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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-2006

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

PART-IV
(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

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

- Editor

CORRIGENDUM

The readers are requested to replace the parties name "National Garage, Raipur (CG) v. Oriental Insurance Co. Ltd., Raipur, Reported in 2005 (2) MPHT 13" in Note No. 166 of JOTI Journal June, 2006, Part II Page 197.with the following :

"Khemchand (Dead) through L.Rs. Shyamlal and another v. Govindram and others, Reported in 2006 (2) MPHT 304".

NEWTELEPHONE NUMBERS OF J.OT.R.I

1.	HON'BLE SHRI JUSTICE DIPAK MISRA, CHAIRMAN, HIGH COURT TRAINING COMMITTEE	2629492 **(O)**
3.	SHRI SHAILENDRA SHUKLA, ADDL. DIRECTOR	2629588 **(O)**
3.	SHRI KAPIL MEHTA, DEPUTY DIRECTOR	2629788 **(O)**

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director, JOTRI

Esteemed Readers!

Let me regret at the outset that there has been considerable delay in bringing out this issue of JOTI Journal. With the diversification in the activities of the Institute without proportionate expansion of infrastructure, we had a testing time in the recent past. In past few months, the Institute has organized six innovative training programme/workshops, each requiring considerable attention and efforts. We made it a point to come out with reading material for each of the workshops which related to various arenas of law including mediation, consumer protection, land acquisition, juvenile justice and human rights. This is not to justify the delay. We are aware that we have to make up the delay. We would ensure that the next two issues of this year are brought out within the year itself so that we can enter the new year without having arrears in this respect.

The country is passing through a mega reform process and the process of judicial reform happens to be a part of it. Globalization coupled with information technology revolution requires an innovative approach to handle the challenges of 21st century, be it in any field including judicial administration. We started our training programmes of second half of year 2006 with a two days "Foundation Training Programme in Mediation Procedures" for lawyers and judicial officers. This programme was inaugurated by Hon'ble Shri Justice S.B. Sinha, Judge Supreme Court of India. The programme focused on application of medication technique for amicable settlement of cases. Mediation indeed is a very effective tool of dispute resolution. Statistics shows that in United State of America almost 85-90% cases are decided through the application of mediation technique. Being a complementary process to the traditional adversorial litigation, it has certain distinctive advantages over the latter including aspects of flexibility, expeditiousness and cost effectiveness. Needless to say, the process provides a win-win situation to both parties where none is a loser. As a sequel to this programme, the first Mediation Centre in Madhya Pradesh was started on 8th August, 2006 at the main seat of High Court at Jabalpur.

A two days' workshop on Consumer Protection Act was held on 16th and 17th July, 2006 which was inaugurated by Hon'ble the Chief Justice. The workshop focused on appraising the participants, who were none other than the Presidents of District Consumer fora, about the developments which have taken place in the field of consumer jurisprudence and to motivate them about effective and expeditious redressal of consumer grievance so that the consumer redressal mechanism helps in enswring speedy and effective Justice to the concerned.

The workshop on Land Acquisition Act held on 31st July and 1st August, 2006 basically focused on the call given by the Apex Court almost thirteen years back underlining the social accountability of the Courts in expeditious disposal of land acquisition cases because delay in disposal of these matters ultimately costs the State heavily in terms of interest etc.

As we know in past couple of years there has been an explosion of cases regarding dishonour of cheques filed u/s 138 of Negotiable Instruments Act. In Indore itself the number of such cases is said to be more than 40,000. To address this situation, the Institute organized a workshop at Indore itself in the first week of August i.e. 5th August, 2006. The workshop aimed at providing necessary inputs and skills to the Judicial Officers so that they can dispose off the cases expeditiously without compromising with the quality which again is the central theme of the provisions contained in Chapter 17 of Negotiable Instruments Act as amended by the Act of 2000.

A four days' training programme for Chief Judicial Magistrates, Additional Chief Judicial Magistrates and Judicial Magistrates on "Juvenile Justice and Child Psychology" was organized from 21st to 24th August, 2006 which aimed at imparting requisite skills in juvenile psychology to the Judicial Officers who will be dealing with these cases as Principal Magistrates of Juvenile Justice Board as contemplated in the Juvenile Justice (Care & Protection of Children) Act, 2000. The training programme also focused on the aspect of rehabilitation and re-integration of child in conflict with law and the role of Judicial Magistrates as social scientists in this respect.

A two days' workshop on "Protection of Human Rights" for District Judges of the respective districts was again a very ambitious programme which was inaugurated by Hon'ble Shri Justice D.M. Dharmadhikari, former Judge, Supreme Court of India and Chairman, Madhya Pradesh Human Rights Commission. The programme not only focused on the role of district judiciary in protection of human rights but also tried to find out a mechanism for effective working of the human rights courts contemplated in the Act.

It has been said that with vision, every person, organization and country can flourish but without vision, we perish. We express our commitment to the vision provided to this Institute by Hon'ble the Chief Justice which continues to guide us in our march towards the goal of excellence in Judicial Training. We express our resolve for the same

Thank you!

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Hon'ble the Chief Justice Shri A.K. Patnaik saluting the National Flag after unfurling the same at the main seat of the High Court of M.P. on the Independence day. (15th Aug. 2006)

Inaugural session of the workshop on "Protection of Human Rights – Role of District Judiciary" – 30th August, 2006. Dignitaries from L to R – Hon'ble the Chief Justice, Hon'ble Shri Justice D.M. Dharmadhikari, Chairman, M.P.H.R.C. and Hon'ble Shri Justice Dipak Misra

Hon'ble Shri Justice V.D. Gyani (Retd.) addressing the Principal District & Sessions Judges in the workshop on – "Protection of Human Rights – Role of District Judiciary" on 31 August, 2006.

Participating Principal District & Sessions Judges in the workshop on– "Protection of Human Rights – Role of District Judiciary" on 30th August, 2006

PART - I

CONSUMER COURTS & ENVIRONMENTAL PROTECTION

Justice N.K. Jain,
Chairman,
State Consumer Grievance
Redressal Commission,
Bhopal.

We are all consumers in one form or the other. Even a child in a mother's womb is a consumer. The consumer who was once the 'King of market' has in the present socio-economic scenario become victim of many unfair and unethical tactics adopted in the market.

It is often said that a person purchasing goods is responsible for protecting himself and would do so by applying his intelligence and experience in negotiating the terms of any purchase. However this 'let the buyer beware' doctrine of law might have been appropriate in early times when consumer products were less sophisticated and could be inspected before purchase. But now the conditions have changed. Many modern goods are technological mysteries and the consumer knows little or nothing about these goods. The principle of **Caveat emptor,** thus has ceased to be a general rule. The consumer needs protection of law when goods fail to live upto their promises or indeed cause injury. In every society, consumer remains the centre of gravity of all business and industrial activities. He therefore, needs protection from the manufacturer, producer, supplier, wholesaler and retailer.

Consumer policies are no more national issue but have acquired international dimensions. The General Assembly of the United Nations on April 9, 1985 adopted a consumer protection resolution providing guidelines and frameworks for Governments particularly the developing countries like ours, to use those guidelines in elaborating and strengthening consumer protection policies and legislation. Emphasis was on (i) the protection from hazards to health and safety; (ii) the promotion and protection of economic interests; (iii) access to adequate information; (iv) control on misleading advertisements and deceptive representations; (v) consumer education; and (vi) effective consumer redress.

Our Constitution envisages social and economic justice to all. Needless to say that consumer protection is a part of this constitutional mandate. It was for this reason that several laws have been enacted in the field of consumer protection relating to standardization, grading, packing and branding, prevention of food adulteration, short weights and measures, hoarding, profiteering etc. M.R.T.P. Act, 1969 was again a major step in the same direction. But, all these

are scattered pieces of legislation. Recourse to these laws was costly and troublesome rather beyond the reach of small consumers who constitute a vast majority but a long way from affluence. The procedures are complex, cumbersome and time consuming. The Courts are already over burdened. All these factors substantially reduced the impact of these legislations in protecting the consumers more particularly the small and poor ones. Parliament therefore, passed a potentially very important legislation *viz.* The Consumer Protection Act, 1986 to provide better protection to the interest of consumers. The Act is a comprehensive legislation with its main thrust on providing simple, speedy and inexpensive redressal of consumer grievances. The Act came into force on April 15, 1987 except Part-II which came in operation from 1st July, 1987. The most important feature of this Act is that its provisions are in addition to and not in derogation of provisions of any other law for the time being in force. They are supplementary in nature and have no overriding effect.

The Act has undergone several amendments in 1991, 1993 and 2002-03. The Act envisages formation of Consumer Protection Councils at the Centre, State and District levels to promote and protect the interests of consumers and to advise the Governments on the measures to be taken in that direction. More importantly it provides three tier quasi judicial machinery at the District, State and National levels for redresal of consumer grievances. These agencies are headed by judicial authorities (sitting or retired) of the rank of District Judge at the District level, High Court Judge at the State level and Supreme Court Judge at the national level with atleast two other members of integrity and experience of atleast 10 years in various fields like Law, Commerce, Education, Administration etc. A very fair procedure is also prescribed for selection and appointments of officers of these agencies leaving no or little scope for arbitrariness and political interference. These agencies have been invested with powers of civil court necessary to adjudicate consumer disputes expeditiously. While they have all the trappings of civil courts but are not bound by rigid rules of procedure, pleadings and evidence. A time bound inquiry of summary nature is envisaged under the Act. There are provisions for appeal and revision. Approach of these agencies is always consumer friendly. A salutary provision in the form of Section 27 is contained in the Act which empowers every such agency to punish a person or party not obeying orders passed under the Act.

The Act applies to all goods and services in private, public or the co-operative sector. Thus, a consumer can initiate action under the Act against the defective goods or deficient services rendered even by the public sector or Government agencies such as Railways, General Insurance, Telephones, Airlines, Banks, State Electricity Boards, Housing Boards and State Roadways etc.

However, the question arises as to whether Consumer Courts or to be more accurate the Consumer Disputes Redresal Agencies established under the Consumer Protection Act have any role to play in environmental protection. At the out-set it may be observed that so far no case with reference to environment and pollution laws has been filed or decided in our State. I have also not come across of any decision of the National Commission on the point. However I am of the view that there are provisions in the Consumer Protection Act which empower these agencies to deal with the environmental and pollution laws. In order to understand the subject we have to refer to certain provisions of the Consumer Protection Act. The Act is intended and provides for provisions for better protection of interests of consumers. As per section 2 (1) (c) of the Act, a complaint before such an agency or forum can be filed on three grounds, namely:

(i) That an unfair trade practice or restrictive trade practice has been adopted by any trader or service provider.

(ii) That the goods bought by him or agreed to be bought by him suffer from one or more defects.

(iii) That the service hired or availed of or agreed to be hired or availed by him suffer from any deficiency in any respect.

"Unfair trade practice" and "restrictive trade practice" have been assigned the same meaning as provided under the MRTP Act. We may not go into these definitions for the purposes of our discussion. However the terms "defect" and "deficiency" as defined under the Act are relevant.

(f) "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard *which is required to be maintained by or under any law for the time being in force or* under any contract express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods.

(g) "deficiency" means any fault, imperfection or shortcoming or inadequacy in the quality, nature and manner of performance *which is required to be maintained by or under any law for the time being in force or* has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

(Emphasis supplied)

Definition of term 'defect' when seen in conjunction with the definitions of the words and terms 'environmental pollutant' and 'hazardous substance' as defined under section 2 of the Environmental (Protection) Act, 1986 (for short the "Act of 1986"), it becomes clear that the term 'defect' as defined under the CP Act would include a consumer article containing an environmental pollutant or hazardous substance. In fact, the very purpose of the Consumer Protection Act is to protect a consumer from hazards to health and safety.

The question of environmental protection is more relevant in the matter of rendering of consumer services. If any such service hired or availed of by a consumer is such which creates environmental pollution, the same may be declared by a consumer court as deficient and the court may order for removal of the deficiency and also order for payment of compensation to the consumer. As already pointed out various public sectors or government agencies such as railways, state roadways, local bodies like municipalities, town development authorities and housing boards are involved in rendering various consumer services to the people in general. These agencies can be held guilty of rendering defective service if their action while rendering the service has in any manner created environmental pollution. For example, a person having purchased a railway ticket on arriving to a railway station finds that its sanitary conditions are so bad so as to adversely affect the inter-relationship which exists among and between water, air, land and human beings or that environmental pollutant is present in the environment of the railway premises, the person concern may approach the redressal agencies for awardment of compensation. The same rule would apply to Airlines and State Roadways. Similarly the local self governments providing various services like supply of water, maintenance of roads and sanitary conditions etc. can be held responsible for deficiency in rendering the services. It may be observed here that there have been some decisions which provide that any tax or cess charged for rendering the services by these local self governments is not a consideration paid for hiring any such service. (See the decision of the National Commission in the case of *Mayor, Calcutta Municipal Corporation v.Tarapada Chatterjee & Ors.), I (1994) CPJ 99 (NC).* I am personally of the view that these decisions need to be reconsidered, atleast in the matter of those services where a consumer has an option to avail or not to avail. For example, a consumer has always an option whether or not to have a water connection from the municipal corporation. So if there is any deficiency in the matter of supply of water of if the water so supplied is not pollution free, the consumer should have right to approach the consumer court under the CP Act. Builders and government agencies like housing boards and development authorities providing housing services are also expected to observe the provisions of the environment and pollution laws. Any violation on their part of these laws may constitute deficiency in service attracting the provisions of the Consumer Protection Act. In fact, there is need to educate the consumers and make them aware of their rights more particularly with reference to environment and pollution laws.

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TRAFFICKING OF WOMEN AND CHILDREN FOR COMMERCIAL SEXUAL EXPLOITATION - ROLE AND CHALLENGES BEFORE JUDICIARY

RENU SHARMA
District Judge,
Bhopal

INTRODUCTION :

Increased economic globalization and privatization has resulted in an increased familiarization of poverty, forcing greater numbers of women worldwide to migrate in search of work. Lured by false promises, misled by false information, many women fall prey to unscrupulous traffickers, allowing their dream for a better life to be exploited. Trafficking is linked with forced prostitution that follows false promises of well-paid jobs. It is an issue that involves both gender and basic human rights abuses. It is a form of violence against women. Thousands of women are being trafficked and brought into conditions in which their basic human rights are violated and in the worst case, they are denied their right to life. Only a minority of cases are reported and convictions of traffickers are rare. Trafficking networks may recruit and transport women and children legally or illegally for slavery-like work, including forced prostitution, sweatshop labour, and exploitative domestic servitude. The trafficker often poses as a labour contractor or a helpful person who offers job or marriage. Many of these migrants end up as victims of illegal and unscrupulous trafficking networks. Not all trafficked women wind up as dancers or prostitutes. Many find themselves in jobs which we might believe are perfectly legitimate. The job itself may be legitimate, but the conditions under which the women work are not. In most cases the women's passport is taken away, she is not permitted contact with the outside world, wages are typically below minimum wage, no medical benefits are provided, and most often she is required to work at least 18 hours a day. The very same people whom they have come to trust often victimize them is the home. This form of *enslavement is no less insidious than one in which the woman is forced into sexual slavery and all her personal freedoms and choices are denied.* Even when women voluntarily enter into these situations, in hope of making money or finding a better life, the dynamics of the brutal, often illegal sex industry, quickly leave the women with few other options and powerless to leave. Runaway children are trapped by agents and inducted into flesh trade, kidnapping and abduction is yet another means of procuring.

It is reported that young girls and women are being trafficked across well-beaten paths within South Asia and further beyond. From just two routes- Nepal to India and Bangladesh to Pakistan- an estimated *9,000 girls and women are trafficked annually.* Trafficking is taking place in these cases by a variety of means such as promises of jobs or marriages, and at times, even by physical violence and abduction. In India, most women enter prostitution for reasons which tend to be

primarily economic, while some have a base in custom and tradition at times like the Bachra community in Madhya Pradesh. Commercial Sexual Exploitation of Children is particularly high in beach tourism destinations like Goa.

Some pertinent, interrelated issues need to be considered for effective strategies, namely invisibility of the problem of trafficking in women and children owing to its illegal nature, vulnerability of the women and child victims, especially due to their gender and age, use of women and children as economic commodities to be exchanged or sold by strong trafficking syndicates, lack of proper and timely prosecution, lack of legislative measures addressing regional trafficking in women and societal attitudes condoning trafficking in women and young girls and hence causing stigmatization.

LEGAL PROVISIONS

Constitution of India- Article 23 "Right against Exploitation" prohibits the trafficking of human beings and provides that any contravention of this right shall be an offence punishable by law.

Article 39 (e) and (f)- Directive Principles of State Policy declares that the State policies should be directed towards securing that the tender age of children is not abused and that childhood and youth are protected against exploitation and material abandonment.

In the light of the Constitutional provisions, the Suppression of Immoral Traffic in Women and Girls Act was enacted in 1956. It was amended in 1986 and re-titled as Immoral Traffic (Prevention) Act to widen the scope so as to cover all persons, whether male or female, who are exploited sexually for commercial purposes. Further, crimes involving children and minors were made more stringent by enhancing the period of imprisonment, along with appointment of Trafficking Police Officers to investigate crimes having inter-state ramifications within the country. The Act prohibits prostitution in its commercialized form without making **prostitution an offence per se.** Section 26 (b) of the act states *"Prostitution means the sexual exploitation or the abuse of a person for commercial purpose and the expression 'prostitute' shall be construed accordingly".* 'Stringent' punishment is prescribed for those inducting children below 16 and minors, (16 to 18) for the purpose of prostitution. As far as the judicial structure is concerned, Central or State Governments are empowered to consult High Courts and establish special courts for speedy trial of crimes under this Act. Some discretion is also provided to Presiding Officers of both specific and other courts to try cases summarily. Finally, the law provides for the appointment of Special Police Officers in specific areas to deal with crimes under the Act in that area. To assist the Special Police Officer, the State Governments are empowered to associate a non-official advisory body consisting of not more than 5 leading social workers of that area, including women, to advise them on the implementation of Act.

Under the Juvenile Justice (Care and Protection) Act, 'neglected child' includes a juvenile who lives in a brothel or with a prostitute or frequents a place

used for prostitution or who is likely to be abused or exploited for immoral or illegal purpose. A prostitute's child is automatically a neglected child and the Magistrate has been given powers to segregate the child from the mother.

The Indian Penal Code Sections 375 (Rape); 377 (Unnatural practices); 354 (Molestation and outraging the modesty of women); 372 and 373 (Selling and procuring persons for the purpose of prostitution and trafficking); 361 (Kidnapping); 366 (Kidnapping and abduction for immoral purpose); 366-A (Procuring of girl under 16 years); 366-B (Import of girl under 21 years from foreign country or J&K for immoral purpose; – Pedophilia (No specific law but can be covered under various sections of IPC); Local laws banning Devdasi/Jogin cults.

Trafficking has been defined by the UN General Assembly in 1994 as *'the illicit and clandestine movement of persons across national and international borders, illegally from developing countries with the goal of forcing women and girl child into economically oppressive and exploitative situation for profit of recruiters, traffickers and crime syndicates'*. The United Nations has recognized trafficking as a form of slavery and violence against women. In 1949, the United Nations General Assembly passed the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution. The convention states that *"prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community."*

The *Victims of Trafficking and Violence Protection Act of 2000* defines **"severe forms of trafficking in persons"** as follows:

A. Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,

B. The recruitment, harbouring, transportation, provision, or obtaining of person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

DIFFICULTIES IN IMPLEMENTATION

The present laws tend to penalize the prostitute who is really the victim, more than the exploiters. Whenever a brothel is raided, it is the victim who lands in jail, while the culprits – the clients, brothel owners go scot-free. **It has been felt that the law needs to be oriented more to punishing the perpetrator and helping with the rehabilitation and welfare of the sex worker.** Practices routinely used by traffickers, *such as debt bondage, threats, intimidation, and withholding of wages are illegal under National laws but the exploiters are not booked under the relevant provisions by the investigation agencies.* A trafficked person must be treated not as a criminal but as a fully empowered human being. Invariably only *women are booked u/s 7 or 8 ITPA* for carrying prostitution in vicinity of public place or seducing or soliciting for purpose of prostitution in any public place. **Rarely is charge sheet filed against her exploiters.**

There is no separate law against child sexual abuse. Rape of 'minors' is covered under Section 375 IPC and cases of neglected and vulnerable children, are covered under the J.J. Act **but law does not address the needs of sexually abused children.** In case of a girl child below 16 years, offence of rape is complete even if she consents. Section 114A Evidence Act shifts the burden of proof on the accused so far as rape of a minor is concerned. One fails to understand why charge sheets u/s 375, **is not filed against persons, sexually exploiting minors?**

There is no uniformity as to the age of the Child in different Acts dealing with Children in general. Under Factories Act 1948 and Child Labour (Prohibition and Regulation) Act 1986, a child is a person below the age of 14 years; Under Indian Penal Code the definition of a Child is person below 12 years; under J.J. Act 2000, person below 18 years is a child; in ITPA a female child should not exceed 16 years, while a minor is defined as being upto 18 years. These discrepancies in law are providing ample room for perpetrators to escape from the hands of law.

Public perception of women and child victims of commercial sexual exploitation is conditioned by **patriarchal attitudes and gender roles.** There is also an attitude of refusal to recognize the existence of trafficking and commercial exploitation of children. A visit to the red light areas will bring out this fact where number of young girls all dressed up, will be found peeping from the houses where they are kept.

We are party to the Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Rights of the Child. Only a very small number of cases decided by the courts make use of international human rights laws to interpret and apply laws in a manner that would advance justice for women.

Barriers persist for women in **access to justice,** including their lack of knowledge of their rights, social stereotyping of their roles and their inability to approach the courts because of the costs involved.

At times a battered wife is compelled to take to the streets to make both ends meet. She has no shelter nor the means to fight for her rights. Lengthy court proceedings prove a hindrance. Family courts do not exist in several districts, and there is a **lack of accessible and effective structure for dealing with family matters, and with violence against women.** Further the limited jurisdictional boundaries of family courts significantly restrict their effectiveness. These shortcomings lead to inadequate access to justice for women in cases of violence against women and family law matters. In many instances, the number of judges and magistrates assigned to family matters is insufficient to ensure that such matters are dealt with expeditiously, and the infrastructure of these courts is inadequate or absent to deal with such cases in an effective manner.

In addition, courts lack the professional counsellors, psychiatrists and others support personnel necessary to function effectively. There is of lack of respect for orders issued by magistrates and the tendency to trivializing such orders exists.

RECOMMENDATIONS :

(i) Awareness-raising of judges, Magistrates and lawyers about the Convention on the Elimination of All Forms of Discrimination against Women and Rights of Child, its relevance in domestic courts, training and exchange of information so as to increase their capacity for a gender-sensitive interpretation of laws and statutes.

(ii) India follows an adversorial legal system with in–built bias in favour of the accused. Judges are trained to protect the rights of the accused who in the eyes of law is innocent till proved guilty. But if there is an accused, there is also a victimized person. Word 'victim' connotes suffering and the courts need to recognize this aspect while handling the cases of sexually exploited victims. One has to keep in mind women and children who are involved in prostitution are in that profession not by choice but are 'victims of circumstances'. The present laws should be reviewed to ensure that the victims of commercial sexual exploitation **are not re-victimized and that all the exploiters** including clients, traffickers, parents, guardians and others who help them are punished. The human rights of victims should be assured and steps should be taken to ensure they are not criminalised or imprisoned.

(iii) The concepts of victimology, has been introduced into the criminal law recently. Provisions for confiscation of assets of exploiters, compensation by exploiters to the victim should be considered. Victims of trafficking should be awarded compensation through criminal compensation schemes, which could be financed through the confiscated criminal revenue of traffickers.

(iv) Creation of *adequate support systems* and structures, for victims of trafficking, women who are victims of violence and their children. They should have access to legal, psychological and medical assistance, including provision of legal aid schemes for women, whether sponsored by States or otherwise, seeking relief in violence cases and in family matters like maintenance, shelter so as to ensure such women can obtain proper advice and access to courts.

(v) Legislation on violence against women to include comprehensive definitions of violence, including sexual harassment, stalking, economic abuse and marital rape as a criminal offence; Uniformity in definition of Child in all enactments dealing with children. Adoption Laws, based on the Convention of comprehensive and progressive legislation on family matters, its implementation in a systematic and gender-sensitive manner.

(vi) Many victims are held in debt bondage. Laws including Bonded Labour Abolition Act should be strictly implemented.

(vii) Measures to encourage victims of trafficking to identify traffickers and act as witnesses in criminal prosecutions should also be explored. These might include **restrictions on deportation where victims are prepared to act as witnesses, and witness protection measures should be introduced.**

(viii) Establishment or reinforcement of family courts, and/or family divisions at the district/sub-division level; upgrading of the scope and mandate of such Court's and divisions to render effective and-gender-sensitive justice for women and children, the expansion of the jurisdiction of magistrates to include hearing and determining issues of rights to property, shelter, maintenance in cases of domestic violence. Creation of effective mechanisms to ensure that women receive awarded maintenance payments and that granting of such payments is guided by equitable considerations;

(ix) Even with best of Laws, public awareness is necessary to bring its violations to the notice of the authorities. Awareness raising campaigns to enhance women's knowledge of their rights and legal literacy programs to strengthen men's contribution to and participation in gender equality issues, to change cultural perceptions to make violence against women unacceptable and for measures directed at the elimination of social stereotypes that prevents women from seeking justice are required.

(x) Every child has a right against **'Exploitation and Abuse'** (AIR 1986 SC 1773). While the situation is not good for adult victims, there are almost no rehabilitation and reintegration programs specifically directed to child victims of trafficking. Most shelters, to which young people have access, if they exist at all, are designed for victims of domestic violence and other trauma. Trafficked children need to be seen as victims first.

(xi) Special provisions to protect children in the judicial system are needed so that child victims of trafficking can be protected from their abusers and from further trauma. This should include provision of a safe place during police investigations and judicial proceedings, a safe system for filing complaints and giving evidence, speedy trial and a safe system of reincarnation. All cases involving crime against children should be handled by special courts within a specific time frame presided preferably by lady magistrates. Trials should be in camera. Child development professionals must be provided to aid the victims when cross-examination are done, or judges themselves should cross examine the child victim and not the defence advocate. The burden of proof should be shifted to the accused. The phrase "in the best interest of the child" provides the key to interpretation in cases involving children.

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ROLE OF DISTRICT JUDICIARY IN PROTECTION OF HUMAN RIGHTS

VED PRAKASH
Director, JOTRI

Human rights are entitlements of every man, woman and child because of their existence as human being. It has aptly been said that a person is not only flesh, bone and blood but some 'basic rights' are also inbuilt and inherent in him which enable him to transform into a human being.

The law relating to recognition and protection of human rights is of recent past. The Covenant of League of Nations adopted after the First World War in 1919 emphasized the primacy of human dignity over the interests of States. The incidents of Nazi holocaust persuaded the world community to consider the issue of human rights a bit seriously. The United Nations Charter adopted in 1945 set as one of its three main goals to define and protect the rights of every human being regardless of race, sex, language or religion. The Preamble of the United Nations Charter reaffirmed faith in fundamental human rights and the dignity and worth of human person. This paved the way for adoption by the United Nations Assembly on 10th December, 1948 "The Universal Declaration of Human Rights", which has thenceforth been the underlying philosophy in development of human rights' law.

The aforesaid declaration has been supplemented by following International Conventions or Declarations :

i. International Covenant of Civil and Political Rights, 1966
ii. International Covenant on Economic, Social and Cultural Rights, 1966
iii. International Convention on the Elimination of all forms of discrimination against woman 1981
iv. Convention against torture and other cruel inhuman or degrading treatment or punishment, 1987
v. Vienna Declaration of 1993
vi. International Convention on the Rights of the Child, 1998

The Constitution of India in Part III incorporates the concept of human rights as fundamental rights, which are enforceable under Article 32 by the Supreme Court and under Article 226 by the High Courts. Madhya Pradesh pioneered in establishment of State Human Rights Commission in 1992. Thereafter National Human Rights Commission came into existence in 1993. Protection of Human Rights Act was also enacted in the year 1993.

The incorporation of human rights as fundamental rights in Part III of our Constitution generated the hope that there will be no oppression and violation of human dignity. The Apex Court and High courts through various pronouncements, have vigorously championed the cause of human rights and have given a wider meaning to the concept of human rights.

The poverty, illiteracy and innocence of the masses have been great hurdles in real and effective enjoyment of human rights by the majority of the people. The fact remains that the vast majority of the people living below poverty line do not have the means to approach the Constitutional Courts for enforcement of their rights.

Therefore, it is worthwhile to examine how the Subordinate Judiciary can help the millions of poor, downtrodden and illiterate Indians in enforcing their human rights and what may be its role in the given situation. Though Subordinate Judiciary is not having the authority to issue a writ or direction, still it may play a meaningful role in safeguarding the human rights of the people, particularly, the poor, in cases which are brought before these Courts on criminal and civil side.

