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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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JOTI JOURNAL AUGUST 2005

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We are thankful to the Publishers of SCC, MPLJ, JLJ, MPHT, VIDHI BHASVAR for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

Esteemed Readers,

The issue of August 2005 is in your hands. Judicial fraternity of the State under the dynamic leadership of Hon'ble the Chief Justice is making all out efforts to make the year of judicial excellence a grand success by rendering justice at a quicker pace. With the motivation provided to it, the Institute is also pursuing its activities vigourously and has organized various Training Programmes and workshops not only for the Judicial Officers but also for those agencies of State which have a role in the field of justice dispensation. In the past three months we have organized four specialized workshops on Electricity Act, 2003 at Jabalpur, Indore and Ujjain in which Presiding Judges of Special Courts, C.J.Ms. and Senior Officers of the Electricity Distribution Companies participated. The workshops aimed at creating awareness regarding this new piece of legislation and its due implementation as far as investigation and trial of offences is concerned. The Institute also played a prominent role in a two-day workshop of G.Ps. and A.G.Ps. which was organized by the office of Advocate General of M.P. at Bhopal on 27th and 28th August, 2005 in which Hon'ble the Chief Justice enlightened the Prosecutors on 'Legal Ethics and Prosecution'.

Long back, Shakespeare said that brevity is the soul of wit. It has also been said that precision is the loudest virtue of the language of the law and verbosity is its nastiest vice. Intelligibility and clarity should be compatible with brevity and precision because it is the need of the hour. No doubt, initially it takes more time to write briefly than verbosely. As the story goes, Sir Winston Churchill, a leading statesman of his time, once wrote to his daughter a lengthy letter which ended with a candid admission that he did not have time to write a short one, therefore, has written a long one.

Brevity coupled with clarity saves the time of the reader but it is a well recognized fact that with repeated efforts skill of brevity, when properly developed, may save the time, energy and anxiety of a Judge and give him the pleasure of creation. Hence, verbosity or prolixity should be avoided scrupulously in judgments or orders. There may be situations requiring elaborate discussion, but most of the times the rule of brevity and precision should prevail, though not compromising with clarity and intelligibility.

Rules of procedure, be it relating to pleadings, arguments, orders or judgments, insist for brevity and precision. O. 6 R. 2 says that pleadings should be in concise form, meaning thereby brief but pertinent and not verbose. Section 314 (4) of the Code of Criminal Procedure provides that if the oral arguments are not concise and relevant then the Court may regulate such arguments. Rule 237 of Rules and Orders (Criminal) and Rule 154 (4) of Rules and Orders (Civil) are also apposite in this respect. Impressing upon the need of writing concise, brief but reasoned orders/judgments the Apex Court has observed in *Amina Ahmad Dossa's case (AIR 2001 SC 656)* that brevity of orders on application of mind and not the length of the order is the criterion for adjudicating the rights of the parties. Therefore, efforts are needed to sharpen skills in this direction.

We are trying to maintain the utility of this journal. The recent developments by way of judicial pronouncements are noticeable in Part II. The controversy whether 'person' as used in Section 50 NDPS Act, 1985 includes 'bag and baggage' now stands finally resolved with the pronouncement of the Apex Court in *Pawan Kumar's case* [*(2005) 4 SCC 350 (Note 216)*]. The pronouncement of Apex Court in the case of *Kailash* [*(2005) 4 SCC 480 (Note 221)*] holding that provisions of O.8 R.1 CPC which prescribed 90 days time for filing a written statement are directory, is again noticeable. A five Judge Bench decision in the case of *Iqbal Singh Marwah* [*(2005) 4 SCC 370 (Note 217)*] settles the dust as to whether document forged before being filed in a Court of law will be covered u/s 195 (1) (b)(ii) Cr.P.C. being answered in negative.

Amendment into M.P. Higher Judicial Services Rules, 1994 finds place in Part III. The noticeable feature being that promotion to H.J.S. will be on merit-cum-seniority basis and eligibility test as per Rule 5 (1) (k). Electricity Rules, 2005 which have come into force on 8th June, 2005 are being included in Part IV.

I hope that the Journal continues to evoke your interest and prove helpful to you in discharging your onerous duties effectively.

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Justice R.V. Raveendran
CHIEF JUSTICE
High Court of Madhya Pradesh
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Dated : 18.07.2005

Dear District Judge,

Sub : Pendency of Execution Proceedings.

It is generally said that the problems of a plaintiff start when he obtains the decree in his suit. A plaintiff is not interested in a paper decree. He is interested in getting actual relief. He can get relief only when the decree is executed. But I find that our Judges are not giving execution proceedings, the importance it deserves. One probable reason is that units are not assigned for all executions. Assignment of units apart, every Judge owes a duty to ensure that decrees of Courts are implemented promptly and effectively.

The large number of executions pending is a matter of concern. I extract below the following figures from the latest Administrative Report:

Name of the District	Number of suits pending	Number of execution cases pending
Bhopal	3840	2107
Dhar	1798	1364
Guna	2761	1388
Gwalior	4919	1708
INDORE	6519	5122
Mandsour	3096	1622
NEEMUCH	1943	2408
Narsinghpur	521	433
Sagar	2828	1304
Shahdol	2137	534
Ujjain	2879	1997

In other Districts the position is no better. The figures show that the number of pending execution cases is disproportionately high when compared to the pending suits. If the decrees are not executed and the fruits of the decree are not extended, the litigants will lose whatever confidence and trust they may have in courts and Justice delivery system.

Therefore, I request you to bestow your attention on pending executions and have a special drive for disposal to execution of decrees. When I say 'disposals', I am referring to actual disposals giving relief to decree holders, and not disposals for statistical purpose. Let all judges work with commitment to ensure that the decrees are executed without delay. If your Nazarat is found

to be wanting in efficiency or if the process servers are lethargic or otherwise incompetent, please take strict action and fix responsibility. In fact, High Court may itself fix responsibility on the District Judges if the execution cases are not promptly disposed of.

To stress the need for inflexible resolve on the part of Judges to ensure that their decrees and orders are carried out, I can do no better than to extract the following from the Judicial Department Policy of erstwhile Gwalior State formulated nearly a century ago :-

> When after through investigation final orders have been passed in a case such orders must be enforced at all cost. Otherwise execution proceedings are in vain and the law becomes a superfluity. When after a through enquiry a decree has been passed against a person and when the decree has become final, such a judgment debtor is duty bound to satisfy the decree. I maintain that the procedure should be made as expeditious as possible and that so far as execution is concerned, the aim of the Courts should be to enforce with all possible speed and within the shortest possible interval of time.
>
> The Courts should in every possible way demonstrate their inflexible resolve to see orders carried out so as to compel the general belief that the enforcement of the orders already passed can not be avoided.
>
> And they should never by their action afford the public the opportunity to complain that it takes years of stubborn fighting to secure decisions of cases and yet in the course execution proceedings obstacles, interminable and multitudinous, are thrown in the way of obtaining satisfaction of claims.

I am sure you will take appropriate steps to ensure satisfactory progress and conclusion of execution proceedings in the "Year of Excellence" (before 31.12.2005). I recall the following dedication of the Book 'Law relating to Execution Proceedings' by R.K. Soonavala :

> To that lucky DECREE-HOLDER who has lived long enough to enjoy the fruits of his decree;
>
> To the CLERK who went through the execution papers as promptly as he could;
>
> TO THE JUDGE WHO PASSED ORDERS WITHOUT UNNECESSARY DELAY;
>
> TO THE BAILIFF WHO EXECUTED THEM WITHOUT FEAR OR FAVOUR;
>
> To that exemplary JUDGMENT-DEBTOR who carried them out before the bailiff even knocked at his door.

Yours faithfully,

(R.V. RAVEENDRAN)

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PART - I

SCOPE OF REFERENCE U/S 18 OF THE LAND ACQUISITION ACT

HON'BLE JUSTICE ARUN MISHRA
Judge, High Court of M.P.

State as a sovereign body has the power to acquire land when it is needed for public purposes, industrialization, companies etc. Land acquisition Act, 1894 provides a complete scheme to be followed for acquisition of land. The award determining the compensation of acquired land has to be made by the Collector which is final unless altered by the Court to which reference is made as provided under the Act.

Reference can be made to the Court as to :

1. Measurement of Land
2. Amount of Compensation
3. Person to whom it is payable for apportionment of compensation amongst the persons interested.

An application has to be filed stating the grounds.

Application has to be made within six weeks from the date of Collector's award, if a person was present or represented when Collector made the Award.

In other cases, limitation is six weeks from of the receipt of notice from Collector U/s 12(2) or within six months from the date of Collector's award, whichever period shall first start.

A person has the absolute right of reference u/s 18 provided the application is in accordance with Section 18. Scope of reference u/s 30 is limited and is confined to question of title. Collector has discretion u/s 30 to refer or not to refer. However, on fulfillment of condition u/s 18, Collector is bound to make the reference as held in *Dr. G.H. Grant v. State of Bihar, AIR 1966 SC 237.*

2. Who can file an application for reference

Reference can be made at the instance of any "person interested". In *Santosh Kumar v. Central Warehousing Corporation, (1986) 2 SCC 343,* the view was taken that the Government company or local authority cannot seek reference u/s 18 whereas in *Union of India v. Sher Singh, (1993) 1 SCC 608,* the Apex Court has held the term "person interested" includes any person for whose benefit the land is acquired. The term should be liberally construed so as to include a body, local authority or a company for whose benefit the land is acquired. Similar view was taken in *Himalaya Tiles and Marble (P) Ltd. V. Francis Victor Countino, AIR 1980 SC 1118.*

3. Right to apply for reference

The claimant who received compensation under protest and who filed an

application u/s 18 alone can seek the reference. In order to maintain the reference it is necessary that the person should have protested against the determination made by L.A.O. and who has filed an application u/s 18 can seek reference as held in *LAO v. Shiva Bai, AIR 1997 SC 2642* and *Ashwani v. State of Punjab, AIR 1992 SC 974.*

Person who has agreed to accept the compensation cannot make an application for reference as held in State of *Gujarat v. Daya Shamji Bhai, AIR 1996 SC 133.*

4. Reference Court cannot enlarge scope of reference

The jurisdiction of the Court is confined to the reference made to it u/s 18 and it cannot enlarge its scope by invoking order 1 Rule 10 CPC as held in *TKTN Rai v. State of Haryana, 1987 PLR 396.*

5. Power of reference Court to see validity of reference

Collector has no discretion to refuse making of reference u/s 18 if the application is with respect to subject matter prescribed u/s 18 and is made within limitation. However, the reference Court can see if the reference is valid one. The Court has jurisdiction to decide whether the reference was sought beyond period of limitation prescribed by Section 18(2) of the Act as held in *Mohd. Hasuddin v. State of Maharashtra, AIR 1974 SC 404.*

Court cannot quash a notification u/s 4 and 6 of the Land Acquisition Act in reference u/s 18 and has to confine to the reference as laid down in *Balram v. State of U.P., AIR 1995 SC 1552.*

In reference of section 18 State cannot plead lack of title of owner : *State of Madras v. KN Shan Mugam Mudaliya/AIR 1976 SC 1057.*

6. Dismissal in default and restoration of reference

The Apex Court in *Khazan Singh v. Union of India, (2002) 2 SCC 292* has held that reference cannot be dismissed in default of appearance. In *Rajmani v. Collector, Raipur, (1996) 5 SCC 701,* it was laid down that if a reference is dismissed in default, remedy is under Order 9 Rule 9 read with Section 151 CPC. Order 9 Rule 13 is not applicable.

As per Section 53 of the Land Acquisition Act save in case of inconsistency provision of C.P.C. applies to all the proceedings under the Act.

7. Limitation to file application u/s 18 and its extension

Collector acts as statutory authority while making reference u/s 18 and is not a Court. Hence, Section 5 of the Limitation Act is not applicable for extending the period of limitation prescribed under the proviso to Section 18(2), as laid down in *Officer on Special Duty, Land Acquisition v. Shan Maanilal Chudalal, (1996) 8 SCC 414.*

Application for reference filed after 3 years from the date of award cannot be allowed : *State of Gujarat v. Gopal Bhai, (1996) 6 SCC 125.*

In order to set in motion the limitation, there should be knowledge of the details of the award. Notice u/s 12(2) is sufficient to set in motion the limitation to seek reference - *State of Punjab v. Sri Satinder, (1995) 3 SCC 330.*

For commencement of limitation u/s 18(2) proviso (b) either actual or constructive communication of the order is necessary : *Raja Harishchandra Rajdeo v. Dy. LAO, AIR 1961 SC 1500*

8. Reference u/s 30

The Collector is authorised u/s 30 to refer to the Court after compensation is settled, u/s 11 any dispute relating to apportionment to the same or any part thereof.

A person who has not appeared in the acquisition proceedings before the Collector, may raise a dispute relating to apportionment or to the person to whom it is payable and apply to the Collector for reference u/s 30 for determination of his right to compensation which may have existed before the award or devolved upon him since the award.

There is limitation u/s 18. But no limitation is prescribed u/s 30. Collector can ask the person to settle the same in the suit and pay the compensation in the manner declared by his award : *Dr. G.H. rant v. State of Bihar, AIR 1966 SC 237.*

A person can apply for claiming compensation even if right has been acquired after passing of the award and can have the reference u/s 30 of the Act. Collector has the discretion to make the reference *Dr. G.H. rant v. State of Bihar, AIR 1966 SC 237.*

9. Writ against award

An award cannot be challenged in a writ petition. It has to be challenged as per procedure prescribed u/s 18.

10. Remedy in case of refusal to make reference

In case there is refusal to make the reference, remedy of revision can be availed. Remedy of writ petition under Article 226 of the Constitution of India can also be availed : *Sugandhi v. Collector, Raipur, AIR 1969 MP*

11. Beneficiaries should be noticed by reference Court

It is proper to issue the notice to the beneficiaries as payment of compensation has to be made to the beneficiaries. Want of notice may invalidate the award : *Nilaganga v. State of Karnataka, AIR 1990 SC 1321, Krishi Upaj Mandi v. Ashok Singhal, AIR 1991 SC 1320, NTPC v. State of Bihar, (2004) 12 SCC 96-100, Neyveli Lignite Corporation v. Special Officer, (1995) 1 SCC 221 and (1994) Suppl. 3 SCC 743*

12. Evidence in reference

Reference is not an appeal, as such evidence on record of the case of the Land Acquisition Officer has to be proved by independent evidence.

Reference in original case is to be treated as original proceedings. It has to be established that price offered is inadequate as held by the Apex Court in *Chimanlal Hargovinddas v. Lao Poona, AIR 1988 SC 1652 and in Kiran Tandon v. Allahabad Development Authoritu, (2004) 10 SCC745 = AIR 2004 SC 2006*

13. Whether executing Court can enhance compensation

Executing Court cannot allow enhanced compensation on the application for enhancement of compensation in the reference sought by one of the claimant : *Ramesh Singh v. State of Haryana, AIR 1996 SC 3033*

14. Enhancement of award in favour of person who has not sought reference - Section 28 A

Person who has not applied for reference and has received the compensation without protest can claim for additional compensation u/s 28A if regarding land covered by the some notification, the court has increased the compensation on the application of some other person. But such remedy is not available when the award was enhanced u/s 54 of the Act in appeal : *Hukum Singh v. State of Haryana, AIR 1996 SC 3275.* Reference was made to larger Bench as to scope of Section 28A in *Union of India v. Hansali Devi, AIR 2001 SC 2184.*

In (2002) 7 SCC 273, It is held that even if application under Section 18 was filed and dismissed on ground of limitation, Section 28A applies.

For determination of compensation on the basis of judgement of reference Court application should be made within 3 months before LAO : *Raj Kumar Karanwal v. Commissioner, AIR 1997 SC 1792.*

15. Award of Interest U/s 30 and Interest during the pendency of compensation u/s 30

Reference Court cannot award interest during the pendency of objection about apportionment of compensation. The Collector is required to deposit the amount of compensation u/s 31(2) and the liability of the State ceases with effect from the date of deposit of amount in the Court as held in *Special Land Acquisition Officer v. Pattai, AIR SC 136.*

16. Right to Livelihood

Acquisition of land cannot be challenged on the ground that it takes away the right to livelihood. Such a challenge on the ground under Article 19(1) (F) of the Constitution of India is precluded by Article 31 (5).

17. Interest on market value and solatium

Interest on market value of the property not to be granted on solatium : *State of Punjab v. Gouri Shankar, 2000 AIR SCW 4224* has been overruled. The matter was referred to Large Bench. It is held that awarded amount includes all amount in all sub section of Section 23. Section 23 cannot be split up in different heads. Interest on aggregate compensation including solatium was to be paid : *Sunder v. Union of India, (2001) 7 SCC 211.*

18. Determination of Compensation

The price has to be offered applying the test of a prudent buyer : *Special Duty Collector v. K. Sambasiv Rao, AIR 1997 SC 2625.*

(A) Claim for poultry business and land.

Compensation granted for dislocation of business was not interfered with by the Supreme Court in *Ramesh Dutt v. State of Punjab, AIR 1996 SC 2831.*

Same value can be adopted by land covered by the same notification : *Union of India v. Shri Dhyansingh, 2000 AIR SCW 4936.*

(B) Tenant's Right to Compensation

If the land is burdened with tenant, the reduction made incompensation was upheld by the Apex Court in *M.P. Gopal Krishna v. Dy. Collector LAO, AIR 1996 SC 3149.*

In *Smt. Vaidya Wati v. The Collector of Agra, AIR 1979 SC 733* the Apex Court held that the tenant is entitled to proportionate share.

In *Mangatram v. State of Haryana, AIR 1996 SC 3347,* WAKF Board was given 1/4th compensation and tenant who was in actual occupation 3/4th.

(C) Sale deeds to be proved

Sale deeds shall be proved before the reference Court before they are acted upon : *UPSRTC v. State of UP, AIR 1997 SC 3675.*

However, Apex Court held that certified copy of sale deeds can be considered : *State of Haryana v. Ram Singh, (2001) 6 SCC 254.*

(D) Determination of compensation

A sale deed relating to closest or nearest piece of land carried more value : *M/s Printeres House Pvt. Ltd. V. Mst. Saiyadan (Deceased) by LRs and ors., AIR 1994 SC 1160.* Similar potentiality and nature is to be seen : *AIR 2004 SC 1179.*

Distance from the land acquired is relevant consideration : *Triveni Devi v. LAO, AIR 1972 SC 14171.*

(E) Relevant Date

Market value has to be determined on the date of notification u/s 4 of the Land Acquisition Act. Use on the date of acquisition is one of the material factors. 1/5th deduction was made towards development : *P.S. Krishna & Co. Pvt. Ltd. V. LAO, Hysderabad, AIR 1992 SC 421.*

Potential value on the date of notification u/s 4 is relevant, not the subsequent user : *LAO Karnataka Housing Board v. P.N. Malappa, AIR 1997 SC 3661.*

(F) Development and deduction

In case of acquisition of developing land, 60% deduction towards development was held permissible on facts in *Basant Kumar v. Union of India, (1996) 11 SCC 542.*

If the land is developed less deduction can be made : *B. Sammano v. LAO Vishakhapatnam, AIR 1992 SC 2298.*

Different prices can be offered for banana plantation and bagagot.

(G) Size of Land

In case of acquisition of large piece of land 17.57 acres was acquired, grant of compensation per sq. ft. was held to be illegal. Compensation should be awarded as per acre basis : *Indumati Chitle v. Union of India, AIR 1996 SC 531.*

In case of acquisition of large piece of lan, 1/3rd deduction was held to be permissible. Grant of compensation at Rs. 10 per sq. ft. was upheld in *Karan Singh v. Union of India, (1998) 11 SCC 1170.*

(H) Situation

Whether the situation of the land is relevant criteria– If the land is situated near the road, it may fetch higher value. Higher compensation is permissible as held by the Supreme Court in *Priya Vrat v. Union of India, AIR 1995 SC 2471.*

In *G. Rameshan v, State of Kerala, AIR 1997 SC 2159,* **offer of two different price for land abutting road and the land which was low lying area was upheld.**

Distance from the city is relevant consideration. Compensation of Re. 1/- s q. ft. was awarded and 50 paise was deducted for development : *Hansanli Walchand v. State of Maharashtra, AIR 1998 SC 700*

(I) Rise in Market Price

Rise in market price is a valid consideration : *Gokul v. State of Haryana, AIR 1992 SC 150*

(J) Basic Value Register

Basic value register maintained by the Municipal Council cannot be basis for determining the price - Held by the Supreme Court in *LAO Eluru v. Jasti Rohani, (1995) 1 ACC 717*

(K) Various aspects for determination of compensation are elaborately dealt with in *Chimanlal Hargovinddas v. LAO, Poona, AIR 1988 SC 1652*

Time gap between sale transaction, situation, genuineness of the transaction are relevant factors while determining the price, compensation for the land acquired. Similarly acquisition of the plot where it is small or large is relevant factor. Nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filing, shape, level etc. are relevant considerations.

(L) Burden of proof

In various decisions by Apex Court it is held that burden is on claimant to prove inadequacy of compensation. However it was held that burden is on State to prove market value of land acquired by it in *LAO & Mandan Officers v. Narsaih, AIR 2001 SC 117*

(M) Previous Judgement

Previous judgment is relevant for determination of value : *Pal Singh v. Union Territory of Chandigarh, AIR 1993 SC 225*

19. Annual Yield Method

In case of acquisition of agricultural land and considering the potential and the evidence about the annual yield 10 years multiplier of annual yield can be made the basis for awarding the compensation as held by Apex Court in *Special Land Acquisition Officer v. V. Shankar Nadagopuda, (1996) 6 SCC 124* and *Collector of Land Acquisition v. Gangaram Choba, (1996) 1 SCJ 15.*

In *Thakarsi Bhai v. Executive Engineer, AIR 2001 SC 2424*, it is held that annual yield method can be used only in case of absence of sale transaction or expert opinion, not otherwise.

In the case of fruit bearing trees, capitalization of profit of 15 years yield was applied : *K.M. Aisha Amma v. State of Kerala, (1991) 4 SCC 8*

20. Interest

9% interest is to be granted for the first year, 15% after one year on market value till the amount is deposited : *K.S. Shivdevamma v. Assistant Commissioner, LAO, AIR 1996 SC 2886.*

21. Building

If the land and building is acquired, capitalization of the profit is the relevant consideration.

22. Amendment 1984 not retrospective

Controversy as to applicability of the amendment made in 1984 has been settled and enhanced solatium and interest can be awarded only in the cases where award was not passed. The amendment cannot be given retrospective effect : *K.S. Paripoornan v. State of Kerala, (1994) 5 SCC 593 = AIR 1995 SC 1012*

23. Reference Court cannot reduce award of LAO

Reference Court cannot award lesser compensation than awarded by the Collector as provided in Section 25 and the factors mentioned in Section 24 have to be excluded while determining the compensation.

No straitjacket formula can be laid down. Determination of compensation has to be made applying the prudence in the facts and situation of the case.

24. Court cannot grant higher compensation

Court has no jurisdiction to grant higher compensation than claimed as held in *Ujjain Development Authority v. Tarachand, (1996) 5 SCC 574*

25. Court can correct clerical or arithmetic error

It is open to correct clerical and arithmetical errors in award as held in *Union of India v. Pratap Kaur, (1995) 3 SCC 263.*

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EXPEDITIOUS CRIMINAL JUSTICE

VED PRAKASH
Director

Speedy trial is the essence of criminal justice and delay constitutes denial of it. While on one hand reasonably expedious trial is an integral an essential part of the fundamental right to life and liberty enshrined in article 21 of the Constitution of India (see- *Hussainara Khatoon's case AIR 1979 S.C.1310*); the public interest also demands that criminal justice should be swift and sure.The guilty should be punished while events are still fresh in public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. (See-*M.S.Sheriff's case AIR 1954 S.C. 139*). Section 309 of the Code of Criminal Procedure (in short 'the Code') mandates that in every trial the proceedings should be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same should be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same by the following day to be necessary for reasons to be recorded. However, this rule is observed more in breach than compliance. Various factors which contribute to the delay in a trial of a criminal case may be identified as under:

- Delay in framing of charge
- Delay in service of summons on the witnesses
- Non-production of accused before Court when he is in custody
- Delay due to dispute regarding admissibility of documents/oral evidence
- Delay due to non-cooperation of defense counsel
- Delay due to prolix cross-examination

In order to dispense expeditious justice to accused as well as the victim, it is incumbent upon the Court to find out remedies so as to eliminate delays occasioned due to aforesaid factors.

As regards delay in framing of charge it is very often due to non-appearance of the accused on the date when charge has to be framed. In *Shrikishan v The State of M.P., 1991 M.P.J.R. S.N.12* it has been laid down by our own High Court that if counsel is there, arguments on charge can be heard and charges can be framed despite the fact that accused has not been produced from the jail. In this case it has further been made clear that counsel appearing for the defence cannot lawfully refuse to argue on the question of framing of charge on the ground that his client has not been produced from jail.

Laxity on the part of the police in service of summons of witnesses and non-appearance of witnesses even after service of summons contributes to maximum delay in a trial. the Apex Court has impressed upon in *Shailendra Kumar vs State of Rajasthan, AIR 2002 SC 270* that in sessions cases presence of investigating officer in court at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present

then it is the duty of the Court to take appropriate action including issuance of bailable, non-bailable warrants as the case may be. It should be well understood that accused cannot be allowed to frustrate the prosecution, and victims of the crime cannot be left in lurch.

Courts are required to take steps for pulling up the officials responsible for non-service of summons. The Court in a appropriate case may proceed against an erring officer under section 10 and 12 of the Contempt of Courts Act, 1972 because as laid down by Hon'ble Justice R.C. Lahoti, (as His Lordship then was), in Salim @ Sallo v. State of M.P.,1989 MPJR HC 882 default in service of summons may tantamount to obstructing the course of administration of justice.

In cases where the witnesses do not turn up after due service of summons summary procedure as prescribed under section 350 of the Code can also be resorted to in appropriate cases so that witnesses who do not understand the seriousness of turning before the Court after service of summons may be taken to task. The courts are not meant to dispose of the case but to decide it and if a witness does not respond to the court's process then his presence should be procured by coercive methods instead of closing the case. (See- *Jitendra Singh v. State of M.P., 1991 (2) MPJR 327*).

