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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

JOTI JOURNAL AUGUST - 2007

SUBJECT- INDEX

From the pen of the Editor 147

PART-I
(ARTICLES & MISC.)

1. Photographs 151
2. The Message of Hon'ble the Chief Justice on the occasion of the launching of E-Courts in M.P. on 09.07.2007 153
3. Judicial Conduct: An inseparable part of ethics 155
4. Questionnaire of Bi-monthly Training Programme 160
5. न्यायालय द्वारा संज्ञान के लिये अभियोजन हेतु स्वीकृति पूर्ववर्ती शर्त होने पर स्वीकृति सिद्ध किये जाने की रीति 161
6. Whether a Court can take judicial notice of Notification issued by Government 164
7. The procedure which is required to be followed for detention of judgment-debtor in civil prison and for seeking police aid in execution of a decree 169
8. Whether a finding adverse to a party in a suit not having a right to challenge the same in appeal has the effect of res judicata? 178
9. दोषमुक्ति के विरुद्ध अपील में दण्ड अधिरोपित करने की अपीलीय न्यायालय की अधिकारिता का विस्तार 180
10. विधिक समस्याऐं एवं समाधान 183

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

ACT/ TOPIC	NOTE NO.	PAGE NO.
ADMINISTRATIVE LAW		
- Cancellation of allotment of dealership – Income shown by applicant was not found true – Undertaking given by the applicant that if any information supplied by him is found untrue, Corporation would have right to terminate dealership – Held, cancellation of dealership is valid – Importance of undertaking restated	194	253
ARBITRATION AND CONCILIATION ACT, 1996		
Section 37(1) (b) - Appeal against award on ground 'no arbitration clause' stipulated in the contract – No such		

ACT/ TOPIC		NOTE NO.	PAGE NO.
	objection was raised in W.S. before arbitrator – The said plea was not advanced before civil Court in arbitration case – No objection was raised before High Court during proceeding u/s 11 – Not asking arbitrator to rule on its own jurisdiction – Both parties consented and accepted that there was an arbitration clause and proceeded on that basis – Held, such plea cannot be raised	195	254
Sections 37(2) (a), 16(2), 16 (3) & 34	- Appeal against the partial award of the Arbitral Tribunal u/s 37(2) is maintainable only when Tribunal ruled that it has no jurisdiction or Arbitral Tribunal exceeds its authority – Arbitral Tribunal rejected the counter-claim on the ground that it has been already settled by the parties – This is not equivalent to the question pertaining to the jurisdiction of Tribunal	196 (i)	254
CIVIL PROCEDURE CODE, 1908			
Sections 38, 39, 42 & 136	- Territorial jurisdiction of executing Court – Normally the Court that passed the decree is the executing Court – Exception – Other Court can exercise jurisdiction only when property is situated in their jurisdiction – Court passing the decree may transfer the decree for execution to the other Court where the property is situated – Court passing the decree may also issue order of percept u/s 46 of the Act to the other to attach the property which is situated in their jurisdiction. But Court passed the decree has jurisdiction to pass restraint orders in respect of person or property situated outside the jurisdiction to deliver possession to judgment debtor	197	258
Section 151	- 'Fraud', meaning of – Decree obtained by fraud is nullity and can be challenged in any Court whenever in any proceeding decree is sought to be enforced – It has no effect of res judicata – Court can recall such judgment or order by using its inherent power u/s 151 of the Act and it can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. It is an exception to Article 141 of the Constitution and doctrine of merger – Law explained	198	26
Order I Rule 13, Order II Rule 7	- Objections as to non-joinder/misjoinder of necessary parties and cause of action – Are		

ACT/ TOPIC		NOTE NO.	PAGE NO.
	to be taken at the earliest possible opportunity – Otherwise shall be deemed to have been waived	199	264
Order VI Rule 17 & Proviso	- Amendment of W.S. – Proviso creates a bar – Amendment filed after evidence of three plaintiff witnesses – No ground why amendment could not be brought before the commencement of trial – Granting amendment in such a situation – Serious prejudice may cause to the other parties. Trial commences – When issues are settled and case is set down for recording evidence	201	268
Order VII Rule 10 and Sections 16(b) & 16 (d), proviso & Section 20	- Return of plaint – What is to be considered – Meaningful reading of the plaint averments to find out the real intention – Suit for partition, declaration and injunction of immovable properties – Situated beyond the jurisdiction of the Court – Held, Ss.16 (b) and 16 (d) will be applicable – Proviso of S.16 attracts only where relief could be obtained by a personal obedience to the decree by the defendants or compensation for wrong to immovable property – S.20 is residuary in nature and it is attracted only where S.16 has no relevance	202	269
Order VIII Rule 6-A	- Counter-claim – Can be filed after filing of the W.S. – It cannot be dismissed on the ground of limitation – It should be decided with the suit	203	271
Order XIV Rule 2	- Preliminary issues, determination of – Law explained Question of valuation and of limitation raised in written statement – Questions being mixed question of law and fact – Cannot be decided as preliminary issues	204	271
Order XVII, Rule 2 Explanation	- Before application of the Explanation of O.XVII R.2 of the Code, Court has to record its satisfaction	205	274
Order XXI Rules 84 & 85	- Meaning of the term 'immediately' – Not instantaneously but within reasonable time – Auction sale – Confirmed within a period of 30 days from date of acceptance of bid – Cannot be sole ground to set aside sale after 8 years	206	274
Order XXII Rule 4	- Legal representative of deceased – Is entitled to file written statement to make defence appropriate to his character as L.R	207	275

ACT/ TOPIC		NOTE NO.	PAGE NO.
Order XXII Rule 5	- Legal representative brought on record – He steps into the shoes of original party – He cannot litigate his personal right as legal representative	208	276
Order XXXVII Rules 1 & 3(5)	- Principles to be followed while granting leave to defend – Court may grant leave to defend even though defence appears to be moonshine – Court may impose condition that disputed amount should be paid into Court or otherwise secured	209	277
Order XLI R 22, Order II Rule 2 & Order XXXIV Rule 14	- Filing of memorandum of cross-objection by respondent is not necessary for challenging a particular finding rendered against him while the decree itself in his favour. Mode of proof for plea of bar under O.2 R.2 of CPC - Production of plaint in earlier suit is mandatory Suit for recovery of money simplicitor loan transaction - Decree awarded - Subsequent suit for enforcement of equitable mortgage - Not barred under O. 2 R. 2 in view of O.34 R.14 of CPC - Law explained	200 (i), (ii) & (iii)	265
CONSTITUTION OF INDIA			
Article 12	- Expression 'State' as used in Art.12 of the Constitution of India, meaning of – Law explained. M.P.State Co-operative Dairy Federation is 'State' within the meaning	210	278
CONSUMER PROTECTION ACT, 1986			
Sections 2 (1) (d) & (o)	- Jurisdiction of Consumer Forum – Unless there is an express provision prohibiting the consumer forum to exercise its jurisdiction over the matter which falls within the jurisdiction of the Civil Court, the Forum has jurisdiction to entertain the matter which other Courts would also have jurisdiction to adjudicate – The Act being a beneficial legislation, should receive liberal construction Consumer Forum has jurisdiction to adjudicate a complaint regarding deficient and negligent medical service rendered by the E.S.I. doctor or dispensary to appellant's wife	211 (i) & (ii)	283

ACT/ TOPIC		NOTE NO.	PAGE NO.
Section 2 (1) (o)	- Meaning of 'service' – Railways Hospital set up by Union of India for Railways employees as part of service conditions – Service rendered by such hospitals are not gratuitous service – Such service falls within the definition of 'service' u/s 2 (1) (o) of the Act – Forum has jurisdiction to entertain complaints regarding deficiencies of such Railways Hospitals Law laid down in the case of *State of Orissa v. Divisional Manager, LIC, (1996) 8 SCC 655* expressly overruled	212	284
CONTRACT ACT, 1872			
Section 171	- Order granting succession certificate in ignorance of Banker's lien – Held, improper as S.171 of the Act of 1872 recognizes Bankers such right	254	337
CRIMINAL PROCEDURE CODE, 1973			
Section 127 (3)	- Order of awarding maintenance passed u/s 125 – Application u/s 127(3) is filed imputing order on ground of second marriage – Staying order of maintenance not proper	213	285
Sections 161 & 172	- Interpretation or gist of statement of witness recorded by I.O. in case diary – Is not a statement recorded u/s 161 – Accused is not entitled to get copy of the same recorded by I.O. in case diary	214	287
Sections 190 & 228	- Police filed chargesheet u/s 498-A, 323 & 504 IPC – Complainant filed application before Magistrate to the effect that on the basis of evidence collected by police cognizance ought to be taken u/s 406 and 307 IPC – Magistrate ordered that prayer could be considered after evidence – Whether the order of Magistracy is correct? Held, No – Proper stage is stage of framing of charge	215	289
Sections 193 & 465	- Case under Special Act filed before Sessions Court which took cognizance without the case being committed. - Sessions Court did not frame charge under Special Act and proceeded – On conclusion of trial accused was convicted u/Ss 148, 302/149 – Whether non-committal of the case vitiates proceedings? Held, No.		