The role of Subordinate Judiciary regarding protection of human rights of the poor and under privileged people can be examined with reference to following :-

i. Arrest
ii. Handcuffing
iii. Remand
iv. Custodial Interrogation
v. Confessions
vi. Bail
vii. Legal Aid
viii. Speedy Trial
ix. Prison Conditions

I. ARREST

The law of arrest, as pointed out in *Joginder Kumar V. State of U.P., (1994) 4 SCC 260* is one of the balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individual collectively. Expressing that nearly 68% of arrests were unnecessary and that unjustified action accounted for 43.2% of the expenditure of the jails. The Apex Court held that no arrest can be made because if is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so.

Article 22 of the Constitution of India provides constitutional safeguard against arbitrary or unreasonable arrest. It has following distinct features :

(a) An arrested person should be informed of the grounds of arrest.
(b) An arrested person has a right to consult and be defended by a legal practitioner of his choice.
(c) An arrested person should not be detained in custody for more than 24 hours except under the authority of the Magistrate.

Apart these safeguards, the Apex Court in the case of *Joginder Kumar's case* (supra) has issued following directions for being observed while arresting a person :

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
2. The police officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly.

The Apex Court has ordained that it shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

The aforesaid Constitutional mandate is further manifest in the provisions of Sections 50, 56, 57 and 167 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') which respectively provides that an arrested person should be informed about the grounds of arrest as well as the right to be enlarged on bail in case of bailable offence. Such person should be taken before the Magistrate without unnecessary delay and should not be detained in custody for more than 24 hours excluding the time necessary for travel except under the orders of the Magistrate u/s 167.

Apart that Section 54 of the Code provides that the Magistrate on a request being made by the arrested person is obliged to direct the examination of the arrested person by a Registered Medical Practitioner. In *Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96* it has been directed by the Apex Court that the Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under Section 54 of the Code of Criminal Procedure, 1973 to be medically examined.

The aforesaid provision of law coupled with the directions issued by the Apex Court provide a complete scheme to ensure that basic human rights of an arrested person are not transgressed.

Informal arrest and detention in police custody without recording arrest of the person taken into custody is one of the major problems concerning issues relating to arrests. Madhya Pradesh Police Regulation 757 in specific terms prohibits against such practice. A police officer violating the aforesaid regulation may invite penal action u/s 29 of the Police Act.

II. HANDCUFFING

In *Sunil Batra v. Delhi Administration, AIR 1978 SC 1675* and again in *Citizens for Democracy v. State of Assam, (1995) 3 SCC 743* the Supreme Court has mandated that the practice of handcuffing of the arrested person is violative

of Articles 14, 19 and 21 of the Constitution. An under-trial can be handcuffed only on being permitted by the Court for reasons to be recorded by it and not otherwise. Following observations made by the Apex Court in the latter case are apposite in this respect :

> "We declare, direct and lay down as rule that handcuffs and other fetters shall not be forced on a prisoner-convicted or under-trial while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back. The police or jail authorities, on their own shall have no authority to direct the hand-cuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to court and back. Where the police or jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody, then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding pronness of the prisoner to violence, his tendency to escape, he being so dangerous, desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner."

III. REMAND

Article 22 of the Constitution of India read with Section 167 of the Code invests the Magistrate with the power to authorize detention of an arrested person in custody, either police or judicial, if there are grounds for believing that the accusation against such person regarding his involvement in commission of a non-bailable offence is well founded. Here the role of the Magistrate is not of post office rather the Magistrate should satisfy himself, though only *prima facie,* that there are grounds for believing that the accusation or information against an arrested person is well founded. (See : *Trilochan Singh v. State, 1981 Cr. L.J. 1773 Delhi*) The production of the accused before Magistrate is also a condition precedent for authorizing detention. This is something which can provide the Magistrate an opportunity to find out that police has not used third degree against arrested person after arrest.

IV. CUSTODIAL INTERROGATION

A person who is supposed to know the facts and circumstances of the case may be examined by the police during interrogation. However, this is subject to Article 20 (3) of the Constitution that confer on the accused a right to remain silent or refuse to answer any question which could be self-incriminating. In *D.K. Basu v. State of W.B., AIR 1997 SC 610* the Apex Court while strongly deprecating the use of third degree methods during custodial interrogation observed that " 'custodial torture' is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever the human dignity is wounded, civilization takes a step backward, the flag of humanity must on each such occasion fly half mast". The

police is not justified in using third degree method for interrogation. Regarding the nature and effect of duress in eliciting information or collecting evidence, the Apex Court has observed in *Nandani Satpathy v. P.L. Dani and others, (1978) 2 SCC 424* that - 'it isn't only physical threats or violence but psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. Frequent threats of prosecution, if there is a failure to answer, may take the completion of undue pressure violating Article 20 (3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

The Apex Court, while dealing with the issue of custodial violence and remedies available against such acts of custodial violence has observed in its latest pronouncement in *Sube Singh v. State of Haryana and others, (2006) 3 SCC 178* that custodial violence requires to be tackled by resorting to remedial and preventive measures. While award of compensation is one of the remedial measures, efforts are necessary to remove the causes which lead to custodial violence. The Apex Court has ordained that following steps, if taken, may prove to be effective preventive measures:

> (a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.
>
> (b) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.
>
> (c) Compliance with the eleven requirements enumerated in *D.K. Basu v. State of W.B., (1997) 1 SCC 416* should be ensured in all cases of arrest and detention.
>
> (d) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.
>
> (e) Computerization, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, mahazars, inquest proceedings, post-mortem reports and statements of witnesses, etc. and to bring in transparency in action.
>
> (f) An independent investigating agency (preferably the respective Human Rights Commission or CBI) may be entrusted with adequate power to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution wherever necessary.

The Courts are under an obligation to see that police officers, who resort to custodial torture are brought to the book. In this respect provisions contained

in Section 29 of Police Act, Sections 330 and 331 of IPC, Section 49 Cr. P.C. and Regulation 737 of M.P. Police Regulations are noteworthy which stipulate penal action against erring officers.

V. CONFESSIONS

Section 164 of the Code empowers the Magistrate to record confession but again confession which has been obtained by duress or coercion is inadmissible. Section 164 of the Code mandates that normally the Magistrate should allow 24 hours time for reflection to the person offering himself to confess. As held in *Tiwari v. State, AIR 1978 SC 1544* Magistrate should not record a confession unless he is sure that no coercion has been made for extracting confession.

VI. BAIL

No doubt grant of bail in non-bailable cases is discretion of theCourt, however, the discretion has to be exercised in a judicial manner. Demand of heavy security deposit or local sureties for bail has been held to be denial of bail. In *Motiram v. State of MP, (1987) 4 SCC 87,* the Apex Court held that demand of security worth Rs. 10,000/- from a poor mason and that too of sureties from within the district is quite unreasonable.

VII. LEGAL AID

Article 22 (1) of the Constitution guarantees every accused person right to be defended by counsel of his choice. Section 303 of the Code further enables an accused to be defended by a pleader of his or her choice. In cases where the accused is poor and cannot afford to engage a lawyer then it is the duty of the Court to ensure that legal aid is provided to him at the cost of the State u/s 304 of the Code. In *Sukhdas v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401,* the Apex Court held that Trial Court is under obligation to inform the accused that if he is unable to engage a lawyer on account of poverty, then he is entitled to obtain free legal services at the cost of the State.

VIII. SPEEDY TRIAL

Delay in dispensation of justice has been perceived as denial of justice and perpetuation of injustice. In *Hussainara Khatoon v. State, 1980 (1) SCC 98,* the Apex Court has held that trial continuing for unreasonable quite a long time is violative of fair trial particularly when the accused is in custody. In *Maneka Gandhi v. State, (1978) 2 SCC 248* it has been held that speedy trial is essential for a fair trial guaranteed by Article 21 of the Constitution.

IX. PRISON CONDITIONS

Sessions Judge is required to visit the prison to see that inside business in prison is being conducted according to the rules and regulations of Jail Manual and that there is no violation of human rights. This is an onerous duty. Rules 716 to 718 of the Rules and Orders (Criminal) are noticeable in this respect. The Sessions Judge should discharge these duties scrupulously because there has been sharp increase in incidents of violation of human rights inside prisons.

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MARSHALLING AND APPRECIATION OF EVIDENCE - PART II*

VED PRAKASH
Director, JOTRI

PRINCIPLES OF APPRECIATION OF EVIDENCE

Going by the parameters which are there in the definition of 'Proved' and 'disproved' as contained in Section 3 of the Indian Evidence Act, we find that the evidence of a witness has to be judged by the Court on the touchstone of probabilities. As stated in *Dalbir Singh and others v. State of Punjab, AIR 1987 SC 1328* no hard and fast rule can be laid down about appreciation of evidence and every case has to be judged on the basis of its own facts. However, there are certain basic principles, which have since long been considered by the Courts regarding their utility and application. One basic proposition in this respect, as elaborated in *Hari Obula Reddi and others v. The State of Andhra Pradesh, AIR 1981 SC 82,* is that it is useful as a first step to find out whether the presence of the witness at the relevant place and time was probable; and whether the substratum of the story narrated by him is consistent with the other evidence on record, natural course of human events, the surrounding circumstances and inherent probabilities of the case and whether it will carry conviction with a prudent person.

Besides the aforesaid proposition there are certain other principles which have long been discussed and debated regarding appreciation of evidence, like - rule of proof by preponderance of probabilities , rule of proof beyond reasonable doubt, maxim *falsus in uno falsus in omnibus* and maxim 'let hundred guilty persons be acquitted but not a single innocent person be convicted'/separating the grain from chaff.

In fact we started developing our judicial frame of mind considering and contemplating all these principles. We have also applied them one way or the other as per our own perceptions regarding their utility and applicability. To understand these principles in their true perspective it is but necessary to examine them in the light of various pronouncements of the superior Courts.

PROOF IN CIVIL MATTERS V. CRIMINAL MATTERS

Usually, it is said that while facts in a civil case can be proved by applying the yardstick of preponderance of probabilities; conviction cannot be recorded in a criminal case except on the basis of proof beyond reasonable doubt. In this respect it may be worthwhile to examine as to whether the Evidence Act provides for such a classified approach or that the rule of proof beyond reasonable doubt is only is a rule of caution and prudence because post conviction consequences in a criminal case are almost irreversible.

Long back Justice Best in *R. v. Burdett, (1820) 4 B. & Ald. 95* commented that there is no difference between the rules of evidence in civil and criminal

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Note: Part I has been published in JOTI - June 2006 at page 112

cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilized countries. To the same effect are the observations made by Allahabad High Court in *Tehsildar Singh v. State AIR 1958 All 214* . Almost in a similar vein Lawrence, J. observed in *Stone's case, (1796) 25 How. St. Tr. 1314* that there is no difference between civil and criminal cases as to evidence; whatever is proper evidence in one case is in the other. With respect to criminal case, if there is any doubt, one would lean in favour of a defendant, for the reasons, that is not to be set right afterwards.

It can well be gathered from the above that basically rules of evidence are same in civil and criminal cases, however, while appreciating evidence in criminal cases a more cautious approach is required.

PROOF BEYOND REASONABLE DOUBT

The first principle of criminal jurisprudence is that in a criminal case the guilt of an accused should be proved beyond reasonable doubt. But then question arises , what the expression - 'proof beyond reasonable doubt' does really convey? Long back Their Lordships of the Supreme Court observed in *Inder Singh v. State (Delhi Admn.), (1978) 4 SCC 161* (Krishan Iyer, J.) that proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human process. In *Shardul Singh v. State of Haryana, (2002) 8 SCC 372* the Apex Court, sounding a note of caution against demand of implicit proof in a criminal case, observed that there cannot be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof.

Attempting to draw the meaning of expression 'reasonable doubt' the Apex Court expressed in *State of West Bengal v. Orilal Jaiswal, (1994) 1 SCC 73* that reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated and that *exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence.*

The concept of 'reasonable doubt' was further explained by the Apex Court in *Sucha Singh v. State of Punjab, AIR 2003 SC 3617* to the effect that a reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

Viscount Simon J. long back observed that 'a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of innocent.' Referring to this statement Hon'ble Krishna Iyer J.observed in *Shivaji Sahebrao Bobade and another v. State of Maharashtra, AIR 1973 SC 2622* that the

dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.

In the light of the aforesaid pronouncements it can well be said that the rule of proof beyond reasonable doubt should be applied by the courts with objectivity and pragmatism.

'FALSUS IN UNO FALSUS IN OMNIBUS'

The maxim *'falsus in uno falsus in omnibus'* means false in one thing, false in every thing. In our country most of the witnesses, for one party or the other, while giving out substantial truth, introduce one or two falsehood or exaggerations into their statements. If Courts were to act upon the above maxim, it will be very difficult, if not impossible, to decide majority of cases correctly.

In view of number of pronouncements of the Apex Court, now it is well settled, that this maxim, which is neither a sound rule of law nor a rule of practice, is not applicable as far as criminal jurisprudence of our country is concerned. The skill of appreciation of evidence itself demands for disengaging truth from the falsehood, therefore, wholesome rejection of the testimony of a witness because some or the other part of his statement has not been found to be true, may lead to injustice.

In *Ugar Ahir v. State of Bihar AIR 1965 SC 2777* the Apex Court observed that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroidery or embellishments. It is, therefore, the duty of the Court to scrutinize the evidence carefully.

While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly, necessary for the Court to scrutinize the evidence more particularly, keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witness as to render it unworthy of belief. In *Bhagwan Tana Patil v. State of Maharashtra, AIR 1974 SC 1974* the Apex Court ordained that the function of the Court is to disengage the truth from the falsehood and to accept what it finds to be true and reject the rest. It is only where the truth and falsehood are inextricably mixed up, polluted beyond refinement, down the core the entire fabric of the narration given by a witness, that the Court might be justified in rejecting the same.

The legal position was further elaborated in *State of U.P. v. Shankar, AIR 1981 SC 897* wherein the Apex Court observed that mere fact that the witness

has not told the truth in regard to a peripheral matter would not justify whole sole rejection of his evidence. In this country, it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is only where the testimony is tainted to the core, the falsehood and the truth being inextricably intertwined, that the Court should discard the evidence.

'LET HUNDRED GUILTY PERSONS BE ACQUITTED .....'

The often repeated maxim *'Let hundred guilty persons be acquitted but not a single innocent be convicted'* is frequently put forth before Courts with much force and eloquence. Expressing its concern regarding applicability of this maxim in India ,the Apex Court posed a question in *Sucha Singh v. State of Punjab* (supra) whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape?

Considering applicability of the maxim the Apex Court observed in *Shivaji Sahebrao Bobade and another v. State of Maharashtra, AIR 1973 SC 2622* that the excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. The discussion concluded with a note of caution in the following words:

> "In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

Again in *State of West Bengal v. Orilal Jaiswal, (1994) 1 SCC 73* the Apex Court remarked that Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent because letting a guilty escape is not doing justice according to law. In *State of U.P. v. Anil Singh, AIR 1988 SC 1998* it has been stressed that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform. In its latest pronouncement in *Krishna Mochi & Ors. V. State of Bihar, (2002) 6 SCC 81* the Apex Court made it clear that these days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the Courts have become much more. The Court observed that now the maxim *'Let hundred guilty persons be acquitted but not a single innocent be convicted'* is in practice changing the world over and Courts have been compelled to accept that *'society suffers by wrong convictions and it equally suffers from wrong acquittals'*. Precisely put , the approach of the Court should be that neither an innocent person is convicted nor a guilty person is allowed to escape from the clutches of law.

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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, 2006. The Institute has received articles from various districts. Article regarding topic no. 3 received from Indore is being included in this issue. As we have not received worth-publishing articles regarding remaining topics, i.e. topic no. 1, 2, 4 and 5, Institutional Articles are being published on topic no. 1, 2 and 4. Topic No. 5 will be allotted to other group of districts for discussion in future :

Q.1 Explain the legal position regarding set off u/s 428 Cr.P.C. of the period of detention undergone by an accused facing trial in a number of cases,when he is convicted in more than on case?

जहां अभिरक्षा अधीन अभियुक्त एक से अधिक दाण्डिक प्रकरणों में विचारण का सामना कर रहा है, वहां अलग–अलग दोषसिद्धि के मामलों में धारा 428 द.प्र.सं. के अन्तर्गत अभिरक्षा की अवधि के समायोजन विषयक विधिक स्थिति का स्वरूप क्या है?

Q.2 What is the evidential value of seized article where seizure is pursuant to an illegal search?

अवैधानिक तलाशी के क्रम में अभिग्रहीत वस्तु का साक्षिक मूल्य क्या है?

Q.3 Explain the legal position regarding use of statement of a witness recorded u/s 161 Cr.P.C., when such witness says that he had not made any statement to police?

साक्षी द्वारा यह प्रगट करने की दशा में कि उसने पुलिस को कोई कथन नहीं दिया है, उसके धारा 161 द.प्र.सं. के अन्तर्गत लेखबद्ध कथन के उपयोग विषयक विधिक स्थिति क्या है?

Q.4 Explain the procedure to be adopted by a Court while dealing with plaintiff's application seeking exemption from payment of court fees under notification dt. 01.04.1983 issued u/s 35 of the Court Fees Act, 1870.

न्याय शुल्क अधिनियम, 1870 की धारा 35 के अन्तर्गत जारी अधिसूचना दि. 01.04.1983 के अन्तर्गत न्याय शुल्क विमुक्ति हेतु वादी द्वारा प्रस्तुत आवेदन के निराकरण हेतु न्यायालय द्वारा अपनायी जाने वाली प्रक्रिया बतायें?

Q. 5 Whether an appellate Court hearing a criminal appeal has jurisdiction to record acquittal of non-appealing convicts?

क्या दाण्डिक अपील पर सुनवाई में अपीलीय न्यायालय अपील न करने वाले दोषसिद्ध अभियुक्त को दोषमुक्त करने की अधिकारिता रखता है?

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LEGAL POSITION REGARDING SET OFF U/S 428 CR.P.C. OF THE PERIOD OF DETENTION UNDERGONE BY THE ACCUSED FACING TRIAL IN A NUMBER OF CASES WHEN HE IS CONVICTED IN MORE THAN ONE CASE

Institutional Article by
Shailendra Shukla
Addl. Director

Section 428 Cr.P.C. provides for setting off the period of detention of an undertrial person against the sentence of imprisonment imposed upon him. The Section is reproduced as under :

> **S. 428. Period of detention undergone by the accused to be set off against the sentence of imprisonment.-** *Where an accused person has, on conviction been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to under go imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.*

This section was added by way of an amendment in Cr.P.C. in 1973. The reason for adding this provision can be best described by quoting the Joint Committee of Parliament which recommended the addition of this provision. The Committee noted as under :

> "The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as under-trial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as under-trial prisoner. Indeed, there may even be cases where such a person is acquitted. No doubt, sometimes Courts do take into account the period of detention undergone as under-trial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases the accused person is made to suffer jail life of a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also

noted that a large number of persons in the overcrowded jails of today are under-trial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. The new clause provides for the setting off of the period of detention as an under-trial prisoner against the sentence of imprisonment imposed on him. The Committee trust that the provision contained in the new clause would go a long way to mitigate the evil."

Thus we can see that prior to this amendment there was no uniform practice followed by Courts regarding taking into account the period of detention undergone as undertrial prisoner when passing sentence and consequently the set off of the period of detention was also not a consistent practice adopted by Courts. The amendment purports to make it mandatory to set off the period of detention undergone by the accused after sentencing him to a term of imprisonment. A plain reading of this Section shows that barring the imprisonment suffered by him in default of payment of fine, he is entitled to set off the period of detention against the term of imprisonment imposed upon him. However there may be some complex situations in which the applicability of Section 428 Cr.P.C. may need deep deliberation. These may be enumerated as under :

1. If a person is accused in more than one case, then whether on conviction in both, is he entitled for set off in only one case or in both the cases?
2. What is the significance of the words "in the same case" as occurring in Section 428 Cr.P.C.? Whether the accused is entitled to set off only that period which he spent in jail in connection with the case in which he was convicted or whether the period in detention in connection with other case may also be set off?
3. Whether the period spent in jail due to imprisonment in some other case will also be set off against the term of imprisonment in the case under consideration?
4. Whether the period spent in jail on account of preventive detention of the accused will also be set off against the term of imprisonment in the case under consideration?

The view propounded in a two Judge bench of the Apex Court in *Raghubir Singh v. State of Haryana, AIR 1984 SC 1796* was that the benefit of set off to an accused convicted in two different cases can be accorded only once and if the set off is provided in one case, then no set off is accruable in the second case and the accused will have to suffer full length of sentence imposed in the second case. It was also laid down that if an accused is convicted in the first case then the period of detention from the date of conviction in the first case to the date of conviction in the second case will not be set off. In this case it was further held that the

words "same case" signified that only that period can be set off which was spent in jail in connection with investigation, enquiry and trial of that particular case.

A larger bench of the Apex Court in *State of Maharashtra and another v. Najakat alias Mubarak Ali, 2001 Cri.L.J. 2588* however expressed dissent from the views expressed in *Raghubir Singh's case* (supra) set it aside by 2:1 majority. Expressing dissent the Apex Court observed as follows :

> "Reading Section 428 of the Code in the above perspective, the words "of the same case" are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case....." (para 18)

The Apex Court in forming this opinion pointed out the purpose of Section 428 of the Code which was for "advancing amelioration of the prisoner". The Court drew extensively from the report of the Joint Committee of Parliament (the extracts thereof already given in this article)

The Apex Court in *Najakat Ali's cāse* (supra) also made it amply clear that the period spent in jail after the conviction in one case would be available for set off against imprisonment on account of conviction in any other case. Thus if an accused is convicted and sentenced in first case and after sometime is again convicted and sentenced in the second case, then he shall be entitled to set off the period spent in jail subsequent to the date of conviction in the first case till the date of conviction in the second case.

The position in respect of first three questions, as is now clear from *Najakat Ali's case* (supra), is as follows :

(a) A person who is an accused in two cases and is also under detention shall be entitled to set off against imprisonment in both the cases

(b) The advantage of set off shall be available to the accused in second case even if he is on bail in second case but is detained in connection with the first case and the period of set off shall be the time gap between the date he is arrested and sent to jail in the first case and the date of conviction in the second case.

(c) While calculating the period of set off in second case, the period lapsing from the date of conviction in the first case to the date of conviction in the second case shall be taken into account and would not be liable to be excluded.

The above position can now best be clarified by taking an example. Suppose a person is accused of committing theft on three different counts and arrested on the same day u/ss. 457 and 380 I.P.C. in all the three cases. He spends three months in jail and is thereafter convicted in first case and sentence for one year. He is entitled to set off 3 months against the term of imprisonment of one year. Subsequently, after four months of his arrest, he is convicted in second case and sentenced, for say, again one year. He shall be entitled to a set off of four months against one year of sentence. The judgment in the third case, if pronounced on the sixth month of arrest, he shall be entitled to six month's set off.

Now assuming that in the second and third case he secures bail on the first day of his arrest but not in the first case and throughout remains in jail for six months. He is ultimately convicted and sentenced to six months imprisonment in the second case. He shall be entitled to set off of a period of six months (which he had spent in relation to the first case) and shall not be required to be sent to jail in connection with the conviction in second and third case.

Thus we can see that the accused, though on bail in second case, shall be entitled to obtain a set off of that period which he spent in jail during investigation, enquiry and trial of the second case even though his detention was in respect of the first case only. Thus, in the sentence, "period of detention, if any, undergone by him during the investigation, enquiry and trial of the same case....." the word "during" is not to be confused with "in relation to" or "in connection with", meaning thereby that even detention in relation to other case shall be taken into account for setting off. Further, even if the accused is convicted in the first case, the period from date of conviction in first case to the date of conviction in second case shall not be excluded because that was the period of investigation, enquiry or trial of the second case which has to be included.

The only question which now remains to be considered is whether the period spent in jail by a person on account of preventive detention is also liable to be set off or not. A two Judge bench of the Apex Court in the case of *Maliyakkal Abdul Aziz v. Assistant Collector, Kerala and another, (2003) 2 SCC 439* has categorically held that the period of detention under Preventive laws cannot be set off u/s 428 Cr.P.C. against imprisonment imposed under any statute. The Court noted that Section 428 Cr.P.C. was brought to Statute Book in order to give redressal to accused person who were kept in prison for very long time as undertrial prisoners. The persons incarcerated in prisons under preventive detention laws are not "accused" and are "not undertrial" prisoners. However, a larger Bench of the Apex Court in *Najakat Ali's case* (supra) has observed as follows :

> ".....In other words, if the convict was in prison, *for whatever reason*, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced

to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him". (Excerpts from para 16).

The question is whether the words "for whatever reasons" signify that even detenus under preventive detention laws are entitled to get the benefit of S. 428 Cr.P.C.. It clearly appears that in *Najakat Ali's case* (supra) the Apex Court was not seized with the subject mater of the persons detained under preventive detention laws. Therefore, in view of express opinion given on this subject matter by the Apex Court in *Maliyakkal Abdul Aziz case* (supra) the words "for whatever reasons" cannot be assumed to be so encompassing as to include preventive detenues. The Apex Court in the case of *Arnit Das v. State of Bihar, 2000 (5) SCC 488* has laid emphasis on rule of *sub-silentio* which prescribes that when a particular point of law is not consciously determined by the Court, that does not form part of *ratio decidendi* and is not binding. Thus it can safely be stated that the period of detention under preventive detention laws is not liable to be set off against the term of imprisonment.

It may be submitted that one of the consequences of the observations made in *Najakat Ali's case* (supra) will be that a person accused in multiple cases and having being convicted in one of the cases can always plead guilty in respect of other cases pending against him and he would be entitled to get advantage of S. 428 Cr.P.C. in subsequent cases by way of set off of the period spent in jail after conviction in first case against imprisonment imposed in second case.

After detailed analysis, it would be appropriate to once again highlight the answers to the four questions posed earlier as follows :

a. If a person is accused in more than one case then on conviction in these cases he is entitled for a set off in both the cases.

b. The words "in the same case" as occurring in Section 428 Cr.P.C. do not connote the meaning that only that period may be set off which is spent in jail in connection that particular case. The period spent in jail in connection with other case may also be set off provided that he was implicated as an accused in other cases on an earlier date.

c. The period spent under imprisonment in one case will also be set off against the term of imprisonment in the case under consideration till the date of conviction in the later case.

d. The period spent in jail on account of preventive detention of the accused under Preventive Detention laws is not liable to be set off against the term of imprisonment in the case under consideration

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EVIDENTIAL VALUE OF SEIZED ARTICLE WHERE SEARCH SUFFERS FROM ILLEGALITY OR IRREGULARITY

Institutional Article
Ved Prakash,
Director, JOTRI

The power of search and seizure is in any system of jurisprudence, as pointed out in *M.P. Sharma and others v. Satish Chand, AIR 1954 SC 300* is an overriding power of the State for the protection of social security and it is regulated by law. Search may be either of a place or of a person. Search/seizure is only a temporary interference with the right to hold the premises searched and the articles seized.

The provisions of the Code of Criminal Procedure Code, 1973 relating to search may be put under following three groups:

Group - 1: Sections 47 and 51 related with search of a place entered by persons to be arrested and search of an arrested person;

Group - 2: Sections 97, 100 and 103, respectively providing for search for wrongfully confined persons, search of a place and search at the direction and in the presence of a Magistrate;

Group - 3: Search by a police officer without a warrant for the purpose of inspecting or searching for any weights or measures or instruments for weighing believed to be false. (section 153)

There has been a divergence of opinion regarding effect of non-compliance of the provisions relating to search/seizure on the evidentiary value of the article seized during such search. One view is that disregard to the provisions of the Code of Criminal Procedure relating to the powers of search and seizures amounts to a default in doing what is enjoined by law and in order to prevent such default, the courts should take strict view of the matter and reject the evidence adduced on the basis of such illegal search. The other view has been that the piece of evidence cannot be excluded from consideration simply on the ground that it was obtained in a search, which was illegal or improper. In *State of Punjab v. Balbir Singh, AIR 1994 SC 1872* the view was taken that non-compliance of the provisions relating to search as contained in Section 50 of NDPS Act will have the effect of excluding the evidence procured on the basis of such search. On the contrary there are decisions wherein the view has been taken that the admissibility of a piece of evidence should be decided on the basis of provisions contained in the Evidence Act relating to relevancy and admissibility of evidence. Therefore, infraction or violation of any provision relating to search may not ipso facto render such evidence inadmissible. [See - *State of Punjab v. Jasbir Singh & Ors., 1995 (4) JT 765 (SC)*].

CONSEQUENCES OF ILLEGAL/IMPROPER SEARCH

The issue relating to the effect of illegality or irregularity in conducting search on the evidentiary value of evidence came for consideration before the Apex Court in *Radha Kishan v. State of Uttar Pradesh, AIR 1963 SC 822.* In this case it was held that whenever there is illegality in search, two consequences may follow:

> **Firstly**, the search can be resisted by the persons whose premises are sought to be searched ;
>
> **Secondly,** the Court may be inclined to examine the evidence regarding the seizure carefully but the seizure of the articles is not vitiated in such a case.

In *State of Rajasthan v. Rehman, AIR 1960 SC 210* the accused, whose premises were being searched pursuent to a suspicion regarding concealment of cultivated tobacco, obstructed the search and was consequently prosecuted. He was acquitted (u/s 353 IPC) on the ground that the search was illegal. In appeal the Apex Court was of the view that as the search was illegal, therefore, obstruction to such search could not be faulted and cannot be brought within the purview of Section 353 IPC.

