environment (Protection) Act, 1986 (29 of 1986)* read with rule 5 of the Environment (Protection) Rules, 1986, the Central Government hereby makes the following rules further to **amend the Noise Pollution (Regulation and Control) Rules, 2000,** namely :-

1. (1) These rules may be called the Noise Pollution (Regulation and Control) (Amendment) Rules, 2002.

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

2. In the Noise Pollution (Regulation and Control) Rules, 2000, in rule 5 after sub-rule (2), the following sub-rule shall be inserted namely :-

"(3) Notwithstanding anything contained in sub-rule (2), the State Govern-

ment may, subject to such terms and conditions as are necessary to reduce noise pollution, permit use of loud speakers or public address systems during night hours (between 10.00 p.m. to 12.00 midnight) on or during any cultural or religious festive occasion of a limited duration not exceeding fifteen days in all during a calendar year."

●

मध्यप्रदेश शासन,
परिवहन विभाग

क्रमांक एफ 22–152– आठ/91. भोपाल, दिनांक 23.9.92

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, मध्यप्रदेश, ग्वालियर।
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,
मध्यप्रदेश।

विषय :– शासकीय वाहनों के दुरूपयोग रोकने के उपाय।

संदर्भ :– इस विभाग का परिपत्र क्रमांक 22–9–84 आठ दिनांक 31.1.84

उपरोक्त विषय में इस विभाग के संदर्भित ज्ञाप द्वारा यह निर्देश प्रसारित किए गए थे, कि यदि किसी माह में पेट्रोल/डीजल की बचत/ आधिक्य होती है, तो यह बचत/आधिक्य अगले एक महीने के कोटे में जोड़ी जा सकेगी। किन्तु किसी भी परिस्थिति में यह समायोजन अगले एक महीने के कोटे तक ही सीमित रहेगा, अर्थात, यह एक निरंतर प्रक्रिया नहीं होगी।

2. पूर्ण विचारोपरान्त राज्य शासन ने निर्णय लिया है कि उक्त समायोजन की सुविधा एक माह से बढ़ाकर तीन माह कर दी जावे। तीन माह के समायोजन की सुविधा यह सुविधा किसी एक वित्तीय वर्ष तक सीमित रहेगी। अर्थात किसी एक वित्तीय–वर्ष के किसी माह की बचत/आधिक्य का समायोजन अगले वित्तीय वर्ष में नहीं होगा। अन्य सभी शर्तें पूर्ववत रहेंगी।

मध्यप्रदेश के राज्यपाल के नाम से तथा
आदेशानुसार
अवर सचिव

●

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CONSTITUTION (SCHEDULED CASTES) ORDERS (SECOND AMENDMENT) ACT, 2002

No. 61 of 2002*

[17th December, 2002]

An Act further to amend the Constitution (Scheduled Castes) Order, 1950, the Constitution (Scheduled Castes) (Union Territories) Order, 1951, the Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956, the Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962 and the Constitution (Pondicherry) Scheduled Castes Order, 1964.

Be it enacted by Parliament in the Fifty-third Year of the Republic of India as follows :-

1. Short title.— This Act may be called the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002.

2. Amendment of Scheduled Castes Orders. — (1) The Schedule to the Constitution (Scheduled Castes) Order, 1950 is hereby amended in the manner and to the extent specified in Schedule I.

(2) The Schedule to the Constitution (Scheduled Castes) (Union Territories) Order, 1951 is hereby amended in the manner and to the extent specified in Schedule II.

(3) The Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956 is hereby amended in the manner and to the extent specified in Schedule III.

(4) The Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962 is hereby amended in the manner and to the extent specified in Schedule IV.

(5) The Constitution (Pondicherry) Scheduled Castes Order, 1964 is hereby amended in the manner and to the extent specified in Schedule V.