Non-production of the accused before the Court during trial is also a major reason which hampers the progress of a case. As put classically in *Salim's case* (supra) 'it is fortunate for the courts holding Sessions trial to see that the prosecution witnesses have made their appearance; but pleasure of good fortune cannot be enjoyed for a moment because the misfortune of non-production of the accused from judicial custody eclipses the progress of trial tying down the hands of Judge prepared to proceed ahead.' In such a situation the Court is required to act with promptitude and the officials responsible for non-production of the accused should be taken to task and it should be impressed upon them that dispensation of timely justice is a matter to be given priority over other routine duties.

It has been experienced that many a times trial is delayed because of dispute relating to the admissibility of document or to the admissibility of oral evidence. Sometimes the matter is taken to the Revisional Court which further compounds the delay. In order to avoid delay on these counts it has been ordained by the Apex Court in *Bipin Shantilal Panchal v. State of Gujarat, (2002)10 SCC 529* that whenever an objection is raised during evidence recording stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided "at the last stage in the final judgment". If the Court finds at the final stage that the objection so raised is sustainable the Judge can keep such evidence excluded from consideration.

Lack of requisite degree of cooperation by defense counsel again is a potent factor which many a times is responsible for delay. Section 309 of the Code commands that once examination of witnesses has started the trial must

be continued from day to day until all witnesses in attendance have been examined unless the Court finds adjournment necessary for reasons to be recorded. However, it is not uncommon to find cases where adjournments are granted for asking. Expressing its distress and dissatisfaction over this situation the Apex Court observed in State of *U.P. v Sambhu Nath Singh, A.I.R.2001 S.C.1403* that it is almost a common practice and regular occurrence that trial Courts flout the said command with immunity. Even when witnesses are present cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the Advocate concerned. To handle this situation the Apex Court has ordained as under:

> 'At any rate inconvenience of an Advocate is not a "Special reason" for bypassing the mandate of Section 309 of the Code. If any Court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non co-operation of accused or his counsel the Court can adopt any of the measure indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the Court). Another option is, when the accused is absent and the witness is present to be examined, the Court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case.) It is no justification to glide on any alibi by blaming the infrastructure for striking the legislative mandates embalmed in Section 309 of the Code.'

Prolix cross-examination of the witnesses, many a times till the witness gets totally frustrated, is also a common feature of criminal trials. This has the effect of delaying the trial. The judge mostly remains a mute spectator of this ordeal. However, the judge while hearing a case should not act as an umpire or referee, rather as explained by the Apex Court in *Ramchander v. The State of Haryana, AIR 1981 SC 1036,* If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. But this must be done without unduly trespassing upon the functions of the public prosecutor and the defense counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses". In *Raju @ Rajendra Prasad (2002CrLJ2367 M.P.)* dealing with the power

of the trial Court U/S. 311 Cr. P.C. and U/S. 165 of Evidence Act. It has been impressed that trial Court has ample power and discretion to interfere and control the conduct of trial properly, effectively and in the manner as prescribed by law.

Pointing out the duty of a Judge while examining a witness the Apex court expressed in *Makhan Lal Bangal v. Manas Bhunia and others AIR 2001 SC 490* that - 'A Judge presiding over a trial needs to effectively control examination, cross-examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. Power to disallow questions should be effectively exercised by reference to Sections 146, 148, 150, 151 and 152 of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross-examiner must not be allowed to bully or take unfair advantage of the witness. Though the trials in India are adversarial, the power vesting in the court to ask any question to a witness at any time in the interest of justice gives the trial a little touch of its being inquisitorial. Witnesses attend the court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the judge who has to see that they feel confident in the court. An alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way as to gain success for their respective clients is understandable but the obligation of the presiding judge to hold the proceedings so as to achieve the dual objective - *search for truth and delivering justice expeditiously* - cannot be subdued. Howsoever sensitive the subject matter of trial may be; the court room is no place of play for passions, emotions and surcharged enthusiasm.' Apart that, the Apex Court in *Raghunandan v. State of U.P., AIR 1974 SC 463* has clearly propounded that in exercise of its powers u/s 165 of the Evidence Act, the Court in order to secure the ends of justice can use statement of a witness recorded u/s 161 Cr.P.C. during examination of that witness irrespective of the prohibition imposed by Section 162 of the Code.

The aforesaid analysis simply focuses upon the major factors which are responsible for delayed justice in criminal cases. There may be some other factors also, including lack of effective management, and lack of infra-structural support which can be remedied by imparting managerial skills and upgrading infra-structure of the court. Lack of requisite sensitivity on the part of the judge handling the case may also sometimes result in neglect of the case contributing to delay. A mind set necessary to deal with something of utmost importance to the system of administration of justice as well as society is always needed coupled with a determination to proceed in the right direction.

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TRIAL OF RAPE CASES – BASIC PRINCIPLES AND DUTIES OF TRIAL COURTS

SHAILENDRA SHUKLA
Addl. Director

The offence of rape is most reprehensible, as in committing the offence the accused not only exposes the fragility of his moral fabric. but also leaves the prosecutrix with a life long mental scar and such shaken confidence that her whole persona changes forever. She is left to lurch in the morass of misery and despair for eternity. In fact the offence of rape happens to be the only offence in which social stigma attaching to the victim may be more intense and severe than that attaching the accused. Therefore, the Courts are required to show great sensitivity in trying rape cases. While dealing with the offence of rape trial courts encounter several problems and although an exhaustive discussion is not possible in the limited canvass of the article, but it will be an endeavour to throw light on some basic issues in the light of some path breaking judgment of the Apex Court.

RAPE

"Rape" as defined in Section 375 I.P.C. is complete when a man has sexual intercourse with a woman in one of the five situations provided therein. As per explanation one of Section 375 I.P.C., to constitute sexual intercourse, penetration is sufficient. In *State of U.P. v. Babulal, 1994 (6) SCC 29* it has been held that it is not necessary that there is complete penetration of the male organ or the rupture of hymen. Even slightest penetration within the libia majora or vulva into the private part is sufficient. In the case of *Madan Gopal Kakkad v. Naval Dubey, 1992 (3) SCC 204,* the accused being medical practitioner, had taken care not to rupture the hymen of the victim but had only slightly penetrated the libia majora. He was convicted u/s 376 I.P.C. Thus it is quite possible to commit legally the offence of rape even without causing rupture of the hymen or ejaculation.

ATTEMPT TO RAPE

The line between actual offence of rape and attempt to rape may at times be quite blurred. An attempt is an act which if not prevented would result in the full consummation of the attempted act. An attempt to rape therefore, ought not to be arrived at unless Court is satisfied that the conduct of the accused indicated determination to gratify his passion at all events and inspite of all resistance. In the case of *Kopulla Venkat Rao v. State of A.P., 2004 (3) SCC 602* it has been held that ejaculation without penetration constitutes only attempt to rape.

ABSENCE OF INJURIES ON VICTIM - EFFECT OF

Sometimes a rape victim may not have any injuries on her body or person. In *Dastragir and another v. State of Karnataka, 2000 (3) SCC 106* it has been held that presence of injuries is not a sine qua non to prove offence of rape. If there is over whelming ocular evidence then absence of injury is not the sole criterion.

In the case of *Sheikh Zakir v. State of Bihar, 1983 (4) SCC 10* prosecutrix belonging to backward community of Santhal tribe did not have occasion to go to the doctor as the police had turned her away. She had narrated the incident to her husband immediately after the incident.. A criminal complaint was filed in the Court. There was no medical evidence and it was also found that she had washed her clothes and no semen stains could be found. She being a mother of four children, no injury was present on her private parts. It was held that ocular testimony was reliable and the charge of rape was found proved. In *Bhoginbhai Hirjibhai v. State of Gujarat, 1983 (2) SCC 217,* it was laid down that in a trial of rape the presumption should be that the charge is genuine rather than fabricated, unless the fact that having being found in a compromising position the woman leveled the charge to save herself was proved.

ISSUE RELATING TO AGE

Section 375 I.P.C. provides that consent for sexual intercourse on the part of woman is immaterial if she is under sixteen years of age. Courts are faced with problems regarding determination of age. In *Umesh Chandra v. State of Bihar, AIR 1982 SC 1057* it has been held that the best evidence regarding age is the evidence of mother, father and the birth certificate. Only when such evidence is not available, the entries in school register may be resorted to provided there is further evidence available to show as to on what material and on whose instance the entries in the school register were made. Earlier in the case of *Siddheshwar Ganguly v. State of West Bengal, AIR 1958 SC 143* it was held that birth certificate is conclusive evidence but if it is not available, the Court has to base its conclusion upon all facts and circumstances disclosed on examination of all physical features in conjunction with oral evidence. The final opinion as to age cannot be based solely on radiological tests. In the case of *Jaimala v. Home Secretary, Government of Jammu and Kashmir, AIR 1982 SC 1297* it was held that in case of radiological tests, margin of error in ascertaining age is two years on either side. However, the X-ray report coupled with other evidence is relevant in determining the age. In the case of *State v. Mangoram, 2000 (7) SCC 224* there were three different pieces of evidence regarding the age of the prosecutrix. Dentist opined her age to be thirteen years while the doctor conducting the MLC on examining physical features suggested her age

was fourteen years and in the X-ray report her age was shown to be between fourteen to sixteen years. Supreme Court held that these pieces of evidence were enough to prove that the prosecutrix was below sixteen years of age.

WHETHER CORROBORATION NECESSARY?

In a number of citations the Apex Court has held that the evidence of prosecutrix should not be put at par with evidence of an accomplice requiring corroboration. In *State of Punjab v. Ramdeo Singh, 2004 (1) SCC 421* it was reiterated that rape victim is not only not an accomplice, she in fact stands on a higher pedestal than an injured witness, as an injured person has only physical debility while rape victim has physical as well as mental debility on account of the ghastly crime perpetrated against her. It was held that if the Court finds it difficult to accept the version of prosecutrix on its face value, it may search for evidence, direct or circumstantial which would lend assurance to her testimony. In *State of Punjab v. Gurmeet Singh and others, AIR 1996 SC 1393,* it was laid down that the testimony of a rape victim is vital and unless there are compelling reasons necessitating corroboration of her statement, the Courts should find no difficulty to act on the testimony of victim of sexual assault alone to convict the accused. It was further laid down that seeking corroboration of her statement before relying upon the same, as a rule, amounts to adding insult to injury. The Court may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness interested in the outcome of the charge leveled by her. But there is no requirement to insist upon corroboration of her statement to base conviction of the accused. Corroboration is not a requirement of law but a guidance of prudence under given circumstances. Courts cannot cling to fossil formula and insist upon corroboration.

PRECAUTIONS TO BE TAKEN BY COURT WHILE RECORDING EVIDENCE

a. Controlling cross-examination

The Apex Court in the case of *State of Punjab v. Gurmeet Singh (Supra)* has decried strategy of certain defence counsels to resort to continual questioning of the prosecutrix as to the details of the rape. Such counsel force a victim to repeat again and again the details of the rape incidence not so much as to bring out the facts on record or test her credibility but to test her story for inconsistencies with a view to attempt to twist the narration of events given by her so as to make them appear inconsistent with her allegation. The Courts should not sit as silent spectator while the victim of crime is being cross-examined. It must effectively control the recording of the evidence in the Court. It should be seen that the cross-examination is not made a means of harassment for causing humiliation to

the victim. The victim who has already undergone the traumatic experience if is made to repeat again and again in unfamiliar surroundings what she had been subjected to, she may be too ashamed and nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.

b. Court's duty towards appreciation of evidence

In the case of *Gurmeet Singh (Supra)* it was laid down that Courts must deal with the rape cases with utmost sensitivity. Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

c. Requirement of in camera trial

In *Gurmeet Singh's case (Supra)* requirement of in camera trial as provided u/s 327 (2) and 327 (3) Cr.P.C. was considered important not only from the point of view of the victim but also from the point of view of improving the quality of the evidence as she would be hesitant or bashful to depose frankly under the gaze of public. The Apex Court in the same case has directed that as far as possible the name of the prosecutrix should not be disclosed in the orders to save future embarrassment to the victim. In *Bhupinder Sharma v. State of Himachal Pradesh, 2003 (8) SCC 551* it was laid down that in the judgments the Courts should refer to the prosecutrix by the word "prosecutrix" only. Section 228–A IPC prescribes punishment for printing or publishing the name of prosecutrix.

d. Requirement of screen

In the case of *Sakshi v. Union of India, AIR 2004 SC 3566* guideline was given by the Apex Court to the effect that a screen or some other arrangement must be made so that the victim does not see the body or face of the accused. It was further laid down that questions that directly relate to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witness in a language which is clear and not embarrassing.

e. Precautions relating to child victim

In the case of *Sakshi (Supra)* the apex court has directed that a victim of child abuse should be allowed sufficient breaks as and when required to allow her to regain her composure. The Court must ask her few preliminary questions to see as to whether such child victim is capable to depose or not.

f. Injuries on the person of accused

In the case of *Rahim v. State of U.P., AIR 1973 SC 343* it was held that in case of child rape presence of injury on the person of the accused as well as absence of smegma on his member are normal features and attention of courts should be drawn towards these factors.

g. Usage of colloquial language by prosecuterix

It may be that the prosecutrix does not in so many words describes the offence of crime perpetrated on her. In *Wahid Khan v. State of M.P., 1998 (1) JLJ 290* it was laid down that Judge is under the obligation to understand what the witness desires to convey. prosecutrix is not expected to use words as given in the code. In this case the prosecutrix had stated that the accused lifted her clothes and then *"bura kaam kiya"*. It was held that these words had effectively conveyed as to what the prosecutrix wanted to say.

h. Character of prosecutrix – Whether relevant ?

In *State of Haryana v. Prem Chand and others, AIR 1990 SC 538,* it was laid down that the character of prosecutrix has no relevance in the matter of adjudicating the guilt of the accused or on quantum of punishment. Such factors are wholly alien to the very scope and object of Section 376 IPC and can never serve as mitigating or extenuating circumstance.

FALSE ANSWER BY ACCUSED IN ACCUSED STATEMENT

In the case of *State of Maharashtra v. Suresh, 2000 (1) SCC 471* it was laid down that false evidence given by the accused provides missing link in the evidence.

PROVIDING LEGAL ASSISTANCE TO THE VICTIM

In the case of *Bodhisathwa Gautam v. Shubra Chakraborty, AIR 1996 SC 92* the importance of providing legal assistance to victim of rape was stressed upon. It was stated that such complainant should be provided with legal representations by some advocate who is well acquainted with the criminal justice system. His duty would not only be to explain the nature of the proceedings, to prepare her for the case and to assist her in the police station and in the Court but to provide her with guidance as to how she may obtain help from other agencies for example mind counselling or medical assistance. Legal assistance will have to be provided at the police station since the victim might be in a distressed state upon arrival at the police station. A list of advocates willing to act in such case ought be kept at the police station and the police would be under the duty to inform the victim of her right to representation before any

questions were asked of her and the police representation should state that the victim was so informed. The advocate shall be appointed by the Court, upon application by the police at the earliest convenient movement but in order to ensure that victims were questioned without undue delay, the advocate shall be authorized to act at the police station before leave of the Court was sought or obtained.

REQUIREMENT OF COMPENSATION TO THE VICTIMS

The Apex Court in the case of Bodhisathwa Gautam (Supra) has stressed on the need to provide compensation to the victims and has ruled that on conviction, the victims ought to be provided compensation as such victims incur financial loss as they may be too traumatized to continue in employment. Apart from this, the Apex Court has recommended constitution of Criminal Injuries Compensation Board which will decide compensation for victim whether or not a conviction has taken place.

WHETHER SEXUAL UNION AMOUNTS TO RAPE AFTER PROMISE OF MARRIAGE BELIED ?

In the case of *Uday v. State of Karnataka, 2003 (4) SCC 846* it was the case of the prosecution that the accused having sexual intercourse after giving promise of marriage to victim amounted to rape as the consent was obtained under misconception of fact. The Apex Court held that the facts of the case were such that sexual union took place as both were overwhelmed in emotion and passion and they succumbed to temptation and it was not "promise" on the basis of which the incident occurred. Thus no knowledge can be imputed to the accused that the prosecutrix had consented in consequence of misconception of fact arising from promise.

SENTENCE

The Apex Court in its various pronouncements has reflected upon the ghastly nature of the crime. A permanent scar is left on the very sole of helpless victim and it destroys her entire psychology and pushes her into deep emotional crisis. In both the cases of *Bodhisathwa Gautam and Gurmeet Singh (Supr)* it was prophesied that this crime revolts against the basic human rights and is violative of victim's most cherished fundamental right namely right to life contained in article 21 of the Constitution. A three Judge Bench in the case of *State of Karnataka v. Krishnappa, 2000 (4) SCC 75* has emphasized the need of deterrent punishment for offence under Section 376 IPC.

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DNA FINGERPRINTING / DNA PROFILING

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Over the past decade, a forensic technology even more revolutionary in concept than fingerprints has entered into common use. The discovery of DNA fingerprinting created a tool in criminal identification of unprecedented power. The value of DNA fingerprinting in criminal investigations is enormous. Biological samples collected from a crime scene can either link a suspect to the scene, or rule the suspect out as the donor of the DNA. It can also identify a victim through DNA from close relatives. It is now common knowledge that DNA is the genetic material and the carrier of genetic trait. A part of the DNA of various individual is the same, but another part differs from individual to individual, except in case of identical twins.

Forensic-DNA typing, or profiling, was first used in 1986 in England in the case of Colin Pitchfork, who was eventually convicted of the sexual assault and murder of two teenage girls. It is significant to note, in light of recent developments in Canada, that the technology was used in this initial case to exonerate a young man who had falsely confessed to the murders. Alec Jeffrey of University of Licester UK, in 1985 form west and Lalji Singh of Center for Cellular and Molecular Biology, Hyderabad form east, developed methods of showing up these differences in the form of a set of bands on a photographic film, something like the bar-code of a product.

The basis of the technique follow simple laws of heredity, which says that a child inherits about one half of the bands from the mother and the remaining from the father. DNA fingerprints of different unrelated individuals are different just like the bar codes of different products. In the case of identical twins, as one would expect, the DNA bar code is exactly the same. And related individuals show a higher coefficient of similarity in respect to their DNA fingerprints than unrelated individual. And also, all bands in a child's fingerprint must be accounted for by a band either in the father's or mother's DNA fingerprint. The bands are invariant for an individual and cannot be affected by any individual making this technique a foolproof method of establishing the identity, including parentage of an individual.

Sometimes referred to as the blueprint of life, DNA is the fundamental building block for our entire genetic make-up. When sperm and egg unite, equal amounts of DNA from mother and father come together. Every cell except for the red blood cell carries a blueprint of DNA. Both of the egg and sperm hold DNA. The DNA in our blood is the same as the DNA in our skin cells, saliva, and the roots of our hair. Highly discriminating, DNA is a powerful tool for identifying individuals. The DNA molecule is very stable and can withstand significant environmental challenge, which enables forensic scientists to obtain new information from very old biological evidence or establish important data from badly degraded samples. The stability of the molecule, combined with the discriminat-

ing features of each individual's DNA and the accuracy of current DNA analysis techniques, makes this human identification technology a vital component of most police investigations.

The history of forensic-DNA analysis, also called forensic-DNA typing, (or popularly, "DNA fingerprinting or DNA profiling"), is little less than two decade old. The basic science goes back at least to 1953, however, when two young Cambridge University researchers, James Watson and Francis Crick, discovered the molecular structure of DNA. Their landmark paper in molecular genetics opened the way for the dramatic advances in recent years in our understanding of inheritance. Any discussion of DNA typing and its important contribution to forensic science therefore require some understanding of the molecular basis of inheritance.

All living organisms are composed of cells, the basic integrated units of biological activity. In humans, as in other higher organisms, the hereditary material *deoxyribonucleic acid, or DNA,* is contained in the cell nucleus in microscopic assemblages known as *chromosomes.* Human cells have 23 pairs of chromosomes for a total of 46. A typical human cell has one pair of sex chromosomes, and 22 pairs of non-sex chromosomes, known as *autosomes.* The units of inheritance are known as *genes:* human beings are thought to have 50,000 - 100,000 genes, which are contained in the chromosomal DNA in the cell nucleus. A molecule of DNA holds coded plans for thousands of proteins. A piece of a chromosome that dictates a particular trait is called a gene.

WHAT IS DNA?

- DNA is an abbreviation for Deoxyribonucleic Acid.
- The DNA stands in our body stretched out would be about 500 million miles long.
- There are so many millions of base pairs in each person's DNA that every person has a different sequence.

Deoxyribononucleic acid (DNA) is a long, double-stranded molecule that looks like a twisted rope ladder or double helix. DNA is found inside genes, inside chromosomes, inside the nucleus of a cell. Each chromosome is made up of a tightly coiled strand, a molecule of DNA. The structure of DNA resembles a spiral ladder in which the "sides" are made of sugar-phosphate molecules and the "rungs" are formed from pairs of chemicals known as bases or nucleotides. Each strand is made up of a sugar covalently linked to a phosphate, which is covalently linked to another sugar and so on. A DNA strand may contain thousands to millions of these sugar-phosphate units. In DNA from all sources there are only four bases: adenine, thymine, guanine and cytosine. The pairing of the bases is specific: adenine is always paired with thymine, and cytosine is always paired with guanine. In biochemical shorthand, the base-pairs are represented as A-T (adenine-thymine) and G-C (guanine-cytosine). It is estimated that there are about 3 billion base-pairs in the human genome, the term used to describe the total hereditary material in the 46 chromosomes.

Each child receives 23 chromosomes from its mother and 23 from its father.

In human only about 10% of total genome containing information for about 100,000 genes, governs the cell function. The remaining 90% of the genome is suggested to be the "junk". This raises the question: " if genes just make proteins and our proteins are the same, then why are we so different?" The answer to this is perhaps locked in the so-called "junk DNA." A portion of junk DNA consists of minisatellites, which show individual specific variation and are considered to be of no functional significance.

Mitochondrial DNA not the entire DNA in human and other organisms is located in the chromosomes in the nucleus of the cell. Some DNA is found in organelles called *mitochondria,* which are within the cells but outside the nucleus of the cell. The mitochondria carry out essential metabolic functions, notably with respect to cellular energy production and respiration. Although mitochondrial DNA is not often used for forensic purposes, it can be - and has been - used in certain situations to establish family relationships.

Mitochondrial DNA is most useful in connecting the maternal lines of living people in different parts of the world. Human genetics got a real boost with the discovery that mitochondria have their own DNA. Mitochondria are tiny organelles, which live in the cytoplasm of cells, the fluid-filled space between the cell nucleus and the outer membrane. There are thousands of mitochondria in each cell, and each one has its own small circle of DNA, a reminder of their distant bacterial ancestry.

What makes mitochondrial DNA (or mtDNA for short) so special and so useful? First is its unique inheritance pattern. Human eggs are full of mitochondria, while sperm have only a hundred or so, just enough to power it while it swims towards the egg. After fertilization, when the sperm penetrates the egg, these few male mitochondria are immediately destroyed. This means that, while we all receive our nuclear DNA, with the exception of the X and Y sex chromosomes, from both parents, we get all of our mtDNA from our mothers. She got it from her mother, who got it from hers - and so on back in time.

The current level of sophistication and expertise in the science and technology of molecular genetics has provided the basis for the "genome project," an international program to determine the sequence of all the base-pairs in the 23 pairs of human chromosomes. The approximately 3 billion base-pairs in the human genome incorporate both the specific sequences which constitute functional genes, and the 95% (or more) of human DNA which is non-coding; that is, which has no known genetic function. It is important to understand that the genome project is separate, and different, from forensic-DNA profiling, although some of the same technologies are used in both activities.

Another essential point is that the DNA profile, or "DNA fingerprint," of an individual as used in forensic-DNA profiling does not represent the genetic make-up of that person. It represents only a number of fragments of the person's

DNA; these have been extracted, processed and utilized to form an individualized molecular-DNA "snapshot" that can be used for identification purposes. The forensic-DNA profile does not give any information on the individual's genetic make-up.

Forensic-DNA profiling can make use of any specimen that contains DNA. The list include hair (with the root attached), blood stains, semen, bone marrow, or any other tissue or bodily fluid, burnt remains that has nucleated cells. In the use of blood stains, it is the DNA from the white blood cells that is used: mature human red blood cells do not have nuclei and so contain no DNA. Semen normally contains large amounts of DNA in the sperm cells, which makes it very useful for DNA typing, especially in cases of sexual assault. (If the rapist had been vasectomized, however, there would be no sperm cells and the specimen would not be useful with current RFLP technology.)

The basic science and technology behind forensic-DNA typing is not under serious question. The theory is scientifically sound and the technology used to obtain DNA profiles is both well established and evolving in accuracy and efficiency.

One of the most important issues associated with forensic-DNA typing is the individuality of a so-called "DNA fingerprint." It was noted above that a forensic-DNA profile does not represent the complete genetic make-up of an individual; rather, it is a selection of DNA fragments, which can be used as identification markers. The key to the usefulness of the DNA- typing procedure is the fact that the use of "an appropriate number and combination of probes demonstrates that, with the exception of identical twins, each individual (person) has a unique pattern."

Cases from the file of Alec Jeffrey : Father of DNA Fingerprinting (Source from Internet) The body in the carpet: Buying a house can be a stressful time, but surely not as stressful as a house purchaser in Cardiff who moved into their new residence, dug up the patio and found a buried carpet. Inside the carpet was a skeleton. "It was a fairly safe bet this was a murder case," says Professor Jeffrey. "A facial reconstruction from the skeletion was put out in the press and on Crimewatch. Someone phoned Crimewatch and suggested that it was a girl called Karen Price who had gone missing about ten years previously." Working with Erika Hagelberg, an expert in bone DNA extraction and analysis, DNA was extracted from the skeleton and Professor Jeffrey compared it to DNA from Karen's mother and father; it was indeed their daughter.This was enough to give the police a secure basis for identification. A murder enquiry was launched, which led to the identification and the murderer and accomplice. The evidence went to Cardiff Crown Court in 1991 - the first time PCR and ancient bone DNA evidence had been presented to a court in the UK. "It was a lot of firsts for the court to handle, but the evidence was accepted and the perpetrators were convicted," says Professor Jeffrey.