Considering the effect of illegality in search committed while conducting search for collection of evidence the Apex Court in *A.C. Sharma v. Delhi Administration, AIR 1972 SC 913 (3 Judge Bench)* laid down that the function of investigation is merely to collect evidence and any irregularity or even illegality in the course of collection of evidence can scarcely be considered by itself to affect the legality of the trial by an otherwise competent Court of the offence so investigated. In this case the objection raised by the defence was that the person conducting search was not authorized under the provisions of Prevention of Corruption Act, 1947.

Examining the effect of non-compliance of sub section (4) of Section 100 Cr.P.C. the Apex Court in *Sunder Singh v. State of Uttar Pradesh, AIR 1956 SC 411* observed as under:

> "Assuming that the witnesses who actually witnessed the search were not respectable inhabitants of the locality, that circumstance would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. Hence at the highest the irregularity in the search and the recovery, in so far as the terms of S. 103 had not been fully complied with, would not affect the legality of the proceedings."

In *Puran Mal v. Director of Inspection (Investigation) (1974) 1 SCC 345,* a five Judge bench of the Apex Court had an occasion to scan through the law relating to the effect of illegality in conducting search and evidential value of evidence collected during the search. Referring to celebrated judgment by Chief Justice Sir Lawrence Jenkins of Calcutta High Court in *Barindra Kumar Ghosh and others v. Emperor,* ILR 37 Cal 467, the Apex Court observed that 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. In the aforesaid case the Apex Court pointed out that search or seizure for the purpose of preventing or detecting crime reasonably enforced was not inconsistent with the Constitutional guarantee against search and seizure. Finding the search conducted by the police officer illegal, the Apex Court made it clear that the Court had discretion to admit the evidence obtained as a result of illegal search and the constitutional protection against search of person or property without consent did not take away the discretion of the Court. It was further pointed out that if the Court was of the view that the evidence has been obtained by conduct of which the prosecution ought not to take advantage, it was open to the Court not to accept the evidence.

The analysis on this point can be concluded with the following proposition of law laid down by the Apex Court in its latest decision in *State of Madhya Pradesh v. Paltan Mallah, (2005) 3 SCC 169* in the following words:

> "Though different High Courts have taken different views, the decisions of this Court quoted above have settled the position and we have followed the English decisions in this regard. In the Privy Council decision in *Kuruma v. R. , 1955 SC 197, Lord Goddard, C.J.* was of the firm view that in a criminal case the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused. The trend of judicial pronouncements is to the effect that evidence illegally or improperly obtained is not *per se* inadmissible. If the violation committed by the investigating authority is of serious nature and causes serious prejudice to the accused, such evidence may be excluded."

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LEGAL POSITION REGARDING USE OF STATEMENT OF A WITNESS RECORDED U/S 161 CR.P.C. WHEN SUCH WITNESS DENIES HAVING MADE ANY STATEMENT TO POLICE

Judicial Officers
District Indore

Introduction

During an investigation of a cognizable offence the investigation officer under S. 161 Cr.P.C. may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such police officer may reduce into writing any statement made to him in the course of an examination and if he does so, he shall make a separate and true record of the statement of each such person.

A police officer making an investigation is not bound to reduce into writing the statement of witnesses examined by him, but it is desirable that he records at least the substance of such statements. If he does record the statements or their substance, he may do so either in the case diary maintained u/s 172 Cr.P.C. or on separate piece of paper or both, but he must record the statement of each witness or its substance separately and truly.

Limitations in using statement recorded u/s 161 Cr.P.C.

The statement u/s 161 Cr.P.C. is not a substantial piece of evidence and it cannot be used for any purpose in a trial except as provided u/s 162 (1) Cr.P.C.. The statement recorded u/s 161 Cr.P.C. cannot be said to be statement of the person unless established by the Investigating Officer in his examination-in-chief before the trial court.

As per S. 162 (1) Cr.P.C. such statement if reduced into writing, cannot be used for any purpose except for the purpose of contradiction of such witness by accused or with Court's permission by prosecution, if such statement is duly proved. Such statement may also be used in re-examination of such witness for explaining any matter referred to in cross-examination. The manner of contradicting the witness is provided in Section 145 Evidence Act. As per this provision if it is intended to contradict him by the writing, the writing must be shown to him but otherwise he may be cross-examined without the writing being shown to him. An omission to state a fact or circumstance in the police statement in the particular context may amount to contradiction if the same appears to be significant. (See - Explanation to S. 162)

The provisions of S. 162 (1) Cr.P.C. provide a valuable safeguard to the accused and denial of right to cross-examine and contradict sometime may amount to failure of justice, as the right guaranteed to an accused under these provisions is total and absolute. The contradiction under this Section should be between what a witness asserted in the witness-box and what he stated before

the police officer. If the statement before the police officer and the statement in the evidence before the court are so inconsistent or irreconcilable with each other, that both of them cannot co-exist, it may be said that one contradicts the other. So the provisions of S. 162 (1) Cr.P.C. confer a right to the accused by which he can impeach the credit of the witness in the manner provided by S.145 of the Evidence Act, subject to the limitations mentioned therein.

The question relating to contradicting a witness and requirements of compliance with S. 145 of Evidence Act have been considered by the Constitution Bench in *Tahsildar Singh and another v. State of U.P., AIR 1959 SC 1012.* It was observed that if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those part of it which are to be used for the purpose of contradicting him. The proviso to S. 162 Cr.P.C. only enables the accused to make use of such statement to contradict a witness in manner provided by S. 145 of the Evidence Act. Section 145 Evidence Act is in two parts : The first part enables the accused to cross examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him, the second part deals with a situation where the cross examination assumes the shape of contradiction. For S. 162 Cr.P.C. only second part of Section 145 of Evidence Act is to be followed.

If the witness says that he had not made any statement to police

Such type of situation during the trial generally may arise due to one of the following reasons -

a. Sometimes the witness may think that during the investigation, the police officer has simply interrogated him regarding the facts and circumstances of the case and he is giving his statement for the first time only before the trial court, as he is not supposed to sign such police statement, or

b. Sometimes before the trial court when he deliberately does not support the prosecution version and is declared hostile by the prosecution then also he deliberately disowns any statement made to the police, or

c. It is not uncommon to find that Investigating Officer has recorded a statement purported to be u/s 161 Cr.P.C. without formally interrogating the witness and without his knowledge This tendency on the part of investigating agency is very dangerous, so far as the criminal justice is concerned and needs to be taken care of. Copying out of the FIR in the absence of the person treating it as statement u/s 161 Cr.P.C. has to be discouraged and the concerned authorities are expected to take care of it. (Please see - *State of M.P. v. Hakam Singh, 1995 MPLJ 828.*)

d. Sometimes it happens that a witness while supporting the prosecution case states something which is not provided in his police statements and there is thus an omission in the police statements.

From the above it emerges that there are various situations in which a witness may deny having made any statement to police, and if the prosecution

has mentioned such witness in charge-sheet and furnished the copy of his police statement recorded u/s 161 Cr.P.C. to the accused then the accused has right to use such police statement within the limitation given in Section 162 Cr.P.C. as discussed above.

The apex court in *Tahsildar Singh's case* (supra) observed in para-13 that when a witness deposes contrary to his police statement, his attention can be drawn to that part of the statement made before the police, which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. The Apex Court in *Binay Kumar Singh v. State of Bihar, AIR 1997 SC 322* has considered the same situation and has held that if the witness disowns having made any statement which is inconsistent with his court statement, his testimony in court on that score would not be vitiated until the cross-examiner complies with the procedure prescribed in the second limb of Section 145 of Evidence Act.

The legal position regarding use of such police statement enunciated by the Apex Court in *Tahsildar Singh's case* (supra) and *Binay Kumar Singh's case* (supra) as observed above has been again reiterated in *Rajendra Singh and others v. State of Bihar, AIR 2000 SC 1779* and *Raj Kishore Jha v. State of Bihar, AIR 2003 SC 4664.*

Conclusion

The conclusions arrived at on account of aforementioned discussion are as under :—

a. When in a criminal trial, a witness says that he had not made any statement to police, even though his statement was recorded u/s 161 Cr.P.C., the statement may be used by the accused and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by the second limb of the Section 145 of Indian Evidence Act, 1872, as per provision of Section 162 (1) Cr.P.C.

b. The statement u/s 161 Cr.P.C. in such a case cannot be said to be statement of a witness unless in fact it is recorded and this fact is established by the investigating officer in his examination-in-chief before the trial court.

c. In case a witness makes a statement which is not contained in the police statement recorded u/s 161 Cr.P.C. then such an omission will amount to contradiction when the Court examines the Investigating Officer and he establishes that the witness had in fact not given any such statement which he claims to have given to the police in his deposition before the Court.

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धारा–35 न्यायशुल्क अधिनियम, 1870 – प्रयोज्यता एवं प्रक्रिया

सांस्थानिक आलेख
वेद प्रकाश
संचालक

न्याय शुल्क अधिनियम, 1870, जिसे अत्रपश्चात् 'अधिनियम' कहा जायेगा, की धारा–35, जो वर्तमान विश्लेषण हेतु सुसंगत हैं, संबंधित सरकार को सशक्त करती है कि वह समय–समय पर राजपत्र में अधिसूचना प्रकाशित कर 'अधिनियम' की अनुसूची 1 एवं 2 में विहित न्यायशुल्क के संदाय से पूर्णतः या अंशतः छूट दे सकती है। म.प्र. राज्य शासन के द्वारा अधिसूचना क्रमांक 9–1–83–B XXI, दिनांक 01.04.1983 द्वारा इस प्रावधान के अन्तर्गत म. प्र. राज्य के विनिर्दिष्ट श्रेणी के व्यक्तियों द्वारा प्रस्तुत किये गये ऐसे वादों पर, जो अधिनियम की प्रथम अनुसूची के अनुच्छेद 1 एवं 2 तथा द्वितीय अनुसूची के अनुच्छेद 5, 17 एवं 21 के अन्तर्गत आते हैं, संदेय न्यायशुल्क से पूर्ण छूट प्रदान की है, इस अधिसूचना के अन्तर्गत न्यायशुल्क से छूट की पात्रता विनिर्दिष्ट श्रेणी के उन व्यक्तियों को ही प्राप्त है जिनकी वार्षिक आय 6000/– रूपये से अधिक नहीं है।

अधिनियम की धारा–35 और उसके अन्तर्गत जारी अधिसूचना के उद्देश्य पर प्रकाश डालते हुए न्याय दृष्टांत *मांगीलाल विरूद्ध रमेश चन्द्र, 2003 (1) एम.पी.एल.जे. पृष्ठ 290* एवं *लक्ष्मी नारायण विरूद्ध मदन मोहन एवं एक अन्य, ए.आई.आर. 1988 म.प्र. 142* में यह प्रगट किया गया है कि न्याय शुल्क से छूट का प्रयोजन भारतीय संविधान के अनुच्छेद 39 (1) की अपेक्षाओं के अनुसार समाज के कमजोर वर्गो के लोगों को शोषण से बचाने का है, ताकि ऐसे व्यक्तियों को न्याय प्राप्ति के समान अवसर उपलब्ध हों तथा आर्थिक अक्षमता के कारण वे उनसे वंचित न रहें।

अधिनियम की धारा 35 के अन्तर्गत जारी अधिसूचना की प्रयोज्यता हेतु अनुसरित की जाने वाली प्रक्रिया तथा तत्संबंधित प्रावधानों के विस्तार के विषय में समय–समय पर अनेक प्रश्न उठते रहे हैं जिनमें प्रमुख निम्नवत् हैं:–

(i) क्या उक्त अधिसूचना हेतु जांच की प्रक्रिया वही होनी चाहिए जो आदेश 33 व्यवहार प्रक्रिया संहिता में अंकिचन स्वरूप के वाद में जांच हेतु निर्धारित है?

(ii) क्या ऐसी जांच में कलेक्टर को आहूत किया जाना अनिवार्य है?

(iii) क्या प्रतिदावे में उक्त छूट अनुज्ञेय हैं?

(iv) क्या उक्त प्रावधानों का लाभ अपील ज्ञापन पर भी अनुज्ञेय है?

(v) क्या उक्त प्रावधानों के अन्तर्गत छूट प्राप्त करने वाले वादी की मृत्यु पर उसके उत्तराधिकारियों को भी, जो वाद में उसके स्थान पर प्रतिस्थापित हुए हैं, ऐसी छूट जारी रहेगी?

(vi) क्या छूट की पात्रता के विषय में प्रारंभिक वाद प्रश्न विरचित कर विनिश्चय किया जाना चाहिये?

अंततः यह प्रश्न भी उठता है कि छूट की पात्रता स्थापित न होने की दशा में न्यायालय किस स्वरूप की कार्यवाही करेगा?

आदेश 33 नियम 1 व्यवहार प्रक्रिया संहिता एवं अधिनियम की धारा–35:

जैसा कि न्याय दृष्टांत *रामजी शर्मा विरूद्ध उच्च न्यायालय, म.प्र. जबलपुर आदि, ए.आई.आर. 1989 एम.पी. 247* में माननीय म.प्र. उच्च न्यायालय की खण्डपीठ द्वारा विनिश्चित किया गया है, आदेश 33 व्यवहार प्रक्रिया संहिता के प्रावधानों का स्वरूप अधिनियम की धारा 35 के अन्तर्गत जारी अधिसूचनाओं के प्रावधानों से सर्वथा भिन्न हैं। जहां आदेश 33 नियम 1 के अन्तर्गत अंकिचन व्यक्ति द्वारा वाद पर देय न्याय शुल्क के संदाय का स्थगन होता है, वही अधिनियम की धारा 35 के अन्तर्गत जारी अधिसूचना के द्वारा न्याय शुल्क से छूट मिलती है।

उक्त मामले में म.प्र. उच्च न्यायालय द्वारा जारी ज्ञापन दिनांक 8.10.84 को, जिसके द्वारा धारा 35 के अन्तर्गत जारी अधिसूचना विषयक न्याय शुल्क छूट की कार्यवाही में आदेश 33 नियम 1 लगायत 18 में विहित प्रक्रिया का अनुसरण करने का निर्देश दिया गया था, को इस आधार पर चुनौती दी गई थी कि ऐसा किया जाना अधिनियम की धारा–35 की भावना के अनुरूप नहीं हैं क्योंकि आदेश 33 में विहित प्रक्रिया विलम्बकारी है। माननीय उच्च न्यायालय की खण्डपीठ ने सुसंगत विधि का सूक्ष्म एवं गहन परीक्षण करने के बाद उक्त दलील स्वीकार करते हुए यह अभिनिर्धारित किया कि धारा 35 के अन्तर्गत जारी अधिसूचना द्वारा प्रदत्त छूट के बारे में जांच हेतु आदेश 33 में विहित प्रक्रिया के अनुसरण की आवश्यकता नहीं है एवं न्यायालय इस हेतु सक्षम है कि वह ऐसी प्रक्रिया अपनाये जो मामले के द्रुत निराकरण में सहायक हों।

कलेक्टर को सूचनापत्र :

अधिनियम की धारा 35 के अन्तर्गत दी गई छूट हेतु संपादित जांच में कलेक्टर को आहूत किये जाने की अनिवार्यता के विषय में सर्वप्रथम यह उल्लेख करना समीचीन है कि धारा–35 अथवा प्रश्नगत अधिसूचना में ऐसी किसी अनिवार्यता का उल्लेख नहीं है। *के.एम. निजाम एवं एक अन्य विरूद्ध यूनियन बैंक ऑफ इंडिया आदि, 1991 एम.पी.एल.जे. 669* में यद्यपि यह कहा गया कि रामजी शर्मा (पूर्वोक्त) के मामले में किये गये विनिश्चय के प्रकाश में कलेक्टर को सूचना पत्र देना अनिवार्य है (पैरा 12) लेकिन वस्तुतः रामजी शर्मा (पूर्वोक्त) के मामले में ऐसा कोई विनिश्चय नहीं किया गया है तथा इस वस्तुस्थिति को *सत्य नारायण जायसवाल विरूद्ध प्रेमलता सेवक, 2000 (2) एम.पी.एल.जे. पृष्ठ 46* (कंडिका 14) में स्पष्ट भी किया गया है। रामजी शर्मा (पूर्वोक्त) के मामले में इस बिन्दु पर की गयी प्रतिपादना विशुद्धतः यह है कि चूंकि न्याय शुल्क की छूट से राज्य का राजस्व प्रतिकूलतः प्रभावित होता है अतः विचारण न्यायालय को यह अधिकारिता है कि वो न्यायशुल्क छूट विषयक जांच में कलेक्टर को सूचना दे तथा यदि वह ऐसी छूट प्रदान किये जाने का विरोध करता है तो उसे सुनें क्योंकि ऐसा करना नैसर्गिक न्याय के सिद्धांतों के अनुरूप होगा।

उक्त मामले में *लक्ष्मी नारायण विरूद्ध मदन मोहन, ए.आई.आर. 1988 म.प्र. 142* का संदर्भ देते हुए यह भी कहा गया है कि कलेक्टर यदि खण्डन साक्ष्य प्रस्तुत करता है तो न्याय शुल्क से छूट पर विनिश्चय के पूर्व उस पर भी विचार किया जाना चाहिये।

पूर्वोक्त पृष्ठभूमि में यह स्पष्ट है कि यद्यपि अधिनियम की धारा–35 के अन्तर्गत न्याय शुल्क से छूट की जांच में कलेक्टर को सूचना पत्र भेजना विधिक अनिवार्यता नहीं है लेकिन चूंकि ऐसी छूट राज्य के राजस्व को प्रतिकूलतः प्रभावित करती है अतः नैसर्गिक न्याय के सिद्धांतों के अनुरूप कलेक्टर को सुनवाई का अवसर देना औचित्यपूर्ण है।

प्रतिदावा में धारा–35 की प्रयोज्यता:

प्रतिदावा पर देय न्याय शुल्क में छूट की मांग उक्त अधिसूचना के अन्तर्गत के अनुज्ञेय नहीं है, इस बारे में स्पष्ट अभिनिर्धारण माननीय म.प्र. उच्च न्यायालय के द्वारा न्याय दृष्टांत *मैसर्स टावर इंजी. वर्क्स विरूद्ध यूनियन बैंक ऑफ इंडिया एवं अन्य, 2003 (4) एम.पी.एच.टी. 241* के मामले में करते हुए यह व्यक्त किया गया है कि यद्यपि आदेश 8 नियम 6–ए (4) व्यवहार प्रक्रिया संहिता प्रावधित करता है कि प्रतिदावे के संबंध में वाद के सभी नियम प्रयोज्य होगें, लेकिन इसका यह अर्थ नहीं है कि अधिसूचना दिनांकित 1.4.83 द्वारा वादपत्र पर न्याय शुल्क के विषय में दी गई छूट प्रतिदावे के लिये भी प्रयोज्य होगी।

अपील एवं धारा–35:

अधिनियम की धारा 35 के अन्तर्गत प्रकाशित अधिसूचना दिनांक 1.4.83 में दी गई छूट का लाभ पात्र व्यक्तियों को अपील ज्ञापन में भी प्राप्त होगा इस आशय का विनिश्चय यद्यपि न्याय दृष्टांत *जगदम्बे निवाड़ कम्पनी विरूद्ध पंजाब नेशनल बैंक, 1992 जे.एल.जे. 10* में माननीय उच्च न्यायालय की एकल पीठ द्वारा इस तार्किक आधार पर किया गया था कि अपील वाद की निरन्तरता है लेकिन *रामस्वरूप विशिष्ट विरूद्ध म.प्र. राज्य एवं एक अन्य, 1991 (1) एम.पी.जे.आर. 1983* में इस विनिश्चय की विधि सम्मतता पर प्रश्न चिन्ह लगाते हुए मामला खण्डपीठ का संदर्भित किया गया तथा *रामस्वरूप वशिष्ट विरूद्ध म.प्र. राज्य, 1991 (2) एम.पी.जे.आर. 166* में माननीय उच्च न्यायालय की खण्डपीठ ने यह स्पष्ट अभिनिर्धारण किया कि प्रश्नगत अधिसूचना पर दी गई छूट का लाभ अपील ज्ञापन पर अनुज्ञेय नहीं है। माननीय शीर्षस्थ न्यायालय द्वारा न्याय दृष्टांत मोहम्मद महीबुल्ला विरूद्ध *सेठ चमनलाल, 1992 (1) एम.पी.डब्ल्यू.एन. 7 (एस.सी.)* में इस विषय पर किया गया विनिश्चय उक्त अभिनिर्धारण को सम्पुष्ट करता है। अतः अब यह सुस्थापित है कि प्रश्नगत अधिसूचना का लाभ अपील ज्ञापन पर संदेय न्याय शुल्क के विषय में अनुज्ञेय नहीं है।

विधिक प्रतिनिधियों की पात्रता:

अधिनियम की धारा–35 के अन्तर्गत जारी प्रश्नगत अधिसूचना के अन्तर्गत न्याय शुल्क के संदाय से विमुक्त वादी की मृत्यु हो जाने की दशा में छूट का लाभ उसके स्थान पर प्रतिस्थापित विधिक प्रतिनिधियों की यथावत जारी रहेगा या नहीं रहेगा, इस विधिक प्रश्न पर विस्तृत विमर्श *मांगीलाल विरूद्ध रमेश चन्द्र, 2003 (1) एम.पी.एल.जे. 290* के मामले में करते हुए एकल पीठ द्वारा यह अभिनिर्धारण किया गया है कि उक्त लाभ विधिक प्रतिनिधियों को अपने आप में केवल इस आधार पर अनुज्ञेय नहीं होगा कि मूल वादी को ऐसी छूट दी गई थी क्योंकि छूट 'वाद' के लिये न होकर 'व्यक्ति' के लिये है। यदि मृत वादी के विधिक प्रतिनिधि पात्रता की विहित शर्तों को पूरा करते हैं तो ही उन्हें ऐसी छूट प्राप्त हो सकेगी।

प्रारम्भिक वाद प्रश्न की आवश्यकता:

अधिनियम की धारा–35 के अन्तर्गत जारी अधिसूचना के अन्तर्गत पात्रता का विनिश्चय करने के लिये की जाने वाली जांच हेतु प्रारंभिक वादप्रश्न बनाये जाने की प्रक्रिया को यद्यपि *के.एम. निजाम एवं एक अन्य विरूद्ध यूनियन बैंक ऑफ इंडिया आदि, 1991 एम.पी.एल.जे. 669* (निर्णय दिनांक 14.2.91) में माननीय उच्च न्यायालय की एकल पीठ ने विधि सम्मत ठहराया है लेकिन यह विनिश्चय इसी बिन्दु पर न्याय दृष्टांत *आर.एन. राय विरूद्ध शेष नारायण राय आदि, 1990 एम.पी.एल.जे. 528* (निर्णय दिनांक 5.4.90) में किये गये इस पूर्ववर्ती विनिश्चय के सर्वथा प्रतिकूल है कि अधिनियम की धारा–35 के अन्तर्गत जारी अधिसूचना दिनांक 1.4.83 के बारे में पात्रता को पृथक से वाद प्रश्न बनाकर तय करना विधिसम्मत नहीं है क्योंकि ऐसी जांच प्रत्येक दशा में वाद के विचारण के पूर्व ही की जानी चाहिये। सत्य नारायण (पूर्वोक्त) के मामले में कंडिका 10 में इस स्थिति का स्पष्ट करने का प्रयास किया गया है।

के. एम. निजाम (पूर्वोक्त) के मामले में संतोष चन्द्र आदि विरूद्ध ज्ञान सुन्दर बाई आदि, 1970 जे.एल.जे. 290 में माननीय म.प्र. उच्च न्यायालय की पूर्ण पीठ का अवलम्ब इस हेतु लिया गया है कि न्याय शुल्क में छूट का बिन्दु वादप्रश्न प्रारंभिक बनाकर तय किया जाना चाहिये। इस क्रम में यह बात ध्यान देने योग्य है कि संतोष चन्द्र (पूर्वोक्त) का निर्णय वर्ष 1970 का है। तत्पश्चात् वर्ष 1976 में व्यवहार प्रक्रिया संहिता (संशोधन) अधिनियम 1976के द्वारा आदेश 14 नियम 2 में संशोधन किया गया जो दिनांक 1.2.1977 से प्रभावशील हुआ। इस संशोधन द्वारा यह प्रावधान किया गया है कि प्रारंभिक वादप्रश्न के रूप में विधि संबंधी केवल ऐसे वाद प्रश्न का ही निराकरण किया जा सकता है जो न्यायालय की अधिकारिता या विधि द्वारा वाद के वर्जन विषय में हो। उक्त परिवर्तित विधिक स्थिति के परिपेक्ष्य में न्याय शुल्क छूट हेतु प्रारंभिक वादप्रश्न बनाने की प्रक्रिया विधि सम्मत नहीं रह जाती है।

उपरोक्त विश्लेषण के प्रकाश में यह स्थिति स्पष्ट रूप से उभर कर सामने आती है कि न्याय शुल्क से छूट का बिन्दु तय करने के लिये आदेश 14 व्यवहार प्रक्रिया संहिता के अन्तर्गत प्रारंभिक वादप्रश्न विरचित करना विधि सम्मत नहीं है अपितु वाद के विचारण के पूर्व ही इस बिन्दु पर संक्षिप्त जांच कर अग्रसर होना चाहिये।

यदि न्यायालय इस निष्कर्ष पर पहुंचता है कि वादी न्याय शुल्क से छूट का पात्र नहीं है तो व्यवहार प्रक्रिया संहिता की धारा 149 के प्रावधानों के अन्तर्गत उसे न्याय शुल्क संदाय हेतु युक्तियुक्त समय न्यायालय के द्वारा दिया जाना चाहिये। यदि वादी ऐसे आदेश का पालन करने में असफल रहता है तो आदेश 7 नियम 11 (डी) व्यवहार प्रक्रिया संहिता के अन्तर्गत वाद को रद्द (Rejection of plaint) किये जाने की कार्यवाही किया जाना विधि सम्मत होगा तथा इस बारे में रामजी शर्मा (पूर्वोक्त) के पैरा 12 में की गयी मताभिव्यक्ति अवलोकनीय है।

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विधिक समस्याऐं एवं समाधान

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

समस्या एवं समाधान

दंड प्रक्रिया संहिता,1973 में हाल में किये गये संशोधनों के प्रभावशील होने के संबध में वस्तुस्थिति क्या है ?

वर्ष 2005 में दंड प्रक्रिया संहिता,1973 को दाण्डिक विधि (संशोधन) अधिनियम, 2005 (2006 का क्रमांक 2) एवं दंड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 (2005 का क्रमांक 25) द्वारा संशोधित किया गया है।

दाण्डिक विधि (संशोधन) अधिनियम, 2005 की धारा 4, जो 'प्ली बारगेनिंग' के विषय में है, को छोड़कर इस संशोधन अधिनियम के शेष प्रावधानों को, जिनमें धारा 195 दंड प्रक्रिया संहिता का संशोधन शामिल है, दिनांक 16 अप्रेल 2006 से प्रवृत्त किया गया है। धारा 4 के प्रावधान, जिनके द्वारा दंड प्रक्रिया संहिता में प्ली बारगेनिंग के विषय में अध्याय 21–ए समाविष्ट किया गया है, को भारत के राजपत्र में प्रकाशित अधिसूचना दिनांकित 3 जुलाई 2006 द्वारा 5 जुलाई 2006 से प्रवृत्त किया गया है।

दंड प्रक्रिया संहिता (संशोधन) अधिनियम 2005 (2005 का क्रमांक 25) की धारा 16, 25, 28.ए, 28.बी, 38, 42.ए, 42.बी, 42.एफ(III), 42.एफ(IV), तथा 44.ए, को छोड़कर शेष धाराओं को भारत के राजपत्र में प्रकाशित अधिसूचना दिनांकित 21 जून 2006 द्वारा दिनांक 23 जून 2006से प्रवृत्त किया गया है।

दंड प्रक्रिया संहिता (संशोधन) अधिनियम 2005, ज्योति जर्नल–अक्टूबर 2005 (भाग 4) में पृष्ठ 21 पर तथा दाण्डिक विधि (संशोधन) अधिनियम 2005 ज्योति जर्नल– अप्रैल 2006 (भाग 4) में पृष्ठ 6 पर प्रकाशित किया गया है।

दंड प्रक्रिया संहिता (संशोधन) अधिनियम 2005 के उन प्रावधानों से, जो प्रवृत्त हो चुके हैं, न्यायिक मजिस्ट्रेट की अर्थदण्ड अधिरोपित करने की अधिकारिता एवं सत्र न्यायालय की अपीलीय अधिकारिता में क्या परिवर्तन हुआ है?

