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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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3.	**Hon'ble Shri Justice Dipak Misra**	Member
4.	**Hon'ble Shri Justice S.P. Khare**	Member
5.	**Hon'ble Shri Justice Arun Mishra**	Member
6.	**Hon'ble Shri Justice Sugandhi Lal Jain**	Member
7.	**Hon'ble Shri Justice S.K. Pande**	Member

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JOTI JOURNAL AUGUST, 2004

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We are thankful to the publishers of SCC, MPLJ, MPHT, MPWN, JLJ, ANJ & RN for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

A. K. SAXENA
Director

Exchange of views on any problem has a vital role in every sphere of life. It is not possible to thrive our knowledge without hearing others views. It is one of the sources of flourishing one's knowledge. There are various means through which the individuals, Institutes and many others can express their views with regard to issues and situations. They study the problem from various angles and spectrums, and express it through journals, magazines, newspapers, T.V., radio, etc., or even during formal or informal talks. It does not mean that they arrive at right conclusion every time. A problem may have several dimensions and different persons look at the same problem from different angles. Therefore, the difference of opinion is bound to occur in their outcome. In such a situation, our mind should be open so that it can pave the correct approach.

Our judicial system is totally independent but it does not mean that while deciding the cases pending in the Court, the members of District Judiciary are totally free to adopt any view or a view contrary to the principles laid down by the High Courts or the Apex Court. The decisions of the High Courts and the Apex Court are binding on the subordinate Courts. A decision of the Apex Court is the law of land as per Article 141 of the Constitution of India. No doubt while applying the principles laid down by the Higher Courts, one has to keep in mind the concept of 'ratio decidendi' and in general the 'law of precedent'. But what should be the nature of various articles published in journals, newspapers, etc.? Have they got any binding effect? Should they be referred as we refer various citations of Higher Courts? These are the questions which often come in the mind of some of judicial officers who are newly recruited. Even some in-service judicial officers are in dilemma on this point. The straightway answer is 'no'. The articles published in different magazines, journals or through any other means or the views expressed during talks, have no binding effect at all.

The views contained in any article are personal one of the writer of that article and by no means it can bind anyone. One of the objects of writing articles is to have a prismatic view of the problem and may be with a possible solution. But possible solution does not mean, it is the only solution. There may be other solutions. Our Judicial Officers' Training & Research Institute has been publishing this bi-monthly journal for the benefit of judicial officers of Madhya Pradesh. We are also publishing various articles written by judicial officers posted at various places in different capacity. Bi-monthly training programme at district level is

also one of the sources of these articles. The Institute also publishes its articles on various legal issues after doing some research work. But it does not mean that the articles written by judicial officers, officers of the Institute or on behalf of the Institute, have binding effect on other members of District Judiciary. The object behind writing and publishing articles is to provide some material to think and ponder. It does not mean that the conclusions containing in an article are final and it should be followed blindly. The idea behind publishing articles is to open up the mind of the reader so that the thinking process shall gather further momentum. It does propel one to think again and delve into the matter. One should not think even in dream that the articles provide final solutions of the problem and there is no need to think over about that problem. I am writing all this because I have seen so may judicial officers who, while answering legal problems, occasionally refer to various articles published in JOTI Journal as final word in respect of solution to that problem. This is not correct approach.

Normally, any problem has two faces, i.e. right or wrong. Solution of any problem depends upon various factors. Two contrary view is quite possible. The opinions or views are subject to change from time to time depending upon various circumstances. This is also perceptible from various judgments of the Apex Court and the High Courts. Though the judgments of the Apex Court or the High Courts are binding on the District Judiciary subject to law of precedent but the views expressed in various articles by anyone based on various decisions of higher Courts do not have binding effect at all on any one. Therefore, it is necessary to go through the various judgments of the Apex Court and High Courts irrespective of the conclusion provided in any article, and if any precedent is not available on a point, one is require to look at the law, think deeply and summon on the strong commonsense, sound logic and rational ratiocination to aid. One may take assistance from the articles for understanding logic but that cannot form the sole basis to arrive at any conclusion. The conclusion to any problem may differ from individual to individual. Hence, it is necessary to think over about the problem deeply with an open mind with the help of law, precedents and articles and then try to arrive on one's own conclusion. A conclusion provided in an article can never be the last word. Articles should be used as an additional instrument available for deep thinking. Articles are not meant to shut the door of mind but to open up the inner and subtler layers of mind.

Rest in next issue.

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WELCOME TO HON'BLE THE CHIEF JUSTICE

Hon'ble Shri Justice R.V. Raveendran has been appointed as Chief Justice of High Court of Madhya Pradesh. Born on 15th of October, 1946. His Lordship had his schooling at Fort High School, and higher education at St. Joseph's College and Government Law College, Bangalore. His Lordship joined legal profession on March 11, 1968 under the able guidance of Late Shri S.G. Sundra Swami, Former Advocate General of Karnataka. His Lordship practiced on civil side in Bangalore, and also appeared in several Commissions of Enquiry.

His Lordship was elevated as Judge of High Court of Karnataka on February 22, 1993, where His Lordship remained for a period of about 11 years. His Lordship also worked as Executive Chairman of Karnataka State Legal Services Authority. His Lordship took keen interest in settlement of large number of cases in Lok Adalat. On appointment as Chief Justice of Madhya Pradesh High Court, His Lordship was sworn in at Raj Bhawan Bhopal by the Governor of Madhya Pradesh on July 8, 2004. His Lordship was accorded welcome ovation on July 9, 2004 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

We, on behalf of JOTI Journal welcome His Lordship and wish a healthy, happy and prosperous life.

●

HON'BLE SHRI JUSTICE N.S. 'AZAD' DEMITS OFFICE

Hon'ble Shri Justice N.S. 'Azad' demitted office on 15-06-2004 on His Lordship's appointment as Member of M.P. State Human Rights Commission, Bhopal. Was born on 02-12-1942 in Khaniadhana, District Shivpuri, Madhya Pradesh. His Lordship after completing B.Com. and LL.B. started practice at District Court, Shivpuri in July, 1963. Joined Madhya Pradesh Judicial Services as Civil Judge Class II on 02-12-1965. Later on promoted as Civil Judge Class I & Chief Judicial Magistrate. Was appointed District Judge in December, 1990 and served in this capacity at Sagar, Jabalpur, Raipur and Indore. His Lordship also held the office of the Inspecting District Judge, Gwalior. Was elevated as Additional Judge of the High Court of Madhya Pradesh on 22nd October, 2001. Was appointed permanent Judge on 01-04-2002.

We, on behalf of JOTI Journal wish His Lordship a healthy, happy and prosperous life.

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APPOINTMENT OF JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice R.V. Raveendran, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Arvind Kumar Awasthy and Hon'ble Shri Justice Ashok Kumar Tiwari on their appointment as a Judge of the High Court of Madhya Pradesh on 12-07-2004, in a brief swearing-in-ceremony held in the Conference Hall, High Court at Jabalpur.

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ADDRESS BY
HON'BLE SHRI JUSTICE RAJEEV GUPTA, ADMINISTRATIVE JUDGE AT THE WELCOME OVATION OF HON'BLE THE CHIEF JUSTICE HELD ON JULY 9, 2004 AT JABALPUR

My Lord, I on my own behalf and on behalf of my Brother Judges welcome and congratulate you on your elevation as Chief Justice of Madhya Pradesh High Court.

Born on 15th of October, 1946, Your Lordship had your schooling at Fort High School, and higher education in St. Joseph's College and Government Law College Bangalore.

Your Lordship joined the profession as an Advocate on 11th March, 1968 under able guidance of Late Shri S.G. Sundara Swamy, Former Advocate General of Karnataka. Your Lordship practiced extensively on civil side in Bangalore, specializing in Arbitration and Conveyencing. Besides this, Your Lordship also appeared in several Commissions of Enquiry.

Your Lordship was elevated as Judge of High Court of Karnataka on 22nd of February, 1993, where your Lordship remained for a period of about 11 years till your Lordship's elevation as Chief Justice of Madhya Pradesh High Court.

Your Lordship delivered several landmark Judgments as Judge of Karnataka High Court which adorn the Law Journals and would guide the legal fraternity for all times to come.

Your Lordship as Executive Chairman of Karnataka State Legal Services Authority took keen interest in settlement of large number of cases in Lok Adalat.

My Lord, you are the 22nd Chief Justice of Madhya Pradesh High Court, which was formed on 1st of November, 1956. High Court of Judicature at Nagpur established and constituted by the Letters Patent by George the Fifth by the Grace of God under the Government of India Act, 1915 and continued by virtue of Artice 225, of the Constitution of India, after 26th of January, 1950, became the High Court for the (New) Madhya Pradesh State.

My Lord, the ties of Madhya Pradesh High Court with the High Courts of Southern States are now more than a decade old. Hon'ble Shri Justice U.L. Bhat, who came from Kerala High Court, took over as Chief Justice of Madhya Pradesh High Court in the year 1993, and a few months thereafter, Hon'ble Shri Justice Gulab Gupta of our High Court took over as Judge of Madras High Court. Hon'ble Shri Justice Kumar Rajaratnam, from Madras High Court, took over as Chief Justice of Madhya Pradesh High Court in September 2003.

My Lord, we are confident that under Your Lordship's dynamic leadership, our High Court will achieve new heights.

My Lord, while assuring our fullest co-operation, we all wish Your Lordship a successful tenure as Chief Justice of Madhya Pradesh High Cout.

●

REPLY BY
HON'BLE THE CHIEF JUSTICE TO THE WELCOME OVATION

Let me, at the outset, apologise for not being able to give the reply in Hindi. **MUJHE HINDI THODI THODI AATI HAI.** Please therefore permit me to proceed in English. Brother Rajeev Gupta and Shri R.N. Singh, your Advocate General have assured me that the Members of Jabalpur Bar will ensure that I learn Hindi in a short period. **MUJHE ASHA HAI, YAHAN SE JANE SE PAHALE MEIN AAPSE HINDI AWASYA BOLUNGA.**

I thank you for the words of affection and the kind sentiments. It is indeed a great honour to head this illustrious Court and occupy the seat earlier adorned by great Judges like Justice Mohd. Hidyatullah, Justice A.P. Sen, Justice G.P. Singh and Justice J.S. Verma. This Court has also contributed several distinguished Judges to the Supreme Court including Justice G.L. Oza, Justice Faizanuddin, Justice R.C. Lahoti, the present Chief Justice of India and Justice D.M. Dharmadhikari. It will be my earnest endeavour to follow the high traditions and values of this Court. With the co-operation of my brother Judges, Members of the Bar and the officials of the Registry, I will strive to maintain and enhance its glory and fame.

I am also fortunate to have the assistance of one of the great Bars in the country, known for its learning and eruditeness, legal and forensic acumen, high professional ethics and hard work. The Bar and the Bench are equal partners in the endeavour to provide easy access to justice in particular, to the poor, needy and socially and economically backward groups.

The real power of the Courts is not the power to decide cases or the power to punish. The real power of the Courts lies in the trust and confidence of the public in the Judiciary. The Bar and the Bench have to ensure that such trust and confidence earned by the Judiciary is not eroded. That can be done only by providing speedy, inexpensive and uniform justice to the citizens.

Horizons of dispute resolution are fast changing. Some old type of disputes have disappeared. On the other hand, several new fields of litigations have opened up. It is necessary for the Bar and the Bench to keep changing the concept of dispute resolution, to keep pace with globalisation and rapid developments in the fields of trade, technology and commerce. Twenty-first Century development concepts and Nineteenth Century dispute resolution processes cannot obviously go hand in hand. Aggrieved citizens want the judicial process to be easy, speedy and litigant friendly. To achieve this end, the Parliament has amended the Code of Civil Procedure and the Legal Service Authorities Act apart from enacting special laws for creation of Family Courts and other Special Courts. The executive has also shown its concern by enabling the setting up of Fast Track Courts. Let us also show attitudinal changes to meet the social and legal needs of the Society, so as to be a true pillar of democracy. An analogy from Cricket. If **Five Day matches** had not been modified into **One Day format,** cricket would have lost its attraction. Let us also adopt ourselves for quicker disposal and change from five year pendency modes to one year pendency mode, to maintain the importance and relevance of the judiciary.

May I conclude by seeking on behalf of the Bench, the active and meaningful support from the Bar so as to reduce the pendency and provide speedy and inexpensive justice to the litigants.

I once again thank you for the ovation extended to me.

●

PART - I

AM I A JUDGE ?

A. K. SAXENA
Director

The relations between Bench and the Bar is a very delicate matter. It has a great impact on our Judicial system. There are different kinds of Bar Associations and in every Bar Association we find several advocates of different nature and the judicial officers are also not exception to it. How both maintain their relations, is a matter of keen interest.

In this article, I am not talking about the nature and working style of the advocates. Here I am only concerned with the working of judicial officers. Most of the Judicial officers suffer from a phobia of presence of lots of hurdles during their service life. They think this is a service with full of thorns. But it is not the fact. Our judicial service is better than all other services from any point of view. It depends upon us how we take it. As I earlier said, we have judicial officers of different nature and quite naturally, it is not possible to put all of them in one category. Broadly speaking, the judicial officers can be put into three categories and if anyone does not fall into one or the other category, he can be placed in between any of the two categories. The three categories are- (1) Popular Judge, (2) Unpopular Judge and (3) Ideal Judge. The Judicial officers of either of the categories do their work and maintain the relations with the Bar according to their nature and capacity.

There are several qualities and demerits in the judicial officers and on that basis only I shall explain my thoughts in this article. The difficulty arises when a judicial officer thinks about his demerits as if they are his qualities and then only he comes into some kind of trouble. A judicial officer is a 'Judge' in true sense who imparts justice according to facts and law involved in the case without having any 'interest' or 'malice' in his mind. I have used the words 'interest' and 'malice' in a very wide sense. We must have some kind of introspection everytime to ascertain whether are we judges in a true sense? Are we committing some mistakes? Are we doing justice to everyone? Is our conscience clear? How we are maintaining relations with the Bar and that too at what cost? Are we maintaining good relations with our colleagues? These are few points for our continuous introspection.

Hereinafter the word 'I' shall represent every judicial officer. No doubt, I am judicial officer but am I a Judge, is a question mark. As it has already been indicated that broadly speaking, there may be three categories of judicial officers and many of them may fall between these categories, therefore, it is necessary to describe some of the qualities (?) and qualities in real sense of the judicial officers of all categories one by one.

I give adjournments very easily irrespective of the fact that the parties are

keen to dispose of the cases as early as possible. I myself grant adjournments where proper grounds do not exist. The advocates are very happy in my court because without uttering a word they get adjournments. It is very easy to get bail from my court where the chances of granting bail are very bleak. In those cases where the bail is impossible, at least temporary bail is not the problem in my court. I issue ex-parte stay orders without going deep into the merits of a case and if other party is not happy, I do not hesitate to vacate the ex-parte stay order. I am a popular judicial officer, but am I a judge?

I maintain personal relations with the Bar members. I always give importance to them and try to concede to their due or undue demands. I sit with advocates in my chamber or out of court frequently. I do not hesitate to tolerate the misbehaviour of the advocates and clients in my court, rather I ignore such incidents. I am gem of the District Judiciary in the eyes of members of Bar Associations. I am a popular judicial officer, but am I a Judge?

I do not fix the date of judgements or orders in most of the cases and deliver judgments or orders at my own will without noticing of this fact that the advocates may take undue advantage in future of my weakness of not delivering the judgments or orders in time. I am a popular judicial officer, but am I a Judge?

I never try to control my staff. My subordinate staff is totally free to do whatever they like. Sometimes I come late in court and I never bother about the late arrival of the staff. I have friendly relations with the staff members. I am a popular judicial officer, but am I a Judge?

I try to become popular to save my skin. In my opinion, the judicial work comes to second priority and my first priority is to safeguard my interest of service life. I take all these measures for only two purposes. Firstly, I should not face any trouble during my service life and secondly, I must have a garland and a cup of tea from Bar Association at the time of my transfer from that place. I even do not think that those days had gone when a farewell party arranged by the Bar Association in the honour of judicial officer, was a matter of pride. I, as popular judicial officer demand respect from everyone by adopting lenient view knowing fully well that by adopting these measures I cannot command respect. I also try to demand respect knowing fully well that the measures taken by me are not of permanent nature and a time will come when I have to suffer for doing less work or for not doing qualitative work. In order to safeguard my service, I forget the interest of the Institution. I only think in terms of my welfare and farewell. I know that the words of praise from members of Bar Associations will not work for ever. I know that demanding respect through popular measures is not a respect in real sense. It is only a begging which is not expected from a judicial officer but even then I want to become a popular judicial officer. Am I a Judge? The answer is categorical 'No'.

I am in the category of unpopular Judge. As far as possible I do not give any adjournments irrespective of the fact that the cause of the adjournment is genuine. If I am forced to adjourn the case, I always deliver a long lecture with so

many harsh sentences to advocates or clients before adjouring the case. I am an unpopular judicial officer, but am I a Judge?

When I fail to pronounce judgments or orders on any date, I pass it on a date suited to me and while doing so, I expect that the advocate or clients should ignore my fault or they should not dare to go before the higher authorities to lodge the complaint against me and if they do so, they will have to face its consequences in other cases. I am unpopular judicial officer, but am I a Judge?

I do not have any faith in my subordinate judicial officers and staff. I always show my angerness to my staff without knowing who is at fault or is there any fault of myself? I always try to find out their faults and I never praise my subordinate judicial officers and staff members for their hard and good work. I am an unpopular judicial officer, but am I a Judge?

I think myself as an emperor of the court who never does any wrong. I think I am always right and I can do whatever I like. I am self- conceited and swollen headed. Politeness is far from me. I am of the view that by adopting rough behaviour in court, I can maintain dignity of the court. I suffer from Judges' disease. I think I am the only judicial officer who know law very well but in reality I do not know even basic features of law and in order to conceal my ignorance I behave in a fashion as if I know each and every thing about the law. I try to overpower all the persons who are present in Court. I am not ready to hear the parties in congenial atmosphere. I always remain in search of opportunities to take confrontation with the advocates. I indulge in long arguments with the advocates. I work very hard to dispose of the cases. I sit with pre-notions while hearing different matters. I am an unpopular judicial officer, but am I a judge.

I think I am the only honest judicial officer in the whole State and all others are dishonest. I always think in these terms that unpopular judge means an honest judge. I also work with this notion that I am the only judge who is doing justice. I do not pay any respect to my seniors and at the same time I expect that my juniors must respect me. I also demand respect from advocates, clients and other persons and when I fail to get it, I start my working with an intention to cause hurt to others. While working in this fashion, I do not care about my reputation as well as the reputation of the Institution. Sometimes I do not come in court well in time but I expect from everybody that they must always reach to court in time. I am an unpopular judicial officer, but am I a judge? The answer, of course, is 'No'.

I belong to next category of judicial officers. I possess the quality of politeness but at the same time I am very firm in my duties. I never misbehave with anybody and nobody can dare to misbehave with me. My behaviour is graceful all the time. I only talk during the Court proceedings when I find it necessary. I never indulge in unnecessary arguments with the advocates or clients. I enjoy trust of the Bar members. I try to extend proper respect to everyone including senior and junior colleagues. I am a judicial officer, but am I a Judge?

I have full control over the court staff. I always come to court well in time except in a situation beyond my control and expect everyone to come in time. My Court working starts well in time. I deal with the adjournments firmly depending upon the facts and circumstances of each case. I sit properly dressed in my court and the advocates also enter into my court properly dressed. The advocates come well prepared in my court as they know that I am sitting in the court with full preparation of all cases. I always prepare all the cases thoroughly before delivering the judgments and orders. I try to deliver judgments and orders on the date fixed for it. I never adjourn the case for delivery of judgments or orders without fixing a date for the same. I take keen interest in early disposal of cases. In my opinion, the reputation of the Institution is paramount and I try to work hard to achieve the target without being affected by unhealthy and unwarranted criticism from few advocates to whom the working style of a popular judge suits more than my working. I am a judicial officer, but am I a judge?

I do not like those subordinate judicial officers and staff members who do not want to work at all. Since I work hard, therefore, I expect from everybody to work hard. I do not like any kind of indiscipline. I always come very heavily on wrong doers who intentionally try to jeopardise the court working. I never try to save dishonest persons but at the same time I always extend my full support to honest one. I am a judicial officer, but am I a judge?

I never demand respect from anybody but I always command ever lasting respect from every corner. I also enjoy good reputation in all respect which cannot be snatched away even by my death. I am a judicial officer, but am I a Judge? The answer is 'Yes'.

Broadly speaking, these are the three categories of judicial officers. We should try to match ourselves with these categories and to look as to under which category we come? There may be several judicial officers who may not be able to match themselves with a particular category as nobody can claim himself a total popular or unpopular or ideal judge. One may have any of the short- coming enumerated in first two categories and one may possess some qualities of third category. Therefore, one can fix himself honestly in between these categories and then try to overcome short- comings, which are prevailing in him. No doubt, it would not be an easy task but one must realise that he is sitting in a chair of justice and delivery of justice is not an easy task. If we want to deliver justice, we have to assimilate all qualities of a judge to become most suitable person for the chair of justice, no matter, if any kind of hurdles come in our way. We should not afraid of these hurdles. These will come and go without causing any permanent loss to us. They may cause some anxiety but that would be temporary one. There is quite possibility of sudden visibility of bad phases in our service life but we should not deviate from the right path. If we do our 'Karma' honestly and sincerely without having any affection or ill-will, these obstacles or impediments will automatically be eliminated by lapse of time and we will be marching on the right path without having any blemish career.

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N.D.P.S. ACT, 1985 - PROCEDURAL SAFEGUARDS UNDER SECTION 50 AND 42

VED PRAKASH
Addl. Director

Narcotic Drugs and Psychotropic Substances Act, 1985, for short 'the Act', provides for Control and Regulation of operations relating to narcotic drugs and psychotropic substances. The Act basically, aims at controlling the illicit traffic in narcotic drugs and psychotropic substances by stipulating stringent and exemplary punishment to persons found guilty of indulging in illegal activities relating to such drugs. To carry out the objectives in this respect, the Act empowers certain officers to effect arrest, search and seizure in connection with the illicit drugs. As the Act provides for severe punishment and at the same time confers wide powers upon the concerned officers, therefore, the legislature in its wisdom thought it necessary to provide built- in procedural safeguards so that the officials charged with the duty to implement the law may not abuse its provisions so as to harass innocent persons and at the same time, to provide high degree of authenticity to various actions taken by them under it. These safeguards contained in Section 41- 43 and 50 of the Act, which basically relate to search of places or persons conducted to effect seizure of illicit drugs or any evidence connected therewith, constitute core feature of the Act.

Since, the enactment of the Act in 1985, the law in this particular field has developed rapidly. The developmental stream has basically been augmented by the legislative efforts as well as by the judicial pronouncements of the Apex Court and various High Courts. The Act suffered two major amendments in year 1989 and 2001 through Act No.2 of 1989 and Act No.9 of 2001, respectively.

Hitherto, the Act provided for trial of various offences contemplated under Chapter IV of the Act by Special Courts constituted under Section 36, which was inserted in the Act by the Amending Act No. 2 of 1989. By Amending Act No. 9 of 2001 the Act was exhaustively amended, and the seriousness of the offence and consequent quantum of punishment was made dependent upon the quantity of contraband recovered from the person. The Act, after the amendment, classifies an offence into three categories, one relating to smaller quantity, second relating to medium quantity and third relating to commercial quantity. The cases relating to offences concerning medium and commercial quantity are now triable by Special Court, while remaining cases i.e. cases relating to smaller quantity are triable by Court of competent jurisdiction under the provisions of Criminal Procedure Code, 1973. Here, it may be pointed out that the maximum punishment prescribed for offences relating to smaller quantity is up to six months imprisonment and fine up to Rs. 10,000/-, while in relation to offences concerning medium quantity, the imprisonment may extend up to 10 years and fine up to Rs. 1 lac. For offences relating to commercial quantity, minimum sentence of 10 years imprisonment and minimum fine of Rs. 1 lac has been provided. From the above,

it becomes clear that under the new scheme of the things, Court of Judicial Magistrate is also having jurisdiction to try certain offences under the Act.

No doubt, the Courts while trying cases under the Act have consistently tried to ensure that the procedural safeguards contemplated in it, particularly, under Section 42 and 50 do not remain a paper promise and may operate as an effective tool against any capricious or prejudicial action on the part of an errant police officer. However, in order to apply these provisions in there true sense; it is but impetrative to have a thorough and clear-cut understanding of these provisions (i.e. Sections 50 and 42) in the light of various judicial pronouncements related with them and relevant legislative developments.

SECTION 50 - GENERAL:

Section 50 (1) of the Act provides that when an officer duly authorized under Section 42 is about to search a person under Sections 41, 42 and 43, he shall, if such person so requires, take him/her to the nearest gazetted officer of specified departments or nearest Magistrate for being searched in presence of such officer/Magistrate. This Section was amended by the Act No.9 of 2001, by which clause 5 and 6 were inserted which provide that if the officer has reason to believe that it is not possible to take the person to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with the possession of the contraband or related documents, the officer may proceed to search him as provided under Section 100 of Code of Criminal Procedure and after conducting search such officer shall record the reasons for his belief in this respect and will send a copy thereof to his superior officer within 72 hours. As explained by the Constitution Bench of the Apex Court in *State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172,* Section 50 of the Act implicitly makes it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate. The Court declared that the protection provided in the Section is sacrosanct and indefeasible and it cannot be disregarded by the prosecution except at its own peril.

APPLICABILITY:

Regarding applicability of Section 50 (1), it may be pointed out that where the search is a chance search or where a police officer is conducting search due to suspicious conduct of the accused, without having any previous knowledge or information about accused having contraband in his possession, Section 50 will not apply. In this connection, observations made in *State of Punjab Vs. Balbir Singh, AIR 1994 SC 1872* and later reiterated in *Baldev Singh* (Supra) may usefully be referred. In *Bharatbhai Bhagwanjibhai Vs. State of Gujarat, (2002) 8 SCC 327* the accused started running on seeing the police party, therefore, he was searched and contraband recovered from him. In the circumstance Section 50 was held inapplicable. Here it is also noteworthy that where accused himself hands over the contraband without even providing an occasion to search his

'person' then Section 50 may not be applicable (See - *Guffran Mohammad Hased Kasai Vs. State of Maharashtra 1994 Cr LJ 2013, Bombay*)

Some times it is argued that the search was conducted by the gazetted officer who was a member of the search party and present at the time of search, therefore, that amounts to compliance of Section 50. However, this reasoning has not found favour with the Apex Court and it has been held that even in such a situation the accused must be given an option under Section 50 and if he opts for the same, then search must be conducted before another gazetted officer or Magistrate otherwise it will amount to violation of Section 50. (See - *Ahmed Vs. State of Gujarat, (2000) 7 SCC 477*)

In respect of applicability of Section 50 it must also be kept in mind that the right of the accused under Section 50 is only regarding his search being conducted before gazetted officer or Magistrate. Once he opts, it is for the police officer to decide whether he should be taken for such search before a gazetted officer or a Magistrate and accused cannot insist that the search should be in the presence of either. This position was made clear by the Apex Court in *Raghbir Singh Vs. State of Haryana, 1996 Cr.LJ 1694* wherein the Court observed as under :-

> "The option under Section 50 is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a gazetted officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the Police Officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, Gazetted Officer or Magistrate."

This view has been reiterated in *Manoharlal Vs. State of Rajasthan, (1996) 11 SCC 391.*

In some cases (*Laxman Jena Vs. State of Orissa 1995 Cr. LJ 2993, Orissa and Manak Chand jain Vs. State 1995 Cr. LJ 2146 Delhi*) it has been expressed that where accused has been asked to opt to be searched only before a Magistrate or only before a gazetted officer, it would amount to partial compliance and hence, would be violative of Section 50 but in the light of Apex Court's view in *Raghbir Singh (Supra)* that the choice of gazetted officer or Magistrate before whom search should be conducted is that of searching officer, it cannot be said that these views still hold the ground. The latest pronouncement of the Apex Court in *T.T. Haneefa v. State of Kerala, 2004 AIR SCW 3300* lays down this legal position in explicit terms.

"PERSON":

Search of 'person' as contemplated under Section 50 has to be distinguished from the search of baggage/luggage, vehicle or premises of the accused. It has throughout been well settled proposition of law that search of premises do not amount to search of 'person' of the accused. (See - *Union of India and others Vs. L.D. Balam Singh, (2002) 9 SCC 73*). Likewise search of the vehicle also do not by itself involve search of the person (See - *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, (2000) 2 SCC 513*). Therefore, the question of applicability or infraction of Section 50 in such situations may not at all arise.

As regards search of luggage/baggage, initially, a Full Bench of our own High Court in *Ram Dayal Vs. Central Narcotic Bureau, Gawalior, 1992 (2) MPJR 250* took the view that search of luggage/baggage do not come within the purview of Section 50 because search of the 'person' is not involved therein. A Division Bench of Bombay High Court in *Ramji Duda Makwana Vs. State of Maharashtra, 1994 Cri. LJ 1987* also subscribed to the same view. But this legal position stood reversed after the pronouncements of Apex court in *State of Punjab and others Vs. Jasbir Singh, (1996) 1 SCC 288* and *Namdi Francis Nwazor Vs. Union of India and another, (1998) 8 SCC 534.* In the later case Search of hand bag, was held to amount to search of 'person' attracting Section 50. However, this view was soon unsaddled and restoring the earlier view as expressed in Ram Dayal (Supra), the Apex Court quite explicitly laid down in *Kalema Tumba Vs. State of Maharashtra, (1999) 8 SCC 257* that if a person is carrying a bag or some other article with him and contraband article is found from it, it cannot be said that it was found from that 'person'. This view was reiterated by the Apex court in a number of subsequent cases (See -: *Kanhaiya Lal Vs. State of M.P., (2000) 10 SCC 380*). Therefore, it is well settled now that search of baggage/ luggage will not attract applicability of Section 50. The latest pronouncement endorsing the aforesaid propositions is found in *Madan Lal and another Vs. State of H.P. (2003) 7 SCC 465* wherein it has been observed that Section 50 does not extend to search of a vehicle or a container or a bag or premises.

MODE OF COMPLIANCE:

Sometimes the stand is taken before the Court that compliance of Section 50 should be made by giving the option to the accused in writing. However, this proposition was rejected by the Constitution Bench of the Apex Court in *Baldev Singh (Supra).* In this case, it has been laid down that it is not necessary to give the information to the person to be searched about his right in writing and it is sufficient if such information is communicated to the person concerned orally. This view has been reiterated in *Sajan Abraham Vs. State of Kerala, (2001) 6 SCC 692 and Gurubax Singh Vs. State of Haryana, (2001) 3 SCC 28.*

No doubt, the compliance of Section 50 should be made, as far as possible, in the presence of some independent and respectable persons. [(See - *Baldev Singh (Supra)*], but as explained in *Pon Adithan Vs. Dy. Director, Narcotics Control Bureau, (1999) 6 SCC 1,* it cannot be laid down as a proposition of law that in

the absence of an independent evidence or any other supporting documentary evidence, oral evidence of a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of Section 50 (1).