Mengele's bones – The second case that helped establish PCR and microsatellites in DNA profiling involved the Auschwitz camp doctor Josef Mengele. Caught by the Allies at the end of World War II, Mengele escaped to South America. In 1979, a man who might have been Mengele drowned at sea and was buried. Following a tip-off that the body in the grave in Sao Paolo, Brazil, might be Mengele, the skeleton was exhumed."The DNA analysis was very difficult," says Professor Jeffrey. "We only had trace amounts of DNA from badly decomposed bones, but enough to compare with blood samples from Mengele's wife and son, who were still alive in Germany. It was like a paternity case in reverse."The results showed, with 99.9 per cent certainty, that it was indeed Mengele. The evidence went to Germany, the Simon Weisenthal Institute and the US Department of Justice, and the 40-year war crimes investigation was finally closed.

Cases from the files of LAL JI SINGH (Started DNA Fingerprinting in India): (Source from a research article of Pushpa Bhargava, Published in Electrophoresis, 1995, 16, 1775-1781)

Lakshmi *Vs* Mary case

This was the first case in which DNA fingerprinting was used in India. Lakshmi and Mary ,were the two names for the same five year old girl. Lakshmi, daughter of a gypsi couple, was spotted by another couple who had lost their daughter, Mary, some years before; the later couple claimed that the girl was not Lakshmi but Mary.By DNA fingerprinting of the girl and of the two couples the girl turned out to be Mary. This historically is an important case; it received wide publicity and established in the public eye the validity of this technique for deciding paternity in Indian subcontinent.

BLOOD STAINS ON NIGHTGOWNS

In a tragic case a house was raided, the husband was away, the wife, the dog, and the watchman were killed. There was a scuffle between the wife and the murderer before she succumbed. As a consequence of this scuffle, the murderer left some bloodstains on two nightgowns, one of which was being worn by the victim and the other that was lying around, which he apparently used to wipe himself. It was this mistake the murderer made that eventually led to his identification through DNA fingerprinting of the bloodstain.

FINGER REMNANT IN THE MOUTH

In another case in Andhra Pradesh , a person was strangulated to death by the intruder who, unfortunately for him left a bit of his finger remnant in the mouth of murdered person. The DNA fingerprinting of the finger remnant matched that of one suspect, who was then convicted after having been free for three years.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of February, 2005. The Institute has received articles from various districts. Articles regarding topic no. 1 and 3 respectively, received from Chhindwara and Indore are being included in this issue. As the Institute has not received worth-publishing articles regarding topic no.2, 4 and 5, they will be allotted to other group of districts for discussion in future.

1. Procedure to be adopted by a Magistrate when a person proposes to surrender before the Court alleging that he is being accused of committing a non-bailable offence.

   किसी व्यक्ति द्वारा स्वयं के बारे में अजमानतीय अपराध का मामला होने का अभिकथन करते हुए न्यायालय के समक्ष समर्पण की दशा में मजिस्ट्रेट द्वारा अपनायी जाने वाली प्रक्रिया का स्वरूप क्या होगा?

2. What is the legal position regarding acquisition of ownership over agricultural land by adverse possession?

   कृषि भूमि पर विरोधी आधिपत्य के आधार पर स्वत्व अर्जन विषयक विधिक स्थिति का स्वरूप क्या है?

3. Whether an appeal or revision in civil/criminal case can be decided on merits in absence of appellant/revisioner?

   क्या किसी व्यवहार या दाण्डिक अपील अथवा पुनःरीक्षण को अपीलकर्ता/ पुनःरीक्षण कर्ता की अनुपस्थिति में गुणागुण के आधार पर निराकृत किया जा सकता है?

4. What is the extent of right of complainant to challenge the legality of acquittal/ quantum of sentence by way of revision?

   परिवाद मामले में दोषमुक्ति/दण्ड के परिमाण के विषय में परिवादी द्वारा पुनःरीक्षण में चुनौती दिये जाने के अधिकार का विस्तार क्या है?

5. What is the legal position relating to the question of granting permanent/ temporary injunction in favour of a tresspasser?

   अतिक्रामक के पक्ष में व्यादेश/अंतरिम व्यादेश प्रदान किए जाने विषयक विधिक स्थिति का स्वरूप क्या है?

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स्वयं के विरूद्ध अजमानतीय अपराध के अभिकथन के साथ मजिस्ट्रेट के समक्ष समर्पण – न्यायालयीन प्रक्रिया का स्वरूप

न्यायिक अधिकारीगण
जिला छिंदवाड़ा

दण्ड प्रक्रिया संहिता की धारा–44 (2) यह प्रावधित करती है कि:

> कोई कार्यपालक या न्यायिक मजिस्ट्रेट किसी भी समय अपनी स्थानीय अधिकारिता के भीतर किसी ऐसे व्यक्ति को गिरफ्तार कर सकता है या अपनी उपस्थिति में उसकी गिरफ्तारी का निर्देश दे सकता है, जिसकी गिरफ्तारी के लिए वह उस समय और उन परिस्थितियों में वारंट जारी करने के लिए सक्षम है।

उक्त धारा के प्रावधानों से स्पष्ट है कि भले ही मजिस्ट्रेट के समक्ष कोई अपराध न किया गया हो, परन्तु यदि मजिस्ट्रेट किसी व्यक्ति की गिरफ्तारी के लिए वारंट जारी करने के लिए सक्षम है तो वह उस व्यक्ति को गिरफ्तार कर सकता है। जब मजिस्ट्रेट किसी व्यक्ति को गिरफ्तार कर सकता है तो निश्चित रूप से इस धारा के प्रावधान मजिस्ट्रेट को किसी व्यक्ति का समर्पण स्वीकार करने की भी शक्ति प्रदान करते हैं। अतः अपनी अधिकारिता के अंतर्गत मजिस्ट्रेट किसी व्यक्ति का समर्पण भी स्वीकार कर सकता है। माननीय उच्चतम न्यायालय द्वारा *डायरेक्टर ऑफ इन्फोर्समेंट विरूद्ध दीपक महाजन, ए.आई.आर. 1994 एस.सी. 1775* के प्रकरण में यह अभिनिर्धारित किया गया है कि :

> When an accused person appears before a magistrate or surrenders voluntarily, the magistrate is empowered to take that accused person, into custody and deal with him according to law.

अब प्रश्न यह उत्पन्न होता है कि यदि कोई व्यक्ति स्वयं के विरूद्ध अजमानतीय अपराध का मामला होने का अभिकथन करते हुए मजिस्ट्रेट के समक्ष समर्पण करता है, तब इसे क्या माना जाना चाहिए?

इस संबंध में माननीय उच्चतम न्यायालय द्वारा *निरंजनसिंह विरूद्ध प्रभाकर (1980 क्रिमिनल लॉ जर्नल–426)* के प्रकरण में यह अभिनिर्धारित किया गया है कि :

> He (accused person) can be in custody not merely when the police arrests him, produces him before a magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its direction.

अतः स्पष्ट है कि यदि कोई व्यक्ति न्यायालय के समक्ष यह आवेदन प्रस्तुत करते हुए समर्पण करता है कि उसके विरूद्ध अजमानतीय अपराध का मामला है तो यह माना जाएगा कि वह न्यायालय की अभिरक्षा (custody) में है, परन्तु केवल अभिरक्षा में होने का अर्थ यह नहीं निकाला जा सकता है कि उस व्यक्ति को न्यायालय के द्वारा गिरफ्तार कर लिया गया है। अभिरक्षा तथा गिरफ्तारी में अंतर है। प्रत्येक गिरफ्तारी में अभिरक्षा सम्मिलित है, परन्तु प्रत्येक अभिरक्षा में गिरफ्तारी सम्मिलित नहीं है; जैसा कि माननीय उच्चतम न्यायालय द्वारा *डायरेक्टर ऑफ इन्फोर्समेंट विरूद्ध दीपक महाजन, ए.आई.आर. 1994 एस.सी. 1775* के न्याय दृष्टांत में अभिनिर्धारित किया गया है कि:

Taking of a person into judicial custody is followed after the arrest of the person by the magistrate on appearance or surrender. In every arrest, there is custody but not vice-versa and that both the words are not synonymous terms.

अत: स्पष्ट है कि गिरफ्तारी अभिरक्षा के बाद की स्थिति है एवं जब तक मजिस्ट्रेट के द्वारा किसी व्यक्ति को गिरफ्तार नहीं किया जाता है, तब तक उस व्यक्ति को न तो न्यायिक अभिरक्षा में जेल भेजा जा सकता है और न ही जमानत पर स्वतंत्र किया जा सकता है।

अब प्रश्न यह उत्पन्न होता है कि क्या किसी व्यक्ति को मात्र उसके द्वारा दिए गए आवेदन के आधार पर न्यायालय के द्वारा गिरफ्तार किया जा सकता है?

किसी व्यक्ति की गिरफ्तारी उसे उसकी दैहिक स्वतंत्रता से वंचित कर देती है तथा भारतीय संविधान के अनुच्छेद–21 के अनुसार किसी व्यक्ति को उसके प्राण और दैहिक स्वतंत्रता से विधि द्वारा स्थापित प्रक्रिया के अनुसार ही वंचित किया जा सकता है, अन्यथा नहीं। किसी भी व्यक्ति को तब तक गिरफ्तार नहीं किया जा सकता है, जब तक कि प्रथम दृष्टया यह निष्कर्ष निकालने के लिए आधार विद्यमान न हों कि उस व्यकित के द्वारा कोई अपराध किया गया है। मात्र किसी व्यक्ति के द्वारा आवेदन में यह उल्लेख कर देना कि उसके विरूद्ध अजमानतीय अपराध का मामला है, यह निष्कर्ष निकालने के लिए पर्याप्त नहीं है कि उसके द्वारा कोई अपराध किया गया है, जब तक कि कोई अन्य सामग्री मजिस्ट्रेट के समक्ष विद्यमान न हो। अत: यदि कोई व्यक्ति न्यायालय में समर्पण करता है तो यह निष्कर्ष निकालने के लिए, कि उसके द्वारा कोई अपराध किया गया है या नहीं, सर्वप्रथम यह देखना चाहिए कि उस व्यक्ति के विरूद्ध दण्ड प्रक्रिया संहिता की धारा–157 के अंतर्गत संबंधित आरक्षी केन्द्र से मजिस्ट्रेट को प्रथम सूचना प्रतिवेदन की प्रतिलिपि भेजी गई है या नहीं। यदि प्रथम सूचना प्रतिवेदन की प्रतिलिपि उपलब्ध है तो यह रिपोर्ट उस व्यक्ति के विरूद्ध अपराध के संबंध में निष्कर्ष निकालने के लिए एक आधार हो सकती है। इसके साथ ही आवेदन की एक प्रति अभियोजन को तथा एक प्रति संबंधित आरक्षण केन्द्र को भेजकर यह प्रतिवेदन मंगाया जाना चाहिए कि क्या उस व्यक्ति के द्वारा कोई अपराध कारित किया गया है एवं क्या उस व्यक्ति को आवश्यकता संबंधित आरक्षी केन्द्र को किसी अपराध के संबंध में है। यदि आरक्षी केन्द्र से प्रतिवेदन प्राप्त होने के पश्चात् एवं केस डायरी का अवलोकन करने के पश्चात् मजिस्ट्रेट का यह निष्कर्ष है कि प्रथम दृष्टया समर्पण करने वाले व्यक्ति के द्वारा कोई अपराध किया गया है तो मजिस्ट्रेट उस व्यक्ति को गिरफ्तार करके विधि अनुसार कार्यवाही करते हुए उस व्यक्ति को न्यायिक अभिरक्षा में भेज सकता है अथवा आवेदन प्रस्तुति पर पुलिस अभिरक्षा में भी स्वविवेकानुसार भेज सकता है, परन्तु यदि न्यायालय समय समाप्त होने के पूर्व आरक्षी केन्द्र से अथवा अभियोजन से कोई प्रतिवेदन प्राप्त नहीं होता है तो ऐसी स्थिति में यदि मजिस्ट्रेट के पास उपलब्ध प्रथम सूचना प्रतिवेदन की प्रतिलिपि से मजिस्ट्रेट का समाधान हो जाता है कि समर्पण करने वाले व्यक्ति के द्वारा कोई अपराध कारित किया गया है तो वह उस व्यक्ति को गिरफ्तार करके अपने विवेकानुसार उस व्यक्ति को पुलिस प्रतिवेदन प्राप्त होने तक जेल वारंट तैयार कर न्यायिक अभिरक्षा में भेज सकता है, परन्तु यदि समर्पण करने वाले व्यक्ति के आवेदन के अतिरिक्त अन्य कोई सामग्री मजिस्ट्रेट के पास अपराध के संबंध में निष्कर्ष निकालने के लिए उपलब्ध नहीं है तो मजिस्ट्रेट उस व्यक्ति की गिरफ्तारी बाबद् तत्काल आदेशित नहीं कर सकता है तथा ऐसी दशा में पुलिस प्रतिवेदन बुलाने का आदेश देते हुये संबंधित व्यक्ति को अगले कार्य दिवस में पुन: न्यायालय में उपस्थित होने के लिये कहा जा सकता है ।

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WHETHER AN APPEAL OR REVISION IN CIVIL OR CRIMINAL CASE CAN BE DECIDED ON MERITS IN ABSENCE OF APPELLANT/REVISIONIST?

JUDICIAL OFFICERS
District-Indore

(A) CIVIL CASES :-

1. In civil appeals as per provisions of 0.41 R.17 (1) of CPC where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed. An explanation has also been inserted with above sub-rule that nothing shall be construed as empowering the court to dismiss the appeal on merits.
2. So far as civil revision is concerned, at present as per Sec. 115 CPC this power is vested only with the High Court but in M.P. Gram Nyayalaya Adhiniyam, 1996 as per provision of Sec 31 a revision petition may be filed against the final decision of the Gram Nyayalaya in civil cases before Civil Judge Class-I. So the provisions of Sec 115 CPC are relevant and applicable for CJ-I in this regard as per provision of Sec 141 CPC. Similarly, if in any other Special Act powers of revision in civil matters have been vested with Civil Judge or DJ/ADJ the provision of Sec. 115 CPC shall be followed.
3. It is true that the Code of Civil Procedure does not specifically provide that a revision may be dismissed for default but since the nature of the revisional jurisdiction is the same as that of the appellate jurisdiction, the power to dismiss an appeal for default is attracted to the case of a revision. Sec. 141C.P.C. also provides that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. By virtue of this provision the power to dismiss an appeal in default is available in case of a revision also. The Court is not bound to enter into the merits of case when no one appears to press the revision. (See-*Ram Murti Singh v. Gyanendra Kumar Arya & Ors., AIR 1982 Allahabad 185*)
4. In view of the position of law emerged as above, it is clear that in absence of appellant/revisioner the civil appeal and revision can not be decided on merits but it may be dismissed in default. Because of this legal position a specific provision for restoration of such dismissed civil appeal is given in O.41 R.19 of C.P.C. Similarly, a revision petition dismissed for default can be restored if there be sufficient ground for the non-appearance of the petitioner at the hearing. Sec. 151 C.P.C. is meant to provide for cases in which the courts ought to act in the interest of justice although specific

provision is not to be found elsewhere in the Code. If there is no specific prohibition and resort to such power serves the ends of justice instead of defeating it, then it can always be resorted to. [See-*Gulam Ali v. Vishwanath Balwant Mahakal, A.I.R. 1962 M.P. 308*]

5. If the Court dismisses an application in revision for default simply for non-appearance of the petitioner, it is not an order covered by Section 115. It would be an order made under the inherent powers of the Court under Section 151 or under Section 141 read with Order 9 of the C.P.C. There is no express provision in the C.P.C., for dismissing a revision petition for default. If it is done, the same power which the Court exercised when dismissing an application for default can be and should be invoked when restoring the same. [See- *Rahim v. Karim, A.I.R. 1967 J.& K. 93*]

(B) CRIMINAL CASES :

1. As we have to discuss the legal position of decision on merits in absence of appellant/revisioner, we can safely say that such appeal or revision is admitted for final hearing & position is to be discussed afterwards.

2. Firstly for criminal appeals, there are provisions under section 385 & 386 Cr.P.C. As per relevant portion of Section 385 (1) if the appellate Court does not dismiss the appeal summarily, it shall cause notice, of the time & place at which such appeal will be heard, to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf. Under Section 385 (2) the appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties: Provided that if the appeal is only as to extent or the legality of the sentence, the Courts may dispose of the appeal without sending for the record. Under Sec. 386 after perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may pass any one of the orders enumerated in clause (a) to (e)

3. The provisions of Sec. 385 & 386 Cr.P.C. show the enormous powers which the Appellate Court possesses in regard to a criminal appeal. The Apex Court has laid down the principles and developed the legal position regarding the decision of the criminal appeals which are admitted for final hearing. In *Sankatha Singh & other v. State of U.P., AIR 1962 SC. 1208* the Apex Court in para 7 of the judgment has ruled that a criminal appeal cannot be dismissed for the default of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal to enable them to appear or should consider the appeal on merits and pass the final order.

4. In *Shyam Deo Pandey & other v. The State of Bihar, AIR 1971 SC 1606* it was laid down that a criminal appeal cannot be dismissed for default of

appearance of the appellants or their counsel. The court has either to adjourn the hearing of the appeal in order to enable them to appear or it should consider the appeal on merits and pass final orders. The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are put before the court and the appeal is set down for hearing, it is essential that the Appellate Court should (a) peruse such record, (b) hear the appellant of his pleader, if he appears, and (c) hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section [Sec. 386 Cr.P.C.]. It is to be noted that if the appellant or his pleader is not present, it is not obligatory on the Appellate Court to postpone the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the appeal; but that disposal must be after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the facts whether the appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits.

5. In *Kabira v. State of U.P. 1982, SCC (Cri.) 144* the Apex Court ruled that if the appellant was not present, the learned Judge should have appointed some advocate as amicus curiae and then proceed to dispose of the appeal on merits. Again in *Parasuram Patel & another v. State of Orissa, 1994 SCC (Cri.) 1320* it was reiterated that no criminal appeal can be dismissed on the ground of default in appearance. The Court has to go through the record of the case even in the absence of the appellants or their counsel and decide the matter on merit.

6. After referring and analysing its earlier decisions on this point the Apex Court's three Judge Bench in *Bani Singh & other v. State of U.P., AIR, 1996 SC 2439* crystallized the legal position and laid down that the plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits not merely by perusing the reasoning of the

trial court in judgment, but by cross–checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non–prosecution but only contemplates disposal on merits after perusal of the record.

7. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. If the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so.

8. The *Bani Singh's* case can be termed as milestone on this subject. The principles laid down by the Apex Court in this case were followed by Apex Court in *Rishinandan Pandit & Others v. State of Bihar, AIR 1999 SC 3850* but the Court also observed that as a matter of legal position the Court is not precluded from perusing the records and come to its own conclusion unaided by any legal practitioner to project the points favourable to the accused, when the counsel engaged by them does not turn up to argue. It is a matter of prudence that the Court may, in an appropriate case, appoint a counsel at the State's expense to argue for the cause of the accused. Of course it is for the Court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could be disposed of unassisted by the counsel to put forth the favourable features for the accused.

9. So far criminal revision is concerned, under Sec. 397 Cr.P.C. the concerned Court may call for and examine the record of any proceeding before any inferior Court within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. Under Sec. 399 (1) & 401 (1) Cr.P.C. the concerned Court has powers conferred on a Court of appeal under Sec. 386 etc. provided therein. The scope of sec. 386 Cr.P.C. in criminal appeal as emerged above is clear, similarly a criminal revision also can not be dismissed for default of the revisioner or his counsel. The Court should con-

sider the revision on merits and pass final order, since the nature of the revisional jurisdiction is the same as that of the appellate jurisdiction.

The ultimate conclusion of the above discussion in respect of the given legal problem emerges as under :

A That a civil appeal and revision can not be decided on merits in absence of appellant/revisioner.

B. That a criminal appeal can be decided on merits in absence of appellant after perusing the record and the judgment of the trial court. But –

I. If the appellant is in jail and cannot, on his own, come to court it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant if his lawyer is not present,

II. If the lawyer is absent and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it form doing so,

III. There can be appeals which could be disposed of unassisted by counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range it is advisable to seek the assistance of a legal talent.

C. That a criminal revision can be decided on merits in absence of revisionist after perusing the record and the impugned order of the inferior Court.

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HON'BLE SHRI JUSTICE VISHNUDEO NARAYAN DEMITS OFFICE

Hon'ble Shri Justice Vishnudeo Narayan demitted office on 12.08.2005. Born on 13.08.1943, His Lordship joined Higher Judicial Service in the State of Bihar. Was Additional District Judge at Saran and Nalanda. Worked as Principal Judge, Family Court, Patna. Also worked as District Judge Deogarh and thereafter Registrar General of the Jharkhand High Court. Was appointed as Permanent Judge of the Jharkhand High Court on 28.01.2002. Was transferred to the High Court of Madhya Pradesh and took oath of office on 07.12.2004. Was accorded farewell ovation on 12.08.2005 in the Conference Hall of the South Block of the High Court of Madhya Pradesh.

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

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PART - II

NOTES ON IMPORTANT JUDGMENTS

201. PRECEDENTS

Dismissal of SLP by the Supreme Court by a speaking order – Such order is binding as precedent – Law explained.
M.P. State Electricity Board, Jabalpur v. Pandey Construction Co. Reported in 2005 (2) MPLJ 550 (FB)

Held :

The Apex Court in *Kunhayammed and others vs. State of Kerala and another, AIR 2000 SC 2587* held :-

"43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

To sum up our conclusions are:-

(i) Where appeal or revision is provided against an order passed by a Court, Tribunal or any other Authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or Authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, Tribunal or Authority below has stood merged in the order of Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the Civil Procedure Code." (Emphasis supplied)

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202. CRIMINAL PROCEDURE CODE, 1973 – Section 154
F.I.R., nature of – F.I.R. not a substantive piece of evidence – F.I.R. need not disclose all facts and circumstances relating to the offence – Law explained.
Suraj and others v. State of M.P.
Reported in 2005 (2) MPLJ 505

Held :

It is well settled in law that FIR is not a substantive piece of evidence but it can be used for the purposes of corroboration and contradictions. In the case of *Superintendent of Police, CBI vs. Tapan Kumar Singh, (2003) 6 SCC 175* the Supreme Court has laid down the law that it is not necessary that the FIR must disclose all facts and details relating to the offence reported. What is required is

that the information given must disclose the commission of a cognizable offence and must provide a basis for the police officer to suspect the commission of such an offence. In another case *Kamma Otukunta Ram Naidu vs. Chereddy Pedda Subba Reddy and others, (2003) 11 SCC 293* the Supreme Court has held that if minute details are omitted in the FIR, it cannot be held that the case of prosecution becomes doubtful. In the FIR it has come that abovesaid four persons entered inside the house and out of these four persons namely Suraj, Matru, Ramesh and Bablu, Suraj caused 'Baka' injury and other three accused persons were standing there and they were also carrying weapons. Thus, even if there is some minor contradiction in regard to carrying the sword or lathi by other three accused persons would not be with much fatal. In the ease of *State of M.P. vs. Mansing and others, (2003) 10 SCC 414* in the FIR it was not mentioned that accused was carrying a knife, in that situation the Supreme Court has held that it would not wash away the effect of the evidence tendered by the injured witnesses. In the case of *Om Prakash vs. state of Uttaranchal, (2003) 1 SCC 648* it was held that FIR need not contain exhaustive account of the incident when prosecution evidence have given all the essential and relevant details of the incident naming the accused, merely because non-mention of certain further particulars in FIR which were stated by the prosecution witnesses before the Court, deposition of the prosecution witnesses cannot be said to be improvement over the version in the FIR.

203. INTERPRETATION OF STATUTES:

Interpretation and construction of wills, statutes or instruments – Golden rule is to adhere to grammatical and ordinary sense of words – Law explained.

State of Kerala and another v. P.V. Neelakandan Nair and others Judgment dt. 11.07.2005 by the Supreme Court in Civil Appeal No. 3603 of 2005, reported in (2005) 5 SCC 561

Held :

The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (see *Grey v. Person, (1857) 6 HL case 61.*)

The latter part of this "golden rule" must, however, be applied with much caution. "If", remarked Jervis, C.J.,

> "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though

it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning". [See *Abley v. Dale, (1851) 11 CB 378 (ER p. 525.*]

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204. CRIMINAL PROCEDURE CODE, 1973 – Section 125
FAMILY COURTS ACT, 1984 – Sections 7 and 19 (4)
Order passed u/s 125 by Family Courts, revisability – Order is revisable u/s 397 Cr.P.C. in criminal revision – Contra view expressed in *Aruna Choudhary v. Sudhakar Choudhary, 2004 (2) MPLJ 101* expressly overruled
Rajesh Shukla v. Smt. Neena and another
Reported in 2005 (2) MPLJ 483 (FB)

Held :

Chapter IX of the Code provides for its own procedure. Section 125 of the Code pertains to orders for maintenance of wives, children and parents. Section 126 of the Code provides the procedure of dealing with said application. Code of Civil Procedure provides for proceeding ex parte in civil cases, wherein there is no provisions for proceedings ex parte in criminal case. Code does not provide for review or change in the order once finally passed under section 362 of the Code. However, unlike section 362 of the Code, power to alter or modify the maintenance is conferred upon the Court under section 127 of the Code. Under section 126 of the Code, power is conferred for setting aside ex parte order. Section 128 of the Code relates to enforcement of order of maintenance by the Magistrate. Thus, Chapter IX of the Code itself provides its own procedure for grant of maintenance.

Therefore, we answer the reference that since powers of judicial Magistrate First Class have been exercised by the Family Court for deciding application under section 125 of the Code, revision filed against the said order should be registered as Criminal Revision. Therefore, with respect to the judgment in the case of Aruna Choudhary (supra) we hold that correct law has not been laid down in this judgment. Revisions arising out of applications under section 125 of the Code shall be registered as criminal revisions as they flow from the proceedings under the Code. However, it is for the High Court to frame rules for hearing of appeals and revisions arising out of the orders passed by the Family Court and its registration. The High Court may consider this matter on administrative side.