दंड प्रक्रिया (संशोधन) अधिनियम 2005 की धारा 5 द्वारा मूल संहिता की धारा 29 को संशोधित करते हुये यह प्रावधान किया गया है कि न्यायिक मजिस्ट्रेट प्रथम श्रेणी 10,000/– रूपये से अनाधिक एवं न्यायिक मजिस्ट्रेट द्वितीय श्रेणी 5000/– रूपये से अनाधिक अर्थदण्ड अधिरोपित कर सकता है। संशोधन अधिनियम की धारा 20 द्वारा संहिता की धारा 206 को संशोधित कर यह प्रावधान किया गया है कि 'सम्मन' में प्रस्तावित अर्थदण्ड रूपया 1000/– तक हो सकता है।

संशोधन अधिनियम 2005 की धारा 31 एवं 32 द्वारा मूल संहिता की धारा 377 एवं 378 को संशोधित किया गया है। धारा 377 में किये गये संशोधन के परिणामस्वरूप दंडादेश की अपर्याप्ता के विषय में मजिस्ट्रेट द्वारा पारित निर्णय के विरूद्ध सत्र न्यायालय के समक्ष अपील की जा सकती है जब कि संशोधन के पूर्व ऐसी अपील उच्च न्यायालय के समक्ष ही की जा सकती थी।

धारा 378 में किये गये संशोधन के परिणामस्वरूप अब मजिस्ट्रेट द्वारा संज्ञेय एवं अजमानतीय अपराध के विषय में पारित दोषसिद्धि के निर्णय के विरूद्ध अपील सत्र न्यायालय के समक्ष ही की जा सकती है तथा ऐसी अपील प्रस्तुत करने हेतु जिला मजिस्ट्रेट लोक अभियोजक को निर्देशित कर सकता है। यह उल्लेखनीय है कि पूर्व में दोषमुक्ति के विरूद्ध अपील उच्च न्यायालय के समक्ष ही संधारणीय थी।

दंड प्रक्रिया संहिता (संशोधन) अधिनियम 2005 के द्वारा कौन से अपराध सृजित हुये हैं तथा प्रभावशील होने विषयक स्थिति क्या है ?

दंड प्रक्रिया संहिता (संशोधन) अधिनियम 2005 की धारा 44 के द्वारा भारतीय दंड संहिता को संशोधित कर तीन नवीन धाराएं –153.ए ए, 174.ए एवं 229.ए जोड़ी गयी हैं। धारा 153.ए ए, जो अभी प्रवृत्त नहीं हुयी है, द्वारा जुलूस में जानबूझकर हथियार लेकर चलने या हथियारों से सज्जित होकर ड्रिल आयोजित करने या उसमें भाग लेने को दण्डनीय बनाया गया है।

धारा 174.ए, जो प्रवृत्त हो चुकी है, द्वारा दंड प्रक्रिया संहिता की धारा 82 के अंतर्गत अपराधी घोषित किये जाने के बावजूद सम्बन्धित व्यक्ति का निर्दिष्ट स्थान पर उपस्थित न होना दण्डनीय अपराध बनाया गया है जो सात वर्ष के कारावास एवं अर्थदण्ड से दण्डनीय है ।

इसी प्रकार धारा 229.ए जो प्रभावशील हो चुकी है, के अंतर्गत बंधपत्र या जमानत पर छोड़े गये अभियुक्त द्वारा पर्याप्त कारण के बिना न्यायालय में उपस्थित न होना एक वर्ष के कारावास अथवा अर्थदण्ड या दोनों से दण्डनीय बनाया गया है।

उक्त तीनों ही अपराध संज्ञेय एवं अजमानतीय हैं। जहां धारा 153.ए ए तथा धारा 229.ए के अर्न्तगत दण्डनीय अपराधों का विचारण न्यायिक मजिस्ट्रेट प्रथम या द्वितीय श्रेणी द्वारा किया जा सकता है वहीं धारा 174–ए के अपराध का विचारण केवल न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा किया जा सकता है।

क्या किसी व्यवहार वाद में आपसी राजीनामा होने के पश्चात् इस आधार पर न्यायालय द्वारा डिक्री पारित करने से इंकार किया जा सकता है कि राजीनामें की किसी शर्त का पालन नहीं किया गया या उल्लंधन किया गया है?

नहीं। यदि एक बार न्यायालय यह सुनिश्चित कर ले कि पक्षकारों के बीच समझौता विधिसम्मत है तो वह डिक्री पारित करने हेतु आबद्व है एवं समझौते की किसी शर्त का उल्लंघन अथवा पालन न होना डिक्री पारित करने के मार्ग में कोई रूकावट उत्पन्न नहीं करेगा। शर्त का पालन न किया जाना पीड़ित पक्ष को यह अधिकार देता है कि डिक्री के निष्पादन की कार्यवाही के द्वारा समझौते की शर्त का पालन विपक्ष से करवाए परंतु डिक्री पारित करने में रोक लगाए जाने का अधिकार नहीं देता है। इस विषय में *दुर्गाप्रसाद विरूद्ध भग्गोबाई, 1961 जे.एल.जे. 1285* का न्यायिक दृष्टांत अवलोकनीय है।

नोटः स्तंम्भ 'समस्याऐं एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याऐं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे– संचालक

PART - II

NOTES ON IMPORTANT JUDGMENTS

201. MOTOR VEHICLES ACT, 1988 – Section 171

Award of interest – Whether Tribunal can impose penal interest? Held, No – Law explained.

Oriental Insurance Company Limited v. Harish Kumar and others Judgment dated 16.05.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in M.A. No. 79 of 2002 (DB)

Held:

The next aspect that we would presently advert to is with regard to the grant of interest with the condition as has been indicated above. The Tribunal has granted interest at the rate of 9% While so granting, it has added a rider that if the amount is not paid within a period of two months, it shall carry 12% interest per annum. In this context it is profitable to refer to Section 171 of the Act which deals with award of interest. It reads as under:

> 171. Award of interest where any claim is allowed.- Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation, simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."

The aforesaid provision came to be interpreted by the Apex Court in the case of *National Insurance Company Ltd. Vs. Keshav Bahadur and Others (2004) 2 SCC 370.* In the said case, the Apex Court expressed the view as under:

> "13. Though Section 110-CC of the Act (Corresponding to Section 171 of the new (Act) confers a discretion on the Tribunal to award interest, the same is meant to be exercised in cases where the claimant can claim the same as a matter of right. In the above background, it is to be judged whether a stipulation for higher rate of interest in case of default can be imposed by the Tribunal. Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation. No express or implied power in this regard can be culled out from Section 110-CC of the Act or Section 171 of the new Act. Such a direction in this award for retrospective enhancement of interest for default in payment of the compensation together with interest payable thereon virtually amounts to imposition of penalty which is not statutorily envisaged and prescribed. It is, therefore, directed that the rate of interest as awarded by the High Court shall alone be applicable till payment, without the

stipulation for higher rate of interest being enforced, in the manner directed by the Tribunal."

In view of the aforesaid pronouncement of law, the award of penal interest granted by the Tribunal is absolutely infirm and, therefore, unsustainable.

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202. INTERPRETATION OF STATUTES :

Generally Courts are not entitled to read words into an Act – Intention of Legislature be gathered from the language used – Law explained.

Vemareddy Kumaraswamy Reddy and another v. State of A.P. Judgment dt. 13.02.2006 passed by the Supreme Court in Civil Appeal No. 3066 of 2000, reported in (2006) 2 SCC 670

Held :

Statute being an edict of the legislature, it is necessary that it is expressed in clear and unambiguous language. In spite of courts saying so, the draftsmen have paid little attention and they still boast of the old British jingle

"I m the parliamentary draftsman

I compose the country's laws

And of half the litigation

I' m undoubtedly the cause"

Which was referred to by this Court in *Palace Admn. Board v. Rama Varma Bharathan Thampuran, 1980 supp SCC 234* (SCC at p. 244, para 21; AIR at p. 1195). In Kirby v. Leather, (1965) 2 All ER 441 the draftsmen were severely criticised in regard to Section 22(2)(b) of the (UK) Limitation Act, 1939, as it was said that the section was so obscure that the draftsmen must have been of unsound mind.

Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so." (See Frankfurter *"Some Reflections on the Reading of Statutes in 'Essays on Jurisprudence'*, Columbia Law Review, p. 51)

Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See *Institute of Chartered Accountants of India v. Price Waterhouse, (1977) 2 SCC 273*). The intention of the ligistature is primarily to be

gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford v. Spooner, (1846) 6 M 00 PC 1* courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there (See *State of Gujarat v. Dilipbhai Nathjibhai Patel, (1998) 3 SCC 234.*) It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See *Stock v. Frank Jones (Tipton) Ltd., (1978) 1 All ER 948*] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in *vickers Sons and Maxim Ltd. v. Evans, 1910 AC 444* quoted in *Jumma Masjid v. Kodimaniandra Deviah, 1962 Supp (2) SCR 554.*

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203. EVIDENCE ACT, 1892 – Sections 40 to 42

Relevancy of Judgment – Whether earlier judgment regarding one accused in a case is relevant for recording conviction or acquittal of another accused in the same case? Held, No – Further held – Case has to be decided on the basis of evidence led in the trial – Law explained.

Rajan Rai v. State of Bihar.

Judgment dated 10.11.2005 passed by the Supreme Court in Criminal Appeal No. 199 of 2000, reported in (2006) 1 SCC 191

Held :

Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Evidence Act, 1872 (in short "the Evidence Act") which are under the heading "Judgments of courts of justice when relevant", and in the aforesaid sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment, order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 insofar as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a

fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of the earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

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A three-Judge Bench of this Court had occasion to consider the same very question in *Karan Singh v. State of M.P., (1965) 2 SCR 1* in which there were in all 8 accused persons out of whom the accused Ram Hans absconded, as such trial of seven accused persons, including the accused Karan Singh, who was the appellant before this Court, proceeded and the trial court although acquitted the other six accused persons, convicted the seventh accused i.e. Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, the accused Ram Hans was apprehended and put on trial and, upon its conclusion, the trial court recorded the order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of the accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of the accused Ram Hans, the conviction of the accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when the other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Sections 302/149 to one under Sections 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of the accused Ram Hans, it was not permissible in law for the High Court to uphold the conviction of the accused Karan Singh. This Court, repelling the contention, held that the decision in each case had to turn on the evidence led in it. Case of the accused Ram Hans depended upon evidence led there while the case of the accused Karan Singh, who had appealed before this Court, has to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering the merits of the case of Karan Singh, who was the appellant before this Court. This Court observed at AIR p. 1038 thus: (SCR pp. 3-4)

"As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ram Hans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ram Hans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ram Hans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of the accused Karan Singh from Sections 302/149 to one under Section 302 read with Section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh. This Court was of the view that in spite of the fact that the accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering the appeal of the accused Karan Singh, to consider the evidence recorded in the trial of Karan Singh only for a limited purpose of find out as to whether Karan Singh could have shared the common intention with the accused Ram Hans to commit the murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans....

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204. TRANSFER OF PROPERTY ACT, 1882 – Sections 113 and 116
Lessee holding over after expiry of lease – Status of such person is of tenant at sufferance akin to a trespasser – Effect of receipt of rent by landlord – Law explained.
C. Albert Morris v. K. Chandrasekaran and others
Judgment dated 26.10.2005 passed by the Supreme Court in Civil Appeal No. 1027 of 2005, reported in (2006) 1 SCC 228

Held :

... The consensus of judicial opinion in this country is that a mere continuance in occupation of the demised promises after the expiry of the lease, notwithstanding the receipt of an amount by the quondam landlord, would not create a tenancy so as to confer on the erstwhile tenant the status of tenant or a right to be in possession. In this context, we may refer to the judgment of this Court in *Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184.* In para 13 of the said judgment, this Court held as under : (SCC p. 200)

"13. In view of the aforesaid settled legal position, it must be held that on the expiry of the period of lease, the erstwhile lessee continues in possession because of the law of the land, namely, that the original landlord cannot physically throw out such an erstwhile tenant by force. He must get his claim for possession adjudicated by a competent court as per the relevant provisions of law. The status of

an erstwhile tenant has to be treated as a tenant at sufferance akin to a trespasser having no independent right to continue in possession."

The following judgments may also be beneficially looked into in support of the above submission:

The judgment in *Saleh Bros. v. K. Rajendran, AIR 1970 Mad 165* deals with the receipt of rent subsequent to the notice determining lease and pending adjudication suit and as to whether receipt of rent by itself amounts to waiver. In paras 12, 19, 20 and 31, this Court held as under:

> "12. The receipt of rent may only create a presumption and cannot by its own force amount to a waiver. Section 113 consists of two limbs: (a) the express or implied consent of the person to whom notice is given and (b) 'the act of the person giving the notice showing the intention to treat the lease as subsisting'. In order to constitute a waiver, both the limbs must concurrently operate, which means, that an act by itself and of its own force, without reference to the intention of the parties, cannot bring about a waiver. So much is quite clear from the plain language of the section, which embodies the basic principles, and I find no justification for reading the Illustrations as being repugnant to the section. Every effort should be made to interpret the Illustration in conformity with the main section. The principle underlying Section 116 of the Act will also apply in applying Section 113 as this is also a case of continuance of the lease restoring the old tenancy. (AIR pp. 470-71)
>
> 19. I shall next refer to another recent decision of the Supreme Court, in *Calcutta Credit Corpn. Ltd. v. Happy Homes (P) Ltd., AIR 1968 SC 471.* In that decision, too, the Supreme Court pointed out that under Section 113 of the Transfer of Property Act the act which operates as a waiver must show an intention to treat the lease as subsisting and other party's consent, express or implied therefor. In that case the tenants, who were holding over, issued, on 12-8-1953, a notice to the landlord of their intention to vacate the premises on 31.8.1953. But by their letter, dated 26th August they withdrew that notice. The landlord did not agree to the withdrwal of the notice and insisted that the lease had been determined under Section 111(h) of the Transfer of Property Act. Dealing with the question of waiver, the Supreme Court observed as follows:
>
> 'Clearly Section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act show an intention to treat the lease as subsisting and the other party gives his consent... express or implied therefor. The law under the Transfer of Property Act on the question in hand is not different from the law in England. Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is

at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting.'

20. ... 'The question therefore is, *quo amino* the rent was received, and what the real intention of both parties was?, (AIR p. 172)

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31. ... The decision in *Kai Khushroo v. Bai Jerbai, AIR 1949 FC 124* turned upon the peculiar facts of that case and there was a difference of opinion, Patanjali Sastri, J., as he then was, taking a different view. There, after notice to quit, Defendants 2 and 3 who claimed to be sub-tenants insisted upon continuing in possession and paid the rent month after month. The majority took the view that the landlord had obvious motive in receiving the payments of rent after a particular period i.e. the appointment of a receiver of the property of the mortgagor at the instance of his mortgagee. Having regard to the uniform view taken in all the decisions, both Indian and English, I am not inclined to interpret this decision of the Federal Court as an authority for the position that the payments and receipt of rent as such in every circumstance would amount to waiver, whatever may be the circumstances of the case and the intention of the lessor. (AIR p. 175)"

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205. PRECEDENTS

Precedent, postulates of – Initiation of reasons or principle alone binding as a precedent – Law explained.

State of Orissa and others v. Md. Illiyas

Judgment dated 22.11.2005 passed by the Supreme Court in Civil Appeal No. 6980 of 2005, reported in (2006) 1 SCC 275

Held :

... A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as precedent. (See *State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 152 and Union of India v. Dhanwanti Devi, (1996) 6 SCC 44*.) A

case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In *Quinn v. Leathem, 1901 AC 495* the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

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206. INDIAN PENAL CODE, 1860 – Sections 366 and 376

Age, determination of – Whether scientific evidence of ossification test is binding on ocular evidence ? Held, No – Further held, evidence of father and mother is best evidence for determining date of birth – Law explained.

Vishnu alias Undrya v. State of Maharashtra

Judgment dated 24.11.2005 passed by the Supreme Court in Criminal Appeal No. 1112 of 1999, reported in (2006) 1 SCC 283

Held:

It is urged before us by Mr. Lalit that the determination of the age of the prosecutors by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.

In *Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204* this Court has considered a similar question and pointed out in para 34 at SCC pp. 221-22 as under :

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court."

We are of the opinion that this contention of the counsel for the appellant will be of no assistance in the face of evidence of fact from the mouth of PW 1 the

father and PW 13 the mother, well corroborated by the register of the date of birth of the Greater Bombay Municipal Corporation and the evidence of Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santa Cruz (West), Mumbai, produced by him which shows that PW 4 Pushpa was born on 29-11-1964.

In the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother, PW 1 and PW 13 categorically stated that PW 4 the prosecutrix was born on 29-11-1964, which is supported by unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW 1 and PW 13, supported by unimpeachable documents. Normally the age recorded in the school certificate is considered to be the correct determination of age, provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW 15 SI Bagal was not an authenticated document. Nobody was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29-6-1963 is, therefore, belied by the unimpeachable evidence of PWs 1 and 13 and contemporaneous documents like date of birth register of the Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above.

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207. CRIMINAL PROCEDURE CODE, 1973 – Section 197
Sanction – Sanction granted u/s 197 Cr.P.C. and u/s 19 of Prevention of Corruption Act, 1988, difference between – Sanction u/s 197, when necessary – Law explained.
Romesh Lal Jain v. Naginder Singh Rana and others
Judgment dated 28.10.2005 passed by the Supreme Court in Criminal Appeal No. 691 of 2003, reported in (2006) 1 SCC 294

Held :

Sanction required under Section 197 CrPC and sanction required under the 1988 Act stand on different footings. Whereas sanction under the Penal Code in terms of the Code of Criminal Procedure is required to be granted by

the State; under the 1988 Act it can be granted also by the authorities specified in Section 19 thereof.

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It is also beyond any cavil of doubt that an order granting or refusing sanction must be preceded by application of mind on the part of the appropriate authority. If the complainant or the accused can demonstrate such on order granting or refusing sanction to be suffering from non-application of mind, the same may be called in question before a competent court of law...

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The upshot of the aforementioned discussions is that whereas an order of sanction in terms of Section 197 CrPC is required to be obtained when the offence complained of against the public servant is attributable to the discharge of his public duty or has a direct nexus therewith, but the same would not be necessary when the offence complained of has nothing to do with the same. A plea relating to want of sanction although desirably should be considered at an early stage of the proceedings, but the same would not mean that the accused cannot take the said plea or the court cannot consider the same at a later stage. Each case has to be considered on its own facts. Furthermore, there may be cases where the question as to whether the sanction was required to be obtained or not would not be possible to be determined unless some evidence is taken, and in such an event, the said question may have to be considered even after the witnesses are examined.

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208. CRIMINAL PROCEDURE CODE, 1973 – Section 321
Withdrawal from prosecution – Duty of the Public Prosecutor – Public Prosecutor not to act like a post box or on the dictates of the State Government – Duty should be discharged as an officer of the Court – Law explained.
S.K. Shukla and others v. State of U.P. and others
Judgment dated 10.11.2005 passed by the Supreme Court in Writ Petition (Crl.) No. 132 of 2003, reported in (2006) 1 SCC 314

Held :

...In *Sheonandan Paswan v. State of Bihar, (1983) 1 SCC 438* it was held : (SCC p. 440)

> "The settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so.

However, Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the Government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government.

If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter after applying his mind to the facts of the case may either agree with the instructions and file a petition stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal petition. In the latter event the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State."

(emphasis supplied)

The Public Prosecutor cannot act like a postbox or act on the dictates of the State Government. He has to act objectively as he is also an officer of the court. At the same time the court is also not bound by that. The courts are also free to assess whether a prima facie case is made or not. The court, if satisfied, can also reject the prayer. However, in the present case we have examined the matter and found that there is a prima facie case to proceed against the accused persons under Section 4(b) of the Act and the other provisions of the Explosives or Arms Acts, therefore, the sanction granted by the Government and application moved by the Public Prosecutor for withdrawal of the cases cannot be sustained...

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209. CIVIL PROCEDURE CODE, 1908, – O.VII R.10

Suit filed in a Court having no jurisdiction – Return of plaint for presentation in proper Court – Objection regarding limitation raised in the second Court – Whether presentation of plaint in the second Court is continuation of the suit filed in the earlier Court? Held, No.

Harshad Chimanlal Modi (II) v. DLF Universal Ltd. and another

Judgment dated 14.12.2005 passed by the Supreme Court in Civil Appeal No. 2726 of 2000, reported in (2006) 1 SCC 364

Held:

We may in this connection refer to a decision of this Court in *Amar Chand Inani v. Union of India, (1973) 1 SCC 115.* In that case, the plaintiff, a practising advocate, sustained serious injuries in a raliway accident while travelling by a train. He instituted a suit for damages in the Karnal Court which was then transferred to the Panipat Court. The plaint was, however, returned for presentation to the proper court since the Panipat Court had no jurisdiction to hear the suit. In pursuance of the said order, the plaint was presented to the Ambala Court. At the time of presentation of the plaint to the Ambala Court, an objection was raised that the suit was barred by limitation. The question before the Court was as to whether the suit was filed within the period of limitation. This Court held that since the Karnal Court had no jurisdiction to entertain the suit, it was not a proper court. The submission that the suit instituted in the Ambala Court after the plaint was returned from the Karnal Court should be deemed to be a continuation of the suit filed in the Karnal Court had been negatived.

Considering the provisions of the Limitation Act and Order 7 Rule 10 of the Code, the Court stated: (SCC p. 118, para 9)

> "It was, however, argued by counsel for the appellant that the suit instituted in the trial court by the presentation of the plaint after it was returned for presentation to the proper court was a continuation of the suit filed in the Karnal Court and, therefore, the suit filed in Karnal Court must be deemed to have been filed in the trial court. We think there is no substance in the argument, for, *when the plaint was returned for presentation to the proper court and was presented in that court, the suit can be deemed to be instituted in the proper court only when the plaint was presented in that court.* In other words, the suit instituted in the trial court by the presentation of the plaint returned by the Panipat Court was not a continuation of the suit filed in the Karnal Court."
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> (emphasis supplied)

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210. PRECEDENTS

Precedent – Disposal of cases by blindly placing reliance on a decision not proper – Circumstantial flexibility may make a world of difference – Law explained.

Union of India and another v. Major Bahadur Singh

Judgment dated 22.11.2005 passed by the Supreme Court in Civil Appeal No. 4482 of 2003, reported in (2006) 1 SCC 368

Held :

The courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context.

These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes: their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton, (1951) 2 All ER 1 (HL)* Lord MacDermott observed : (All ER p. 14 C-D)

> "The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge..."

In *Home Office v. Dorset Yacht Co., (1972) All ER 294* Lord Reid said: (All ER p. 297 g-h)

"Lord Atkin's speech... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."

Megarry, J. in *Shepherd Homes Ltd. v. Sandham* (No.2) *, (1971) 2 All ER 1267* observed: (All ER p. 1274 d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" and, in *Herrington v. British Railways Board (1972) 1 All ER 749* Lord Morris said: (All ER p. 761c)

> "There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus :

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.
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> Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side

branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

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211. PREVENTION OF CORRUPTION ACT, 1947 – Sections 4, 5 (2) and 5 (1) (d)
Presumption available u/s 4, rebuttal of – Bald and belated statement u/s 313 Cr.P.C. by way of explanation not sufficient to rebut presumption – Law explained.
State of Maharashtra v. Rashid B. Mulani
Judgment dated 04.01.2006 passed by the Supreme Court in Criminal Appeal No. 557 of 1999, reported in (2006) 1 SCC 407

Held :

Section 4 of the Act, *inter alia,* provided that where in any trial of an offence punishable under Section 161 IPC or Section 5(1) (a) or (b) punishable under Section 5(2) of the Act, it is proved that an accused person has accepted any gratification (other than legal remuneration), it shall be presumed, unless the contrary is proved, that he accepted that gratification as a motive or reward, such as is mentioned in the said Section 161. This would mean that a mere explanation in the statement under Section 313 that the amount was received towards a loan will not be sufficient. The contrary position should be established by the accused either from inferences legally drawn from the evidence on record let in by the prosecution, or by letting in direct evidence in regard to the explanation. The statutory presumption raised under Section 4 will not stand rebutted merely by offering an explanation under Section 313 if such explanation does not find support from the evidence let in by the prosecution.

In *Dhanvantrai Balwantrai Desai v. State of Maharashtra, 1963 Supp (1) SCR 485* this Court observed thus: (SCR pp. 497-99)

> "Therefore, the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that though that money was not due to him as legal remuneration, it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. *The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible.* A fact is said to be proved when its

existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

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Something more than raising a reasonable probability, is required for rebutting a presumption of law. *The bare word of the appellant is not enough and it was necessary for him to show that upon the established practice his explanation was so probable that a prudent man ought, in the circumstances, to have accepted it."*

(emphasis supplied)

Though, it is well settled that the accused is not required to establish his explanation by the strict standard of "proof beyond reasonable doubt", and the presumption under Section 4 of the Act would stand rebutted if the explanation or defence offered and proved by the accused is reasonable and probable, the following words of caution in *Chaturdas Bhagwandas Patel v. State of Gujarat* (1976) 3 SCC 46 should be kept in mind before it can be said that the presumption stood rebutted: (SCC pp. 50 ^ 53, paras 13 & 23)

"Thus it had been indubitably established that the appellant, a public servant accepted a gratification, that is, a sum of Rs. 500 which was not his legal remuneration, from Ghanshamsinh (PW 1). On proof of this fact, the statutory presumption under Section 4(1) of the Prevention of Corruption Act was attracted in full force and the burden had shifted on to the appellant to show that he had not accepted this money as a motive or reward such as is mentioned in Section 161, Penal Code.

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[I]t is true that the burden which rests on an accused to displace this presumption, is not as onerous as that cast on the prosecution to prove its case. *Nevertheless, this burden on the accused is to be discharged by bringing on record evidence, circumstantial or direct, which establishes with reasonable probability, that the money was accepted by the accused, other than as a motive or reward such as is referred to in Section 161."*

(emphasis supplied)

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212. ARBITRATION AND CONCILIATION ACT, 1996 – Section 8
Whether proceedings u/s 8 can result in an order restraining arbitral proceedings? Held, No – Law explained
Ardy International (P) Ltd. and another v. Inspiration Clothes & U and another
Judgment dated 08.12.2005 passed by the Supreme Court in Civil Appeal No. 3040 of 2005, reported in (2006) 1 SCC 417

Held :

... The situation contemplated by Section 8 can arise only at the first instance of an opponent and defendant in a judicial proceeding, or, at the highest, suo motu at the instance of the judicial authority, when the judicial authority comes to know of the existence of an arbitration agreement. In either event, there is no question of the court under Section 8 of the 1996 Act restraining the arbitral proceedings from commencing or continuing. In fact, Section 8 is intended to achieve, so to say, the converse result. Unfortunately, in this case the application for interim relief was made by the respondent who was the plaintiff before the civil court. The relief sought therein is the restraint of arbitral proceedings. It could only have been decided as an application under Order 39 Rules 1 and 2 for whatever it was worth. Once the objection to this application was filed by the appellant bringing to the notice of the court the existence of an arbitration agreement, thereafter the proceedings could have been continued only within the parameters of Section 8 of the 1996 Act. A proceeding under Section 8 could never result in an order restraining the arbitral proceedings, which is what finally the impugned order before us does.

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213. CIVIL PROCEDURE CODE, 1908 – O.XXIII R.4

Whether parties can validly enter into a settlement in execution proceedings despite provisions of R.4? Held, Yes

N.K. Rajgarhia v. Mahavir Plantation Ltd. and others

Judgment dated 16.12.2005 passed by the Supreme Court in Civil Appeal No. 7535 of 2005, reported in (2006) 1 SCC 502

Held:

... Order 23 Rule 4 of the Code of Civil Procedure states that other provisions thereof are not applicable to execution proceedings. But, despite the same, it is now well settled that the parties may enter into a settlement even in execution proceedings.

In *Moti Lal Banker v. Mahraj Kumar Mahmood Hasan Khan, (1968) 3 SCR 158* this Court held such compromise to be permissible in law stating: (SCR p. 161 D-F)

> "Independently of Order 23 Rule 3, the provisions of Order 21 Rule 2 and Section 47 enable the executing court to record and enforce such a compromise in execution proceedings. Nor does Order 20 Rule 11(2) affect this power of the executing court. Order 20 Rule 11 enables the court passing the decree to order postponement of the payment of the decretal amount on such terms as to the payment of interest as it thinks fit on the application of the judgment-debtor and with the consent of the decree-holder. It does not affect the power of the executing court under Section 47 and Order 21 Rule 2."

Yet again in *Periyakkal v. Dakshayani, (1983) 3 SCC 127* this Court held that, in certain situations, the court has also jurisdiction to extend the time stating: (SCC p. 131, para 4)

> "The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; and, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed."

There cannot, thus, be any doubt that the compromise entered into by and between the parties hereto in the execution proceedings was valid in law.

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214. SUCCESSION ACT, 1925 – Section 63

Will, execution of – Whether scribe of the will is disqualified from being attesting witness? Held, No.

Mathew Oommen v. Suseela Mathew

Judgment dated 03.01.2006 passed by the Supreme Court in Civil Appeal No. 2034 of 2003, reported in (2006) 1 SCC 519

Held :

... The learned counsel for the respondent also argued that the Will had not been attested by the two attesting witnesses as required under the law. In support of this argument it was submitted that one of the alleged attesting witnesses is only scribe of the Will and is not an attesting witness. Regarding this objection we may note that there is no requirement in law that a scribe cannot be an attesting witness. The person concerned has appeared in the witness box as PW 1 and has clearly stated that he is a scribe of the Will as well as he is an attesting witness of the Will. For attestation what is required is an intention to attest which is clear from the statement of PW 1. He categorically stated that he has signed as an attestor and scribe. In our view, the requirement of attestation of the Will by two witnesses is fully met in the present case.