Again, the question arises whether the option has to be given in some particular form or substantial compliance in conformity with the spirit of the provisions of Section 50 (1) will suffice. In *K. Mohanan Vs. State of Kerala (2000) 10 SCC 222,* it has been held that merely asking the accused whether he requires to be searched in the presence of gazetted officer or a Magistrate does not amount to compliance of Section 50 and that the accused should be informed about his right to be searched in the presence of a Magistrate or gazetted officer and failure to do so will amount to non-compliance of Section 50. However, a different view in this respect is found in *Krishan Mohar Singh Dugal Vs. State of Goa, (1999) 8 SCC 552.* In this case, the accused was told that if he so desires he could be searched in the presence of a Magistrate or a gazetted officer. He declined to be searched either in the presence of Magistrate or a gazetted officer. It was held that the provisions of Section 50 stood fully complied. In *Joseph Fernandez Vs. State of Goa (2000) 1 SCC 707,* which is a decision by a Three Judge Bench of the Apex Court, it has been laid down that the option given by the police officer in terms that 'if you wish you may be searched in the presence of a gazetted officer or a Magistrate' is substantial compliance with the requirements of Section 50 because while proceeding to conduct search the Searching Officer had only Section 50 of the Act in his mind unaided by its interpretation given by the Apex Court. In *Krishna kanwar (Smt.) @ Thakuraeen Vs. State of Rajasthan (2004) 2 SCC 608,* which is the latest decision on this point, the Apex Court has reiterated the view that no specific mode or manner is prescribed for the compliance of Section 50 and substantial compliance is sufficient.

The stage to examine whether the provisions of Section 50 have been complied with or not is when the prosecution has laid evidence in support of his case and as laid down in *State of H.P. Vs. Pirthi Chand and another, (1996) 2 SCC 37* any finding without such evidence is not proper and discharge of the accused on the ground of non-compliance of Section 50 is also unwarranted. This view has been approved by the Constitution Bench in *Baldev Singh's (Supra)* case.

SEARCH OF FEMALE:

Section 50 (4) provides that no female shall be searched by anyone except a female. As observed in *Baldev Singh (Supra)*, failure to observe this requirement not only affects the credibility of the prosecution case but also is violative of the basic right of a female to be treated with decency and proper dignity. The provision aims at honoring and preserving the modesty of female and has been held to be mandatory in *State of Punjab Vs. Surinder Rani @ Chhindi, (2000) 10 SCC 429* with the observation that it cannot be diluted even on the ground that a female was not available at the time of search.

NON-COMPLIANCE, CONSEQUENCES:

In Balbir Singh (Supra), it was laid down that the provisions of Section 50 are mandatory and non-compliance thereof shall vitiate the trial. Later on this question was examined by the Constitution Bench of the Apex Court in *Baldev Singh (Supra)*. The Court after examining various authorities laid down that the question whether provisions of Section 50 are mandatory or directory does not strictly speaking arise in the context in which the protection has been incorporated but the provisions make it obligatory for the investigating officer to comply with them. Non-compliance may not vitiate the trail as such, but it would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused. It was further made clear that where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act such non-compliance shall render his conviction and sentence unsustainable. After this pronouncement, it has been expressed in *Bharatbhai's case (supra)* that the provisions of Section 50 are mandatory. Be that as it may, the fact remains that non-compliance of the provisions of Section 50 will render the conviction and sentence unsustainable.

PROOF AND PRESUMPTIONS:

The compliance of the provisions of Section 50 must be proved by the prosecution and as expounded by the Apex Court in *Saiyad Mohd. Saiyad Umar Saiyed and others Vs. State of Gujarat, 1995 Cr. LJ 2662* there is no room for drawing a presumption on this point in favour of the prosecution under Section 114 illustration (e) of Evidence Act.

SECTION 42 - GENERAL:

Section 42 of the Act cannot be understood in isolation and to have a proper perspective of the provisions contained in it, it would be better to examine it alongwith Section 41 and Section 43 because provisions of these three Sections together knit the scheme regarding search of places.

Section 41 (1) speaks about the power of a Magistrate to issue search warrant. Section 41 (2) says about the powers of certain officers of gazetted rank of enumerated departments of Central or State Government, who have been empowered by way of notification by the respective government, to conduct search etc. These empowered officers also have the power to authorize their subordinate officers, superior to the rank of peon, constable or sepoy, to conduct search.

Section 42 (1) provides that an officer of the Central or State Government of the enumerated departments superior to the rank of peon, sepoy or constable, who has been authorized by the respective government by notification, may also carry out search, seizure etc. Section 43, which is about search/seizure in public places, says that such search may be conducted by any officer referred to in Section 42 (1).

A conjoint reading of Ss. 41, 42 and 43 reveals that search of a building, conveyance or enclosed place may be conducted by the following four category of officers, though their powers in this respect vary :-

(I) An officer having authority under a search warrant issued by Magistrate under Section 41 (1). Such officer may conduct search by day or night. Question of recording any information by him does not arise in this case.

(II) An empowered officer under Section 41 (2) who may conduct search by day or night, if he has reason to believe from personal knowledge or information given by any person and taken down in writing about contraband or any article or document kept or concealed in such place.

(III) An officer subordinate to empowered officer of Section 41 (2) but above the rank of peon, constable and sepoy, who has been authorized by such empowered officer to conduct search by day or night.

(IV) Empowered officer under section 42 (1), above the rank of a peon, constable and sepoy , having power to conduct search on a reasonable belief based upon his personal knowledge or *information given by any person* and *recorded in writing,* between sun- rise *and* sun- set or under emergent situation even during night provided reasons therefor are recorded. Such officer is required to send a copy of the information so recorded/ reasons so recorded within 72 hours to his superior officer.

An officer referred to in Section 41 (1) has also power to conduct search under Section 43 in any public place whether by day or by night.

A bare perusal of Ss. 41, 42 and 43 makes it abundantly clear that the empowered officer as provided in Section 41 (2) is an officer of gazetted rank having wide powers to carry out search, seizure etc. himself by day or by night. Though, if search or seizure is affected on the basis of information received from some person, such officer is required to record such information in writing but he is not required to send its copy to his superiors. Such officer has authority to empower his subordinate above a particular rank who may conduct search by day or by night. The officer contemplated under Section 42 (1) though being of a rank superior to peon, sepoy or constable; need not be a gazetted officer. Such officer enjoys qualified powers to carry out search by day or if situation demands then, after recording reasons even by night. If such officer is affecting search on the basis of information received from some person he is required not only to record the same but also to send a copy thereof to his superior officer. If search has been conducted after sun- set, then he is also required to sent the copy of reasons recorded in this respect, within 72 hours. An absorbing analysis of these provisions and exposition of the legal principles emerging therefrom is found in *M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449.* In this case the Apex Court has made it clear that the provision of Section 41 (2) requiring sending of a copy of information recorded by empowered officer, though, mandatory in nature is not applicable to the empowered officer contemplated under Section 41 (2) because this requirement is in the

shape of an additional check for empowered officer contemplated under Section 42 (1) who may not be necessarily a gazetted officer. Again, it should also be taken note of that the requirement of recording information shall arise only when the information has been received from any person.

APPLICABILITY:

Regarding applicability of Section 42 few important aspects require consideration. As expounded in *Balbir Singh (Supra)*, Section 42 is not applicable when the search is being conducted under the Code of Criminal Procedure without any sort of previous information about contraband etc. In *Kameshwar Singh Vs. The State of M.P., 1997 Cr. LJ 1284 (M.P)* wherein contraband was seized by a Head Constable while investigating a case under IPC, it was held that Section42 was not violated.

Search and Seizure in public places like hotels (See-*Ganga Bahadur Thapa Vs. State of Goa, (2000) 10 SCC 312*), Airport (See-*Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, (2002) 8 SCC 7*) etc. is covered by Section 43 and in such cases Section 42 is not applicable. Again as laid down in *Karnail Singh Vs. State of Rajasthan, (2000) 7 SCC 632* where search of a vehicle is conducted by an officer referred to in Section 42 not on the basis of personal knowledge or information received from any person but simply on the basis of suspicion then such search shall fall within the purview of Section 49 read with Section 43 of the Act and not under Section 42. Therefore, in such case Section 42 shall not be applicable. Section 49 empowers an officer referred to in Section 42 to stop and search any animal or conveyance which he has reason to suspect is being used for transport of illicit drugs.

If the search is not a chance search then it should be made by an empowered or authorized officer. Search/seizure effected by unauthorized officer being illegal would vitiate the trial. [(See- *Balbir Singh (Supra) and Roy V.D. Vs. State of Kerala, (2000) 8 SCC 5900*]. However, if the search is conducted by or under the supervision of a gazetted officer who is an empowered officer under Section 41 (2) then Section 42 will not be attracted. [(See - *State of Orissa Vs. S. Mohanty and others, (2000) 2 SCC 170 and Mohd. Hussain Farah Vs. Union of India and another, (2000) 1 SCC 329)*]

NON-COMPLIANCE, CONSEQUENCES:

Again the question arises as to what will be the effect of non-compliance of Section 42 (2) which requires the sending of a copy of recorded information to the superior officer. Though, it is found dictated in *Balvbir Singh (Supra)* that non-compliance will vitiate the trial but in *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, (2000) 2 SCC 513,* which is a decision by a larger Bench, the Apex Court has held that in such situations the unrecorded information would become suspect causing prejudice to the accused, though, the trial may not stand vitiated on that score alone. Being a decision by a larger Bench the later view must prevail.

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REFERENCE UNDER SECTION 18 OF LAND ACQUISITION ACT, 1894 - GENERAL GUIDELINES

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The Land Acquisition Act provides four distinct matters - (1) acquisition of land, (2) taking over possession of land, (3) assessment of compensation and (4) payment of compensation. This Act also provides deprivation of property by authority of law. This Act, therefore, fulfils a constitutional obligation. In the absence of a provision in the Act taking over possession of the notified or the acquired land, the acquisition would have been futile. Therefore, the Act provides for interference with possession and taking over possession of the notified or acquired land. Acquiring land without payment of compensation would have been arbitrary, violating Article 14 of the Constitution of India. Accordingly, the Act provides for assessment and payment of compensation. *(Ram Jiyawan Vs. State of U.P., AIR 1994 All 38 at 48)*

The Court has to treat the reference under Section 18 of Land Acquisition Act as an 'original proceeding' and has to determine the market value of the acquired land afresh on the basis of evidence produced before it. It is settled legal position that it is the duty of the Court to sit in the armchair of a willing and prudent purchaser and seek answer to the question whether he would purchase the lands offered for sale with the existing features, at the same market value proposed by the Court. It is also settled law that though determination involves some guesswork, it must have a reasonable basis and feats of imagination should be eschewed. It is the salutary duty of the Court to award reasonable and adequate compensation. *Union of India Vs. Mangatu Ram, (1997) 6 SCC 59.*

A reference so made is not an appeal against the award passed by the Land Acquisition Officer. Therefore, the Court cannot take into account the material relied upon by the Land Acquisition Officer in his award unless it is produced and proved before the Court. Meaning thereby, award given by the Land Acquisition Officer should not be treated as a judgment of the trial Court. Award is merely an "offer" made by the Land Acquisition Officer. The "offer" may or may not be accepted. The Court has no jurisdiction to entertain the material utilized by Land Acquisition Officer during proceedings unless it is produced and proved. The Court should not work as an Appellate Court to approve or disapprove the reasoning or correct its error or offering, modify or reverse the conclusion of award.

In reference, claimant is in the position of a plaintiff who has to show that he has not accepted that award. Action under this section can only be taken when claimant has not accepted the award. Acceptance of award operates as a bar to an application under Section 18 of Land Acquisition Act. It is true that particular mode of protest is not prescribed under the Act. In case of *Smt. Suran Ramakka Vs. District Collector, Karim Nagar, AIR 1994 AP 5,* it is observed that the petitioner was an illiterate landlady residing in a remote corner of the rural area and

the law does not prescribe any particular mode of protest and such an oral protest, is a valid protest under law. Reference under Section 18 of the Land Acquisition Act, 1894 is maintainable.

The claimant has to show that application for reference is within time. Now, the question arises that what would be the limitation? Admittedly, the cause of action for seeking a reference arises on the date of service of the award under Section 12 (2) of the Act. Within 90 days from the date of the service of the notice, the respondents should make an application requesting the concerning authority to refer the case to the Civil Court under Section 18 of the Act. Under Section 3 (a) of the Act, concerning authority has to make reference within 90 days. If such authority fails to do so within 90 days, in that case by operation of sub-section 3 (b) of the Act, with the expiry of the aforestated 90 days, the cause of action will accrue to the respondents. The respondents should make an application to the Civil Court with a prayer to direct the authority concerned to make a reference. There is no period of limitation prescribed in sub-section 3 (b) of the Act to make that application but it should be done within limitation prescribed and by the Schedule to the Limitation Act. There is no express provision regarding limitation to make such application, hence Article 137 of the Schedule to the Limitation Act gets attracted. Therefore, in the absence of any special period of limitation prescribed by clause (b) of sub-section (3) of Section 18 of the Act, the application should have been produced within three years from the date of expiry of 90 days prescribed in Section 18 (3) (b) of the Act.

The claimant has to assert that the price offered for his land in the award is inadequate on the basis of the material produced in the Court. Of course, the material placed and proved by the opponent can also be taken into account for this purpose. Meaning thereby, the claimant has to prove his case in the Court with the help of documentary as well as oral evidence. The Court hearing the reference is a Civil Court and the provisions of the Civil Procedure Code, 1908 are applicable to the proceedings in the Court as provided in Section 53 of the Land Acquisition Act, 1894. Likewise, the provisions of the Indian Evidence Act, 1872 are applicable as the proceedings are before a Civil Court. On the basis of above, it is clear that claimants stand in the position of plaintiffs.

Hon'ble the Apex Court has observed in para 6 in the case of *Special Deputy Collector and another Vs. Kurra Sambasiva Rao and others, (1997) 6 SCC 41* that the burden of proof is always on the claimants to prove by adduction of cogent and acceptable evidence that the lands are capable of fetching higher compensation than what is determined by the Land Acquisition Officer, which is only an offer. If the award is accepted without protest, it binds the parties. It is the bounden duty of the Court to evaluate the evidence on the basis of the human conduct, even if no rebuttal evidence is produced by the Land Acquisition Officer, to assess the market value applying the relevant tests laid down by this Court in beadroll of decisions. In *Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, (1994) 4 SCC 195,* the Court has considered the entire case - law as on that date, on the

principle of determination of market value and the relevant test laid in that behalf. It is also mentioned in the judgment that the object of the enquiry in a reference under Section 18 of the Act is to bring on record the price which the land under acquisition was capable of fetching in the open market as on the date of the notification. The relative situation of the acquired land which is the subject of the sale transaction, the nature of the land, its suitability, nature of the use to which the lands are put to on the date of the notification, income derived or derivable from or any other special distinctive feature which the land is possessed of and the sale transactions in respect of lands covered by the same notification are all relevant factors to be taken into consideration in determining the market value.

The market value of land under acquisition has to be determined as on the date of publication of the notification under Section 4 of the Land Acquisition Act. Dates of publication of notifications under Sections 6 and 9 of the Act are not relevant. Hon'ble the Apex Court has reiterated in paras 17 and 18 in the judgment of *Urban Improvement Trust, Udaipur Vs. Bheru Lal and others, (2002) 7 SCC 712,* that for the purpose of acquiring the lands, publication of the notification under Section 4 (1) of the Act in the Official Gazette is mandatory. If the decision taken by the Government to acquire the land is not notified in the Official Gazette, the said decision will be of no effect. Section 4 of the Act mandates that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and acquisition process starts after publication of the notification in Official Gazette under Section 4 (1) of the Act. Therefore, publication of the notification under Section 4 (1) of the Act being a condition precedent for acquisition of land.

In *Panna Lal Ghosh and others Vs. Land Acquisition Collector and others, 2004 (1) SCC 467,* the Apex Court has observed in para 7 of the judgment that while determining the market value of land, it must be with reference to a piece of land which is comparable to the present lands being acquired. It must be similar in potentiality and nature.

Now, the question arises that what will be the method to determine the market value of a land? It is well-settled that the determination has to be made on the date & time of valuation (date of publication of notification under Section 4 of the Act) as if the value is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price. In adopting instances method, the Court has to the market value reflected in the most comparable instance, which provides the index of market value. It must be kept in mind that only genuine and bona fide instances have to be taken into account. The genuine instance can be identified by proximity from time angle and by proximity from situation angle. After identification of genuine instances, index of market value and the price reflected therein may be prepared. Plus and Minus factors should be adjusted from that price respectively.

Plus factors are smallness of size of land, its proximity to a road, frontage on a road, nearness to developed area and regular shape. The minus factors are largeness of area, situation in the interior at a distance from the road, narrow strip of land with very small frontage compared to depth, remoteness from developed area.

The Court deciding the matter should keep in its mind that the expression "compensation" in Section 28 of the Act colour from Section 23 (1) of the Act and does not comprehend any and every payment made to the land- holder for the deprivation of land. The word "compensation" in Section 28 of the Act should be restricted and confined only to the elements of compensation embodied in Section 23 (1) of the Act. The Court shall take into consideration the market value of the land on the date of the publication of notification under Section 4 of the Act, the damages sustained by the person interested by reason of the taking of the standing crops or trees which may be on the land at the time of taking possession, the damages sustained by the reason of serving such land from his other land, the damages sustained by reason of the acquisition injuriously affecting his property, movable or immovable, in any other manner or his earnings, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable incident to such change and the damage which bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under Section 6 of the Act and the time of the Collector's taking possession of the land.

In determining compensation, in addition to the market value of the land, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier. Under Section 23 (2) of the Act, in addition to the market value of the land, the Court shall in every case award a sum of (thirty per centum) on such market-value, in consideration of the compulsory nature of the acquisition. By an amendment in 1984, the rate was increased to 30% from the original 15% by virtue of Section 30 (2) of the amending Act.

Solatium is "money comfort" quantified by the statute and given as a conciliatory measure for the compulsory acquisition of land of the citizen, by a welfare State such as India. (See - *Narain Das Jain Vs. Agra Nagar Mahapalika, (1991) 4 SCC 212*). Interest on solatium is part of the component under Section 23 (1) of the Act. Under Section 28 of the Act the claimants will be entitled to the interest on enhanced compensation from the date of the award of the Court under Section 26 of the Act and on appeal under Section 54 of the Act on the respective compensation, if enhanced till date of deposit in the Court.

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DOCTRINE OF PRECEDENT

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Our judicial system is a three-tier system under the Constitution of India. The Article 124 of the Constitution provides the establishment and constitution of Supreme Court of India whereas Articles 214 and 216 deal with the constitution of High Courts in the States. Next comes the Subordinate Courts and the provisions with regard to Subordinate Courts find place under Chapter VI of Part VI of the Constitution. Though the subordinate courts are independent in their decision making process but they have to decide the cases as per law of the land. Article 141 of the Constitution provides as follows :

> "141. The law declared by the Supreme Court shall be binding on all courts within the territory of India."

This Article empowers the Supreme Court to declare the law. It means the Supreme Court does not enact the law. The Article incorporates the Doctrine of Precedent and gives constitutional status to this theory. The law declared by the Supreme Court not only binds the High Courts and subordinate courts but also binds the State and its officers. In *Gopal Krishna vs. 5th Additional District Judge, Kanpur, AIR 1981 Allahabad 300,* it has been held as follows :

> "This Article gives a constitutional status to the theory of the precedent in respect of the law declared by the Supreme Court which is essential for a proper administration of justice."

OBJECT AND UTILITY :

The main object of doctrine of precedent is that the law of the land should be clear, certain and consistent so that the Courts shall follow it without any hesitation and where conflicting decisions come before Courts, the appropriate law based on the doctrine of precedent may be followed. This has been held in *Union of India vs. Raghubir Singh, AIR 1989 SC 1933* as under:

> "The doctoring of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."

The utility of doctrine of precedent cannot be denied in any circumstances. If there are so many conflicting decisions of Supreme Court or High Courts and if law declared is so uncertain, the difficulty lies with the subordinate courts as to which of the law should be followed. Sometimes they find it very difficult to apply the law where two contrary legal principles are laid down and it is not possible to reconcile them at all. In such a situation a well settled doctrine of precedent comes to rescue of the judges of subordinate courts. Apart from that a long settled position of any law through various decisions of higher Courts cannot be dislodged in normal circumstances by any decision and the subordinate courts

may decide, on the basis of principle of doctrine of precedent, as to which of the decision should be followed. Everybody should know the exact and certain legal position of any provisions of the law. While dealing with the various judgments of Supreme Court and High Courts, the High Court of Madhya Pradesh in case of *Jabalpur Bus Operators Association and others vs. State of M.P. and others, 2003 (1) MPLJ 513* observed in para 23 (P.545) that-

> "A careful perusal of the above judgment shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our Judicial system. It promotes certainty and consistency in judicial decision. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."

It has further been observed in last but one para of this decision that -

> "The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is *per incuriam,* having been rendered without noticing some earlier precedents with which the Court agrees."

MAIN FEATURES :

Before going through the details with regard to main features of Doctrine of Precedent, this should be in our mind that while applying the principles of doctrine of precedent it has to be seen whether the decision delivered by the higher Courts are of co-equal Benches or single Benches or is there any conflict between the judgments of larger Bench and smaller Bench? As far as subordinate courts are concerned, the decisions of Supreme Court and High Courts are binding on them. So, the doctrine of precedent can be dealt with taking into consideration the provisions of Article 141 of the Constitution and the binding nature of decisions rendered by High Courts.

Earlier, the legal position about the doctrine of precedent was not very much clear. There was no settled position as to which of the decisions should be followed by the High Court or the subordinate Courts in case of conflicting decisions rendered by the Supreme Court. The law about the doctrine of precedent developed from time to time. There are catena of decisions of various High Courts in which it was held that where two contrary decisions of higher Courts consist-

ing of equal number of Judges are there, the later one should prevail. (See: *Gujarat Housing Board, Ahmedabad vs. Nagajibhai Laxmanbhai and others, AIR 1986 Guj, 81, U.P.S.R.T.C. vs. State Transport Appellate Tribunal, U.P., Lucknow and others, AIR 1977 All. 1 and Vasant Tatoba Hargude vs. Dikkaya Muttaya Pujari, AIR 1980 Bom. 341.)* It was opined in *Govindanaik G. Kalaghatigi vs. West Patent Press Company Limited and another, AIR 1980 Karnataka 92* as follows :

> "However, if both such Benches of the Supreme Court consist of equal number of Judges, the later of the two decisions should be followed by High Courts and other Courts."

Another view about the conflicting decisions of the higher Courts was that the question of earlier or later judgment hardly matters and what should be seen is that which of the judgment lay down the law more elaborately and accurately. (See : *M/s Indo Swiss Time Limited, Dundahera vs. Umrao and others, AIR 1981 Punjab and Haryana 213.*) In a decision of High Court of Madhya Pradesh rendered in case of *M.P. Municipal Corporation, Indore and others vs. Smt. Ratnaprabha Dhanda, Indore and another, 1989 MPLJ 20,* the same view was expressed that- 'In such a situation, where there is a direct conflict between the decisions of the Supreme Court of co-equal Benches, this Court has to follow the judgment, which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act'. This principle was again followed in the case of *Balkishan vs. State of M.P., 1994 MPLJ 381.* Later on, the Apex Court in case of *Indian Oil Corporation Ltd. Vs. Municipal Corporation and another, AIR 1995 SC 1480* overruled the judgment rendered by the High Court of Madhya Pradesh in *1989 MPLJ 20* and observed as follows :

> "It is also obvious that a Bench of 3-Judges only in the later decisions could not overrule the decision of this Court in Ratna Prabha, (1977) 1 SCR 1017 : (AIR 1977 SC 308) and, therefore, none of the later decisions could be so read to have that effect. The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in Ratna Prabha (AIR 1977 SC 308) (Supra) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do. The view taken by the Division Bench of the High Court in 1989 MPLJ 20 proceeds on a total misunderstanding of the law of precedents and Article 141 of the Constitution of India, to which it referred."

In another case *State of M.P. Vs. Balveer Singh, 2001 (2) MPLJ 644,* relying on the principles laid down in *Municipal Corporation's case (supra)* it was held that- 'Where there is a direct conflict between the decision of the Hon'ble Supreme Court in its co-equal Benches, the High Court has to follow the judgment, which appears to it to state the law more elaborately and more accurately and in confirmity with the scheme of the Act. The date of delivery of the judgment cannot be a guiding factor. The view expressed in this case is based on a judgment which was overruled by the Apex Court, therefore, has no binding force accord-

ing to the principle of per *incuraim* because the Court has reached on a decision without having knowledge of the decision of the Apex Court. The above mentioned view was contrary to the principle laid down in *Indian Oil Corporation's case (supra)* in respect of binding nature of two conflicting decisions of the higher Court. It clearly indicates that the decision of Supreme Court cannot be overruled by a Bench of co-ordinate strength in a later case. In another case *Commissioner of Sales Tax, J & K and others vs. Pine Chemicals Ltd. and others, (1995) 1 SCC 58* the Apex Court categorically observed in para 10 as follows :

> "10..... In our respectful opinion, the decision in *Indian Aluminium, (1976) 4 SCC 27* which was a decision rendered by a Bench of three learned Judges was binding upon the Bench which decided the *Pine Chemicals, (1992) 2 SCC 683.* (This Bench too comprised three learned Judges.)"

This principle has also been followed in *Jabalpur Bus Operators Association's case (supra).* Referring to the principle laid down in *Vijay Laxmi Sadho (Dr) v. Jagdish, (2001) 2 SCC 247,* the Apex Court in *State of Bihar vs. Kalika Kuer alias Kalika Singh and others, (2003) 5 SCC 448* reiterated that-

> "It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of 'different arguments' or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law."

Considering the above pronouncements, now it appears to be settled position that in case of two conflicting decisions of the Apex Court or the High Court rendered by Benches consisting of equal number of Judges, the earlier decision is binding on subordinate courts.

Next point is if there is a conflict between the two decisions, one is rendered by smaller Bench and another by a larger Bench, which should be followed by the subordinate courts? It has already been made clear that the subordinate courts cannot examine the merits of the decisions of the higher Courts. Relying on the decisions of the Apex Court rendered in *Union of India Vs. K.S. Subramanian, AIR 1976 SC 2433 and State of U.P. Vs. Ram Chandra Trevedi, AIR 1976 SC 2547,* the High Court of Madhya Pradesh in case of *Balkishan (supra)* held that-

> "But when such a conflict does arise, and it may simply not be possible to follow both kinds of decisions, the rule of precedent is that decision given by larger Bench of the Supreme Court should be followed in preference to decisions by smaller Benches of that Court. This practice has crystallized into a rule of law."

(Also see : *Commissioner of Sales Tax case (supra), Coir Board Ernakulum Kerala State and another vs. Indira Devai P.S.* and *others, (2000) 1 SCC 224 and Jabalpur Bus Operators Association's case (Supra).*

The decision of the Apex Court in *State of Bihar's case (supra)* has further clarified the matter in para 12 as follows :

> "In *Pradip Chandra Parija vs. Pramod Chandra Patnaik, (2002) 1 SCC 1,* it has been held that where a Bench consisting of two Judges does not agree with the judgment rendered by a Bench of three Judges, the only appropriate course available is to place the matter before another Bench of three Judges and in case the three- Judge Bench also concludes that the judgment concerned is incorrect then the matter can be referred to a larger Bench of five Judges."

Thus, it is a settled position that the decision of larger Bench is binding on the smaller Benches of the higher Courts and the question of earlier or later decisions does not arise at all. So, the subordinate Courts must follow the decision of larger Bench in place of decision of smaller Bench without going through the merits of cases.

WHEN NOT BINDING:

(A) Where a decision does not set out the facts or reasons for the conclusion, it is not a binding precedent. (See : *Government of India vs. Workmen of State Trading Corporation and others, (1997) 11 SCC 641.)* A decision of the co-ordinate Bench may be said to have ceased to be good law only if it is shown that it is due to any subsequent change in law. (See : *State of Bihar's case) (supra).*

(B) OBITER DICTA :

An obiter dictum means an observation made on a legal point in a decision but not arising in such manner as to require decision. Such obiter has no binding precedent but the observations made by the Apex Court will have considerable weight. (See : *Director of Settlements, A.P. and others vs. M.R. Apparao and another, (2002) 4 SCC 638*). But, mere casual expressions carry no weight at all and cannot be treated as an ex cathedra statement having the weight of authority. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative (See : *Divisional Controller, KSRTC vs. Mahadeva Shetty and another, (2003) 7 SCC 197.*)

(C) PER INCURIAM DECISIONS :

Per incuriam decisions do not have binding effect. (See : *Santosh v. Central Bank of India, 2004 (1) JLJ 158*) Per incuriam decisions means where the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction or when the decision is given in ignorance of the terms of a statute or a rule having statutory force. Referring the Halsbury's Laws of England, the Apex Court in *State of Bihar's case (supra)* examined the circumstances in which a decision is said to have been rendered per incuriam as follows :

> "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of House of Lords decision, in which case it must follow that decisions; or when

the decision is given in ignorance of the terms of a astute or rule having statutory force."

In para 9 it is further observed referring the case of *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., (2001) 6 SCC 356* that-

> "A prior decision of the Supreme Court on indentical facts and law binds the Court on the same points of law in a later case. In exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoing and result reached, the principle of per incuriam may apply."

It has also been made amply clear in *National Insurance Co. Ltd. Vs. Dwarika Prasad Singhal and others, 1998 (1) JLJ 372* as under :

> "What, however, I find is that in the circumstances which have been referred to hereinabove, the doctrine of *per incuriam* applies as in the case of *Puskhar Sharma (supra)* the Court has reached a decision in the absence of knowledge of a decision binding on it and had the Court had this material, it must have reached a contrary decision. This is *perincuriam.* The doctrine does not extend to a case where if a different argument had been placed before a Court or a different material had been placed before it, it might have reached a different conclusion. In the decision in the case of Pushkar Sharma (supra) the binding effects of the decisions of the Apex Court as well as the observations made therein and the earlier decision of this Court have not been taken into notice at all. This decision, is, therefore, clearly *perincuriam* and the defendant tenant cannot derive any advantage out of the same."

STARE DECISIS :

The rule of stare decisis means a principle of law settled by the Courts long ago and followed by series of decisions for a long period where the facts are substantially the same. It is binding in nature and should be strictly adhered by Courts. The settled position of law cannot be dislodged by this fact that another view is also possible. Where it is found that the established principle of law is outside the statute or common law or considerations of public policy demand the change, only the Apex Court can dislodge the settled position. (See : *Mishrilal (dead) by LRs. vs. Dhirendra Nath (dead) by LRs. and others, (1999) 4 SCC 11.* As far as subordinate courts are concerned, they should go by the principle of stare decisis as the settled legal position in binding on them unless it is overruled by the Apex Court.

RAITO DECIDENDI :

Ratio decidendi means the reason or the principle upon which the case has been decided by the higher Courts and only this much is binding on the subordinate courts while applying the earlier decision. The ratio decidendi can be ascertained by an analysis of facts. There is a difference between the ratio decidendi or the basis of reasons or the principles underlying a decision and the ultimate

relief granted or manner of disposal adopted in a given case. (See : *Executive Engineer vs. N.C. Budharaj, (2001) 2 SCC 72.)* In another case *Krishena Kumar vs. Union of India and others, (1990) 4 SCC 207* it has been observed :

> "20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decideni is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge- made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it."