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205. ARBITRATION ACT, 1940 – Section 30

Grounds for setting aside an award – Order refusing grant of adjournment not a ground to interfere with the award – Law explained.

Hari Om Maheshwari v. Vinitkumar Parikh

Reported in 2005 (2) MPLJ 414 (SC)

Held:

Section 30 of the Arbitration Act, 1940 reads thus

"**30**. *Grounds for setting aside award.*– An award shall not be set aside except on one or more of the following grounds, namely –

(a) that an arbitrator or umpire has misconducted himself of the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid."

A bare reading of the said section shows that the Civil Court has very limited jurisdiction to interfere with an award made by the arbitrators and it certainly does not permit the Civil Court including the High Court to interfere with the discretionary order of granting or refusing an adjournment. This Court in *Arosan Enterprises Ltd. vs. Union of India, (1999) 9 SCC 449* considering section 30 of the Act held thus:

> "Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression 'shall' in the main body of the section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit : (i) arbitrator or umpire has misconducted himself; (ii) award has been made after the suppression of the arbitration or the proceedings becoming invalid; and (iii) award has been improperly procured or otherwise invalid. These three specific provisions under section 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the arbitrator being the judge chosen by the parties, the decision of the arbitrator as such ought to be final between the parties. Reappraisal of evidence by the Court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to proceedings under section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the Court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist total perversity in the award or the judgment is based on a wrong

proposition of law. In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award. The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

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206. POWERS OF ATTORNEY ACT, 1882 – Section 2
Attorney's power to testify on behalf of the complainant in a case u/s 138 of N.I. Act – Attorney can appear in his own capacity and not on behalf of complainant – Law explained
Mahendra Kumar v. Armstron and another
Reported in 2005 (2) MPLJ 419

Held:

The Supreme Court in case of *Janki Vashdeo Bhojwani and another vs. Industrial Bank Ltd. and others, 2005 (1) MPLJ (S.C.) 421* has finally set at rest the controversy about filing of the complaint or plaint and examination of the holder of power of attorney as witness and ruled that "a general power of attorney-holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear as a witness is altogether a different act. A general power of attorney-holder or special power of attorney-holder cannot be allowed to appear as a witness on behalf of the plaintiff/complainant in the capacity of plaintiff/complainant.

Section 118 of the Evidence Act, is a provision giving power to the Court to examine persons as witness. According to this section, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. In explanation of this section, it is said that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. In the opinion of this Court, if Court does not find a person competent to testify as envisaged under section 118 of the Evidence Act, such incompetent person also cannot execute general or special power of attorney to act on his/her behalf for filing plaint or/complaint, so the question for the purposes of deciding whether the agent or holder of power of attorney can appear as a witness, on behalf of the person who is incompetent to be examined in a Court as per provision under section 118 of the Evidence Act would not arise.

The judgment, passed in case of *Dr. Anil Kumar Haritwal vs. Sant Prakash, 2001 (2) MPLJ 488* and in case of *Smt. Shanti Devi Agrawal v. V.H. Lulla, 2003 (4) MPLJ 138* by Single Judges of this High Court regarding examination of holder of power of attorney on behalf of the party as witness is impliedly overruled by recent judgment rendered in case of *Janki Vashdeo Bhojwani* (supra). The holder of power of attorney can only appear on his capacity but he cannot become a witness on behalf of the party under any circumstance.

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207. CIVIL PROCEDURE CODE, 1908 – Section 100
Second appeal – Interference with the finding of fact in second appeal, scope of – Law explained.
Gaya Prasad (dead) through LRs. v. Banmali
Reported in 2005 (2) MPLJ 427

Held :

There is no blanket bar in law to the High Court's power in Second Appeal to interfere with the finding of fact recorded by lower Appellate Court. If the appreciation of evidence made by it is patently erroneous and the finding recorded in consequence is grossly erroneous and on account of ignoring the weight of evidence on record altogether, the High Court would be justified in reappraising the evidence and giving its own conclusion.

In *Ishwardas Jain (dead) through LRs. vs. Sohanlal (dead) by LRs. (2000) 1 SCC 434* the Apex Court has held :–

> "Under section 100, Civil Procedure Code, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered, which if considered, would have led to an apposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

A Single Bench of this Court also in *Gappulal Meena and others vs. Gajanand and others, 2001 (1) MPLJ 697* held :-

> "The Apex Court in the case of *Ishwar Das Jain vs. Sohanlal* (supra) had observed that in second appeal, interference with findings of fact is permissible, when material or relevant evidence is not considered, which if considered, would have led to opposite conclusion. Similarly in the case *Rahini Prasad vs. Kasturchand reported in (2000) 3 SCC 668,* it was pointed out that where misreading of evidence by

Appellate Court would lead to miscarriage of justice or its finding is based on no evidence and thus, perverse, High Court would be justified in interfering in Second Appeal".

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208. HINDU MARRIAGE ACT, 1955 – Section 13
Divorce on ground of cruelty – Proof of adultery no ground to refuse decree of divorce on the ground of cruelty.
Uttam Soni v. Smt. Kiran Soni
Reported in 2005 (2) MPLJ 414 (SC)

Held :

Even if it is accepted that the non-applicant has proved that the petitioner is living in adultery, the same will not deprive the wife from seeking divorce on the ground of cruelty. The fact that the wife was living in adultery or she had voluntarily sexual intercourse with any person other than her spouse may be a ground for husband to seek dissolution of marriage by a decree of divorce on that ground but the same will not deprive the non-applicant from seeking dissolution of marriage by decree of divorce on the ground of cruelty.

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209. MOTOR VEHICLES ACT, 1988 – Section 166
Award, challenge of on the ground of limitation – Held, award cannot be challenged on the ground of limitation in execution proceedings.
Amit Kumar Tiwari v. Maltabai and others
Reported in 2005 (2) MPLJ 466

Held :

The Tribunal while executing the award cannot enter into the spectrum that the award was passed ignoring the peremptory period of limitation provided under the Statute, as that does not go to the very root of the jurisdiction of the Tribunal. That award can never be regarded as an order without jurisdiction. It would be at best an illegal order. Once it is regarded or assailed by way of appeal within the permissible parameters, indubitably it cannot be questioned before the Tribunal which is in seisin of the matter for the purpose of execution.

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210. ARBITRATION ACT, 1940 – Sections 30 and 33
LIMITATION ACT, 1963 – Section 5
Applicability of Section 5 of Limitation Act in a petition u/s 30/33 of Arbitration Act – Section 5, held, applicable.
Union of India v. M/s Poorti Metal Industries
Reported in 2005 (2) MPLJ 474

Held :

In view of the aforesaid pronouncements of law by the Apex Court, there can be no trace of doubt that seciton 5 of the Limitation Act would be applicable

to file an objection under sections 30 and 33 of the Act. At this juncture, for the sake of completeness, we would refer to a decision rendered in the case of *Union of India vs. Popular Construction Co., (2001) 8 SCC 470.* In the aforesaid Case, their Lordships have held section 5 of the Limitation Act is not applicable as regards certain action under the Arbitration and Conciliation Act, 1996. We quote with profit paragraphs 12 and 13 of the said decision:

> "12. As far as the language of section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of section 29(2) of the Limitation Act, and would therefore bar the application of section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

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211. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 (3) Application for setting aside award, commencement of limitation for– Meaning of expressions 'party' and 'party making application' – Chief Engineer of Railways signed the contract on behalf of Union of India – Date of service of notice on Chief Engineer would be starting point of limitation – Law explained.
Union of India v. Tecco Trichy Engineers & Contractors
Judgment dt. 16.03.2005 by the Supreme Court in Civil Appeal No. 1784 of 2005, reported in (2005) 4 SCC 239

Held :

Form and contents of the arbitral award are provided by Section 31 of the Act. The arbitral award drawn up in the manner prescribed by Section 31 of the Act has to be signed and dated. According to sub-section (5), "after the arbitral award is made, a signed copy shall be delivered to each party". The term "party" is defined by clause (h) of Section 2 of the Act as meaning "a party to an arbitration agreement". The definition is to be read as given unless the context otherwise requires. Under sub-section (3) of Section 34 the limitation of 3 months commences from the date on which "the party making that application" had received the arbitral award. We have to see what is the meaning to be assigned to the term "party" and "party making the application" for setting aside the award in the context of the State or a department of the Government, more so a large organisation like the Railways.

It is well known that the Ministry of Railways has a very large area of operation covering several divisions, having different divisional heads and various departments within the division, having their own departmental heads. The General Manager of the Railways is at the very apex of the division with the

responsibility of taking strategic decisions, laying down policies of the organisation, giving administrative instructions and issuing guidelines in the organisation. He is from elite managerial cadre which runs the entire organisation of his division with different departments, having different departmental heads. The day-to-day management and operations of different departments rests with different departmental heads. The departmental head is directly connected and concerned with the departmental functioning and is alone expected to know the progress of the matter pending before the Arbitral Tribunal concerning his department. He is the person who knows exactly where the shoe pinches, whether the arbitral award is adverse to the department's interest. The departmental head would naturally be in a position to know whether the arbitrator has committed a mistake in understanding the department's line of submissions and the grounds available to challenge the award. He is aware of the factual aspect of the case and also the factual and legal aspects of the questions involved in the arbitration proceedings. It is also a known fact and the Court can take judicial notice of it that there are several arbitration proceedings pending consideration concerning affairs of the Railways before arbitration. The General Manager, with executive workload of the entire division cannot be expected to know all the niceties of the case pending before the Arbitral Tribunal or for that matter the arbitral award itself and to take a decision as to whether the arbitral award deserves challenge, without proper assistance of the departmental head. The general manager, being the head of the division, at best is only expected to take final decision whether the arbitral award is to be challenged or not on the basis of the advice and the material placed before him by the person concerned with arbitration proceedings. Taking a final decision would be possible only if the subject--matter of challenge, namely, the arbitral award is known to the departmental head, who is directly concerned with the subject matter as well as arbitral proceedings. In large organisations like the Railways, "party" as referred to in Section 2(h) read with Section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the arbitrator.

In the present case, the Chief Engineer had signed the agreement on behalf of the Union of India entered into with the respondent. In the arbitral proceedings the Chief Engineer represented the Union of India and the notices, during proceedings of the arbitration, were served on the Chief Engineer. Even the arbitral award clearly mentions that the Union of India is represented by the Deputy Chief Engineer/Gauge Conversion, Chennai. The Chief Engineer is directly concerned with the arbitration, as the subject-matter of arbitration relates to the department of the Chief Engineer and he has direct knowledge of the arbitral proceedings and the question involved before the arbitrator. The General Manager of the Railways has only referred the matter for arbitration as required under the contract. He connot be said to be aware of the question involved in the arbitration nor the factual aspect in detail, on the basis of which the Arbitral Tribunal had decided the issue before it, unless they are all brought

to his notice by the officer dealing with that arbitration and who is in charge of those proceedings. Therefore in our opinion, service of the arbitral award on the General Manager by way of receipt in his inwards office cannot be taken to be sufficient notice so as to activate the department to take appropriate steps in respect of and in regard to the award passed by the arbitrators to constitute the starting point of limitation for the purposes of Section 34(3) of the Act. The service of notice on the Chief Engineer on 19-3-2001 would be the starting point of limitation to challenge the award in the Court.

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212. MUTATION :

Mutation proceedings, nature of – Mutation proceedings are of fiscal nature meant for fixing liability regarding tax.

Calcutta Municipal Corpn. and others v. Shrey Mercantile (P) Ltd. and others

Judgment dt. 09.03.2005 by the supreme Court in Civil Appeal No. 5631 of 2000, reported in (2005) 4 SCC 245

Held :

As stated above, the purpose of mutation is to register the transfer in the records of the Corporation which in turn would help the Corporation to recover taxes from the existing taxpayers. Therefore, no special benefit results to the transferee who is made statutorily liable to inform the Corporation of the change, if any, in the name of the person primarily liable to pay the tax.

In the case of *Nand Kishwar Bux Roy v. Gopal Bux Rai, AIR 1940 PC 93* the Court, while discussing the nature of mutation proceedings, observed; (AIR pp. 94-95)

> "Mutation proceedings are merely in the nature of fiscal inquiries, instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of the property may be put into occupation of it with the greater confidence that the revenue for it will be paid."

Therefore, it is clear that mutation enquiry is instituted in the interest of the Corporation for tax purposes and not for the benefit of the taxpayer.

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213. LAND ACQUISITION ACT, 1894 – Sections 18 (1) and 11 (2)

Consent award u/s 11 (2), challenge of – Such award cannot be challenged u/s 18 – Law explained.

State of Karnataka and another v. Sangappa Dyavappa Biradar and others

Judgment dt. 30.03.2005 by the Supreme Court in Civil Appeal No. 2266 of 2005, reported in (2005) 4 SCC 264

Held :

An award under the Act is passed either on consent of the parties or on adjudication of rival claims. For the purpose of passing a consent award, it was not necessary to comply with the provisions of Article 299 of the Constitution. An agreement between the parties need not furthermore be strictly in terms of a prescribed format.

The respondents having accepted the award without any demur were estopped and precluded from maintaining an application for reference in terms of Section 18 of the Act. It is also trite that by reason of such agreement, the right to receive amount by way of solatium or interest etc. can be waived.

In *State of Gujarat v. Daya Shamji Bhai, (1995) (5) SCC 746* this Court held : (SCC p. 749, para 6)

> "The right and entitlement to seek reference would, therefore, arise when the amount of compensation was received under protest in writing which would manifest the intention of the owner of non-acceptance of the award. Section 11(2) opens with a non obstante clause 'notwithstanding anything contained in sub-section (1)' and provides that "if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement'. By virtue of sub-section (4), 'notwithstanding anything contained in the Registration Act, 1908, no agreement made under sub-section (2) shall be liable to registration under that Act'. The award made under Section 11(2) in terms of the agreement is, therefore, an award with consent obviating the necessity of reference under Section 18."

In *Ishwarlal Premchand Shah, (1996) 4 SCC 174,* it was held: (SCC pp. 177-178, paras 8-9)

> "8. It is true that on determination of compensation under sub-section (1) for the land acquired, Section 23(2) enjoins to award, in addition to the market value, 30% solatium in consideration of compulsory nature of acquisition, Equally, Parliament having taken notice of the inordinate delay in making the award by the Land Acquisition Officer from the date of notification published under Section 4(1) till passing the award under Section 11, to offset the price pegged during the interregnum, Section 23 (1-A) was introduced to award an amount calculated @ 12% per annum on such

market value, in addition to the market value of the land, for the period commencing on and from the date of the publication of Section 4(1) notification to the date of award of the Collector or date of taking possession of the land whichever is earlier. Under Section 28, interest was directed to be paid on the excess compensation at the rate specified therein from the date of taking possession of the land to the date of deposit into court of such excess compensation. These three components are in addition to the compensation determined under sub-section (1) of Section 23. They intended to operate in different perspectives. One for compulsory acquisition, the other for the delay on the part of the Land Acquisition Officer in making the award and the third one for deprivation of the enjoyment of the land from the date of taking possession till determination of the compensation. The three components are in addition to the determination of market value under sub-section (1) of Section 23. They are not integral to determination of sub-section (1) of Section 23 but in addition to, for the circumstances enumerated hereinbefore. In a private sale between a willing vendor and a willing vendee, parties would arrive at consensus to pay and receive consolidated consideration which would form the market value of the land conveyed to the vendee. For public purpose, compulsory acquisition under the Act gives absolute title under Section 16 free from all encumbrances. Determination of the compensation would be done under Section 23(1) on the basis of market value prevailing as on the date of the publication of the notification under Section 4(1). It would, therefore, be open to the parties to enter into a contract under Section 11(2), without the necessity to determine compensation under Section 23(1) and would receive market value at the rates incorporated in the contract signed under Section 11(2) in which event the award need not be in Form 14.

This Court in *State of Gujarat v. Daya Shamji Bhai* (Supra) had considered the similar contentions and held that once the parties have agreed under Section 11(2) of the Act, the Land Acquisition Officer has power under Section 11(2) to pass the award in terms thereof and that the award need not contain payment of interest, solatium and additional amount unless it is also part of the contract between the parties. The same ratio applies to the facts in this case. In view of the above clauses in the agreements the appellants are not entitled to the payment of additional amounts by way of solatium, interest and additional amount under the provisions of the Act."

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214. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail, ambit and scope of – 'Reason to believe for apprehended arrest in non-bailable offence', meaning of – Mere fear is not belief – Direction restraining arrest cannot be given u/s 438 of the Code – Law explained.

Adri Dharan Das v. State of W.B.

Judgment dt. 21.02.2005 by the Supreme Court in Criminal Appeal No. 326 of 2005, reported in (2005) 4 SCC 303

Held :

The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438. The power being of important nature it is entrusted only to the higher echelons of judicial forums i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order form the Court of Session or the High Court, he shall be released immediately on bail without being sent to jail.

Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind

of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facia appear to be a case where any order in terms of Section 438 of the Code can be passed.

Ordinarily arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code.

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215. CIVIL PROCEDURE CODE, 1908 – Section 9 and 0.7 R.11(a)

(i) Power to reject plaint can be exercised at any stage of proceedings.

(ii) Plea as to non-maintainability on the ground of suit being premature be raised promptly– Exercise of jurisdiction by the Court regarding decreeing a pre-mature suit – Law explained.

Vithalbhai (P) Ltd. v. Union Bank of India
Judgment dt. 11.03.2005 by the Supreme Court in Civil Appeal No. 2390 of 2002, reported in (2005) 4 SCC 315

Held :

In *Samar Singh v. Kedar Nath* this Court while dealing with an election petition has had that the power to summarily reject conferred by Order 7 Rule 11 of the Code of Civil Procedure can be exercised at the threshold of the proceedings and is also available, in the absence of any restriction statutorily placed, to be exercised at any stage of subsequent proceedings. However, the Court has also emphasised the need of raising a preliminary objection as to maintainability as early as possible though the power of the Court to consider the same at a subsequent stage is not taken away.

To be entitled to file a civil suit the plaintiff must be entitled to a relief and the suit must be of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred (see Section 9 of the Code of Civil Procedure, 1908). Section 3 of the Limitation Act, 1963 provides that a suit filed after the prescribed period of limitation, shall be dismissed without regard to the fact whether limitation has been set up as a defence or not. However, there is no such provision (and none brought to our notice at the Bar in spite of a specific query in that regard having been raised) which mandates a premature suit being dismissed for this reason. The only relevant provision is the one contained in Rule 11 of Order 7 CPC which provides for a plaint being rejected where it does not disclose a cause of action. Though the plaint is not rejected, yet a suit may be dismissed if the court on trial holds that the plaintiff was not entitled on the date of the institution of the suit to the relief sought for in the plaint.

In our opinion, a suit based on a plaint which discloses a cause of action is not necessarily to be dismissed on trial solely because it was premature on the date of its institution if by the time the written statement came to be filed or by the time the court is called upon to pass a decree, the plaintiff is found entitled to the relief prayed for in the plaint. Though there is no direct decision available on the point but a few cases showing the trend of judicial opinion may be noticed.

We may now briefly sum up the correct position of law which is as follows:

A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiffs entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filling the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases : (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or

the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, alone and affects and involves persons other than those arrayed as parities, such as in an election petition which affects and involves the entire constituency. (*See Samar Singh v. Kedar Nath (supra)* One more category of suits which may be added to the above, is : where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained.

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216. N.D.P.S. ACT, 1985 – Section 50

(i) Search of person – Expression 'search of person' as used in Section 50, ambit and scope of – Search of bag, articles, container or other baggage carried by accused is not search of person.

(ii) Illegality in search, effect of – Evidence obtained in illegal search not per se inadmissibly.

State of H.P. v. Pawan Kumar

Judgment dt. 08-04.2005 by the Supreme Court in Criminal Appeal No. 222 of 1997, reported in (2005) 4 SCC 350

Held :

Learned counsel for the respondent has placed strong reliance on *Namdi Francis Nwazor v. Union of India (1998) 8 SCC 534* which is a decision by a Bench of three learned Judges. In this case, the accused had checked in at the Indira Gandhi International Airport for taking the flight from Delhi to Lagos. A team of the Narcotics Control Bureau, on suspicion, decided to check his baggage. At the point of time when the actual search took place, he was carrying two handbags but nothing incriminating was found therefrom. He had booked one bag which had already been checked in and was loaded in the aircraft by which he was supposed to travel. The bag was brought to the Customs counter and on checking 180 gm of heroin was found therein. The Bench held that on a plain reading of sub-section (1) of Section 50, it applies to cases of search of a person and not to search of any article in the sense that the article is at a distant place from where the offender is actually searched. After arriving at the above finding, the Bench also observed; (SCC p. 537, para 3)

> "We must hasten to clarify that if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act, However, when an article is lying elsewhere and is not on the person of the accused and is brought to a

place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person."

The Bench then finally concluded that on the facts of the case Section 50 was not attracted. The facts of the case clearly show that the bag from which incriminating article was recovered had already been checked in and was loaded in the aircraft. Therefore, it was not at all a search of a person to which Section 50 may be attracted. The observations, which were made in the later part of the judgment (reproduced above), are more in the nature of obiter as such a situation was not required to be considered for the decision of the case. No reasons have been given for arriving at the conclusion that search of a handbag being carried by a person "would amount to search of a person. It may be noted that this case was decided prior to the Constitution Bench decision in *State of Punjab v. Baldev Singh (1999) 6 SCC 172 Baldev Singh* (Supra) this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.

The Constitution Bench decision in *Pooran Mal v. Director of Inspection (1974) 1 SCC 345* was considered in *State of Punjab v. Baldev Singh* (Supra) and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provision of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him.

(ii) .....

Again in *Shyam Lal Sharma v. State of M.P. AIR 1972 SC 886* it was held that even if the search is illegal being in contravention of the requirement of Section 165 CrPC, that provision ceases to have any application to the subsequent steps in the investigation. This question has recently been examined by a three-Judge Bench of this Court in *State v. N.M.T. Joy Immaculate, (2004) 5 SCC 729* and the relevant portion of paras 14, 15 and 15.1 are being reproduced below : (SCC pp. 739-41)

"14.... The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure. Challenge to a search and seizure made under the Criminal Procedure Code on the ground of violation of fundamental right under Article 20(3) of the Constitution was examined in *M.P. Sharma v. Satish Chandra, AIR 1954 SC 300* by Bench of eight Judges of this Court. The challenge was repelled and it was held as under : (AIR pp. 306-07, para 18)

> 'A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.'

15. The law of evidence in our country is modelled on the rules of evidence which prevailed in English law. In *Kuruma v. R., 1955 AC 197* an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under : (All er p. 239 B)

> The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, if is admissible and the court is not concerned with how it was obtained.

15.1. This question has been examined threadbare by a Constitution Bench in *Pooran Mal. v. Director of Inspection (Investigation), (1974) 1 SCC 345* and the principle enunciated therein is as under : (SCC pp. 363 & paras 23 & 24)

> If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the

American Constitution. So neither by invoking the spirit or our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result or illegal search or seizure is not liable to be shutout."

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217. CRIMINAL PROCEDURE CODE, 1973 – Section 195 (1)(b)(ii)
Expression "no court shall take cognizance of any such offence except on the complaint in writing of the court concerned", connotation of – Held, the expression not applicable to a document forged before being filed before the Court – Conflict of opinion between two decisions of the Apex Court rendered by Benches of coordinate strength resolved.
Iqbal Singh Marwah and another v. Meenakshi Marwah and another (5 Judge Bench)
Judgment dt. 11.03.2005 by the Supreme Court in Criminal appeal No. 402 of 2005, reported in (2005) 4 SCC 370

Held :

In view of conflict of opinion between two decisions of this Court, each rendered by a Bench of three learned Judges in *Surjit Singh v. Balbir Singh, (1996) 3 SCC 533* and *Sachida Nand Singh v. State of Bihar, (1998) 2 SCC 493* regarding interpretation of Section 195(1)(b)(ii) of the Code of Criminal Procedure, 1973 (for short "CrPC"), this appeal has been placed before the present Bench.

The principal controversy revolves round the interpretation of the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court" occurring in clause (b)(ii) of sub-section (1) of Section 195 Cr.PC. The appellants place reliance on the following observations made in para 10 of the Report in *Surjit Singh v. Balbir* (Supra) : (SCC p. 538)

> "10. It would thus be clear that for taking cognizance of an offence, the document, the foundation for forgery, if produced before the court or given in evidence, the bar of taking cognizance under Section 195(1)(b)(ii) gets attracted and the criminal court is prohibited from taking cognizance of offence unless a complaint in writing is

filed as per the procedure prescribed under Section 340 of the Code by or on behalf of the court. The object thereby is to preserve purity of the administration of justice and to allow the parties to adduce evidence in proof of certain documents without being compelled or intimidated to proceed with the judicial process. The bar of Section 195 is to take cognizance of the offences covered thereunder."

to contend that once the document is produced or given in evidence in court, the taking of cognizance on the basis of private complaint is completely barred.

In *Sachida Nand Singh* (Supra) after analysis of the relevant provisions and noticing a number of earlier decisions (but not Surjit Singh), the court recorded its conclusions in paras 11, 12 and 23 which are being reproduced below : (SCC pp. 499 & 501)

"11. The scope of the preliminary enquiry envisaged in Section 340(1) of the Code is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that court. In other words, the offence should have been committed during the time when the document was in *custodia legis*.

12. It would be a strained thinking that any offence involving forgery of a document if committed far outside the precincts of the court and long before its production in the court, could also be treated as one affecting administration of justice merely because that document later reached the court records.

23. The sequitur of the above discussion is that the bar contained in Section 195(1)(b)(ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a court."

On a plain reading clause (b)(ii) of sub-section (1) of Section 195 is capable of two interpretations. One possible interpretation is that when an offence described in Section 463 or punishable under Section 471, Section 475 or Section 476 IPC is alleged to have been committed in respect of a document which is subsequently produced or given in evidence in a proceeding in any court, a complaint by the court would be necessary. The other possible interpretation is that when a document has been produced or given in evidence in a proceeding in any court and thereafter an offence described as aforesaid is committed in respect thereof a complaint by the court would be necessary. On this interpretation if the offence as described in the section is committed prior to production or giving in evidence of the document in court, no complaint by court would be necessary and a private complaint would be maintainable. The question which requires consideration is which of the two interpretations should be accepted having regard to the scheme of the Act and object sought to be achieved.