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215. RULES AND ORDERS (CRIMINAL) – Rule 255

Furnishing of copy of the judgment to District Magistrate in sessions trial and appeal, requirement as to – Home Department directed to issue directions to authorise Public Prosecutors to receive copy of judgment on behalf of District Magistrate – Further directed, till such orders are issued, Sessions Judge/Additional Sessions Judge to for-

ward copy of judgment to District Magistrate through GP/AGP
State of M.P. v. Manish Singh and others
Reported in 2006 (3) MPHT 54 (DB)

Held:

We have perused Rule 255 of the Rules and Orders (Criminal). As per Rule 255, as soon as practicable after the judgment is pronounced a copy of it free of charge should be sent –

(f) to the District, Magistrate, in sessions trials and appeals.

According to this provision, the copy shall be forwarded to the District Magistrate by the Courts. We have also perused provisions of Law Department Manual, Rules 86-A, 86-B and Rule 91 *inter alia* provides as under :–

> **"86-A. Public Prosecutor's duty to report result.** – It shall be the duty of the Public Prosecutor and Additional Public Prosecutor to report immediately to the District Magistrate, the result of every criminal case conducted by him. A copy of the report shall be forwarded simultaneously to the District Superintendent of Police.
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> **86-B. Further report when decision is adverse.** – Where in any criminal case the decision is adverse to the prosecution, the Public Prosecutor or the Additional Public Prosecutor in charge of the case shall, not later than seven days from the date of the order or judgment, submit to the District Magistrate a detailed report on the case, together with his opinion as to the advisability of filing of a revision or appeal and a draft of the grounds therefor if a revision or appeal is advised. A copy of the report shall be forwarded simultaneously to the District Superintendent of Police.
>
> **91. Procedure.**– Ordinarily the District Magistrate will propose the appeal. With his proposal he should send the records and a note of his own giving the facts of the case and stating where he thinks the Court was wrong. If he took the opinion of the Public Prosecutor or the District Superintendent of Police he should state or attach it separately."

According to the aforesaid Rules, though, it is the duty of the Public Prosecutors and Additional Public Prosecutors to report immediately to the District Magistrate about the result of the criminal case and if decision is adverse to the prosecution, the Public Prosecutor or the Additional Public Prosecutor in charge of the case shall, not later than seven days from the date of the order or judgment, submit to the District Magistrate a detailed report on the case, together with his opinion as to the advisability of filing a revision or appeal and a draft of the grounds therefor, if a revision or appeal is advised and it is also the procedure that ordinarily the District Magistrate will propose for filing the appeal. After perusal of the aforesaid provisions, it is clear that the PP or APP who is conducting that trial is not directly getting the copy of the judgment/order from

the Court and therefore, in most of the matters delay is being caused in furnishing opinion and taking decision. Therefore, we are of the view that to cut short the delay in getting the copy of the order or judgments the correct approach would be that the copy of the order/judgment should be forwarded to District Magistrate through the Public Prosecutor or Additional Public Prosecutor, who has conducted the trial, so that he may forward the same to the District Magistrate along with his report, opinion and case file including necessary documents. We have seen that the State Government or Law Department are not caring to modify their procedure. Though the Law Department have issued various circular but none of the circular indicate that District Magistrate will authorise the Public Prosecutor or Additional Public Prosecutor (Govt. Advocate or Addl. Govt. Advocate) to obtain copy of the judgment on their behalf from Court. No responsibility has been cast on the Public Prosecutors or Additional Public Prosecutors (GPs or AGPs) to obtain certified copy quickly and to submit the report to the District Magistrate.

In view of the aforesaid background, we have no option but to issue the directions to the Home Department and Law Department to issue direction to the District Magistrates to authorise the Public Persecutors as well as to the Additional Public Prosecutors who have conducted the trial to obtain certified copy from the Court on behalf of the District Magistrate so that after obtaining certified copy they may submit their opinion and report to the District Magistrate in compliance of the provisions of Rule 86-B and thereafter, District Magistrate may also submit proposal for filing appeal as per Rule 91 of the Law Department Manual. Till such directions are issued, we direct that all the Sessions Judges and Additional Sessions Judges to forward the copy of the judgment of the sessions trials to the District Magistrate through Public Prosecutors as well as Additional Public Prosecutors (GPs and AGPs) who has conducted the trial in compliance of Rule 255 so that the Public Prosecutors and Additional Public Prosecutors (GPs and AGPs) in charge of the case may submit their report about the filing of appeal to the District Magistrate well in time i.e., not later than 7 days as prescribed in Rule 86-B. We also propose to put a rider on the District Magistrates that they will also submit their proposal within 15 days after receiving the copy of the judgment as well the opinion from the Public Prosecutors and Additional Public Prosecutors (GPs and AGPs) about the filing of appeal to the concerned authority. In our considered opinion, this slight modification in the procedure will not only be helpful in reducing the delay but will be workable easily and smoothly. A copy of this order be forwarded to the State Government including Home and Law and Legislative Department for necessary compliance in the matter. A copy of this order be placed before the Registrar General to forward it to all the Sessions Judges and Additional Sessions Judges for compliance.

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216. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Extent of umbrella available under the order of anticipatory bail while considering application u/s 437/439 – Law explained.
Rajul Rajendranath Dubey v. State of M.P.
Reported in 2006 (3) MPHT 65

Held:

Therefore, considering all the facts and circumstances, it would be proper to explain present legal position in following plain and simple words so that the Subordinate Courts may not feel any difficulty with regard to maintainability of bail applications filed under Section 437 or 439 of the Code :–

(a) If a person has been enlarged on anticipatory bail for a limited period with this condition that if he so desires, may file an application for regular bail before the Competent Court and the Competent Court is the Court of Magistrate, the bail application under Section 437 of the Code would lie and it is not necessary at all that such person must remain present before the Court or he must be in jail for the maintainability of that application because he is on anticipatory bail and the umbrella has already been provided to him for a limited period or till the rejection of that application, which ever is earlier.

(b) Where the Court of Sessions is Competent Court and if an application for regular bail has been filed under Section 439 of the Code, it would certainly be maintainable even if the applicant is not present in Court or he is not in jail because he is on anticipatory bail and the umbrella has already been provided to him for a limited period or till the rejection of that application, whichever is less. If this application is rejected then only the person can be taken into custody, if present.

(c) Where an application under Section 437 of the Code is rejected by the Magistrate and the applicant has not been taken into custody because of any reason or he moves out of the custody of the Court, then the application under Section 439 of the Code would not be maintainable in the Court of Sessions. Similarly, if an application under Section 439 of the Code is filed before the Sessions Court because the Sessions Court is the Competent Court and after rejection of that application, if the applicant is not taken into custody for any reason or he moves out of the custody of the Court, the application under Section 439 of the Code would not be maintainable in the High Court. For maintainability of the application for regular bail in both the cases, the actual custody of such person would be the condition precedent.

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217. RENT CONTROL AND EVICTION

Death of original tenant, effect of on heirs of deceased tenant –Held, heirs of such tenant become joint tenant – One joint tenant cannot be evicted by another joint tenant – Law explained.

Akhtar Nawab Naqvi v. Smt. Taj Jahan @ Amina Begum and others

Reported in 2006 (3) MPHT 72

Held :

In the present case, admittedly as per the pleading of the parties, Wakf Board reppondent No. 5 is the owner of the suit accommodation. It is also no more in dispute that the original tenant was Yakoob Hussain who took the suit accommodation on tenancy basis from Wakf Board. The original tenant died on 14-5-1980 and admittedly, dependent/appellant is also the son of deceased tenant and if that is the position, he along with the plaintiffs inherited the tenancy right in the suit accommodation. The defendant/appellant being son would come under the ambit of the definition of member of the family as envisaged under Section 2 (e) of the M.P. Accommodation Control Act, 1961 and since the tenancy right is inheritable the defendant/appellant also enjoys the same status as the plaintiff Nos. 1 to 4 are enjoying in the suit accommodation after the death of original tenant. The status of defendant/appellant is that of co-tenant along with the plaintiff Nos. 1 to 4. The Supreme Court in the case of *Damdilal and others v. Parasram and others, 1976 JLJ 655,* has held that on the death of original tenant his heirs becomes joint tenant in the accommodation since the tenancy right is inheritable. In this view of the matter, since defendant also inherited the tenancy right, after the death of his father who was the original tenant, he cannot be evicted by the co-tenant like plaintiff Nos. 1 to 4 because defendant/appellant also enjoys the same status as being enjoyed by the plaintiff Nos. 1 to 4. ...

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218. CRIMINAL PROCEDURE CODE, 1973 – Section 328

Accused being deaf and dumb unable to understand the proceedings – Procedure to be followed – If the proceeding results in conviction, case to be forwarded to the High Court.

In Re : Boura @ Drigpal

Reported in 2006 (3) MPHT 80

Held:

... I am of the firm opinion that accused is a deaf and dumb person who cannot be made to understand the proceedings of the Court and the Trial Court was right in making the reference to this Court under Section 318 of the Code while convicting him. In *Re:Peetambaran [AIR 1959 Kerala 165],* the Division Bench of Kerala High Court observed:

> "(2) Having found that the accused was a *sane deaf-mute* who could not be made to understand the proceedings of the trial, the learned

Judge rightly invoked the provision of Section 341, Criminal Procedure Code to make the reference after finding him guilty and convicting him of murder, without at the same time passing the sentence therefor. It is settled law that the provision of the said section could be invoked only when the accused is unable to follow the proceedings, see *King Emperor Vs. Dada Mahadu,* 3 Bom LR 371, *Emperor Vs. Ganga,* AIR 1927 Lah 799 (1), *Isso Vs. Emperor,* AIR 1943 Sind 237, *The Crown Vs. Naru,* AIR 1950 EP 174 and In Re: *Pondavi Jaddidu,* (1954) 2 Mad LJ (Andhra) 226.

These cases hold that though an accused is a deaf-mute, if he understood what was being alleged against him by the prosecution and its witnesses, Section 341 would have no place and that the Court concerned should deal with him in the ordinary way and dispose of the case. In the *Sind case, AIR 1943 Sind 237,* Davis, C.J. and Weston, J., have elaborately considered the scope and amplitude of Section 341, Criminal Procedure Code."

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219. CIVIL PROCEDURE CODE, 1908 – O.6 R.17

Amendment of plaint – Whether amendment resulting in enhancement of relief exceeding the pecuniary jurisdiction of the Court can be allowed? Held, Yes.

Krishna Kumar Khandelwal v. Mangal Prasad

Judgment dated 29.06.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Writ Petition No. 393 of 2005 (DB)

Held:

These two writ petitions involving similar question of law were referred to a larger Bench by the learned Single Judge who had expressed doubt with regard to correctness of the decisions rendered in the cases of *Trilokchand vs. Jabbar Khan, 1967 MPLJ Short Note 78* and *Indori Lal vs. Indore Municipal Corporation, 1976 MPLJ SN 5* and *Shri Hanuman Rice Mill, Rajgarh Vs. G.G. Dhandekar Machine Works Ltd., 1984 MPLJ SN 2* whereby a view was expressed that when question of allowing an amendment would result in a situation where the claim would exceed the pecuniary jurisdiction of the trial Court, the legal procedure for the trial Court would be to return the plaint together with the application for amendment for consideration of that Court which would have jurisdiction to consider the plaint if the amendment was allowed.

On a perusal of the aforesaid decisions it is quite luminescent that various High Courts had taken different views. The language of Order 6 Rule 17 of the Code of Civil Procedure cannot be construed in a narrow manner to mean that the application for amendment which will oust the jurisdiction the proper course is to return the plaint along with an application for amendment for presentation before the proper Court. We are disposed to think the correct legal position has been expressed in the cases of *Benisham Mohanlal Khetan v. Mahadev Tukaram*

Borker, AIR 1985 Bom. 462, T.K. Sreedharan v. P.S. Job, AIR 1969 Kerala 75 and *Simadri Panda v. Durgasi China Appanna and others, AIR 1982 Orissa 25.* We are inclined to think so, for the following reasons:

> *"i) Every Court has the inherent jurisdiction to decide its own jurisdiction and when an application for amendment is filed seeking enhancement of the valuation by which the pecuniary jurisdiction of the original Court would be ousted it is incumbent and in a way, imperative on the part of the original Court to dwell upon the spectrum of amendment subject to contest by the defendants on which basis he would determine his pecuniary jurisdiction. His jurisdiction would only be ousted if he allows the amendment as that would be a consequence of the amendment. If the amendment petition is not adverted to solely on the ground a prayer has been made to amend the plaint in relation to valuation it would tantamount to pre-judging the matter and abrogating the jurisdiction to decide once own.*
>
> *ii) The logic that the amendment relates back to the date of presentation of the plaint is fundamentally immaterial inasmuch as only after the amendment takes place the jurisdiction as a matter of subsequent resultant would be ousted and then only it can be returned due to lack of requisite pecuniary jurisdiction.*
>
> *iii) If it would become a warrant of law to return the plaint along with the application for amendment it can give rise to anomalous situation. For example plaintiff obtains an order of injunction and the order of injunction is valid till a particular date by abundant caution he files an application for amendment and the Court is under obligation to return the plaint along with the amendment, a void is likely to usher in for the interregnum period. It is an elementary principle that law does not allow itself to function in a vacuum. It may be argued that the Court can pass a protective order for the interregnum period but there again the question of jurisdiction may cause a problem and a remora.*
>
> *iv) Once the plaint and the amendment application are returned to be resented before the Court which has pecuniary jurisdiction the Court which has the pecuniary jurisdiction may refuse to entertain the application for amendment on many a score and in that case the plaintiff would again be bound to present the plaint in the original Court. This time consuming process not only puts the plaintiff in a different situation but also runs counter to public policy of speedy disposal and creates an impediment in putting the controversy to rest.*
>
> *v) Assuming both the modes, namely, return of the plaint along with an application for amendment for presentation in proper court at the initial stage or deal with the application for amendment and after allowing it return it to the plaintiff for presentation in proper court are permissible the second alternative appears to be more reasonable and*

convenient and really does not touch the area of jurisdiction of the original Court in dealing so. That apart, the second mode should be taken recourse to by applying the doctrine of convenience inasmuch as the issue of lack of inherent jurisdiction does not arise.

vi) The controversy can be looked from another angle, namely, while deciding own's jurisdiction each Court has the authority to deal with jurisdictional fact. Valuation of suit though sought to be brought in by way of amendment is basically an issue relating to fact. When the question of returning of the plaint arises there is a presumption that the Court would allow the amendment. It may refuse the prayer. To conceive the idea that it must return the plaint along with amendment would tantamount to denuding the Court to exercise his jurisdiction to determine his own jurisdiction."

At this juncture it world be appropriate to refer to the decision rendered in the case of *Lakha Ram Sharma vs. M/s Balar Marketing Pvt. Ltd. in Special Leave to Appeal (Civil) No. 16097/2002* wherein the Apex Court has expressed the view as under :

"It is settled law that while considering whether the amendment is to be granted or not, the Court does not go into the merits of the matter and decide whether or not the claim made therein is bonafide or not. That is a question which can only be decided at the trial of the suit. It is also settled law that merely because an amendment may take the suit out of the jurisdiction of that Court is no ground for refusing that amendment. We, therefore, do not find any justifiable reason on which the High Court has refused this amendment."

(emphasis supplied)

In view of the aforesaid premises, we are inclined to hold that the law laid down in the decisions rendered in the case of *Trilokchand (supra), Indori Lal (supra); Shree Hanuman Rice Mill, Raigarh* (supra) and others which are in that line do not state the correct position of law. The correct position of law is where the effect of the amendment would entail in ouster of the jurisdiction of the Court, which it originally had, the proper course would be to allow the amendment and then return the amended plaint for presentation before the proper Court.

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220. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) and 202 Exercise of jurisdiction by Magistrate u/s 156 (3) and 202 – Law explained.
Mohd. Yousuf v. Afaq Jahan (Smt) and another
Judgment dated 02.01.2006 passed by the Supreme Court in Criminal Appeal No. 2 of 2006, reported in (2006) 1 SCC 627

Held:

In order to appreciate the rival submissions Section 156 of the Code needs to be quoted; the same reads of follows:

"156. *Police officer's power to investigate cognizable cases.* –(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into to try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.

Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of Magistrate to "direct an investigation by a police officer", But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.

The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation must 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an inves-

tigation to be made either by police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202 (1) i.e.

> "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police could take further steps contemplated in Chapter XII of the Code only thereafter.

The above position was highlighted in *Suresh Chand Jain v. State of M.P., (2001) 2 SCC 628*

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221. EVIDENCE ACT, 1872 – Section 92
CRIMINAL PROCEDURE CODE, 1972 – Section 164
(i) Principles regarding applicability of Section 92 – Section applicable to a proceeding *inter partes* to a document and not to a criminal proceeding where document is said to be fictitious.
(ii) Confession of co-accused, use of – Confession of co-accused can be used to lend support regarding conclusion of guilt reached on the basis of other evidence – Law explained.
R. Janakiraman v. State Represented by Inspector of Police, CBI, SPE, Madras
Judgment dated 04.01.2006 passed by the Supreme Court in Criminal Appeal No. 773 of 2000, reported in (2006) 1 SCC 697

Held:

We may cull out the principles relating to Section 92 of the Evidence Act, thus:

(i) Section 92 is supplementary to Section 91 and corollary to the rule contained in Section 91.

(ii) The rule contained in Section 92 will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract (which would include the prosecution in a criminal proceeding) are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, Section 91 may apply to strangers also.

(iii) The bar under Section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what is purports to be. To put it differently, the bar is to oral evidence to disprove the terms of a contract, and not to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different.

Applying the aforesaid principles, it is clear that the bar with Section 92 will apply to a proceeding inter partes to a document and not to a criminal proceeding, where the prosecution is trying to prove that a particular document or set of documents are fictitious documents created to offer an explanation for disproportionate wealth. Oral evidence can always be led to show that a transaction under a particular document or set of documents is sham or fictitious or nominal, not intended to be acted upon.

The contention that a statement under Section 164 CrPC of an accomplice/co-accused cannot be used as evidence against an accused, on the facts of this case, is rather misleading. It is no doubt well settled that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused and it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of such evidence, it is permissible to turn to the confession in order to lend support or assurance to the conclusion of guilt which the court is about to reach on the other evidence, vide *Hari Charan Kurmi v. State of Bihar, AIR 1964 SC 1184* and *Dagdu v. State of Maharashtra, (1977) 3 SCC 68.* But in this case, the statements made by PW 11 and PW 15 before the Magistrate at Chennai are not the only evidence on which reliance is placed. It is used more as a corroboration. We may also note that PW 11 and PW 15 were not "co-accused" or "accomplices" or "abettors" of the appellant in regard to the charge of disproportionate assets. They came into the picture, only after the appellant's house was raided, in an effort by the appellant to explain the cash found to an extent of Rs. 2,50,000.

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222. EVIDENCE ACT, 1872 – Section 24

Extra-judicial confession, evidentiary value of – Extra-judicial confession may or may not be a weak evidence – Law explained.

Sivakumar v. State by Inspector of Police

Judgment dated 08.12.2005 passed by the Supreme Court in Criminal Appeal No. 242 of 2005, reported in (2006) 1 SCC 714

Held:

Extra-judicial confession may or may not be a weak evidence. Each case is required to be examined on its own fact. In *Sidharth v. State of Bihar, (2005) 12 SCC 545* a Division Bench of this Court held: (SCC p. 560, para 25)

> "He had also made extra-judicial confession to PW 8 Arko Pratim Banerjee. The confession made by appellant Arnit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act."

In *Piara Singh v. State of Punjab, (1977) 4 SCC 452* this Court observed: (SCC p. 459, para 10)

> "The learned Sessions Judge regarded the extrajudicial confession to be a very weak type of evidence and therefore refused to rely on the same. Here the learned Sessions Judge committed a clear error of law. Law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. In the instant case, the extra-judicial confession was proved by an independent witness who was a responsible officer and who bore no animus against the appellants. There was hardly any justification for the Sessions Judge to disbelieve the evidence of Balbir Singh particularly when the extra-judicial confession was corroborated by the recovery of an empty from the place of occurrence."

Yet again in *State of Rajasthan v. Raja Ram, (2003) 8 SCC 180* it was stated: (SCC p. 192, para 19)

> "19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. *It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence.* It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to the unbiased, not even

remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

(emphasis supplied)

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223. N.D.P.S. ACT, 1985 – Section 50

Personal search, meaning of – Search of bag, article or container not a personal search – observations made in *Namdi Francis Nwazor v. Union of India, (1998) 8 SSC 534* **being obiter, not in conflict with observations made by the Apex Court in** *State of H.P. v. Pawan Kumar, (2005) 4 SCC 350* **– Law explained.**

State of Haryana v. Ranbir alias Rana

Judgment dated 05.04.2006 passed by the Supreme Court in Criminal Appeal No. 650 of 1999, reported in (2006) 5 SCC 167

Held:

The question as regards applicability of Section 50 of the Act need not detain us for long. We may notice that in view of conflict in the opinions of different Benches as also difference of opinion between two Judges of this Court in *State of H.P. v. Pawan Kumar, (2004) 7 SCC 735* the question was referred to a larger Bench. A three-Judge Bench of this Court in State of *H.P. v. Pawan Kumar, (2005) 4 SCC 350* relying on or on the basis of large number of decisions and in particular the decision of the constitution Bench of this Court in *State of Punjab v. Baldev Singh, (1999) 6 SCC 172* clearly held that Section 50 of the Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some baggage like a bag, article or container, etc. which the accused at the relevant time was carrying.

Before us, however, the learned counsel appearing on behalf of the respondent placed strong reliance on another three-Judge Bench of this Court in *Namdi Francis Nwazor v. Union of India, (1998) 8 SCC 534* wherein the following observations were made: (SCC pp. 536-37, para3)

> "3. On a plain reading of sub-section (1) of Section 50, it is obvious that it applies to cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to sub-section (4) of Section 50 which in terms says that no female shall be searched by anyone excepting a female. This would,

in effect, mean that when the person of the accused is being searched, the law requires that if that person happens to be a female, the search shall be carried out only by a female. Such a restriction would not be necessary for searching the goods of a female which are lying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position in law that the said article was not being carried by the accused on his or her person when apprehended. *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 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. So, on the facts of this case, it is difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the prosecution case." (emphasis supplied)

It was urged that this Court in *Pawan Kumar* (supra[2]) wrongly distinguished *Namdi Francis Nwazor* (supra) staliy that the observations made therein (underlined by us) were obiter and did not lay down a law.

We may at once notice the observations made in *Pawan Kumar* (supra[2]) as regards *Namdi Francis Nwazor* (supra) which are in the following terms: (SCC p. 363, para 16)

> "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* (supra[2]). After the decision in Baldev Singh 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."

We do not agree with the contention of the learned counsel for the respondent that in Namdi Francis Nwazor (supra) the observation of this Court

constituted a dicta and not an obiter. The appellant therein was apprehended at the international airport, New Delhi. He had already checked in his baggage. The said baggage was cleared but later on, the same was called to the customs-counter at the airport and upon examination thereof, it was found to be containing 153 cartons of.tetanus vaccine, which having been opened, found to be containing 152 cartons of ampoules whereas the remaining one carton carried a polythene packet containing brown-coloured powder packet with black adhesive tape, which was suspected to be heroin and which was then seized.

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224. INTEREST ACT, 1978

Scheme and scope of applicability of the Act of 1978 – Interest prior to the date of suit, entitlement of – Claim for interest on amount of premium paid, not contemplated under the Act – Law explained.

LIC of India and another v. S. Sindhu

Judgment dated 04.05.2006 passed by the Supreme Court in Civil Appeal No. 4492 of 2000, reported in (2006) 5 SCC 258

Held:

... It is now well settled that interest prior to the date of suit/claim (as contrasted to *pendante lite* interest and future interest) can be awarded in the following circumstances:

(a) where the contract provides for payment of interest; or

(b) where a statute applicable to the transaction/liability, provides for payment of interest; or

(c) where interest is payable as per the provisions of the Interest Act, 1978.

Let us now consider the provisions of the Interest Act, 1978 ("the Act" for short) which deals with payment of interest up to the date of suit/claim. The Act was enacted to consolidate and amend the law relating to the allowance of interest in certain cases. The objects and reasons state that the Act was enacted to prescribe the general law of interest in a comprehensive and precise manner, which becomes applicable in the absence of any contractual or statutory provision specifically dealing with interest. Sub-section (1) of Section 3 of the Act provides that in any proceedings for the recovery of any debt or damages, or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say –

> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in that regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

Sub-section (3) of Section 3 makes it clear that nothing in Section 3 shall apply in relation to any debt or damages upon which interest is payable as of right, by virtue of any agreement, or any debt or damages upon which payment of interest is barred, by virtue of an express agreement. Clause (a) of Section 2 of the Act defines "court" as including a tribunal and an arbitrator; clause (c) of Section 2 defines "debt" as any liability for an ascertained sum of money and includes a debt payable in kind but does not include a judgment debt; and clause (b) defines "current rate of interest". Sub-section (1) of Section 4 of the Act provides that notwithstanding anything contained in Section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law. Sub-section (2) of Section 4 provides that notwithstanding what is stated in Section 3 or Section 4(1) of the Act, in the cases of money deposited as security for performance of an obligation, interest is payable from the date of deposit; and in the case of money payable by virtue of a fiduciary relationship, money/property obtained/retained by fraud and money due as dower/maintenance, interest is payable from the date of cause of action. A claim for interest on the amounts of premium paid, from the respective dates of payment of premium to date of settlement of claim, does not find support from any of the provisions of the Act.

Even assuming that interest can be awarded on grounds of equity, it can be awarded only on the reduced sum to be quantified and paid from the date when it becomes due under the policy (that is on the date of death of the assured) and not from any earlier date. We do not propose to examine the question as to whether interest can be awarded at all, on equitable grounds, in view of the enactment of the Interest Act, 1978 making a significant departure from the old Interest Act (32 of 1839). The present Act does not contain the following provision contained in the proviso to Section 1 of the old Act: "interest shall be payable in all cases in which it is now payable by law". How far the decisions of this Court in *Satinder Singh v. Amrao Singh, AIR 1961 SC 908* and *Hirachand Kothari v. State of Rajashtan, 1985 Supp SCC 17* and the decision of the Privy Council in *Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji, AIR 1938 PC 67* holding that interest can be awarded on equitable grounds, all rendered with reference to the said proviso to Section 1 of the old Interest Act (Act of 1839), will be useful to interpret the provisions of the new Act (Act of 1978) may require detailed examination in an appropriate case.

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225. CIVIL PROCEDURE CODE, 1908 – O.XXXIX Rr. 1 & 2

Grant of temporary injunction in case of demolition of buildings – Factors to be considered while exercising discretion – Extent of jurisdiction of – Appellate Court to interfere with the order – Law explained.

Seema Arshad Zaheer and others v. Municipal Corpn. of Greater Mumbai and others

Judgment dated 05.05.2006 passed by the Supreme Court in SLP (C) No. 9479 of 2005, reported in (2006) 5 SCC 282

Held:

The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a *prima facie* case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.

It is true that in case relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was authorised and not illegal. In such cases, where *prima facie* case is made out, the balance of convenience automatically tilts in favour of the plaintiff and a temporary injunction will be issued to preserve *status quo*. But where the plaintiffs do not make out a prima facie case for grant of an injunction and the documents produced clearly show that the structures are unauthorised, the court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorised and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality. We may refer to the following observations of this Court in *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464* made in a different context: (SCC p. 529, para 73)

> "This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is

illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."

Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is "no material", or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on "no material" (similar to "no evidence", we refer not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion.

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226. LIMITATION ACT, 1963 – Article 54

Suit for specific performance of contract, limitation for – Vendor may not be allowed to take advantage of his own wrong – Factors to be seen while deciding limitation.

Panchanan Dhara and others v. Monmatha Nath Maity (Dead) through L.Rs. and another

Judgment dated 12.05.2006 passed by the Supreme Court in Civil Appeal No. 5187 of 2001, reported in (2006) 5 SCC 340

Held:

Performance of a contract may be dependent upon several factors including grant of permission by the statutory authority in appropriate cases. If a certain statutory formality is required to be complied with or permission is required to be obtained, a deed of sale cannot be registered till the said requirements are complied with. In a given situation, the vendor may not be permitted to take advantage of his own wrong in not taking steps for complying with the statutory provisions and then to raise a plea of limitation.

An almost identical question came up for consideration before a Division Bench of this Court in *S. Brahmanand v. K.R. Muthugopal, (2005) 12 SCC 764* wherein this Court laid down the law: (SCC p. 777, para 34)

> "34. Thus, this was a situation where the original agreement of 10-3-1989 had a 'fixed date' for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act

of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article."

In *R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy, (2006) 2 SCC 428* wherein one of us was a member, it was observed: (SCC p. 431, paras 10-11)

> "10. In terms of the said article, a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff has notice that performance is refused. The notice dated 24.4.1984, thus, is required to be construed in the context of the agreement dated 13.10.1982 entered into by and between the parties.
>
> 11. There cannot be any doubt whatsoever that in respect of a contract for sale of immovable property, time is not of the essence of the contract, but the question as regards the conduct of the appellant must be considered in the backdrop of the events noticed hereinbefore."