SCHEDULE I

[See section 2(1)]

Amendments to the Constitution (Scheduled Castes) Order, 1950

1. In PART 1. — *Andhra Pradesh,*—

(i) for entry 9, substitute —

"9. Beda (Budga) Jangam (in the districts of Hyderabad, Ranga Reddy, Mahbubnagar, Adilabad, Nizamabad, Medak, Karimnagar, Warangal, Khammam and Nalgonda)";

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* Received the assent of the President on the 17th December, 2002 and Act published in the Gazette of India (Extraordinary) Part II, Section 1 dated 18-12-2002 Pages 1-6.

(ii) for entry 11, substitute —

"11. Byagara, Byagari";

(iii) for entry 14, substitute —

"14. Chamar, Mochi, Muchi, Chamar-Ravidas, Chamar-Rohidas";

(iv) for entry 23, substitute —

"23. Godagali, Godagula (in the districts of Srikakulam, Vizianagaram and Vishakhapatanam)";

(v) for entry 30, substitute —

"30. Kolupulavandlu, Pambada, Pambanda, Pambala";

(vi) for entry 35, substitute —

"35. Mala, Mala Ayawaru";

(vii) omit entry 52;

(viii) after entry 59, insert —

"60. Yatala

61. Valluvan.".

2. In PART III.— *Bihar,*—

(i) for entry 6, substitute —

"6. Chamar, Mochi, Chamar-Rabidas, Chamar-Ravidas, Chamar-Rohidas, Charmarkar";

(ii) for entry 9, substitute —

"9. Dhobi, Rajak";

(iii) for entry 10, substitute —

"10. Dom, Dhangad, Bansphor, Dharikar, Dharkar, Domra";

(iv) for entry 20, substitute-

"20. Pan, Sawasi, Panr".

3. In PART IV.— *Gujarat,*—

(i) for entry 4, substitute —

"4. Bhambi, Bhambhi, Asadaru, Asodi, Chamadia, Chamar-Ravidas, Chambhar, Chamgar, Haralayya, Harali, Khalpa, Machigar, Mochigar, Madar, Madig, Mochi (in Dangs district and Umergaon Taluka of Valsad district only), Nalia, Telugu Mochi, Kamati Mochi, Ranigar, Rohidas, Rohit, Samgar";

(ii) for entry 5, substitute —

"5. Bhangi, Mehtar, Olgana, Rukhi, Malkana, Halalkhor, Lalbegi, Balmiki, Korar, Zadmalli, Barwashia, Barwasia, Jamphoda, Nazmpada, Zampda, Rushi, Valmiki";

4. In PART V.— *Haryana,—*

(i) for entry 9, substitute —

"9. Chamar, Jatia Chamar, Rehgar, Raigar, Ramdasi, Ravidasi, Balahi, Batoi, Bhatoi, Bhambi, Chamar-Rohidas, Jatav, Jatava, Mochi, Ramdasia";

(ii) for entry 23, substitute —

"23. Mazhabi, Mazhabi Sikh";

(iii) for entry 25, substitute —

"25. Nat, Badi";

(iv) for entry 34, substitute —

"34. Sapela, Sapera";

(v) for entry 36, substitute —

"36. Sikligar, Bariya".

5. In PART VI. — *Himachal Pradesh, after entry 56, insert-*

"57. Barwala."

6. In PART VII.— *Karnataka,-*

(i) for entry 17, substitute —

"17. Banjara, Lambani, Lambada, Lambadi, Lamani, Sugali, Sukali";

(ii) for entry 23, substitute—

"23. Bhovi, Od, Odde, Vaddar, Waddar, Voddar, Woddar";

(iii) for entries 53 and 54, substitute —

"53. Koracha, Korachar

54. Korama, Korava, Koravar";

7. In PART VIII.— *Kerala,-*

(i) Omit entries 9 and 11;

(ii) for entry 12, substitute—

"12. Bharathar (other than Parathar), Paravan";

(iii) omit entries 13, 19, 20 and 21;