It has been held in *Hanuman Datt and others vs. State of M.P. and others, 2002 (4) MPLJ 354-* "The ratio decidendi alone has the precedential efficacy". While applying the principle of ratio decidendi one must be careful because one different fact may lead to different conclusion of the two cases. Therefore, disposal of cases by blindly placing reliance on a decision is not proper. (See : *Hanuman Datt's case) (supra).* It has been laid down in *Divisional Controller's case (supra)* that while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision.

CONCLUSION :

1. In case of two conflicting decisions of two co-equal Benches, the earlier decision is binding on the subordinate courts.
2. The earlier decision cannot be overruled by the same strength of Judges in a later case. The later case should be referred to larger Bench.
3. In case of two conflicting decisions, one of larger Bench and another of smaller Bench, the decision rendered by larger Bench is binding and the point of earlier or later decision does not have any importance.
4. The smaller Bench cannot overrule the decision of a larger Bench and the proper course would be to refer the matter to another larger Bench of same strength and in view of that larger Bench, the judgment is incorrect, the matter can be referred to a more larger Bench.
5. The subordinate courts are not empowered to see in case of conflicting decisions that which of the judgment lay down the law more elaborately and accurately.
6. A decision which is per incuriam does not have binding effect at all.
7. Where facts or reasons not narrated in a decision, it cannot be treated as binding precedent.

8. Mere observation of higher Courts which is not related to that case, has no binding force.
9. The principle of stare decisis is always enforceable until and unless it is overruled by the Supreme Court.
10. Ratio decidendi alone has the precedential efficacy.
11. Ratio decidendi should not be applied blindly. The subordinate courts should carefully try to ascertain the principle laid down by the previous decision.

निष्कर्ष :

1. समान संख्या के न्यायाधीशों की दो न्यायपीठों के परस्पर विरोधी विनिश्चयों की स्थिति में पूर्ववर्ती विनिश्चय अधीनस्थ न्यायालयों पर बंधनकारी है।
2. पश्चात्वर्ती मामले में समान संख्या में न्यायाधीशों द्वारा पूर्ववर्ती मामले में दिये गये निर्णय को 'ओवररूल' नहीं किया जा सकता है। पश्चात्वर्ती मामला वृहत्तर न्यायपीठ को संदर्भित किया जाना चाहिये।
3. दो विरोधाभासी विनिश्चयों की दशा में, जिनमें से एक वृहत्तर न्यायपीठ का तथा दूसरा लघुतर न्यायपीठ का है, वहाँ वृहत्तर पीठ का विनिश्चय बंधनकारी होगा एवं यह महत्वहीन है कि कौन सा विनिश्चय पूर्व का अथवा बाद का है।
4. एक लघुतर न्यायापीठ, वृहत्तर न्यायपीठ के विनिश्चय को 'ओवररूल' नहीं कर सकती है तथा ऐसी स्थिति में उचित मार्ग यह होगा कि लघुतर पीठ उस मामले को समान संख्या की वृहत्तर पीठ को संदर्भित करे और यदि इस समान वृहत्तर पीठ की दृष्टि में पूर्ववर्ती वृहत्तर पीठ का विनिश्चय सही नहीं है तो मामला और वृहत्तर न्यायपीठ को संदर्भित किया जा सकता है।
5. अधीनस्थ न्यायालयों को विरोधाभासपूर्ण विनिश्चियों की दशा में यह देखने का कोई अधिकार नहीं है कि उनमें से कौन सा विनिश्चय स्थिति को अधिक विस्तार एवं सही रूप से प्रतिपादित करता है।
6. अनवधानता के कारण (पर इनक्यूरियम) विनिश्चय बंधनकारी प्रभाव नहीं रखता है।
7. जहाँ विनिश्चय के संबंध में तथ्य एवं कारण वर्णित नहीं है, वहाँ ऐसा विनिश्चय आबद्धकर पूर्व-निर्णय का प्रभाव नहीं रखेगा।
8. किसी निर्णय में की गई ऐसी टिप्पणी जो अन्तर्वलित विवाद से संबंद्ध है, आबद्धकर प्रभाव नहीं रखती है।
9. किसी विनिश्चय के विषय में निर्णीतानुसरण (स्टेयर डेसाइसिस) का सिद्धान्त सदैव लागू होता है जब तक सर्वोच्च न्यायालय द्वारा 'ओवररूल' न कर दिया जावे।
10. केवल विनिश्चय-आधार (रेश्यो डेसिडेन्डी) को ही पूर्व-निर्णय की प्रभावकारिता है।
11. विनिश्चय आधार (रेश्यो डेसिडेन्डी) को आंख बंद करके लागू नहीं किया जाना चाहिए। अधीनस्थ न्यायालयों को, पूर्ववर्ती विनिश्चय में अधिकथित सिद्धान्त को सावधानीपूर्वक अधिनिश्चित करने का प्रयास करना चाहिये।

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BI-MONTHLY TRAINING PROGRAMME

In all following five topics were sent by this Institute to the districts for bi-monthly training meeting of April 2004. The Institute has received various articles relating to these topics from different districts. None of the articles relating to topic no. 5 has been found of requisite standard for being published in "JOTI JOURNAL". Out of the articles relating to topic no. 1 to 4, one article relating to each topic is being included in this issue of "JOTI JOURNAL". The Institute is publishing its own article on topic no. 5 and another article on 'right to continue suit by L.Rs. coming within Section 23-J of M.P. Accommodation Control Act, 1961'.

Q.1 Whether the Court of Sessions can summon a person not already arrayed as an accused in a case. to stand trial as an accused, apart from the provisions of Section 319 Cr.P.C.?
क्या सत्र न्यायालय किसी व्यक्ति को, जो पूर्व से प्रकरण में अभियुक्त नहीं है, धारा 319 द.प्र.सं. की अधिकारिता के परे, विचारण हेतु आहूत कर सकता है ?

Q.2 Consequences of non-payment of arrears of rent/monthly rent by tenant in eviction suit when rate of rent/period of arrears is disputed?
निष्कासन प्रकरणों में किरायेदार द्वारा बकाया किराया/मासिक किराया की अदायगी में व्यतिक्रम का प्रभाव, जबकि किराये की दर/बकाया किराये की अवधि विवादित है ?

Q.3 What is the Nature and scope of protection available under Article 20 (3) of the Constitution of India to a person who is accused of an offence in relation to collection of physical/scientific evidence?
भौतिक/वैज्ञानिक साक्ष्य संग्रह के संबंध में किसी व्यक्ति जो कि किसी अपराध का अभियुक्त है, को भारतीय संविधान के अनुच्छेद 20 (3) के अन्तर्गत प्राप्त संरक्षण का स्वरूप एवं विस्तार क्या है ?

Q.4 Whether Delay can be condoned on the ground of lack of legal knowledge regarding limitation and/or mistake on the part of the Counsel ?
क्या परिसीमा के विषय में विधिक ज्ञान के अभाव और/अथवा अधिवक्ता की त्रुटि के आधार पर विलम्ब क्षमा किया जा सकता है ?

Q.5 Whether prosecution of a company is unsustainable in a case where offence is punishable with imprisonment and fine because being a legal person the company cannot be sent to jail to undergo the sentence?
क्या ऐसे मामले में जहां किसी अपराध के लिए कारावासीय तथा अर्थदंड का प्रावधान है, कंपनी के विरुद्ध अभियोजन संधारणीय नहीं होगा, क्योंकि विधिक व्यक्ति होने के कारण उसे दंड भुगतने हेतु कारावास नहीं भेजा जा सकता है ?

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सत्र न्यायालय की किसी व्यक्ति को, धारा 319 दं.प्र.सं. की अधिकारिता के परे, विचारण हेतु आहूत करने की शक्ति

न्यायिक अधिकारीगण
जिला झाबुआ

धारा 190 दं.प्र. सं. के अन्तर्गत मजिस्ट्रेट द्वारा निम्न परिस्थितियों में संज्ञान लिया जा सकता है :-

(अ) उन तथ्यों का, जिनसे ऐसा अपराध बनता है परिवाद प्राप्त होने पर,

(ब) ऐसे तथ्यों के बारे में पुलिस रिपोर्ट पर,

(स) पुलिस अधिकारी से भिन्न किसी व्यक्ति से प्राप्त इस इत्तला पर या स्वयं अपनी इस जानकारी पर कि ऐसा अपराध किया गया है।

धारा 193 द.प्र.सं. में सेशन न्यायालय को सीधे संज्ञान लेने से रोकते हुए प्रावधान किया गया है कि-

''इस संहिता द्वारा या तत्समय प्रवृत्त किसी अन्य विधि द्वारा अभिव्यक्त रूप में जैसा उपबंधित है उसके सिवाय, कोई सेशन न्यायालय आरंभिक अधिकारिता वाले न्यायालय के रूप में किसी अपराध का संज्ञान तब तक नहीं करेगा जब तक मामला इस संहिता के अधीन मजिस्ट्रेट द्वारा उसके सुपुर्द नहीं कर दिया गया है।''

मजिस्ट्रेट द्वारा अपराध का संज्ञान लेने के पश्चात यह विचार किया जाता है कि वह अपराध दं.प्र.सं. की प्रथम अनुसूची के अनुसार मजिस्ट्रेट द्वारा विचारण योग्य है अथवा अनन्यतः सेशन न्यायालय द्वारा विचारण योग्य है ? यदि अपराध अनन्यतः सेशन न्यायालय द्वारा विचारण योग्य होता है तब मजिस्ट्रेट द्वारा वह प्रकरण धारा 209 दं.प्र.सं. के प्रावधान के अनुसार, सेशन न्यायालय को उपार्पित कर दिया जाता है।

जब कोई प्रकरण उपरोक्तानुसार सेशन न्यायालय को सुपुर्द किया जाता है तब सेशन न्यायालय द्वारा दं.प्र.सं. के अध्याय 18 के अनुसार विचारण किया जाता है। विचारण का प्रारंभ साक्ष्य लेखन से प्रारंभ होता है। यदि साक्ष्य लेखबद्ध करते समय किसी साक्षी द्वारा यह कथन दिया जाता है कि किसी ऐसे व्यक्ति ने भी अपराध किया है जो सेशन न्यायालय के समक्ष अभियुक्त के रूप में नहीं है तो सेशन न्यायालय द्वारा धारा 319 द.प्र.सं. के अन्तर्गत कार्यवाही की जाती है। कभी-कभी ऐसे परिस्थितियां भी निर्मित होती हैं कि प्रथम सूचना रिपोर्ट अथवा धारा 161 दं.प्र.सं. के अन्तर्गत लेखबद्ध कथन में किसी व्यक्ति का नाम अपराध कारित करने वाले व्यक्ति के रूप में तो लिखा होता है परन्तु अभियोग पत्र में उस व्यक्ति का नाम अभियुक्त के रूप में नहीं होता है अर्थात उसके विरुद्ध अभियोग पत्र प्रस्तुत नहीं किया गया होता है और मजिस्ट्रेट द्वारा प्रकरण कमिट कर दिया जाता है। तब क्या सेशन न्यायालय द्वारा साक्ष्य लेखन प्रारंभ करने के पूर्व ही, ऐसे छोड़े गये व्यक्ति को अभियुक्त के रूप में आहूत किया जा सकता है? यहां यही विचारणीण बिन्दु है।

पूर्व में विधि इस प्रकार थी कि अभियुक्त कमिट किये जाते थे। वर्ष 1973 में धारा 193 में संशोधन हुआ और धारा 209 दं.प्र.सं. नई जोड़ी गई। इनके द्वारा प्रावधान किया गया कि केस कमिट किया जावे। माननीय उच्चतम न्यायालय ने न्याय दृष्टांत **जोगिन्दरसिंह वि. पंजाब राज्य ए.आई.आर. 1979 सु.को. 339 : 1979 क्रिमिनल लॉ जरनल 333 एस.सी.** में इस संशोधन की व्याख्या करते हुए मत व्यक्त किया था कि

जब प्रकरण कमिट होकर आया और सेशन न्यायालय ने संज्ञान ले लिया तब धारा 193 दं.प्र.सं. अन्य व्यक्ति को अभियुक्त बनाने में बाधक नहीं रह जाती। माननीय उच्चतम न्यायालय ने यह तर्क मान्य किया कि जब धारा 319 (4) (b) दं.प्र.सं. में इसी प्रकार नये जोड़े गये अभियुक्त के विरुद्ध कार्यवाही की जाती है तब भी पृथक से कमिटल की आवश्यकता नहीं है।

माननीय सर्वोच्च न्यायालय ने **किशुनसिंह वि. बिहार राज्य 1993 क्रि.लॉ.ज. 1700 सु.को,: 1993 ए.आई.आर एस.सी.डब्ल्यू. 771 : 1993 (2) एस.सी.सी. 16** में इसी प्रावधान की और अधिक व्याख्या की। इसमें कहा गया कि संज्ञान "अपराध" का लिया जाता है, "अपराधी" का नहीं। न्याय दृष्टांत **रघुवंश दुबे वि. बिहार राज्य ए.आई.आर. 1967 सु.को. 1167** का हवाला देते हुए यह कहा गया कि प्रकरण में जब अपराध का संज्ञान ले लिया गया हो तब यह न्यायालय का कर्तव्य है कि वह यह पता लगावे कि वास्तव में अपराधी कौन है ? इस प्रकरण में यह माना गया कि जब एक बार केस कमिट कर दिया गया तब यह प्रतिबंध समाप्त हो जाता है कि सेशन न्यायालय मूल क्षेत्राधिकार (original jurisdiction) के न्यायालय की भांति संज्ञान नहीं ले सकती। अर्थात इस न्याय दृष्टांत में यह माना गया था कि यदि प्रकरण कमिट होने के पश्चात सेशन न्यायालय को अभिलेख से यह ज्ञात होता है कि कोई अन्य व्यक्ति भी है, जिसने अपराध किया है और उस व्यक्ति को अभियुक्त नहीं बनाया गया है तब सेशन न्यायालय को यह अधिकार प्राप्त है कि वह उस व्यक्ति को अभियुक्त के रूप में आहूत कर सकता है। इसी न्याय दृष्टांत के आधार पर न्याय दृष्टांत **निसार वि. उ.प्र. राज्य 1994 (3) क्राइम्स 871 : (1995) 2 एस.सी.सी. 23 : 1995 ए.आई.आर.एस.सी. डब्ल्यू 1493** मे भी माननीय उच्चतम न्यायालय ने यही अभिनिर्धारित किया।

माननीय सर्वोच्च न्यायालय के न्याय दृष्टांत **राजकिशोर वि. बिहार (1996) 4 एस.सी.सी. 495** के कारण कुछ अलग स्थिति बनी जिसे माननीय उच्चतम न्यायालय की पूर्ण पीठ ने **रंजीत सिंह वि. पंजाब राज्य, ए.आई.आर. 1998 एस.सी. 3140** के द्वारा अब स्पष्ट कर दिया गया है तथा इस प्रकरण में यह माना कि धारा 319 दं.प्र.सं. में जहां "साक्ष्य" परिकल्पित है वहां साक्ष्य से तात्पर्य सेशन न्यायालय के समक्ष विचारण के दौरान प्रस्तुत की गई साक्ष्य से है, कमिटल न्यायालय के समक्ष प्रस्तुत साक्ष्य से नहीं। सेशन न्यायालय के समक्ष कार्यवाही तब प्रारंभ होती है जब धारा 209 दं.प्र.सं. की औपचारिकताएं पूरी करके प्रकरण कमिट कर दिया जाता है। कमिटल के पश्चात धारा 225,228 द.प्र.सं. की स्टेज आती है। इस स्टेज पर सेशन न्यायालय उन्हीं अभियुक्तों के विरुद्ध कार्यवाही करेगा जो धारा 209 दं.प.सं. के अन्तर्गत भेजे गये हैं या जो अभियुक्त धारा 209 के अन्तर्गत उपस्थित हुआ है या न्यायालय के समक्ष लाया जा सकता है। इसके पश्चात अभियुक्तों को डिस्चार्ज करने की (धारा 227 दं.प्र.सं.) अथवा चार्ज लगाने की (धारा 228 दं.प्र.सं.) प्ली लेखबद्ध करने (धारा 229 दं.प्र.सं.) की स्टेज आती है। तत्पश्चात साक्ष्य लेने की (धारा 230 तथा 231 दं.प्र.सं.) की स्टेज आती है। धारा 209 दं.प्र.सं. के अन्तर्गत कमिटल से लेकर साक्ष्य प्रारंभ करने की स्टेज (धारा 230 दं.प्र.सं.) तक उसी अभियुक्त के संबंध में कार्यवाही की जाती है जो धारा 209 दं.प्र.सं. के अन्तर्गत भेजा गया है। तब तक सेशन न्यायालय के लिए किसी व्यक्ति का अभियुक्त के रूप में जोड़ने की कोई मध्यवर्ती स्टेज नहीं है।

इस प्रकार जहां एक बार सेशन न्यायालय ने कमिटल आदेश के आधार पर संज्ञान ले लिया तब उसके पश्चात किसी व्यक्ति को अभियुक्त के रूप में जोड़े जाने की शक्ति प्रदान करने वाली स्टेज धारा 319 दं.प्र.सं. के अन्तर्गत साक्ष्य एकत्रित करने के पश्चात ही आती है। इसके अलावा सेशन न्यायालय को किसी व्यक्ति को

अभियुक्त बनाने की अन्य कोई शक्ति प्राप्त होने का अन्य कोई प्रावधान नहीं है। परन्तु जहां अन्वेषण में प्रस्तुत सामग्री से यह स्पष्ट होता है कि किसी व्यक्ति की सकारात्मक अन्तर्ग्रस्तता है जिसे किसी त्रुटि या लोप के कारण अभियुक्त नहीं बनाया गया है तब सेशन न्यायालय के लिये मार्ग खुला है कि वह संपूर्ण तथ्यों की विस्तृत रिपोर्ट, उच्च न्यायालय को भेजें। उच्च न्यायालय अपनी अन्तर्निहित शक्तियों अथवा पुनरीक्षण शक्तियों का प्रयोग करते हुए, मजिस्ट्रेट को निर्देश देंगे कि ऐसे व्यक्ति को आहूत कर कमिटल आदेश में सुधार करें। पूर्ण पीठ के इस न्यायदृष्टांत के द्वारा, किशुनसिंह वाले उपरोक्त प्रकरण में प्रतिपादित सिद्धान्त उलट दिया गया है।

अमरेश श्रीवास्तव वि. म.प्र. राज्य 1999 (1) एम.पी.डब्ल्यू एन. 228, तथा महेन्द्रसिंह वि. म.प्र. राज्य 1999 (2) एम.पी. डब्ल्यू. एन. 12 में भी रणजीत सिंह वाले उपरोक्त पूर्णपीठ के निर्णय का अवलंबन लेते हुए, कहा गया है कि नया अभियुक्त चालान किये जाने के प्रारंभिक प्रक्रम पर समन नहीं किया जा सकता। ऐसे अभियुक्त को साक्ष्य के अभिलेखन के पश्चात धारा 319 के अधीन सामग्री के आधार पर दोषी पाये जाने के पश्चात ही समन किया जा सकता है। राजेन्द्रसिंह वि. एडमिनिस्ट्रेशन 2001 (2) एम.पी. डब्ल्यू एन. 105 में भी न्यायालय ने माना है कि ऐसे व्यक्ति के विरुद्ध आदेशिका जारी की जाना जो आरोप-पत्रित नहीं हो, विचारण आरंभ होने तथा कुछ साक्ष्य अभिलिखित होने के पश्चात ही होना चाहिए, धारा 319 (3) दं.प्र.सं. के अन्तर्गत आवेदन आरोप की विरचना के प्रक्रम पर ग्रहण नहीं किया जा सकता।

वर्तमान स्थिति यह है कि सेशन न्यायालय द्वारा किसी व्यक्ति को, जो पूर्व से प्रकरण में अभियुक्त नहीं है, धारा 319 दं.प्र.सं. की अधिकारिता के परे, विचारण हेतु आहूत नहीं किया जा सकता।

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सांस्थानिक पूरक आलेख

उक्त आलेख में विधिक स्थिति को यद्यपि विधि सम्मत रूप में प्रस्तुत किया गया है लेकिन दो महत्वपूर्ण न्याय दृष्टांतों तथा धारा 199 (2) दण्ड प्रक्रिया संहिता के प्रावधानों का संदर्भ इस आलेख में न होने के कारण विधिक स्थिति को किंचित अधिक स्पष्ट करने के आशय से सांस्थानिक पूरक आलेख दिया जा रहा है :-

1. माननीय उच्चतम न्यायालय ने शशिकांत विरुद्ध तारकेश्वर सिंह (2002) 5 SCC 738 (द्विसदस्यीय पीठ) में यह अभिनिर्धारित किया है कि मजिस्ट्रेट के द्वारा धारा 209 दं.प्र.सं. के अन्तर्गत मामला सत्र न्यायालय को उपार्पित कर दिए जाने के उपरांत सत्र न्यायालय की संज्ञान लेने की अधिकारिता के विषय में धारा 193 द.प्र.सं. का वर्जन समाप्त हो जाता है तथा सत्र न्यायालय को मूल न्यायालय की पूर्ण एवं असीमित अधिकारिता के अन्तर्गत ऐसे व्यक्ति के विरुद्ध संज्ञान लेने का अधिकार भी मिल जाता है जिसकी संलिप्तिता अभिलेख के आधार पर प्रथम दृष्टया प्रगट होती है, लेकिन जो अभियोग पत्र में नामित नहीं है।

2. उक्त अभिमत रंजीत सिंह विरुद्ध पंजाब राज्य ए.आई.आर. 1998 सु.को. 3148 में माननीय उच्चतम न्यायालय द्वारा त्रिसदस्यीय वृहतर पीठ द्वारा दिये गये इस विनिश्चय के विपरीत है कि उपार्पण के पश्चात सत्र न्यायालय धारा 193 दण्ड प्रक्रिया संहिता के वर्जन के कारण किसी ऐसे व्यक्ति के विरुद्ध जिसे अभियोग पत्र में नामित नहीं किया गया है, संज्ञान लेने के लिए सशक्त नहीं है। आबद्धकारी पूर्व निर्णय के सिद्धान्त के परिप्रेक्ष्य में रंजीत सिंह (पूर्वोक्त) के मामले में वृहतर पीठ द्वारा इस बारे में किया गया विनिश्चय ही आबद्धकर प्रभाव रखता है।

3. डी.आर. महेश्वर विरुद्ध मध्यप्रदेश राज्य 2001 (2) एम पी एल जे 519 के मामले में किशुन सिंह विरुद्ध बिहार राज्य 1993 (2) एस.सी.सी. 16 को अनुसरित करते हुए यह प्रकट किया गया है कि उपार्पण हो जाने के बाद धारा 193 दण्ड प्रक्रिया संहिता का वर्जन सत्र न्यायालय की संज्ञान लेने की अधिकारिता में बाधक नहीं है। लेकिन उक्त अवलंबित मामले के विनिश्चय को चूंकि माननीय उच्चतम न्यायालय की त्रिसदस्यीय वृहत्तर पीठ ने रंजीत सिंह (पूर्वोक्त) के मामले में अभिव्यक्ततः पलट दिया है अतः ऐसी स्थिति में डी.आर. महेश्वर (पूर्वोक्त) में प्रकट किया अभिमत भी आबद्धकर नहीं माना जा सकता है।

खंडवा जिले के न्यायिक अधिकारीगण की ओर से प्राप्त आलेख में धारा 199 (2) दण्ड प्रक्रिया संहिता के प्रावधानों के संदर्भ में किया गया उल्लेख आलेख को पूर्णता प्रदान करने की दृष्टि से यहां पर किया जाना उचित प्रतीत होता है। आलेख के सुसंगत अंश मूलतः निम्नवत् है :-

यह उल्लेखनीय है कि माननीय उच्चतम न्यायालय द्वारा रंजीतसिंह के प्रकरण में द.प्र.सं. की धारा-173, 209, 225, 226, 227, 228, 229, 230, 231 एवं 319 पर विचार किया गया था, लेकिन इसमें धारा - 199 (2) द.प्र.सं. पर विचार नहीं किया गया था। धारा 199 (2) दं.प्र.सं. इस प्रकार है :

> इस संहिता में किसी बात के होते हुए भी जब भारतीय दंड संहिता (1860 का 45) के अध्याय 21 के अधीन आने वाले किसी अपराध के बारे में यह अभिकथित है कि वह ऐसे व्यक्ति के विरुद्ध, जो ऐसा अपराध किये जाने के समय भारत का राष्ट्रपति, या भारत का उपराष्ट्रपति या किसी राज्य का राज्यपाल या किसी संघ या राज्यक्षेत्र का प्रशासक संघ या किसी राज्य का या किसी संघ राज्यक्षेत्र का मंत्री अथवा संघ या किसी राज्य के कार्यकलापों के संबंध में नियोजित अन्य लोक सेवक था, उसके लोक कृत्यों के निर्वहन में उसके आचरण के संबंध में किया गया है तब सेशन न्यायालय, ऐसे अपराध का संज्ञान, उसको मामला सुपुर्द हुए बिना, लोक अभियोजक द्वारा किये गये लिखित परिवाद पर कर सकता है।

इस प्रकार धारा 199 (2) दं.प्र.सं. में भारतीय दंड संहिता के अध्याय- 21 (मानहानि) से संबंधित प्रकरणों में बिना उपार्पण के ही लोक अभियोजक की लिखित परिवाद पर संज्ञान लेने की अधिकारिता सत्र न्यायालय को दी गयी है। यदि ऐसी परिस्थिति निर्मित होती है कि लोक अभियोजक द्वारा किसी एक व्यक्ति (धारा-199 (2) में वर्णित) के विरुद्ध परिवाद पेश किया जाता है और उस पर सत्र न्यायालय उस व्यक्ति के विरुद्ध संज्ञान ले लेता है, लेकिन विचारण प्रारंभ होने के पहले वह व्यक्ति (कथित पीड़ित) जिसकी वस्तुतः मानहानि हुई है, न्यायालय में उपस्थित होकर न्यायालय के समक्ष या लोक अभियोजक को ऐसी साक्ष्य निविदित करता है, जिससे यह दर्शित होता है कि परिवाद में उल्लेखित अभियुक्त से भिन्न अन्य व्यक्ति के विरुद्ध भी कार्यवाही के लिये पर्याप्त आधार है तो सत्र न्यायालय ऐसे व्यक्ति के विरुद्ध संज्ञान ले सकता है। रंजीतसिंह के प्रकरण में माननीय उच्चतम न्यायालय ने धारा 199 (2) द.प्र.सं. के प्रावधान पर चर्चा नहीं किया है, ऐसी दशा में धारा 199 (2) दं.प्र.सं. की परिधि में आने वाले प्रकरणों में सत्र न्यायालय को किसी ऐसे व्यक्ति के विरुद्ध जो प्रकरण में पूर्व से अभियुक्त नहीं है, अपराध के संज्ञान लेने में कोई बाधा नहीं है।

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किराये की दर/ शेष किराये की अवधि विवादित होने पर किराया अदायगी में व्यतिक्रम का प्रभाव

न्यायिक अधिकारीगण
जिला बालाघाट

सामान्यतयः भवन-स्वामी और किराएदारों के बीच किराएदारी उनके बीच हुई संविदा की शर्तों से शासित होती है। मध्यप्रदेश स्थान नियंत्रण अधिनियम- 1961 की धारा 12 भवन-स्वामी द्वारा किराएदारों की मनमाने आधार पर बेदखली पर निर्बंधन लगाता है। धारा 12 (1) स्थान नियंत्रण अधिनियम के मुताबिक "किसी अन्य विधि या संविदा में अंतरविष्ट किसी प्रतिकूल बात के होंते हुए भी, किसी किराएदार के विरुद्ध, किसी स्थान से उसकी बेदखली के लिए सिविल न्यायालय में कोई वाद धारा-12 (1) की उपधारा- ए, बी, सी, डी, ई, एफ, जी, एच, आई, जे, के, एल, एम, एन, ओ, पी, में दर्शित किसी एक या एक से अधिक आधारों पर ही प्रस्तुत किया जावेगा अन्यथा नहीं।" इस प्रकार भवन-स्वामी को धारा 12 (1) स्थान नियंत्रण अधिनियम में दिए गए आधार पर ही किराएदार के विरुद्ध बेदखली का वाद लाने के लिए निबंधित या सीमित किया गया है, परन्तु इस अधिनियम में किराए की राशि प्राप्त करने के भवन स्वामी के अधिकार को भी अधिनियम की धारा- 13 के द्वारा संरक्षित किया गया है। कोई भी किराएदार बेदखली के विरुद्ध सुरक्षा तभी प्राप्त कर सकता है, जब वह धारा 13 के आज्ञापक प्रावधान की शर्तों का पालन करते हुए किराया जमा या अदा करता है। जैसे ही किराएदार धारा-13 की शर्तों का पालन करने में चूक करता है वैसे ही वह धारा-12 में प्राप्त अपने अधिकार को खो देता है। इस प्रकार धारा-13 स्थान नियंत्रण अधिनियम के प्रावधानों के द्वारा जहाँ एक तरफ भवन-स्वामी के किराया प्राप्त करने के अधिकार को संरक्षित किया गया है, वहीं किराएदार द्वारा बिना किराया अदा किए निष्कासन के बाद के निपटारे को विलम्बित करने की प्रवृत्ति पर भी रोक लगाई गई है।

इस प्रश्न कि "निष्कासन में किराएदार द्वारा बकाया किराया/मासिक किराया की अदायगी में व्यतिक्रम का प्रभाव, जहाँ किराए की दर/ बकाया किराया की अवधि विवादित है ?" के संबंध में इस अधिनियम की धारा 12 (1) (ए), 12 (3), 13 (1), 13 (2), 13 (5) व 13 (6) को एक साथ देखा जाना अपेक्षित है। मध्यप्रदेश स्थान नियंत्रण अधिनियम की धारा 12 (1) (ए) के मुताबिक यदि किराएदार ने उससे वैध रूप से वसूली योग्य भाड़ा के सम्पूर्ण बकाया का उस तारीख के, जिसको कि भाड़ा की बकाया के लिए मांग की सूचना भू-स्वामी द्वारा उस पर विहित रीति में तामील की गई हो, दो मास के भीतर न तो संदाय किया है और न निविदत्त ही किया है, तो भू-स्वामी इस आधार पर किराएदार के विरुद्ध बेदखली का वाद ला सकता है। अतः इस प्रावधान से स्पष्ट है कि किराएदार बकाया किराए की वसूली का नोटिस प्राप्त करने से दो माह के अंदर सम्पूर्ण बकाया किराया अदा करके बेदखली की कार्यवाही से बच सकता है। यदि किरायेदार द्वारा नोटिस प्राप्त करने के दिनाँक से दो माह के अंदर बकाया संपूर्ण किराया अदा नहीं किया जाता, तभी उसके विरुद्ध धारा 12 (1) (ए) के आधार पर दावा लाया जा सकता है। जब अधिनियम की धारा 12 (1) (ए) के आधार पर भवन-स्वामी द्वारा दावा दायर कर दिया जाता है, तब भी अधिनियम की धारा 13 (1) के तहत किराएदार को बकाया किराया अदा करने का एक और अवसर प्राप्त होता है। अधिनियम की धारा 13 (1) के मुताबिक दावा दायर होने के पश्चात जब किराएदार को दावा दायर किए जाने का समंस या सूचना प्राप्त होती है तो वह सूचना की तामिली होने के एक माह के अंदर अथवा न्यायालय को आवेदन किए जाने पर न्यायालय द्वारा जो समय अनुज्ञात किया जावे, उसके अंदर सम्पूर्ण बकाया किराया न्यायालय में निक्षेप या भवन स्वामी को संदाय करेगा तथा उसके पश्चात भाड़ा की समतुल्य राशि का