The said decision has again been noticed in *Gunwantbhai Mulchand Shah v. Anton Elis Farel, (2006) 3 SCC 634* wherein it has been held: (SCC p. 639, para 8)

> "8. We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance of the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in *R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy* (supra). In the case on hand, there is no dispute that no date for performance is fixed in the agree-

ment and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial."

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227. LIMITATION ACT, 1963 – Article 59

Period of limitation in a case for cancellation of document – Art. 59, applicability of – Law explained.

Prem Singh and others v. Birbal and others

Judgment dated 02.05.2006 passed by the Supreme Court in Civil Appeal No. 2412 of 2006, reported in (2006) 5 SCC 353

Held:

Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are *voidable* transactions.

A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under:

> "31. *When cancellation may be ordered.* – (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

Section 31 of the Specific Relief Act, 1963 thus, refers to both *void* and *voidable* documents. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation. When a document is *void ab initio,* a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.

Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be.

Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is *prima facie* valid. It would not apply only to instruments which are presumptively invalid. (See *Unni v. Kunchi Amma, ILR (1891) 14 Mad 26 and Sheo Shankar Gir v. Ram Shewak Chowdhri, ILR (1897) 24 Cal 77.*)

It is not in dispute that by reason of Article 59 of the Limitation Act, the scope has been enlarged from the old Article 91 of the 1908 Act. By reason of Article 59, the provisions contained in Articles 91 and 114 of the 1908 Act had been combined.

If the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a *void* transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be *void.*

★ ★ ★

If a deed was executed by the plaintiff when he was a minor and it was *void,* he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court.

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228. INDIAN PENAL CODE, 1860 – Section 405

Criminal breach of trust, offence of – Once entrustment proved, it is for accused to prove how he dealt with the entrusted property – Law explained.

State of H.P. v. Karanvir

Judgment dated 12.05.2006 passed by the Supreme Court in Criminal Appeal No. 1040 of 1998, reported in (2006) 5 SCC 381

Held:

... Learned counsel appearing on behalf of the respondent would submit that no material was brought on record by the prosecution to show as to how the respondent had utilised the amount. In our opinion, the same was not necessary. In view of the admitted fact, we are of the opinion, that it was for the respondent himself to prove the defence raised by him that the entire amount had not been paid to him by the complainant. The learned Judge had rejected the said defence.

The actual manner of misappropriation, it is well settled, is not required to be proved by the prosecution. Once entrustment is proved, it was for the accused to prove as to how the property entrusted to him was dealt with in view of Section 405 IPC. If the respondent had failed to produce any material for this purpose, the prosecution should not suffer therefor.

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229. CRIMINAL PROCEDURE CODE, 1973– Sections 360 & 361
PROBATION OF OFFENDERS ACT, 1958 – Sections 3 & 4
Applicability of Sections 360 and 361 Cr.P.C. and Sections 3 & 4 of Probation of Offenders Act, difference between – Enforcement of provisions of Probation of Offender Act in a particular area excludes the applicability of Sections 360 & 361 Cr.P.C. – Law explained.
Chhanni v. State of U.P.
Judgment dated 06.07.2006 passed by the Supreme Court in Criminal Appeal No. 721 of 2006, reported in (2006) 5 SCC 396

Held:

Where the provisions of the Probation Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, that gave birth to the Probation Act and the Code wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code to apply one of the other beneficial provisions; be it Section 360 of the Code or the provisions of the Probation Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the Probation Act are further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said section shall affect the provisions of the Probation Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for probation officers in assisting the courts in relation to supervision and other matters while the Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to coexist at the same time in the same area. Such coexistence would lead to anomalous results. The intention to retain the provisions of Section

360 of the Code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

Enforcement of the Probation Act in some particular area excludes the applicability of the provisions of Sections 360 and 361 of the Code in that area.

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230. CONTEMPT OF COURTS ACT, 1971 – Section 19

Appeal against order passed in exercise of power to punish for contempt – Ambit and scope of appeal u/s 19 – Law explained.

Midnapore People's Coop. Bank Ltd. and others v. Chunilal Nanda and others

Judgment dated 25.05.2006 passed by the Supreme Court in Civil Appeal No. 1727 of 2002, reported in (2006) 5 SCC 399

Held :

The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarised thus:

I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemner, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intracourt appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

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231. CIVIL PROCEDURE CODE, 1908 – O.37 R.3

Leave to defend suit, grant of – Manner of exercise of jurisdiction – Law explained.

UBS AG v. State Bank of Patiala

Judgment dated 10.05.2006 passed by the Supreme Court in Civil Appeal No. 2578 of 2006, reported in (2006) 5 SCC 416

Held :

Reference was made to the decision of this Court in *Raj Duggal v. Ramesh Kumar Bansal, 1991 Supp (1) SCC 191* where a question had been raised regarding leave to defend in a suit under Order 37 of the Code of Civil Procedure. While considering the said question, this Court set out the principles to decide whether leave should be granted or denied in the following manner: (SCC pp. 191-92, para 3)

> "3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

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232. LAND ACQUISITION ACT 1894 – Section 28

Grant of interest and solatium – Dictum of the Apex Court in *K.S. Paripoornan's case, 1995 SCW 1004* explained.

Union of India v. Ram Prasad and Anr.

Judgment dated 06.02.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in First Appeal No. 17 of 1993 (DB)

Held:

The next issue that arises for consideration is whether grant of interest at the rate of 9% under Section 28 of the Act and the solatium at the rate of 30% is erroneous or not. In this context, we may refer to the case of *K.S. Paripoornan Vs. State of Kerala, 1995 SCW 1004* wherein a three Judge Bench of the Apex Court after referring to paragraph 31 of the decision rendered in the case of Union of *India Vs. Raghubir Singh, (1989) 2 SCC 754* in paragraphs 4 and 5 came to hold as under:

> "4. This Court thereby clearly held that even in the pending reference made before April, 30, 1982 if the civil court makes an award between April 30, 1982 and September 24, 1984 Section 30 (2) gets attracted and thereby the enhanced solatium was available to the claimants. Since Sec. 30(2) deals with both the amendment under Sec. 23(2) and the amendment to Sec. 28 of the principal Act by Section 15(b) and Sec 18 respectively by parity of the reasoning the same ratio applies to the awards made by the Civil Court between those dates. The conflict of decisions as to whether Sec. 23 (2) as amended by Sec 15(b) of the Amendment Act through Sec 30(2) of the transitory provisions would be applicable to the pending appeals in the High Court and the Supreme Court was resolved in the *Raghuvir Singhs's case (AIR 1989 SC 1933)* by the Constitution Bench holding that the award of the Collector or the Court made between April, 30, 1982 and September, 24, 1984 would alone get attracted to Sec. 30(2) of the transitory provision. The restricted interpretation would not be understood to mean that sec. 23 (2) would not apply to the awarded decree of the civil court pending at the time when the Act has come into force or thereafter. In this case, admittedly the award of the civil court was after the Act has come into force, namely, February 28, 1985.
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> 5. Therefore, if the sum which, in the opinion of the court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the court shall direct to pay interest on such excess at the rate of 9% per annum from the date on which the Collector took possession of the land to the date of payment of such excess into the Court. By operation of the proviso if such excess or any part thereof is paid into the court after the date of expiry of a period of one year from the date on which possession is

taken, interest at the rate of 15% per annum shall be payable from the date of the said period of one year on the amount of such excess or part thereof which has not been paid into the court before the date of such expiry. Accordingly, the appellant is entitled to the enhanced interest @ 9% from the date of taking possession namely, January 15, 1981 and March 11, 1981 respectively for one year @ 9% and thereafter 15% till the date of deposit made by the Collector. Admittedly, the deposit of the enhanced compensation was made on October, 20, 1986 and December 3, 1986 therefore, the interest shall be calculated at the enhanced rates for the aforesaid period."

In this context we may usefully refer to the decision rendered in the case of *Major Pakhar Singh Atwal and others vs. State of Punjab and Others, AIR 1999 SC 2185* wherein the Apex Court granted solatium at the rate of 30% on the enhanced compensation and interest at the rate of 9% from the date of taking possession for one year and after expiry of one year at the rate of 15% per annum till the date of payment or deposit of the additional compensation before the Tribunal whichever is earlier.

In this context, we may also refer with profit to the decision rendered in the case of *Arjun Sethi Vs. L.A. Collector, Cuttack, and others, 85 (1988) CLT 742* wherein the learned single Judge after discussing the decisions in the field culled out the principles as under :

"(i) If the award of the Collector is after 13.4.1982, the claimant is entitled to all the benefit of the amended Act;

(ii) If the award of the Collector is before 13.4.1982, but the award of the Civil Court in reference under Section 18 of the Act is after 18.4.1982, the claimant is entitled to the benefits under Section 23 (2) and Section 28, as amended by the Amending Act, but is not entitled to the benefit under Section 23 (1-A) of the Act;

(iii) If the award of the Collector as well as that of the Civil Court under Section 18 of the Act is prior to13.4.1982, the claimant is not entitled to the benefits of the amended Act in the appeals against such awards."

In view of the aforesaid pronouncement of law, grant of solatium at the rate of 30% is in consonance with the requirement of the statute. Similarly grant of interest under Section 28 of the Act cannot be found fault with. Hence, we do not find any error on that score.

At this juncture, we think it condign to state whether there should be grant of interest on the whole amount which includes solatium and intererst. In this context, we may profitably refer to the decision rendered in the case of *Sunder Vs. Union of India, (2001) 7 SCC 211* wherein it has been held as under:

"26. We think it useful to quote the reasoning advanced by the Chief Justice S.S. Sandhawalia of the Division Bench of the Punjab and haryana High Court in *State of Haryana V. Kailashwati:*

"Once it is held as it inevitably must be that the solatium provided for under Section 23(2) of the Act forms an integral and statutory part of the compensation awarded to a land owner, then from the plain terms of section 28 of the Act, it would be evident that the interest is payable on the compensation awarded and not merely on the market value of the land. Indeed the language of Section 28 does not even remotely refer to market value alone and in terms talks of compensation or the sum equivalent thereto. The interest awardable under Section 28 therefore would include within its ambit both the market value and the statutory solatium. It would be thus evident that the provisions of section 28 in terms warrant and authorise the grant of interest on solatium as well."

27. In our view the aforesaid statement of law is in accord with the sound principles of interpretation. Hence the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium."

In view of the aforesaid the benefits are to be computed and extended.

233. SERVICE LAW :

Criminal case and departmental enquiry based on same set of facts, charges, witnesses and material – Accused acquitted in criminal case – Whether continuation of departmental proceedings unjust and unfair? Held, Yes.

G.M. Tank v. State of Gujarat and others

Judgment dated 10.05.2006 passed by the Supreme Court in Civil Appeal No. 2582 of 2006, reported in (2006) 5 SCC 446

Held:

The judgments relied on by learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles thereform. The Investigating Officer Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came

to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charges has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., (1999) 3 SCC 679* will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed.

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234. CIVIL PROCEDURE CODE, 1908 – O.26 Rr.9 and 10

Dispute as to identity of immovable property – Property should be identified either by boundary or by any other specific description – Commissioner identifying the property with respect to boundaries – Survey of all adjacent lands not necessary – Law explained.

Subhaga and others v. Shobha and others

Judgment dated 07.07.2006 passed by the Supreme Court in Civil Appeal No. 2836 of 2006, reported in (2006) 5 SCC 466

Held:

We find that a commission was issued for demarcating the suit Plot No. 1301/1 Ba and the Commissioner showed the disputed area in the map prepared by him. the lower appellate court while considering the question of identification had referred to the description of the boundaries in the plaint, the admissions of one of the defendants as DW 1 and the report and plan submitted by the Commissioner. That court also noticed that the plaintiff had given specific boundaries of the suit land and it was clear from the sketch prepared by the Commissioner that the disputed constructions lay in the suit land and that it belonged to the plaintiff. This was the basis of the affirmation of the decree in favour of the plaintiff by the lower appellate court. In the second appeal, the learned Judge of the High Court, after referring to the description of the boundaries in the plaint, simply discarded the sketch prepared by the Commissioner in the presence of the parties after ascertaining the plots lying as boundaries of the suit property. It also appears to have taken the view that without a survey of the adjoining plots, it cannot definitely be said that the disputed structure lies in the plot belonging to the plaintiff, namely, Plot No. 1301/1 Ba.

... Once we accept the identification made by the Commissioner as was done by the first appellate court, it is clear that the plaintiff has the right to have the disputed construction removed and the well filled up. That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff.

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235. CONSTITUTION OF INDIA – Article 21

Inter-caste/inter-religious marriages – Duty of administration to ensure that a couple contracting inter-caste/inter-religious marriage is not harassed or subjected to violence – A major person can marry whosoever he/she likes.

Lata Singh v. State of U.P. and another

Judgment dated 07.07.2006 passed by the Supreme Court in Writ Petition (Crl.) No. 208 of 2004, reported in (2006) 5 SCC 475

Held:

This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. Hence, we cannot see what offence was committed by the petitioner, her husband or her husband's relatives.

We are of the opinion that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above), the police has instead proceeded against the petitioner's husband and his relatives.

Since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matters of great public concern, such as the present one.

The caste system is a curse on the nation and the sooner it is destroyed the batter. In fact it is dividing the nation at a time when We have to be united to face the challenges before the nation untidily. Hence, inter-caste marriages are

in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

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236. CRIMINAL PROCEDURE CODE, 1973 – Sections 256 and 302
Complaint case – Death of the complainant – Right of legal heirs to continue with the complaint – Law explained.
Balasaheb K. Thackeray and another v. Venkat alias Babru and another
Judgment dated 05.07.2006 passed by the Supreme Court in Criminal Appeal No. 236 of 2005, reported in (2006) 5 SCC 530

Held:

Learned counsel for the appellants with reference to Section 256 of the Code submitted that the complaint was to dismissed on the ground of the death of the complainant. As noted above learned counsel for Respondent 1's legal heirs submitted that the legal heirs of the complainant shall file an application for permission to prosecute and, therefore, the complaint still survives consideration.

At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In *Ashwin Nanubhai Vyas v. State of Maharashtra, AIR 1967 SC 983* with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the old Code") it was held that the Magistrate had the power to permit a relative to act as the complainant

to continue the prosecution. In *Jimmy Jahangir Madan v. Bolly Cariyappa Hindley, (2004) 12 SCC 509* after referring to *Ashwin case,* (supra) it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

Section 302 of the Code reads as under:

> "302. *Permission to conduct prosecution.* – (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
>
> Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
>
> (2) Any person conducting the prosecution may do so personally or by a pleader."

to bring in application of Section 302 of the Code, permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission.

Above being the position, if any permission is sought for by the legal heirs of the deceased complainant to continue prosecution, the same shall be considered in its perspective by the court dealing with the matter.

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237. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal – Substantial question of law, meaning and connotaion of – Duty of the Court to formulate substantial question of law – Law explained.

Hero Vinoth (Minor) v. Seshammal

Judgment dated 08.05.2006 passed by the Surpeme Court in Civil Appeal No. 4715 of 2000, reported in (2006) 5 SCC 545

Held:

It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable

grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact. This Court in *Sir Chunilal v. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd., AIR 1962 SC 1314* held that: (SCR pp. 557-58)

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an openf question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principle or that the plea raised is palpably absurd the question would not be a substantial question of law."

It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

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The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a juidicial

manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.

This Court in *Reserve Bank of India v. Ramkrishna Govind Morey, (1976) 1 SCC 803* held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference. (See *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722.)*

The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133 (1) (a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta, AIR 1928 PC 172* the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal case,* (supra) the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju, AIR 1951 Mad 1969.*

> "[w]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determing the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (Sir *Chunilal case*, SCR pp. 557-58)

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls

for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

In *Dy. Commr. v. Rama Krishna Narain, AIR 1953 SC 521* also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See *Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179.*

The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either Ignoring or acting contrary to such legal principle. In the second type of cases,

the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

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238. EVIDENCE ACT, 1872 – Sections 101 and 111
Burden of proof and onus of proof, distinction between – Principle of burden of proof, applicability of – Rule of 'active confidence' as incorporated in Section 111, applicability – Law explained.
Anil Rishi v. Gurbaksh Singh
Judgment dated 02.05.2006 passed by the Supreme Court in Civil Appeal No. 2413 of 2006, reported in (2006) 5 SCC 558

Held:

Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question. The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would very from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant- appellant, the burden would lie on him as he had alleged fraud. The trial court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendant.

The learned trial Judge has misdirected himself in proceeding on the premise, "it is always difficult to prove the same in the negative (sic by) a person/party in the suit."

Difficulties which may be faced by a party to the *lis* can never be determinative of the question as to upon whom the burden of proof would lie. The learned trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Evidence Act. With a view to prove forgery or fabrication in a document, posses-

sion of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned trial Judge to produce the same.

There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that a establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others, The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752* the law is stated in the following terms: (SCC p. 768, para 29)

> "29. In a suit for recovery of possession based on title it is for the plainfiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *Addagada Raghavamma v. Addagada Chenchamma, AIR 1964 SC 136* there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

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239. INDIAN PENAL CODE, 1860 – Clause 3rdly of Section 300
Murder – Ambit, scope and applicability of Clause 3rdly of Section 300 – Law explained.
Hakim Khan v. State of M.P.
Judgment dated 20.05.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Cr. Appeal No. 1046 of 1992 (F.B.)

Held:

Clause 3rdly of section 300 of IPC is explained in the case of *Virsa Singh*

vs. State of Punjab. Counsel for the appellant submitted that after *Virsa Singh's case* (Supra), clause 3rdly of section 300 of IPC was considered in the case of *Anda vs. State of Rajasthan (AIR 1966 SC 148).* In the said case the Apex Court has considered the illustration (c) appended to clause 3rdly of section 300 of IPC and held that the sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Thus, material part is that the injury to cause death in the ordinary course of nature is the gist of this clause. Intention to cause death is immaterial. Once causing of intentional injury is proved and nature of injury is sufficient in the ordinary way of nature to cause death, then offence is covered by clause 3rdly of section 300 of IPC.

In the case of *Abdul Waheed Khan Vs. State of A.P. [(2002)7 SCC 175]* the intention of accused prevailing at the time of assault was considered. It is held by the Apex Court that the intention of accused prevailing at the time of assault determines the applicability of the relevant provisions of IPC. While considering section 299 and section 300 of IPC, culpable homicide and murder and its distinction, it is held in this case that clause (b) of section 299 corresponds to clause (2) and (3) of section 300. The distinguishing feature of the means rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that "intention to cause death" is not an essential requirement of clause. Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood or such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person. The apex Court after placing reliance on *Rajwant Singh vs. State of Kerala (AIR 1966 SC 1874)* reiterated that for the cases to fall within clause (3) it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. The Apex Court again reiterated the principles laid down in the case of *Virsa Singh vs. State of Punjab* (Supra) While considering the scope of clause (c) of section 299 and clause (4) of section 300, it is held that both require knowledge of the probability of the act causing death. It is held that clause (4) of section 300 will be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical cer-

tainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk for causing death or such injury as aforesaid.

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240. EVIDENCE ACT, 1872 – Section 35

Date of birth, determination of – Date of birth Determination of – Different standards not to be applied in civil and criminal case – Conditions necessary for applicability of Section 35 – Law explained.
Ravinder Singh Gorkhi v. State of U.P.
Judgment dated 12.05.2006 passed by the Supreme Court in Criminal Appeal No. 362 of 1999, reported in (2006) 5 SCC 584

Held:

Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

Mr. Mishra, however, would urge that while in a civil dispute a strict proof may be necessary, in a criminal case and particularly in the case of a juvenile, the court may consider any evidence which may be brought on record by the parties. We do not agree.

Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.

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

Limitation – Decision on the question of limitation – Unless suit is barred ex facie on the reading of plaint the issue should be decided by framing issue and recording evidence.
Ramesh B. Desai and others v. Bipin Vadilal Mehta and others
Judgment dated 11.07.2006 passed by the Supreme Court in Civil Appeal No. 4766 of 2001, reported in (2006) 5 SCC 638

Held:

A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order 7 Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two-Judge Bench of this Court to which one of us was a member (Ashok Bhan, J.) in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust, (2006) 5 SCC 658* it was held: (SCC p. 661, para 8)

> "8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact, Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.

This principle would be equally applicable to a company petition. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11 (d) CPC.

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242. CIVIL PROCEDURE CODE, 1908 – O.7 R.11 (d)

Whether plaint can be rejected under O.7 R.11 (d) for being barred by limitation? Legal position discussed in the background of different views expressed in the case of *Popat and Kotecha Property v. State Bank of India Staff Assn., (2005) 7 SCC 510.*

Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and others Judgment dated 08.11.2005 passed by the Surpeme Court in Civil Appeal No. 4539 of 2003, reported in (2006) 5 SCC 658

Held:

This case was argued at length on 30.8.2005. Counsel appearing for the appellant had relied upon a judgment of this Court in *N.V. Srinivasa Murthy v. Mariyamma, (2005) 5 SCC 548* for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later judgment of this Court in *Popat and Kotecha Property v. State Bank of India Staff Assn., (2005) 7 SCC 510* in respect of the proposition that Order 7 Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words "barred by law" occuring in Order 7 Rule 11(d) CPC would include the suit being "barred by limitation" was not specifically dealt

with in either of these two judgments, cited above. But this point has been specifically dealth with by the different High Court in *Mohan Lal Sukhadia University v. Priya Soloman, AIR 1999 Raj 102, Khaja Quthubullah v. Govt. of A.P., AIR 1995 AP 43, Vedapalli Suryanarayana v. Poosarla Venkata Sankar Suryanarayana, (1980) 1 APLJ (HC) 173, Arjan Singh v. Union of India, AIR 1987 Del 165* wherein it has been held that the plaint under Order 7 Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7 Rule 11 CPC. A contrary view has been taken in *Jugolinija Rajia Jugoslavija v. Feb Leathers Ltd., AIR 1985 Cal 193, National Insurance Co. Ltd. v. Navrom Constrantza, AIR 1988 Cal 155, J. Patel & Co. v. National Federation of Industrial Coop. Ltd., AIR 1996 Cal 253 and State Bank of India Staff Assn. v. Popat & Kotecha Property, (supra).* The last judgment was the subject-matter of challenge in *Popat and Kotecha Property v. State Bank of India Staff Assn, (2001) 2 Cal Lt 34.* This Court set aside the judgment and held in para 25 as under: (SCC p. 517)

> "25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo case, (2004) 3 SCC 137* the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case."

Noticing the conflict between the various High Court and the apparent conflict of opinion expressed by this Court in *N.V. Srinivasa Murthy v. Mariyamma,* (supra) and *Popat and Kotecha Property v. State Bank of India Staff Assn* (supra) the Bench referred the following question of law for consideration to a larger Bench:

> "Whether the words 'barred by law' under Order 7 Rule 11(d) would also include the ground that it is barred by the law of limitation."

Before the three-Judge Bench, counsel for both the parties stated as follows:

> "... It is not the case of either side that as an absolute proposition an application under Order 7 and Rule 11(d) can never be based on the law of limitation. Both sides state that the impugned judgment is based on the facts of this particular case and the question whether or not an application under Order 7 Rule 11(d) could be based on law

of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of this case."

In view of the statement made by the counsel for the parties, the Bench held that the question referred to the larger Bench was academic so far as this case is concerned and accordingly declined to decide the question. The case was sent back to the Bench for disposal on merits based on the facts of the case.

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243. SPECIFIC RELIEF ACT, 1963

Injunction, grant of – Whether a person in settled possession of land is entitled to injunction against dispossession? Held, Yes – Law explained.

Shavaram alias Seva v. Deobai through L.Rs. and another
Reported in 2006 (2) MPLJ 450

Held:

It is not in dispute that after the death of Nanda, plaintiff is in possession of the land. Since January, 1979 he is in possession over the land. He must have reaped the crop of that year and at the time when he was preparing the land for the next crop by ploughing it, the suit was filed. Thereafter, all the Courts issued a temporary injunction order in his favour. Finding about possession has also been recorded in this favour. In these circumstances, it can very well be said that he is in settled possession of the land. Once a person is in settled possession, he is entitled to protect his possession by issuance of an injunction order in his favour. The Apex Court in *Rame Gowda vs. Varadappa Naidu, (2004) 1 SCC 769* considering legal position held thus: –

> "7. The though has prevailed incessantly, till date, the last and latest one in the chain of decisions being *Ramesh Chand Ardawatiya vs. Anil Panjwani* In between, to quote a few out of several, in *Lallu Yeshwant Singh vs. Rao Jagdish Singh* this Court has held that a landlord did committ respass when he forcibly entered his own land in the possession of a tenant whose tenancy has expired. The Court turned down the submission that under the general law applicable to lessor and a lessee there was no rule or principle which made it obligatory for the lessor to resort to Court and obtain an order for possession before he could eject the lessee. The Court quoted with approval the law as stated by a Full Bench of the Allahabad High Court in *Yar Mohd. vs. Lakshmi Das* (AIR at p. 4)
>
> "Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No. person can be allowed to become a Judge in his own cause" (AIR p. 5, para 13).

In the oft-quoted case of *Nair Service Society Ltd. vs. K.C. Alexander* this Court held that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. *When the facts disclose no title in either party, possession alone decides.* The Court quoted LOft's maxim – "Possessio contra omnes valet praeter eur cui ius sit possession is (he that hath possession right against all but him that hath the very right)" and said: (AIR p. 1175, para 20)

"A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to plaintiff's and thus be able to raise a presumption prior in time."

In *M.C. Chockalingam vs. V. Manickavasagam* this Court held that the law forbids forcible dispossession, even with the best of the title. In *Krishna Ram Mahale vs. Shobha Venkat Rao* it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In *Nagar Palika, Jind vs. Jagat Singh* this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.

It is thus clear that so far as the Indian law is concerned, the person in peaceful possession in entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes

the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram vs. Delhi Admn. Puran Singh vs. State of Punjab and Ram Rattan vs. State of U.P.* the authorities need not be multiplied. In *Munshi Ram* case it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the treaspasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray of even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh case* the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled possession. The "settled possession" must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession":

(i) that the trespasser must be in actual physical possesion of the property over a sufficiently long period;

(ii) that the possesion must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the owner by the trespasser must be complete and final and must be acquiesced to by the true owner, and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable (sic cultivable) land, would be whether or not the trespasser, after having taken possesison, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession."

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244. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (e) Composite tenancy – Landlord can seek eviction of entire accommodation for residential or non-residential need of the part of accommodation – Law explained.
Machala Bai v. Nanak Ram
Reported in 2006 (2) MPLJ 484

Held:

In view of the aforesaid it is held that the tenancy of the accommodation was remained for composite purpose and in such case on proving the need for any purpose non-residential or residential the decree for eviction can be passed against the tenant as laid down by this Court in the matter of *Jagdish Kumar vs. Jagdishchandra reported in 1982 JLJ 319* in which it was held as under:–

> "9. It is thus clear that even though it is established that a landlord requires a part of an accommodation let out and that requirement is for the purpose for which the accommodation was let out, a landlord became entitled to seek eviction from the entire accommodation, provided the other conditions specified in clause (e) or (f) of section 12(1) of the Act are satisfied."
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> 11. As a result of aforesaid discussion, it emerges that when a landlord has made out a case for eviction from apart of the premises let out, a decree for eviction from the extra premises can be passed.

Our answer to the question referred to us is that in case of composite tenancy, if it is established that the landlord requires that non-residential part of the accommodation or residential part of the accommodation, a decree for eviction of the tenant from the entire premises can be passed."

The same question was again answered by this Court in the matter of *Parasram vs. Balkrishan reported* in *1984 M.P.R.C.J.* (N.75) in which it was held as under:–

"So far as the bona fide requirement of non-residential purpose is concerned, it is no doubt true that the plaintiff though in his plaint has come up with a case that he needs the suit accommodation for starting his own business, in his examination-in-chief he has stated that it is required for his son Ramprasad, who is living separtely from him. However, in his cross-examination he has also admitted that he himself would start the milk shop therein. Therefore, on this point admittedly there is no uniformity in the statements of plaintiff and his pleading. Thus, even if this part of the requirement under section 12(1) (f) has not been satisfactorily proved, still as pointed above, the plaintiff has proved his requirement in respect of the residential accommodation and even in case of composite tenancy the decree for eviction can be passed."

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245. CIVIL PROCEDURE CODE, 1908 – O.6 R.17

Amendment of pleadings – Principles governing grant or rejection of the prayer – Duty of the Court – Law explained.