ACT/ TOPIC		NOTE NO.	PAGE NO.
	- Conflicting judgments of the Apex Court as to the legality of trial without committal – Both the judgments passed by Bench of equal strength – Earlier judgment applicable as it is not discussed in the later judgment – Conviction upheld.	230	307
Section 220 (4)	- Consolidation of two challans/chargesheet – Two different chargesheets were filed against the same accused one u/ss 302, 420 and 465 IPC and another u/s 25 Arms Act – Chargesheet u/s 25 Arms Act was an offshoot of the main case – Both chargesheets were consolidated and were tried together – Framing charge and trying both the challans together – Not illegal in view of S. 220 (4) Cr.P.C	216	289
Section 313	- Examination of accused – Statement given by accused u/s 313 is not evidence – Conviction cannot be sustained solely upon the statement of accused – But its effect can be considered in light of the other evidence brought on record	226 (ii)	303
Section 319	- S.319, applicability of – Application filed u/s 319 of the Act, consideration of – Should be decided on worth of witnesses – Report of investigation officer is irrelevant	217	290
Section 322	- Counter case – Could not be tried by the same Court one after another – Accused failed to draw attention of the Court about pendency of the counter case – No application was moved for holding trial by the same court – Held, trial is not vitiated – Accused cannot claim prejudice	218	290
Section 378	- What are the powers of an appellate Court against an order of acquittal? Held, the appellate Court has full power to review, re-appreciate and reconsider the evidence etc	219	291
Sections 386 & 378	- Scope of Appellate Court to interfere with a judgment of acquittal – Manifest illegality and perversity is prime consideration – Merely other view also possible on an appraisal of the evidence, Appellate Court cannot legally interfere with an order of acquittal – Even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is errorneous	224 (iv)	297

ACT/ TOPIC		NOTE NO.	PAGE NO.
Sections 387 & 378	- Reversal of order of acquittal in appeal by High Court – No counsel appeared on behalf of accused – High Court ought to have provided counsel by way of legal aid – Order of High Court reversing order of acquittal set aside – Matter remitted back to dispose of appeal after providing opportunity of hearing to accused	223	296
Sections 389 (1) & (3)	- Suspension of sentence – Power of Courts – Trial Court empowered to suspend sentence of jail only – Appellate Court can suspend sentences of jail as well as fine	220	293
Section 394	- Abatement of appeal – If it is filed on the ground of inadequacy of sentence or against acquittal – Shall finally abate on the death of appellant – Appeal against conviction also abate if fine is not a part of sentence – If fine is part of sentence, Court is duty bound to decide appeal even no legal heir obtains leave of Court to continue appeal	221	294
Section 439	- Grant of bail – Changed circumstances – Grant of bail to co-accused by High Court amounts to change in the circumstances – It entitles identically placed another co-accused for grant of bail by Lower Court on the principle of parity		
	Judicial discipline – Order passed against the principles settled by higher Courts amounts to contempt of Court	205 (i) & (ii)	295
CRIMINAL TRIAL			
	- Circumstantial evidence – Conviction on the basis of such evidence – Test to be satisfied for.	224 (i)	297
	- Time of death – Exact time of death cannot be established by 'rigor mortis' – 'Rigor mortis' depends upon many factors temperature, weather conditions, age, condition of the body etc. – Opinion of doctor about time of death based on rigor mortis – Cannot be ground to reject ocular evidence about time of death. Ocular evidence vis-a-vis medical evidence – Ocular evidence that firing took place from long range – Medical evidence showing close range as tattooing or charring was found on		

ACT/ TOPIC		NOTE NO.	PAGE NO.
	the wound – It depends on propellant charge, nature of the gun and distance between victim and the gun – In such situation ocular evidence if trustworthy, should be relied upon	225	301
EVIDENCE ACT, 1872			
Section 9	- Last seen together – When relevant – Necessary considerations – Duration of time gap is also material circumstance – That is material consideration – Possibility of any other person meeting or approaching the deceased could completely be ruled out Identification of articles – Reliability – No sufficient opportunity to see the said articles being used by the deceased for long duration – Not carrying any distinctive marks – Easily accessible and available in market – Identification of such articles could not be believed	224 (ii) & (iii)	297
Section 24 & 30	- Confession – If found voluntary, may be the basis of conviction	226 (i)	303
Sections 25, 133	- Evidence of accomplice – Normally, should not be accepted without corroboration Officer of the department of Revenue Intelligence under NDPS Act is not a police Officer – Confession made before such officer is admissible – Yet, such confession must be subject to closer scrutiny than a confession made to private citizens or official	242	323
Section 120	- Competent witness – Husband holding special power of attorney of wife/plaintiff – Husband is competent to depose for his wife as provided u/S 120 – No adverse inference can be drawn due to non-examination of plaintiff/wife	227	304
Section 137	- Cross-examination is not a mere formality – It is a mater of substance – Party is required to put its version to shake the credibility of statement	228	304
HINDU MARRIAGE ACT, 1955			
Section 13 (1) (i-a)	- 'Mental cruelty' has no comprehensive definition – Depends on the entire human behaviour – Cannot be assimilated in one definition – Instances for guidance which may infer mental cruelty is only suggestive	229	305

ACT/ TOPIC		NOTE NO.	PAGE NO.
INDIAN PENAL CODE, 1860			
Sections 148 & 302/149	- Case under Special Act filed before Sessions Court which took cognizance without the case being committed Sessions Court did not frame charge under Special Act and proceeded – On conclusion of trial accused was convicted u/Ss 148, 302/149 – Whether non-committal of the case vitiates proceedings? Held, No	230	307
	- Conflicting judgments of the Apex Court as to the legality of trial without committal – Both the judgments passed by Bench of equal strength – Earlier judgment applicable as it is not discussed in the later judgment – Conviction upheld		
Section 307	- S.307, ingredients of – Court has to see whether the act has been done with the culpable intention or knowledge irrespective of result – Injury caused is not always decisive factor	231	308
Section 364-A	- Offence u/s 364-A of the Act of 1860 may be tried within the jurisdiction of the Court where abduction/kidnapping takes place or threat coupled with death if ransom is not paid or death has been caused	232	309
Sections 376 (2) and 376-B to D	- S.376-B – Ingredients of – Custody contemplated, meaning of – Students of the school cannot be said to be in the custody of teacher – Distinction between Ss. 376 (2) and 376-B to 376-D – U/s 376 (2) intercourse with a woman without her consent – Whereas u/s 376-B to 376-D there would be consent on the part of the prosecuterix but such consent has been obtained by taking undue advantage of the position as a public servant	233	310
INTERPRETATION OF STATUTES			
	- Golden Rule that statutes are to be interpreted according to grammatical and ordinary sense of the word in grammatical or literal meaning unmindful of consequence of such interpretation has given go-by – 'Rule of legislative intent' and 'purposive interpretation, is developing trend	234	312

ACT/ TOPIC		NOTE NO.	PAGE NO.
LAND REVENUE CODE, 1959 (M.P.)			
Sections 257 (I-I) & 170-B	- Transaction took place before the period contemplated u/s 170-B for inquiry – Jurisdiction of Civil Court not barred	235	315
LIMITATION ACT, 1963			
Section 14	- Exclusion of time of proceeding bonafide in court without jurisdiction – Law explained	236	316
MOTOR VEHICLES ACT, 1988			
Sections 147 & 149	- Third party risk cases vis-à-vis own damage cases – Principle of 'pay and recover' applies in former cases and not in later ones – *National Insurance Company Ltd. v. Swaran Singh (2004) 3 SCC 297* has no application in the own damage cases	237	317
Section 147 (b)	- Insurer's liability – Owner himself was driving the vehicle – He was found negligent – Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle – Held, petition u/s 166 of the Act not maintainable	238	318
Sections 166 & 168	- Motor accident – Determination of compensation – Selection of multiplier – Law explained. The highest multiplier of 18 for the age group of 21 to 25 years – The lowest multiplier for the age group of 60 to 70 years should be selected for just compensation	239	319
MOTOR VEHICLES RULES, 1994 (M.P.)			
Rule 233	- Claim filed through next friend in accordance with O.XXXII Rule 1 – Rule 233 is not applicable in such a case – Claims Tribunal may appoint representative if it finds next friend to be not suitable	240	322
MUSLIM LAW			
	- Wakfs – Once created cannot be extinguished – Title rest in Almighty – Wakfs may be questioned – If it is shown that Wakifs had no intention to create a Wakf but had done to avoid a liability	241	322
MUTATION ENTRY			
	- Mutation entry does not confer right of title of property – Law explained	246 (iii)	328

ACT/ TOPIC		NOTE NO.	PAGE NO.
N.D.P.S. ACT, 1985			
	- Evidence of accomplice – Normally, should not be accepted without corroboration. Officer of the department of Revenue Intelligence under NDPS Act is not a Police Officer – Confession made before such officer is admissible – Yet, such confession must be subject to closer scrutiny than a confession made to private citizens or officials	242	323
PENALTY			
	- Imposition of penalty – Aggravating and mitigating factors in which offence has been committed, should be delicately balanced – Object of imposing punishment is to protect society and deter criminals	243	324
PRACTICE AND PROCEDURE			
	- Disparaging remarks – Relevant considerations – Not called for unless necessary for decision as an integral part there of	244	325
PREVENTION OF CORRUPTION ACT, 1988			
Section 2 (c)	- Public servant – Officers/employees of State Electricity Board – Held, covered under the definition of S. 2(c) of the Act – A person may be public servant in terms of another statute Law laid down in *Bimal Kumar Gupta v. Special Police Establishment Lokayukt, 2001 (1) MPHT 330 = 2001 (3) JLJ 2* expressy overruled.	245	326
REGISTRATION ACT, 1908			
Section 47	- Only executed and registered document – It would be presumed that parties intended title to pass forthwith	246 (i)	328
RENT CONTROL AND EVICTION			
	- Sub-letting – Firm (with four partners) was tenant after dissolution of the firm – The rights of the tenant including tenancy right had been transferred to one of the partners who has constituted a new firm and continued as the owner of the firm – Held, firm is not legal entity – Possession is retained by a partner therefore no sub-letting	247	329