(iv) for entry 26, substitute—

"26. Kakkalan, Kakkan";

(v) for entry 28, substitute—

"28. Kanakkan, Padanna, Padannan";

(vi) for entry 30, substitute—

"30. Kavara (other than Telugu speaking or Tamil speaking Balija, Kavarai, Gavara, Gavarai, Gavarai Naidu, Balija Naidu, Gajalu Balija or Valai Chetty)";

(vii) for entry 34, substitute—

"34. Kuravan, Sidhanar, Kuravar, Kurava, Sidhana";

(viii) for entry 37, substitute —
"37. Mannan, Pathiyan, Perumannan, Vannan, Velan";

(ix) for entry 39, substitute —
"39. Moger (other than Mogeyar)";

(x) omit entries 44 and 49;

(xi) for entry 50, Substitute —
"50. Paraiyan, Parayan, Sambavar, Sambavan, Sambava, Paraya, Paraiya, Parayar";

(xii) omit entries 51 to 53;

(xiii) for entry 54, substitute—
"54. Pulayan, Cheramar, Pulaya, Pulayar, Cherama, Cheraman, Wayanad, Pulayan, Wayanadan Pulayan, Matha, Matha Pulayan";

(xiv) omit entry 55;

(xv) for entry 60, substitute—
"60. Semman, Chemman, Chemmar";

(xvi) omit entries 65 and 66;

(xvii) for entry 68, substitute—
"68. Vettuvan, Pulaya Vettuvan (in the areas of erstwhile Cochin State only)
69. Nerian."

8. In PART IX.- *Madhya Pradesh*,—

(i) for entry 36, substitute—
"36. Mahar, Mehra, Mehar, Mahara";

(ii) after entry 47, insert—
"48. Sargara.".

9. In PART XIII.— *Orissa*,—

(i) for entry 2, substitute —
"2. Amant, Amat, Dandachhatra Majhi";

(ii) for entry 10, substitute —
"10. Bauri, Buna Bauri, Dasia Bauri";

(iii) for entry 24, substitute—
"24. Dewar, Dhibara, Keuta, Kaibarta";

(iv) for entry 42, substitute—
"42. Kandra, Kandara, Kadama";

(v) for entry 45, substitute —
"45. Kela, Sapua Kela, Nalua Kela, Sabakhia Kela, Matia Kela";

(vi) for entry 56, substitute—
"56. Mala, Jhala, Malo, Zala, Malha, Jhola";

(vii) for entry 69, substitute—
"69. pan, Pano, Buna Pana, Desua Pana";

(viii) for entry 86, substitute—

"86. Siyal, Khajuria".

10. In PART XIV.— *Punjab,-*

(i) for entry 5, substitute—

"5. Batwal, Barwala";

(ii) for entry 23, substitute—

"23. Mazhabi, Mazhabi Sikh".

11. In PART XVII.—*Tripura, after entry 32, insert* —

"33. Dhuli, Sabdakar,Badyakar

34. Natta, Nat".

12. In PART XXI.- *Arunachal Pradesh, omit entries 1 to 16.*

SCHEDULE II

[See section 2(2)]

Amendments to the Constitution (Scheduled Castes) (Union Territories) Order, 1951]

1. In PART I.— *Delhi, for entry 29, substitute* —

"29. Nat (Rana), Badi".

2. In PART II.- *Chandigarh, for entry 4, substitute*—

"4. Batwal, Barwala".

3. In PART III.— *Daman and Diu, for entry 2, substitute*—

"2. Chambhar, Mochi".

SCHEDULE III

[See section 2(3)]

Amendments to the Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956

(i) for entry 4, substitute —

"4. Chamar or Ramdasia, Chamar-Ravidas, Chamar-Rohidas";

(ii) for entry 5, substitute —

"5. Chura, Bhangi, Balmiki, Mehtar";

(iii) for entry 7, substitute —

"7. Doom or Mahasha, Dumna".