Ram Vishal alias Vishali Kachhawaha v. Dwarka Prasad Jaiswal Reported in 2006 (2) MPLJ 507

Held:

The purpose of amendment of pleadings is to place material facts before the Court which are necessary, just and proper for deciding the real question in controversy between the parties. If some pleading has been amended after closure of evidence, the party in whose favour such an order has been passed would be entitled for reasonable opportunity to prove the contention raised in the pleading, otherwise the entire purpose of amendment of pleading shall frustrate. Without any proof there is no meaning of amendment of pleading, or the pleading though on record, but in absence of proof no finding can be recorded by the Court. Particularly when the contention has been denied/ contradicted by the other party, in these circumstances in the interest of justice the Court has to allow an opportunity in this regard to prove amended pleadings. Simultaneously the Court should also see that the aforesaid opportunity is not misutilised by any of the party and in the garb of such opportunity the case is not reopened de-nevo. In each and every case it is to seen whether such an opportunity is necessary and to what extent. If the contention can be proved by recalling all the witnesses and/or by further examination of witnesses the Courts are em-

powered to grant such opportunity. The Courts while granting such an opportunity shall see that the entire case is not reopened and this opportunity shall be limited to the extent of newly amended pleadings. The Apex Court in *J. Jermons vs. Aliammal and others, (1999) 7 SCC 382* considering the similar question held:-

> "From the above discussion, it is evident that the requirements of clause (a) are different from the requirements of clause (c). For purposes of clause (c), the following additional facts will be necessary viz. – whether the landlord is occupying only a part of the building whether residential or non-residential and whether the tenant is occupying the whole or any portion of the remaining part of the building and the facts relevant to the consideration with regard to comparative hardship to the landlord and tenant. Such facts are to be brought on record because they are not the subject-matter of consideration in an application filed under sub-section (3)(a). In a case where the original application for eviction is based, inter alia, on the ground in clause (a) of sub-section (3) and an application for amendment of eviction petition is allowed permitting to raise further ground under clause (c) either by the appellate authority or the revisional authority, the appropriate course will be to remand the case to the Rent Controller for giving opportunity to the opposite party to file further pleadings and adduce such evidence relevant to the issue, as they desire. Inasmuch as the petition filed by the respondents and allowed by the High Court was to raise additional ground in the revision and not to amend the eviction petition, we are of the view that it is not a fit case to remand the matter to the Rent Controller."

The Apex Court in *Dondapati Narayana Reddy vs. Duggireddy Venkatanarayana Reddy and others, (2001) 8 SCC 115* considering the scope of Order 6, Rule 17 and Order 18, Rule 17, Civil Procedure Code, held :-

> "Rules governing pleadings and leading of evidence have been incorporated to advance the interests of justice and to avoid multiplicity of litigation. If the claim of the plaintiff Dondapati Narayana Reddy is based upon the Will dated 20.8.1994 executed by Dondapati Tirumala Ramareddy, the defendant-appellant has a right to seek the amendment of his written statement incorporating the plea sought to be introduced by way of proposed amendment. Such a prayer cannot be denied on hypertechnical grounds. The amendment should, generally, be allowed unless it is shown that permitting the amendment would be unjust and result in prejudice against the opposite side which cannot be compensated by costs or would deprive him of a right which has accrued to him with the lapse of time. Amendment may also be refused, if such a prayer made separately, is shown to be barred by time. Neither the trial Court nor the High Court has found the existence of any of the circumstances justifying the rejection of the prayer

for amendment of the written statement. Whether or not the amendment is allowed, the trial Court is otherwise obliged to decide the validity of the disputed Will which is the basis of the suit filed by the plaintiff. We are of the opinion that the Courts below were not justified in rejecting the prayer of the defendant seeking amendment of his written statement.

In view of the fact that the validity of the Will was sought to be challenged by way of amendment, the plaintiff acquired a right to lead evidence to prove its authenticity. Otherwise also when the basis of the suit was the Will dated 20.8.1994, the interests of justice demanded that the plaintiff should have been allowed an opportunity to lead additional evidence to prove its validity. The High Court appears to have adopted a very rigid and technical approach in rejecting the prayer of the plaintiff to lead additional evidence to prove testamentary succession by producing the registered Will dated 20.8.1994 executed by Dondapati Tirumala Ramareddy."

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246. CRIMINAL PROCEDURE CODE, 1973 – Section 207

Supply of copy of statement of witnesses or persons recorded during investigation – Court need not supply copies of the statements of persons whom prosecution does not propose to examine – Law explained.

Ram Khelawan Patel v. State of M.P.

Reported in 2006 (2) MPLJ 544

Held:

Learned counsel for the State as well as counsel for the Objector submitted that the accused was entitled to obtain the copies of the statements of the witnesses recorded during investigation, only on which the prosecution proposes to rely during the trial and not of all the statements.

In *Naresh Dhakad vs. State of M.P., 1997 (1) MPWN 81,* it was held that if the investigating agency had recorded the statements of witnesses more than once, there may be material contradictions in the same and the accused may like to utilize the same for his benefit, therefore, the copies of the statement of such witnesses should be provided to him because due to non-supply of the copies, the purpose for enacting the provision of section 207, Criminal Procedure Code shall be frustrated.

It is settled position that the statements of all the persons on whom the prosecution proposes to rely, if recorded by the investigating agency more than once, the copies of the same should be supplied to the accused. However, it is not incumbent on the Court to supply the copies of the statements of all the persons recorded during the investigation whom the prosecution does not propose to examine.

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247. CIVIL PROCEDURE CODE, 1908 – O.20 R.12

Mesne profits, award of – Power of the court to award mesne profits on a higher rate – Law explained.

Basodi alias Munishilal and another v. Smt. Meera Bai and others Reported in 2006 (2) MPLJ 556

Held:

... In view of the law laid down by the Apex Court in the matter of *Gopalakrishna Pillai and others vs. Meenakshi Ayal and others* reported in *AIR 1967 SC 155* the Courts are empowered to award the mesne profit on a higher rate in the facts and circumstances of the case. The Apex Court has held as under:

> "7. Order 20 R. 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of O.7 Rr. 1 and 2 and O.7 R.7 of the Code of Civil Procedure and section 7 (1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately; and pay Court-fees thereon. With regard to future mesne profit the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay Court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of O.20 R.12 apply. But in a suit to which the provisions of O.20 R.12 apply, the Court has a discretionary power to pass a decree directing an inquiry into the future mesne profits, and the Court may grant this general relief, though it is not specifically asked for in the plaint, see *Basavayya vs. Guruvayya, ILR (1952) Mad. 178 at P.117 : (AIR 1951 Mad 938 at p. 940) (FB).* In *Fakharuddin Mahomed Ahsan vs. Official Trustee of Bengal, (1982) ILF 8 Cal. 178 at p. 189* (PC), Sir R.P. Collier observed;
>
> > "The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat upto the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that as it may, they are of opinion that, under section 196 of Act VIII of 1859, it was in the power of the Court if it thought fit, to make a decree which should give the plaintiff wasilat upto the date of obtaining possession."
>
> Section 196 of Act VIII of 1859 empowered the Court in a suit for land or other property paying rent to pass a decree for mesne profits from

the date of the suit until the date of delivery of possession to the decree holder. The observations of the Privy Council suggest that in a suit to which section 196 of Act VIII of 1859 applied, the Court had jurisdiction to pass a decree for mesne profits though there was no specific claim in the plaint for future mesne profits. The Court has the like, power to pass a decree directing an inquiry into future mesne profits in a suit to which the provisions of O.20, R.12 of the Code of Civil Procedure, 1908 apply."

In the aforesaid dictum of the Apex Court, it was said that mesne profit can be awarded in such case in which it was not prayed. Some amount was claimed by respondents but the same was awarded on higher rate but the aforesaid dictum speaks regarding discretionary power of the Court to award the future mesne profit.

Thus, at the time of judgment such power could be invoked by the Court to decide the mesne profit on appropriate rate. But such power could have been invoked after inquiry and with sufficient reasons, the same was not done by the appellate Court in the case at hand.

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248. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 4 Benami transaction – Ambit and scope of Section 4 – Law explained. Jagdish Prasad Agrawal and another v. Rajkumar and another Reported in 2006 (2) MPLJ 603

Held:

The Act is a piece of prohibitory legislation and it prohibits Benami transactions subject to stated exceptions and make such transactions punishable and also prohibits the right to defences against enforcing Benami transactions.

As a result of the provisions of the Act all the properties held Benami at the moment of the Act coming into force may be affected irrespective of their beginning duration and origin. This will be so even if the legislation is not retrospective but only prospective. The intention of legislature is clear that section 4 of the Act prohibits the institution of the suit or preferring of claim or action to enforce any right, the real owner in Benami transaction is having in respect of any property standing in the name of Benamidar. Therefore, after the coming into force of the Act the agreement of Benami transaction cannot be enforced by the Court. Even if the date of the agreement was prior to the commencement of the Act, the date of the execution of the sale deed will be after the commencement of the Act. An agreement to sale entered into prior to the coming into force of the Act cannot be enforced through Court after coming into force of the Act. Hence, the trial Court committed no error in refusing the specific performance of the agreement by which the property was to be transferred to Jagdish for a consideration paid or provided by another person Ganga Bisen as the Benami Transactions have been prohibited by the Act.

The counsel for the appellants also submitted that the property was purchased for the benefit of the son and the transaction cannot be said to be Benami.

The contention is not acceptable. The exceptions have been given under sub-section (2) of section 3 of the Act and apply only on the purchase of the property by any person in the name of his wife or any unmarried daughter. Sub-section (2) does not apply to a son, therefore, purchase of property in the name of son has not been exempted.

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249. MOTOR VEHICLES ACT, 1988 – Section 166
Insurance company, exoneration from the liability – Driver holding licence to drive Light Motor Vehicle only while driving Jeep being used as taxi/commercial vehicle – Whether insurance company absolved from the liability – Held, Yes – Law explained with reference to pronouncement in *Swaran Singh case, (2004) 3 SCC 297*
National Insurance Co. Ltd. v. Kusum Rai and others
Judgment dated 24.03.2006 passed by the Supreme Court in Civil Appeal No. 1731 of 2006, reported in (2006) 4 SCC 250

Held:

In a proceeding arising out of a claim petition filed under Section 166 of the Motor Vehicles Act, the Insurance Company is a necessary party as it is required to indemnify the owner or driver of the vehicle. Even in a case where the owner colludes with the claimants or is not otherwise represented, the Insurance Company can contest the matter on merits of the claim petition upon obtaining leave of the court as is provided under Section 170 of the Act. However, there does not exist any embargo in raising a defence which comes within the purview of sub-section (2) of Section 149 of the Act which reads as under:

> "149. *Duty of insurers to satisfy judgments and awards against persons insured in respect of third-party risks.* – (1)
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> ★ ★ ★
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> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely –
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> (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely –
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> (i) a condition excluding the use of the vehicle –

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side car being attached where the vehicle is a motorcycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular."

It has not been disputed before us that the vehicle was being used as a taxi, it was therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. he did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence.

We have noticed hereinbefore that the Tribunal has not gone into the said question. It proceeded on the basis that the case was covered by *Kamla, (2001) 4 SCC 342.* The correctness of the said decision came up for consideration before this Court in *National Insurance Co Ltd. v. Swaran Singh, (2004) 3 SCC 297* wherein this Court clearly held: (SCC p. 335, para 84)

> "The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the

driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See. *Jitendra Kumar, (2003) 6 SCC 420.*)"

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250. MOTOR VEHICLES ACT, 1988 – Sections 149 and 166
Insurance Company exonerated but directed to pay compensation to third party and recover the amount from owner – Mode of recovery – Law explained.
Oriental Insurance Corpn. Ltd. v. Nanjappan,
Reported in AIR 2004 SC 1630

Held:

Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in *Baljit Kaur case, (2004) 2 SCC 1* that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondent claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured.

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251. SERVICE LAW :
Whether confession by respondent/employee inadmissible in departmental inquiry because of provisions contained in Section 25 of Evidence Act and Section 162 of Cr.P.C.? Held, No – Law explained.
Commissioner of Police, New Delhi v. Narender Singh
Judgment dated 05.04.2006 passed by the Supreme Court in Civil Appeal No. 7488 of 2004, reported in (2006) 4 SCC 265

Held:

The correctness or otherwise of the statement contained in Ext. PW 8-A has also not been disputed. The Tribunal, therefore, was not correct in its view that the confession made by the respondent herein had not been proved in accordance with law. So far as the evidentially value of the said confession is

concerned, we may notice that Section 25 of the Evidence Act and Section 162 of the Code of Criminal Procedure provides for an embargo as regards admissibility of a confession in a criminal trial. The said provisions have per se no application in a departmental proceeding. Section 25 of the Evidence Act and Section 162(1) of the Code of Criminal Procedure read thus:

> "25. *Confession to police officer not to be proved.*– No confession made to a police officer, shall be proved as against a person accused of any offence."
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> ★ ★ ★
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> "162. *Statements to police not to be signed: Use of statements in evidence.* – (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

"Offence" has been defined in Section 2(n) of the Code of Criminal Procedure to mean:

> "2 (n) 'offence' means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871 (1 of 1871);"

The said definition would apply, thus, both to Section 25 of the Evidence Act and Section 162 of the Code of Criminal Procedure.

The Tribunal as also the High Court were, therefore, not correct in arriving at the finding that the said confession was not admissible even in a departmental proceeding.

In *Kuldip Singh v. State of Punjab, (1996) 10 SCC 569* this Court held: (SCC p. 664, para 10)

> "10. Now coming to the main contention of the learned counsel for the appellant, it is true that a confession or admission of guilt made by a person accused of an offence before, or while in the custody of, a police officer is not admissible in a court of law according to Sections 25 and 26 of the Evidence Act, 1872 but it is equally well settled that these rules of evidence do not apply to departmental enquires..."

It is not well settled that the provisions of the Evidence Act are not applicable in a departmental proceeding. (See *Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya, (1997) 2 SCC 169, Lalit Popli v. Canara Bank, (2003) 2 SCC 583* and *N. Rajarathinam v. State of T.N., (1996) 10 SCC 371*

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252. CONSTITUTION OF INDIA – Article 226

Writ Petition under Article 226, delay in filing, effect of – Law Explained.

Karnataka Power Corpn. Ltd. through its Chairman & Managing Director and another v. K. Thangappan and another

Judgment dated 04.04.2006 passed by the Supreme Court in Civil Appeal No. 3726 of 2000, reported in (2006) 4 SCC 322

Held:

Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary power under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in *Durga Prashad v. Chief Controller of Imports and Exports, (1969) 1 SCC 185.* Of course, the discretion has to be exercised judicially and reasonably.

What was stated in this regard by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd, (1874) 5 PC 221* (PC at p. 239) was approved by this Court in *Moon Mills Ltd. v. M.R. Meher, AIR 1967 SC 1450* and *Maharashtra SRTC v. Shri Balwant Regular Motor Service, AIR 1969 SC 329* Sir Barnes had stated:

> "Now, the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially inequitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."

It would be appropriate to note certain decisions of this Court in which this aspect has been dealt with in relation to Article 32 of the Constitution. It is apparent that what has been stated as regards that article would apply, a fortiori, to Article 226. It was observed in *Rabindranath Bose v. Union of India, (1970) 1 SCC 84* that no relief can be given to the petitioner who without any reasonable explanation approaches this Court under Article 32 after inordinate delay. It was stated that

though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution-makers that this Court should disregard all principles and grant relief in petitions filed after inordinate delay.

It was stated in *State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566* that the High Court in exercise of its desertion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is insordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in *K.V. Rajalakshmiah Setty v. State of Mysore, AIR 1967 SC 993.* This was reiterated in *Rabindranath Bose case* (supra) by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In *State of Orissa v. Pyarimohan Samantaray, (1977) 3 SCC 396* making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone (See *State of Orissa v. Arun Kumar Patnaik, (1976) 3 SCC 579* also.)

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253. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) 169, 173 (2), 190 (1) & 200
Cognizance – Police report submitted u/s 173 (2) (1) before Magistrate – Course open for Magistrate to proceed – Expressions 'charge sheet' and 'final report', connotation of and difference between – Duty of the Magistrate to provide opportunity to complainant while considering final report – Law explained.
Minu Kumari and another v. State of Bihar and others
Judgment dated 12.04.2006 passed by the Supreme Court in Criminal Appeal No. 420 of 2006, reported in (2006) 4 SCC 359

Held:

When a report forwarded by the police to the Magistrate under Section 173 (2) (i) is placed before him several situations arise: the report may con-

clude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156 (3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he again has option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173 (2) a Magistrate is entitled to take cognizance of an offence under Section 190(1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190 (1) (b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) though it is open to him to act under Section 200 or Section 202 also. (See *India Carat (P) Ltd. v. State of Karnataka, (1989) 2 SCC 132)*

The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. This Court in *Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537:* held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

We may add here that the expressions "charge-sheet" or "final report" are not used in the Code, but it is understood in Police Manuals of several States

containing the rules and the regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169 i.e. where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e. referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, there is nothing in Section 173 specifically providing for such a notice.

As decided by this Court in *Bhagwant Singh case* (supra) the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows: (SCC p. 542, para 4)

> "[T]he Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh case* (supra) the right is conferred on the informant and none else.

When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in *All India Institute of Medical Sciences Employees' Union (Reg.) v. Union of India, (1996) 11 SCC 582.* It was specifically observed that a writ petition in such cases is not to be entertained.

The above position was highlighted in *Gangadhar Janardan Mhatre v. State of Maharashtra, (2004) 7 SCC 768.*

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254. CIVIL PROCEDURE CODE, 1908 – O.6 R.17

Amendment of pleadings – Ambit, scope and applicability of R.17 as amended by the Act or 2002 – Correctness of falsity of averments of the proposed amendment not to be seen – Law explained.

Rajesh Kumar Aggarwal and others v. K.K. Modi and others

Judgment dated 22.03.2006 passed by the Supreme Court in Civil Appeal No. 5350 of 2002, reported in (2006) 4 SCC 385

Held :

Order 6 Rule 17 CPC reads thus:

> "17. *Amendment of pleadings.* – The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

This rule declares that the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial.

The object of the rule is that the courts should try the merits of the case that come before them and should, consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basis structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

As discussed above, the *real controversy test* is the basis or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

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255. MOTOR VEHICLES ACT, 1939 – Section 103-A
MOTOR VEHICLES ACT, 1988 – Section 157
(i) Transfer of vehicle – Effect of transfer on the liability vis-a-vis third party – Held, insurer liable under both the Acts – Law explained.
(ii) Liability of Insurance Company regarding gratuitous passenger under old and the new Acts – Law explained.
United India Insurance Co. Ltd. Shimla v. Tilak Singh and others
Judgment dated 04.04.2006 passed by the Supreme Court in Civil Appeal No. 2291 of 2000, reported in (2006) 4 SCC 404

Held:

Citing with approval the judgment of the Full Bench of the Andhra Pradesh High Court in *Madineni Kondaiah v. Yaseen Fatima, AIR 1986 AP 62* and constricting the provisions of Section 103-A of the 1939 Act with Section 157 of the 1988 Act, this Court said in *Complete Insulation (P) Ltd. v. New India Assurance Co. Ltd., (1996) 1 SCC 221* (vide SCC p. 225, para 6):

> "6. Now, under the old Act although the insurer could refuse to transfer the certificate of insurance in certain circumstances and the transfer was not automatic as under the new Act, there was under the old law protection to third parties, that is victims of the accident. The protection was available by virtue of Sections 94 and 95 of the old Act."

The judgment of the Andhra Pradesh High Court in *Kondaiah* (supra) was specifically referred to and affirmed in the subsequent judgment of this Court in

New India Assurance Co. Ltd. v. Sheela Rani, (1998) 6 SCC 599 where this Court observed after referring to the judgment in *Complete Insulation,* (supra) as follows: (vide SCC p. 604, para 10):

> "A careful reading of the judgment of this Court, extracted as above, will clearly show that on the transfer of the vehicle about which intimation was given though not strictly as required under Section 103-A of the Act and in the absence of refusal from the insurer, the policy already given by the Insurance Company to the transferor will not lapse."

In *G. Govindan v. New India Assurance Co. Ltd., (1999) 3 SCC 754* this Court had occasion to refer to the decisions of the Full Bench of the Andhra Pradesh High Court in *Kondaiah case,* (supra) *Complete Insulation Ltd.* (supra) and *New India Assurance Co. Ltd. v. Sheela Rani,* (supra) in the context of the 1988 Act and, after contrasting it with the provisions of the 1939 Act, held (vide SCC p. 761, para 13):

> "13. In our opinion, both under the old Act and under the new Act the legislature was anxious to protect the third-party (victim) interest. It appears that what was implicit in the provisions of old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts."

In *Rikhi Ram v. Sukhrania, (2003) 3 SCC 97* a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in *G. Govindan case,* (supra) and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned.

(ii) In *Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. (P) Ltd., (1997) 2 SCC 745* the insurance company had raised the contention that the scope of statutory insurance under Section 95 (1) (a) read with 95 (1) (b) (i) of the Motor Vehicles Act, 1939 does not cover the injury suffered by a passenger and, since there was a limited liability under the insurance policy, the risk of the insurance company would be limited to the extent it was specifically covered. After referring to the English Road Traffic Act, 1960 and Halsbury's Laws of England, (3rd Edn.) this Court came to the conclusion that Section 95 of the 1939 Act required that the policy of insurance must be a policy insuring the insured against any liability incurred by him in respect of death or bodily injury to a third party and rejected the contention that the words "third party" were wide enough to cover all persons except the insured and the insurer. This Court held as under (vide SCC p.760, para 20)"

> "Therefore it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured, the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act."

In *Amrit Lal Sood v. Kaushalya Devi Thapar, (1998) 3 SCC 744* it was held that in that particular case the terms of the policy were wide enough to cover a gratuitous passenger and, therefore, there was liability towards the gratuitous person.

In *T.V. Jose (Dr.) v. Chacko P.M., (2001) 8 SCC 748* Variava, J. had an occasion to survey the law with regard to the liability of insurance companies in respect of gratuitous passengers. After referring to a number of decisions of this Court the learned Judge observed (vide SCC p. 757, para 19) "the law on this subject is clear, a third-party policy does not cover liability to gratuitous passengers who are not carried for hire or reward". The insurer company was held not liable to reimburse the appellant.

Thus, even under the 1939 Act the established legal position was that unless there was a specific coverage of the risk pertaining to a gratuitous passenger in the policy, the insurer was not liable.

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The argument that the risk pertaining to a third party would extend to a person other than the parties to the insurance contract was raised in *New India Assurance Co. v. Satpal Singh, (2000) 1 SCC 237* where after contrasting the language of Section 95 (1) of the 1939 Act with the provisions of Section 147 (1) of the 1988 Act this Court held: (SCC p. 241, para 11)

> "11. The result is that under the new Act an insurance policy covering third-party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or class. Hence the decisions rendered under the old Act vis-a-vis gratuitous passengers are of no avail while considering the liability of the insurance company in respect of any accident which occurred or would occur after the new Act came into force."

The view expressed in *Satpal Singh case* (supra) however, has been specifically overruled in the subsequent judgment of a Bench of three Judges in *New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223.* In that case the discussion arose in connection with carrying passengers in a goods vehicle. This Court after referring to the terms of Section 147 of the 1988 Act, as contrasted with Section 95 of the 1939 Act, held that the judgment in *Satpal Singh case,* (supra) had been incorrectly decided and that the insurer will not be liable to pay compensation. In the concurring judgment of Sinha, J. after contrasting

the language used in the 1939 Act with that of the 1988 Act, it has been observed (vide SCC p. 235, paras 25 and 27):

> "25. Section 147 of the 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of 'public service vehicle'. Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does not speak of any passenger in a 'goods carriage'.
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> 27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place."

In our view, although the observations made in *Asha Rani case,* (supra) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger.

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256. CIVIL PROCEDURE CODE, 1908 – Section 115 and O.21 Rr.97 & 103 Resistance or obstruction to delivery of possession in execution decree – Order by executing Court on an application complaining about resistance/obstruction – Such order having effect of decree is appealable and not revisable – Law explained.
S. Rajeswari v. S.N. Kulasekaran and others
Judgment dated 29.03.2006 passed by the Supreme Court in Civil Appeal No. 1417 of 2001, reported in (2006) 4 SCC 412

Held:

Having heard learned counsel for the parties, we are satisfied that in a case of this nature, Respondent 1 ought to have filed an application under Order 21 Rule 97 of the Code of Civil Procedure. Order 21 Rule 97 clearly provides that where execution of decree is resisted or obstructed by any person, the decree-holder may make an application to the court complaining of such resistance or obstruction, whereupon the court shall proceed to adjudicate upon

the application in accordance with the provisions contained in the Code. Rules 98 to 100 are the rules which provide the manner in which such an application has to be dealt with. Under Rule 101, all questions including the questions relating to right, title and interest of property arising between the parties to the proceedings and relevant to the adjudication of the application, have to be determined by the court dealing with the said application. Rule 103 provides that when an application is adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree. It thus follows that if an application is made under Order 21 Rule 97, which is adjudicated upon by the court, the adjudicatory order is treated as a decree against which an appeal may be filed. In the instant case, therefore, since the adjudicatory order passed by the executing court went against Respondent 1, he ought to have filed an appeal before the High Court.

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Respondent 1 did not appeal to the High Court and instead preferred a revision petition under Section 115 CPC. We have no doubt that in view of the provisions of Order 21 Rule 103 CPC which provide for appeal against the order passed by the executing court in such matters, no revision could be entertained by the High Court against that order in view of the clear prohibition contained in Section 115 (2) CPC, which in clear terms provides that the High Court shall not under Section 115 vary or reverse any decree or order against which an appeal lay either to the High Court or to any other court subordinate thereto.

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257. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34

Setting aside of award on the ground of being opposed to public policy of India – Expression 'public policy of India', meaning and connotation of.

Hindustan Zinc Ltd. v. Friends Coal Carbonisation

Judgment dated 04.04.2006 passed by the Supreme Court in Civil Appeal No. 3134 of 2002, reported in (2006) 4 SCC 445

Held:

This Court in *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705* held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31)

> "13. The question, therefore, which requires consideration is – whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31 (3), which affects the rights of the parties. Under sub-sec-

tion (1) (a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be – whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31 (3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

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31... in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/ decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar Power Co. Ltd. v. General Electric Co., 1994* Supp (1) SCC 644 it is required to be held that the award could be aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality; or
(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

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258. SERVICE LAW:

Order of removal from service, whether innocuous or stigmatic? Test to be applied – Law explained.

Abhijit Gupta v. S.N.B. National Centre, Basic Sciences and others

Judgment dated 18.04.2006 passed by the Supreme Court in Civil Appeal No. 5551 of 2004, reported in (2006) 4 SCC 469

Held:

The real test to be applied in a situation where an employee is removed by an innocuous order of termination is: Is he discharged as unsuitable or is he punished for his misconduct? In *Allahabad Bank Officers' Assn. v. Allahabad Bank, (1996) 4 SCC 504* this Court was considering a challenge to a compulsory retirement and formulated a practical test to answer the question posed above. This Court (vide para 17) observed that if the order of compulsory retirement from the service casts a stigma in the sense that it contains a statement casting aspersion on his conduct or his character, then it can be treated as an order of punishment but not if it merely amounts to highlighting the unsuitability of the employee. As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service.

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259. CIVIL PROCEDURE CODE, 1908 – O.21

Setting aside sale of immovable property, grounds for – Material irregularity or fraud in publishing and conducting sale – Fraud should be pleaded specifically – Proclamation of sale by beat of drum not mandatory – Law explained.

Saheb Khan v. Mohd. Yousufuddin and others

Judgment dated 17.04.2006 passed by the Supreme Court in Civil Appeal No. 2079 of 2006, reported in (2006) 4 SCC 476

Held:

Order 21 Rule 90 of the Code of Civil Procedure allows, inter alia any person whose interests are affected by the sale to apply to the court to set aside a sale of immovable property sold in execution of a decree on the ground of "a material irregularity or fraud in publishing or conducting" the sale. Sub-rule (2) of Order 21 Rule 90 however places a further condition on the setting aside of a court sale in the following language:

> "90. (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, AIR 1964 SC 1300, Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala, (1991) Supp. (2) SCC 691 and Kadiyala Rama Rao v. Gutala Kahna Rao, (2000) 3 SCC 87*

A charge of fraud or material irregularity under Order 21 rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction-purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with Order 21 Rule 67 (1) read with Order 21 Rule 54 (2). No doubt, the trial court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order 21 Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of the court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order 21 Rule 67 (1) "as nearly as may be, in the manner prescribed by Rule 54 sub-rule (2)". Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:

> "54. (2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the courthouse, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village."

The proclamation of the sale by beat of drum was not mandatory, so long as the sale notice was proclaimed at or adjacent to the property. Admittedly, the Advocate Commissioner distributed the pamphlets advertising the sale in the locality several days prior to holding of the sale and also affixed a copy of the sale notice on the property itself.

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260. FAMILY LAW :

Family arrangement/settlement – Duty of Court while considering family arrangement/settlement – Law explained.

Hari Shankar Singhania and others v. Gaur Hari Singhania and others Judgment dated 04.04.2006 passed by the Surpeme Court in Civil Appeal No. 126 of 2005, reported in (2006) 4 SCC 658

Held:

The concept of *"family arrangement or settlement"* and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation, etc. should not be put at risk of the implementation of a settlement *drawn by a family, which is essential for maintaining peace and harmony in a family.* Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into to allay disputes *existing or apprehended* and even any dispute or difference apart, *if it was entered into bona fide to maintain peace or to bring about harmony in the family.* Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in *Ram Charan Das v. Girjanandini Devi, AIR 1966 SC 323*

In *Lala Khunni Lal v. Kunwar Gobind Krishna Narain, ILR (1911) 33 All 356* PC the Privy Council examined that it is the duty of the courts to uphold and give full effect to a family arrangement.