ACT/ TOPIC		NOTE NO.	PAGE NO.
SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989			
Section 3(1)(x)	- Case under Special Act filed before Sessions Court which took cognizance without the case being committed Sessions Court did not frame charge under Special Act and proceeded – On conclusion of trial accused was convicted u/Ss 148, 302/149 – Whether non- committal of the case vitiates proceedings? Held, No. Conflicting judgments of the Apex Court as to the legality of trial without committal – Both the judgments passed by Bench of equal strength – Earlier judgment applicable as it is not discussed in the later judgment – Conviction upheld	230	307
SERVICE LAW			
	- Deputation, meaning of – Deputing or transferring employee to a post outside his cadre or outside parent department is deputation.		
	- Whether a deputationist has legal right to continue on deputation? Held, No	248	331
	- Disciplinary proceedings against a Judicial Officer – Power of High Court – Considerations – High Court should take up case to protect honest Judicial Officer against false complaints by unscrupulous lawyers and litigants – Disciplinary actions against subordinate judiciary merely on the basis that orders/ judgments are wrong – Not good practice – Such practice adversely affect the morale of subordinate judiciary and ability to exercise their power freely and independently	249	333
	- Disciplinary proceedings can be continued inspite of acquittal of delinquent by Criminal Court – Disciplinary authority is required to consider *factum* with regard to acquittal while imposing punishment	250	334
	- Resignation – It becomes effective from the date of acceptance by the competent authority – Before acceptance, it can be withdrawn – Law explained	251	335

ACT/ TOPIC		NOTE NO.	PAGE NO.
SPECIFIC RELIEF ACT, 1963			
Section 38	- Suit for permanent injunction could be filed on the posssessory title – Prayer for declaration is not a condition precedent to file such a suit – Plaintiff is not found in possession – Suit is liable to be dismissed – Enquiry of title is not warranted	252	336
STAMP ACT, 1899			
	- Section 47-A (As inserted by M.P. Act 30 of 1997) Stamp duty – Parties entered into an agreement on 28.8.78 – Suit for specific performance decreed on 13.10.95 – In execution of the decree sale deed was presented on 5.1.98 before Sub Registrar for registration – Held, stamp duty has to be paid on market value on the date on which instrument was put to registration and not on market value prevailing on date of agreement	253	336
SUCCESSION ACT, 1925			
Section 372	- Order granting succession certificate in ignorance of Banker's lien – Held, improper as S.171 of the Act of 1872 recognizes Bankers such right	254	337
TRADE UNIONS ACT, 1926			
Section 28-J (3)	- Jurisdiction of Civil Court – Suit barred only where the matters have already been referred to Industrial Court u/s 28 (1-A) of the Act – Dispute not falling u/s 28 (1-A) of the Act may be resolved by the Civil Court	255	339
TRANSFER OF PROPERTY ACT, 1882			
Section 52	- Doctrine of lis pendens – Suit for maintenance by widow – Creating charge on the property – Property alienated during the pendency of the suit – Purchaser will get subject to the doctrine of lis pendens – Widow can proceed against the alienated property as it had not been alienated	256	340
Sections 54 & 58	- Document ostensibly a sale deed – Burden of proof is on the person who alleges it to be a mortgage	246 (ii)	328

ACT/ TOPIC	NOTE NO.	PAGE NO.
WORDS AND PHRASES		
- 'Fraud', meaning of – Decree obtained by fraud is nullity and can be challenged in any Court whenever in any proceeding decree is sought to be enforced – It has no effect of res judicata – Court can recall such judgment or order by using its inherent power u/s 151 of the Act and it can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. It is an exception to Article 141 of the Constitution and doctrine of merger – Law explained	198	260
- 'Jurisdiction' contemplated u/s 16, of Arbitration and Conciliation Act, 1996, meaning of	196 (ii)	254

PART-III
(CIRCULARS/NOTIFICATIONS)

1.	Notification regarding date of enforcement of the Electricity (Amendment) Act, 2007 (No. 26 of 2007)	21
2.	Notification regarding amendment in notification No. F-30-8-02-X-3, dated 16th May, 2005 of the Forest Department	21
3.	Notification regarding amendment in the Madhya Pradesh Transit (Forest Produce) Rules, 2000	21
4.	लोक अदालत स्कीम, 1997 के अधीन जारी अनुदेशों में संशोधन संबंधी अधिसूचना	22
5.	विधिक साक्षरता शिविर स्कीम,1999 में संशोधन संबंधी अधिसूचना	22
6.	Notification dated 28th June, 2007 regarding establishment of Special Court of Judicial Magistrate First Class	23
7.	म.प्र. श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002 के प्रवृत्ति होने की तिथि संबंधी अधिसूचना	24

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

1.	The Court-Fees (Madhya Pradesh Amendment) Amendment Act, 2007	25
2.	The Madhya Pradesh Industrial Relations (Amendment) Act, 2007	26
3.	The Madhya Pradesh Van Upaj (Vyapar Viniyaman) Sanshodhan Adhiniyam, 2006	27
4.	The Electricity (Amendment) Act, 2007	29
5.	The Environment (Protection) Second Amendment Rules, 2006	35
6.	Madhya Pradesh Nyay Seva Sadan Rules, 2006	36

FROM THE PEN OF THE EDITOR

J.P. Gupta
Director

Esteemed Readers

It is a matter of great privilege for me to have the opportunity of sharing my views with distinguished readers of this bi-monthly Journal. The immediate challenge before the Indian Judiciary is the tremendous explosion of docket. The Courts are flooded with new cases because of many new enactments. That apart pending cases are awaiting adjudication. Consequently, it has led to insurmountable pendency. Even then, people approach the Courts to resolve their disputes. It demonstrates that people of this country have immense and explicit faith and trust in our judicial system. We must preserve this faith and trust and do not allow any corrosion at any cost.

We are under obligation to provide speedy justice, which is an assurance extended to a citizen under the ambit of Right to Life guaranteed under Article 21 of our Constitution. It is the best way to restore people's faith in the administration of justice and 'Rule of Law'. In such a scenario Indian Judicial System needs to find short and long term solutions to reduce the backlog of cases and be in a position to provide speedy and fair justice to the litigants.

Recently, various strategies and tools have been used in various jurisdictions to lessen the burden of trials, and to ensure speedy disposal of cases.

One of the strategies adopted for civil matters is incorporation of Section 89 of the Code of Civil Procedure wherein **Alternative Dispute Resolution System** has been engrafted. The strategy adopted for criminal matters is insertion of provisions relating to **Plea Bargaining** in the Code of Criminal Procedure, 1973 by way of Criminal Law (Amendment) Act, 2005. Another strategy, a sophisticated one, is providing the facility to extend the **use of Information Technology** in day-to-day working of the Judge in the Court and office.

We can say that Indian Judiciary has the aforesaid tools to go ahead on the path of speedy and qualitative justice but the acquaintance, use and implementation of these tools, which is expected in this direction, are yet to gather momentum.

First of all, we will advert to Alternative Dispute Resolution (ADR). It should be regarded as a supplementary method in addition to the traditional process of dispute resolution for Courts. It refers to a set of practices and techniques to resolve disputes outside the Courts. It is mostly a non-judicial means or procedure to the settlement of disputes. In its wider sense, it refers to every thing to facilitate settlement, negotiations in which parties are encouraged to negotiate directly with each other prior to some other adjudicatory process. In the ADR mechanism, in the Indian context and nature of litigation, 'Mediation' and 'Counselling' are most effective. By extending use of these tools of ADR, Judges will be able to reduce the burden in the Courts and provide speedy justice. In the aforesaid process, results will be more effective as the parties are involved in the process and the procedures which are employed are flexible, informal in contrast with the rigid procedure followed in the ordinary process of dispute resolution in the Courts of law. Courts may reduce pendency of cases relating to the business, trade, compensation, matrimonial disputes and litigation amongst neighbours and emotionally involved persons. The main objective of the ADR process is to make the parties come together with a view to achieve settlement and sustain the relationships with real amiability.

Similarly, the concept of 'Plea Bargaining', which is introduced in the Indian Criminal Justice System by inserting Chapter XXI-A (containing Sections 265-A to 265-L) in the Code of Criminal Procedure, 1973 by the Criminal Law (Amendment) Act, 2005 with effect from 5.7.2006, is nothing but to extend the concept of Alternative Dispute Resolution into the criminal arena. The accused, the victim and the prosecution settle the controversy by participation and the judge gives his approval after being convinced. The implementation of ADR mechanism in Criminal Justice Process is to provide speedy and inexpensive justice to the people. It is expected that ADR in this context will be able to bring the accused and the victim of the crime together and help them to reach a mutual satisfactory disposition that will not only compensate and satisfy the victim but will also restore the relationship between the accused and the victim. It also helps in maintaining social harmony.

Prior to the enactment of Criminal Law (Amendment) Act, 2005, Indian Judiciary consistently opposed the concept of plea bargaining as reflected in the judgments of the Apex Court rendered in cases of *Madanlal Ram Chandra Daga v. State of Maharashtra, AIR 1968 SC 1267, Murlidhar Meghraj*

v. State of Maharashtra, AIR 1976 SC 1929, Ganesh Mal Jashraj v. Government of Gujrat, AIR 1980 SC 264, Thippaswamy v. State of Karnataka, 1983 Cr.L.J. 1271 (SC), Kasambhai Abdulrehmanbhai Sheikh and Ors. v. State of Gujrat and anr, AIR 1980 SC 854 and State of Uttar Pradesh v. Chandrika, AIR 2000 SC 164. In these judgments, the concept of plea bargaining was considered to be against the public policy under our criminal justice system and on the basis of plea bargaining Court could not dispose of the criminal cases and the Court was required to decide it on merits. But looking to the great success of the concept of plea bargaining in United States of America, we have adopted the aforesaid concept in our criminal jurisprudence.