निक्षेप या संदाय उस वाद/अपील या कार्यवाही का विनिश्चय होने तक मासानुमास प्रत्येक उत्तरवर्ती मास की 15 तारीख तक करता रहेगा।

परन्तु अधिनियम की धारा 13 (2) के मुताबिक यदि किसी वाद या कार्यवाही में भाड़े की उस रकम के बारे में कोई विवाद हो, जो किराएदार द्वारा देय है तो न्यायालय या तो भू-स्वामी द्वारा या किराएदार द्वारा इस संबंध में अभिवचन किए जाने पर, जो कि ऐसे वाद या कार्यवाही के दौरान सर्वप्रथम अवसर पर किया जावेगा कि उस स्थान के संबंध में युक्तियुक्त अनंतिम भाड़ा नियत करेगा और तब धारा 13 (1) के उपबंध के अनुसार भाड़ा निक्षिप्त या संदत्त किया जावेगा। यदि किराएदार द्वारा अधिनियम की धारा 13 (1) या 13 (2) के पालन में किराया निक्षेप या संदाय कर दिया जाता है तो उसे अधिनियम की धारा 13 (5) एवं 12 (3) का संरक्षण प्राप्त हो जाता है और उस स्थान के कब्जे की पुनः प्राप्ति के लिए न्यायालय द्वारा कोई डिक्री या आदेश भाड़ा का संदाय करने में किराएदार द्वारा व्यतिक्रम के आधार पर नहीं किया जावेगा।

यदि किराएदार अधिनियम की धारा 13 (1) या 13 (2) द्वारा अपेक्षित किए गए अनुसार किराए की रकम निक्षिप्त या संदत्त करने में चूक करता है तो न्यायालय बेदखली के विरुद्ध उसकी प्रतिरक्षा समाप्त किए जाने (Defence struck of) का आदेश दे सकेगा और वाद/अपील या कार्यवाही की सुनवाई करने के लिए अग्रसर होगा। अतः निष्कर्ष रूप में यह कहा जा सकता है कि यदि किराएदार निष्कासन के प्रकरण में अधिनियम की धारा 13 (1) एवं 13 (2) के पालन में बकाया किराया या मासिक किराया की अदायगी में व्यतिक्रम करता है तो वह अधिनियम की धारा 12 (3) एवं 13 (5) के प्रावधानों का संरक्षण प्राप्त नहीं कर सकेगा और न्यायालय द्वारा उसकी प्रतिरक्षा का अधिकार समाप्त कर दिया जावेगा। परन्तु यदि किराए की दर विवादित है तो न्यायालय द्वारा धारा 13 (2) के तहत अनंतिम भाड़ा तय किया जावेगा तथा न्यायालय द्वारा अनंतिम भाड़ा तय किए जाने के बाद किराएदार धारा 13 (1) के तहत किराए की अदायगी करने के लिए आबद्ध होगा। किराए की दर विवादित होने की दशा में जब तक न्यायालय द्वारा अनंतिम भाड़ा तय नहीं किया जाता, तब तक अधिनियम की धारा 13 (1) का प्रावधान किराएदार पर बंधनकारी नहीं होगा।

"जमनालाल एवं अन्य विरुद्ध राधेश्याम", 2000 (2) जे.एल.जे. 1 के मामले में माननीय उच्चतम न्यायालय ने यह प्रतिपादित किया है कि यदि भाड़े की दर विवादित नहीं है और केवल बकाया राशि विवादित है तो यह विवाद अधिनियम की धारा 13 (2) के विवाद के अंतर्गत नहीं आता है। इसी मामले में माननीय उच्चतम न्यायालय ने यह भी प्रतिपादित किया है कि भाड़ा प्राप्त करने की हकदारी के बारे में यदि किराएदार द्वारा तुच्छ विवाद (Frivolus dispute) उठाया जाता है तो भी न्यायालय द्वारा किराएदार की प्रतिरक्षा समाप्त की जा सकती है। यदि किराएदार द्वारा बकाया किराया की अवधि का विवाद किया जाता है तो भी यह विवाद धारा 13 (2) के तहत नहीं आता है। बकाया किराया की अवधि का निराकरण संक्षिप्त प्रक्रिया के तहत न किया जाकर गुण-दोष के आधार पर ही किया जाना अपेक्षित है।

यदि भूमि-स्वामी द्वारा अधिनियम की धारा 12 (1) (ए) से 12 (1) (पी) तक के किसी आधार पर बेदखली का वाद लाया जाता है तो किराएदार भाड़े की समस्त बकाया राशि एवं वाद लंबित रहने के दौरान भाड़ा संदत्त या निक्षिप्त करने के लिए अधिनियम की धारा 13 (1) के तहत आबद्ध हो जाता है। अधिनियम की धारा 13 का उपबंध किराएदार और भवन-स्वामी दोनों के लिए ही लाभप्रद है क्योंकि इसके द्वारा किराएदार को भाड़ा का निक्षेप या संदाय किए जाने पर बेदखली से संरक्षण दिया गया है तो भवन-स्वामी को मुकदमेबाजी से पूर्व की अवधि के लिए अथवा वाद के लंबन के दौरान भाड़ा प्राप्त करने का भी अधिकार दिया गया है।

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NATURE AND SCOPE OF PROTECTION AVAILABLE TO AN ACCUSED IN RELATION TO COLLECTION OF EVIDENCE

JUDICIAL OFFICERS
District, Shahoal

PHOLOGUE: Our Constitution in Articles 20 and 22 provides certain safeguards to the persons accused of crimes. The protection secured by Article 20 may conveniently be considered under the-

(i) Ex-post Facto Laws.

(ii) Double jeopardy.

(iii) Self- incrimination.

Clause (3) of Article 20 of Indian Constitution declares that "No person accused of any offence shall be compelled to be a witness against himself". The law as laid down in this respect by Hon'ble the Supreme Court in *Balkishna A. Devidayal vs. State of Mahashtra, (1980) 4 SCC 600* is that in order to avail the protection of Article 20 (3), three conditions must be satisfied. Firstly, the person must be accused of an offence, *Secondly*, the element of compulsion to be a witness should be there and *Thirdly,* it must be against himself. All the three ingredients must necessarily exist before protection of Article 20 (3) is available. If any of these ingredients does not exist, the Article 20 (3) cannot be invoked.

PROHIBITION AGAINST SELF INCRIMINATION :-

1. The privilege under Clause (3) is confined only to an accused. It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. It is, however, not necessary, to avail the privilege, that actual trial or inquiry should have commenced before the Court or Tribunal. Thus a person against whom the F.I.R. has been recorded by the police and investigation ordered by the Magistrate can claim benefit of the provision. The aforesaid was laid down by the Supreme Court in *M.P. Sharma Vs. Satish Chandra, A.I.R. 1954 S.C. 300.*

2. The Guarantee in Article 20 (3) is against the compulsion "To be a Witness". The Hon'ble Supreme Court in the Case of *M.P. Sharma (supra)* emphasised, "To be a witness" in its widest significance as including not merely making of oral or written statement but also production of document or giving materials which may be relevant at trial to determine the guilt or innocence of the accused. But in the leading case of *State of Bombay Vs. Kathi Kalu, A.I.R. 1961 S.C. 1808,* a Bench of the Supreme Court consisting of eleven Judges disagreeing with the interpretation in the earlier case of *M.P. Sharma* (supra), defined the scope of protection thus, "it is well established the clause (3) of Article 20 is directed against self-incrimination by an accused person. The self-incrimination must mean conveying information based upon the "Personal knowledge' of the person giving the information and cannot include merely the mechanical process

of producing documents in court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his 'Personal knowledge'. For example- The accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such document with a view to comparision of the writing or the signature or the thumb impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. Hence giving thumb impressions or impressions of foot or impressions of his fingers or palms or specimen signatures or showing parts of the body by way of identifications are not included in expression 'To be a witness'."

On the same ground the Court declared Sec. 27 of the Evidence Act valid. The information furnished by an accused person after his arrest to the investigating officer which leads to the discovery of articles u/s 27 of Evidence Act is admissible in evidence and does not in any way offend Article 20 (3) of the Constitution. But if the Police has obtained the statement by third degree methods, the Statement would be barred under Article 20 (3) of the Constitution.

On the other hand referring to the powers conferred u/s 53 Cr.P.C. the Andhra Pradesh High Court in case *Ananth Kumar Vs. State of Andhra Pradesh, 1977 Cr.L.J. 1797* has held that although there is no clear provision in Cr.P.C. for taking blood samples yet there is no prohibition for taking such blood samples of an accused by exercising powers u/s 53 of Cr.P.C. In this respect a Division Bench of Allahabad High Court in *Jamshed Vs. State of U.P., 1976 Cr.L.J. 1680* was of the view that though there was no specific provision in Indian Law permitting taking of blood yet in criminal cases an examination of person can be made u/s 53 (1) of the Cr.P.C., which shall include the taking of blood samples, including an examination of an organ inside the body. The court drew the aforesaid conclusion perforce the provisions of Sec. 367 (1) and Sec. 482 of the Cr.P.C. It also held that there is nothing repulsive or shaking to conscience in taking the blood of an accused person in order to establish his guilt, and so far as the question of causing hurt is concerned, even causing some pain may be permissible u/s 53 Cr.P.C. To bring the evidence, within the inhibition of Art. 20 (3), it must be shown that the accused was compelled to make the statement having a material bearing on the criminality of the maker (*see : State of Bombay Vs Kathi Kalu, AIR 1961 S.C. 1808*)

EPILOGUE

By above discussion and Law laid down by the Apex Court in *State of Bombay Vs. Kathi Kalu, A.I.R. 1961 S.C. 1808,* it is clear that the protection of an accused in Art. 20 (3) is against self-incrimination by such accused person. Self-incrimination must mean conveying information based upon the 'Personal Knowledge' of the person giving the information and cannot include the collection of physical/ scientific evidence.

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विधिक ज्ञान का अभाव/अधिवक्ता की त्रुटि-परिसीमा में विलम्ब क्षमा योग्य ?

न्यायिक अधिकारीगण
जिला छतरपुर

"क्या परिसीमा के विषय में विधिक ज्ञान के अभाव/अथवा अधिवक्ता की त्रुटि के आधार पर विलम्ब क्षमा किया जा सकता है ? यह इस लेख में विचारणीय बिन्दु है। यह विदित है कि विधि दो प्रकार की है :-

(1) सारवान विधि (2) प्रक्रियात्मक विधि

1. सारवान विधि के अधीन अधिकार, दायित्व एवं आपराधिक कृत्य के लिये दायित्व का विनिश्चय किया जाता है, जबकि प्रक्रियात्मक विधि के अधीन उक्त विनिश्चय तक न्यायालय पहुँचता है। न्यायालय के लिए न्यायिक कार्य साध्य है तथा प्रक्रियात्मक विधि उस साध्य तक पहुँचने का साधन है। इसलिए प्रक्रियात्मक विधि के प्रयोग में न्यायालय को इतना कठोर नहीं होना चाहिए कि न्याय का उद्देश्य ही विफल हो जाये।

2. विचाराधीन समस्या परिसीमा अधिनियम, 1963 की धारा-5 से संबंधित है, जिसे आगे केवल 'अधिनियम' से संबोधित किया जा रहा है। 'अधिनियम' को विशुद्ध रूप में प्रक्रियात्मक विधि कहा जा सकता है। उक्त विधि में किसी अधिकार एवं दायित्व का विनिश्चय होना नहीं कहा जा सकता है। अधिनियम की धारा-5 निम्न है :-

"कोई भी अपील या कोई भी आवेदनपत्र जो आदेश-21 व्य.प्र.सं. के प्रावधानों के अंतर्गत न हो, निर्धारित समय सीमा के बाद भी स्वीकार किया जा सकता है, यदि अपीलार्थी या आवेदक न्यायालय का समाधान कर देता है कि अपील या आवेदन पत्र समय सीमा में प्रस्तुत नहीं किये जाने का पर्याप्त कारण था।"

स्पष्टीकरण :- यह तथ्य कि अपीलार्थी या आवेदक उच्च न्यायालय के किसी आदेश, प्रक्रिया या निर्णय से समय सीमा की गणना में दिग्भ्रमित हो गया था, इस धारा के अन्तर्गत पर्याप्त कारण हो सकता है।

3. उक्त प्रावधान से यह स्पष्ट है कि धारा-5 का प्रावधान वादों एवं निष्पादन की कार्यवाहियों के लिए लागू नहीं होता है। कहने का आशय यह है कि वाद एवं निष्पादन कार्यवाहियों के निर्धारित अवधि सीमा में पेश न होने की स्थिति में भले ही उसके लिए सुदृढ़ एवं पर्याप्त उचित कारण बताया जाये, फिर भी न्यायालय को विलम्ब से पेश किये गये वाद या निष्पादन कार्यवाही को क्षमा करने का अधिकार नहीं है। धारा-5 के अंतर्गत अपील एवं आवेदनपत्रों के विलम्ब से पेश होने व उसके लिए पर्याप्त उचित कारण बताये जाने की स्थिति में न्यायालय विलम्ब को क्षमा करने की अधिकारिता रखता है।

4. जैसा कि पूर्व में कहा गया है कि प्रक्रियात्मक विधि के क्रियान्वयन में न्यायालय का रुख अधिक कठोर नहीं होना चाहिए क्योंकि न्यायिक कार्य का मुख्य उद्देश्य पक्षकारों के मध्य विवादित प्रश्नों का गुण-दोष पर निराकरण किया जाना है न कि तकनीकी आधार पर न्यायालय में संस्थित कार्यवाही को समाप्त करना। विलम्ब से कार्यवाही संस्थित किये जाने का आधार सद्भावनापूर्ण, पर्याप्त व उचित कारण पर आधारित है और यदि न्यायालय उससे संतुष्ट है तो विलम्ब को क्षमा किया जा सकता है , जिससे कि मामले का निराकरण उसके गुण-दोष पर किया जा सके व पक्षकारों को मामले के गुण-दोष के निराकरण से वंचित न होना पड़े।

5. विधि के इस सूत्र, कि 'विधि की अज्ञानता क्षम्य नहीं है', से सभी भली-भांति परिचित हैं, लेकिन विधि का उक्त सूत्र मुख्यतः सारवान विधि के लिए अधिक महत्व रखता है क्योंकि सारवान विधि के बाबत् यह नहीं कहा जा सकता है कि उक्त विधि का व्यक्ति को ज्ञान नहीं था और उसकी अज्ञानता का कोई पक्षकार लाभ नहीं उठा सकता है। उदाहरण के तौर पर किसी भी पक्षकार को यह कहने का अधिकार नहीं है कि उसे यह मालूम नहीं था कि अवयस्क से की जाने वाली संविदा शून्य होती है या नहीं, लेकिन उक्त विधि का सूत्र प्रक्रियात्मक विधि, खासकर धारा-5, के लिए लचीले स्वरूप का ही प्रभाव रखेगा क्योंकि यदि सूत्र का अधिनियम की धारा-

5 के लिए कठोरता से पालन किया गया तो उस स्थिति में, न्याय का उद्देश्य ही विफल हो सकता है। कई अशिक्षित व ग्रामीण क्षेत्र के पक्षकार ऐसे भी हो सकते हैं कि जिन्हें अपील या आवेदनपत्र पेश करने की अवधि सीमा के संबंध में ठीक से जानकारी न रहे और यदि उनकी उक्त भूल/त्रुटि सद्भावनापूर्ण होना न्यायालय के मत में पाई जाये तो ऐसे विलम्ब को क्षमा किया जा सकता है। *विनीता प्रकाश कुमार गवाने विरूद्ध प्रकाश कुमार गवाने, 1998 (1) एम.पी.एल.जे. पृष्ठ 320* में माननीय उच्च न्यायालय ने यह उल्लेख किया है कि विलम्ब के लिए कई कारण हो सकते हैं, उनमें एक विधि की अज्ञानता को भी क्षमा के लिए आधार होना कहा गया है।

6. यद्यपि माननीय उच्च न्यायालय ने न्याय दृष्टांत *चंद्रकांता बाई बनाम तुलसीराम, 1974 जे.एल.जे. नोट-97 (एम.पी.)* तथा *नन्दा बनाम लक्ष्मण, 1982 एम.पी. वीकली नोट्स 4 (एम.पी.)* में मात्र विधि की अज्ञानता को विलम्ब क्षमा किये जाने का समुचित कारण नहीं माना है तथा यह अभिमत निर्धारित किया गया है कि यदि विधि की अज्ञानता के अभिवाक् को स्वीकार कर लिया गया तो प्रत्येक मामले में इस बाबत् निवेदन किये जाने का कोई अन्त नहीं होगा किन्तु माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *रामनाथ साव उर्फ रामनाथ साहू व अन्य विरूद्ध गोवर्धन साव व अन्य, ए.आई.आर. 2002 एस.सी. 1201* में यह स्पष्ट निर्देश दिये हैं कि विलम्ब क्षमा किये जाने हेतु न्यायालयों को उदार दृष्टिकोण अपनाना चाहिए ताकि सारवान विधि का उद्देश्य विफल न हो तथा पक्षकार के अशिक्षित, ग्रामीण होने की दशा में यदि अन्यथा दुर्भावना या जानबूझकर विलंब के तथ्य प्रमाणित न हो तो विलम्ब क्षमा किया जाना चाहिए। इसी प्रकार नवीन न्याय दृष्टांत *श्रीमति निर्मलाबाई विरुद्ध डाक्टर ओम प्रकाश, 2001 म.प्र. वीकली नोट्स नोट नंबर- 193, श्रीमति भापूबाई वि. भारत सरकार, 2002 (1) एम.पी.वीकली नोट्स नोट नंबर- 60, दोलाराम व अन्य विरुद्ध किशन व अन्य, 1999 (2) एम.पी.एल.जे.-620* में भी यही दिशा निर्देश दिये गये हैं कि पक्षकार के अशिक्षित, ग्रामीण या महिला होने की दशा में विधि की प्रक्रिया की अज्ञानता के कारण हुए विलम्ब के संबंध में उदारतापूर्वक दृष्टिकोण अपनाते हुए विलम्ब क्षमा किया जाना चाहिए।

7. चूंकि अशिक्षा विधि की अज्ञानता का एक कारण भी है, अतः माननीय सर्वोच्च न्यायालय तथा उच्च न्यायालय द्वारा उपरोक्त प्रतिपादित सिद्धान्तों के प्रकाश में विधि की अज्ञानता के आधार पर विलम्ब क्षमा किया जाना चाहिए जब तक कि अन्यथा दुर्भावना तथा जानबूझकर अनावश्यक विलम्ब प्रमाणित न हो।

8. जहां तक अधिवक्ता की त्रुटि के आधार पर विलम्ब क्षमा किये जाने का प्रश्न है, यह प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों पर निर्भर करता है। अधिवक्ता की त्रुटि सद्भावी होना चाहिए। यदि त्रुटि उपेक्षा, दुराचरण, युक्तियुक्त तत्परता का अभाव, घोर अक्रियाशीलता से पीड़ित हो तो यह त्रुटि क्षमा किये जाने के अयोग्य होगी। इस संबंध में न्याय दृष्टांत *अभिमन्यु रथ बनाम वीरेन्द्र पांडे, 1978 एम.पी.एल.जे.- 189 (एम.पी.), जी.रामगोंडा, मेजर व अन्य बनाम स्पेशल लैण्ड एक्वीजीशन ऑफीसर बैंगलोर, (1988)2 एस.सी.सी.142= ए.आई.आर. 1988 एस.सी.-897* अवलोकनीय है।

9. अधिवक्ता की गल्ती के लिए पक्षकार को दंडित नहीं किया जाना चाहिए, यह मत माननीय सर्वोच्च न्यायालय द्वारा *म्युनिसिपल कारपोरेशन ग्वालियर विरुद्ध रामचरण व अन्य 2002, ए.आई.आर. (एस.सी.डब्ल्यू) 1946 तथा देवेन्द्र स्वामी विरुद्ध कर्नाटक राज्य रोड ट्रांसपोर्ट कारपोरेशन, ए.आई.आर. 2002 सु.को. 2777* में व्यक्त किया गया है। अतः अधिवक्ता की त्रुटि यदि सद्भाविक हो तथा दुर्भावना या दुराचरण एवं घोर अक्रियाशीलता से ग्रसित न हो तो विलम्ब क्षमा किये जाने का आधार माना जा सकता है।

निष्कर्ष :- उपरोक्तानुसार की गई व्याख्या से यह निष्कर्ष निकलता है कि विधि की अज्ञानता तथा अधिवक्ता की त्रुटि के आधार पर विलम्ब क्षमा किया जा सकता है, यदि त्रुटि सद्भाविक हो तथा दुर्भावना या दुराचरण एवम् घोर अक्रियाशीलता से ग्रसित न हो।

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PENAL LIABILITY OF COMPANY WHERE IMPRISONMENT IS MANDATORY PART OF SENTENCE

The penal law basically aims at punishing a person found guilty of commission of an offence. Term "person" as defined in Section 11 of the Indian Penal Code, 1860 and Section 2 (42) of General Clauses Act, 1872 do unmistakably and in quite unequivocal terms indicates that it includes within its fold a Company also, which is a juristic person. Various enactments like Prevention of Food Adulteration Act, 1954 (Section-17), Trade Marks Act, 1999 (Section-114), N.D.P.S. Act, 1985 (Section-38), Essential Commodities Act, 1955 (Section-10), Drugs & Cosmetics Act, 1940 (Section-34) and Cable Television Networks (Registration) Act, 1955 (Section-17) provide in respect of penal liability of a Company in relation to the offences prescribed in these Acts. This liability is apart from the liability which is stipulated for the persons who at the time of commission of the offence were in charge of or responsible for the conduct of the business of the Company including the Director, Manager, Secretary or other officers of the Company with whose consent or connivance, the offence was committed. This is what can reasonably be gathered for the phrase *'as well as the company'* as used in various provisions regarding the penal liability of the Company. Thus, the liability of the Company is independent of such persons though, in most of the situations they are also vicariously liable for the acts of Company.

There has been a long drawn controversy in legal circles as to whether a Company being a juristic person and incapable of being sent to prison for undergoing corporal punishment may still be prosecuted and punished for an offence where such offence is punishable with imprisonment only or with imprisonment and fine or with a minimum term of imprisonment. The physical incapacity of the Company as a juristic person to suffer corporal punishment is the source of this controversy.

If we bestow our attention to various pronouncements dealing with this issue, we find that there has been a diversity of opinion on the point. One view has been that the company being incapable of suffering corporal punishment cannot be prosecuted or punished in respect of offences which are punishable with imprisonment as a mandatory sentence and in such a situation it will be lawful to impose the sentence of fine only. This view has been taken *in P.V. Pai Vs. R.I. Rinawma, ILR (1993) Karnataka 709, Kusum Products Lts. Vs. S.K. Sinha , ITO, Central Circle-X, Calcutta, (1980) 126 ITR 804 (Calcutta) and Modi Industries Ltd. Vs. B.C. Goel, (1983) 744 ILR 416 (Calcutta).*

The other view has been that, though, Company may not be made to suffer corporal punishment because of its physical incapability, nonetheless, the Company may not be allowed to go scot-free and, therefore, in such a situation after being held guilty it must be punished with fine only. This view is found to have been expressed in *Municipal Corporation of Delhi Vs. J.B. Bottling Company, (1975) Cri. LJ 1148, (FB) Delhi, Oswal Vanaspati & Allied Industries Vs.*

State of U.P., (1993) 1 CLJ 172 (FB) Allahabad and Manian Transports Vs. S. Krishnamurthy, 1991 (72) Comp Cases 746, (Madras).

Before proceeding further, it may be pointed out that Law Commission of India in its 41st (Paragraph 24-7) and 47th (Paragraph 8-3) report took cognizance of the legal anomaly on this count and recommended suitable changes in the existing provisions of law by providing that whenever, a Company is held guilty for commission of an offence which is punishable with imprisonment, imprisonment and fine or a minimum term of imprisonment, the Court instead of sentencing the Company to imprisonment may sentence it to fine only. On the basis of these recommendations, a Bill to amend the Indian Penal Code (Amendment Bill, 1972) was also mooted but it lapsed. Therefore, as of today, there is no provision in the Penal Law of India to resolve this anomaly.

Hon'ble the *Supreme Court of India took cognizance of this legal anomaly in M.V. Javali Vs. Mahajan Borewell & Company & Ors., (1997) 8 SCC 72* and after referring to the recommendations of the Law Commission of India propounded that a harmonious interpretation of the existing provisions of law has to be made and in that light though, a Company may not be punished with imprisonment still the Court has jurisdiction to inflict the sentence of fine only irrespective of the fact that the particular offence is punishable with imprisonment and fine or imprisonment simplicitor or a minimum term of imprisonment.

The aforesaid view, which was expressed by a Division Bench, was examined by a 3 Judge Bench of the Apex Court in *Assistant Commissioner, Assessment-II, Banglore and others Vs. Velliappa Textiles Ltd. and others, AIR 2004 SC 86.* The Court after examining the pros and cons of the issue and various earlier pronouncements came to the conclusion that the Courts have to interpret and apply the law as it is and have no jurisdiction to fill up the legislative lacunas by indirectly making law. The Court was of the view that a legislative lacuna regarding incapability of a Company to suffer corporal punishment in cases where sentence of imprisonment is mandatory one, though, noticed by the Law Commission of India, was not addressed and remedied by the legislature, therefore, the Court has no business to step in and resolve the same. The Court per majority (2:1) held that in such a situation the Company being incapable of suffering corporal punishment may not be prosecuted and held guilty. The Court expressed that Corporate criminal liability cannot be imposed without making corresponding legislative changes i.e. the imposition of fine in lieu of imprisonment.

In view of the above, the legal position as it obtains today is that in cases where an offence is punishable with imprisonment simplicitor or imprisonment along with fine or with a minimum term of imprisonment, a Company being a juristic person is not liable to be prosecuted and punished because of its incapability to suffer sentence of imprisonment and in such situation, it will not be lawful for the Court to inflict the sentence of fine only.

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RIGHT TO CONTINUE SUIT BY LEGAL REPRESENTATIVES COMING WITHIN SECTION 23-J OF M.P. ACCOMMODATION CONTROL ACT, 1961

The precise question requiring consideration is "whether a person coming within the definition of landlord u/s 23-J of the M.P. Accommodation Control Act, 1961 has a right to continue a suit as legal representative of deceased plaintiff before the Civil Court on the ground of bona fide need of the family?" To examine and appreciate the issue it is worthwhile to have a glance at the relevant statutory provisions and the legislative development related therewith.

Madhya Pradesh Accommodation Control Act, 1961 (hereinafter referred to as the Act), which is a special enactment providing for the regulation and control of letting and rent of accommodations, initially contemplated exclusive jurisdiction of Civil Court regarding matters related to eviction of tenants on one or more of the grounds enumerated in Section 12 (1), including the ground of bona fide need of landlord for accommodation. It was a common experience that eviction matters took unduly long time to reach the stage of final decision, thereby sometimes rendering the grant of ultimate relief almost illusory to the plaintiff/landlord. Therefore, the legislature in its wisdom inserted Chapter III-A in the Act by Amending Act No. 27 of 1983 containing Section 23-A to 23-I, which came into force w.e.f. August 16, 1983. Under the amended provisions, which aimed at providing quick, expedious and efficacious remedy regarding eviction matters based on bona fide need of the landlord, exclusive jurisdiction was conferred upon the Rent Control Authority (hereinafter referred as RCA) by Section 23-A. This measure, however, proved counter productive, therefore, the Act was again amended by Amending Act No. 7 of 1985, w.e.f. 16 January, 1985, which curtailed the jurisdiction of RCA and restricted it only to eviction matters based on bona fide need of specified categories of landlords, as defined in Section 23-J of the Act. Section 11-A was also added by this Amending Act.

Thus, from the scheme of the Act as obtaining after 16.1.1985 it is amply clear that as far as eviction of a tenant on the ground of bona fide requirement of accommodation for residential or non-residential purpose is concerned the Act contemplates two forums one in the shape of RCA for landlords coming within the category enumerated in Section 23-J and the other one for remaining category of landlords under Section 12 of the Act in the shape of regular Civil Court.

This jurisdictional dichotomy, though having a laudable object behind it, gave rise to a conflict of judicial opinion on the point as to whether in view of the provisions of Sections 11-A and 45 (1) of the Act a specified landlord as defined in Section 23-J of the Act was excluded from pursuing the remedy before ordinary Civil Courts or vice-versa. Section 11-A and 45 (1) being relevant here, are reproduced hereunder for the sake of convenience:-

> 11-A: **"Certain provisions not to apply to certain categories of landlords** - The provisions of this Chapter so far as they relate to matter specially provided in Chapter III-A shall not apply to the landlord defined in Section 23-J."

45 (1): **Jurisdiction of Civil Courts barred in respect of certain matters-** Save as otherwise expressly provided in this Act, no civil court shall entertain any suit or proceeding in so far as it relates to the fixation of standard rent in relation to any accommodation to which this Act applies or to any other matter which the Rent Controlling Authority is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Rent Controlling Authority under this Act shall be granted by any civil court or other authority".

Dealing with the issue of jurisdiction of Civil Court vis-à-vis RCA, a Full Bench of our High Court in *Ashok Kumar Shiv Prasad Verma Vs. Babulal and another, 1998 (1) MPLJ 461,* has laid down that the Special Forum created under Section 23-J of the Act, is for the benefit of the landlords and that does not exclude the jurisdiction of the Civil Court, if the landlords so choose. If the landlords defined in Section 23-J, want to avail the benefit of Chapter III-A, they can maintain a suit for eviction of a tenant before the RCA on the ground of bona fide requirement and in case, they do not want to avail the special forum created under Chapter III-A and want to invoke the ordinary Civil Court remedy then that forum will be available to them and their suit will not be dismissed on the ground that they should invoke the remedy provided under Chapter III-A.

As the issue at hand relates to the rights of a legal representative to continue the suit after death of the original plaintiff, here it would be worthwhile to have a look at the provisions of Order 22 Rule 1 C.P.C., which provide that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Explaining the phrase 'right to sue" Harrington J. in *Sarat Chandra Banerjee Vs. Nani Mohan Banerjee, ILR 36 Calcutta 799* observed that the right to sue in Order 22 means, 'the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death'. So, it would imply clear that right to sue means right to bring a suit before the same forum asserting the same right which the deceased asserted at the time of his death.