SCHEDULE IV

[See section 2(4)]

Amendments to the Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962

For entry 4. substitute —

"4. Mahayavanshi.".

SCHEDULE V

[See section 2(5)]

Amendments to the Constitution (Pondicherry) Scheduled Castes Order, 1964

After entry 15, insert —

"16. Puthirai Vannan.".

●

INDIAN EVIDENCE (AMENDMENT) ACT, 2002

(No. 4 of 2003)

[The Indian Evidence (Amendment) Act, 2002 was published in Gazatte of India dated 1-1-2003, Part II, Section 1. The Act received the assent of the President on 31-12-2002. The Act has been reproduced below :]

[31st December, 2002]

An Act further to amend the Indian Evidence Act, 1872.

1. ***Short title.***— This Act may be called the Indian Evidence (Amendment) Act, 2002.

2. ***Amendment of section 146.***— In section 146 of the Indian Evidence Act, 1872 (hereinafter referred to as principal Act), after Clause (3), the following proviso shall be inserted, namely :—

"Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."

3. ***Amendment of section 155.***— In section 155 of the principal Act, clause (4) shall be omitted.

●

THE ELECTRICITY ACT, 2003

[No. 36 of 2003]

[26th May, 2003]

An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows :-

PART XIV

OFFENCES AND PENALTIES

135.(1) Whoever, dishonestly,—

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use —

(i) does not exceed 10 Kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that if it is proved that any artificial means or means not authorised by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(2) Any officer authorised in this behalf by the State Government may—

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been, is being, or is likely to be, used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been, is being, or is likely to be, used for unauthorised use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefore in his presence.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list :

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.

136. (1) Whoever, dishonestly —

(a) cuts or removes or takes away or transfers any electric line, material or meter from a tower, pole, any other installation or place of installation or any other place, or site where it may be rightfully or lawfully stored, deposited, kept, stocked, situated or located, including during transportation, without the consent of the licensee or the owner, as the case may be, whether or not the act is done for profit or gain; or

(b) stores, possesses or otherwise keeps in his premises, custody or control, any electric line, material or meter without the consent of the owner, whether or not the act is committed for profit or gain; or

(c) loads, carries, or moves from one place to another any electric line, material or meter without the consent of its owner, whether or not the act is done for profit or gain,

is said to have committed an offence of theft of electric lines and materials, and shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) If a person, having been convicted of an offence punishable under sub-section (1) is again guilty of an offence punishable under that sub-section, he shall be punishable for the second or subsequent offence for a term of imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine which shall not be less than ten thousand rupees.

137. Whoever, dishonestly receives any stolen electric line or material knowing or having reasons to believe the same to be stolen property, shall be punishable with imprisonment of either description for a term which may extend to three years or with fine or with both.

138. (1) Whoever,—

(a) unauthorisedly connects any meter, indicator or apparatus with any electric line through which electricity is supplied by a licensee or disconnects the same from any such electric line; or

(b) unauthorisedly reconnects any meter, indicator or apparatus with any electric line or other works being the property of a licensee when the said electric line or other works has or have been cut or disonnected; or

(c) lays or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee; or

(d) maliciously injures any meter, indicator, or apparatus belonging to a licensee or wilfully or fraudulently alters the index of any such meter, indicator or apparatus or prevents any such meter, indicator or apparatus for duly registering,

shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten thousand rupees, or with both, and, in the case of a continuing offence, with a daily fine which may extend to five hundred rupees; and if it is proved that any means exist for making such connection as is referred to in clause (a) or such reconnections as is referred to in clause (b), or such communication as is referred to in clause (c), for causing such alteration or preventions as is referred to in clause (d), and that the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved, that such connection, reconnection, communication, alteration, prevention or improper use, as the case may be, has been knowingly and wilfully caused by such consumer.

139. Whoever, negligently causes electricity to be wasted, or diverted or negligently breaks, injures, throws down or damages any material connected with the supply of electricity, shall be punishable with fine which may extend to ten thousand rupees.