An enlarged interpretation to Section 195(1)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse. As pointed out in *Sachida Nand Singh* (Supra) after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large.

Judicial notice can be taken of the fact that the courts are normally reluctant to direct filing of a criminal complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in clause (b)(ii) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided.

That apart, the section which we are required to interpret is not a penal provision but is part of a procedural law, namely, the Code of Criminal Procedure which elaborately gives the procedure for trial of criminal cases. The provision only creates a bar against taking cognizance of an offence in certain specified situations except upon complaint by court. A penal statute is one upon which an action for penalties can be brought by a public officer or by a person aggrieved and a penal Act in its wider sense includes every statute creating an offence against the State, whatever is the character of the penalty for the offence. The principle that a penal statute should be strictly construed, as projected by the learned counsel for the appellants can, therefore, have no application here.

Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor nay legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in *M.S. Sheriff v. State of Madras, AIR 1954 SC 397* give a complete answer to the problem posed : (AIR p. 399, paras 15-16)

"15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undersirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. the public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard-and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

In view of the discussion made above, we are of the opinion that *Sachida Nand Singh* (Supra) has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the time when the document was in *custodia legis*.

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218. NEGOTIABLE INSTRUMENTS ACT, 1881– Sections 148 & 142 (b) Dishonour of cheque, offence relating to – Requisite ingredients – Successive presentation of cheque – Dishonour followed by notice u/s 138 (b) snowballing into cause of action – Further presentation and dishonour cannot create another cause of action – Law explained.
Prem Chand Vijay Kumar v. Yashpal Singh and another
Judgment dt. 02.05.2005 by the Supreme Court in Criminal Appeal No. 651 of 2005, reported in (2005) 4 SCC 417

Held :

Clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. On each presentation of the cheque and its dishonour, a fresh right — and not a cause of action — accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.

But once he gives a notice under clause (b) of Section 138, he forfeits such right as in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise.

In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908 (in short "CPC") "cause of action" means every fact which it is necessary to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under Section 138 of the Act;

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

Proceeding on the basis of the generic meaning of the term "cause of action", certainly each of the above facts would constitute a part of the cause of action but clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. A combined reading of Sections 138 and 142 makes it clear that cause of action is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142 (b) arises — and can arise — only once.

The period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires.

As noted in *Sadanandan Bhadran case, (1998) 6 SCC 514* once a notice under clause (b) of Section 138 of the Act is "received" by the drawer of the cheque, the payee or holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account.

One of the indispensable factors to form the cause of action envisaged in Section 138 of the Act is contained in clause (b) of the proviso to that section. It involves the making of a demand by giving a notice in writing to the drawer of the cheque "within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid." If no such notice is given within the said period of 15 days, no cause of action could have been created at all.

Thus, it is well settled that if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque.

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219. EVIDENCE ACT, 1872 – Section 112
SUCCESSION ACT, 1925 – Section 372

(i) DNA test for determination of paternity, permissibility of – Test not to be directed as a matter of routine – Finding of DNA test cannot disturb conclusiveness regarding paternity permissible to be raised u/s 112 – Law explained.

(ii) Succession Certificate – Object regarding grant of succession certificate – Law explained.

Banarsi Dass v. Teeku Dutta (Mrs) and another
Judgment dt. 27.04.2005 by the Supreme Court in Civil Appeal No. 2918 of 2005, reported in (2005) 4 SCC 449

Held :

We may remember that Section 112 of the Evidence act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclu-

siveness must be answered in the light of what is meant by access or non-access as delineated above. (See *Kamti Devi v. Poshi Ram, (2001) 5 SCC 311*)

The main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of deceased persons. All that the succession certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A succession certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act, or is compelled by the decree of a court to pay it to the person, he is lawfully discharged. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so choose, can also adduce evidence to oppose grant of succession certificate.

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220. CRIMINAL PROCEDURE CODE, 1973 – Section 125 (3)

Bar of limitation u/s 125(3), whether to be applied in case of subsequent application while his first application already pending– Law explained.

Shantha alias Ushadevi and another v. B.G. Shivananjappa

Judgment dt. 06.05.2005 by the Supreme Court in Criminal Appeal No. 673 of 2005, reported in (2005) 4 SCC 468

Held

To appreciate the question whether the bar of limitation under the proviso to Section 125(3) is attracted in the light of the facts of the present case, a reference to the said provision is necessary:

> "125 (3). If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:

It is true that the amount of maintenance became due by virtue of the Magistrate's order passed on 20.1.1993 and in order to seek recovery of the amount due by issuance of warrant, application shall be made within a period of one year from the date the amount became due. In the present case, the application, namely, Crl. Misc. Petition No. 47 of 1993 was filed well within one year. As no amount was paid even after the disposal of the matter by the High Court, the appellant filed IA No. 1 in Crl. Misc. Petition No. 47 of 1993 wherein the arrears due up to that date were calculated and sought recovery of that amount under Section 125(3). Thus, IA No. 1 was filed even when Crl. Misc. Petition No. 47 of 1993 was pending and no action to issue warrant was taken in that proceeding. Crl. Misc. Petition No. 47 of 1993 which was filed within one year from the date the amount became due was kept alive and it was pending throughout. The purpose of filing IA on 16-6-1998 was only to mention the amount due up to date. The fact that the additional amount was specified in the IA does not mean that the application for execution of the order by issuing a warrant under Section 125(3) was a fresh application made for the first time. As already noticed, the main petition filed in the year 1993 was pending and kept alive and the filing of subsequent IA in 1998 was only to specify the exact amount which accrued due up to that date. Such application is only supplementary or incidental to the petition already filed in 1993 admittedly within the period of limitation. The fact that only a sum of Rs. 5365 representing the arrears of eight months was mentioned therein does not curtail the scope of criminal miscellaneous petition filed in 1993 more so when no action was taken thereon and it remained pending.

We are, therefore, of the view that in the peculiar circumstances of the case, the bar under Section 125(3) cannot be applied and the High Court has erred in reversing the order of the Sessions Judge. It must be borne in mind that Section 125 CrPc is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section 125(1) is a continuing liability.

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221. CIVIL PROCEDURE CODE, 1908 – O. 8 Rr. 1 & 9

(i) Filing of written statement, limitation for – Limitation of 90 days in Rule 1 is directory – Power of Court to grant further time not taken away – However, extension of time should be an exception and not a rule – Law explained.

(ii) Court can require written statement under Rule 9 even after the time limit.

Kailash v. Nanhu and others
Judgement dt. 06.04.2005 by the Supreme Court in Civil Appeal No. 7000 of 2004, reported in (2005) 4 SCC 480

Held :

Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order 8. In spite of the time-limit appointed by Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such written statement. Under Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Rule 1 or 9. The court may still make such other order in relation to the suit as it thinks fit.

The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, if is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.

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222. CRIMINAL PROCEDURE CODE, 1973 – Section 197
Ambit and scope of – The question regarding sanction need not necessarily be considered at the initial stage – Law explained.
K. Kalimuthu v. State by DSP
Judgment dt. 30.03.2005 by the Supreme Court in Criminal Appeal No. 469 of 2005, reported in (2005) 4 SCC 512

Held :

So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression "no court shall take cognizance of such offence except with the previous sanction." Use of the words "no" and "shall" make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to *Black's Law Dictionary* the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance it means "taking notice of." A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

Such being the nature of the provision the question is how should the expression "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", be understood ? What does it mean ? "Official" according to the dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In *B. Saha v. M.S. Kochar, (1979) 4 SCC 177* it was held : (SCC pp. 184-85, para 17)

> "The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, *directly and reasonably* connected with his official duty will require sanction for prosecution under the said provision." (emphasis in original)

Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from state to stage. Further, in cases where offences under the Act are concerned, the effect of Section 197, dealing with the question of prejudice has also to be noted.

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223. SENTENCING

Corporate liability for sentence in a case punishable with imprisonment and fine – Company can be punished with fine because it cannot suffer imprisonment – Earlier view expressed in *Velliappa Textiles Case, (2003) 11 SCC 405* expressly overruled .

Standard Chartered Bank and others v. Directorate of Enforcement and others

Judgment dt. 05.05.2005 by the Supreme Court in Civil Appeal No. 1748 of 1999, reported in (2005) 4 SCC 530

Held :

The contention of the appellants is that when an offence is punishable with imprisonment and fine, the court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed (*impotentia excusat legem*). This principle can be found in *Bennion's Statutory Interpretation,* 4th Edn. at p. 969. "All civilized systems of law import the principle that lex non cogit ad impossibly...." As Patterson, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at P. 970 states that; "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance (lex non cogit ad impossibilia) in numerous cases (*State of Rajasthan v. Shamsher Singh, 1985 Supp SCC 416* and *Special Reference No. 1 of 2002, In re, (2002) 8 SCC 237)*

As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section () of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs. one lakh, and that they could be prosecuted only when the offences involve and amount or value less than Rs. one lakh.

As the company connot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life liberty and property of the citizens. Large-scale financial regularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (sic and fine). We overrule the views expressed by the majority in *Asst. Commr. v. Velliappa Textiles Ltd., (2003) 11 SCC 405* on the point and answer the reference accordingly.

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224. PROBATION OF OFFENDERS ACT, 1958 – Section 4
Procedure requiring Court to call report from Probation Officer, held mandatory – Law explained
MCD v. State of Delhi and another
Judgment dt. 29.04.2005 by the Supreme Court in Criminal Appeal No. 660 of 2005, reported in (2005) 4 SCC 605

Held :

We have already reproduced Section 4 of the POB Act. It applied to all kinds of offenders whether under or above 21 years of age. This section is intended to attempt possible reformation of an offender instead of inflicting on him the normal punishment of his crime. The only limitation imposed by Section 6 is that in the first instance an offender under twenty-one years of age will not be sentenced to imprisonment. While extending benefit of this case, the discretion of the court has to be exercised having regard to the circumstances in which the crime was committed, the age, character and *antecedents of the offender.* Such exercise of discretion needs a sense of responsibility. The offender can only be released on probation of good conduct under this section when the court forms an opinion, having considered the circumstances of the case, the nature of the offence and the character of the offender, that in a particular case, the offender should be released on probation of good conduct. The section itself is clear that before applying the section, the Magistrate should carefully take into consideration the attendant circumstances. The second respondent is a previous convict as per the records placed before us. Such a previous convict cannot be released in view of Section 4 of the POB Act. The Court is bound to call for a report as per Section 4 of the POB Act but the High Court has failed to do so although the Court is not bound by the report of the probation officer but it must call for such a report before the case comes to its conclusion. The word "shall" in sub-section (2) of Section 4 is mandatory and the consideration of the report of the probation officer is a condition precedent to the release of the accused as reported in the case of *State v. Neguesh G. Shet Govenkar, AIR 1970 Goa 49* and a release without such a report would, therefore, be illegal.

In the case of *Ram Singh v. State of Haryana, (1971) 3 SCC 914* a Bench of two Judges of this Court in para 16 of the judgment observed as under: (SCC p. 918)

> "16. Counsel for the appellants invoked the application of the Probation of Offenders Act. Sections 4 and 6 of the Act indicate the procedure requiring the court to call for a report from the probation officer and consideration of the report and any other information available relating to the character and physical and mental condition of the offender. These facts are of primary importance before the court can pass an order under the Probation of Offenders Act."

In the case of *R. Mahalingam v. Padmavathi, 1979 Cri LJ (NOC) 20 (Mad)* the Court observed as under : [Cri LJ (NOC) pp. 8-9]

"If any report is filed by the probation officer, the court is bound to consider it. Obtaining such a report of the probation officer is mandatory since sub-section (1) of Section 4 says that the court shall consider the report of the probation officer. Words 'if any' dc not mean that the court need not call for a report from the probation officer. The words 'if any' would only cover a case where notwithstanding such requisition, the probation officer for one reason or other has not submitted a report.

Before deciding to act under Section 4(1), it is mandatory on the part of the court to call for a report from the probation officer and if such a report is received, it is mandatory on the part of the court to consider the report. But if for one reason or the other such a report is not forthcoming, the court has to decide the matter on other materials available to it.

In the instant case, the Magistrate passed order releasing the accused on probation without taking into consideration their character. Held, the requirement of Section 4(1) was not fulfilled and therefore the case remanded."

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225. LIMITATION ACT, 1963 – Section 3

Ambit and scope of Section 3 – It mandates the Court to dismiss a time barred suit – Law explained.

V.M. Salgaocar v. Board of Trustees of Port of Mormugao

Judgment dt. 31.03.2005 by the Supreme Court in Civil Appeal No. 4662 of 1999, reported in (2005) 4 SCC 613

Held :

"3. *Bar of limitation.*— (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(2) For the purposes of this Act,—

(a) a suit is instituted

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set-off or a counterclaim, shall be treated as a separate suit and shall be deemed to have been instituted—

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded;

(ii) in the case of a counterclaim, on the date on which the counter-claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation.

The Court in *Manindra Land & Building Corpn. Ltd. v. Bhutnath Banerjee, (1964) 3SCR 495* held (AIR para 9): (SCR pp. 500-01)

> "Section 3 of the Limitation Act enjoins a court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court and no choice and if in construing the necessary provision of the Limitation Act applies, the subordinate court comes to an erroneous decision, it is open to the court in revision to interfere with that conclusion as that conclusion led the court to assume or not to assume the jurisdiction to proceed with the determination of that matter."

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226. HINDU MARRIAGE ACT, 1955 – Section 25

Marriage declared illegal on being found bigamous – Right of spouse for alimony u/s 25 – Spouse still has right of alimony – Law explained.

Ramesh Chand Daga v. Rameshwari Bai

Judgment dt. 16.03.2005 by the Supreme Court in Criminal Appeal No. 1780 of 2005, reported in (2005) 4SCC 772

Held :

This Court in its aforementioned judgment and order dated 13-12-2004 upon interpreting Section 25 or the Hindu Marriage Act, 1955 upheld the judgment and decree passed by the learned Family Court holding : (*Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga, (2005) 2SCC 33* (SCC pp. 40-41, para 20)

> "20. It is well-known and recognised legal position that customary Hindu law like Mohammedan law permitted bigamous marriages which were prevalent in all Hindu families and more so in royal Hindu families. It is only after the Hindu law was codified by enactments includ-

ing the present Act that bar against bigamous marriages was created by Section 5(i) of the Act. Keeping in consideration the present state of the statutory Hindu law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent. It is with the purpose of not rendering a financially dependent spouse destitute that Section 25 enables the court to award maintenance at the time of passing *any type of decree* resulting in breach in a marriage relationship."

(emphasis in original)

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227. LAND ACQUISITION ACT, 1894 – Section 23

Determination of compensation – Factors to be considered – Positive and negative factors – Purpose for which acquisition made, also relevant – Law explained.

Viluben Jhalejar Contractor (Dead) by LRs. v. State of Gujarat Judgment dt. 29.04.2005 by the Supreme Court in Criminal Appeal No. 2485 of 2001, reported in (2005) 4 SCC 789

Held :

Section 23 of the act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub-section (1) of Section 4.

One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered.

The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by placing the two in juxtaposition. The positive and negative factors are as under :

Positive factors	*Negative factors*
(i) smallness of size	(i) largeness of area
(ii) proximity to a road	(ii) situation in the interior at a distance from the road
(iii) frontage on a road	(iii) narrow strip of land with very small frontage compared to depth
(iv) nearness to developed area	(iv) lower level requiring the depressed portion to be filled up.
(v) regular shape	(v) remoteness from developed locality
(vi) level vis-a-vis land under acquisition	(vi) some special disadvantageous factors which would deter a purchaser
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage.	

Whereas a smaller plot may be within the reach of many a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price.

The purpose for which acquisition is made is also a relevant factor for determining the market value. In *Basavva v. Spl. Land Acquisition Officer, (1996) 9 SCC 640* deduction to the extent of 65% was made towards development charges.

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228. EVIDENCE ACT, 1872 – Section 116 III.(g)

Appreciation of evidence – Best evidence rule – Raising of adverse inference for non-production of evidence is optional and not obligatory – Law explained.

Manager, Reserve Bank of India, Bangalore v. S. Mani and others Judgment dt. 14.03.2005 by the Supreme Court in Criminal Appeal No. 6306 of 2003, reported in (2005) 5 SCC 100

Held :

The question came up for consideration before this Court recently in, *Municipal Corpn., Faridabad v. Siri Niwas, (2004) 8 SCC 195* Wherein it was held : (SCC p. 198, para 15)

> "15. A court of law even in a case where provisions of the Evidence Act, apply may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would

be different where despite direction by a court the evidence is withheld, Presumption as to adverse for non-production of evidence is always option and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds."

Referring to the decision of this Court in *Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1* this Court observed; (*Siri Niwas case* (Supra) SCC p. 199, para 19)

"19. Furthermore a party in order to get benefit of the provisions contained in Section 114 III. (g) of the Evidence Act must place some evidence in support of his case. Here the respondent failed to do so."

In *M.P. Electricity Board v. Hariram, (2004) 8 SCC 246* this Court observed: (SCC p. 250, para 11)

"11. The above burden having not been discharged and the Labor Court having held so, in our opinion, the Industrial court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously."

As noticed hereinbefore, in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.

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229. SPECIFIC RELIEF ACT, 1963 – Section 12 (3)
Specific performance of the part of the contract – Necessary ingredients to attract applicability of Section 12 (3) – Law explained.
Surinder Singh v. Kapoor Singh (Dead) through L Rs. and others Judgment dt. 03.05.2005 by the Supreme Court in Civil Appeal No. 401 of 1994, reported in (2005) 5 SCC 142

Held :

In *Rachakonda Narayana v. Ponthala parvathamma (2001) 8 SCC 173* analysing the provisions of sub-section (3) of Section 12 of the Act, this Court opined: (SCC pp. 177-78, para 8)

"Thus, the ingredients which would attract specific performance of the part of the contract, are : (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relin-

quish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

It was furthermore held that an application for amendment of the plaint relinquishing the claim in respect of that part of the contract, which cannot be performed can be filed even at the appellate stage.

Kartar Singh, v. Harjinder Singh, (1990) 3 SCC 517 was rendered in the fact situation on obtaining therein. The observations therein to the effect that the provision of Section 12 was not applicable came to be made in view of the finding that the sister of the respondent had not entered into any contract at all. In this case, however, the appellant herein had entered into the aforementioned agreement for sale on the premise that he had the requisite authority to do so on behalf of his sister as also on his own behalf. The sister of the appellant denied or disputed such authority and in that view of the matter, it is beyond any pale of doubt that the agreement for sale was entered into in respect of the entire suit land and having regard to the fact that the sister of the appellant did not authorise him to enter into the said agreement, sub-section (3) of section 12 of the Act would clearly be attracted. *Kartar Singh (Supra)* should not be held to lay down a law to the effect that even in a case where a part of the contract is held to be invalid, Section 12 will have no application.

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230. N.D.P.S. ACT, 1985 – Section 50

Ambit and scope of Section 50 regarding personal search – Law as laid down by Constitution Bench of the Apex Court in *Baldev Singh's case (1999) 6 SCC 172* reiterated – Person conducting search cannot act in the capacity of gazetted officer – Law explained.

State of Rajasthan v. Ram Chandra

Judgment dated 12.04.2005 by the supreme Court in Criminal Appeal No. 541 of 2005, reported in (2005) 5 SCC 151

In order to appreciate rival submissions, some of the observations made by the Constitution Bench in *State of Punjab v. Baldav Singh, (1999) 6 SCC 172* are required to be noted. It is also to be noted that the Court did not in the abstract decide whether Section 50 was directory or mandatory in nature. It was held that the provisions to the Act implicitly make 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 and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused

and render the recovery of the illicit articles suspect and vitiate the conviction and sentence of the accused. 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, it was illegal. It was further held that the omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. In para 32 of the judgment (at p. 200) this position was highlighted. In para 57, inter alia, the following conclusions were arrived at : (SCC pp. 208-10)

> "57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 [of the Act] of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.
>
> (5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the *trial*. Finding on that issue, one way or the other would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.
>
> (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

It is not disputed that there is no specific form prescribed 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 generalisation and/or straitjacket formula.

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231. CRIMINAL PROCEDURE CODE, 1973 – SECTIONS 464 and 465 CRIMINAL TRIAL :

(i) Misjoinder of charges, effect of – Misjoinder of charge not an illegality but an irregularity curable under S 465 – Law explained

(ii) Appreciation of evidence – Evidence of prosecutrix in rape case – Prosecuterix not an accomplice and her evidence more reliable than an injured person – Corroboration not a requirement of law but a guidance of prudence – Law explained.

Kamalanantha and others v. State of T.N.

Judgment dt. 05.04.2005 by the Supreme Court in Criminal Appeal No. 611 of 2003, reported in (2005) 5 SCC 194

Held :

(i) It is clear from the aforesaid decisions that misjoinder of charges is not an illegality but an irregularity curable under Section 464 or Section 465 CrPC provided no failure of justice had occasioned thereby. Whether or not the failure of justice had occasioned thereby, it is the duty of the court to see, whether an accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

(ii) It is trite law that the prosecutrix is not an accomplice. The evidence of a victim of sexual assault, if inspires confidence, conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. Her evidence is more reliable than that of an injured witness. In a case of sexual assault corroboration as a condition for judicial reliance is not a requirement of law but a guidance of prudence. Examining the testimony of the prosecutrix in the background, as stated above, and in the facts and circumstances of this case, we are of the clear view, that the testimony of the prosecutrix

inspires confidence, on the basis of which alone conviction can be safely sustained. Moreover, in the instant case we find that the statements of the prosecutrix are well corroborated by medical and other contemporaneous documents. It is also well-established principle of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. (See *State of Punjab v. Gurmit Singh., (1999) 2 SCC 384:*)

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232. CRIMINAL TRIAL :

Appreciation of evidence – Dying declaration, evidentiary value of – If dying declaration passes the test of scrutiny it can be the sole basis of conviction.

Raja Ram v. State of Rajasthan

Judgment dt. 29.02.2000 by the Supreme Court in Criminal appeal No. 180 of 1998, reported in (2005) 5 SCC 272

Held :

In order to involve the appellant in the alleged offence the solitary evidence is the dying declaration made by the deceased. Though the dying declaration was made by her repeatedly at an interval of one hour in between, the basic factum remains that the only material of the prosecution is her dying declaration. If the dying declaration would pass the test of scrutiny it can be relied on as the sole basis of conviction. There is no dispute on the aforesaid legal proposition.

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233. CRIMINAL PROCEDURE CODE, 1973 – Section 389

Suspension of execution of sentence – Requirement to record reasons for suspension essential – Law explained

Vasant Tukuram Pawar v. State of Maharashtra.

Judgment dt. 15.04.2005 by the Supreme Court in Criminal Appeal No. 558 of 2005 reported in (2005) 5 SCC 281

Held :

Section 389 of the Code of Criminal Procedure, 1973 (in short "The Code") deals with "suspension of execution of sentence pending the appeal and release of the appellant on bail". There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement of the appellate court to record reasons in writing for order of suspension of execution of the sentence or an order of release if the accused is in confinement. The said court can direct that he be released on bail or on his own bond. Requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

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234. CRIMINAL PROCEDURE CODE, 1973 – Sections 438 and 439
Bail – Prima facie reasons for granting/not granting bail should be stated – Giving reasons is different from discussing merits/demerits– Law explained.
Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and another
Judgment dt. 07.04.2005 by the Supreme Court in Criminal Appeal No. 523 of 2005 reported in (2005) 5 SCC 294

Held :

The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

In *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528* this Court observed: (SCC pp. 537-38, para 18)

> "18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in the case *Puran v. Rambilas, (2001) 6 SCC 338 :* (SCC p. 344, para 8)
>
> > 'Giving reasons is different from discussing merits or demerits, At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. ... That did not mean that whilst granting bail some reasons for prima facia concluding why bail was being granted did not have to be indicated'.
> >
> > We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facia reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail.

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235. SCIENTIFIC EVIDENCE :
Scientific Evidence, pre-conditions for admissibility of – Brain Mapping Test Report, probative value of – Law explained.
Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and another
Judgment dt. 07.04.2005 by the Supreme Court in Criminal Appeal No. 523 of 2005 reported in (2005) 5 SCC 294

Held :

Furthermore, the admissibility of a result of a scientific test will depend

upon its authenticity. Whether the brain mapping test is so developed that the report will have a probative value so as to enable a court to place reliance thereupon, is a matter which would require further consideration, if and when the materials in support thereof are placed before the court.

In *Frye v. United States, 293 F 1013 (DCcir) (1923)* the principles to determine the strength of any investigation to make it admissible were stated in the following terms:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force must be recognised, and while the courts will go a long way in admitting the expert testimony deducted from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs."

Frye (supra), however, was rendered at a time when the technology, the polygraph test, was in its initial stage and was used in few laboratories. The guidelines issued therein posed a threat of lack of judicial adaptation of the new developments and ignored the reliability on a particular piece of evidence.

A change of approach was, however, found in *Daubart v. Merryll Dow Pharmaceuticals Inc., 113 S Ct 2786 (1993)* where the courts while allowing "general acceptance" stated that this might not be a precondition for admissibility of the scientific evidence, for which the court may consider the following :

(a) Whether the principle or technique has been or can be reliably tested?

(b) Whether it has been subject to peer review or publication?

(c) Its known or potential rate of error?

(d) Whether there are recognised standards that control the procedure of implementation of the technique?

(e) Whether it is generally accepted by the community? and

(f) Whether the technique has been introduced or conducted independently of the litigation?

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236. CIVIL PROCEDURE CODE, 1908 – Section 11

Res judicata – Declaratory decree simplicitor, finality of – Such decree if to be used for obtaining future decree is final – Decree granted by Court having no jurisdiction or a decree contrary to the prevailing law not to have the effect of res judicata.

Shakuntala Devi v. Kamla and others

Judgment dt. 11.04.2005 by the Supreme Court in Civil Appeal No. 3644 of 1998 reported in (2005) 5 SCC 390

Held :

But a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree.