Initially, in America also the concept of plea bargaining was not welcomed by the Courts. In fact, the courts actively discouraged the accused from pleading guilty. As population increased and courts became overcrowded and trials in every case became lengthier, expensive and impossible, then the need was felt for such strategy which could result in speedy disposal. Thereafter in the 19th century American Courts gradually started accepting guilty pleas and by 20th century a vast majority of criminal cases started to be resolved with the help of plea bargaining. Now, the concept of plea bargaining has emerged as prominent feature of American Judicial System. At present nearly 90% of criminal cases are being settled by plea bargaining process rather than by a jury trial. Thus less than 10% of criminal cases go to actual trial. This success shows that the concept of plea bargaining has the real potentiality for expeditious delivery of justice.

Plea bargaining is useful and beneficial to all concerned. The accused is entitled to receive lighter sentence and he can save expenses of litigation and time as well as adverse publicity against him. Under this process, victim also plays a key role in the adjudication process. Earlier, the victim has to satisfy himself with what the court decided. Plea bargaining settles the victim's anxiety and unpleasantness of hearing all details of crime analysed at length in public. He may be able to avoid stress and price of trial. Plea bargaining mandates the Court to pay compensation to the victim of the crime. Meaning thereby, after completing the process victim will be entitled to get compensation. So far the prosecution and Courts are concerned, the time saved by the aforesaid process, may be utilized to conduct trial of serious and heinous crimes. Another effect of this process is that number of appeals and revisions will also be lessened and in such manner backlog of the cases will be cleared and burden of the courts will definitely be

reduced and we will be able to achieve the goal of speedy and qualitative justice.

The next strategy is use of Information Technology, which is also having an immense potential for rendering aid in the direction of speedy and qualitative justice. Initially, to implement Information Technology in judicial system, National Information Centre (NIC) under measure of Information Technology has taken the initiative to develop information technology applications to the Indian Courts. But due to inadequate and insufficient resources and manpower, it has not been able to develop the needed package for all the district Court in India in a short time frame. Keeping in view of the fact situation and the need of information technology in the judicial wing of the State, a National Plan for implementation of Information Technology in Judiciary was prepared by the e-committee and was released on 4th August, 2005. Under the aforesaid scheme, all the judicial officers in the country have been provided with lap top computers with a view to enable them to work in their office, chamber and in Court. Along with the lap top computer, the judicial officers are also being equipped with mobile broadband internet connectivity to understand the importance of use of information technology in the judiciary. Apart, Hon'ble the High Court of Madhya Pradesh is also providing software of AIR which includes AIR Supreme Court, AIR SCW, AIR all High Courts and Criminal Law Journal. Computer training is being imparted to all the judicial officers. Importance and areas of use of this tool in judicial work can be better understood from the message of Hon'ble the Chief Justice, Shri A.K. Patnaik, which finds place in this issue. Readers are requested to go through the message.

I am extremely optimistic that with the joint efforts of all the judicial officers, the aforesaid tools will be a well-known part of judicial system and with the help of these tools, we will be able to achieve our dreams of speedy justice.

Thank you.

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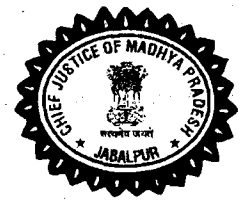
Hoisting of the National Flag on Independence Day by Hon'ble the Chief Justice Shri A.K. Patnaik in the High Court of Madhya Pradesh, Jabalpur (15.08.2007)

Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee delivering inaugural address on the opening day of the two days' workshop on — 'Juvenile Justice (Care & Protection of Children) Act, 2000' (10.08.2007). On His Lordship's right is Director, JOTRI

> The fair and speedy delivery of justice is undoubtedly the noblest of human aspirations. It must remain our constant goal.
>
> **- COOKE, Lawrence H.**

A. K. Patnaik
Chief Justice



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Dated : .....

THE MESSAGE OF HON'BLE SHRI JUSTICE A.K. PATNAIK, CHIEF JUSTICE, HIGH COURT OF M.P. ON THE OCCASION OF THE LAUNCHING OF E-COURTS IN M.P. ON 09.07.2007

On 28th December 2004, with the initiative of the then Chief Justice of India Justice R.C. Lahoti, the Central Government constituted an E-Committee with Dr. G.C. Bharuka as its Chairman to assist the Chief Justice of India in formulating a National Policy on computerization of Indian Judiciary. The National Policy and Action Plan for implementation of Information and Communication Technology in Judiciary was prepared by the E-Committee and released on 4th August 2005 by the Prime Minister of India Dr. Manmohan Singh.

One of the measures contemplated in the National Policy and Action Plan is to provide to all Judicial Officers in the country with laptop computers so as to enable them to work in their office, chambers and in Courts. The object of such a measure is to foster a culture of use of Information and Communication Technology and computer usage among the decision makers of Judiciary. Along with the laptop computers, the Judicial Officers are to be provided with mobile broadband internet connectivity to access and disseminate information through internet and for this purpose, each judge is to be given user unique I.D. and password for accessing judicial data, etc. According to the National Policy and Action Plan, once the

Judges start using database and accessing information from website, it would be much faster to implement Information and Communication Technology in the judicial system.

Today at 6.30 p.m. His Excellency the President of India, Dr. A.P.J. Abdul Kalam will launch E-Courts Project in presence of Hon'ble the Chief Justice of India, Mr. Justice K.G. Balakrishnan and this launching of E-Courts Project will witness the beginning of delivery of laptop computers to 12,155 Judicial Officers all over the country and beginning of their training of meaningful use of Information and Communication Technology. Simultaneously, the E-Courts Project is being launched at the State level in the conference hall of the High Court of Madhya Pradesh at Jabalpur and at the District level by District Judges concerned in the District Court premises.

The Judicial Officers will be provided training by training personnel deputed by the E-Committee. Initially Judicial Officers will be able to use laptop computers for case law research available on CDs and law related websites, preparation of judgments and other documents using word processing software and preparation of personal notes. Eventually, the Judicial Officers will be able to use laptop computers for various other purposes as and when they are trained to use the laptop computers for such purposes and they are provided with Application Software.

With the launching of E-Courts today, Judiciary in the State of Madhya Pradesh has started a new phase when Information and Communication Technology and computer usage will be adopted for enhancing judicial productivity both quantitatively and qualitatively. All the stake holders of the Judicial System - Judges of the High Court, Judicial Officers of the subordinate Judiciary, the Advocates and the litigant public must co-operate in all respects to make the project of E-Courts launched today a great success.

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PART - I

JUDICIAL CONDUCT : AN INSEPARABLE PART OF ETHICS

Justice Dipak Misra
High Court of MP
Jabalpur

A question that may be emerging and crossing your mind is whether there is any necessity or the warrant to be acquainted or told about the dos and don'ts in judicial conduct at this stage and phase of judicial life or for that matter life. Though the aforesaid question would be penetrating and piercing into your individual sensitivity and disturbing your perception but, an eloquent and significant one, in the ethical conception the terms that get encapsuled are 'challenges' and 'judicial education'. There can be no room for disagreement and it can be proclaimed with absolute certitude that challenges do always remain challenges throughout life in whatever sphere you function and the gravity and sanctity of such challenges are more in the life of a judge when his conduct is evaluated within the parameters of judicial education.

Be it noted with humble acceptance that some harbour the notion that ethics cannot be taught to be implanted. There is a view that one is either ethical or not, and there is no question of educating them in that kind of morality. This impression is based upon an erroneous assumption that judicial ethicality is personal. It is also pyramided by a further fallacious thinking that the conduct, albeit judicial, is individualistic. These two, a priori notions, are to be abandoned and ostracized. Unless one rationally does that every prescription will be viewed as admonition and every injunction will be painful as if it is an injection that is pierced through the spinal cord.

One should remember that judicial conduct as a species of basic ethicality and fundamental morality does not elementarily remain in the realm of personal perception, individual view point and semi-collective altruistic phenomenon. It is to be borne in mind that the conduct in this sphere has to be tested on the parameters of objectivity, paradigms of collective acceptability and principles of social expectations founded on ancient as well as modern norms and logic, in its connotative expanse. It may not be equated with the precise test of a laboratory but it must have approximation in equivalence in social laboratory.

Once it is accepted by heart and permitted by mind, one should sit in a time machine and go to the ancients and the ancestors. In the ancient days, as the Shastras postulate, a Judge was required to have knowledge of law, pragmatic wisdom, fearlessness, courage and impartiality. He was to be armoured with the courage to advise the ruler as per law. A Judge was required to keep in view what was right according to the ethical principles morality of society, the ruler's order and the material evidence brought on record. It was also the prescription that when there would be conflict between the established tradition and ethical principles, the Judge should be expected to be guided to

decide the case on the basis of ethical principles. Justice was given paramountcy. The conduct and the righteousness of a judge was regarded sacrosanct as the contrary was viewed as a path paving towards disaster and catastrophe. A judge while sentencing was not expected to be severe or mild. He had to follow the line of deserving punishment. An adjudicator, as prescribed, was not to house anger, lust, ignorance and greed. Kautiliya had mandated:

"Samaha Serveshu Bhaveshu Vishwashya Lok Sampriyaha"

(Judges) should be impartial to all beings, trustworthy, and liked by the people."