140. Whoever, maliciously causes electricity to be wasted or diverted, or, with intent to cut off the supply of electricity, cuts or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with fine which may extend to ten thousand rupees.

141. Whoever, maliciously extinguishes any public lamp shall be punishable with fine which may extend to two thousand rupees.

142. In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable

under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

143. (1) For the purpose of adjudging under this Act, the Appropriate Commission shall appoint any of its Members to be an adjudicating officer for holding an inquiry in such manner as may be prescribed by the Appropriate Government, after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or produce any document which in the opinion of the adjudicating officer, may be useful for a relevant to the subject-matter of the inquiry, and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of section 29 or section 33 or section 43, he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

144. While adjudicating the quantum of penalty under section 29 or section 33 or section 43, the adjudicating officer shall have due regard to the following factors, namely :—

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the repetitive nature of the default.

145. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate authority referred to in section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

146. Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence.

147. The penalties imposed under this Act shall be in addition to, and not in derogation of, any liability in respect of payment of compensation or, in the case of a licensee, the revocation of his licence which the offender may have incurred.

148. The provisions of this Act shall, so far as they are applicable, be deemed to apply also when the acts made punishable thereunder are committed in the case of electricity supplied by or of works belonging to the Appropriate Government.

149. (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of having committed the offence and shall be liable to be proceeded against and punished accordingly :

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

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

Explanation.— For the purposes of this section,—

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

(b) "director", in relation to a firm, means a partner in the firm.

150. (1) Whoever abets an offence punishable under this Act, shall, notwithstanding anything contained in the Indian Penal Code, be punished with the punishment provided for the offence.

(2) Without prejudice to any penalty or fine which may be imposed or prosecution proceeding which may be initiated under this Act or any other law for the time being in force, if any officer or other employee of the Board or the licensee enters into or acquiesces in any agreement to do, abstains from doing, permits, conceals or connives at any act or thing whereby any theft of electricity is committed, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

151. No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorised by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose.

152. (1) Notwithstanding anything contained in the Code of Criminal Proce-

dure 1973, the Appropriate Government or any officer authorised by it in this behalf may accept from any consumer or person who committed or who is reasonably suspected of having committed an offence of theft of electricity punishable under this Act, a sum of money by way of compounding of the offence as specified in the Table below :

TABLE

Nature of Service	Rate at which the sum of money for compounding to be collected per Kilowatt (KW)/ Horse Power (HP) or part thereof for Low Tension (LT) supply and per Kilo Volt Ampere (KVA) of contracted demand for High Tension (HT)
(1)	(2)
1. Industrial Service	twenty thousand rupees;
2. Commercial Service	ten thousand rupees;
3. Agricultural Service	two thousand rupees;
4. Other Services	four thousand rupees;

Provided that the Appropriate Government may, by notification in the Official Gazette, amend the rates specified in the Table above.

(2) On payment of the sum of money in accordance with sub-section (1), any person in custody in connection with that offence shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court.

(3) The acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Appropriate Government or an officer empowered in this behalf shall be deemed to amount to an acquittal within the meaning of section 300 of the Code of Criminal Procedure, 1973.

(4) The compounding of an offence under sub-section (1) shall be allowed only once for any person or consumer.

PART XV
SPECIAL COURTS

153. (1) The State Government may, for the purposes of providing speedy trial of offences referred to in sections 135 to 139, by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the State Government with the concurrence of the High Court.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he was, immediately before such appointment, an Additional District and Sessions Judge.

(4) Where the office of the Judge of a Special Court is vacant, or such Judge is absent from the ordinary place of sitting of such Special Court, or he is incapacitated by illness or otherwise for the performance of his duties, any urgent business in the Special Court shall be disposed of-

(a) by a Judge, if any, exercising jurisdiction in the Special Court;

(b) where there is no such other Judge available, in accordance with the direction of District and Sessions Judge having jurisdiction over the ordinary place of sitting of Special Court, as notified under sub-section (1).

154. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under sections 135 to 139 shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under sections 135 to 139 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act:

Provided that it shall be lawful for such Special Court to act on the evidence, If any, recorded by any court in the case of presence of the accused before the transfer of the case to any Special Court;

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is required in the interest of justice, it may resummon any such witness and after such further examination, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code of Criminal Procedure, 1973, try the offence referred to in sections 135 to 139 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of the said Code shall, so far as may be, apply to such trial :

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding five years.

(4) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of section 308 of the Code of Criminal Procedure, 1973, be deemed to have been tendered under section 307 thereof.

(5) The Special Court may determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.

(6) In case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licensee or the concerned person, as the case may be, shall be refunded by the Board or licensee or the concerned person, as the case may be, within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime lending rate for the period from the date of such deposit till the date of payment.

Explanation.- For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in sections 135 to 139.

155. Save as otherwise provided in this Act, the Code of Criminal Procedure, 1973, insofar as they are not inconsistent with the provisions of this Act, shall apply to the proceedings before the Special Court and for the purpose of the provisions of the said enactment, the Special Court shall be deemed to be a Court of Session and shall have all powers of a Court of Session and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

156. The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973, as if the Special Court within the local limits of the jurisdiction of the High Court is a District Court, or as the case may be, the Court of Session, trying cases within the local limits of jurisdiction of the High Court.

157. The Special Court may, on a petition or otherwise and in order to prevent miscarriage of justice, review its judgment or order passed under section 154, but no such review petition shall be entertained except on the ground that it was such order passed under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record:

Provided that the Special Court shall not allow any review petition and set aside its previous order or judgment without hearing the parties affected.

Explanation.- For the purposes of this Part, "Special Courts" means the Special Courts constituted under sub-section (1) of section 153.

185. (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

(2) Notwithstanding such repeal,-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made thereunder shall have effect until the rules under sections 67 to 69 of this Act are made;

(c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

Note : The other provisions of the Act are not being published here due to lack of space. The said Act may be perused for other provisions.

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MADHYA PRADESH ACT

(No. 14 of 2003)

THE INDIAN STAMP (MADHYA PRADESH AMENDMENT) ACT, 2003.

[Received the assent of the governor on the 21st April, 2003; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 26th April, 2003].

An Act further to amend the Indian Stamp Act, 1899 in its application to the State of Madhya Pradesh.

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

1. (1) This Act may be called the Indian Stamp (Madhya Pradesh Amendment) Act. 2003.

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

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

3. In Schedule 1-A to the Principal Act, —

(i) against article 22, in columm (2), in the proviso, after clause.

(e) the following clauses shall be inserted, namely:-

"(f) where by an instrument, a person includes the name of his wife or daughter or daughter-in-law severally or jointly as co-owner in his property, the rate of duty applicable shall be one percent on the market value of the property :

(g) where by an instrument, 50 percent or more share of the property is conveyed to any female transferee, the rate of duty applicable shall be one precent less than the rate of duty payable under this article.";

(ii) for article 31, the following article shall be substituted, namely :—

"31. Gift- Instrument of, not being a settlement (No. 52) or will or transfer (No. 56).	The same duty as a conveyance (No.22) on the market value of the property, which is the subject matter of the gift.".

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Indian Stamp (Madhya Pradesh Amendment) Act (14 of 2003), S. 1(2)— Comming into force of the Act on 28-4-2003— In exercise of powers conferred by sub-section (2) of section 1 of the Indian Stamp (Madhya Pradesh Amendment) Act, 2003 (No. 14 of 2003) the State Government hereby appoints the 28th day of April 2003 as the date on which the said Adhiniyam, shall come into force.

(M.P. Govt. Gazette, Extraordinary dt. 26-4-2003, page 459)

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