Unfortuntely for the appellant the declaration obtained by her based on which she was seeking possession in the present suit being contrary to law, the courts below correctly held that the appellant could not seek possession on the basis of such an illegal declaration. Thus, the law is clear on this point i.e. if a suit is based on an earlier declaratory decree and such decree is contrary to the law prevailing at the time of its consideration as to its legality or is a decree granted by a court which has no jurisdiction to grant such decree, principles of res judicata under Section 11 CPC will not be attracted and it is open to the defendant in such suits to establish that the declaratory decree relied upon by the plaintiff is not based on a good law or court granting such decree did not have the jurisdiction to grant such decree.

In the instant case, as noticed hereinabove, the present suit is filed for possession of the suit properties on the basis of a declaratory decree obtained earlier which is found to be not a lawful decree as per the law prevailing at present. Hence, the impugned judgment cannot be interfered with.

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237. ARBITRATION AND CONCILIATION ACT, 1996 – Section 21
Arbitration proceedings, commencement of – Expressions "commencement of arbitration proceedings" and "commencement of proceedings before arbitration", difference between – Law explained.
Neeraj Munjal and others v. Atul Grover and another
Judgment dt. 05.05.2005 by the Supreme Court in Civil Appeal No. 3100 of 2005 reported in (2005) 5 SCC 404

Held :

The decisions of this Court in *Thyssen Stahlunion GMBH, v. Steel authority of India Ltd., (1999) 9 SCC 334* and *Fuerst Day Lawson Ltd. Vrs., Jindal Exparts Ltd., (2001) 6 SCC 356* wherupon Mr. Deshpande relied upon were considered by a three-Judge Bench of this Court in *Milkfood Ltd., v. GMC Ice Cream (P) Ltd., (2004) 7 SCC 288.* This Court upon taking into consideration a large number of decisions observed; (SCC pp. 306-07, paras 45-46)

> "45. 'Commencement of an arbitration proceeding' and 'commencement of a proceeding before an arbitrator' are two different expressions and carry different meanings.
>
> 46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What

matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons was charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a cretain purpose including the purpose of following statutory procedures required therefore. If the provisions of the 1940 Act apply, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common-parlance meaning given to the expression 'commencement of an arbitration' which, admittedly, for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under the one Act or the other required to be followed. It is only in that limited sense the expression commencement of an arbitration' qua 'a notice of arbitration' as assumes significance".

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238. SENTENCING :

Sentencing – Exercise for discretion regarding imposition of sentence – Imposition of meagre sentence may be counter productive and against social interest – Sentence less than the prescribed minimum, factors to be considered.

State of M.P. v. Babbu Barkare alias Dalap Singh

Judgment dt. 13.05.2005 by the Supreme Court in Criminal Appeal No. 738 of 2005 reported in (2005) 5 SCC 413

Held :

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 against women, dacolty, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time 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.

Similar view has also been expressed in *Ravji v. State of Rajasthan, (1996) 2 SCC 175.* It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for the extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. What is applicable to trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

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239. CIVIL PROCEDURE CODE, 1908 – Section 105 (1)
Interlocutory orders, challenge of in appeal – Every order, except orders covered by Ss. 97 and 105 (2) CPC, may be challenged in regular appeal – Law explained.
Achal Misra v. Rama Shankar Singh
Judgment dt. 11.04.2005 by the Supreme Court in Criminal appeal No. 738 of 2005, reported in (2005) 5 SCC 531

Held :

In *Sheonoth v. Ramnath (1865) 10 MIA 413* the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in

the procedure that leads to a final decree. It is open on appeal from such final decree to question in interlocutory order.

This principle is recognised by Section 105(1) of the Code of Civil Procedure and reaffirmed by Order 43 Rule 1-A of the Code. The two exceptions to this rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in *Satyadhyan Ghosal v. Deorajin Debi (1960) 3 SCR 590* wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105 (2) of the Code of Civil Procedure as regards orders of remand where the order of remand itself was made appealable. Since Section 105 (2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court. the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in *Amar Chand Butail v. Union of India AIR 1964 SC 1658* and in other subsequent decisions.

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240. TRANSFER OF PROPERTY ACT, 1882 – Section 116

Holding over, meaning of – Mere acceptance of rent for subsequent months not indicative of assent to continuance of lease – Law explained.

Shanti Prasat Devi and another v. Shankar Mahto and others Judgment dt. 11.07.2005 by the Supreme Court in Civil Appeal No. 2718 of 2000, reported in (2005) 5 SCC 543

Held :

Section 116 of the Transfer of Property Act reads thus:

> *"116. Effect of holding over.* – If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or *otherwise assents* to his continuing in possession the lease is, in the *obsence of an agreement to the contrary,* renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106."
>
> (emphasis supplied)

We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying "assent" to the continuance of the lease even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in clause (7) read with clause (9) required fulfilment of two conditions: first, the exercise of option of renewal by the lessee before the expiry of original period of lease and second, fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local *mukhia or panchas* of the village. The aforesaid renewal clauses (7) and (9) in the agreement of lease claraly fell within the expression "agreement to the contrary" used in Section 116 of the Transfer of Property Act. Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.

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241. CIVIL PROCEDURE CODE, 1908 – O.7 R.11

Rejection of plaint – Exercise of discretion regarding rejection when suit as framed barred by limitation or manifestly vexatious and meritless – Role of the Judge/Court – Law explained.

N.V. Srinivasa Murthy and others v. Mariyamma (Dead) by proposed LRs. and others

Judgment dt. 11.07.2005 by the Supreme Court in Civil Appeal No. 4500 of 2004, reported in (2005) 5 SCC 548

Held :

After examining the pleadings of the plaint as discussed above, we are clarly of the opinion that by clever drafting of the plaint the civil suit which is hopelessly barred for seeking avoidance of registered sale deed of 5.5.1953, has been instituted by taking recourse to orders passed in mutation proceedings by the Revenue Courts.

Civil Suit No. 557 of 1990 was pending when the present suit was filed. In the present suit, the relief indirectly claimed is of declaring the sale deed of 5.5.1953 to be not really a sale deed but a loan transaction. Relief of reconveyance of property under alleged oral agreement on return of loan has been deliverately omitted from the relief clause. In our view, the present plaint is liable to rejection, if not on the ground that it does not disclose "cause of action", on the ground that from the averments in the plaint, the suit is apparently barred by law within the meaning of clause (d) of Order 7 Rule 11 of the Code of Civil Procedure.

The High Court does not seem to be right in rejecting the plaint on the ground that it does not disclose any "cause of action". In our view, the trial court was right in coming to the conclusion that accepting all averments in the plaint,

the suit seems to be barred by limitation. On critical examination of the plaint as discussed by us above, the suit seems to be clearly barred on the facts stated in the plaint itself. The suit as framed is prima facie barred by the law of limitation, provisions of the Specific Relief Act as also under Order 2 Rule 2 of the Code of Civil Procedure.

This is a fit case not only for rejecting the plaint but imposing exemplary costs on the appellant on the observations of this Court in the case of *T. Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467 : (SCC p. 468)*

> "The trial court must remember that if on a meaningful – not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not discolsing a clear right to sue, it should exercise its power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Chapter 11) and must be triggered against them."

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242. INDIAN PENAL CODE, 1860 – Section 307

Attempt to murder, proof of – Proof of bodily injury capable of causing death not required – Injury actually inflicted not itself determinative – Intention or knowledge with which injury inflicted determinative – Law explained.

State of M.P. v. Saleem alias Chamaru and another

Judgment dt. 13.07.2005 by the Supreme Court in Criminal Appeal No. 822 of 2005, reported in (2005) 5 SCC 554

Held :

To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its re-

sult, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. it is not essential that bodily injury capable of causing death should have been inflicted. The section makes a disinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

This position was highlighted in *State of Maharashtra v. Balram Bama Patil, (1983) 2 SCC 28 Girija Shankar v. State of U.P., (2004) 3 SCC 793 and R. Prakash v. State of Karnataka, (2004) 9 SCC 27.*

In *Sarju Prasad v. State of Bihar, AIR 1965 SC 843* it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim. is not by itself sufficient to take the act out of the purview of Section 307.

Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is the intention on knowledge, as the case may be, and not the nature of the injury.

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243. CIVIL PROCEDURE CODE, 1908 – O. 41 R.22

Cross-objections, nature and maintainability of – Cross-objections maintainable even after withdrawal of appeal – Law explained.

Hari Shankar Rastogi v. Shri Shyam Manohar and others

Reported in 2005 (3) MPLJ 1 (SC)

Held :

The question whether the Cross-objections are maintainable, even when the Appeal has been withdrawn was considered by this Court in *Superintending Engineer and ors. vs. B. Subba Reddy reported in 1999(4) SCC 423.* After considering various judgments, it was held as follows :–

"From the examination of these judgments and the provisions of section 41 of the Act and Order 41, Rule 22 of the Code, in our view, the following principles emerge :

(1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(2) Cross-objection is like an appeal. It has all the trappings of an appeal. If filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeal by an indigent person also apply to cross-objection.

(4) Even where that appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filling an appeal. Time for filling objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the Court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree and order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order."

Thus, it is clear that cross–objection is like an Appeal. It has all the trappings of an Appeal. Even when the Appeal is withdrawn or is dismissed, cross-objection can still be heard and determined.

On behalf of the respondents, reliance was placed upon the authority of this Court in *Municipal Corporation of Delhi and ors. vs. International Security and Intelligence Agency Ltd. reported in 2004(3) SCC 250.* However, in our view this authority does not lay down any contrary proposition. In the Judgment, it has also been held that right to prefer cross–objection partakes of the right to prefer an Appeal. It has been held that a party may rest content by partial success with a view to giving a quietus to the litigation. However, if he finds that the other party is not interested in burying the hatchet, then he may also like to exercise his right of Appeal which he may do by filing cross–objections. It has been held that the substantive right is the right of Appeal and the form of cross–objection is merely a matter of procedure.

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244. CIVIL PROCEDURE CODE, 1908 – O.9 R.13 and Section 96
First appeal, maintainability of after dismissal of application under O.9 R.13 – Held, such appeal maintainable.
Bhanu Kumar Jain v. Archana Kumar and another
Reported in 2005 (3) MPLJ 3 (SC)

Held :

The question which now arises for consideration is as to whether the first appeal was maintainable despite the fact that an application under Order 9, Rule 13 of the Code was dismissed.

An appeal against an *ex parte* decree in terms of section 96 (2) of the Code could be filed on the following grounds :

(i) the materials on record brought on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) the suit could not have been posted for ex parte hearing.

In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial Court merges with the order passed by the appellate Court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

In an appeal filed in terms of section 96 of the Code having regard to section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein.

It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

We have, however, no doubt in our mind that when as application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail remedy available there-against viz. to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order positing the suit for ex parte hearing by the trial Court and/or existence of a sufficient case for non–appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the Court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhary that the "Explanation" appended to Order 9, Rule 13 of the Code shall receive a strict construction as was held by this Court in *Rani Choudhary, v. Lt. Col. Suraj Jit Choudhary, (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar, (2002) 5 SCC 161 and Shyam Sundar Sarma vs. Pannalal Jaiswal, (2004) 9 Scale 270.*

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245. CONTRACT ACT, 1872 – Section 176
MONEY LENDERS ACT, 1934 – Sections 3 and 7

(i) Pawnee's right on pawnor's default on payment of debt – Pawnee may retain pawned articles as co-lateral security and may sale it after giving reasonable notice to pawnor– Law explained.

(ii) Sections 3 and 7, applicability of – The sections applicable only when suit is filed by money lender – Law explained.

Sunderlal Saraf and others v. Subhas Chand Jain and others
Reported in 2005 (3) MPLJ 73

Held :

(i) In order to appreciate and decide the rival contention of learned counsel for the parties, it would be apposite to re–write the law in this regard viz. Section 176 of the Act which deals with the pawnee's right, thus :

> "176. *Pawnee's right where pawnor makes default.* – If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawner."

On bare perusal of section 176 of the Act, it is revealed that sending a reasonable notice of the sale by pawnee is a condition precedent before selling the pledged article. Once the pawnee, after reasonable notice to the pawnor of

his intention to sell the goods pawned, sells them under section 176 of the Act, the pawnor's night of re-delivery is extinguished, but his right to redeem continue up to the sale. In this context, I may profitably rely the decision of Supreme Court in *Lallan Prasad vs. Rahmat Ali and another, AIR 1967 SC 1322.* After sale, it is the pawnee's ordinary right to recover the balance of the loan unsatisfied on the sale pledged. If we analyse section 176 of the Contract Act, it is perceptible that a pawnee has three rights in case of default by pawnor:

(i) he may bring a suit upon the debt; and

(ii) he may retain the pawned as collateral security; or

(iii) he may sell it giving the pawnor a reasonable notice of sale.

The right to retain to sale the pawned are not concurrent but the right to sue and to sell are concurrent rights, i.e. he may sue and retain goods as concurrent security or sale them after giving notice. The word "or" used in the section is in relation to, two or more alternatives does not necessarily imply mutual exclusion. It depends upon the intention ascertainable from the provision as a whole. On going through the provisions of section 176 of the Act, one can safely say that the sale of pawned articles by a pawnee without notice to pawnor, is void. Examining from all the angles, it is clear like a noon day that pawnee may sell the thing pledged on giving the pawnor reasonable notice of the sale. The section is mandatory and the required notice must be given notwithstanding any contract to the contrary. Since the sending of notice is mandatory, it cannot be waived. It is the discretion of the pawnee either to file suit for recovery of the debt and retain pledged articles as collateral security or in the alternative to sell the pledged goods after giving reasonable notice to the pawnor.

(ii) The contention of learned counsel for appellant is that section 7 is applicable to money-lenders, he may be plaintiff or may be defendant and if he had not maintained the account in terms of section 3(1) (a) of the Act of 1934, he is not entitled for the interest. It be seen that both the decisions which are relied by the appellant are tangentially off the point. In both the cases, the suit was brought by the money-lender and money-lender was the plaintiff. However, the present suit has not been filed by the Money-lender and, therefore, the cases of *Rajaram Bhiwaniwala, Calcutta & others v. Nand Kishore, 1975 MPLJ (F.B.) 225* and *Pratap Singh v. Firm Devendra Kishanlal and others, 1984 MPLJ 661* are not applicable, In order to appreciate the contention of learned counsel for appellant, it would be appropriate to re-write section 7(a) and (b) of the Act of 1934 which reads thus:

"7. *Procedure of Court in suits regarding loans.*– Notwithstanding anything contained in any other enactment for the time being in force, in any suit or proceeding relating to a loan–

(a) the Court shall, before deciding the claim on the merits, frame and decide the issue whether the money-lender has complied with the provisions of clauses (a) and (b) of sub-section (1) of section 3;

(b) if the Court finds that the provisions of clause (a) of sub-section (1) of section 3 or of section 6 have not been complied with by the money-lender, it shall, if the *plaintiffs claim* is established in whole or in part, disallow the whole or any portion of the interest found due, as may seem reasonable to it in the circumstances of the case, and may disallow costs; and"

On bare reading of section 7(b) of the Act of 1934, it is gathered that if the money lender files a suit and if plaintiff's claim is established then if there is non-compliance of sub-section (1) of section 3 he shall not be entitled for the interest. Thus, the contention of learned counsel for appellant cannot be accepted and section 7 of the Act of 1934 is applicable to defendant also. Shri Sanghi learned senior counsel for respondent has placed reliance on the decision of this court in the case of *Sitaram Shrawan Koshti vs. Bajya Parnya Bhoi, 1941 NLJ 94= AIR 1941 Nagpur 177.* In this case it has been held as under :

> "It was argued that the burden is on the plaintiff to prove that he is not a money-lender. That however is incorrect. The Act only applies to money-lenders and therefore before it can be applied it must be shown by the person seeking to apply it and seeking to take advantage of its provisions that the plaintiff is a money-lender".

Thus if the money-lender is plaintiff then only compliance of section 3 is to be considered.

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246. MOTOR VEHICLES ACT, 1988 – Section 149 (2)
Lifting more passengers than prescribed in permit – Whether Insurance Company can disown its liability for such breach – Held No, because lifting passengers to more than prescribed capacity not a fundamental breach.
Munawar Ulla v. New India Assurance Co. Ltd. and others
Reported in 2005 (3) MPLJ 142

Held :

In the case of *B.V. Nagaraju vs. Oriental Insurance Co. Ltd., reported in 1996 ACJ 1178,* the Hon'ble Apex Court after placing reliance on the decision of *Skandia Insurance Co. Ltd., vs. Kokilaben Chandravardhan reported in 1987 MPLJ (S.C.) 347 = 1987 ACJ 411,* wherein the Hon'ble Court has considered whether the terms of the policy of insurance need be construed strictly or be read down to advance the main purpose of the contract, has held that merely by lifting more passengers by cleaner or driver of the vehicle without the knowledge of owner, cannot be said to be such a fundamental breach that the owner should in all events be denied indemnification. The misuse of the vehicle was somewhat irregular though not so fundamental in the nature so as to put an end to the contract, unless some factors existed which, by themselves, had shown to contribute to the causing of the accident.

In the present case, appellant who happens to be owner of the offending vehicle was also travelling in the said vehicle at the time of accident. Therefore, it can easily be presumed that the more number of passengers were travelling in the offending vehicle within knowledge and with the consent of the owner of the vehicle. Since the carrying of the passengers was not the cause of accident, therefore, this fact is of no relevance.

In *2004 (3) SCC 297, National Insurance Co. Ltd., vs. Swaran Singh,* the Hon'ble Supreme Court has held as under :-

> 110 (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under section 149 (2) of the Act.

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247. MOTOR VEHICLES ACT, 1988 – Section 166
RAILWAYS ACT, 1989 – Section 18
Accident of motor vehicle at railway crossing due to negligence of railway staff – Suit for compensation maintainable before Motor Vehicles Claims Tribunal – Law explained.
Sanno Devi v. Balram and others
Reported in 2005 (3) MPLJ 142

Held :

First question, which is required to examined is whether claim before Motor Accidents Claims Tribunal is maintainable. It may be mentioned that it is the duty of railway under section 18 of the Railways Act, 1989 to erect suitable gates, chains, bars, stiles or hand-rails by railway administration at level crossings. Section 18 (c) provides that persons be employed by a railway administration to open and shut gates, chains or bars. Thus, it is the duty of railway to employ a person, who will open and close the railway gate as and when trains comes.

The case of *Union of India vs. United India Insurance Co. Ltd., (1997) 8 SCC 683* is held to be no longer good law by the Apex Court in the case of *Union of India vs. Bhagwati Prasad, (2002) 3 SCC 661,* wherein it has been held that the jurisdiction of the Tribunal to entertain the application for claim of compensation in respect of an accident arising out of the use of a motor vehicle depends essentially on the fact whether there had been any use of motor vehicle

and once that is established the Tribunal's Jurisdiction cannot be held to be ousted on a finding being arrived at a later point of time that it is the negligence of the other joint torfeasors and not the negligence of the motor vehicle in question. Therefore, in the light of the aforesaid judgment we hold that the Tribunal had jurisdiction to entertain the dispute

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248. CRIMINAL PROCEDURE CODE, 1973 – Section 313

Examination of accused u/s 313 – Contents of Chemical examiner's report not put to accused during examination u/s 313 of the Code – Such report though exhibited cannot be used against him – Law explained.

Kalu s/o Mohan Singh v. State of M.P.

Reported in 2005 (3) MPLJ 142

Held :

The learned trial Court in its judgment para 47 placed reliance on the Chemical Examiner's report Ex. P/15 and in paras 49 and 50, considering the arguments and judgments relied upon by the appellant held that even if the blood group was not found on the seized lathi, axe and Darata, the presence of simple blood is sufficient as an incriminating circumstance against the appellant and the same can be used against the accused and the learned trial has accepted the contents of the Chemical Examiner's Report Ex. P/15, as circumstantial evidence against the appellant though in the accused-statement recorded under section 323, Criminal Procedure Code, no question was put to the accused about receiving of Chemical Examiner's Report (Ex. P/15), and the contents thereof. The statement of the accused under section 313, Criminal Procedure Code were recorded on 3-9-2001 and thereafter, the case was fixed on 7-9-2001 for examination of defence witnesses. On this date (7-9-2001), the Court had exhibited the Chemical Examiner's report as Ex. P/15.

Since the incriminating circumstances available in the chemical Examiner's report (Ex. P/15) were not specifically put in the accused statement to the appellant and no opportunity was given to him to explain the same, the contents of the report (Ex. P/15) could not be relied upon as an incriminating circumstance against the appellants.

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249. CIVIL PROCEDURE CODE, 1908– O.8 Rr. 1 and 6-A

Written statement, filing of – Whether Court can grant time for filing written statement beyond the period of 90 days as prescribed under O.8 R.1 – Held No, because provisions of O.8 R.1 are mandatory in nature.

Narendra Kumar v. Smt. Manju Agarawal and others

Reported in 2005 (3) MPLJ 186

Held :

Thus, it is provided that the written statement should be filed within thirty days. If written statement is not filed within thirty days, Court may allow time to file the same on such other day, for the reasons to be recorded in writing. Thus, Court can extend the time beyond thirty days, for reasons to be recorded in writing and it cannot grant time for mere asking. However, in any case time cannot be granted beyond ninety days after service of summons. Intention of legislature is that to avoid delay in the suit specific time limit is prescribed for filing written statement i.e. thirty days. Beyond thirty days trial Court must record its reason for further time and if no reason could be assigned it cannot grant time without assigning any reason and the Court must work within the time of thirty days and written statement must be filed within thirty days from the date of receipt of summons. However, power of Court for adjournment or granting further time to file written statement is not beyond ninety days. Language of Rule 1 of Order VIII is clear and specific. It is mentioned that the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. Legislature has used the word 'shall'. Thus, the provision is mandatory in nature and it is obligatory on the part of defendant to file the written statement within thirty days. However, it is further provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other days, as may be specified by the Court, for reasons to be recorded in writing. Thus, it there is sufficient cause and sufficient ground is made out for extension of time beyond thirty days, time will not be extended beyond the period of ninety days. Court is also not empowered to accept written statement beyond the period of ninety days. Provisions have been brought in by the Code of Civil Procedure (Amendment) Act, 2002 and the statement of objects and reasons for bringing such amendment provides that a defendant is to file written statement within thirty days from the date of service of summons but such date can be extended upto ninety days by the Court for reasons to be recorded in writing. Statement of objects and reasons of the amending Act provides that the Code has been amended from time to time with a view to cut short the delay at various levels. Thus, intention of legislature is to cut short the delay in trial. Thus, legislative intent is clear and specific that in order to avoid delay in trial legislature has amended Order VIII, Rule 1, Civil Procedure Code which provides that the written statement must be filed within thirty days from the date of service of summons. However, this period can be extended upto ninety days for the reasons to be recorded in writing and not beyond ninety days.

Note : Readers are requested to go through the judgment of Apex Court in the case of *Kailash v. Nanhu and others, (2005) 4 SCC 480* published in this issue at Note no. 221 wherein the provisions of O.8 r.1 have been held to be directory by the Apex Court.

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250. SERVICE LAW :

Probationer, termination of – Termination simplicitor of a probationer not a punishment – Law explained.

State of Punjab and others v. Sukhawinder Singh

Judgment dt. 14.07.2005 by the Supreme Court in Civil Appeal No. 4441 of 2001, reported in (2005) 5 SCC 569

Held :

Termination of service of a probationer during or at the end of the period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to. The period of probation, therefore, furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master and it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer. (See *Ajit Singh v. State of Punjab, (1983) 2 SCC 217*).

Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical, (2002) 1 SCC 520 is a recent decision of this Court where, after referring to large number of earlier decisions, the law on the point has been very clearly elucidated in the following manner : (SCC pp. 528-30, paras 21 & 29)

> "One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.
>
> * * *
>
> Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probatiner's appointment, is also not stigmatic.... In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job".

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251. ESSENTIAL COMMODITIES ACT, 1955 – Sections 7(1) (a) (ii) and 3 Section 7 contemplates penal liability for violation of order made u/s 3 and not violation of Scheme – The order alleged to have been violated be placed before the Court – Law explained.
Prakash Babu Raghuvanshi v. State of M.P.
Reported in 2005 (1) Vidhi Bhasvar 318 (SC)

Held :

An interesting point has been raised in the appeal, which unfortunately does not appear to have been canvassed before the Courts below. The appellant was convicted for allegedly committing offence in terms of section 3 read with section 7 (1) (a) (ii) of the Essential Commodities Act, 1955 (in short 'the Act'). He was found guilty by the learned Sessions Judge, Vidisha in Sessions Case No. 11 of 1996. The conviction and the sentence of one year's rigorous imprisonment and a fine of Rs. 2,000/- as had been imposed, came to be confirmed by a learned Single Judge of the High Court of Madhya Pradesh, Gwalior Bench by the impugned judgment.

Mr. S.B. Upadhyay, learned counsel appearing for the appellant submitted that for attracting section 7 of the Act, the primary requirement is that there must be violation of an order. What the prosecution seems to have relied upon is the Madhya Pradesh Sarvajanik Purti Vitaran Scheme, 1991 (in short 'the Scheme'). According to him, the Scheme cannot be equated with an Order, as required under the Act. Learned counsel for the respondent State, on the other hand, submitted that such a plea which essentially would need factual adjudication, was not canvassed before either the trial Court or the High Court.

Though there is substance in the plea raised by learned counsel for the State, yet, for bringing an application under section 7 of the Act, the essential requirement is an Order, the violation of which is alleged. Unfortunately, neither before the trial Court nor the High Court, any effort was made to place on record the Order, the violation of which was alleged. In *M.P. Ration Vikreta Sang Society v. State of M.P. [1981 JLJ 564= (1981) 4 SCC 535],* it was observed that a scheme like the one at hand is framed under Article 162 of the Constitution of India in short 'the Constitution'). That being so, it was necessary for the prosecution to place on record the 'Order' which, according to it, was the foundation for taking action against the accused appellant.

Section 7 refers to contravention of any Order made under section 3. It is essential for bringing in application of section 7 to show that some 'Order' has been made under section 3 and the order has been contravened. Section 3 deals with powers to control production, supply, distribution etc. of essential commodities. Exercise of such powers, can be done by 'Order'. According to section 2(c), 'notified order' means an order notified in the Official Gazette, and section 2 (cc) provides that 'Order' includes a direction issued thereunder.