While describing the duties of a judge, Brihaspati asseverated thus:

"Vivade Prichhati Prashanam
Pratiprashnam Tathaiavcha
Nayapurvam Vadati Yah
Pradvivaka iti Smrutah."

With the advent of modern jurisprudence various new concepts relating to judicial ethics gained ground. It may not be understood that the old perceptions and views were given a go by but they required to be ironed and fitted into appropriately to various forms of government especially in democratic set ups. Patrick Devlin would like to put that impartiality and appearance of it are supreme judicial virtues. Every verdict must bear the stamp of complete fairness. In this context, it is worth reproducing the thought of the learned author:

> "The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails."

The said learned author has further proceeded to state :

> "If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism."

Be it noted, no one appreciates a Judge to take recourse to the doctrinaire approach. He is required to walk on the path of balance, openness of mind requisite transparency in action, delineation of the issue with utmost objectivity, cordiality of behaviour, appreciation of material on acceptable norms having endowed himself with qualities of high order to function within the frame work of law.

The aforesaid being the essential requirements of a Judge the issue of dos and don'ts in the backdrop of ethical education acquire signification. Justice Jackson of the US Supreme Court had observed in 1952 that 'men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir'.

Lord Chancellor Hailshamson had stated that those who sit in judgment occasionally become subject to what he called 'judges' disease, that is to say a condition of which the symptoms may be pomposity, irritability, talkativeness, proneness to obiter dicta [that is, statements not necessary for the decision in the case], a tendency to take short-cuts.

The role of a Judge in a democratic polity is not that easy. The Judge may be in any ladder or sphere. It is well known, no Judge is infallible and he is also a human being. A critical analysis of his judicial conduct and as well as human conduct are necessary and in a way imperative. The high esteem and respect that judiciary enjoys is not to be treated with complacence. The judiciary cannot afford to live in an Ivory Tower and feed on its splendid deeds, for society at large should speak about its splendid action. That is where the truth emerges as the primary pillar. A Judge has to accept that truth is the foundation of the Institution and the fundamental the serviceability of the Institution. Judge Jerome Frank of the U.S. Court of Appeals had stated that he had

> "little patience with, or respect for, that suggestion. I am unable to conceive .... that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions... the best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

In this context it is fruitful to refer to what the Supreme Court has observed (*All India Judges' Association Case, AIR 1992 SC 165 & AIR 1993 SC 2493, 2510*). Their Lordships observed that under the Constitution the judiciary is above the administrative executive.... the judicial service is not service in the sense of 'employment'.

Members of the judiciary exercise sovereign judicial power of the State and hold public office as the Members of the Council of Ministers and the Members of the Legislature.

Viewed from the aforesaid spectrums, it is the public esteem that is centripodal to judge's existence, that is earth and salt. Not for nothing Earl Warren, American Chief Justice in early 60s had said "for civilized life law floats in a sea of ethics."

Ethics must echo in every step of the conduct for "echoes" roll from soul to soul and grow forever and forever. Apart from Socratian mandate to have patience, delineation with wisdom, consideration with sobriety and decision with impartiality, the further aspects of ethicality are to be kept in view.

Presently to the numerative facets, dos and don'ts. They would come precisely within the realm or sphere of conduct, for conduct and character are inseparable and inextricably intertwined. Conduct is a blending of many a quality. It must have resplendence as well as total cleanliness. Hence, they are put in one compartment to breed a wholesome judicial personality.

(a) His conduct should be impartial which is fundamental to his duty and should have total transparency so that he does not allow any room for criticism in that regard.

(b) While being impartial he should not get obsessed with attitude of 'holier than thou' because the said attitudinal reflection creates a dent in the institutional set up.

(c) While discarding dishonesty from the core of his heart and map of his mind he must eahdeavour to cultivate absolute intellectual honesty for an intellectually dishonest Judge is inasmuch as dishonest as a non-ethical judge.

(d) He must have the filament which can brighten and heighten the credibility of litigants by not expressing unnecessary, unwarranted, half-baked and non-clear throughts while deciding the lis.

(e) He should remember that quality of clear conceptual perception results in ornament of profound throught which in the ultimate eventuate paves the path of justice.

(f) He should not give an impression either to the members of the Bar or to the litigants that he suffers from any kind of fear, for on such impression being given others overreach the judge and in that process, the Court.

(g) While abandoning the fear one should not be enthusiastically and unreasonably courageous because the same is really not courage but suppression of inferiority complex which manifests having the contour of courage.

(h) A judge should recluse himself from deciding a lis in which he has the slightest interest which he alone knows.

(i) It has been said long ago that it is the sacrosanct duty of a judge to throw overboard any kind of self hypocrisy as the same corrodes the marrows of his judicial personality.

(j) He must look presentable in the Court as well as out of Court, for presentableness is an insegregable aspect of a judge. Let no one forget that simplicity and presentableness go hand in hand as two non-separable twins.

(k) A judge must present himself with utmost dignity but the said dignity has to be totally bereft of ego and reflective of institutional dignity.

(l) His every word and action must convey "a neutral and impartial Judge". Even his silence must also speak of his impartiality.

(m) A judge as an ethical person must remember that only honour that never grows old and it is the honour that alone matters.

(n) A judge while conducting the business in the Court should be well acquainted with the law and should not pretend knowledge as that would become his Waterloo.

(o) Do not be impatient as a hurried man is basically restless. 'Inordinate patience', as Brennan J. would put it, is a positive quality of a judge.

(p) A judge must acquaint himself with the changing milieu and existing social turmoil and acquit himself with acceptable sensibility so that his ethical perception is not jeopardized.

(q) He must follow the precedents and not behave in a fanciful manner as that would be judicial impropriety.

(r) A judge should not throw his weight around in the name of self-respect or discipline as the said attitude demeans the personality.

(s) A judge must not yield to passion, emotion, sentiments in the name of mercy as that is regarded as a part of erratic conduct.

(t) He should endeavour to develop conceptual clarity and not throw tantrums as it is regarded as inadequacy and inefficiency.

(u) He should have respect for the litigants, witnesses and the staff, for that brings respect and puts one on a pedestal.

(v) One should speak less and hear more so that one can save time and simultaneously one should develop techniques of one's own within permissible range to avoid wastage of court's time.

(w) A judge should never think that he is in employment but a functionary in a constitutional wing which is powerful because of its alpine serenity and protective prowess for liberty.

(x) A Judge should inspire and imbibe himself to respond positively to meet the challenge of the new millennium.

(y) He should maintain harmony in the fraternity and sustain the public confidence as public power has been resposed in him.

(z) There should be no deviant in behaviour as that does guillotine the faith of the public.

(z-i) He should not develop syndromes of judge's disease as they are incurable and only become extinct with death-both civil and natural.

(z-ii) Remember, when you stand, you want people to say here he stands like a colossus with Himalayan patience, Pacific serenity and Everstian height – every inch a judge.

In conclusion, it may be said with all earnestness that the aforesaid dos and don'ts should never be regarded as sermons from the pulpit, for they are to be treated as principles to be practised in functional ground reality.

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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, 2007. The Institute has received articles from various districts. Articles regarding topic no. 1, 3, 4 & 5 received from Jabalpur, Balaghat, Guna and Ujjain respectively, are being included in this issue. As we have not received worth publishing article regarding topic no. 2 Institutional Article is being published on this topic:

1. Explain the mode of proof of sanction for prosecution where such a sanction is condition precedent for taking cognizance by Court?

   यदि न्यायालय द्वारा संज्ञान लिये जाने के लिये अभियोजन हेतु स्वीकृति पूर्ववर्ती शर्त हो तब ऐसी स्वीकृति सिद्ध किये जाने की रीति समझाइये?

2. Whether a Court can take judicial notice of notifications issued by Government?

   क्या न्यायालय शासन द्वारा जारी अधिसूचनाओं की न्यायिक अवेक्षा कर सकता है ?

3. Describe the procedure which is required to be followed for detention of judgment-debtor in civil prison and for seeking police aid in execution of a decree.

   निर्णीत ऋणी को सिविल कारागार में निरूद्ध किये जाने एवं आज्ञप्ति के निष्पादन में पुलिस सहायता लिये जाने हेतु अपनायी जाने वाली प्रक्रिया समझाइये।

4. Whether a finding adverse to a party in a suit, not having a right to challenge the same in appeal, has the effect of res judicata?

   क्या वाद के किसी पक्षकार के विरुद्ध दिया गया ऐसा निष्कर्ष, जिसे अपील में चुनौती देने का अधिकार उसे नहीं है, प्रांग न्याय का प्रभाव रखता हैं?

5. Describe the extent of jurisdiction of Appellate Court to impose sentence in an appeal against acquittal?

   दोषमुक्ति के विरुद्ध अपील में दण्ड अधिरोपित करने की अपीलीय न्यायालय की अधिकारिता का विस्तार क्या है ?