In *Sahu Madho Das v. Pandit Mukand Ram, AIR 1955 SC 481 (Vivian Bose, Jagannadhadas and B.P. Sinha, JJ.)* placing reliance on *Clifton v. Cockburn, (1824-34) All ER Rep 1813* and *Williams v. Willams, (1866) LR 2 Ch 294* this Court held that a family arrangement can, as a matter of law, be implied from a long course of dealings between the parties. It was held that : (SCR p. 43)

> "[S]o strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement..."

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261. INDIAN PENAL CODE, 1860 – Section 201

Offence u/s 201, ingredients of – Law explained.

Budhan Singh and others v. State of Bihar

Judgment dated 25.04.2006 passed by the Supreme Court in Criminal Appeal No. 1221 of 1998, reported in (2006) 4 SCC 740

Held:

In *Wattan Singh v. State of Punjab, (2004) 3 SCC 700* following *Palvinder Kaur v. State of Punjab, AIR 1952 SC 354* this Court held: (SCC p. 703, para (14)

> "14 This Court in *Palvinder Kaur v. State of Punjab,* (supra) has held that in order to establish the charge under Section 201 IPC, it is essential to prove that an offence has been committed; mere suspicion that it has been committed is not sufficient. It has to be proved that

the accused knew or had reason to believe that such offence had been committed, and with the requisite knowledge and with the intent to screen the offender from legal punishment caused the evidence thereof to disappear or gave false information respecting such offence knowing or having reason to believe the same to be false."

In that case also, there was no proof about the knowledge of the accused as regards commission of an offence and only because they were present at the cremation ground was not found to be sufficient for arriving at a conclusion that they were guilty of commission of an offence under Section 201 of the Penal Code.

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262. MOTOR VEHICLES ACT, 1988 – Section 166

Whether owner/driver/insurer of both the vehicles are necessary party to the claim petition? Held, No – Whether there can be apportionment of liability of joint tort feasors? Held, on general principles apportionment not necessary – Law explained.

Shrimati Sushila Bhadoriya and others v. Madhya Pradesh State Road Transport Corporation and Anr.

Judgment dated 29.10.2004 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Misc. Appeal No. 385 of 1997 (F.B.)

Held :

Considering all the aforesaid judgments two questions require to be determined:

(i) whether the owner, driver and insurer of both the vehicles are necessary party in the claim petition; and

(ii) whether there can be apportionment of the liability of joint tort-feasors?

In the present case, claimants have impleaded owner and driver of only one offending vehicle and has not impleaded driver and owner of the other vehicle. In our opinion, in the cases of joint tort-feasors when the liability is joint and several, it is the choice of the claimant to impaled either driver. owner and insurer of both the vehicles, or of one vehicle and recover the whole amount of compensation from one of the tort-feasors. It is not necessary for him to impaled both the tort-feasors. He can impaled only one of them as per his choice. Claim petition cannot be defeated on the ground of non-impleading the owner, driver and insurance company of other vehicle-party because the intention of the Legislature is that the Claims Tribunal should issue notice to the owner, driver and insurer of the offending vehicle/vehicles.

Next question involved in the case is whether there can be apportionment?

In the cases of joint tort-feasors, it is difficult to determine the extent of liability of each tort-feasor and it will not be possible to apportion the ratio of negligence of the joint tort-feasors. In the cases of composite negligence or in the cases of joint tort-feasors arising out of the use of motor vehicle, Award can be passed against both or any one of them for the entire amount because the

injured is not in a position to quantify of qualify the apportionment of each vehicle. Since he has suffered injury on account of use of motor vehicles, both the motor vehicles will be jointly and severally liable to pay the compensation. It is the choice of the claimant to sue both or may claim compensation from one of the joint tort-feasors as their liability is joint and several. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two, as it is difficult to determine the apportionment in the absence of the drivers of the vehicles appearing in the witness box. Therefore, there cannot be any apportionment of the claim between the joint tort-feasors.

When injury is caused as a result of negligence of two joint tort-feasors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint-tort-feasor, liability can be fastened on both the tort-feasors jointly and in case only one of the joint tort-feasors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feasors. If both the joint tort-feasors are before the court and there is sufficient evidence regarding the act of each tort-feasors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-feasors, it may apportion the claim. However, it is not necessary to apportion the claim when it is not possible to determine the ratio of negligence of joint-tort-feasors. In such cases, joint tort-feasors will be jointly and severally liable to pay the compensation.

On the same principle, in the case of joint tort-feasors where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them.

There cannot be apportionment of claim of each tort-feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.

To sum up, we hold as under :

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles. Claimant may impaled the owner, driver and insurer of both the vehicles or anyone of them.

(ii) There cannot be apportionment of the liability of joint-tort-feasors. In case, both the joint-tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of law, there is no necessity to apportion the inters liability of joint-tort-feasors.

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263. MOTOR VEHICLES ACT, 1988 – Section 142

Whether fracture of bone simpliciter can be termed as privation of any membrane or joint? Held, No – Law explained.

Kamal Kumar Jain v. Tazuddin and others & other allied cases Judgment dated 22.03.2004 passed by the High Court of Madhya Pradesh (Gwalior Bench) in the Misc. Appeal No. 400 of 1998 (F.B.)

Held :

This is a reference by the Division Bench on the following question on account of conflicting decisions between two Division Benches of this Court :-

> "Whether the fracture of bones in a motor accident can be called privation of any member of joint and whether fracture of a bone simpliciter (without there being any permanent impairment or any weakness of body on account of it), would amount to a permanent disability within the meaning of "permanent disability" defined under Section 142 of the Motor Vehicles Act, 1988?

It may be mentioned that mere fracture of bones and its reunion will not amount to permanent total disablement or permanent partial disablement, unless the doctor has examined the claimant and assessed the percentage of disability after performing scientific tests. without performing scientific tests bald statement of the doctor and certificate is inadmissible in evidence. Visual opinion of doctor has no evidentiary value. Claims Tribunals, therefore, must assign reasons in arriving at the conclusion about the percentage of loss of income in the case of permanent partial disablement. Therefore, for determining the nature of permanent disability, there must be sufficient evidence on record to determine total or partial disablement. In the absence of evidence regarding scientific tests to determine the percentage of disability, Claims Tribunals should take guidance from the Schedule of Workmen's Compensation Act to determine the percentage of loss and shall apply multiplier on the basis of loss of income of the injured.

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

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

manent or partial disability is insufficient, the Courts can certainly refer to the Schedule of Workmen's Compensation Act to determine loss of earning capacity or percentage of loss of partial disability or permanent disability, as the case may be, and determine the quantum of compensation.

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264. M.P. LOK PARISAR BEDAKHALI ADHINIYAM,1974 – Section 2 (e)
Whether premises belonging to a local authority are covered by the definition of 'public premises' contained in Section 2 (e) of the Act? Held, Yes – Law explained.
Meena Agrawal v. Chief Municipal Officer, Municipal Council. Shivpuri and others
Judgment dated 29.06.2003 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 1449 of 2001 (F.B.)

Held:

Learned Single Bench has referred this dispute before the larger Bench on account of difference of interpretation of provisions of Section 2 (e) of M.P. Lok Parisar Bedkhali Adhiniyam by the Division Bench judgments in the case of *Hariom Verma and another v. State of M.P. and others* and in the case of *R.P. Sharma v. Competent Authority M.P. No. 424/92* decided on 23.6.1992 reported in *1992 (2) M.P. W.N. SN 74.*

Short question involved in these cases is whether the premises belonging to local authority will fall within the meaning of "public premises" as defined under Section 2 (e) of the Madhya Pradesh Lok Parisar Bedakhali Adhiniyam, 1974 (hereinafter referred to as Adhiniyam) and Adhiniyam is applicable to premises belonging to local authority.

We are of the view that the properties owned and controlled by Local Authority will fall within the ambit of 'Public Premises' under Section 2 (e) (ii) of Adhiniyam, and we hold that *Hariom Verma* (supra) has not laid down the correct law, and law laid down in the case of *R.P. Sharma* (supra) is the correct law. We answer the Reference as under :

> That the 'Public Premises' as defined under Section 2 (e) of the Adhiniyam includes the premises belonging to Local Authority created by Central or State Act, or under the Control of State Government or the Local Aurhotity.

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265. CIVIL PROCEDURE CODE, 1908 – O.6 R.17
Whether application seeking amendment to introduce time-barred claim maintainable? Law explained.
Smt. Sita Devi v. Mahendra Kumar and others
Judgment dated 24.02.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Writ Petition No. 1593 of 2005

Held:

The seminal question that arises for consideration is whether in respect of the claim barred by limitation an application for amendment should be entertained or not. In the case of *Pankaja and another Vs. Yellappa (Dead) by Lrs. and others, (2004) 6 SCC 415* the Apex Court after posing the said question in paragraphs 14 to 16 expressed the view as under:

> "14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.
>
> 15. This Court in the case of *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.* has held: (AIR p. 362, para 16)
>
> "16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amendment claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."
>
> 16. This view of this Court has, since, been followed by a three-Judge Bench of this Court in the case of *T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board.* Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing, such amendment in the interest of justice."

In my considered opinion, the ratio of the said decision should be made applicable to the case at hand and accordingly the order refusing the amendment is quashed and it is directed that the learned trial judge shall allow the amendment and permit the respondents to file a further written statement and thereafter frame an issue as regards the limitation and decide the same.

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PART - III

CIRCULARS/NOTIFICATIONS

GOVERNMENT OF INDIA
MINISTRY OF EXTERNAL AFFAIRS

No. T4410/24/2006 New Delhi, the 23rd March' 06

The Ministry of External Affairs has been receiving summons; notice and other judicial processes etc. in criminal and civil or commercial matters from the various courts in India for servicing the same on the persons residing outside the geographical limits of the Republic of India.

2. It is reiterated here that service of judicial processes outside India, including summons/show cause notice etc. is regulated by reciprocal arrangements with foreign countries, finalized and notified by the Ministry of Home Affairs, as per statutory provisions in the Criminal Procedure Code (Section-105). In the absence of such notified arrangements, the question of service of judicial processes outside India is required to be examined and decided by the Ministry of Home affairs, in view of the relevant India Municipal laws.

3. As per Allocation of Business Rules of the Government of India, the Ministry of Home Affairs is the nodal Ministry and Central authority for seeking and providing the mutual legal assistance in criminal law matters. The Ministry of Home Affairs receives all kind of such requests, examines and takes appropriate action.

4. Similarly, the cases pertaining to civil and commercial matter are required to be taken up with the Ministry of Law & Justice, as that Ministry performs all the above mentioned functions, with regard to civil law matters as per Allocation of Business Rules of the Government of India. The Ministry of Law & Justice finalizes and notifies treaties and arrangements with others countries as per the relevant statutory provisions in the Code of Civil Procedure.

5. It is therefore requested that all requests for seeking assistance from a foreign country including the service of all kinds of judicial processes or other documents be directly submitted to the Ministry of Home Affairs in criminal law matters and the Ministry of Law and Justice in the civil and commercial matters.

6. It is requested that the information contained in the above paras may also kindly be suitably brought to the notice of the judicial authorities under your jurisdiction.

Sd/-

(R.R. DASH)
Joint Secretary to the
Government of India

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G.S.R. 646 (E). – In exercise of the powers conferred by Section 23 of the said Act, the Central Government, after consultation with the Central Committee for Food Standards, hereby makes the following rules further to amend the Prevention of Food Adulteration Rules, 1955, namely :–

1. (1) These rules may be called the **Prevention of Food Adulteration (Third Amendment) Rules, 2005.**

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

2. In the Prevention of Food Adulteration Rules 1955,–

(i) in Rule 50, after sub-rule (15) following shall be added, namely,–

"(16) (a) the manufacturing or packing or processing of food in any establishment, and;

(b) serving food in hotel or restaurants,–

where twenty or more person are working on any day of preceding twelve months, shall be supervised by a person having any one of the following qualifications;

(i) a degree in Science with Chemistry or Home Science or Microbiology or Food Technology, or;

(ii) diploma in Food Technology from a recognized University/Board or;

(iii) diploma in Hotel Management and Catering Technology Course of three years or;

(iv) Food Craft Course of one year run by National Council for Hotel Management and Catering Technology, or;

(v) Certificate Course on food safety conducted by University/Institutions based on the course curriculum developed by Department of Health.

Provided that the name of such person with his consent, signature and complete address as required under the provisions of the Prevention of Food Adulteration Act, 1954, shall be notified to the Food (Health) Authority.".

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उच्च न्यायालय मध्यप्रदेश, जबलपुर

अधिसूचना

क्रमांक सी/3040 / तीन–2–9/40–चार फा.नं.1–ए — जबलपुर, दिनांक 19 जुलाई, 2006

भारत के संविधान के अनुच्छेद 227 के खण्ड (2) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए मध्यप्रदेश उच्च न्यायालय, एतद् द्वारा, मध्यप्रदेश में दण्ड न्यायालयों के मार्ग–दर्शन के लिए नियम तथा आदेश (दाण्डिक) में निम्नलिखित संशोधन करता है, अर्थात:–

संशोधन

भाग–चार में, अभ्यास 24 में शीर्षक ''न्यायालय रजिस्टर'' के अधीन, नियम 570 में, सारणी (Table) में, अनुक्रमांक 1 के सामने कॉलम (4) में शब्द ''जिला मुख्यालय में, मुख्य न्यायिक मजिस्ट्रेट के न्यायालय में तथा अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट के न्यायालय में दूरस्थ स्टेशन पर वरिष्ठतम अभिहित न्यायालय'' के स्थान पर शब्द ''जिला मुख्यालय में मुख्य न्यायिक मजिस्ट्रेट के न्यायालय में और विशेष रेलवे मजिस्ट्रेट के न्यायालय में (उनके द्वारा विचारणीय मामलों के संबंध में) और दूरस्थ स्टेशनों पर अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट/वरिष्ठतम अभिहित न्यायालय'' स्थापित किए जाएं।

2. नियम 571 के खण्ड (क) के स्थान पर, निम्नलिखित खण्ड स्थापित किया जाए, अर्थात:–

(क) जिला मुख्यालय में मूल मामलों (रेलवे मजिस्ट्रेट द्वारा विचारणीय मामलों के सिवाय) का रजिस्टर मुख्य न्यायिक मजिस्ट्रेट के न्यायालय में रखा जाएगा और पर्यवेक्षित किया जाएगा तथा इस जिला मुख्यालय में पदस्थ न्यायिक मजिस्ट्रेट के समक्ष फाइल किए गए समस्त मामलों की प्रविष्टि पूर्वोक्त रजिस्टर में की जावेगी । विशेष रेलवे मजिस्ट्रेट द्वारा विचारणीय मूल मामलों का रजिस्टर विशेष रेलवे मजिस्ट्रेट के न्यायालय में रखा जाएगा और पर्यवेक्षित किया जाएगा।''

आदेशानुसार
एडिशनल रजिस्ट्रार

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The most important thing in communication is to hear what isn't being said.

– PETER E. DRUCKER

Ministry of Home Affairs Notification No. S.O. 923 (E) dated the 21st June, 2006. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii), dated 21.06.2006.

In exercise of the powers conferred by sub-section (2) of section 1 of the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), the Central Government hereby appoints the 23rd day of June, 2006 as the date on which the provisions of the said Act, except the provisions of Sections 16, 25, 28 (a), 28(b), 38, 42(a), 42(b), 42(f) (iii) and (iv) and 44(a), shall come into force.

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Ministry of Home Affairs Notification No. S.O. 990 (E) dated the 3rd July, 2006. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii), dated 3.7.2006.

In exercise of the powers conferred by sub-section (2) of section 1 of the Criminal Law (Amendment) Act, 2005 (2 of 2006), the Central Government hereby appoints the 5th day of July, 2006 as the date on which the provisions of section 4 of the said Act shall come into force.

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The difference between the impossible and the possible lies in a person's determination.

– TOMMY LASORDA

What the superior man seeks is in himself; what the small man seeks is in others.

– CONFUCIUS

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH GRAM NYAYALAYA (SANSHODHAN) ADHINIYAM, 1997

No. 26 of 2005*

[Received the assent of the President on t he 17th November 2005; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 28th November 2005.]

An Act to amend the Madhya Pradesh Gram Nyayalaya Adhiniyam, 1996.

Be it enacted by the Madhya Pradesh Legislature in the Forty-eighth Year of the Republic of India, as follows :–

1. Short title and commencement.– (1) This Act may be called the Madhya Pradesh Gram Nyayalaya (Sanshodhan) Adhiniyam, 1997.

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

2. Amendment of Section 1. – To sub-section (2) of Section 1 of the Madhya Pradesh Gram Nyayalaya Adhiniyam, 1996 (No. 26 of 1997) (hereinafter referred to as the Principal Act) the following provision shall be added namely :–

"Provided that it extends to the Scheduled Areas referred to in clause (i) of Article 244 of the Constitution subject to such exceptions and modifications as provided in Section 31-A."

3. Amendment of Section 3.– In Section 3 of the Principal Act, the following proviso shall be inserted, namely :–

"Provided that in the Scheduled Areas a circle may also be declared of the area comprising less than Ten Gram Panchayats.".

4. Amendment of Section 5.– In Section 5 of the Principal Act, proviso to sub-section (2) shall be omitted.

5. Amendment of Section 7.– In clause (i) of sub-section (1) of Section 7 of the Principal Act –

(i) for the words "a Sarpanch or Up-Sarpanch of Gram Panchayat or an office bearer of a Janpad Panchayat or Zila Panchayat" the words "an Office bearer of a Panchayat" shall be substituted.

Published in M.P. Rajpatra (Asadharan) dated 28-11-2005 Pages 1134 (3-6).

(ii) after the word "Vice Chairman" wherever it occurs the words "Director" shall be inserted.

6. Insertion of new Section 9-A– After Section 9 of the Principal Act, the following section shall be inserted, namely :–

"9-A. Removal of member. – The District Judge may after such enquiry as he may deem fit to make at any time remove a member if –

(a) he has been guilty of misconduct in the discharge of his duties; or

(b) his continuance in office is undesirable in the interest of the public; or

(c) he is incapable of discharging his duties; or

(d) he lacks importiability or

(e) he has been found guilty of corrupt practices :

Provided that no member shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office."

7. Amendment of Section 16.– In Section 16 of the Principal Act. –

(i) in sub-section (1), –

(a) in clause (ii) after sub-clause (a), the following sub-clause shall be inserted, namely :–

(a-1) Section 34, 36 and 36-B of the Madhya Pradesh Excise Act, 1915 (No. 2 of 1915) where the quantity illegally imported, exported, transported, manufactured, collected or possessed is not more than 25 litres in the case of foreign liquor or country liquor, 500 grams in the case of Bhang and 15 litres in the case of Tari;

(b) after the existing proviso, the following proviso shall be added, namely :–

"Provided further that if the Gram Nyayalaya is of the opinion that the imposition of a fine is not severe enough looking to the gravity of the offence and the punishment of imprisonment is warranted, it may refer the case to the criminal courts having jurisdiction to try the offence";

(ii) in sub-section (2), –

(a) in sub-clause (b) of clause (ii), for the word and figures "Rs. 500/-" the words "two thousand rupees" shall be substituted;

(b) for sub-clause (d) of clause (ii), the following sub-clause shall be substituted, namely :–

"(d) of an offence in a case where either the complainant or the accused is a public servant acting or purporting to act in his official capacity or a member of a Gram Nyayalaya.".

8. Insertion of new Section 29–A. After Section 29 of the Principal Act, the following Section shall be inserted, namely :–

"**29-A. Grant by Zila Panchayat.** – The Zila Panchayat shall place a sum of rupees five thousand at the disposal of every Gram Nyayalaya at their jurisdiction to meet the expenses of the Gram Nyayalaya and the Gram Nyayalaya shall get it recouped from time to time.".

9. Insertion of new Section 31-A.– After Section 31 of the Principal Act, the following Section shall be inserted, namely :–

"**31-A. Special provision for Scheduled areas.** – (1) The reservation of seats of members in the Gram Nyayalaya in the scheduled area shall be in proportion to the population of the communities in that Gram Nyayalaya areas :

Provided that the reservation for the scheduled tribes shall not be less than one half of the total number of seats :

Provided further that all the seats of Pradhan in the Gram Nyayalaya in the scheduled areas shall be reserved for Scheduled Tribes.

(2) Notwithstanding anything contained in this Act or the rules made thereunder, the Gram Sabha in the Scheduled areas shall decide the cases under Section 16 by customary mode of dispute resolution keeping in view the customary law, social and religious practices of the parties in the dispute :

Provided that if there is controversy in respect of customary mode of dispute resolution and customary law between the parties in the dispute or the customary law and mode are not distinctive or on any other reasonable grounds, the Gram Sabha is not able to decide the case, it shall refer the case to the Gram Nyayalaya having jurisdiction for adjudication and the Gram Nyayalaya shall proceed to try and decide the case as if the case is filed afresh before it.

●

A fanatic is one who can't change his mind and won't change the subject.

– SIR WINSTON CHURCHILL

THE COMMISSIONS FOR PROTECTION OF CHILD RIGHTS ACT, 2005

The following Act Parliament received the assent of the President on the 20th January, 2006 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 5, dated January 20, 2006.

INDIAN PARLIAMENT ACT NO. 4 OF 2006

An Act to provide for the constitution of a National Commission and State Commissions for Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.

Whereas India participated in the United Nations (UN) General Assembly Summit in 1990, which adopted a Declaration of Survival, Protection and Development of Children;

And whereas India has also acceded to the Convention on the Rights of the Child (CRC) on the 11th December, 1992;

And whereas CRC is an international treaty that makes it incumbent upon the signatory States to take all necessary steps to protect children's rights enumerated in the Convention;

And whereas in order to ensure protection of rights of children one of the recent initiatives that the Government have taken for Children is the adoption of National Charter for Children, 2003;

And whereas the UN General Assembly Special Session on Children held in May, 2002 adopted an and Outcome Document titled "A World Fit for Children" containing the goals, objectives, strategies and activities to be undertaken by the member countries for the current decade;

And whereas it is expedient to enact a law relating to Children to give effect to the policies adopted by the Government in this regard, standards prescribed in the CRC, and all other relevant international instruments;

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

Chapter I
Preliminary

1. Short title, extent and commencement. – (1) This Act may be called **the Commissions for Protection of Child Rights Act, 2005.**

(2) It extends to the whole of India except the State of Jammu and Kashmir.

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

2. Definitions.– In this Act, unless the context otherwise requires,-

(a) "Chairperson" means the Chairperson of the Commission or of the State Commission, as the case may be;

(b) "child rights" includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992;

(c) "Commission" means the National Commission for Protection of Child Rights constituted under section 3;

(d) "Member" means a Member of the Commission or of the State Commission, as the case may be, and includes the Chairperson;

(e) "notification" means a notification published in the Official Gazette;

(f) "prescribed" means prescribed by rules made under this Act;

(g) "State Commission" means a State Commission of Protection of Child Rights constituted under section 17.

CHAPTER II
THE NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS

3. Constitution of National Commission for Protection of Child Rights.- (1) The Central Government shall, by notification, constitute a body to be known as the National Commission for Protection of Child Rights to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

(2) The Commission shall consist of the following Members, namely:-

(a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and

(b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the Central Government from amongst persons of eminence, ability, integrity, standing and experience in,-

(i) education;

(ii) child health, care, welfare or child development;

(iii) juvenile justice or care of neglected or marginalized children or children with disabilities;

(iv) elimination of child labour or children in distress;

(v) child psychology or sociology; and

(vi) laws relating to children.

(3) The office of the Commission shall be at Delhi.

4. Appointment of Chairperson and Members.- The Central Government shall, by notification, appoint the Chairperson and other Members:

Provided that the Chairperson shall be appointed on the recommendation of a three member Selection Committee constituted by the Central Government under the Chairmanship of the Minister in-charge of the Ministry of Human Resource Development.

5. Term of office and conditions of service of Chairperson and Members.– (1) The Chairperson and every Member shall hold office as such for a term of three years from the date on which he assumes office:

Provided that no Chairperson or a Member shall hold the office for more than two terms:

Provided further that no Chairperson or any other Member shall hold office as such after he has attained-

(a) in the case of the Chairperson, the age of sixty-five years; and

(b) in the case of a Member, the age of sixty years.

(2) The Chairperson or a Member may, by writing under his hand addressed to the Central Government, resign his office at any time.

6. Salary and allowances of Chairperson and Members.– The salary and allowances payable to, and other terms and conditions of service of, the Chairperson and Members, shall be such as may be prescribed by the Central Government:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member, as the case may be, shall be varied to his disadvantage after his appointment.

7. Removal from office.– (1) Subject to the provisions of sub-section (2), the Chairperson may be removed from his office by an order of the Central Government on the ground of proved misbehaviour or incapacity.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may by order remove form office the Chairperson or any other member, if the Chairperson or, as the case may be, such other Member,-

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) refuses to act or become incapable of acting; or

(d) is of unsound mind and stands so declared by a competent court; or

(e) has so abused his office as to render his continuance in office detrimental to the public interest; or

(f) is convicted and sentenced to imprisonment for an offence which in the opinion of the Central Government involves moral turpitude; or

(g) is, without obtaining leave of absence from the Commission, absent from three consecutive meetings of the Commission.

(3) No person shall be removed under this section until that person has been given an opportunity of being heard in the matter.

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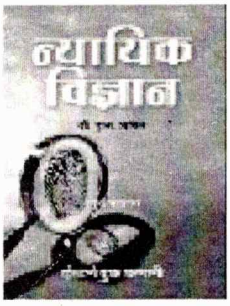
न्यायिक विज्ञान
(Forensic Science in Hindi)

डॉ बसन्तीलाल बाबेल



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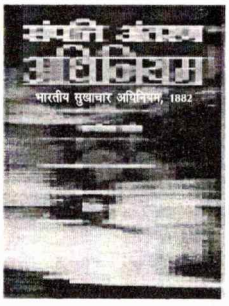
न्यायिक विज्ञान अपराध अन्वेषण विधि और न्याय का विज्ञान है। अपराध-जगत में होती हुई वृद्धियों और उनके तरीकों की अतिशयता को रोकने के लिए आज इस क्षेत्र में नई-नई तकनीक विकसित हुई हैं। पुस्तक के इस नवीनतम संस्करण में लेखक ने न केवल उन तकनीकों पर प्रकाश डाला है, अपितु न्यायिक मनोविज्ञान को भी इसमें सम्मिलित किया है, जिसका प्रयोग न्यायालयों के समक्ष विधिक मामलों के विनिश्चय में किया जाता है।

पुस्तक में जिन महत्वपूर्ण विषयों पर प्रकाश डाला गया है उनमें से कुछ प्रमुख इस प्रकार हैं– अन्वेषण का अर्थ एवं लक्ष्य, अपराध अन्वेषण में न्यायिक विज्ञान का महत्व एवं योगदान, अपराध-स्थल एवं लोकार्ड का परस्पर विनिमय का सिद्धान्त, अपराध अन्वेषण में फोटो-चित्र का महत्व, गोदन-चिह्न एवं क्षत-चिह्न, अंगुलि चिह्न, रन्ध्र विज्ञान एवं डी.एन.ए., झूठ दर्शक यंत्र, कम्प्यूटर, अग्निशस्त्र, सम्मोहन विज्ञान, भौतिक साक्ष्य का साक्ष्यिक मूल्य, इत्यादि। इस दिशा में प्रकाश में आई हुई अधुनातन तकनीकों यथा-डिजिटल वायस एनालिसिस सिस्टम, सॉफ्टवेयर, साइलेंट टॉकर, ब्रेन फिंगर प्रिंट, पेंट बाल गन नामक यन्त्रों का वर्णन किया गया है। जिनकी सहायता से अपराधी को आसानी से पकड़ा जा सकता है।

पुस्तक की भाषा, सरल, आकर्षक एवं बोधगम्य है। आवश्यकतानुसार दिए गए फोटो-चित्र इसकी महत्ता में वृद्धि करते हैं। निस्सन्देह यह संस्करण सभी के लिए अत्यन्त उपयोगी सिद्ध होगा।

संपत्ति अंतरण अधिनियम, 1882
एवं भारतीय सुखाचार अधिनियम, 1882
[Transfer of Property Act, 1882 and Indian Easements Act, 1882 (in Hindi)]

बसन्तीलाल बाबेल



अब तक के सभी महत्वपूर्ण न्यायिक निर्णयों को इसमें दिया गया है। इसके अतिरिक्त रजिस्ट्रीकरण और तत्सम्बंधित विधियाँ (संशोधन) अधिनियम, 2001 तथा संपत्ति अंतरण संशोधन अधिनियम, 2002 के उपबंधों को और प्रतियोगी परीक्षाओं के लिए महत्वपूर्ण (उपयोगी) प्रश्नोत्तरों को (संपत्ति अंतरण तथा सुखाचार अधिनियम दोनों से सम्बद्ध) इस संस्करण में सम्मिलित किया गया है। कुछ पुरानी धाराओं के स्थान पर नई धाराएं आ गई हैं, जिन्हें यथास्थान दिया गया है। लगभग प्रत्येक अध्याय में नवीनतम वाद भी दिये गए हैं।

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