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252. INDIAN PENAL CODE, 1860 – Section 363

Age, proof of – Entry in School Register, evidentiary value of – It has no value unless person who made the entry or who gave the date of birth is examined – Law explained.

Deepak v. State of Madhya Pradesh

Reported in 2005 (3) MPHT 5 (NOC)

Held :

Now, the question is whether the evidence of Ramniwas Sharma (P.W.5) is reliable and the entries in the School Register mentioning date of birth of the prosecutrix to be 30.9.1985 are admissible in evidence. For answer of this question it is relevant to refer to the law laid down by the Apex Court in the case of *Birad Mal Singhvi vs. Anand Purohit, reported in AIR 1988 SC 1796:*

> "14. ... The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of document were also proved. Mere proof of the documents 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents."

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253. CRIMINAL PROCEDURE CODE, 1973 – Sections 438 and 439

Protection of order passed u/s 438, availability of – The moment application u/s 439 is allowed or dismissed, order passed u/s 438 will become inoperative – Law explained.

Sunil Gupta v. State of M.P.

Reported in 2005 (3) MPHT 272

Held :

The applicants were released on anticipatory bail by this Court and it was directed that the order shall remain in force for a period of 45 days and during this period, the applicants may surrender and apply for regular bail. But, it does not mean that where before expiration of period of anticipatory bail, application for regular bail is filed before the Competent Court and the same is rejected by that Court, even thereafter, the order of anticipatory bail shall remain in force. Two bail orders can not remain in force simultaneously. Where an application

under Section 439, Cr.PC is presented before the Court, and the same is allowed by that Court, it means the operation of order of anticipatory bail comes to an end because a person can no remain on bail under Sections 438 and 439, Cr.PC, simultaneously. The moment an application filed under Section 439, Cr.PC is allowed or dismissed, the order passed under Section 438, Cr.PC will become inoperative and the applicant would not be able to get the benefit of the umbrella which was provided by the order passed under Section 438, Cr.PC.

In the present cases, it is an interesting position that when the applications under Section 439 of the Cr.PC of the applicants were rejected by the respective Additional Sessions Judge, the applicants were not present pysically in the Court, though the applicant Takeshwar Sahu, was physically present in the Court of CJM. But whether a person, who filed an application under Section 437 or 439 of the Cr.PC, is present physically before the Court, can he move out of the custody of that Court after the rejection of the application ? In the opinion of this Court, once a person is physically present and he is in custody of that Court, he can not move out of the custody of that Court, if the application of regular bail is rejected. No doubt, that when a person surrenders before the Competent Court for consideration of his bail application moved under Section 439, Cr.PC, he remains in custody at that time but after rejection of his application, if he is allowed to go out of custody, how can a person be said to be in custody who is totally free? The said person can not be said to be in custody and therefore his application for regular bail under Section 439, Cr.PC shall not be maintainable in this Court.

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254. AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981
ENVIRONMENT (PROTECTION) ACT, 1986
Noise Pollution (Regulation and Control) Rules, 2000, thrust of – Norms for controlling noise pollution as per directions issued by the Apex Court from time to time – Restriction on bursting fire crackers between 10 pm to 6 am not violative of Article 25 of the Constitution – Law explained.
Noise Pollution (v), In Re v. Union of India and another
Judgment dt. 18.7.2005 by the Supreme Court in Civil Appeal No. 3735 of 2005, reported in (2005) 5 SCC 733

Held :

It would be useful to have a brief resume of some of the laws which are already available on the statute-book. Treatment of the problem of noise pollution can be dealt with under the law of crimes and civil law. Civil law can be divided under two heads (i) the law of torts (ii) the general civil law. Cases regarding noise have not come before the law courts in large quantity. The reason behind this is that many people in India did not consider noise as a sort of pollution and they are not very much conscious about the evil consequences of noise pollution. The level of noise pollution is relative and depends upon a

person and a particular place. The law will not take care of a supersensitive person but the standard is of an average and rational human being in the society.

Noise Pollution (Regulation and Control) Rules, 2000

In order to curb the growing problem of noise pollution, the Government of India has enacted the Noise Pollution (Regulation and Control) Rules, 2000. Prior to the enactment of these rules noise pollution was not being dealt specifically by a particular Act.

> "Whereas the increasing ambient noise levels in public places from various sources, inter alia, industrial activity, construction activity generator sets, loudspeakers, public address systems, music systems vehicular horns and other mechanical devices, have deleterious effects on human health and the psychological well-being of the people; it is considered necessary to regulate and control noise producing and generating sources with the objective of maintaining the ambient air quality standard in respect of noise," Ministry of Environment and Forest Notification, New Delhi, 14 Feb. 2000
>
> 1. The State Government may categorise the areas into industrial commercial, residential or silence areas/zones for the purpose of implementation of noise standards for different areas.
>
> 2. The ambient air-quality standards in respect of noise for different areas/zones has been specified for in the Schedule annexed to the Rules.
>
> 3. The State Government shall take measures for abatement of noise including noise emanating from vehicular movements and ensure that the existing noise levels do not exceed the ambient air-quality standard specified under these rules.
>
> 4. An area comprising not less than 100 meters around hospital, educational institutions and courts may be declared as silence area/zone for the purpose of these rules.
>
> 5. A loudspeaker or a public address system shall not be used except after obtaining written permission from the authority and the same shall not be used at night i.e. between 10.00 p.m. and 6.00 a.m.
>
> 6. A person found violating the provisions as to the maximum noise permissible in any particular area shall be liable to be punished for it as per the provisions of these rules and any other law in force.

Penal Code, 1860

Noise pollution can be dealt with under Sections 268, 290 and 291 of the Penal Code, as a public nuisance. Under Section 268 of this Code, it is mentioned that:

> "268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which cause any common injury, danger or annoyance to the public or to the people in general who

dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not executed on the ground that it causes some convenience or advantage."

Sections 290 and 291 of the Penal Code deal with the punishment for public nuisance.

Criminal Procedure Code, 1973

Under Section 133 of the Code of Criminal Procedure, 1973 the Magistrate has the power to make conditional order requiring the person causing nuisance to remove such nuisance.

Factories Act, 1948

The Factories Act does not contain any specific provision for noise control. However, under the Third Schedule read with Sections 89 and 90 of the Act, "noise-induced hearing loss", is mentioned as a notifiable disease Ed.: In item 22 of the third schedule. Under Section 89 of the Act, any medical practitioner who detects any notifiable disease, including noise-induced hearing loss, in a worker, has to report the case to the Chief Inspector of Factories, along with all other relevant information. Failure to do so is a punishable offence.

Similarly, under the Model Rules, limits for noise exposure for work zone area has been prescribed.

Motor Vehicles Act, 1988, and Rules framed thereunder

Rules 119 and 120 of the Central Motor Vehicles Rules, 1989, deal with reduction of noise:

"119. *Horns.*– (1) On and after expiry of one year from the date of commencement of the Central Motor Vehicles (Amendment) Rules, 1999, every motor vehicle including a construction equipment vehicle and agricultural tractor manufactured shall be fitted with an electric horn or other devices conforming to the requirements of IS: 1884-1992, specified by the Bureau of Indian Standards for use by the driver of the vehicle and capable of giving audible and sufficient warning of the approach or position of the vehicle.

Provided that on and from 1.1.2003, the horn installation requirements shall be as per AIS-014 specifications, as may be amended from time to time, till such time as corresponding Bureau of Indian Standards specifications are notified.

(2) No motor vehicle including agricultural tractor shall be fitted with any motioned horn giving a succession of different notes or with any other sound-producing device an unduly harsh, shrill, loud or alarming noise.

* * *

Giving Silencers.– (1) Every motor vehicle including agricultural tractor shall be fitted with a device (hereinafter referred to as a silencer) which by means of an expansion chamber or otherwise reduces as far as practicable, the noise that would otherwise be made by the escape of exhaust gases from the engine.

(2) *Noise standards.*– Every motor vehicle shall be constructed and maintained so as to conform to noise standards specified in Part E of Schedule VI to the Environment (Protection) Rules, 1986, when tested as per IS:3028-1998, as amended from time to time."

Law of Tort

Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. No proprietor has an absolute right to create noises upon his own land, because any right which the law gives is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. Noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary, plain and simple notions, and having regard to the locality; the question being one of degree in each case. *Ratanlal & Dhirajlal : The Law of Torts (24th Edn., Edited by Justice G.P. Singh), p. 589.*

Air (Prevention and Control of Pollution) Act, 1981

Noise was included in the definition of air pollutant in Air (Prevention and Control of Pollution) Act in 1987. Thus, the provisions of the Air (Prevention and Control of Pollution) Act, became applicable in respect of noise pollution, also.

Environment (Protection) Act, 1986

Although there is no specific provision to deal with noise pollution, the Act confers powers on the Government of India to take measures to deal with various types of pollution including noise pollution.

Fireworks

The Explosives Act, 1884 regulates manufacture, possession, use, sale, transport, import and export of explosives. Firecrackers are governed by this Statute. Rule 87 of the Explosives Rule, 1983 prohibits manufacture of any explosive at any place, except in factory or premises licensed under the Rules.

In India there is no separate Act that regulates the manufacture, possession, use, sale, manufacture and transactions in firecrackers. All this is regulated by the Explosives Act, 1884. The noise that is produced by these fireworks is regulated by the Environmental Protection Act, 1986 and the Noise Pollution (Regulation and Control) Rules, 2000.

VII. Judicial opinion in India

During the course of the hearing of this case the Court had passed several interim orders keeping in mind the importance of the issue.

The interim order dated 27.9.2001 noise pollution (II), In re (2005) 5 SCC 728 deserves to be mentioned in particular, which directed as under: (SCC pp. 728-29, para 2)

"(1) The Union Government, the Union Territories as well as all the State Governments shall take steps to strictly comply with Notification No. GSR 682(E) dated 5.10.1999 whereby the Environment (Protection) Rules, 1986 framed under the Environment (Protection) Act, 1986 were amended. They shall in particular comply with amended Rule 89 of Schedule I to the said Rules, which reads as follows :

'89. Noise standards for firecrackers

A. (i) The manufacture, sale or use of firecrackers generating noise level exceeding 125 dB (Al) or 145 dB (C) pk at 4 metres distance from the point of bursting shall be prohibited.

(ii) For individual firecracker constituting the series (joined firecrackers), the abovementioned limit be reduced by 5 log10(N) dB, where N=number of crackers joined together.'

(2) The use of fireworks or firecrackers shall not be permitted except between 6.00 a.m. and 10.00 p.m. No fireworks or firecrackers shall be allowed between 10.00 p.m. and 6.00 a.m.

(3) Firecrackers shall not be used at any time in *silence zones*, as defined in S.O. No. 1046 (E) issued on 22.11.2000 by the Ministry of Environment and Forests. In the said notification, silence zone has been defined as:

> 'Silence zone is an area comprising not less than 100 metres around hospitals, educational institutions, courts, religious places or any other area which is declared as such by the competent authority.'

(4) The State Education Resource Centres in all the States and the Union Territories as well as the management/principals of schools in all the States and Union Territories shall take appropriate steps to educate students about the ill-effects of air and noise pollution and apprise them of Directions (1) to (3) above." (emphasis in original)

In our opinion the total restriction on bursting firecrackers between 10 p.m. and 6 a.m. must continue without any relaxation in favour of anyone.

Whether such restriction is violative of Article 25 of the Constitution?

The affidavit filed by Mr. Mariappan, the Secretary of the Tamil Nadu Fireworks and Amorces Manufacturers Association, alleges the restriction on bursting firecrackers to amount to infringement of religious rights under Article 25. He says:

> "Therefore, the interference with the date and time of celebrating the festivals, amounts to infringement of religious rights under Article 25 and the limitation under Article 21 does not cause any health hazard."

The Court by restricting the time of bursting the firecrackers has not in any way violated the religious rights of any person as enshrined under Article 25 of the Constitution. The festival of Diwali is mainly associated with pooja performed on the auspicious day and not with firecrackers. In no religious textbook is it written that Diwali has to be celebrated by bursting crackers. Diwali is considered as a festival of lights, not of noises. Shelter in the name of religion cannot be sought for, bursting firecrackers, and that too at odd hours.

Another argument that has been put forward to remove the restriction during festivals is that they are celebrated by most of the people and that an inconvenience to a few should not become the reason for restraining a greater lot.

> In *P.A. Jacob v. Supdt. of Police, AIR 1993 Ker 1* it has been said: (AIR p.5, para 10)
>
> "10 However wide a right is, it cannot be as wide, as to destroy similar or other rights in others.
>
> Jefferson said:
>
> > 'No one has a natural right to commit aggression on the equal right of another.'
>
> J.S. Mill said
>
> > 'If all mankind minus one were of one opinion, and if only one person was of contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.' "

If at all the people feel it necessary to burst firecrackers they can choose and go for such firecrackers which on being burst emit colours or lights mainly and produce very little or no sound. Their use can be permitted. The Department of Explosives can, while working out formulae for firecrackers, also alongside classify the crackers into two categories that could be: (a) sound-emitting crackers, and (b) colours/light-emitting crackers. A few examples of such colour-emitting crackers are, snake tablets, sparklers, pencils, hunters, chakri, colour rockets, flowerpots, parachutes, etc. Category (b) firecrackers may not have restriction as to timings. Though, it would need expert examination and opinion if colour-emitting crackers also emit fumes and gases which though not a source of noise pollution yet would cause air pollution, equally bad. Till such time the Department of Explosives makes any such classification there shall be a total ban on bursting of firecrackers between 10 p.m. and 6 a.m.

It is hereby directed as under :

(i) Firecrackers

1. On a comparison of the two systems i.e. the present system of evaluating firecrackers on the basis of noise levels, and the other where the firecrackers shall be evaluated on the basis of chemical composition, we feel that the latter method is more practical and workable in Indian

circumstances. It shall be followed unless and until replaced by a better system.

2. The Department of Explosives (DOE) shall undertake necessary research activity for the purpose and come out with the chemical formulae for each type or category or class of firecrackers. DOE shall specify the proportion/composition as well as the maximum permissible weight of every chemical used in manufacturing firecrackers.

3. The Department of Explosives may divide the firecrackers into two categories – (i) sould-emitting firecrackers, and (ii) colour/ light-emitting firecrackers.

4. There shall be complete ban on bursting sound-emitting firecrackers between 10 p.m. and 6 a.m. It is not necessary to impose restrictions as to time on bursting of colour/light-emitting firecrackers.

5. Every manufacturer shall on the box of each firecracker mention details of its chemical contents and that it satisfies the requirement as laid down by DOE. In case of a failure on the part of the manufacturer to mention the details or in cases where the contents of the box do not match the chemical formulae as stated on the box, the manufacturer may be held liable.

6. Firecrackers for the purpose of export may be manufactured bearing higher noise levels subject to the following conditions: (i) the manufacturer should be permitted to do so only when he has an export order with him and not otherwise; (ii) the noise levels for these firecrackers should conform to the noise standards prescribed in the country to which they are intended to be exported as per the export order; (iii) these firecrackers should have a different colour packing, from those intended to be sold in India; (iv) they must carry a declaration printed thereon something like 'not for sale in India' or 'only for export to country AB" and so on.

(ii) Loudspeakers

1. The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB(A) above the ambient noise standards for the area or 75 dB(A) whichever is lower.

2. No one shall beat a drum or tom-tom or blow a trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00 p.m. and 6 a.m.) except in public emergencies.

3. The peripheral noise level of privately-owned sound system shall not exceed by more than 5 dB(A) than the ambient air-quality standard specified for the area in which it is used, at the boundary of the private place.

(iii) Vehicular noise

No horn should be allowed to be used at night (between 10 p.m. and 6 a.m.) in residential area except in exceptional circumstances.

(iv) Awareness

1. There is a need for creating general awareness towards the hazardous effects of noise pollution. Suitable chapters may be added in the textbooks which teach civic sense to the children and youth at the initial/ early-level of education. Special talks and lectures be organised in the schools to highlight the menace of noise pollution and the role of the children and younger generation in preventing it. Police and civil administration should be trained to understand the various methods to curb the problem and also the laws on the subject.

2. The State must play an active role in this process. Resident Welfare Associations, service clubs and societies engaged in preventing noise pollution as a part of their projects need to be encouraged and actively involved by the local administration.

3. Special public awareness campaigns in anticipation of festivals, events and ceremonial occasions where at firecrackers are likely to be used, need to be carried out.

The above said guidelines are issued in exercise of power conferred on this Court under Articles 141 and 142 of the Constitution. These would remain in force until modified by this Court or superseded by an appropriate legislation.

(v) Generally

1. The States shall make provision for seizure and confiscation of loudspeakers, amplifiers and such other equipment as are found to be creating noise beyond the permissible limits.

2. Rule 3 of the Noise Pollution (Regulation and Control) Rules, 2000 makes provision for specifying ambient air-quality standards in respect of noise for different areas/zones, categorisation of the areas for the purpose of implementation of noise standards, authorising the authorities for enforcement and achievement of laid down standards. The Central Government/State Governments shall take steps for laying down such standards and notifying the authorities where it has not already been done.

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255. MOTOR VEHICLES ACT, 1988 – Section 149 (2) (a) (ii)
Driver having licence for one type of vehicle – Driving another type of vehicle on the relevant time – Whether insurance company can raise the defence about driver not having requisite licence – Held, Yes – Law explained.
National Insurance Corporation Ltd. v. Kanti Devi (Mrs) and others
Judgment dt. 9.5.2005 by the Supreme Court in Civil Appeal No. 3197 of 2005, reported in (2005) 5 SCC 789

Held :

In *Swaran Singh case (2004) 3 SCC 297* this Court dealt with scope and

ambit of Section 149 (2) (a) (ii) vis-a-vis proviso appended to sub-section (4) and sub-section (5) thereof. While dealing with cases where the driver who has been granted licence for one type of vehicle at the relevant time was driving another type of vehicle. In para 89 it was observed as follows: (SCC pp. 336-37)

> "89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi- cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', "semi-trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for 'motorcycle without gear', [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a 'maxi-cab', 'motor-cab' or 'omnibus' for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence."

In para 101 the effect of a driving licence being found fake was considered. It was noted as follows: (SCC p. 339)

> "101. The submission of Mr Salve that in United India Insurance Co. Ltd. v Lehru, (2003) 3 SCC 338 this Court has, for all intent and purport, taken away the right of an insurer to raise a defence that the licence is fake does not appear to be correct. Such defence can certainly be raised but it will be for the insurer to prove that the insured

did not take adequate care and caution to verify the genuineness or otherwise of the licence held by the driver."

Obviously, defence can be raised by the insurer about the licence being fake. By analogy, the insurer can also take a defence that the driver did not have the requisite driving licence to drive a particular type of vehicle. Such defence can be raised and it will be for the insurer to prove that the insured did not take adequate care and caution to verify genuineness or otherwise of the licence held by the driver. The effect of the evidence in this regard has to be considered by the Tribunal concerned.

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256. TORT

CIVIL PROCEDURE CODE, 1908 – Section 20

Conversion – Property taken or detained wrongfully amounts to conversion – Act of conversion being a tortuous act, Civil Court has jurisdiction to try the case at the place where conversion took place – Defendant finance company illegally seizing the truck for default in payment of monthly instalment – Remedy by way of civil suit available.

Ram Bahori v. Tata Finance Ltd. and others

Reported in 2005 (3) MPLJ 106

Held :

There is no dispute that there is an agreement between the parties. It is no doubt, true, that if any dispute or any differences and/or claims arising out of the agreement or as to the construction, meaning or effect of the agreement, the matter would be referred to the sole arbitrator at Bombay. Here the plaintiff is challenging the tortuous action of the defendants that by taking the law in their own hands, without obtaining any order from the competent Court, they forcefully had taken away the truck from the possession of the plaintiff and this action of defendants is being challenged by the plaintiff in the instant suit. There was no quarrel to the preposition laid down by the Supreme Court in the case of *Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, AIR 1965 SC 338.* Learned counsel for the appellant also did not dispute that if the Civil Court is not having any jurisdiction over the subject–matter of the suit, it cannot decide any question on merit. It can simply decide the question of jurisdiction and can return the plaint for proper presentation before the proper Court if it is found to be without jurisdiction. But, here the moot question to be decided is that whether any tortuous action has been submitted by the defendants or their employees. From this angle I have perused the plaint and on going through the averments specially para-8, it is revealed that there is a specific pleading of the plaintiff in regard to the tortuous action of the defendants. According to plaintiff, by taking the law in their own hands, they had seized the truck from the possession of plaintiff on 27.11.1992. Thus, if the suit is based on the tortuous action of the

defendants, according to me, the decision and ratio decidendi of the case of *Raigarh Jute* and *Textitle Mills Ltd. v. New Haryana Transport Co., 1994 MPLJ 626* is set in motion, in the said decision P.P. Naolekar, J. as his Lordship then was, while considering the action of defendants and the scope of section 20, Civil Procedure Code came to hold that the Court at Raigarh was having jurisdiction and the Court below, which returned the plaint to the plaintiff for proper presentation at Calcutta was found to be illegal and set it aside. His Lordship, while arriving at the finding, placed reliance on the decision of the Supreme Court in the case of Dhian *Singh vs. Union of India, AIR 1958 SC 274.* It would be appropriate to quote paras-6 and 7 of the decision of *Raigarh Jute* (supra) which reads thus :

> "6. According to me, the plaintiff has based his case for value of the goods wrongfully detained by the defendant/respondent which is an act of conversion. An act of conversion may be committed–
>
> 1. When property is wrongfully taken.
> 2. When it is wrongfully parted with.
> 3. When it is wrongfully sold.
> 4. When it is wrongfully retained.
> 5. When it is wrongfully destroyed.
> 6. When there is a denial of the lawful owner's right.
>
> A conversion is an act of wilful interference, with lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that order is deprived of the use and possession of it. In *Dhian Singh vs. Union of India, AIR 1958 SC 274,* the Supreme Court has held that–
>
> "A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. If a carrier or other bailee wrongfully and mistakenly delivers the chattel to the wrong person or refuses to deliver it to the right person, he can be sued as for a conversion, Every person is guilty of a conversion, who without lawful justification, deprives a person of his goods by delivering them to some one else so as to change the possession."
>
> 7. When a person holds a possession of another's chattel and refuses to deliver it or fails to deliver it fun spite of notice, the act will amount to assertion of a right inconsistent with the general domain over it, and the use which at all times, and in all places, he is entitled to make of it, and consequently amounts to an act of conversion. An act of conversion is an act of tort and the plaintiff can base his case on torts of conversion which is torts to immovable property.

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257. CRIMINAL PROCEDURE CODE, 1973 – Section 410

Power of C.J.M. u/s 410 to withdraw or recall a case pending before another Magistrate, scope of – C.J.M. can withdraw or recall any case – Law explained.

Bipin Saluja v. M/s Damodar Coal Agency

Reported in 2005 (3) MPLJ 116

Held :

The other contention of learned counsel for the petitioner is that under section 410 of the Code, the Chief Judicial Magistrate may withdraw or recall any case which he has made over to any Magistrate subordinate to him and in that situation only, the power can be exercised. According to the learned counsel since the case was not made over to Judicial Magistrate at Maihar by the Chief Judicial Magistrate, therefore the powers could not have been exercised. This argument cannot be accepted for the simple reason that in section 410, after the wordings "any Chief Judicial Magistrate may withdraw any case from" there is a comma and thereafter the wordings are "or recall any case which he has made over to" and thereafter there is another comma and then the language of section is "any Magistrate subordinate to him, and may enquire into or try such case himself or referred it for enquiry or trial to any other such Magistrate competent to enquire or try to the same". Since there is a comma, subsection (1) is to be read in the context that any Chief Judicial Magistrate may withdraw any case from ..... any Magistrate subordinate to him. Thus, the Chief Judicial Magistrate can withdraw any case from any Magistrate subordinate to him and this power is not restricted only to those cases which are made over to any Magistrate and thus under section 410 of the Code, the Chief Judicial Magistrate Satna was empowered to withdraw the case from any Magistrate subordinate to him. The last contention of learned counsel is that no notice was issued to the petitioner before transferring the case is devoid of any substance. The issue of a notice is not mandatory and the want of a notice does not amount to illegality at the most it may be extended and can be stretched up to the extent of improprietory.

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258. ACCOMMODATION CONTROL ACT, 1961 (M.P.)– Section 12 (1) (a) and 13 (1)

Section 13 (1), ambit and scope of – Protection u/s 13 (1) can be availed only on compliance of both the limbs of Section 13 (1) – Consistent defaults in payment of rent without any valid reason – Protection not available – Law explained.

Devendra Choudhary and another v. Warsilal Dua

Reported in 2005 (2) JLJ 149

Held :

Thus consistent defaults were persistently committed by the appellants with regard to payment of arrears of rent. Not only this, without there being any

valid reason appellants failed to pay/deposit monthly rent by 15 of each succeeding month as has been rightly noticed by the lower appellate Court, yet ignoring all these glaring and successive defaults with regard to compliance of second limb of section 13 (1), trial Court found that no ground under section 12(1) a was made out. In the considered opinion of this Court, lower appellate Court adopted the correct approach in this regard and properly held that appellants were not entitled to the benefit of section 12(3) of the Act. It is now well settled that the twin obligations imposed by section 13 are mandatory in nature and in order to avoid a decree on any ground under section 12(1) of the Act, the tenant must pay the arrears of rent and thereafter the monthly rent in manner prescribed otherwise the inevitable result would be a decree for eviction, see *2000 (2) JLJ 1= (2000)4 SCC 380 Jamnalal and others v. Radheshyam.* When statute lays down the period within which the rent is required to be paid or deposited, then the statutory direction is directed against private individual,it is mandatory in nature and is required to be complied with if the tenant desires to avert eviction under section 12(1) (a) of Act. No doubt, rent legislation is normally intended for the benefits of tenant but those benefits can be enjoyed by the tenant only on the basis of strict compliance of the statutory provisions and in such matter equitable considerations has no place.