न्यायालय द्वारा संज्ञान के लिये अभियोजन हेतु स्वीकृति पूर्ववर्ती शर्त होने पर स्वीकृति सिद्ध किये जाने की रीति

न्यायिक अधिकारीगण
जिला जबलपुर

उपरोक्त प्रश्न के उत्तर के पूर्व उन कतिपय अधिनियमों के प्रासंगिक उपबन्धों का संक्षिप्त उल्लेख किया जाना समीचीन होगा, जिनके अंतर्गत विहित अपराधों के संज्ञान के पूर्व अभियोजन स्वीकृति अपेक्षित है, वे निम्न है :–

1. दण्ड प्रक्रिया संहिता 1973 की धारा 197 के अंतर्गत न्यायाधीशों और लोक सेवकों का अभियोजन किसी ऐसे अपराध के लिये जिसके बारे में अभिकथित है कि ऐसे अपराध अपने पदीय कर्तव्यों में किए गए हैं।
2. भ्रष्टाचार निवारण अधिनियम–1988 की धारा–19 के अनुसार धारा–7, धारा–10, धारा –11, धारा–13 और धारा–15 के अधीन जिसके बाबत् यह अभिकथित है कि लोक सेवक द्वारा किया गया है।
3. आयुध अधिनियम 1959 की धारा–39 के अनुसार किसी व्यक्ति के विरूद्ध धारा–3 के अधीन किसी अपराध के संबंध में।
4. आयकर अधिनियम–1961 की धारा–279 के अनुसार धारा 275–'ए', 275–'बी', 276,276 'ए', 276–'बी', 276–'बी' ('बी'), 276 'सी', 276 'सी', ('सी'), 276 'सी', ('सी'), ('सी'), 277, 277 'ए' अथवा धारा 278 के अधीन अपराध के संबंध में।
5. विस्फोटक पदार्थ अधिनियम 1908 की धारा 7, के अनुसार अधिनियम के अंतर्गत अपराध के सम्बन्ध में।
6. खाद्य अपमिश्रण निवारण अधिनियम 1954 की धारा 20, के अनुसार अधिनियम के अंतर्गत अपराध के सम्बन्ध में।
7. विधि विरूद्ध क्रिया–कलाप (निवारण) अधिनियम 1967 की धारा 17 के अनुसार अधिनियम के अंतर्गत अपराध के सम्बन्ध में।

जब किसी अधिनियम में दर्शित उपबन्धों के अंतर्गत किसी न्यायाधीश, लोक सेवक अथवा किसी व्यक्ति द्वारा अभिकथित अपराधों के अभियोजन हेतु विहित प्राधिकारियों से अभियोजन स्वीकृति आवश्यक होना उपबन्धित किया गया है, तथा बिना पूर्व अभियोजन स्वीकृति के उपरोक्त अभिकथित अपराधों का संज्ञान न्यायालय द्वारा नहीं लिया जा सकता है, ऐसी स्थिति में स्पष्ट है कि उक्त अधिनियमों में उपबन्धित उपरोक्त अपराधों के लिये अभियोजन स्वीकृति न्यायालय द्वारा संज्ञान लेने हेतु पूर्ववर्ती शर्त है।

अब यह प्रश्न उत्पन्न होता है कि जहॉ न्यायलय द्वारा किसी अपराध का संज्ञान लेने के पूर्व अभियोजन स्वीकृति पूर्ववर्ती शर्त हो तब अभियोजन स्वीकृति प्रमाणित करने की रीति क्या होगी? इस सम्बन्ध में उपरोक्त अधिनियमों में अभियोजन स्वीकृति प्रमाणित करने की रीति नहीं बताई गई है, अतः इस सम्बन्ध में सुसंगत न्यायिक दृष्टॉतों पर विचार किया जाना अपेक्षित हो जाता है।

प्रासंगिक विषय के सम्बन्ध में ***मदन मोहन सिंह विरूद्ध उ. प्र. राज्य, ए. आई. आर. 1954 सुप्रीम कोर्ट 637*** में माननीय सर्वोच्च न्यायालय द्वारा यह अभिनिर्धारित किया गया है कि जहाँ अभियोजन स्वीकृति आदेश से यह दर्शित नहीं होता है कि ऐसा आदेश समस्त सामग्रियों पर विचार करने के पश्चात दिया गया है, वहाँ अन्य साक्ष्य द्वारा यह प्रमाणित करना चाहिये कि अपराध गठित करने वाली तात्विक सामग्री मंजूरी देने वाले प्राधिकारी के समक्ष प्रस्तुत की गई थी। माननीय *उच्चतम न्यायालय का यह मत* ***गोकुल मोरारका चन्द द्वारकादास बनाम द किंग, ए. आई. आर 1948, प्रीवी कौंसिल 82*** में प्रतिपादित विधि पर आधारित है।

राजस्थान राज्य विरूद्ध ताराचन्द जैन, ए. आई. आर. 1973 सुप्रीम कोर्ट 2131 में माननीय सर्वोच्च न्यायालय द्वारा अभिनिर्धारित किया गया है कि जहाँ अभियोजन स्वीकृति के आदेश के परिशीलन से स्पष्ट हो कि अपराध गठित करने वाले तथ्यों को सन्दर्भित किया गया है वहाँ यह दर्शित करने के लिए कि मंजूरी देने वाले प्राधिकारी के समक्ष सुसंगत तथ्य प्रस्तुत किया गया था, पृथक से साक्ष्य प्रस्तुत करने की आवश्यकता नहीं है।

मोहम्मद इकबाल विरूद्ध आन्ध्र प्रदेश राज्य, ए. आई. आर. 1979 सुप्रीम कोर्ट 677 में भी माननीय सर्वोच्च न्यायालय द्वारा दिया गया सम्प्रेक्षण महत्वपूर्ण है, जिसमें अभियोजन स्वीकृति प्रमाणित करने की रीति स्पष्ट करते हुए यह अभिनिर्धारित किया गया है कि अभियोजन स्वीकृति प्रमाणित करने के लिये या तो मूल स्वीकृति आदेश जिसमें अपराध गठित करने वाले तथ्य एवं संतुष्टि के आधार वर्णित हो प्रस्तुत कर अथवा इस प्रभाव की साक्ष्य प्रस्तुत कर अभियोजन स्वीकृति प्रमाणित की जा सकती है ।

इसी प्रकार ***सी. के. कृष्णमूर्ति विरूद्ध कर्नाटक राज्य, 2005 (2) एम. पी. वी. नो.–35*** में भी माननीय सर्वोच्च न्यायालय द्वारा यह अभिनिर्धारित किया गया है कि जहाँ अभियोजन स्वीकृति का आदेश अपने आप में अभिव्यक्त एवं पूर्ण है, ऐसे मामलों में मंजूरी देने वाले सक्षम अधिकारी द्वारा मस्तिष्क का उपयोग करते हुए मंजूरी दी गई, अतः मंजूरी देने वाले प्राधिकारी अथवा अन्य साक्षी की औपचारिक साक्ष्य प्रस्तुत कर अभियोजन स्वीकृति प्रमाणित की जा सकती है। इस संबंध में ***इन्द्रभूषण चटर्जी विरूद्ध पश्चिम बंगाल राज्य, 1958 क्रि. लॉ ज. 279*** का न्यायिक दृष्टांत भी अवलोकनीय है।

उपरोक्त न्यायिक दृष्टाँतों में प्रतिपादित सिद्धान्तों के आलोक में यह स्पष्ट हो जाता है कि यदि अभियोजन स्वीकृति का आदेश अपने आप में पूर्ण है, तथा उसमें अपराध गठित करने वाले तथ्यों एवं सन्तुष्टि के आधार वर्णित हो तब मंजूरी देने वाले प्राधिकारी अथवा अन्य औपचारिक साक्षी से अभियोजन स्वीकृति सिद्ध की जा सकती है, किन्तु इसके प्रतिकूल यदि मंजूरी आदेश में अपराध गठित करने वाले तथ्यों एवं सक्षम प्राधिकारी के सन्तुष्टि के आधार वर्णित नहीं है, वहाँ यह प्रमाणित करने के लिए कि अपराध गठित करने वाले तथ्य एवं सामग्री पर समुचित रूप से विचार कर मंजूरी दी गई है? मंजूरी देने वाले प्राधिकारी से अभियोजन स्वीकृति प्रमाणित कराया जाना आवश्यक है।

[1][On the above subject it would also be useful to refer that in *State of Maharashtra and others v. Ishwar Piraji Kalpatari, AIR 1996 SC 722, Hon'ble Apex Court has observed* that —

"We should not find any warrant, in law, which require a statement being made while according sanction that the Officers signing the order had presently scrutinized the file and had arrived at the required satisfaction. In the Preamble of the sanction order it is categorically stated "and where as the Government of Maharashtra having fully examined the material before it and consider all the facts and circumstances disclosed here in, is satisfied that there is a prima facie case made out against the accused person and it is necessary in the interest of justice that the accused should be prosecuted in the Court of competent jurisdiction for the offence". This prima facie show that there has been an application of mode and that the material on record has been examined by the concerned officers before according sanction. In view of the aforesaid there was absolutely no justification for the learned Judge of the High Court to observe that any such statement as indicated by him was required to be made in the order."

In another case *State v. K. Narasimhachary, AIR 2006 SC 628,* Hon'ble Apex Court held that sanction order u/s 19 of Prevention of Corruption Act, 1988 issued by the State Government in the name of the Governor of State and authenticated by the Secretary according to the rule of Executive Business is a public document within the meaning of Section 74 of the Evidence Act and a public document can be proved in terms of Sections 76 to 78 of the Evidence Act. A public document can be proved otherwise also. The sanction order is not an opinion. Therefore, provision of Section 47 of Indian Evidence Act is not applicable. Hence, the mode of proving the opinion of expert is not required to be followed.

In conclusion it can be said that an order of valid sanction can be proved by producing the original sanction which itself contained the facts constituted in the offence on the grounds of satisfaction or by adducing evidence aliunde so that the facts were placed before the sanctioning authority and the satisfaction arrived at by it if such facts not contained in the original sanction order. The order of sanction is a public document. Therefore it can be proved as the public document according to Sections 76 to 78 of the Evidence Act.]1

[1][Supplied by the Institute]

WHETHER A COURT CAN TAKE JUDICIAL NOTICE OF NOTIFICATION ISSUED BY GOVERNMENT

– Institutional Article
Kapil Mehta,
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The issue relating to taking of judicial notice of notifications issued by government comes before the Courts regularly. Therefore, it is necessary to examine this issue at length.