Proceeding on the basis of the aforesaid premise if we examine the issue in the light of the pronouncement in *Ashok Kumar's case (Supra)* to the effect that a landlord of specified category may pursue his remedy before either forum of his choice i.e. Rent Controlling Authority or Civil Court; coupled with the pronouncement of the Apex Court in *Shantilal Thakordas and others Vs. Chimanlal Maganlal Telwala, (1976) 4 SCC 417* to the effect that if the law permitted the eviction of the tenant for the requirement of the landlord "for occupation as a residence for himself and members of his family", then the requirement was both of the landlord and the members of his family and on his death the right to sue did survive to the members of the family of the deceased landlord; the logical conclusion will be that after plaintiff's death a person as legal representative, though not coming within the purview of specified landlord under Section 23-J may continue the suit before the Civil Court because he as of his own was also having a right to approach the Civil Court for the same relief. However, the things are not as simple as they appear to be, particularly, if the

entire scenario is viewed in the light of undernoted two pronouncements of the Apex Court.

In *Ashok Kumar Gupta vs. Vijay Kumar Agrawal, AIR 2002 SC 1310,* the Apex Court while dealing with the jurisdictional aspect of Civil Court vis-à-vis RCA with reference to the Amending Act No. 27 of 1983, by which Chapter III-A was inserted in the Act, observed as under:

> "In other words, the jurisdiction to pass order of eviction on the ground mentioned in Section 23-A was conferred on the Rent Control Authority and the Civil Court's jurisdiction was ousted impliedly in that behalf."

The Apex Court further observed as under:

> "A conjoint reading of Sections 11-A, 12, 23-A, 23-J and Section 45 would show that in regard to the bona fide personal requirement of the landlord who does not fall within the specified Category in 23-J, the Civil Court has jurisdiction to entertain a suit and pass decree under Clause (e) of Sub-Section (1) of Section 12 of the Act."
>
> "A perusal of this Section (i.e. section 45) shows that it bars the jurisdiction of the Civil Court to entertain any suit or proceeding relating to the fixation of standard rent in relation to any accommodation or to any other matter which the Rent Controlling Authority is empowered by or under the Act to decide————. ————This takes us to the question, what are other matters, which the Rent Controlling Authority is empowered to decide by or under the Act. They are; (i) fixation of standard rent under Section 10; (ii) eviction of tenants on the ground of bona fide requirement under Chapter III-A of the Act."

The aforesaid observations manifestly indicate that the jurisdiction of a Civil Court stands impliedly ousted in respect of suits relating to eviction of tenants on the grounds of bona fide requirement falling under Chapter III-A of the Act. This legal position has the effect of impliedly overruling the proposition of law expounded by the Full Bench in *Ashok Kumar Shiv Prasad Verma's case (Supra)* to the effect that a landlord coming within the category of Section 23-J may choose either forum i.e. Rent Controlling Authority or Civil Court for pursuing remedy of eviction on the ground of bona fide requirement.

Another case which has a close bearing on the issue is *Dhannalal Vs. Kalawatibai and others, (2002) 6 SCC 16* wherein the Apex Court while examining the scheme of the Act in the background of the jurisdictional dichotomy observed as under;

(i) Where a claim for eviction is filed by a landlord, or a co-landlord, belonging to any one of the five categories defined in Section 23-J of the Act, as the sole applicant without objection by other co-landlords who have not joined as co-applicants and the nature of claim for eviction is covered by Section 23-A (b) of the Act, *the proceedings would lie only before the Rent Controlling Authority.*

(ii) Where a claim for eviction is filed by a landlord or by such a co-landlord who does not belong to any of the categories defined by Section 23-J and the other co-landlord/landlady falling in one of the categories defined in Section 23-J is not joined as a co-plaintiff *the claim shall have to be filed only by way of a Suit instituted in a Civil Court.*

(Emphasis added)

Thus, with the aforesaid authorities there remains not an iota of doubt that the pronouncement made in *Ashok Kumar Shiv Prasad verma's case (Supra)* is no longer holding the ground and in view of the Apex Court's aforesaid pronouncements, it is luminously clear that RCA and Civil Court have exclusive jurisdictions to deal with the cases respectively falling under Chapter III-A and Chapter III of the Act, meaning thereby that a person coming within a particular category of landlord, either specified or general, shall have the right to sue only before the forum devised for that category and not the other one. For the sake of clarity, though at the cost of repetition, it may be stated that a landlord of general category may have right to sue either initially or as legal representative only before Civil Court, similarly, a landlord of specified category may have a right to sue either initially or as legal representative only before RCA.

At this juncture, it would be appropriate to refer to some authorities of our own High Court which have a bearing on the issue.

In *Sunil Kumar Mukerjee Vs. Smt. Durgarani and others, 1989 MPRCJ NOC 76,* which is the earliest case on the point, a retired Government servant sought eviction under Chapter III-A of the Act for the need of his son. Pending application, on his death, his son sought substitution which was opposed on the ground that the special remedy before the Authority being available only to the specified category of landlord, on his death, his heir or legal representative not belonging to that category cannot resort to that remedy or continue the action initiated by the deceased landlord of the specified category in that special forum. The objection found favour with the Court. Hon'ble D.M. Dharmadhikari, J. (as His Lordship then was) relying on the Apex Court's decision in *J.C. Chatterjee & others Vs. Shri Sri Kishan Tandon and others, AIR 1972 SC 2526* held that the original landlord was a retired government servant and he alone had the right to approach the Authority for eviction through a summary procedure. On his death, his need and the special forum available to him for summary eviction was lost. The legal representative cannot continue the proceedings for a need personal to him in the special forum which is not available to him because he did not fall in the category of specified landlords as defined in Section 23-J of the Act.

In *Narain vs. Smt. Ansuyiya Bai, 1990 MPJR 517,* action was initiated by landlady under Chapter III-A. The order made in her favour by the RCA was challenged in revision. Pending revision, landlady died and her legal representatives prayed for being brought on record which was opposed by the tenant on the ground that cause of action did not survive to them. Hon'ble R.C. Lahoti, J. (as His Lordship then was) held that disqualification as to jurisdiction could be attracted to the RCA and not to the Court hearing revision. The Court expressed

the view that if the death of the plaintiff occurs after a decree for possession was passed in his favour; the legal representatives can defend the decree as their accrued estate in further proceedings prosecuted by an unsuccessful tenant.

In *Santosh Kumar Jaiswal vs. Joseph, 1999 (II) MPJR 19,* the Court expressed the view that heirs of the deceased landlady of specified category cannot step into her capacity after her death and they can resort to Section 12 of the Act. The same view was also expressed *in Smt. Zarina vs. Smt. Hazzanbai and another, 2001 (II) MPJR 326.* In both these cases, however, the question arose due to death of landlord of specified category during pendency of revision but, as expressed in ***Narain's case (Supra),*** the disqualification as to the jurisdiction will not be attracted at the stage of revision.

In *Indarmal Vs. Dropadbai and others, 2004 (2) MPLJ 314,* which is the latest decision on the point, the Court has expressed that the heirs of the deceased landlady, who died during the pendency of the application before RCA, may continue the proceedings under Section 23-A of the Act because application had not abated on her death and cause of action continued. In this decision no reference is found of the view that was taken in the case of *Sunil Kumar Mukerjee (Supra).* Therefore, if we go by the rule of precedent to the effect that decision by an earlier Co-ordinate Bench of equal strength is binding on the subsequent Bench, then the only conclusion will be that the view expressed in *Sunil Kumar Mukerjee's case, (Supra)* still holds the ground as a binding precedent.

The ultimate conclusion in the light of the aforesaid analysis is that unless cause of action survives to the legal representatives to pursue the matter before specified forum, the legal representatives may not have a right to continue the proceedings before that particular forum. Right to sue, as stated earlier, means right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death before the same forum. Where the suit has been filed by the plaintiff under Section 12 (1) of the Act, on his death his legal representative who is covered by the definition of specified landlord under Section 23-J of the Act, may not have the right to bring the suit before that very Court on the same cause of action, because as held in *Dhannalal's case (Supra), if* the claim is covered by Section 23-A the proceedings would lie only before RCA. In the light of the above, it cannot be said that right to sue will survive to a person covered by the definition under Section 23-J, hence in such an eventuality the suit shall stand abated. No doubt, such a person will have cause of action in his favour to approach the forum of RCA. However, in a case where the deceased has left more than one legal representative and any one of them comes within the general category of landlords, then the right to sue will survive to such person and he may continue the suit before Civil Court. Therefore, what can be concluded in precise terms is that a landlord coming within the definition of Section 23-J of the Act may not have a right to continue a civil suit as legal representatives of the deceased plaintiff because on the death of the plaintiff right to sue does not survive to him within the meaning of Order 22 Rule 1 C.P.C.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

182. MOTOR VEHICLES ACT, 1988- Section 147
Gratuitous passenger travelling in goods vehicle- Insurer's liability in respect of- Held, insurance company not liable.
National Insurance Co. Ltd. Vs. Baljit Kaur and others
Judgment dt. 06.01.2004 by the Supreme Court in Civil Appeal No. 16 of 2004, Reported in (2004) 2 SCC 1= 2004 (2) MPLJ 1 (SC)

Held :

The question that arises for consideration in these appeals is whether an insurance policy in respect of a goods vehicle would also cover gratuitous passengers, in view of the legislative amendment in 1994 to Section 147 of the Motor Vehicles Act, 1988.

It is the submission of the respondent vehicle owner and driver that the insertion, by way of legislative amendment, of the words "including owner of the goods or his authorized representative carried in the vehicle" in Section 147 would result in the inference that gratuitous passengers would as well be covered by the scope of the provision. Any other construction, it was urged by the learned counsel for the second and third respondents, would render the effect of the words "any person" completely redundant.

The material portion of the provision contained in Section 147 of the Motor Vehicles Act, 1988, as amended by the Motor Vehicles (Amendment) Act, 1994 reads as follows :

"147. *Requirements of policies and in its of liability.*— (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which —

(a) ★ ★ ★

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) —

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to *any person*, including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) ★ ★ ★"

(emphasis added)

In *Asha Rani* it has been noticed that sub-clause (i) of clause (b) of sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be in-

curred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of the 1994 amendment would only cover a third party as also the owner of the goods or his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

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

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183. INDIAN PENAL CODE, 1860- Section 169
Offence u/s 169 relating to public servant unlawfully buying and bidding for property- Essential ingredients.
R. Sai Bharathi Vs. J. Jayalalitha and others
Judgment dt. 24.11.2003 by the Supreme Court in Criminal Appeal No. 115 of 2002, Reported in (2004) 2 SCC 9

Held :

Section 169 IPC bears the marginal heading "Public servant *unlawfully* buying or bidding for property." (emphasis supplied) Section 169 IPC sets out that : (I) the person should be a public servant, (2) in such capacity as public servant, he is legally bound not to purchase or bid for "certain property", and (3) either in his name or in the name of another or jointly, or in shares with others.

The offence under Section 169 IPC is incomplete without the assistance of some other enactment which imposes the legal prohibition required.

"[T]he enactment containing the prohibition naturally and necessarily defines the area which is covered by it both as to the class of public servants to whom it applies, and the nature of the dealings in which those servants are prevented from engaging." (*Vide Narayan v. Emperor, (1910) 11* Cri LJ 613 at p. 615.)

Therefore, in order to come within the clutches of Section 169 IPC, there should be a law which prohibits a public servant from purchasing certain property and if he does it, it becomes an offence under Section 169 IPC. Section 481 of the Criminal Procedure Code, Section 189 of the Railways Act, 1989 and Section 19 of the Cattle Trespass Act, 1871 and instances of that nature in several enactments are available in which persons mentioned therein shall not directly or indirectly purchase any property at a sale under those Acts. Similarly, Section

136 of the Transfer of Property Act provides that no judge, legal practitioner, or officer connected with any court of justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim and no court of justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims so dealt with by him as stated above. Thus, in these circumstances where a law has prohibited purchase of property or to bid at an auction, the prohibition contained therein will be attracted and will become an offence under Section 169 IPC.

On a plain reading of the section and seeking the assurance from the marginal heading as well, it is fairly clear that prohibition should flow from a law. Such law in the context of Section 169 IPC should mean that the law as ordinarily understood, that is to say, an enacted law or a rule or regulation framed under such law but not an executive order which confers no rights on anybody nor sets down legally enforceable obligations.

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184. ADMINISTRATIVE LAW :

Noting in the file- It does not confer any right on a person.

Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and others

Judgment dt. 17.12.2003 by the Supreme Court in Civil Appeal No. 32 of 1999, Reported in (2004) 2 SCC 65

Held :

The basic legal premise that even a noting in the file would not confer any right upon a person, as adumbrated by this Court in *Bachhittar Singh v. State of Punjab, AIR 1963 SC 395* was not taken note of. In the instant case there does not exist even any noting, nor any other document showing delivery of possession.

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185. INDIAN PENAL CODE, 1860- Section 376/120-B

Criminal conspiracy to commit rape- To be a co-conspirator it is not necessary to act in an identical manner with other conspirators-Law explained.

Moijullah @ Puttan Vs. State of Rajasthan

Judgment dt. 19.12.2003 by the Supreme Court in Criminal Appeal No. 459 of 2002, Reported in (2004) 2 SCC 90

Held :

So far as Meradona is concerned, it is no doubt true that there is no allegation of his having raped any girl or having misbehaved with any one of them. What, however, is apparent from the evidence on record is that he used to transport the girls to the farmhouse and the house of Farukh from their respective residences or the school. The evidence also discloses that he was responsible for arranging food etc. for them. It is not necessary that in order to be a co-conspirator, each one of the conspirators should act in an identical manner. What is essential is that they must agree to do or cause to be done an illegal act. Different members of the conspiracy may be assigned different roles with the

object of committing the agreed illegal act. Meradona was certainly aiding the others to commit the illegal act which was the object of their conspiracy. Having regard to his conduct and the evidence on record it is quite obvious to us that he was aware of what was happening and the role played by him establishes the fact that he was also a member of the conspiracy in which he was assigned the role of transporting the victims. He was, therefore, clearly guilty of the offence of conspiracy.

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186. ADMINISTRATIVE LAW :

Judicial review, principle of- Applicability and scope.
Union of India and another Vs. S.B. Vohra and others
Judgment dt. 05.01.2004 by the Supreme Court in Civil Appeal No. 2887 of 2001, Reported in (2004) 2 SCC 150

Held :

Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' right of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads and the like, or overseas aid, or compensating victims of crime (see, for example, *R.v. Secy., of State for the Home Deptt., ex p Fire Brigades Union (1995) 2 WLR 1*).

The Court, however, exercises its power of restraint in relation to interference of policy. In his recent book *Constitutional Reform in the UK* at p. 105, Dawn Oliver commented thus:

"However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risks for the judges and for the public. Courts may interfere inadvisably in public administration. The case of *Bromely London Borough Council v. Greater London Council, (1982) 1 All ER 129* is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions, but were accused of themselves misunderstanding transport policy in so doing. The courts are not experts in policy and public administration- hence Jowell's point that the courts should not step beyond their institutional capacity (Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws, L.J. in *International Transport Roth GmbH v. Secy, of State for the Home Deptt., (2002) 3 WLR 344* and of Lord Nimmo Smith in *Adams v. Lord Advocate* in which a distinction was drawn between areas where the subject-matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, Government may

react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law."

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187. INDIAN PENAL CODE, 1860- Section 96

Right of private defence, proof of- Burden lies on the accused- May be proved by preponderance of probabilities- Proof beyond reasonable doubt not required.

James Martin Vs. State of Kerala

Judgment dt. 16.12.2003 by the Supreme Court in Criminal Appeal No. 887 of 1997, Reported in (2004) 2 SCC 203

Held :

Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on

the basis of the material on record. (See *Munshi Ram v. Delhi Admn., AIR 1968 SC 702, State of Gujarat v. Bai Fatima (1975) 2 SCC 7, State of U.P. v. Mohd. Musheer Khan, (1977) 3 SCC 562* and *Mohinder Pal Jolly v. State of Punjab, (1979) 3 SCC 30.*) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is a reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in *Salim Zia v. State of U.P., (1979) 2 SCC 648* runs as follows : (SCC p. 654, para 9)

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

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188. HINDU SUCCESSION ACT, 1956- Section 8

Ancestral property received by father in partition- Son does not acquire any right by birth.

Anil and others Vs. Gattulal and others.

Reported in 2004 RN 109 (HC)

Held :

The theory that the son acquires the right in the ancestral property by birth does not exist in respect of ancestral property which is received by the father in a partition, in view of the coming into force of section 8 of the Hindu Succession Act. In such case, the son gets the share in the property only after the death of his father. This preposition of law is clearly spelt out in case of *Commissioner of Wealth Tax. Kanpur etc. v. Chander Sen (AIR 1986 SC 1753), Yudhishter v. Ashok Kumar (AIR 1987 SC 558) and in case of Chandrakanta and another v. Ashok Kumar and others, 2002 (3) MPLJ 576.*

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189. LAND ACQUISITION ACT, 1894- Section 23

Market value, determination of- Basic valuation register maintained by the Registering Authority for collection of stamp duty cannot be used as basis- Market value to be determined on the basis of sale deeds of comparable lands- A party cannot be permitted to say that his sale deed did not reflect the correct market value.

Krishi Utpadan Mandi Samiti, Sahaswan, District Badaun through its Secretary Vs. Bipin Kumar and another.
Judgment dt. 07.01.2004 by the Supreme Court in Civil Appeal No. 7463 of 1997, Reported in (2004) 2 SCC 283

Held :

It has been held by this Court in the case of *Jawajee Nagnatham v. Revenue Divisional Officer, (1994) 4 SCC 595* that market value under Section 23 of the Land Acquisition Act, 1894 cannot be fixed on the basis of a basic valuation register maintained by the registering authority for collection of stamp duty. Therefore, the reliance by the Reference Court on the values of land fixed by the District Magistrate for stamp duty purposes is clearly erroneous. For the purposes of the Land Acquisition Act the market value must be determined on the basis of sale deeds of comparable lands. In this case the Land Acquisition Officer had taken note of one such sale deed where the price was Rs. 15.37 per sq yard. The Reference Court also had before it the sale deed by which the respondent purchased a portion of the acquired land. As stated above, the sale deed was for Rs. 15.40 per sq yard. Section 92 of the Evidence Act precludes a party from leading evidence contrary to the terms of a written document. It was, therefore, not open to the respondent to urge that, even though his sale deed showed a price of Rs. 15.40 per sq yard the real market value was Rs. 120 per sq yard. To permit a party to so urge would be to give a premium to dishonesty. Parties who undervalue their documents, for purpose of payment of stamp duty, cannot be allowed to then claim that their own documents do not reflect the correct market value.

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190. EVIDENCE ACT, 1872- Section 68
SUCCESSION ACT, 1925- Section 63
WORDS AND PHRASES :
(i) Will, proof of- Propounder should explain suspicious circumstances- Will altering ordinary course of succession, not itself a suspicious circumstance.
(ii) Discretion- Meaning and connotation of.
Uma Devi Nambiar and others Vs. T.C. Sidhan (Dead)
Judgment dt. 11.12.2003 by the Supreme Court in Civil Appeal No. 9726 of 2003, Reported in (2004) 2 SCC 321

Held :

Section 63 of the Act deals with execution of unprivileged Wills. It lays down that the testator shall sign or shall affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. Section 68 of the

Indian Evidence Act, 1872 (in short "the Evidence Act") mandates examination of one attesting witness in proof of a will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court. (See *H. Venkatachala Iyangar v. B.N. Thimmajamma, AIR 1959 SC 443, Rani Purnima Debi v. Kumar Khagendra Narayan Deb, AIR 1962 SC 567,* and *Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR* 1964 SC 529.) A Constitution Bench of this Court in *Shashi Kumar Banerjee case* succinctly indicated the focal position in law as follows : (AIR p. 531, para 4)

> "The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstance. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been

made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar v. P.P. K. Balakrishnan Nambiar, AIR 1995 SC 1852* it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the will might be unnatural in the sense that it has cut off wholly or in part near relations. (See *Pushpavathi v. Chandraraja Kadamba, AIR 1972 SC 2492.*). In *Rabindra Nath Mukherjee v. Panchanan Benerjee, (1995) 4 SCC 459* it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit. to which an honest man, competent to the discharge of his office ought to confine himself (per *Lord Halsbury, L.C., in Sharp v. Wakefield, 1891 AC 173*). Also see *S.G. Jaisinghani v. Union of India, AIR 1967 SC 1427.*

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility.

> "The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is every vice, folly and passion to which human nature is liable", *said Lord Camden, L.C.J., in Hindson and Kersey,* (1680) 8 How, St. Tr. 57.

If a certain latitude or liberty is accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (per Willes, J. in *Lee v. Bude Rly. Co., (1871) LR 6 CP 576* and in *Morgan v. Morgan, (1869) LR1 P&M 644*).

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191. CRIMINAL PROCEDURE CODE, 1973- Section 354 (3)
Death sentence, imposition of- Rarest of rare case, determination of- Relevant factors to decide imposition of death sentence- Law explained.
Sushil Murmu Vs. State of Jharkhand
Judgment dt. 12.12.2003 by the Supreme Court in Criminal Appeal No. 947 of 2003, Reported in (2004) 2 SCC 338

Held :

The following guidelines which emerge from *Bachan Singh case* will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCCp. 489, para 38)

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "birde-burning" or "dowry death" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

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192. PREVENTION OF CORRUPTION ACT, 1988- Section 19
INDIAN PENAL CODE, 1860- Sections 406, 409 & 120-B

(i) Sanction for prosecution u/s 19- No sanction required in case of retired public servant.

(ii) Prosecution for offences u/s 406, 409 read with 120-B Indian Penal Code- No sanction required under Section 197 Cr.P.C.

State of H.P. Vs. M.P. Gupta
Judgment dt. 09.12.2003 by the Supreme Court in Criminal Appeal No. 339 of 1997, Reported in (2004) 2 SCC 349

Held :

In *S.A. Venkataraman v. State, AIR 1958 SC 107* and in *C.R. Bansi v. State of a Maharashtra, (1970) 3 SCC 537* this Court has held that : (AIR p. 111, para 14)

"There is nothing in the words used in Section 6 (1) to even remotely

suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed".

The above position was illuminatingly highlighted in *State of Maharashtra v. Dr. Budhikota Subbarao, (1993) 3 SCC 339.*

When the newly worded section appeared in the Code (Section 197) with the words "when any person who is or was a public servant" (as against the truncated expression in the corresponding provision of the old Code of Criminal Procedure, 1898), a contention was raised before this Court in *Kalicharan Mahapatra v. State of Orissa, (1998) 6 SCC 411* that the legal position must be treated as changed even in regard to offences under the old Act and the new Act also. The said contention was, however, repelled by this Court wherein a two-Judge Bench has held thus : (SCC p. 416, para 14)

> "A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time, the court can take cognizance of the offence without any such sanction."

The correct legal position, therefore, is that an accused facing prosecution for offences under the old Act or the new Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences.

That apart, the contention of the respondent that for offences under Sections 406 and 409 read with Section 120-B IPC sanction under Section 197 of the Code is a condition precedent for launching the prosecution is equally fallacious. This Court has stated the legal position in *Shreekantiah Ramayya Munipalli case* and also *Amrik Singh case* that it is not every offence committed by a public servant which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position it was held in *Harihar Prasad v. State of Bihar, (1972) 3 SCC 89* as follows : (SCC p. 115, para 66)

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

Above views are reiterated in State of *Kerala v. V. Padmanabhan Nair, (1999) 5 SCC 690.* Both *Amrik Singh* and *Shreekantiah* were noted in that case.

Sections 467, 468 and 471 IPC relate to forgery of valuable security, Will etc; forgery for the purpose of cheating and using as genuine a forged document respectively. It is no part of the duty of a public servant while discharging his official duties to commit forgery of the type covered by the aforesaid offences. Want of sanction under Section 197 of the Code is, therefore, no bar.

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193. CRIMINAL PROCEDURE CODE, 1973- Sections 437 (5) & 439 (2) Cancellation of bail- Considerations for cancellation of bail and grant of bail are different- Law explained.
Mehboob Dawood Shaikh Vs. State of Maharashtra
Judgment dt. 16.01.2004 by the Supreme Court in Criminal Appeal No. 64 of 2004, Reported in (2004) 2 SCC 362

Held :

It is trite law that the considerations for grant of bail and cancellation of bail stand on different footings. By a majority judgment in *Aslam Babalal Desai v. State of maharashtra, (1992) 4 SCC 272* the circumstances when bail granted can be cancelled were highlighted in the following words: (SCC pp. 289-90, para 11)

"11. On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours and if this is not possible within 15 days and failing that within the time stipulated in clause (a) of the proviso to Section 167 (2) of the Code. The law expects that the investigation must be completed with dispatch and the role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167 (2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex case and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (a) to that sub-section. We may here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time frame. The deeming fiction of correlating the release on bail under sub-section (2) of Section 167 with Chapter XXXIII i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the

order of release is by fiction of law an order passed under Section 437 (1) or (2) or Section 439 (1) it follows as natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in *Raghubir Singh v. State of Bihar, (1986) 4 SCC 481* the grounds for cancellation under Sections 437 (5) and 439 (2) are identical, namely, bail granted under Section 437 (1) or (2) or Section 439 (1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."

It is, therefore, clear that when a person to whom bail has been granted either tries to interfere with the course of justice or attempts to tamper with evidence or witnesses or threatens witnesses or indulges in similar activities which would hamper smooth investigation or trial, bail granted can be cancelled. Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and is not to be lightly resorted to.

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194. MOTOR VEHICLES ACT, 1988- Section 171
Interest- Stipulation of penal rate of interest not contemplated under Section 171-Award thereof not permissible in law.
National Insurance Co. Ltd. Vs. Keshav Bahadur and others
Judgment dt. 20.01.2004 by the Supreme Court in Civil Appeal No. 399 of 2004, Reported in (2004) 2 SCC 370

Held :

The residual question is whether there could be any stipulation of penal rate of interest as done by the Tribunal and affirmed by the High Court . So far as the higher rate of interest stipulation is concerned, it is to be noted that grant of interest under Section 110-CC of the Act (corresponding to Section 171 of the Motor Vehicles Act, 1988, in short "the new Act") is discretionary. The purpose for award of interest is to put pressure on the relevant person not to delay in making the payment; and to compensate the victim or his dependants at least to some extent for such delay as may occur, by way of interest. In determining the quantum of interest awardable under the relevant section, the Tribunal acting under Section 110 of the Act corresponding to Section 166 of the new Act can derive direct guidance from Section 34 of the Code of Civil Procedure, 1908 (in

short "CPC"). In fact, the provisions require payment of interest in addition to compensation already determined. Even though the expression "may" is used, a duty is laid on the Tribunal to consider the question of interest separately with due regard to the facts and circumstances of the case. The provision is discretionary and is not and cannot be bound by rules.

Though Section 110-CC of the Act (corresponding to Section 171 of the new Act) confers a discretion on the Tribunal to award interest, the same is meant to be exercised in cases where the claimant can claim the same as a matter of right. In the above background, it is to be judged whether a stipulation for higher rate of interest in case of default can be imposed by the Tribunal. Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation. No express or implied power in this regard can be culled out from Section 110-CC of the Act or Section 171 of the new Act. Such a direction in the award for retrospective enhancement of interest for default in payment of the compensation together with interest payable thereon virtually amounts to imposition of penalty which is not statutory envisaged and prescribed. It is, therefore directed that the rate of interest as awarded by the High Court shall alone be applicable till payment, without the stipulation for higher rate of interest being enforced, in the manner directed by the Tribunal.

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195. NEGOTIABLE INSTRUMENTS ACT, 1881- Section 131
Non-liability of banker receiving payment of cheque- Banker must prove good faith and absence of negligence on its part.
Kerala State Cooperative Marketing Federation Vs. State Bank of India and others
Judgment dt. 30.01.2004 by the Supreme Court in Civil Appeal No. 151 of 1998, Reported in (2004) 2 SCC 425

Held :

Section 131 of the Negotiable Instruments Act reads as follows :

"131. *Non-liability of banker receiving payment of cheque.*- A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

It is thus to be seen that a banker, who encashes a cheque, in respect of which his client had no title, would become liable in conversion or for money had and received. However, Section 131 of the Negotiable Instruments Act protects the banker, provided he has received payment in good faith and without negligence of a cheque crossed generally or specially.

In the case of *Indian Overseas Bank v. Bank of Madura Ltd., (1992) 75 Comp Cas 481 (Mad)* the receiving banker was held guilty of negligence and lack of

good faith inasmuch as it had allowed the opening of an account with a small amount and shortly thereafter i.e. within nine days allowed withdrawal of a sum of Rs. 9500. It was held that the opening of the account, the presentation of the draft and withdrawal of the amount were part of one integral scheme. The fact that the person who introduced the account-holder had not been examined in the suit was held against the Bank.

In the case of *Syndicate Bank v. United Commercial Bank, (1991) 70 Comp Cas 748 (Kant)* it was held that the appellant Bank had to prove that it had acted in good faith and without negligence. It was held that the fact that the customer had just opened the account and had only one transaction with the Bank, namely, the encashment of the cheque, showed that the Bank had not acted in good faith and without negligence.

In the case of *Brahma Shum Shere Jung Bahadur v. Chartered Bank of India, AIR 1956 Cal. 399* it has been held that the onus of proving "good faith" and "absence of negligence" is on the banker claiming protection under Section 131 of the Negotiable Instruments Act. It is held that in deciding whether a collecting banker has or has not been negligent, it becomes necessary to take into consideration many factors such as the customer, the account and the surrounding circumstances. It is held that if the cheque is of a large amount, then the bank has to be more careful unless the customer was a customer of long-standing, good repute and with great personal credit and was one who regularly deposited and withdrew cheques of large amounts.

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196. CRIMINAL PROCEDURE CODE, 1973- Section 357
Award of compensation u/s 357- Factors to be considered- Opportunity of hearing should also be given to the accused before fixing the quantum of compensation.
Mangilal Vs. State of M.P.
Judgment dt. 05.01.2004 by the Supreme Court in Criminal Appeal No. 667 of 2003, Reported in (2004) 2 SCC 447

Held :

The power of the court to award compensation to victims under Section 357 is not ancillary to other sentences but is in addition thereto. In *Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551* it was observed that the power under Section 357 is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a recompensatory measure to rehabilitate to an extent the beleaguered victims of the crime; a modern constructive approach to crimes and a step forward in our criminal justice system. In *Sarwan Singh v. State of Punjab, (1978) 4 SCC 111* it was held that in awarding compensation, the court has to decide whether the case is a fit one in which compensation has to be awarded. If it is found that the compensation should be ordered to be paid, then while arriving at the quantum to be paid, courts are obliged to keep into account the capacity of the accused to pay the compensa-

tion besides taking into consideration also the nature of the crime in each case, the justness of the claim for compensation and the need for it in the context of the victim or members of the family of the victim and other relevant circumstances, if any, in so fixing or apportioning the amount of compensation. As noted above, the mode of application of the fine is indicated in sub-section (1) of Section 357. Sub-section (3) contains an independent and distinct power to award compensation.

That brings us to the most crucial question, that is, whether the court was required to hear the accused before fixing the quantum of compensation. It is urged by the learned counsel for the State that unlike a sentence of fine before imposition of which a court is required to hear the accused while considering the question of quantum of sentence, it is but natural that the trial court after heaving on the question of sentence does not impose a fine, but in terms of sub-section (3) of Section 357 proceed to award compensation, at that juncture or even during the course of hearing as to the quantum of sentence by sufficient indication made by the court concerned, the accused gets opportunity to present his version as to the relevant criteria or norms to be applied in the context of the case before the court on the quantum of compensation. The position cannot be said to be in any way different while the appellate or revisional court also does it in terms of sub-section (4), as long as it requires to be done in the light of the criteria indicated as above, unless it is by any agreement or consent of the parties such compensation has been fixed.