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259. CRIMINAL PROCEDURE CODE, 1973 – Sections 312 and 397
Whether order directing applicant/accused to deposit the expenses of the witness recalled at his request is interlocutory – Held, No – Further held, the Court was duty bound to direct State to bear expenses of such witness.
Nandlal and others v. State of Maharashtra
Reported in 2005 (2) JLJ 158

Held :

So far his first submission is concerned that the order is interlocutory and cannot be entrained in revisional jurisdiction has not impressed me because by impugned order, applicants are directed to deposit very huge amount for recalling of the witness while the concerning documents were not submitted by the prosecution at the earlier stage when witness was cross-examined at first occasion and subsequently when, at the efforts of the applicants upto the apex Court, the documents are submitted then in view of this the applicants are entitled to cross-examine the witness at the expenses of prosecuting agency. Suppose the impugned order is maintained and the applicants are not is a position to deposit the money of the expenses then they will be deprived of their valuable right to cross-examine by which they may prove their case and it is a settled principle of criminal jurisprudence that defence of the accused should never be prejudiced because of the act of the prosecuting agency.

In view of section 312 of Code, the trial Court was duty bound to direct the non-applicant State to afford the expenses of witness in above-mentioned cir-

cumstances but contrary to it, impugned order was passed without supplying proper and cogent reasons. So non-applicant cannot be given any advantage just contradictory to provision of section 312 of Code.

On scrutinizing all circumstances, the cross-examination had become necessary because of the act of prosecuting agency, therefore, this expenses could not be directed to be borne by applicants. While considering all these aspects, if the impugned order is maintained then this will affect the valuable right of the applicants because if this amount is not deposited by the applicants or they are not in a position to afford then applicants would suffer with a great loss and, intention of Legislature would be defeated therefore, impugned order cannot be said as an interlocutory order only. So I hold that in these circumstances revision is maintainable against such type of arbitrary order of the trial Court.

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260. CIVIL PROCEDURE CODE, 1908 – 0.39 Rr. 1 and 2

Grant of interim injunction pertaining schemes based on costing – Held, Court should be slow and cautious in such matters – Law explained.

M.P. Housing Board v. Anil Kumar Khiwani

Reported in 2005 (2) JLJ 168 (SC)

Held :

Time has come when Courts should be slow in interfering at interim stage with schemes which are based on costing. India is having cost-push economy. In a self-financing scheme based on costing, an interim injunction has a cascading effect. Failure on the part of even one contributory in contributing the amount to the cost results in total failure of the project. The developer, like the Housing Board, makes an initial investment by borrowing funds from the market. Therefore, an interim injunction at the initial stage of the project would result in the total collapse of the entire project. It would also affect the contributions made by other co-purchasers. Several components go into costing, including the lease rent payable to the State Government. These aspects have not been considered by the trial Court.

Our observations herein however should not be read to mean that the developer in the present case has an absolute right to increase the cost of flats initially announced as estimated cost. The final cost should be proportionate to the estimated cost mentioned in the offer keeping in mind the rate inflation, escalation of the prices of inputs, escalation in the prices of the construction material and labour charges. These factors have got to be taken into account on the basis of the evidence which may be considered at the time of final hearing of the suit. In the present case, however, the appellant has not placed before the trial Court the documents mentioned hereinabove and, therefore, we are remitting the matter to the trial Court for fresh decision, in accordance with law.

In the case of *Gujarat Bottling Co. Ltd. v. Coca Cola Co.[(1995) 5 SCC 545]* this Court, while discussing the factors to be considered by the Courts in exercise of the discretion under Order 39 Rules 1 & 2 CPC, has observed as follows:

> "The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests (i) whether the plaintiff has a *prima facie* case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the "balance of convenience" lies. In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.
>
> Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the *ad interim* or temporary injunction order already granted in the pending suit or proceedings."

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261. INDIAN PENAL CODE, 1860 – Section 306

Offence of abetment to commit suicide u/s 306 – Mere cruelty/beating or harassment before death not itself an abetment to commit suicide – Law explained.

Aman Singh v. State of M.P.

Reported in 2005 (2) JLJ 224

Held :

In the case of *Sanju alias Sanjay Singh Sengar v. State of M.P. [2002 (2) JLJ 275 = (2002) 5 SCC 371],* Supreme Court has further considered the following judgments:

> "8. In *Swamy Prahaladdas v. State of M.P. [1995 SCC (Cri.) 943]* the appellant was charged for an offence under section 306, IPC on the ground that the appellant during the quarrel is said to have remarked to the deceased "to go and die". This Court was of the view that mere words uttered by the accused to the deceased : "to go and die" were not even *prima facie* enough to instigate the deceased to commit suicide.
>
> 9. In *Mahendra Singh v. State of M.P. [1995 SCC (Cri.) 1157],* the appellant was charged for an offence under section 306, IPC basically based upon the dying declaration of the deceased, which reads as under :
>
> 'My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning.'
>
> 11. In *Ramesh Kumar v. State of Chhattisgarh [2001 (2) BLJ 113= (2001) 9 SCC 618],* this Court was considering the charge framed and the conviction for an offence under section 306, IPC on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kirosene on herself and had set herself on fire."
>
> and considering the scope, Supreme Court has held as under:
>
> "Even if we accept the prosecution story that the appellant did tell the deceased "to go and die", that itself does not constitute the ingredient of "instigation". The word "instigate" denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. Presence of *mens rea*, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or on

the spur of the moment cannot be taken to be uttered with *mens rea.* It is in a fit or anger and emotion. Secondly, the alleged abusive words, said to have been told to the deceased were on 25.7.1998 ensued by a quarrel. The deceased was found hanging on 27.7.1998. Assuming that the deceased had taken the abusive language seriously, he had enough time in between to think over and reflect and, therefore, it cannot be said that the abusive language, which had been used by the appellant on 25.7.1998 drove the deceased to commit suicide. Suicide by the deceased on 27.7.1998 is not proximate to the abusive language uttered by the appellant on 25.7.1998."

Recently, in the case of *Hans Raj v. State of Haryana [2004 (16) AIC (SC)],* again Supreme Court has considered all the previous cases and the facts of the prosecution case that the wife of the appellant committed suicide on account of the cruelty and harassment meted out to her by the appellant therein. Considering the earlier judgments in the cases of *Ramesh Kumar v. State of Chhattisgarh; (Supra) State of West Bengal v. Orilal Jaiswal* and another [(1994) 1 SCC 73], the Court held that the allegation that the appellant did not like to keep the deceased with him because she was not good looking, or that he was addicted to liquor or that the deceased had reported these matters to her parents and others, or that the appellant intended to remarry and had told his wife about it, or that the deceased had once come to her father's house in an injured condition, or even the allegations regarding beatings, do not find place in the statements recorded by the police in the course of investigation and under the aforesaid circumstances the Court has found that the prosecution has failed to establish the offence under Section 306, IPC and set aside the conviction.

Thus, considering the aforesaid law laid down by the Supreme Court and the scope of section 107 of IPC, it is necessary that a reasonable certainty to incite the consequence must be capable of being spelt out. In this case there is no allegation available on record against the appellant for a betting the deceased to commit suicide. Merely practising cruelty or beating 15 days before her death does not constitute offence of abetment. More so, in this case the accused has not by his acts or omission or by a continued course of conduct created such circumstances that the deceased was felt with no other option except to commit suicide, in which an instigation may have been inferred. Even by the apex Court in case of *Swamy Prahaladdas* [1995 SCC (Cri) 943] the mere words uttered by the accused to the deceased "to go and die" have not been considered enough to instigate the deceased.

●

262. LIMITATION ACT, 1963 – Section 3
Applicability of Section 3 – Suit beyond limitation liable to be dismissed though limitation not set up as defence – When defendant required to raise plea regarding limitation? – Law explained.
Food Corporation of India and others v. Babulal Agrawal
Reported in 2005 (2) JLJ 233

Held :

A suit filed beyond limitation is liable to be dismissed even though limitation may not be set up as 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. In the present case except for making a passing reference in the list of dates/synopsis, no such ground or question has been raised or framed on the point of limitation. It is quite often that question of limitation involves question of facts as well which are supposed to be raised and indicated by the defendant. The objecting party is not supposed to conveniently keep quite till the matter reaches the apex Court and wake up in a non-serious manner to argue that the Court failed in its duty in not dismissing the suit as barred by time. The trial Court may not find the suit to be barred by time and proceed with the case but in that even the Court would not be required to record any such finding unless any plea is raised by the defendant.

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263. CRIMINAL TRIAL :

Stricture against a person or authority by Court – Factors to be kept in mind by the Court – Law explained.

K.P. Singh Kushwaha v. State of M.P.

Reported in 2005 (2) JLJ 258

Held :

Having heard learned counsel for the parties and after perusing the relevant documents filed by the applicant, this Court is of the view that the learned trial Court has failed to consider the guidelines laid down by the Supreme Court in the case of *State of U.P. v. Mohd. Naiem (AIR 1964 SC 703)*. His Lordship Shri S.K. Das, speaking for the four Judges' Bench, has held in para 10 of the judgment as under :

> "The last question is, is the present case a case of an exceptional nature in which the learned judge should have exercised his inherent jurisdiction under S. 561 A, CrPC in respect of the obsersations complained of by the State Government ? If there is one principle of cardinal importance– in the administration of justice, it is this : the proper

freedom and independance of judges and Magistrates must be maintained and they must be allowed to perform their function freely and fearlessly, and without undue interference by anybody, even by this Court. As the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-plan and restraint. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks, and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature and should not normally depart from sobriety, moderation and reserve."

Disparaging remarks and directions issued by the learned trial Court does not fulfil the abovementioned guidelines fixed by the apex Court and the same have been quoted with approval and applied by the Supreme Court in catina of judgments out of which some are *Dr. Dilip Kumar v. State of Assam, [(1996) 6 SCC 234], A.M. Mathur v. Shri Pramod Kumar Gupta [1990 JLJ 340 (SC)], State of West Bangal v. Babu Chakraborty, AIR 2004 SC 4324 (ibid).*

The Criminal Courts have full power and authority to pass adverse remarks against the Invistigating Agency and witnesses and also has power for issuing direction to the concerned authority to take necessary action in accordance with law, but while doing so, the Criminal Courts are required to follow the three norms as laid down by the Supreme Court in the case of *Mohammad Naiem* (supra). The adverse remarks should be passed against the Investigating Agency with a view to point out their inherent illegality and lapses in investigaiton which give benefit to the guilty person, so that they may improve in future and their superior authority may also know about the way and working of Subordinates and they may also provide them proper facility and guidance for proper and effective investigation in accordance with law so that the guilty person may not escape from the eye of law.

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PART - III

CIRCULARS/NOTIFICATIONS

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

अधिसूचना

In exercise of the powers conferred by section 28 of the Legal Service Authorities Act, 1987 (No. 39 of 1987), and in consultation with the Chief Justice of the Madhya Pradesh High Court, the State Government hereby makes the following amendment in the Madhya Pradesh State Legal Service Authority Rules, 1996, namely :-

AMENDMENT

In the said rule, in rule 20, for the figures, brackets and words "Rs. 25,000/- (Rupees Twenty five thousand)" the figures, brackets and words "Rs. 50,000/- (Rupees Fifty thousand)" shall be substituted.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,

(सत्येन्द्र कुमार सिंह)
अतिरिक्त सचिव
मध्यप्रदेश शासन विधि और विधायी कार्य विभाग

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विधि और विधायी कार्य विभाग

भोपाल, दिनांक 8 जून 2005

फा.क्र. 17 (ई) 40–88–इक्कीस–ब (एक) – भारत के संविधान के अनुच्छेद 309 के परन्तुक के साथ पठित अनुच्छेद 233 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, मध्यप्रदेश के राज्यपाल, उच्च न्यायालय के परामर्श से, एतद द्वारा, मध्यप्रदेश उच्चतर न्यायिक सेवा (भरती तथा सेवा शर्तें) नियम, 1994 में निम्नलिखित और संशोधन करते हैं, अर्थात् :–

संशोधन

उक्त नियमों में, –

1. नियम 1 के उपनियम (1) के स्थान पर, निम्नलिखित उपनियम स्थापित किया जाये, अर्थात्:

"(1) इन नियमों का संक्षिप्त नाम मध्यप्रदेश उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, 1994 है।"

2. नियम 2 में, –

(एक) खण्ड (ख) के स्थान पर, निम्नलिखित खण्ड स्थापित किया जाये, अर्थात् :–

"(ख) "सीधी भर्ती" से अभिप्रेत है नियम 3 के उपनियम (1) के प्रवर्ग (क) में के पद पर नियम 5 के उपनियम (1) में विहित रीति में की गई सीधी भर्ती;";

(दो) खण्ड (ङ) के पश्चात, निम्नलिखित खण्ड जोड़ा जाये, अर्थात् :–

"(च) "संवर्ग" से अभिप्रेत है एक पृथक इकाई के रूप में स्वीकृत सेवा की सदस्य संख्या या सेवा का भाग"

3. नियम 3 के उपनियम (1) के स्थान पर, निम्नलिखित उपनियम स्थापित किया जाये, अर्थात्

"(1) सेवा जिला न्यायाधीशों के निम्नलिखित प्रवर्गों से मिलकर बनेगी, अर्थात्

(क)	जिला न्यायाधीश (प्रवेश स्तर)	(रु. 16750–400–19150–450–20500)
(ख)	जिला न्यायाधीश (चयन ग्रेड)	(रु. 18750– 400–19150–450– 21850–500– 22850)
(ग)	जिला न्यायाधीश (सुपर समय वेतनमान)	(रु. 22850–500–24850)"

4. नियम 4 में, विद्यमान परन्तुक के स्थान पर, निम्नलिखित परन्तुक स्थापित किया जाये, अर्थात् :–

"परन्तु नियम 3 के उपनियम (1) के प्रवर्ग (ख) तथा (ग) में पदों की संख्या सेवा में संवर्ग पदों की कुल संख्या के क्रमशः 25 प्रतिशत तथा 10 प्रतिशत होगी।

5. नियम 5 के स्थान पर, निम्नलिखित नियम स्थापित किया जाये, अर्थात् :–

5. नियुक्ति का तरीका. – (1) नियम 3 के उपनियम (1) के प्रवर्ग (क) में के पदों पर नियुक्ति निम्नलिखित अनुसार की जायेगी :–

(क) सिविल न्यायाधीशों (वरिष्ठ श्रेणी) में से योग्यता–सह–ज्येष्ठता के तथा उपयुक्तता परीक्षा उत्तीर्ण करने के आधार पर पदोन्नति द्वारा 50 प्रतिशत,

(ख) ऐसे सिविल न्यायाधीशों (वरिष्ठ श्रेणी) जिनकी कम से कम 5 वर्ष की अर्हक सेवा हो, की सीमित प्रतियोगिता परीक्षा के माध्यम से सर्वथा योग्यता के आधार पर पदोन्नति द्वारा 25 प्रतिशत :

परन्तु इस बात के होते हुए भी किसी व्यक्ति ने ऐसी प्रतियोगिता परीक्षा उत्तीर्ण कर ली है, पदोन्नति के लिये उसकी उपयुक्तता का विचार उसके विगत के कार्य संपादन तथा ख्याति के आधार पर उच्च न्यायालय द्वारा किया जायेगा:

परन्तु यह और कि पदों पर भरती उपलब्ध पदों के आधार पर अपेक्षित प्रतिशतता की प्राप्ति होने तक की जायेगी।

(ग) उच्च न्यायालय द्वारा ली जाने वाली लिखित परीक्षा तथा मौखिक साक्षात्कार के आधार पर 25 प्रतिशत पद पात्र अधिवक्ताओं में से सीधी भरती द्वारा भरे जायेंगे।

(2) नियम 3 के उपनियम (1) के प्रवर्ग (ख) तथा (ग) के पदों पर नियुक्ति क्रमशः प्रवर्ग (क) तथा (ख) की सेवा के सदस्यों से योग्यता–सह–ज्येष्ठता के आधार पर उच्च न्यायालय द्वारा चयन के द्वारा की जायेगी :

परन्तु सेवा का कोई सदस्य नियम 3 के उपनियम (1) के प्रवर्ग (ख) तथा (ग) में तब तक नियुक्त नहीं किया जायेगा जब तक कि उसने पांच वर्ष तथा तीन वर्ष की निरंतर सेवा क्रमशः प्रवर्ग (क) तथा (ख) में पूरी नहीं कर ली हो."

6. नियम 7 के अंतिम पैरा के स्थान पर, निम्नलिखित पैरा स्थापित किया जाये, अर्थात् :–

"सीधी भरती तथा पदोन्नति के लिये चयन की प्रक्रिया ऐसी होगी, जैसी उच्च न्यायालय द्वारा समय–समय पर विनिर्दिष्ट की जाये."

7. नियम 8 के स्थान पर, निम्नलिखित नियम स्थापित किया जाये, अर्थात् :–

"**8. नियुक्ति प्राधिकारी.**– (1) नियम 3 के उपनियम (1) के प्रवर्ग (क) की समस्त नियुक्तियां राज्यपाल द्वारा उच्च न्यायालय की सिफारिश के अनुसार की जाएंगी."

(2) नियम 3 के उपनियम (1) के प्रवर्ग (ख) तथा (ग) में की समस्त नियुक्तियाँ उच्च न्यायालय द्वारा की जाएंगी."

8. नियम 9 में, –

(एक) उपनियम (क) के स्थान पर, निम्नलिखित उपनियम स्थापित किया जाये, अर्थात् :–

"(1) नियम 3 के उपनियम (1) के प्रवर्ग (क) में किसी पद पर नियुक्त व्यक्ति उस तारीख से जिसको वह कर्तव्य ग्रहण करता है, दो वर्ष की कालावधि के लिये परिवीक्षा पर रहेगा."

(दो) उपनियम (ख), (ग), (घ) तथा (ङ) को क्रमशः उपनियम (2), (3), (4) तथा (5) के रूप में पुनर्क्रमांकित किया जाये.

9. नियम 11 के स्थान पर, नियम स्थापित किया जाये, अर्थात् :–

"**11. ज्येष्ठता.**– (1) नियम 3 के उपनियम (1) के प्रवर्ग (क), (ख) तथा (ग) में किसी पद पर नियुक्त किये गये किसी व्यक्ति की ज्येष्ठता, जब तक कि उसे दण्ड के परिणामस्वरूप पदावनत नहीं कर दिया जाता है, निम्नानुसार अवधारित की जायेगी :–

(क) प्रवर्ग (क) के पदों पर पदोन्नत किये गये अधिकारियों के मामले में सेवा में उनकी निरंतर स्थानापन्नता की तारीख से;

(ख) प्रवर्ग (क) के पदों पर सीधी भरती द्वारा नियुक्त किये गये व्यक्तियों के मामले में उनकी नियुक्ति के आदेश की तारीख से; और

(ग) क्रमशः प्रवर्ग (ख) तथा (ग) में उसकी पदोन्नति के आदेश की तारीख से या ऐसी तारीख से, जो उच्च न्यायालय द्वारा इस संबंध में विनिर्दिष्ट की जाये :

परन्तु जहां प्रवर्ग (क) में के किसी पद पर पदोन्नत किये गये किसी सदस्य के मामले में, निरन्तर स्थानापन्नता की तारीख और उसी प्रवर्ग में उसी पद पर सीधी भरती द्वारा नियुक्त किये गये व्यक्ति के मामले में, सेवा में पद ग्रहण करने की तारीख एक ही है तो पदोन्नत किया गया अधिकारी ज्येष्ठ माना जायेगा;

परन्तु यह और कि एक ही तारीख के आदेश द्वारा पदोन्नत किये गये व्यक्तियों या एक ही तारीख के आदेश द्वारा सीधी भरती से नियुक्त किये गये व्यक्तियों के बीच पारस्परिक ज्येष्ठता का क्रम वही होगा जिस क्रम में उनके नाम उच्च न्यायालय द्वारा सिफारिश किये गये हैं.

(2) इन नियमों के प्रारंभ होने के पूर्व विभिन्न प्रवर्गों में नियुक्त किये गये या पदोन्नत किये गये व्यक्तियों की ज्येष्ठता का अवधारण भी उपरोक्त सिद्धांतों के आधार पर किया जायेगा."

10. नियम 12 के स्थान पर, निम्नलिखित नियम स्थापित किया जाये, अर्थात् :–

"**12. वेतन तथा भत्ते.–** (1) उच्चतर न्यायिक सेवा के सदस्यों का महंगाई भत्ता मध्यप्रदेश न्यायिक सेवा वेतन पुनरीक्षण नियम, 2003 द्वारा शसित होगा तथा उसी महंगाई भत्ते के फार्मूले का अनुसरण किया जायेगा जो कि केन्द्रीय सरकार द्वारा अंगीकृत है."

(2) जिला न्यायाधीश (प्रवेश स्तर), जिला न्यायाधीश (चयन ग्रेड) तथा जिला न्यायाधीश (सुपर समय वेतनमान) का मूल वेतन उच्च न्यायालय के न्यायाधीश के वेतन के क्रमशः 71.6 प्रतिशत, 80 प्रतिशत एवं 91.7 प्रतिशत होगा।

●

The law cannot make all men equal, but they are equal before the law in the sense that their rights are equally the subject of protection and their duties of enforcement.

- Pollock, Frederick

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MINISTRY OF POWER

NOTIFICATION

G.S.R. 379(E).– In exercise of powers conferred by section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government hereby makes the following rules, namely :-

1. Short title and commencement. –

(1) These rules shall be called the Electricity Rules, 2005.

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

2. Definitions.–

In these rules, unless the context otherwise, requires:

(a) "Act" means the Electricity Act, 2003;

(b) the words and expressions used and not defined herein but defined in the Act shall have the meaning assigned to them in the Act

3. Requirements of Captive Generating Plant.–

(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

(a) in case of a power plant-

(i) not less than twenty six percent of the ownership is held by the captive user (s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including-

Explanation :-

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation.–(1) For the purpose of this rule.–

(a) **"Annual Basis"** shall be determined based on financial year;

(b) **"Captive User"** shall mean the end user of the electricity generated in a Captive Generating Plant and the term **"Captive Use"** shall be construed accordingly;

(c) **"Ownership"** in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) **"Special Purpose Vehicle"** shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.

4. ..... (Not reproduced)

5. ..... (Not reproduced)

6. ..... (Not reproduced)

7. **Consumer Redressal Forum and Ombudsman.**– (1) The distribution licensee shall establish a forum for redressal of grievances of consumers under sub-section (5) of section 42 which shall consist of officers of the licensee.

(2) The Ombudsman to be appointed or designated by the State Commission under sub-section (6) of section 42 of the Act shall be such person as the State Commission may decide from time to time.

(3) The Ombudsman shall consider the representations of the consumers consistent with the provisions of the Act, the Rules and Regulations made hereunder or general orders or directions given by the Appropriate Government or the Appropriate Commission in this regard before setting their grievances.

(4) (a) The Ombudsman shall prepare a report on a six monthly basis giving details of the nature of the grievances of the consumer dealt by the ombudsman, the response of the Licensees in the redressal of the grievances and the opinion of the ombudsman on the Licensee's compliance of the standards of performance as specified by the Commission under section 57 of the Act during the preceding six months.

(b) The report under sub-clause (a) above shall be forwarded to the State Commission and the State Government within 45 days after the end of the relevant period of six months.

8. **Tariffs of generating companies under section 79.**– The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.

9. **Inter-State trading Licence.**– A licence issued by the Central Commission under section 14 read with clause (e) of sub-section (1) of section 79 of the Act to an electricity trader for Inter-State Operations shall also entitle such electricity trader to undertake purchase of electricity from a seller in a State and resell such electricity to a buyer in the same State, without the need to take a separate licence for intra-state trading from the State Commission of such State.

10. **Appeal to the Appellate Tribunal.**– In terms of sub-section (2) of section 111 of the Act, the appeal against the orders passed by the adjudicating officer or the appropriate commission after the coming into force of the Act may be filed within fortyfive days from the date, as notified by the Central Government, on which the Appellate Tribunal comes into operation.

11. **Jurisdiction of the courts.–** The Jurisdiction of courts other than the special courts shall not be barred under sub-section (1) of section 154 till such time the special court is constituted under sub-section (1) of section 153 of the Act.

12. **Cognizance of the offence.–** (I) The police shall take cognizance of the offence punishable under the Act on a complaint in writing made to the police by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them in this regard or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be.

(2) The police shall investigate the complaint in accordance with the general law applicable to the investigation of any complaint. For the purposes of investigation of the complaint the police shall have all the powers as available under the Code of Criminal Procedure, 1973.

(3) The police shall, after investigation, forward the report along with the complaint filed under sub-clause (1) to the Court for trial under the Act.

(4) Notwithstanding anything contained in sub-clauses (1), (2) and (3) above, the complaint for taking cognizance of an offence punishable under the Act may also be filed by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be directly in the appropriate Court.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every special court may take cognizance of an offence referred to in sections 135 to 139 of the Act without the accused being committed to it for trial.

(6) The cognizance of the offence under the Act shall not in any way prejudice the actions under the provisions of the Indian Penal Code.

13. **Issue of Orders and Practice Directions.–**

The Central Government may from time to time issue Orders and practice directions in regard to the implementation of these rules and matters incidental or ancillary thereto as the Central Government may consider appropriate.

[F.No.23/4/2004-R & R]

Ajay Shankar, Addl Secy.

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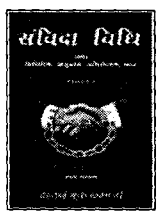

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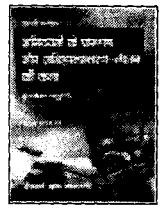

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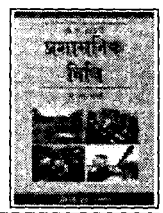

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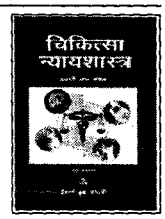

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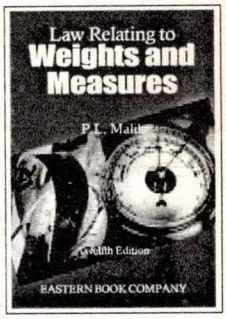

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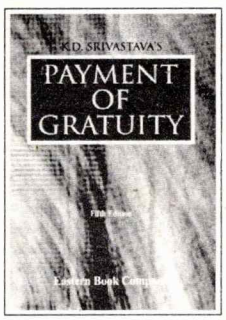

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