In this regard Sections 56, 57 and 78 of the Indian Evidence Act, 1872 are relevant which run as under:

S.56. Fact judicially noticeable need not be proved. —No fact of which the Court will take judicial notice need be proved.

S.57 Facts of which Court must take judicial notice.— The Court shall take judicial notice of the following facts: —

(1) All laws in force in the territory of India;

(2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;

(3) Articles of War for the Indian Army, Navy or Air Force;

(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the States;

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

(6) All seals of which English Courts take judicial notice : the seals of all the Courts in India and of all Courts out of India established by the authority of the Central Government or the Crown Representative : the seals of Courts of Admiralty and Maritime jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution of an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India:

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette.

(8) The existence, title, and national flag of every State or Sovereign recognized by the Government of India;

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) The territories under the dominion of the government of India,

(11) The commencement, continuance, and termination of hostilities between the Government of India and any other State or body of persons;

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;

(13) The rule of the road, on land or at sea.

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or documents as it may consider necessary to enable it to do so.

S.78. Proof of other official documents.— The following public documents may be proved as follows : —

(1) Acts, orders or notifications of the Central Government in any of its departments, or of the Crown Representative or of any State Government or any department of any State Government, — by the records of the departments, certified by the heads of those departments respectively.

or by any document purporting to be printed by order of any such Government or, as the case may be, of the Crown Representative;

(2) the proceedings of the Legislatures, —

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the Government concerned;

(3) proclamations, orders or regulations by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's printer,

(4) the acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some Central Act;

(5) the proceedings of a municipal body in a State—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(6) Public documents of any other class in a foreign country, —

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic agents that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

A bare perusal of Sections 56 and 57of the Indian Evidence Act shows that all laws in force in India are judicially noticeable and that there is no need to prove what the law is. Section 78 of the Evidence Act provides that notifications of the Central and State Government and of their departments may be proved by the records of the department, certified by the heads of departments respectively.

Therefore, it is apparent from aforesaid provisions that unless amount to law, notifications are required to be proved in the manner provided u/s 78 of the Evidence Act.

In this connection, the Gwalior Bench of Madhya Bharat High Court in the case of *Pannalal and another v. The State, MANU/MP/0014/1952 = 1953 Cri.L.J 605* considered the matter relating to proof of the notification issued by the Textile Commissioner under Clause 15 of the Madhya Bharat Textile Control order. It was observed by the Court that 'there can be no doubt that an order made under Section 3(1), Essential Supplies (Temporary Powers) Act, 1946 falls within the definition of "Indian Law" given in Section 3 Clause (27a), General Clauses Act. ..... But such a notification is clearly an executive order and cannot be said to be included in the definition given in the General Clauses Act of the words "Indian Law". Therefore, in this case the Madhya Bharat High Court was of the view that such a notification was not judicially noticeable.

The question in hand was again considered by the Division Bench of Nagpur High Court in the case of *Mathuradas v. The State,* reported in *AIR 1954 Nagpur 296.* In this case, the Court opined that notification issued by a Government, fixing the retail price of yarn under the Cotton Textiles (Control) Order, 1948, published in the Madhya Bharat Gazette does not amount to law, therefore, it was held that a Court is not entitled to take judicial notice of a notification published in the Gazette and also that the fact of publication of notification has to be proved in the manner provided for in Section 78, Evidence Act.

The Full Bench of Madhya Bharat High Court in the matter or State v. Gopal Singh, MANU/MP/0026/1955 = 1956 Cri.L.J 621 placing reliance upon the decisions in Edward *Mills Co. Ltd. v. State of Ajmer, AIR 1955 SC 25* and *State of Bombay v. P.N. Balsara, AIR 1951 SC 318,* which emphasized the distinction between an order or notification issued by an authority of State in exercise of its legislative and executive functions, dissented from the decision in Mathuradas (supra) and has held that —

> "Judicial notice can be taken of a notification issued by the Government or any competent authority in the exercise of delegated power of legislation but a court has discretion, under the last paragraph of Section 57 Evidence Act, to refuse to take judicial notice of a notification made in exercise of delegated power of legislation unless the notification is produced."

The Court further held that —

> "Judicial notice cannot be taken of a notification issued by any authority in the exercise of its executive functions."

The question relating to a post constitution order or notification in the context whether it amounts to law was considered by the Supreme Court in *Jayantilal Amratlal v. F.N. Rana, AIR 1964 SC 648.* The notification considered in this case was issued by the President under Article 258 of the Constitution entrusting to the Commissioners of Divisions in the State of Bombay, the functions of the Central Government under the Land Acquisition Act, 1894. The question before the Supreme Court was whether this notification amounted to law under Section 87 read with Section 2 (d) of the Bombay Reorganization Act, 1960, and continued to be effective after the reorganization of the State of Bombay into two States, namely the State of Maharashtra and the State of Gujarat. In holding that the notification amounted to law, the Court pointed out that the effect of the notification was that, wherever the expression "appropriate Government" occurred in the Land Acquisition Act in relation to the provisions for acquisition of land for the purposes of the Union, the words "appropriate Government or the Commissioner of the Divisions having territorial jurisdiction over the area in which the land is situate" were deemed to be substituted and in other words the Act was deemed to be pro tanto amended. The Court further observed as follows:

> "This is not to say that every order issued by an executive authority has the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law."

The decision rendered in the case of *Mathura Das* (supra) was finally overruled by the Full Bench of Madhya Pradesh High Court in *State of Madhya Pradesh v. Ramcharan, AIR 1977 MP 68* and it was observed by the Court that Mathura Das (supra) was wrongly decided and it failed to notice the distinction between statutory and non statutory notification. Therefore, the view that a statutory notice fixing price has not the force of law is clearly erroneous.

In the case of *Ramcharan* (supra) it was observed in para 8 that —

> "..... our legal order and jurisprudence based on the Constitution, "law" is not limited to legislative enactments. All forms of delegated legislation and conditional legislation amount to law. All orders and notifications made and issued under statutory powers and which are legislative in nature amount to law....."

The Court further observed that—

> "A comparison of Sections 57 and 78 of the Evidence Act goes to show that Acts, orders or notifications of the Central or any State Government require proof in the manner prescribed by Section 78, unless they amount to law in force and can be taken judicial notice of under Section 57....."

In *Ramcharan's case* (supra), Madhya Pradesh High Court held that all orders and notifications made and issued under statutory powers and which are legislative in nature amount to law. A statutory order or notification will be legislative in nature if in substance it adds to, supplements, modifies or amends a statute or exempts certain matters from its operation.

While answering the question whether notification issued u/s 7(1) of the Telegraph Wires Act is judicially noticeable, the Court opined that such a notification amounts to law and should be taken judicial notice of under Section 57 (1) of the Evidence Act.

CONCLUSION

In view of above, it is crystal clear that judicial notice u/s 57 of the Evidence Act can be taken of notification issued under statutory powers and which amounts to law and if a notification is issued in exercise of executive functions, it does not amount to law and therefore, it has to be proved in accordance with Section 78 of the Evidence Act.

●

Common sense (which, in truth, is very uncommon) is the best sense I know of: abide by it; it will counsel you best

- MAHON, Lord, ed.

THE PROCEDURE WHICH IS REQUIRED TO BE FOLLOWED FOR DETENTION OF JUDGMENT-DEBTOR IN CIVIL PRISON AND FOR SEEKING POLICE AID IN EXECUTION OF A DECREE

Judicial Officers
District Balaghat

To send a judgment-debtor in jail in execution proceedings is one of the toughest jobs in execution proceedings. In the Code of Civil Procedure and also in the Rules and Orders Civil there are some provisions that provide some restrictions and also procedure regarding sending of a Judgment-debtor into the jail.

Section 51 of the CPC provides the procedure in execution. One of the mode as provided in sub section (c) of Section 51 is by arrest and detention of judgment-debtor in prison. This Section provides:

> Subject to such conditions and limitations as may be prescribed the Court may, on the application of the decree-holder, order execution of the decree–
>
> (c) by arrest and detention in prison;
>
> [Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied–
>
> (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, –
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
>
> (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property, or
>
> (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
>
> (c) that the decree is for a sum for which the judgment-debtor was bound in fiduciary capacity to account.

Sections 55 to 59 provide procedure for arrest and detention and time during which and the persons who could be arrested. Provisions also restricted the arrest of women in execution of decree for money. There is one more restriction regarding minimum amount of money for which detention of a judgment debtor can be made. A person cannot be detained in civil prison in execution of a decree for payment of money not exceeding two thousand rupees. There are

certain situations in which a person who was detained should be released. Sections 55 to 59 provide: –

> **S.55. Arrest and detention.** – (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained :
>
> Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:
>
> Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:
>
> Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw, and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:
>
> Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.
>
> (2) The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf. (Also see – Rule 226 of the M.P. Civil Courts Rules, 1961)

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he [may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court [may release] him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

In *K. AL. RM. RM. Alagappan v. Rajaguru & Co., AIR 1985 Mad. 353,* it has been held that simple default by the judgment-debtor in payment of the decretal amount to the decree-holder is not enough for the executing Court to order arrest of the judgment-debtor. The decree-holder must prove that the judgment-debtor is having enough funds to pay and is purposely evading or delaying to pay the decretal amount.