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197. CRIMINAL TRIAL :

Appreciation of evidence- Maxim "falsus in uno, falsus in omnibus" applicability of- It is merely a rule of caution- Attempt should be to separate truth from falsehood.

Narain Vs. State of M.P.

Judgment dt. 04.02.2004 by the Supreme Court in Criminal Appeal No. 1177 of 1997, Reported in (2004) 2 SCC 455

Held :

As a rule of universal application, it cannot be said that when a portion of the prosecution evidence is discarded as unworthy of credence, there cannot be any conviction. It is always open to the court to differentiate between an accused who has been convicted and those who have been acquitted. (See *Gurcharan Singh v. State of Punjab, AIR 1956 SC 460* and *Sucha Singh v. State of Punjab, (2003) 7 SCC 643.*) The maxim *"falsus in uno, falsus in omnibus"* is merely a rule of caution. As has been indicated by this Court in Sucha Singh case in terms of felicitous metaphor, an attempt has to be made to separate the grain from the chaff, truth from falsehood. When the prosecution is able to establish its case by acceptable evidence, though in part, the accused can be convicted even if the co- accused have been acquitted on the ground that the evidence led was not sufficient to fasten guilt on them. But where the position is such that the

evidence is totally unreliable, and it will be impossible to separate the truth from falsehood to an extent that they are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, conviction cannot be made.

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198. CONSTITUTION OF INDIA- Article 19 (1) (a)
FLAG CODE OF INDIA, 2002 :
Right to fly National Flag is a fundamental right of a citizen under Article 19 (1) (a)- The right is qualified one- Flag Code though not a law, deserves to be followed.
Union of India Vs. Naveen Jindal and another
Judgment dt. 23.01.2004 by the Supreme Court in Civil Appeal No. 2920 of 1996, Reported in (2004) 2 SCC 510

Held :

At the ouset, it may be stated that with the coming into force of the Flag Code of India , 2002, members of the public now have the fullest freedom to fly the National Flag. The only restrictions imposed are those which are embodied in the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971. Apart from those statutory restrictions, the Government does not wish to put any restriction on the display of the National Flag by members of the public. Therefore, the grievance of the respondent-writ petitioner stands fully redressed.

The question which the Court is now invited to address is what would be the appropriate constitutional basis on which the flying of the National Flag by citizens of India be rested.

For the aforesaid reason, we hold that: (i) Right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19 (1) (a) of the Constitution of India being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation. (ii) The fundamental right to fly the National Flag is not an absolute right but a qualified one being subject of reasonable restrictions under clause (2) of Article 19 of the Constitution of India. (iii) The Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971 regulate the use of the National Flag. (iv) Flag Code although is not a law within the meaning of Article 13 (3) (a) of the Constitution of India for the purpose of clause (2) of Article 19 thereof, it would not restrictively regulate the free exercise of the right of flying the National Flag. However, the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed . (v) For the purpose of interpretation of the constitutional scheme and for the purpose of maintaining a balance between the fundamental/legal rights of a citizen vis-a-vis, the regulatory measures/restrictions, both Parts IV and IV-A of the Constitution of India can be taken recourse to.

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199. CRIMINAL TRIAL :

Sentencing policy- Sufficiency of sentence- Factors to be considered while imposing sentence- Court duty bound to award proper sentence— Undue sympathy to impose inadequate sentence harmful to justice system.

Union of India Vs. Kuldeep Singh

Judgment dt. 08.12.2003 by the Supreme Court in Criminal Appeal No. 1468 of 2003, Reported in (2004) 2 SCC 590

Held :

In that background, the sufficiency of sentence in the case at hand has to be gauged. Law regulates social interests and arbitrates conflicting claims and demands. Undoubtedly there is a cross- cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenge. The contagion of lawlessness would undermine social order and lay it in ruins. Freedman is has *Law in Changing Society* stated that, "State of criminal law continues to be— as it should be — a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on the factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the motive for commission of the crime, the conduct of the accused, and all other attending circumstances are relevant facts which would enter into the area of consideration.

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

After giving due consideration to the facts and circumstances of each case, for deciding a just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle McGautha v. State of California, 402 US 183* that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the

consideration of the gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

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

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences relating to narcotic drugs or psychopathic substances which have great impact not only on the health fabric but also on the social order and public interest, cannot be lost sight of and per se requires exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.

In *Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220* this Court has observed that a shockingly large number of criminals go unpunished, thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

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200. CIVIL PROCEDURE CODE, 1908- Section 146 & O.9 R.6
Transfer of suit property during pendency of suit- Transferee not brought on record- Suit decreed ex parte against defendant on record - Transferee being representative in interest of defendant entitled to prefer appeal against such decree or to proceed under O.9 R. 13- Law explained.
Raj Kumar Vs. Sardari Lal and others
Judgment dt. 20.01.2004 by the Supreme Court in Civil Appeal No. 400 of 2004, Reported in (2004) 2 SCC 601

Held :

The present case has a peculiar feature. The transfer took place during the pendency of the suit but the decree passed ex prate in the suit is sought to be set aside not by the defendant on record but by a person who did not come or was not brought on record promptly and hence apparently appears to be a third party.

However, as we have already stated hereinabove, the person would be a representative- in- interest of the defendant judgment- debtor.

The solution lies in Section 146 of the Code of Civil Procedure, 1908. It provides :

> "146. *Proceedings by or against representatives.*— Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

A *lis pendens* transferee from the defendant, though not arrayed as a party in the suit, is still a person claiming under the defendant. The same principle of law is recognized in a different perspective by Rule 16 of Order 21 CPC which speaks of transfer or assignment *inter vivous* or by operation of law made by the plaintiff decree-holder. The transferee may apply for execution of the decree of the court which passed it and the decree will be available for execution in the same manner and subject to the same conditions as if the application were made by the decree-holder.

The law laid down by a four-Judge Bench of this Court in *Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394* is apt for resolving the issue arising for decision herein. A transferee of property from the defendant during the pendency of the suit sought himself to be brought on record at the stage of appeal. The High Court dismissed the application as it was pressed only by reference to Order 22 Rule 10 CPC and it was conceded by the applicant that, not being a person who had obtained a transfer pending appeal, he was not covered within the scope of Order 22 Rule 10. In an appeal preferred by such transferee, this Court upheld the view of the High Court that a transferee prior to the filing of the appeal could not be brought on record in appeal by reference to Order 22 Rule 10 CPC. However, the Court held that an appeal is a proceeding for the purpose of Section 146 and further, the expression "claiming under" is wide enough to include cases of devaluation and assignment mentioned in Order 22 Rule 10. Whoever is entitled to be but has not been brought on record under Order 22 Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code. A person having acquired an interest in suit property during the pendency of the suit and seeking to be brought on record at the stage of the appeal can do so by reference to Section 146 CPC which provision being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. Their Lordships held that being a purchaser *pendent lite*, a person will be bound by the proceedings taken by the successful party in execution of decree and justice requires that such purchaser should be given an opportunity to protect his rights.

The appellant cannot dispute that the decree though passed against Respondents 2 and 3 could be executed even against Respondent 4, he being a *lis pendens* transferee though not having been joined in the suit as a party. Such a person can prefer an appeal being a person aggrieved. Cleary, the person who is liable to be proceeded against in execution of the decree or can file an appeal against in decree, though not a party to the suit or decree, does have locus standi to move an application for setting aside an ex parte decree passed against the person in whose shoes he has stepped in. In the expression employed in Rule 13 of Order 9 CPC that "in any case in which a decree is passed ex parte against a defendant, he may apply.... for an order to set it aside", the word "he" cannot be construed with such rigidity and so restrictively as to exclude the person, who has stepped into the shoes of the defendant, from moving an application for setting aside the ex parte decree especially in the presence of Section 146 CPC.

We hold that a *lis pendens* transferee, though not brought on record under Order 22 Rule 10 CPC, is entitled to move an application under Order 9 Rule 13 to set aside a decree passed against his transferor, the defendant in the suit.

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

Search of person u/s 50- It does not involve self- incrimination- Form of intimation to be given to the accused- No specific mode or manner prescribed- Substantial compliance sufficient.

Krishna kanwar (Smt.) @ Thakuraeen Vs. State of Rajasthan

Judgment dt. 27.01.2004 by the Supreme Court in Criminal Appeal No. 53 of 2003, Reported in (2004) 2 SCC 608

Held :

It is not disputed that there is no specific form proscribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or a straitjacket formula.

Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search have been given primacy.

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202. EVIDENCE ACT, 1872- Section 9

Identification- Identification for the first time at the trial- Evidence as to, nature of- It is generally of weak nature- In appropriate cases may be used for conviction without corroboration- Law explained.

Simon and others Vs. State of Karnataka

Judgment dt. 29.01.2004 by the Supreme Court in Criminal Appeal No. 149 of 2002, Reported in (2004) 2 SCC 694

Held :

We are unable to accept the contention that wrong identification by one witness by itself would be fatal to the case of the prosecution. A case is required to be decided on the examination of entire evidence. Mere wrong identification by one of the eyewitnesses by itself cannot be fatal to the case of the prosecution. There can be a variety of reasons for wrong identification. The witness may be won over. There may be loss of memory or any other reason.

The legal position on the aspect of identification is well settled. Under Section 9 of the Indian Evidence Act, 1872, the identity of the accused persons is a relevant fact. We have no difficulty in accepting the contention that evidence of mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration (see *Malkhansingh v. State of M.P., (2003) 5 SCC 746*)

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203. LIMITATION ACT, 1963- Section 3

Limitation not set-up as defence- Still suit, if barred by limitation, liable to be dismissed- Plea of limitation better be raised in the pleadings.

Food Corporation of India and others Vs. Babulal Agrawal

Judgment dt. 05.01.2004 by the Supreme Court in Civil Appeal No. 3484 of 1997, Reported in (2004) 2 SCC 712

Held :

A suit filed beyond limitation is liable to be dismissed even though limitation may not be set up as a defence. The above position as provided under the law cannot be disputed nor has it been disputed before us. But in all fairness, it is always desirable that if the defendant would like to raise such an issue, he would better raise it in the pleadings so that the other party may also note the basis and the facts by reason of which suit is sought to be dismissed as barred by time. It is true that the court may have to check at the threshold as to whether the suit is within limitation or not. There is always an office report on the limitation at the time of filing of the suit. But in case the court does not *prima facie* find it to be beyond time at that stage, it would not be necessary to record any such finding on the point, much less a detailed one. In such a situation, at least at the appellate stage, if not earlier, it would be desired of the defendant to raise such a plea regarding limitation.

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204. ARBITRATION AND CONCILIATION ACT, 1996- Sections 11 and 16 Powers of the designate of the Chief Justice, acting under Section 11- The designate exercises purely administrative powers- Dispute as to existence of arbitration agreement, determination of- Solely within jurisdiction of Arbitral Tribunal.
Hythro Power Corporation Ltd. Vs. Delhi Transco Ltd.
Reported in 2004 (2) MPLJ 59 (SC)

Held :

This Court in three-Judge Bench decision *2001 (1) Mh.L.J. (SC) 115= (2000) 7 SCC 201* and Constitution Bench decision *(2002) 2 SCC 388* in the case of *Konkan Rly.* (supra) has held that the Chief Justice or his designate under section 11 of the Act exercises purely administrative functions and it is not upon to him to discharge any judicial function of adjudicating the dispute even regarding the "existence of arbitration agreement". Whether the letters and exchange of correspondence between the parties, pursuant to the NIT, can constitute a contract and an "arbitration agreement" can be read into the same in terms of section 7 (4) (b) of the Act was a question solely within the jurisdiction of "Arbitral Tribunal" under section 16 of the Act. See decision in the case of *Nimet Resources Inc. Vs. Essar Steels Ltd., (2000) 7 SCC 497* wherein Justice Rajendra Babu of this Court acting as designate of the Chief Justice of India while exercising powers under Section 11 of the Act, observed thus :

> "6. I am conscious of the fact that M. Jagannadha, Rao, J. in *Wellington Associates Ltd. vs. Kirit Mehta, (2000) 4 SCC 272* held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by section 16 of the Act and such a power can be exercised in a suitable case. On this basis, it is no doubt permissible under section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the cor-

respondence or exchange of documents between the parties are not clear as to the existence or nonexistence of an arbitration agreement, in terms of section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question under section 16 of the Act rather than the Chief Justice of India or his nominee under section 11 of the Act.

7. I take this view because the power that is exercised by the nominee of the Chief Justice of India under section 11 of the Act is in the nature of an administrative order. In such a case, unless the Chief Justice of India or his nominee can be absolutely sure that there exists no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further such a view may not be conclusive in view of the nature of the powers that are exercised under section 11 (6) of the Act."

In the latest decision of a two-Judge Bench of this Court in the case of *Food Corpn. of India vs. Indian Council of Arbitration, (2003) 6 SCC 564= JT (2003) 5 SC 480* a similar view was taken.

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205. INDIAN PENAL CODE, 1860- Section 306

Abetment to commit suicide-Writing of letters to deceased by accused disclosing intention to divorce does not constitute abetment.

Manoharlal Vs. State of M.P.

Reported in 2004 (2) MPLJ 64

Held :

I have perused the letters Ex. P/5, Ex. P/8-A and Ex. P/9 which have been allegedly written by the appellant, from none of the letters it can be said that appellant had treated his deceased wife Saroj with cruelty. Mere expression in the letters that he intends to divorce her would not amount an act of abetting her to commit suicide. It is pertinent to mention here that the letters were written about eleven months and more prior to the date of incident and from the close scrutiny of the aforesaid letters it is also clear that the appellant had not disclosed to his wife Saroj about his intention to divorce her. Thus the alleged act of writing of the alleged letters disclosing his intention to divorce his wife Saroj that too much prior to the date of incident is not an act of abetment to commit suicide.

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206. INDIAN PENAL CODE, 1860- Section 302

Wife dying due to burn injuries sustained in the house of accused- Deceased and accused only inmates of house- Accused sustaining burn injuries on right forearm- No explanation forthcoming from accused- Accused must be held liable.

Maiku Baiga Vs. State of M.P.

Reported in 2004 (2) MPLJ 65 (DB)

Held :

The presence of burn injuries on the right forearm and palm of the accused establishes his presence on the spot at the time of occurrence. If the deceased and accused were the only inmates in the house of the accused at the time of incident and burn injuries were found on the right forearm and palm of the accused, the only inference will be that it was the appellant who set the deceased on fire. When the accused was the only person present in the house where the incident took place and it is not his case that some person other than him had set the deceased on fire or she got burnt in some accidental fire, or she tried to commit suicide by setting herself on fire, the irresistible conclusion would be that it was the appellant and appellant alone who burnt his wife alive.

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207. SERVICE LAW :

Transfer is an incident of services- Unless modified or cancelled transfer order must be complied.

Subhash Kher Vs. Jawaharlal Nehru Krishi Vishwa Vidyalaya, Jabalpur and others

Reported in 2004 (2) MPLJ 75

Held :

It is well settled that transfer is an incident of service. In *Gujarat Electricity Board vs. Atmaram AIR 1989 SC 1433* the Supreme Court has held that whenever a public servant is transferred, he must comply with the order but if there be any genuine difficulty in proceeding on transfer, it is open to him to make represantation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled, the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order, a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinery action under the relevant rules as happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other. The same legal position has been reiterated in nurnerous subsequent decisions.

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208. CIVIL PROCEDURE CODE, 1908- Section 115

Order passed under section 24 Hindu Marriage Act regarding maintenance pendent lite- Order not revisable- Law explained.

Ramavtar Vs. Smt. Chintamani and others

Reported in 2004 (2) MPLJ 87

Held :

Thus, no revision lies under the amended proviso of the Code against inter-

locutory orders. Test of order being 'interlocutory' has been 'if it had been made in favour of the party, applying for the revision, would have finally decided the suit or other proceedings' or in other words if the order granting maintenance pendente lite and expenses of proceedings is set aside would the suit or proceedings pending before the Trial Court be finally disposed of. In *Surajmal vs. Dunerlal, 2003 (2) MPLJ 408* a Division Bench of this High Court has interpreted the above proviso and has held that 'now this power of revision cannot be exercised unless the order in one if made in favour of the petitioner would have finally disposed of the suit or proceedings'. It is noteworthy that the order granting maintenance pendente lite and expenses of proceedings is short lived, which is coterminus with the matrimonial proceedings. Right to get maintenance pendente lite or litigation expenses, arises from the start of proceedings and ends with the proceeding, under the Act. Such order does not survive after the proceeding terminates. It is true that a revision in *Hiramani Shukla (Smt) vs. Ravindra Shukla, 1998 (II) MPWN 44, Kaliben Kalabhai Desai vs. Alabhai Karamshibhai Desai, (2001) I DMC 295* against an order granting maintenance and litigation expenses was held permissible yet both of these had been pre amendment cases. It is true that a revision *Keshavrao vs. Tihalibai, 2003 (1) MPHT 5 (N.O.C.)* against an order passed under sections 23 (2) and 24 of the Act was entertained by a Single Judge even after amendment, but in that case no question as to the applicability of amended proviso to section 115 of the Code of Civil Procedure was raised and the plaint remained sub silentio. The learned Advocate for the applicant has relied upon *Hanuman Datt vs. State, 2002 (4) MPLJ 354* and has argued that the order granting maintenance pendente lite and litigation expenses is an order of moment and great importance incurring financial liability to the applicant and thus revision would be competent, but that line of reasoning has been expressly overruled by Surajmal vs. Sunderlal (cited supra).

It has also been argued that application for maintenance pendente lite and litigation expenses is an independent proceeding in itself. However, this view cannot also be upheld by this Court. As already seen/ question of maintenance pendente lite and litigation expenses arises with the filing of an application for matrimonial reliefs under the Act. It ends as the proceedings terminate. It has no separate existence and cannot stand by itself. No application for maintenance pendente lite or litigation expenses can exist independently unless lis is there. Admittedly, no appeal lies against the order. Thus, the revision also does not lie in view of the amended provision to section 115, Civil Procedure Code, hence summarily dismissed.

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209. REGISTRATION ACT, 1908- Section 17
Memorandum of family arrangement containing terms of relinquishment- It requires compulsory registration.
Rukayya Bai Vs. Munni Bai and another
Reported in 2004 (2) MPLJ 92

Held :

The recitals of Ex. P.1 are as under :-
Where a suit against Fida Hussain in respect of suit house was filed by Abdul Hussain and that against the judgment- decree an appeal has been preferred in appellate Court at Nagpur. It has been agreed that late Tahir Ali alone persisting and prosecuting the appeal, if wins he will be the sole owner of the disputed house and rest of the legal heirs shall not claim any right, title or interest in the suit property. In case he losses be will not be entitled to recover any expenses from them.

The recitals in Ex. P.1 per se are of relinquishment of rights in suit house and conferring absolute right solely on late Tahir Ali. Ex. P.1 reads as under :-

" हमारा इस मकान से कोई सरोकार और हक नहीं है। अगर कभी किसी तरह से कोई हक बतलावे झूठा समझा जावेगा।"

The aforesaid recital clearly speaks of the relinquishment of all rights in favour of late Tahir Ali by other heirs of deceased Fida Hussain. Under Section 17 of the Registration Act the document require compulsory registration. With reference to family settlement in the judgment reported in *AIR 1976 SC 807* it has been held as under :-

"(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case memorandum itself does not create or extinguish any right in immovable properties and therefore does not fall within the mischief of section 17 (2) (sic) (section 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable."

As referred above the part of recital Ex. P.I speaks of relinquishment of right by remeining legal heirs in favour of late Tahir Ali, Ex.P.I cannot be termed to be a mamorandum of family settlement. It is a deed relinquishing the right, title. As such document Ex.P.I could not be read in isolation of the facts aforesaid only to refer alleged exclusive possession of late Tahir Ali.

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210. CRIMINAL TRIAL :

Chance witness, meaning of- Evidence of chance witness requires cautious and close scrutiny.
Ganraj Vs. State of M.P.
Reported in 2004 (2) MPLJ 95= 2004 (2) MPHT 294

Held :

If by co-incidence or chance a person happens to be at the place of occur-

rence at the time of incident, he is called a chance witness. The testimony of a chance witness alone is ordinarily not sufficient to form the basis of conviction. His evidence is viewed with suspicion and does require cautious and close scrutiny.

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211. FAMILY COURTS ACT, 1984- Section 19 (4)
CIVIL PROCEDURE CODE- Section 115
Order passed by Family Cout on application under section 125 Cr.P.C., nature of- The order is of civil nature revisable u/s 19 (4) of the Act before the High Court - Limitation for the revision same as for civil revision u/s 115 C.P.C.
Aruna Choudhary Vs. Sudhakar Choudhary
Reported in 2004 (2) MPLJ 101 (DB)

Held :

Perusal of sub-section (4) of section 19 of the Act, now makes it clear and leaves no amount of doubt that against the order passed by Family Court deciding an application under section 125 of the Code, Revision alone would be maintainable. The Parliament in its wisdom had felt it necessary to insert sub-section (4) in section 19 of the Act to remove doubts. Though provisions of the Act have been made applicable to whole of Madhya Pradesh, but, Family Courts have not been established in whole of Madhya Pradesh. Thus, in some part of Madhya Pradesh such power to decide application under section 125 of the Code is still being exercised by the Magistrates, but, where Family Courts have been established, then, there such powers are being exercised by family Courts. It is, therefore, clear that where the orders have been passed by Magistrates, deciding the application under section 125 of the Code, then, Criminal Revision against such an order would still be maintainable under section 397 of the Code. But, where, such an application has been decided by Family Court, then, Revision would be maintainable under section 19(4) of the Act in the High Court and would be heard by Single Bench, as under sub-section (6) of section 19 of the Act, only those appeals which have been preferred under sub-section (1) of section 19 are required to be heard by a Bench, consisting of two or more Judges.

It may further be clarified that although section 19(4) of the Act does not prescribe any period of limitation for filing the Revision, but, as we have held that Civil Revision alone would be maintainable against such an order passed by Family Court, thus, the same period of limitation would be available to an aggrieved party, as is prescribed for filing a Civil Revision under section 115 of the civil Precedure Code.

As far as scope of interference against such an order is concerned, the same shall however be governed only with the scope, ambit and mandate of section 19(4) of the Act and not as provided under section 115 of the Civil Procedure Code.

Thus in our considered opinion, analyzing the legal position as it emerges after critically examining the matter from all angles, we are of the considered opinion, that the proceedings exercisable by the Family Court under section 125 of the Code, would be of civil nature and would be amenable to revisional jurisdiction of learned Single Judge of the High Court.

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212. SERVICE LAW :

Subsistence allowance, not a bounty but a right- Non-payment of subsistence allowance would amount to denial of reasonable opportunity of hearing- Law explained.

Mathura Prasad Dixit Vs. Union of India and others

Reported in 2004 (2) MPLJ 113

Held :

In *Jagdamba Prasad Shukla vs. State of U.P., AIR 2000 SC 2806* it has been held that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. Non-payment of subsistence allowance on grounds that the applicant had not furnished the address where the amount was to be sent and had also not given the requisite certificate indicating that he was not employed else during the period of suspension, is not justified. At no stage, the employee was told that he had to furnish such a certificate, and that he could not be paid subsistence allowance without it. Because of the financial crunch on account of non-payment of subsistence allowance, the employee was unable to appear in enquiry. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the employee to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service also are liable to be quashed. The same principles have been reiterated in *Anwarun Nisha Khatoon vs. State of Bihar, (2002) 6 SCC 703* and *State of Punjab and others vs. K.K. Sharma, (2002) 9 SCC 474.* In these cases also it has been emphasised that the certificate of non-employment is required to be furnished when the employee is asked to do so and non-payment of subsistence allowance would tantamount to denial of a reasonable opportunity in the departmental enquiry.

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213. INDIAN PENAL CODE, 1860- Section 376

Prosecutrix, conduct of- Non-disclosure of incident to stranger passerby- Prosecutrix not to be disbelieved simply for this reason.

Ram Vilas Vs. State of M.P.

Reported in 2004 (2) MPLJ 117= 2004 (2) MPHT 135

Held :

The only contention of learned counsel for the appellant that after the incident when the prosecutrix was coming to her home, DW 2 Jagdish met her but this statement of prosecutrix is not corroborated by the evidence of D.W. 2 Jagdish

who has said that the prosecutrix told that the cattles of the accused were run over on the clothes of the prosecutrix with the result, her clothes became dirty and for that reason, she is weeping. Even if, the prosecutrix has not stated the incident to this witness and narrated some other story, would not weaken the case of the prosecution for the simple reason that it is not supposed to a lady to narrate to a stranger that she was ravished and if any question is being asked by stranger to her, she may narrate some other different story.

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214. ARBITRATION AND CONCILIATION ACT, 1996-Sections 31(5) and 34 (3) Limitation for filing application to set aside award- Limitation of three months under section 34 (3) to be counted from date of delivery of singed copy of award to applicant- Law explained.
Ramesh Pratap Singh (Dead) and others Vs. Vimala Singh and others
Reported in 2004 (2) MPLJ 135= 2004 (2) MPHT 364

Held :

After hearing the learned counsel for both the sides this Court is of the opinion that the impugned order is not correct. In terms of section 31 (5) of the Act, it is mandatory on the part of the arbitrator to deliver a "signed copy" to each party. The receipt of signed copy of the arbitral award is an important event in the arbitration proceedings. It is from that date the limitation period given in section 34 (3) of the Act has to be counted. It has been held by the Supreme Court in *Union of India vs. Popular Construction Company, (2001) 8 SCC 470* that the limitation period given in section 34(3) of the Act can be extended by thirty days as per proviso to that sub-section and there can be no extension of limitation beyond that date. It has also been held that section 5 of the Limitation Act, 1963 is not applicable to the application under section 34(3) of the Act. Thus the law relating to limitation in this matter is very strict and, therefore, the provision in section 31(5) of the Act for delivering a signed copy of the arbitral award to each party should also be construed strictly. In the present case the photocopy which was supplied to the applicants initially on 19.5.1997 was admittedly not bearing the signatures of the Arbitrators. Therefore, it was not a signed copy within the meaning of section 31 (5) of the Act.

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215. CIVIL PROCEDURE CODE, 1908- O.39 R.2 (2) Proviso (b) "Corporation owned or controlled by the State Govt." meaning of- M.P. Mahila Vitta and Vikas Nigam, a Govt. owned corporation- Proviso (b) of O.39 R.2 (2) applicable- Court has no jurisdiction to grant stay in matter of transfer, suspension etc.
State of M.P. and another Vs. M.K. Chaturvedi and another
Reported in 2004 (2) MPLJ 157= 2004 (2) MPHT 246

Held :

As per Clause (b) of the proviso no temporary injunction shall be granted to stay, the operation of an order for transfer, suspension, reduction in rank etc., or

taking charge from, any person appointed to public service and post in connection with the affairs of the State including any employee of any company or corporation owned or controlled by the State Government. In the present case the Society known as "Madhya Pradesh Mahila Vitta Avam Vikas Nigam" is prima facie owned and controlled by the State Government. A memorandum of association of this Society has been placed on record. According to this memorandum, the Chairman of the Society is appointed by the State Government on such terms and conditions as may be prescribed. The Managing Director is also appointed by the State Government. The State Government has the power to issue directives or instructions to this Society as it thinks fit in regard to the finance and the conduct of the business and affairs of the Society and it shall duly comply with and give effect to such directives or instructions. The Society registered under the Act comes within the term "Corporation". Recently in *Professional Examination Board vs. Bhopal Municipal Corporation, 2003 (3) MPLJ 436* after exhaustively considering the case law it has been held that a body of persons or an office which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body is a Corporation. It is created by or under a statute. In the present case the society has been created under a statute. The societies formed under the Society Registrikaran Act or even Co-operative Societies under the Co-Coperative Societies Act come within the term of Corporation as these are incorporated under the statute, it is through the act of 'incorporation' by or under a statute that a separate juridical person is born and it is endowed with a corporate personality. In *Siya Ram Sharma vs. K.S. Bank Maryadit Bhind and ors., 2001 (II) MPJR 278* also it has been held by this Court that a Co-operative society is a Corporation.

In the present case the plaintiff claimed of the relief of the stay of the order by which he was to be reverted to his original post of Manager and an officer of the State Government has been deputed to work as General Manager. There is a statutory ban on the power of the Civil Court to stay, the operation of an order for transfer", "reduction in rank" and also "taking charge from any person". The order of the State Government which has been challenged has the effect of reducing the plaintiff in rank and also taking charge from him of the post of General Manager. The Civil Court has been injuncted by a statutory provision to grant the stay in such matters by issuing an order of temporary injunction. Therefore, in the present case, the trial Court could not entertain the application for issuing the temporary injunction for staying the operation of the order dated 18-6-2003 of the State Government.

It has been argued on behalf of the learned counsel for the plaintiff that the order which has been issued by the State Government is without jurisdiction and, therefore, it can be challenged as per law laid down by this Court in *Sonelal vs. State of M.P., 1988 JLJ 283.* In that case transfer order was challenged on the ground that it was a "fraudulent document". In the present case that is not the position. The order has been issued by the State Government. The question

whether the State Government could issue such order could not be examined by the Civil Court while deciding the application for temporary injunction. It is not said that the order issued by the State Government in the present case is a "fraudulent document".

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216. HINDU MARRIAGE ACT, 1955- Section 26
HINDU ADOPTIONS AND MAINTENANCE ACT, 1956- Section 20
Maintenance of unmarried major daughter- Under section 26 of Hindu Marriage Act father liable only for minor children- Major unmarried daughter may get maintenance under section 20 of Hindu Adoptions and Maintenance Act.
Aditya Shrivastava Vs. Asha
Reported in 2004 (2) MPLJ 175

Held :

On going through section 26 of the Act, it is quite clear that the amount of maintenance can be awarded for minor children, but merely because the application has been moved under section 25 (2) of the Act and because during the pendency of the proceedings, the daughters have become major would not disentitled them from obtaining the maintenance amount from their father. Under section 20 of the Hindu Adoptions and Maintenance Act, 1956, a Hindu is bound, during his lifetime, to maintain his legitimate or illegitimate children. Under section 20(3) of the said Act, it is obligatory on the part of a person to maintain his unmarried daughter who is unable to maintain herself out of her own earning. In the case of *Rishikesh Darshanlal Sharma vs. Saroj Rishikesh Sharma, 1997 (2) MPLJ 530*, a similar type of situation arose and this Court held that though under section 26 of the Act major daughter would not be entitled for maintenance but under section 20 of the Hindu Adoptions and Maintenance Act she would be entitled for the same. I am in respectful agreement of the said authority. Indeed, it had served the real justice ignoring the technicalities. Though technically the major daughters are not entitled for maintenance under section 26 of the Act, but, they are certainly entitled for maintenance under section 20 of the Hindu Adoptions and Maintenance Act.

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217. LAND REVENUE CODE (M.P.) 1959- Section 165 (7)
Section 165 (7) no bar for granting specific performance of agreement to sale of land comprising less than 5/10 acres irrigated/ unirrigated respectively.
Chamrulal Vs. Mahadev Prasad and another
Reported in 2004 (2) MPLJ 185

Held :

It has been contended by Shri K.N. Agrawal, learned senior counsel assisted by Smt. Hansa Agrawal that the Trial Court though gave finding in favour of the plaintiff but did not pass the decree of specific performance of contract

simply on the ground that there is a bar under section 165 (7) of the Code. Section 165 of the Code which speaks about the right to transfer reads thus:

"165. Rights of transfer.- (1) Subject to the other provisions of this section and the provision of section 168 a Bhuniswami may transfer any interest in his land.

(2) Notwithstanding anything contained in sub-section (1)-

(a) xxxxx xxxxx xxxxx

(b) xxxxx xxxxx xxxxx

(c) xxxxx xxxxx xxxxx

(3) xxxxx xxxxx xxxxx

(4) xxxxx xxxxx xxxxx

(5) xxxxx xxxxx xxxxx

(6) xxxxx xxxxx xxxxx

(7) Notwithstanding anything contained in sub-section (1) or in any other law for the time being in force-

(a) where the area of land comprised in a holding or if there be more than one holding the aggregate area of all holdings of a Bhumiswami is in excess of five acres of irrigated or ten acres of unirrigated land, then only so much area of land in his holding or holdings shall be liable to attachment or sale in execution of any decree or order as is in excess of five acres of irrigated or ten acres of unirrigated land ;

(b) no land comprised in a holding of a Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe under sub-section (6) shall be liable to be attached or sold in execution of any decree or order;

(c) No receiver shall be appointed to manage the land of a Bhumiswami under section 51 of the Code of Civil Procedure, 1908 (V of 1908) nor shall any such land vest in the Court or any receiver under the Provincial Insolvency Act, 1920 (V of 1920), contrary to the provisions of clause (a) or clause (b);

Provided that nothing in this sub-section shall apply where a charge has been created on the land by a mortgage."

On going through the above said provisions, it is clear that there is no bar in passing a decree of specific performance under this section. This clause speaks about the attachment or sale in execution of a decree. Neither the present suit land is being attached or being sold in the execution of the decree and, therefore, sub-section (7) of section 165 is not at all applicable in the present factual scenario. In this context, it would be profitable to rely on the decision of *Bhawaniram and others vs. Ghishibai, 1978 RN 418* wherein Justice G.L. Oza as then his Lordship was, in para 4 has laid down the law thus:

"4. As regards objections under sub-clauses (v) and (vii) of section165 it could not be disputed that these pertain to sales in execution of a decree. Admittedly the present sale does not pertain to sale in execution of a decree but it is a decree for specific performance itself. It is also not in dispute that these objections were not raised earlier. In view of these circumstances it could not be said that the learned Courts below have committed any error in disallowing these objections."

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218. CIVIL PROCEDURE CODE, 1908- O.7 R .11 (b), (c) and O.7 R. 10
Defect of undervaluation or insufficiency of stamp on plaint- O.7 R.11 (b) and (c) applicable and not O.7 R.10.
Prism Cement Limited Vs. L & T Finance Ltd. Mumbai and others Reported in 2004 (2) MPLJ 200

Held :

The trial Court reproduced Order 7, Rule 11, Civil Procedure Code in the impugned order but did not closely consider its implications. If in the opinion of the Court the relief claimed was "under valued" or the plaint was "insufficiently stamped" then in both the situations as per Order 7, Rule 11(b) and (c) it was necessary for the Court to require the plaintiff to correct the valuation or to make up the deficiency in Court fee within a time fixed by it and on failure to do so by the plaintiff the plaint could have been rejected. But the trial Court did not give these opportunities to the plaintiff and abruptly passed the order returning the plaint under Order 7, Rule 10, Civil Procedure Code.The Court of Additional District Judge is a Court of unlimited pecuniary jurisdiction and it is not spelt out in the impugned order how the suit was beyond the pecuniary jurisdiction of the Court. It may be that by the Distribution memo issued by the District Judge under section 15 of the M.P. Civil court Act, 1958 the pecuniary limit of the jurisdiction of the Court of Second Additional District Judge might have been limited to some extent but there was no inherent lack of jurisdiction and to meet this situation section 15 (3) has been engrafted in the M.P. Civil Court Act, 1958 according to which it was necessary for 2nd ADJ to refer the case to the District Judge on administrative side for necessary orders. The provision in Order 7, Rule 10, Civil Procedure Code was not at all attracted and the provisions in Order 7, Rule 11 (b) and (c), Civil Procedure Code were not followed.

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219. CONSTITUTION OF INDIA- Article 21
Doctrine of sovereign immunity, applicability of- Infringement of a person's fundamental right by State employees- Held, State is liable for tortious acts of such employees.
State of M.P. and another Vs. Shantibai and another
Reported in 2004 (2) MPLJ 273

Held :

The defence of sovereign immunity is not available when the State or its

officers acting in the course of employment infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution. The decisions commencing from *Rudul Shah Vs. State of Bihar, AIR 1983 SC 1086* have greatly undermined and eroded the concept of sovereign immunity and have laid more emphasis on the principle that if a tortious act has been committed causing injury to any person he would be entitled to claim reasonable compensation from the State for the wrongful act done by its employees. It is by now well settled that the State is responsible for the tortious act of its employees. The compensation for violation of fundamental rights can be awarded in exercise of the writ jurisdiction by the Supreme Court and the High Court. The Civil Court can also award damages to a person aggrieved by wrongful act of the employees of the State. The maintenance of law and order and repression of crime are the traditional sovereign functions of the State and the doctrine of sovereign immunity must be confined to that sphere alone. In that field also the State can be held liable to pay compensation to its citizens if their fundamental rights have been violated and they suffered injuries on that account. The ideal of a welfare State is that it must take care of those who are unable to help themselves. The innocent victims must be provided succour and reasonable compensation. The society as a whole and the people in whom the real sovereignty vests are the insurers of such victims.

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220. CIVIL PROCEDURE CODE, 1908- O.21 R. 97 (2) and 99

Objection by stranger against dispossession in execution of decree- Though stranger should be heard before dispossession- Recording of evidence not a *sine qua non* for adjudicating such objections- Law explained.

Hamid Khan Ansari Vs. Lilabai and others

Reported in 2004 (2) MPLJ 310

Held :

Learned counsel appearing for appellant with the help of decision of Supreme Court reported in *AIR 1997 SC 856 (Brahma Dev Choudhary vs. Rishikesh Prasad Jaiswal and ors.)* submitted that an enquiry/investigation is a must by the Executing Court before adjudicating the claim of obstructer when execution of decree for possession is pending before the Executing Court. According to learned counsel, the moment third party or stranger to a decree files an application resisting execution for delivery of possession, recording of evidence is sine qua non for adjudicating claim of such party. On the other hand Shri B. L. Pawecha, learned Senior Counsel relied upon decision of the Supreme Court reported in *AIR 1998 SC 1754 (Silver Line Private Limited vs Rajiv Trust and another)* and contended that if the application filed to resist the execution of decree for possession on the face of it does not make out any case, then in such a case, no enquiry is needed.

After hearing learned counsel for parties at length and on due considera-

tion of material available on record, I find force in the submission made by Shri Pawecha on behalf of respondents 1 to 3. The decision of the Supreme Court in *Brahma Dev Choudhary (supra)* is not an authority for the proposition that recording of evidence is a must for adjudicating the claim of stranger or third party who is trying to resist the execution of decree for delivery of possession. What it lays down is only this that the executing court must first adjudicate upon the objection on merits under Order 97 (2) of Order XXI, Civil Procedure Code without insisting that the possession must be handed over first and application under Order XXI, Rule 99 of the Civil Procedure Code be moved later on complaining about dispossession. *Brahma Dev's* case does not help or advance the case of appellant. At this stage it would be profitable to point out that a Full Bench decision of this Court in *Usha Jain's case, 1980 MPLJ 623 (FB) = AIR 1980 MP 146* took a view that a stranger claiming to be in possession has no locus to force an enquiry into his rights after a warrant of possession is issued and such enquiry is contemplated only after he is dispossessed pursuant to a decree for possession and his remedy lies in filing of separate civil suit. This view of the Full Bench held the field till the decision of the Supreme Court reported in AIR 1995 SC 358, wherein it was held that an objection can be filed and entertained by the executing court under Order XXI, Rule 97 while executing the decree for possession. A similar view has been reiterated in AIR 1998 SC 1827 wherein the view taken by the Full Bench (supra) was expressly overruled. A similar view has been reiterated in *AIR 1997 SC 856 and AIR 1998 SC 1754; (2002) 7 SCC 50 and lastly, (2001) 8 SCC 187.* In none of these decisions it was held that recording of evidence is sine qua non for the adjudication of application filed by third party to decree for delivery of possession. In this connection, what Supreme Court in *Silver Line* case supra has held, is of great significance. The Supreme Court held as under :

> "It is clear that executing Court can decide whether the resistor or obstructer is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order XXI, Rule 97 (2) of the Code. *The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even* on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary". (Emphasis is added)

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221. INDIAN PENAL CODE, 1860- Section 376
Prosecutrix, conduct of- Prosecutrix, a major lady visiting several places along with accused without complaining to anybody- Conduct is consenting one.
Lakhan Singh and others Vs. State of M.P.
Reported in 2004 (2) MPLJ 320

Held :

On going through the evidence of the prosecutrix it becomes luminously clear like a noon day that she was a consenting party. In the case of *Munnalal vs. State of M.P., 1977 JLJ 731* Division Bench of this Court while dealing with similar situation came to hold that the prosecutrix visited serveral places but she did not complain to anybody and in that situation, Division Bench held that no offence either under sections 363 and 366 or under section 376, Indian Penal Code was made out. In this context, it shall be apposite to rely upon the decision of the Apex Court in the case of *S. Vardarajan vs. State of Madras, AIR 1965 SC 942* where a college going girl at the verge of majority telephoning accused and meeting him and going with him to Sub Registrar's Office for registering marriage agreement, it was held that no offence was made out. In the case of *S. Vardarajan* (supra), the girl was not even completed 18 years but she was on the verge of majority, even then, the Apex Court held that no offence is made out.

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222. CIVIL PROCEDURE CODE, 1908- O.21 R.2

Decree, satisfaction of- Payment outside Court- Payment or adjustment unless certified or recorded not to be recognized by Executing Court- Law explained.

Dev Singh @ Devi Singh Vs. Subhash Chandra

Reported in 2004 (2) MPLJ 343

Held :

Learned counsel for the applicant has submitted that the view taken by the Executing Court is without jurisdiction. For this purpose he relied upon a judgment of Apex Court in the case of *M.P. Shreevastava vs. Mrs. Veena, AIR 1967 SC 1193* and on a Division Bench decision of this Court in the case of *Bherulal Narayanji vs. Ramautar Bihari, 1981 MPLJ 333.* In both these cases it was held that the judgment debtor can oppose the decree by saying that he has already satisfied the decree without certification. The scope of Order 21, Rule 2, Civil Procedure Code and objection under Section 47, Civil Procedure Code are quite different and objections without certification of the execution of the decree can be gone into by the Executing Court. In both these cases the decree was passed prior to the amendment in the Code of Civil Procedure and the decree put into execution prior to the amendment in the Civil Procedure Code in the year 1976 which has come into force from 1-2-1977. By the said amendment sub-clause (3) is incorporated under Order 21, Rule 2, Civil Procedure Code which provides that a payment or adjustment which has not been certified or recorded as provided by Rules 1 and 2 shall not be recognised by any Court executing the decree. Thus, this proviso is introduced which creates a bar against executing Court to recognize any payment which is not certified as provided by Rules 1 and 2, Civil Procedure Code in the light of the said proviso, the decisions referred by the learned counsel for the petitioner, have no application in the present case.

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223. CIVIL PROCEDURE CODE, 1908- O.41 R.14 (4) and O.41 R.14 (3) as amended by M.P. Amendment
Phrase "proceeding incidental to an appeal", meaning of- Issuance of notices to respondent, held, a proceeding incidental to an appeal- Issuance of notices to respondent/ defendant who remained ex prate or did not submit address for service not mandatory-Three Division Bench decisions expressing contra view overruled.
Jamuna Bai and others Vs. Chhote Singh and others
Reported in 2004 (2) MPLJ 376 (FB)

Held :

To examine the controversy it will be appropriate to reproduce the provisions of Order XLI, Rule 14 (4) of Code of Civil Procedure.

> "Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal."

Under sub-rule (4) of Rule 14 of Order XLI it is provided that the Court may dispense with service of notice upon the respondent unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

Division Bench of this Court in the case of *Sushila and another vs. Rajveer Singh and others, 2000 ACJ 719* has held that dispensing with the service of notice relates to "proceeding incidental to an appeal". Division Bench held that sub-rule (4) of rule 14 is applicable only to the proceeding incidental to an appeal, since service of notice is not an incidental to an appeal, therefore, after dispensing with service upon the owner and driver appeal cannot continue because in the event of modification of award owner and driver will be responsible to pay the compensation and has dismissed the appeal where the Court has dispensed with service of notice upon the parties, who were *ex prate* in the Court of first instance. The question which requires consideration is the meaning of words "proceeding incidental to an appeal".

We are unable to agree with the reasonings in the case of *Sushila and others (supra)* that sub-rule (4) of Rule 14 of Order XLI is applicable to incidental proceedings in appeal. On the contrary the Legislature has used specific words i.e. "proceedings incidental to an appeal", which shows that as and when appeal is filed and admitted for hearing, after admission the next incident in the appeal is of issuing notice to respondents. Thus, issuance of notice to respondents will be a "proceeding incidental to an appeal". While interpreting the provisions in the light of objects and reasons for introducing the amendment it is apparent that in order to avoid delay in deciding the appeal discretion is conferred upon the Appellate Court to dispense with service upon the parties, who were proceeded *ex*

parte in the Court of first instance. Once discretion is exercised by the Court, then appeal cannot be thrown out on the ground that owner and driver are going to be affected by modification of award in the appeal and on mere assumption appeal cannot be dismissed.

We, therefore, hold that Division Bench judgments delivered in the cases of *Sushila (supra), Reghavendra Naik (supra)* and *Kalabai Choubey (supra)* do not lay down the correct law. We answer the question that the appeal shall not fail on account of dispensing with notice upon the respondents, who were *ex-parte* before the Court of first instance and they have not submitted the address of service for notice. Since respondents have chosen not to appear before the Court of first instance, they cannot claim right to be heard at he appellate stage. No benefit can be claimed by the party against the exercise of discretion of the Court in dispensing with notice.

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224. SERVICE LAW :

Resignation from service, withdrawal of- Can be withdrawn only before its aceptance.

Brij Bhooshan Mishra Vs. State of M.P.

Reported in 2004 (1) MPWN 92

Held :

The resignation letter is marked as Annexure P-4. In this letter it is clearly mentioned that the petitioner is resigning from his post. There is no mention that he is giving notice of 30 days as stipulated in the appointment letter. This was resignation *in praesenti.* It was not a prospective resignation which was to take effect after sometime. The letter (Annexure P-4) does not state that it is a prospective resignation. Therefore, the acceptance of this resignation by the impugned order dated 25.10.1996 (Annexure P-5) cannot be said to be contrary to any law.

In *Moti Ram v. Param Dev, AIR 1993 SC 1662* it has been pointed out in para 17 that it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. It can be withdrawn before its acceptance.

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225. EVIDENCE ACT, 1872- Section 114 (g)

WORDS AND PHRASES :

(i) Best evidence rule- Party in possession of best evidence must adduce it irrespective of onus of proof- Law explained.

(ii) Word "Caste", meaning and connotation of.

Punit Rai Vs. Dinesh Chaudhary

Reported in 2004 (1) MPWN 99 (SC)

Held :

(i) We may consider a few cases on the point of drawing adverse inference in the event of withholding of a witness. In *Gopal Krishnaji Ketkar v. Mohd. Haji Latif AIR 1968 SC 1413 at p. 1416* it has been held that if a party who is in possession of best evidence which would throw light on the issue in controversy withholds such evidence, an adverse inference under section 114 (g) of the Evidence Act ought to be drawn against such a party notwithstanding that the onus of proof may not lie on him. It is observed that a party cannot rely on the abstract doctrine on onus of proof or on the fact that he was not called upon to produce such evidence.

In the instant case, however, the onus of proof that the respondent was Pasi by caste due to the alleged marriage of Bhagwan Singh with Deo Kumari Devi in some other place was wholly within the special knowledge of the respondent.

In *Virendra Kumar Saklecha v. Jagjiwan 1973 JLJ 6 = (1972) 1 SCC 826* the allegation of threatening voters with divine displeasure in speech delivered in some meetings was not accepted and an adverse inference was drawn due to non-production of the material witness and the notes made by him at the meeting. In yet another case in *Lachman Utamchand Kirpalani v. Meena AIR 1964 SC 40* a matrimonial dispute in which the question as to whether or not the wife had left the husband's place with the consent of the husband's parents, non-production of parents of the husband led to an adverse inference drawn against the husband.

(ii) Caste has been defined in *Colons English Dictionary* as "any of the four major hereditary classes, namely, the *Brahman, Kshatriya, Vaisya* and Sudra into which Hindu society is divided".

The caste system in India is ingrained in the Indian mind. A person, in the absence of any statutory law, would inherit his caste from his father and not his mother even in a case of intercaste marriage.

In *Caste in Modern India and other Essays by M.N. Srinivas at p. 3,* it is stated :

> "A sociologist would define caste as a hereditary, endogamous, usually localized group, having a traditional association with an occupation, and a particular position in the local hierarchy of castes. Relations between castes are governed, among other things by the concepts of pollution and purity, and generally, maximum commensality occurs within the caste."

In *Caste and the Law in India by Justice S.E. Wad at p. 30* under the heading "Sociological Implications", it is stated:

> "Traditionally, a person belongs to a caste in which he is born. The caste of the parents determines his caste but in case of reconversion a person has the liberty to renounce his casteless status and voluntarily accept his original caste. His caste status at birth is not immutable.

Change of religion does not necessarily mean loss of caste. If the original caste does not positively disapprove, the acceptance of the caste can be presumed. Such acceptance can also be presumed if he is elected by a majority to a reserved seat. Although it appears that some dent is made in the classical concept of caste, it may be noticed that the principle that caste is created by birth is not dethroned. There is also a judicial recognition of caste autonomy including the right to outcast a person."

If he is considered to be a member of the Scheduled Caste, he has to be accepted by the community. [See *C.M. Arumugam v. S. Rajgopal (1976) 3 SCR 82 and Principal, Guntur Medical College v. Y. Mohan Rao (1976) 3 SCR 1040.*)

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226. LAND REVENUE CODE, 1959 (M.P.)- Section 57 (2)
Claim of Bhumiswami right against State- Claim must be filed before Sub-Divisional Officer under Section 57 (2)- Civil Suit maintainable only after proceedings under Section 57 (2).
State of M.P. Vs. Krishan Das and another
Reported in 2004 RN 117 (HC)

Held :

The Sub-Divisional Officer under section 57 (2) of the M.P. Land Revenue Code has a right to resolve the dispute of bhumiswami rights between the individual and the State Government.

The plaintiff has not filed an application under section 57 (2) of the M.P. Land Revenue Code before the Sub-Divisional Officer for the declaration of his bhumiswami rights. It is provided in Clauses 3 of section 57 of the M.P. Land Revenue Code that the person aggrieved by the order of the SDO under Section 57 (2) of M.P. Land Revenue Code may institute civil suit within one year from the date of impugned order. The learned counsel for the appellant has rightly relied on case of *Hukumsingh and others v. State of M.P., 2000 RN 135 = 2000 (1) MPLJ 93* wherein it is held that suit claiming right of bhumiswami against State without adjudication under section 57 (2) by Sub- Divisional Officer as provided in M.P. Land Revenue Code is not maintainable.

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227. ACCOMMODATION CONTROL ACT, 1961 (M.P.) - Section 23-A
Accommodation acquired by Government servant after retirement- Such retired Government Servant may file eviction petition under Section 23-A.
Naveen Chandra Vs. Lokumal
Reported in 2004 (2) MPHT 107

Held :

A retired Government servant acquiring accommoation after retirement, may

file eviction application under Section 23-A. While dealing with the aspect aforesaid, the Division Bench of this Court *in Jenendra Kumar Vs. Roshanlal, 1994 JLJ 19* has held :-

> "The language of the provision is wide enough to include retired Government servant who acquires accommodation after his retirement. The words, "retired servant of any Government including a retired member of Defence "Services" are capable of only one interpretation and that every retired Government servant is a landlord within the meaning of the provision and, therefore, entitled to invoke special jurisdiction under Section 23-A of the Act. 1987 MPRCJ 66, 1987 (1) MPWN 51, 1987 MPLJ 695, 1989 MPRCJ 1, 1990 (1) MPWN 19 and 1991 (1) MPWN 76 overruled. 1985 MPRCJ 178, C.R. No. 206 of 1989, C.R. No. 151 of 1988 and 1991 JLJ 189 affirmed."

Further in *Kunjulal Yadu Vs. Parasram Sharma, 2000(3) M.P.H.T. 355 (FB)= 2000(2) MPLJ 514,* it has been held that retired Government servants acquiring accommodation after retirement is entitled to invoke Section 23-A of the Act.

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228. SPECIFIC RELIEF ACT, 1963- Section 34
Relief of declaration simpliciter, grant of- Plaintiff not entitled to further relief, may seek declaration simpliciter- Law explained.
Darbari Vs. Sunwa and another
Reported in 2004 (2) MPHT 111

Held :

It has been contended that the suit for declaration simpliciter without seeking any other relief is not maintainable. Section 34 of the Specific Relief Act is as under :-

> **34. Discretion of Court as to declaration of status or right.-** Any person entitled to any legal character, or to any right as to any person, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is entitled, and the plaintiff need not in such suit ask for any further relief :
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

The object of the proviso to Section 34 is to prevent a multiplicity of suits by preventing a person from getting a mere declaration of right in one suit and then after seeking the remedy without which the declaration would be useless. The "further relief" referred in the proviso must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent on the right. The meaning of the proviso is to the effect that a mere declaration should not be granted where, as things stand at the time when the

suit is brought, the plaintiff is entitled to further relief which he omits to claim either because he does not want to pay the stamp duty or for any other reason. The proviso does not extend to cases where the plaintiff is not entitled to the further relief unless he does something further which he is not bound to do and which he may not be in a position to do

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229. ACCOMMODATION CONTROL ACT, 1961 (M.P.) - Sections 12 (1) and 13 Protection under Section 13, availability of- Section 13 consists of two parts- To avail the benefit compliance of both parts necessary.
Madhya Pradesh Sahasik Evam Khoji Sansthan, Bhopal and another Vs. Shri R.S. Bangad
Reported in 2004 (2) MPHT 19 (NOC)

Held :

In order to avail benefit of Section 12 (3) it is necessary for the defendants to show that they have paid or deposited the rent as per Section 13 of the Act. Section 13 of the Act has two parts. The first part requires the tenant to pay the arrears of rent within one month of the service of writ of summons or within such time as the Court may, on an application made to it, allow in this behalf. The second part of Section 13 (1) requires the tenant to deposit monthly rent before the 15th of each of the following month.

The defendants never made any application for condonation of delay in respect of the second limb and also did not deposit the rent in time. They have been chronic defaulters. Such a delay can not be condoned in view of the decision of the Supreme Court in *Jamnalal Vs. Radheshyam (supra)* and also in view of the recent decision *in Sayada Akhtar Vs. Abdul Ahad, 2003 (3) M.P.H.T. 493 (SC) = AIR 2003 SC 2985.* In this latter judgment the Supreme Court has observed in Para 6 as under :-

> "A bare perusal of the aforementioned provision would clearly go to show that although the Court has the jurisdiction to extend the time for depositing the rent both for the period during which the tenant had defaulted as well as the period subsequent thereto but therefor an application is to be made. The provision requiring an application to be made is indisputably necessary for the purpose of showing sufficient cause as to why such deposit could not be made within the time granted by the Court. The Court does not extend time or condone the delay on mere sympathy. It will exercise its discretion judicially and on a finding of existence of sufficient cause."

It is contended on behalf of the appellants that as per order dated 3-8-2001 of this Court in Civil Revision No. 1153/2001 the entire rent has been deposited. In that order the question of striking of the defence of the defendants under Section 13 (6) of the Act was considered. As the defendants had deposited the rent by the time this order was passed the defence of the defendants (under Section

13 (6) of the Act) was held not liable to be struck of. That does not mean that the defendants would automatically get the benefit of Section 12 (3) of the Act.

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230. CRIMINAL PROCEDURE CODE, 1973- Section 167 (2)
Formal arrest of the accused by Magistrate's order dated 26-06-2003- Accused produced before the Court on 1-07-2003 for police remand- Held, period of 90 days to be calculated w.e.f. 1-07-2003 and not 26-06-2003.
Kok Singh Vs. State of M.P.
Reported in 2004 (2) MPHT 215

Held :

Mr. Desai, learned Dy. Advocate General has placed reliance on a judgment passed by the Supreme Court in the case of Central Bureau of Investigation, Special *Investigation Cell- I, New Delhi Vs. Anupam J. Kulkarni,* Relevant discussion, as discussed in para 11 of the aforesaid judgment is as follows :-

> "However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody."

In the present case formal arrest of the applicant was done by order dated 26.6.2003, passed by learned Chief Judicial magistrate, Ujjain but the applicant was not taken in police custody but thereafter, on 27-6-2003, police has filed the application to produce the applicant before Dewas Court having jurisdiction over the matter and in pursuance thereof, he was produced on 1-7-2003. From 26-6-2003 to 1-7-2003 he was not in police custody. His police custody was sought by filing an application on 1-7-2003 and the learned Judicial Magistrate, First Class, Dewas granted police custody for the purpose of interrogation and investigation upto 5-7-2003.

In this view of the matter, the first remand in this case has been granted by the concerned Court on 1-7-2003 and the charge-sheet was filed on 27-9-2003 within 90 days.

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231. CRIMINAL PROCEDURE CODE, 1973- Section 125
State amendment raising the limit of maintenance allowance from Rs. 500/- to Rs. 3,000/- -Amendment though applicable to pending matter is prospective in its application- Law explained- Observation "Magistrates have the power to enhance the amount of maintenance in the

cases in which orders are passed after 30th May 1998" in Ramfool's case 2001 (2) MPHT 234 held no binding precedent.
Satish Patel Vs. Smt. Pusia Bai
Reported in 2004 (2) MPHT 226 (DB)

Held :

Having heard learned Counsel for the parties we are of the considered view that the State amendment which came into force on 30-5-98 has rightly been held to be prospective by the learned Single Judge. He has also rightly held that this would apply to pending proceedings but observed that the Magistrates have the power to enhance the amount of maintenance in the cases in which orders are passed after 30-5-98 requires to be clarified. The provision under Section 125 at the time of initiation of proceeding under Section 125, Cr.P.C. has to be respected. If the proceeding is in continuance it would be governed by the amendment 30-5-98 and the Magistrates would be entitled to grant maintenance allowance to the maximum limit as fixed by the State Legislature from the date of amendment by the State Legislature. The Magistrate can not enhance the amount of the maintenance solely because he is passing the order after the date of amendment. To elaborate, the amendment though would be applicable to pending proceeding, can not be made retrospective. To give an example : if a proceeding has been initiated in the year 1992, the rate fixed under Section 125, Cr.P.C. would be applicable and thereafter, if proceeding has been continuing after 30-5-98 the amended provision would be applicable from the date the amended provision came into existence. Similarly, the provision enshrined by the Parliament has to be treated to be prospective. It is because there is no intendment of the Legislature to make it retrospective. It is one thing to say that it would be applicable to pending proceeding and another thing to confer the benefit retrospectively.

Accordingly, we elarify that the decision rendered in Ramfool's case and hold that the observation "Magistrate have the power to enhance the amount of maintenance in the cases in which orders are passed after 30th May, 1998" is out of context and was not necessary to stated in the context of the said case and has been too broadly stated. The same is not to be treated as the binding precedent.

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232. SERVICE LAW :

M.P. Civil Services (Pension) Rules, 1976- Family pension, entitlement of- Term "wife" used in Rule 44, Sub-rule (5) (1) does not include divorced wife- Divorced wife not entitled to retiral dues and family pension.
Smt. Saraswati Pandey Vs. Secretary, State of M.P. and another
Reported in 2004 (2) MPHT 261

Held :

If the rules are read in a purposive and harmonious manner it is graphically clear that term 'wife' has been given a meaning which is understood as such and no artificial meaning can be given to the said term as has been given under

Section 125 of the Code, It is well settled in law the Court can not read anything to a statute which is clear and unambiguous.

The term 'wife' has been used in strict manner and would not include any divorced wife. The language of Section 125 of the Code of Criminal Procedure is quite different. The language employed in the Rules is absolutely clear and has to be guided by rule itself and not anything else. In the case at hand, it is clear as day that the petitioner had divorced her husband late Ram Khilawan Pandey. The decree in this regard has been brought on record and the same has not been disputed by Mr. Bharti, learned Counsel for the petitioner. In view of the aforesaid premised base, I am of the considered opinion that the petitioner can no putforth a claim with regard to retiral dues or family pension.

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233. ADVERSE POSSESSION :

Possession claimed under invalid document- Possession is adverse to the true owner.

Hotam Singh and others Vs. Sewaram and others

Reported in 2004 (2) MPHT 379 (DB)

Held :

When a party claims to be in possession under an invalid document, then also its possession is adverse to the true owner as held in the case of *Kalika Prasad and another Vs. Chhatrapal Singh [(1997) 2 SCC 544]*.

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234. MOTOR VEHICLES ACT, 1988- Section 142

Fracture of bone- Whether always amounts to permanent disability- Each fracture not to be termed as privation of any member or joint- Law explained by the Full Bench after considering conflicting views- In case of insufficient evidence on the point Schedule of Workmen's Compensation Act may be referred by the Court.

Kamal Kumar Jain Vs. Tazuddin and others

Reported in 2004 (2) MPHT 386 (FB)

Held :

We have heard Counsel for the parties. Question involved in all the cases is whether fracture of bones in a motor accident will amount to privation of any member or joint and would amount to permanent disability as defined in Section 142 of the Act. We may mention here that Section 142 is limited to Chapter X only. Mere Fracture of bones and its re-union will not be sufficient to determine nature of disability unless determined by performing scientific test.

Schedule 1 of the Workmen's Compensation Act relates to injuries under Sections 2 (1) and 4 of the Workmen's Compensation Act. Schedule I Part I relates to 100 per cent loss of earning capacity in the cases of permanent total disablement. Part II relates to injuries deemed to result in permanent partial disablement. In the Schedule, 48 types of injuries causing permanent and partial

disablement pertaining to different parts of body are mentioned. Note is appended below the Schedule which mentions that complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent to the loss of that limb or member. Note is clear where there is permanent loss of use of limb, disability will be 100 per cent and the injuries of permanent loss of those limbs disability which fall in Part I of the Schedule. However, percentage of loss shall not be higher than what has been mentioned in Para II regarding partial disablement. In the cases of complete and partial loss of use of any limb or member, it will amount to loss of use of that limb or member. Thus, the Legislature's intent is clear and Court should determine percentage of loss of earning capacity from the nature of injuries mentioned in the Schedule. Even otherwise, doctor's statement determining the loss of disability should be based upon scientific tests. If no scientific tests are conducted, then the Court may safely record the percentage of disability from schedule I of the workmen's Compensation Act. Percentage of loss determined in the Schedule of Workmen's Compensation Act will be sufficient to determine the nature of disability and amount of compensation can be calculated by applying the multiplier mentioned in the schedule under Section 163-A of the Act. It may be mentioned that mere fracture of bones and its re-union will not amount to permanent total disablement or permanent partial disablement, unless the doctor has examined the claimant and assessed the percentage of disability after performing scientific tests. Without performing scientific tests bald statement of the doctor and certificate is inadmissible in evidence. Visual opinion of doctor has no evidentiary value. Claims Tribunals, therefore, must assign reasons in arriving at the conclusion about the percentage of loss of income in the case of permanent partial disablement. Therefore, for determining the nature of permanent disability, there must be sufficient evidence on record to determine total or partial disablement. In the absence of evidence regarding scientific tests to determine the percentage of disability, Claims Tribunals should take guidance from the Schedule of Workmen's Compensation Act to determine the percentage of loss and shall apply multiplier on the basis of loss of income of the injured.

We, therefore, answer the reference as under :-

that fracture of bone simpliciter in an accident through a motor vehicle can not be termed as privation of any member or joint, unless it is proved by the medical evidence that after union of bones disability has occurred or on account of mal-union injury has suffered permanent/ partial disability. In the absence of any evidence, each fracture can not be termed as privation of any member or joint. However, fracture in a joint where union of bones is not possible or where union of bone may cause permanent/ partial disability, then interim compensation under Section 140 of the Act can be awarded.

We may further add that in other cases for the purposes of permanent disability, Claims Tribunal has to record findings at the time of final adjudication of the case, and loss of income should be determined on

the basis of evidence on record. If the evidence about permanent or partial disability is insufficient, the Court can certainly refer to the Schedule of Workmen's Compensation Act to determine loss of earning capacity or percentage of loss of partial disability or permanent disability, as the case may be, and determine the quantum of compensation.

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235. PRECEDENT :

Law laid down by the High Court, if in conflict with the law laid down by the Supreme Court is per incuriam- Not binding as precedent.
Santosh Vs. Central Bank of India
Reported in 2004 (1) JLJ 158

Held :

Submission of learned counsel for the respondent Bank was that when this Court (Single Bench) has already upheld the demand issued under the M.P. Adhiniyam after interpreting the provisions of RDB Act in the case of *M.L. Chaurasia* (supra), then in such event, the law laid down must be followed even by this Court is not acceptable for two reasons. Firstly, what is binding on this Court is the law laid down by the Supreme Court under Article 141 of the Constitution of India. Secondly, if the law laid down by the High Court is in conflict with the law laid down by the Supreme Court and/or if, the view taken by the High Court is rendered without taking into consideration the law already laid down by the Supreme Court then, in such eventuality, the view taken by the High Court is held to be per-incuriam. It is not then a binding precedent.

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236. CRIMINAL TRIAL :

(i) Injuries on person of accused, explanation of- Prosecution evidence if clear, cogent and trustworthy then non-explanation will not affect prosecution's case- Law explained.

(ii) Relative witness, evidence of- Relationship/ interestedness per se no ground to suspect the evidence- Evidence should be examined carefully.

Shriram Vs. State of M.P.
Reported in 2004 (1) JLJ 252 (SC)= 2004 (2) MPHT 398 (SC)

Held :

(i) One of the pleas is that the prosecution has not explained the injuries on the accused. Issue is if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In *Mohar Rai and Bharath Rai v. The State of Bihar 1968 (3) SCR 525,* it was observed:

"…. In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further, those injuries probabilise the plea taken by the appellants."

In another important case Lakshmi Singh and others v. State of Bihar (supra), after referring to the ratio laid down in Mohar Rai's case (supra), this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow :

(1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants."

It was further observed that :

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

In *Mohar Rai's* case (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh's case (supra) it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in *Vijayee Singh and others V. State of U.P. AIR 1990 SC 1459.*

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweights the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in *Ramlagan Singh v. State of Bihar AIR 1972 SC 2593* prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh and others v. State of Bihar AIR 1988 SC 863,* it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case.

(ii) So far as relationship of eye-witnesses, that they being interested and/ or the so-called familiarity with the deceased it does not render *per se* their evidence suspect. All that is required to be done in such case is to carefully analyse the evidence and if after deeper scrutiny it is found acceptable to act on it. The Trial Court and the High Court have done it. Nothing infirm would be pointed out as to how the evidence suffers from any unreality or infirmity in law.

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237. N.D.P.S. ACT, 1985- Section 20 (b)
Production of seized contraband before the Court and its marking as article in evidence- Necessity- Law explained.
Jitendra and another Vs. State of M.P.
Reported in 2004 (1) ANJ 101 (SC)

Held :

Although, the High Court noticed that fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brurshed aside the contention by observing that it would not vitiate the

conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 of the Cr.P.C. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.

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238. CRIMINAL PROCEDURE CODE, 1973- Section 235 (2)
Hearing on question of sentence- Normal rule- Hearing should be made on the same day and sentence also should be pronounced that day itself- Law explained.
Motilal Vs. State of M.P. (Now Chhattisgarh)
Reported in 2004 (1) ANJ (SC) 282

Held :

We have carefully considered the submissions of the learned Counsel appearing on either side. The grievance sought to be made on the alleged non-compliance with the provision in Section 235 (2), Cr.P.C., does not merit countenance and the decision relied upon, as noticed above, does not help to support the claim as well. The decision in Santa Singh's case (supra), was one where the sentence imposed was of dealth the maximum and in such circumstances this Court thought fit to set aside the sentence alone and remand the same to give a hearing on the same. It was indicated even therein in the concurring judgment of *S. Murtaza Fazl Ali, J.* that no grievance can be made where minimum sentence under the provision of law has been awarded . As a matter of fact, the same Bench while dealing with the case reported in *Narpal singh* and *Ors. vs. State of Haryana, AIR 1977 SC 1066,* remitted for consideration afresh of the Sessions Judge the question of sentence after giving opportunity only in respect of the accused on whom death sentence was imposed and straightaway disposed of and dismissed the appeal in respect of these accused who were sentenced to life imprisonment only on being convicted of an offence of murder under Section 302, I.P.C. In *Ramdeo Chauhan Rajnath Vs. State of Assam, (2001) 5 SCC 714,* a

Bench of three learned Judges had an occasion to consider the question in the light of the amendment made by introducting third proviso to Sub-Section (2) of Section 309, Cr.P.C., and observed that the plea made as to the sentence and conviction being recorded on the same day resulting in contravention of Section 235 (2) Cr.P.C., cannot be accepted and that though the normal rule be that after pronouncing the verdict of guilt the hearing should be made on the same day and sentence also should be pronounced that day itself, in cases where the Judge feels or if the accused demands more time for hearing on the question of sentence especially when the Judge proposes to impose death penalty, the third proviso to Section 309, Cr.P.C., would be no bar for affording such time and if for any reason the Court was inclined to adjourn the case after pronouncing the verdict of guilt in grave offences, the person convicted should be committed to jail till the verdict on the sentences is pronounced.

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239. CRIMINAL TRIAL :

(i) F.I.R.- Delay in lodging- Delay if explained satisfactorily not fatal to the prosecution case.

(ii) Proof beyond reasonable doubt- Irrelevant or insignificant circumstances may not be a basis for giving benefit of doubt- Unmerited acquittal not good to the society- Law explained.

State of Punjab Vs. Ramdev Singh
Reported in 2004 (1) ANJ (SC) 321

Held :

(i) Delay in lodging the FIR cannot be used as artiualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the First Information Report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the procecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the same would be fatal to the prosecution, However, if the delay is expalined to the satisfaction of the Court, same cannot by itself be a ground for disbelieving and discarding the entire prosecution version.

(ii) An unmerited acquittal does not good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Courts should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none reasonably exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so

when the victims of crime are helpless females or minor children. The Courts have to display a greater sense of responsiblity and to be more sensitive while dealing which charges of sexual assault on women, particularly of tender age and children.

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240. CRIMINAL TRIAL :

Speaking orders- Need to pass speaking orders stressed.
Omar Usman Chamadia Vs. Abdul and another
Reported in 2004 (1) ANJ (SC) 397

Held :

It may be convenient for the said court to pass orders without indicating the grounds or basis but it certainly is not convenient for the court of appeal while considering the correctness of such impugned orders. The reasons need not be very detailed or elaborate, lest it my cause prejudice to the case of the parties, but must be sufficiently indicative of the process of reasoning leading to the passing of the impugned order. The need for delivering a reasoned order is a requirement of law which has to be complied with in all appealable orders. This Court in a somewhat similar situation has deprecated the practice of non-speaking orders in the case of *State of Punjab & Ors. vs. Jagdev Singh Talwandi (AIR 1984 SC 444),* that was a case where the High Court in a detention order while allowing the challenge to the detention order directed the release of the detenu before it could give a reasoned order. Even such a practice was deprecated by a Constitution Bench of this Court. Whereas in the intstant case it is a final order reversing the order of the learned Sessions Judge wherein the High Court thought it not necessary to give the reasons on the ground that the counsel appearing for the parties did not press for a reasoned order.

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241. INDIAN PENAL CODE 1860- Section 34

Common intention, liability for- Law explained.
State of M.P. Vs. Deshraj and others
Reported in 2004 (1) ANJ (SC) 423

Held :

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circum-

stances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar vs. State of Punjab (AIR 1977 SC 109),* the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be diferent in character, but must have been actuated by one and the same common intention in order to attract the provision.

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34. When an accused in convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch. Pulla Reddy and Ors. vs. State of Andhra Pradesh (AIR 1993 SC 1899),* Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

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242. PREVENTION OF FOOD ADULTERATION RULES, 1955- R. 18
Sending copy of memorandum and specimen impression of seal separately to public analyst, requirement as to- Law explained.
State of H.P. Vs. Narendra Kumar and another
Reported in 2004 (1) ANJ (SC) 446

Held :

Rule 18 requires the Food Inspector; (i) to send (a) a copy of the memorandum; and (b) specimen impression of the seal used to seal in a sealed packet to the Public analyst ; (ii) to send this sealed packet separately by any suitable means (iii) to send the same immediately but not later than the succeeding working day. The expression 'separately' has to be understood on a conjoint reading

of Rules 7, 17 and 18. Rule 7 postulates that Public Analyst on receipt of the packet containing the sample for analysis has to compare the seals on the container and the outer cover with specimen impression received separately and has to note the condition of the seals thereon. Reading Rules 17 and 18 together, it is clear that the work 'separately' used in Rule 18 has been intended to convey the sense that the copy of the memorandum and the specimen impression of the seal has to be sent independently of the articles that are required to be sent under Rule 17. In this connection, reference can be made to the observations made by this Court in *Raj Karan's* case (supra), wherein it was observed that it is mandatory that the materials referred in Rules 17 and 18 are to be separately sent to the Public Analyst. The object of Rule 18 is to ensure the accuracy of the seal on the sample sent to the Public Analyst by comparison with the epecimen impression of the seal sent by the food Inspector separately. The report of the Public Analyst in terms of Rule 7 (3) marked as Ext. PJ shows that he found the same intact and unbroken. The seal fixed on the container and on the outer cover of the sample tallied with speciman impression of the seal separately sent by the Food Inspector. A presumption can be drawn that requirement of Rule 18 have been complied with. The presumption under Section 114 of the Indian Evidence Act, 1872 (in Short 'the Evidence Act') in relation to regular performance of official act applies to the report of a Public analyst. However, this presumption is rebuttable. No effort was made by the accused to dislodge this presumption. There was even no suggestion to the Food Inspector (PW-1) who exhibited the report that there is any untruth in the recital by the Public Analyst. It is relelvant to note that under sub-section (5) of Section 13 of the Act any document purporting to be a report signed by a Public Analyst unless it has been supreseded under sub-section (3) of the said Section or any document purporting to be a certificate to be signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under the Act. It is urged that the memorandum and the specimen impression of seal were to be sent separately in different packets. On a plain reading of Rule 18, what is required is that a copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent in a sealed packet (underlined for emphasis) separately to the Public analyst. As indicated above, the word 'separately' refers to separate dispatch of articles indicated in Rule 17, and Rule 18. The expression in scaled packet refers to both the copy of memorandum and the specime impression of the seal. They are both required to be sent in a sealed packet. Plurality of packets is not provided for and obligated. What is required is that they copy of memorandum and specimen impression of the seal used to seal the packet are to be sent in a sealed packet separately and not with the articles required to be sent under Rule 17.

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PART - III

CIRCULARS/NOTIFICATIONS

GOVERNMENT OF MADHYA PRADESH GENERAL ADMINISTRATION DEPARTMENT "MANTRALAYA" VALLABH BHAWAN, BHOPAL- 462004

ORDER

Bhopal, Dated 07/06/2004.

No. F 5-7/2002/PCC/1 : The State Government in compliance of the orders dated 21.03.2002 and 25.11.2002 passed by the Hon'ble Supreme Court in write petition (civil) No. 1022/89 between All India Judges Association and others vs. Government of India and others partly amend its previous even no. order 3rd May, 2003.

2. The second para of the previous order dated 3rd May, 2003 is substituted as follows :-

2. The pay fixation shall be made on the basis of above revised pay scales and cash payment shall be made from 1st July, 2002 and the difference in arrears of amount on the basis of revised pay scales relating to pay, dearness allowance and other allowances w.e.f. 01.07.1996 to 30.06.2002 shall be deposited in General Provident Fund account of the concerning officer after deducting the income tax payable.

3. The Finance Department has accorded approval in this case vide its U.O. No. 2659/ FSAPS, dated 5.6.2004.

By order and in the name of the Governor of
Madhya Pradesh.
Sd/-
Additional Secreretary,
Govt. of Madhya Pradesh,
General Administration Department.

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

फा.क्रमांक-3 (ए)-19/2003/21-ब (एक), भोपाल, दिनांक 2.7.2004

प्रति,

रजिस्ट्रार जनरल,
मध्यप्रदेश उच्च न्यायालय,
जबलपुर

विषय :- मध्यप्रदेश न्यायिक सेवा के सदस्यों को जनवरी, 2004 से पुनरीक्षित दरों से मंहगाई भत्ते का भुगतान।

केन्द्र सरकार के कर्मचारियों को वित्त मंत्रालय (व्यय विभाग) के ज्ञापन क्रमांक एफ-संख्या 1(1)2003/ई/दो/बी, दिनांक 1-3-2004 (प्रतिलिपि संलग्न) द्वारा दिनांक 1.1.04 से पुनरीक्षित दरों से मंहगाई भत्ता स्वीकृत किया गया है। मध्यप्रदेश न्यायिक सेवा वेतन पुनरीक्षण नियम, 2003 के नियम 9 के तहत यह पुनरीक्षित दरें मध्यप्रदेश न्यायिक सेवा के सदस्यों को लागू हो गई हैं। अतः राज्य शासन राज्य में कार्यरत समस्त न्यायिक सेवा के सदस्यों को दिनांक 1.1.2004 से 31.3.2004 तक निम्नलिखित उपबंधों पर पुनरीक्षित दरों से मंहगाई भत्ता भुगतान करने की स्वीकृति प्रदान करता है एवं दिनांक 1.4.2004 से न्यायिक सेवा के अधिकारियों को प्राप्त हो रहे 61 प्रतिशत मंहगाई भत्ते की राशि में से 50 प्रतिशत की राशि के बराबर मंहगाई वेतन एवं शेष राशि 11 प्रतिशत मंहगाई भत्ते के रूप में प्राप्त होगी।

1. पुनरीक्षित दरों से मंहगाई भत्ते का नियमन वित्त मंत्रालय (व्यय विभाग) के ज्ञापन क्रमांक एफ नं. 1 (1)/2003/ई-2/बी, दिनांक 1.3.2004 में बताई गई रीति से होगा।
2. इस आदेश के तहत देय मंहगाई भत्ते का भुगतान 1.1.2004 से 31.3.2004 तक नकद किया जावेगा।
3. मंहगाई भत्ते की गणना मूल वेतन, मंहगाई वेतन के आधार पर की जायेगी, इसमें विशेष वेतन, व्यक्तिगत वेतन शामिल नहीं होगा।
4. मंहगाई भत्ते का कोई भाग मूलभूत नियम 9 (21) के अंतर्गत वेतन नहीं माना जावेगा।
5. इस आदेश के विपरीत अधिक भुगतान पाए जाने की दशा में अधिक भुगतान की राशि संबंधित भुगतान पाने वाले अधिकारी से वसूली योग्य होगी।
6. एरियर के देयक उसी कार्यालय द्वारा बनाए जावेंगे जहां से उक्त अवधि के लिए संबंधित अधिकारी का वेतन आहरण किया गया हो।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

(जी.एस. सोलंकी)
अतिरिक्त सचिव,
मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE RAILWAYS (SECOND AMENDMENT) ACT, 2003

No. 51 of 2003*

[23rd December, 2003]

An Act further to amend the Railways Act, 1989.

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

1. Short title and commencement.— (1) This Act may be called the Railways (Second Amendment) Act, 2003.

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

2. Amendment of section 2.— In section 2 of the Railways Act, 1989 (24 of 1989) (hereinafter referred to as the principal Act),—

(a) after clause (26), the following clause shall be inserted, namely :—

'(26A) "officer authorised" means an officer authorised by the Central Government under sub-section (2) of section 179;';

(b) in clause (34), after the words "service of a railway", the following shall be inserted, namely :—

"including member of the Railway Protection Force appointed under clause (c) of sub-section (1) of section 2 of the Railway Protection Force Act, 1957 (23 of 1957)".

3. Substitution of new section for section 179.— For section 179 of the principal Act, the following section shall be substituted, namely :—

"179. Arrest for offences under certain sections.— (1) If any person commits any offence mentioned in sections 150 to 152, he may be arrested without warrant or other written authority by any railway servant or police officer not below the rank of a head constable.

(2) If any person commits any offence mentioned in sections 137 to 139, 141 to 147, 153 to 157, 159 to 167 and 172 to 176, he may be arrested, without warrant or other written authority, by the officer aurhotised by notified order of the Central Government.

(3) The railway servant or the police officer or the officer authorised, as the case may be, may call to his aid any other person to effect the arrest under sub-section (1) or sub-section (2), as the case may be.

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* Received the assent of the President on the 23rd December 2003 and Act published in the Gazette of India Extraordinary, Part II, Section 1, dated 23.12.2003 Pages 1-3.

(4) Any person so arrested under this section shall be produced before the nearest Magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate."

4. Amendment of section 180.— In section 180 of the principal Act,—

(a) in sub-section (1),—

(i) for the words and figures "section 179", the words, brackets and figures "sub-section (2) of section 179" shall be substituted;

(ii) for the words "any railway servant authorised in this behalf or any police officer not below the rank of a head constable", the words "the officer authorised" shall be substutited;

(b) in sub-section (2), for the words "The railway servant or the police officer", the words "The officer authorised" shall be substituted.

5. Insertion of new sections 180A to 180G.— After section 180 of the principal Act, the following sections shall be inserted, namely :—

"180A. Inquiry by officer authorised to ascertain commission of offence.— For ascertaining facts and circumstances of a case, the officer authorized may make an inquiry into the commission of an offence mentioned in sub-section (2) of section 179 and may file a complaint in the competent court if the offence is found to have been committed.

180B. Powers of officer authorised to inquire.— While making an inquiry, the officer authorised shall have power to,—

(i) summon and enforce the attendance of any person and record his statement;

(ii) require the discovery and production of any document;

(iii) requisition any public record or copy thereof from any office, authority or person;

(iv) enter and search any premises or person and seize any property or document which may be relevant to the subject-matter of the inquiry.

180C. Disposal of persons arrested.— Every person arrested for an offence punishable under sub-section (2) of section 179 shall, if the arrest was made by as person other than the officer authorised, be forwarded, without delay, to such officer.

180D. Inquiry how to be made against arrested person.— (1) When any person is arrested by the officer authorised for an offence punishable under this Act, such officer shall proceed to inquire into the charge against such person.

(2) For this purpose, the officer authorised may exercise the same powers and shall be subject to the same provisions as the officer in charge

of a police station may exercise and is subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) when investigating a cognizable case:

Provided that—

(a) if the officer authorised is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the officer authorised that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer authorised may direct, to appear, if and when so required, before the Magistrate having jurisdiction.

180E. Search, seizure and arrest how to be made.— All searches, seizures and arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating respectively to searches and arrests made under that Code.

180F. Cognizance by Court on a complaint made by officer authorised.— No court shall take cognizance of an offence mentioned in sub-section (2) of section 179 except on a complaint made by the officer authorised.

180G. Punishment for certain offences in relation to inquiry.— Whoever intentionally insults or causes any interruption in the inquiry proceedings or deliberately makes a false statement before the inquiring officer shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.".

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THE MADHYA PRADESH GOVANSH VADH PRATISHEDH ADHYADESH, 2004

Published in the Madhya Pradesh Gazette, Extraordinary, dated 22nd January, 2004.

MADHYA PRADESH ORDINANCE NO. 1 OF 2004

Promulgated by the Governor in the Fifty-fourth year of the Republic of India.

And ordinance to provide, in the interest of the general public and to maintain communal harmony and peace, for prohibition of slaughter of cow progeny and for matters connected therewith.

CONTENTS

Sections

1. Short title, extent and commencement
2. Definitions
3. Appointment of veterinary officer.
4. Prohibition of slaughter of cow progeny
5. Prohibition of possession of beef.
6. Strengthening of Institutions.
7. Levy of charges.
8. Penalities.
9. Offences to be cognizable and non-bailable
10. Power of entry and inspection
11. Power to remove difficulties.
12. Power to make rules.

Whereas the state Legislature is not in Session and the Governor of Madhya Pradesh is satisfied that circumstances exist which render it necessary for him to take immediate action.

Now, therefore, in exercise of the powers conferred by clause (1) of article 213 of the Constitution of India, the Governor of Madhya Pradesh is pleased to promulgated the following Ordinance :-

1. Short title, extend and commencement. — (1) This Ordinance may be called the Madhya Pradesh Govansh Vadh Pratishedh Adhyadesh, 2004.

(2) It extends to the whole of the State of Madhya Pradesh.

(3) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Definitions.— In this Ordinance, unless the context otherwise requires,

(a) "Beef" means flesh of cow progeny, whose staughter is prohibited under this Ordinance;

(b) "Cow progeny" means cows, bulls, bullocks and calves of cows;

(c) "Competent Authority" means a person appointed by the State Government by notification to perform in any local area specified therein the functions of a competent authority under this Ordinance;

(d) "Institution" means any charitable institution registered under any enactment for the time being in force, established for the purpose of keeping, breeding and maintaining cow progeny or for the purpose of reception, protection, care, management and treatment of infirm, aged and diseased cow progeny;

(e) "Slaughter" means killing by any method whatsoever and includes maiming or inflicting of physical injury which in the ordinary course will cause death;

(f) "Veterinary Officer" means a person appointed as a Veterinary Officer under Section 3.

3. Appointment of Veterinary Officer. — The Commissioner-cum- Director of Veterinary Services, Madhya Pradesh, may, by general or special order,

appoint for the purposes of this Ordinance, any person, or class of persons, to be the Veterinary Officer for a local area specified in the Order.

4. Prohibition of slaughter of cow progeny. — Notwithstanding anything contained in any other law for the time being in force as in any usage or customs to the contrary no person shall slaughter or cause to be slaughtered or offer or cause to be offered, for slaughter of any cow progeny.

5. Prohibition of possession of beef.— Notwithstanding anything contained in any other law for the time being in force, no person shall have in his possession beef of any cow progeny slaughtered in contravention of the provisions of this Ordinance.

6. Strengthening of Institutions.— The State Government shall take necessary steps for strengthening of Institutions which are engaged in Cow progeny welfare activities.

7. Levy of charges.— The person incharge of Institution may levy such charges as may be prescribed, for care and maintenance of infirm, aged and diseased Cow progeny from their owners.

8. Penalties.— Whoever contravenes or attempts to contravene or abets the contravention of the Provisions of Section 4 and 5 shall be punished with imprisonment of either description for a term which may extend to three years, or with fine which may extend to ten thousand rupees or with both.

9. Offences to be congnizable and non-bailable.— Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (No. 2 of 1974), all offences under this Ordinance shall be cognizable and Non-bailable.

10. Power of entry and inspection.— (1) For the purpose of enforcing the provisions of this Ordinance the Competent Authority or the Veterinary Officer or any person authorised by the Competent Authority or the Veterinary Officer in writing in this behalf, shall have power to enter and inspect any premises within the local limits of his jurisdiction, where he has reason to believe that an offence under this Ordinance has been, is being or is likely to be committed.

(2) Every person in occupation of any such premises as is specified in subsection (1) shall allow the competent authority, the Veterinary Officer or the person authorised, as the case may be, such access to the premises as he may requires for the aforesaid purpose, and shall answer any question put to him by the competent authority, the Veterinary Officer or the person authorised, as the case may be, to the best of his knowledge and belief.

(3) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (No. 2 of 1974) relating to search and seizure shall, so far as may be, applied to searches and seizures under this Section.

11. Power to remove difficulty.— If any difficulty arises in giving effect to the provisions of this Ordinance, the State Government may within period of three years from the commencement of this Ordinance, by order published in the Official Gazette, make such provisions or give such directions not inconsistent with

the provisions of this Ordinance, as appears to it to be necessary or expedient for removing the difficulty.

12. Power to make rules. — (1) The State Government may, after coming into force of this Ordinance, make rules for the economic rehabiliation of such person if any, likely to be affected.

(2) The State Government may, by notification, makes rules for carrying out the purposes of this Ordinance.

(3) The rules made under this Ordinance shall, as soon impossible after they are publihsed, be laid on the table of the Legislative Assembly.

Ram Prakash Gupt
Governor
Madhya Pradesh.

Bhopal :
Dated the 22nd January, 2004

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THE MADHYA PRADESH COOPERATIVE SOCIETIES (AMENDMENT) ACT, 2003.

[Received the assent of the Governor on the 12th November, 2003, assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 22nd November, 2003]

An Act further to amend the Madhya Pradesh Cooperative Societies Act, 1960. Be it enacted by the Madhya Pradesh Legislature in the Fifty Fourth Year of the Republic of India as follows :-

1. Short title and commencement. (1) This Act may be called the Madhya Pradesh Co-operative Societies (Amendment) Act, 2003.

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

2. Amendment of Section 2. In Section 2 of the Madhya Pradesh Co-operative Socities Act, 1960 (No. 17 of 1961) (hereinafter referred to as the Principal Act), for clause (n), the following clause shall be substituted, namely :-

"(n) "Housing Society" means a society, the object of which is to provide its members plots for housing, including low density housing, dwelling houses or flats and/or if plots, the dwelling houses or flats are already acquired, to provide common amenities and services including housing finance to its members through mutual aid in accordance with the co-operative principles.

3. Insertions of new Chapter VIII-A. After Chapter VIII of the Principal Act, the following Chapter shall be inserted, namely :-

CHAPTER VIII-A
Special Provisions For Cooperative Housing Societies

72-A. Application of Chapter. The provisions of this Chapter shall apply to all co-operative housing societies registered under the Madhya Pradesh Co-operative Socities Act, 1960 (No. 17 of 1961).

72-B. Member's entitlement for plot, house and amenities and the liability of the cost. (1) (a) Every member of a housing society shall be entitled to a plot for housing including low density housing, dwelling house or a flat, as the case may be, and in case dwelling houses or flats have already been acquired, the common amenities and services including housing finance.

(b) The list of seniority of a member comprising his name, his father and mother's name, his date of birth and permanent account number of income tax, if any, shall be maintained by the society and such list shall be prepared strictly in accordance with his admission by the society. The list so prepared shall be published at the end of every co-operative year by the housing society. The list shall be updated every year by the society concerned and shall be sent to the Joint/ Deputy/ Assistant Registrar concerned of the district.

(c) Where a society gets any land from Government or any other agency on concessional rate for the housing purposes, it shall be compulsory for the member thereof to submit an affidavit to the effect that there is no plot/flat/ house in his name or in the name of his family members, in that Municipal area.

(d) Alongwith the seniority list of members prepared under clause (b) every housing society shall submit its yearly balance sheet and particular of assets and liabilities to the Joint/Deputy/ Assistant Registrar concerned of the district. This information shall also be made available to general public on the web-site of the society. For this purpose service charge equivalent to 10% of the audit fee shall be recovered from the society which shall be credited to the account of Housing Federation maintaing the web-site.

(e) Every member of a housing society shall pay his share of cost of land, development, construction, legal expenses, maintenance and services, as the case may be, within the specified time as decided by the committee of the society.

(f) If a member fails to pay such share of cost of land, development and construction within the prescribed time, the society shall charge interest at the rate at which the housing society is availing housing finance and in case the default continues beyond period of two years, it shall cancel the allotment of plot, dwelling house or flat, as the case may be.

(g) If a member fails to pay his share of legal expenses, maintenance and services, as the case may be, within the prescribed time, the society shall impose a surcharge at the rate of 20% for a period not exceeding three months and if default continues beyond three months, the services shall be discontinued forthwith:

Provided that such services shall not be discontinued unless the member concerned is given a reasonable opportunity of being heard by the committee in this behalf.

(2) Every member of a housing society shall attend every meeting of the general body of which he receives the intimation from the Secretary of the committee of the housing society and in case of his absence without prior intimation

to the committee he shall be liable to pay fine not exceeding Rs. 200/- for each default, as may be decided by the general body :

Provided that no fine shall be imposed unless the member concerned is given a reasonable opportunity of being heard.

72-C. Restriction on membership of housing society. (1) Notwithstanding anything contained in this Act and the rules made thereunder, the membership of a housing society shall be restricted to a specific number as may be prescribed in the bylaws.

(2) The housing society may increase its membership up to a maximum number, as specified in the bylaws, in such a manner that every member of the society may get a plot/dwelling house/flat in order of his seniority and avail housing finance, common amenities and services.

72-D. Offences. Any of the following acts shall amount to and be construed as an offence under Section 74, namely :-

(i) Transfer of a registered plot dwelling house or flat to another person, in violation of the provisions of this Act, Rules, Bylaws of the society or any condition of allotment.

(ii) Tampering with the seniority of the members.

(iii) Admitting members in excess of the number prescribed in the bylaws.

(iv) Not-developing the land in accordance with the development plans of the society.

(v) Allotment or sale of the land, in violation of the approved layout plan of the society.

(vi) Non-development of the land which is reserved for general use of the society such as for community hall, school or hospital, or for any other purpose specified in the bylaws.

(vii) Not maintaining or providing services paid for by the members without just and sufficient cause.

72-E. Penalties for offences. Every committee, officer or past officer or member or past member or an employee or a past employee of a society or any other person shall, without prejudice to any action that may be taken against him under any law for the time being inforce, be liable to be punished.-

(a) for an offence mentioned in clause (i) of Section 72-D, with a fine which may extend to Rs. 50,000/- or with imprisonment for a term which may extend to one year or with both;

(b) for an offence mentioned in clause (ii) of Section 72-D, with a fine which may extend to Rs. 50,000/-;

(c) for an offence mentioned in clause (iii) of Section 72-D, with a fine which may extend to Rs. 50,000/-;

(d) for an offence mentioned in clause (iv), (v), (vi) and (vii), with a fine which may extend to Rs. 50,000/- or with imprisonment for a term which may extend to one year or with both."

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