In *K. Karunakaran Shetty v. Syndicate Bank, AIR 1990 Kant* 1, it has been held that it is the decree-holder who has to demonstrate that the judgment-debtor has wilfully with the mala-fide intention, to deprive the benefit of the decree, is refusing to pay the decretal amount inspite of having sufficient means to pay. If the decree-holder has not discharged this burden by cogent evidence, order directing arrest and detention of judgment-debtor in Civil Prison will be invalid.

S.56 provides that the Court shall not order the arrest or detention in the civil prison of a **woman** in execution of a decree for the payment of money and **S.57** says, the State Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors. (Also See: Rule 227 of the M.P. Civil Courts Rules, 1961).

S.58 is related with detention and release, it says–

(1) Every person detained in the civil prison in execution of a decree shall be so detained, –

(a) where the decree is for the payment of a sum of money exceeding five thousand rupees, for a period not exceeding three months, and,

(b) *where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees for a period not exceeding six weeks:*

Provided that he shall be released from such detention before the expiration of the [said period of detention]–

(i) on the amount mentioned in the warrant for his detention being paid to the officer incharge of the civil prison or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance:

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

[(1-A) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed (two thousand rupees)].

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

In *Kesar Singh v. Karam Chand, AIR 1937 Lah 253,* it has been held, that immunity from re-arrest exist only when the judgment-debtor has been actually detained in prison and not where he has been merely arrested.

S. 59 provides release on ground of illness –

(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom–

(a) by the State Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by Section 58.

Order 21 Rules 11, 11-A, 37 to 40 also provide procedure regarding arrest and detention of a judgment-debtor. Sub-rule (1) of Rule 11 provides procedure for initiation of execution proceedings. For initiation of execution there may be an oral application for arrest of judgment-debtor. As provided in sub rule (1) of Rule 11–

> (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

Order 21 Rules 37 to 40 provide procedure for arrest and detention. These provisions provide that court has discretion to issue show cause to the judgment -debtor before sending him to jail. It is also provided that subsistence allowance must be deposited in advance. These Rules are reiterated here: –

> **R.37. Discretionary power to permit judgment-debtor to show cause against detention in prison.—** (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:
>
> [Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]
>
> (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.
>
> **R. 38. Warrant for arrest to direct judgment-debtor to be brought up.—** Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to

pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

R. 39. Subsistence allowance.— (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs. (Rules 229 and 230 of the M.P. Civil Courts Rules, 1961)

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

R.40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.— (1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil person.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-

debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment debtor is under arrest, direct his release.

By the State amendments from 16.9.1960, State of M.P. has inserted following sub-rules in rule 40 namely: —

"(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-rule (2) or the proviso to sub-rule (3) above, the Court may direct the decree-holder to deposit such amount as, having regard to the specified or probable length of detention, will provide: —

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under Section 57, and (See Rules 229 and 230 of M.P. Civil Courts Rules, 1961)

(b) for the payment to the officer of the Court in whose custody the judgment-debtor is placed or such fees (including lodging charges) in respect thereof as the Court may by order; fix :

Provided —

(i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by decree-holder under sub-rule (6) shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the Civil Prison or arrested on account of any sum so disbursed."

'Enquiry' contemplated under Rule 40 means an enquiry with regard to defence, if any, taken by Judgment-Debtor and also to enquire into the averments by Decree-Holder before the Judgment-Debtor is sent to civil prison.

In *T.S. Ranganathan v. P.R. Mohanram, AIR 1992 Mad 322,* it has been held that finding of deliberate non-payment is necessary. Provisions of Rule 40 of Order 21 are mandatory. Non-compliance of the provisions would amount to vitiate the proceedings of arrest. In the case of *K. Vijayan v. K.G. Kuppusamy & Ors., AIR 2007 (NOC) 55 (Mad.)* decree holder had filed execution petition to realize decretal amount. He filed affidavit claiming that judgment-debtor sold suit property even though same was attached before judgment. Execution Court however, never conducted any enquiry about alleged sale. Even with regard to the capacity or means of the judgment-debtor, Court has only drawn adverse inference as he did not enter the witness box to deny averment of decree-holder regarding his means. It was also not shown whether any opportunity to show cause was given to judgment-debtor as why he should not be committed to civil prison as contemplated under O.21 R.40 (1) of C.P.C. In view of said matter, order of arrest passed by execution Court is set aside.

Detention of the judgment-debtor be made only after making an enquiry after giving opportunity to both parties to adduce evidence in order to decide as to whether the judgment-debtor was liable to be detained in civil prison in execution of the decree. In the case of *K. Manokaran v. A.U. Subbanna, AIR 2002 Madras 340* considering the facts of the case it was held: —

> "As indicated above the application has been filed under O.21 Rr. 10 and 11 CPC requesting to issue notice under Rule 37 and then to issue warrant under Rule 38. In respect of that prayer, the executing Court after hearing the counsel for the parties has passed the order impugned issuing warrant under Rule 38. In other words, it is clear that the impugned order cannot be construed to be the order passed under Order 21 Rule 40 C.P.C. If this order is established to be an order under Order 21 Rule 40 of the Code, then it would certainly be wrong, for the reason, ordering detention of the judgment-debtor should be only after giving opportunity to both parties to adduce evidence in order to decide as to whether the judgment-debtor was liable to be detained in civil prison in execution of the decree. But as indicated above, there is nothing to show that in the present

> case, the order of arrest passed by the executing Court was one made under Order 21 Rule 40 since the order was passed only under Rule 38."

In the light of the above discussion, it shall be held that the order of arrest passed by the executing Court without conducting enquiry as provided in Rule 40 and without giving a finding with regard to the means of the judgment-debtor, is not one without jurisdiction, as the order of arrest is only under O.21 R.38 CPC. Therefore, I do no find any illegality in the impugned order."

At least 40 Sq. Ft. area with some furniture and fan etc. should be provided to one person. Such accommodations in a civil jail are prescribed by Supreme Court in *T.N. Mathur v. State of U.P., 1993 MPWN (II) 199 (SC).*

Police help

Rule 232 of the M.P. Civil Court Rules, 1961 provides conditions under which a decree-holder can seek police help through Court. It is desirable for courts to keep in mind that police help should not be granted in routine manner. Before granting police help, Court must be satisfied that execution will not be effected without serious danger to the public peace or grave emergency. Request for police help should be made through District Judge to District Superintendent of Police. For clear picture of the procedure it is appropriate to reiterate the Rule (1) of Rule 232.

> **R. 232.** (1) A decree-holder praying for police help in execution shall state in his application the full reasons thereof, supported, if required, by an affidavit. The Court may further examine the decree-holder or such other persons as it think fit touching the necessity of Police help. If, upon consideration of all the facts and circumstances, the presiding Judge is of the clear opinion that there are reasonable grounds to suppose that execution will not be effected without serious danger to the public peace, he may after recording his reason for so doing, make a request through the District Judge to the District Superintendent of Police of the district for such police aid as the latter may be able to give in the execution of the writ. It is to be understood that police help is to be regarded as extreme step and it should not be recommended unless the Court is fully convinced of the existence of a grave emergency. The District Judge should, therefore, satisfy himself that all other measures have failed before the request is forwarded.

All this is the procedure that has to be required to follow for detention of judgment-debtor in civil prison and police help.

[**Note :** Readers are requested to go through *Pashpagadan v. Gwalior Rayon Silk, 1980 (II) MPWN 110*].

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WHETHER A FINDING ADVERSE TO A PARTY IN A SUIT NOT HAVING A RIGHT TO CHALLENGE THE SAME IN APPEAL HAS THE EFFECT OF RES JUDICATA

Judicial Officers
District Guna

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or a question of law has been decided between two parties in a suit or proceeding and the decision is final, either because no appeal was filed before a higher Court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

Section 96 C.P.C. does not enumerate the person who can file an appeal. But it is a fundamental principle that in order to be entitled to file an appeal, the person must be aggrieved by and dissatisfied with the judgement. No appeal can lie against a mere finding on a simple reason that C.P.C. does not provide for any such appeal. (See : Smt. *Ganga Bai v.Vijay Kumar & Others, AIR 1974 SC 1126.)*

Now, we have to find out whether a finding adverse to a party in a suit not having a right to challenge the same in appeal has the effect of res judicata?

Equity requires that nobody should be penalized for an omission which occurred because of reasons beyond the control of that person. On the same footing, long back in case of *Midnapur Zamindary Co. Lt. v. Naresh Narayan Roy, AIR 1924 Privy Council 144,* where the question of occupancy right was not decided in a previous suit but the same was disposed of on another plea, Lord Dunedin from the Bench expressed that the point was not res judicata in subsequent suit as defendants having succeeded on the other plea, had no occasion to go further as to the finding against them.

In case of *Abdul Rahman Mullick & other v. Azahar Ali Khan, AIR 1935 Calcutta 733* and later on in case of *Kumar Pashupati Nath Malia & another v. Shri Sankari Prasad Singh Deo & Others, AIR 1957, Calcutta 128* Hon'ble the Calcutta High Court laid down that a suit ended in dismissal, the defendant had no right to appeal. So the adverse finding against the defendant in that suit will not operate as res judicata.

The Apex Court in case of *Satyadhyan Ghosal & others v. Smt. Deoragin Devi and Another, AIR 1960 SC 941* reiterated above principle and again in case of *Smt. Ganga Bai v. Vijay Kumar and others* (Supra), the Apex Court in para 25 of Judgement, held -

"...That as the matter regarding the partition was not directly and substantially in issue in the mortgage suit and as the finding given by the trial court in that respect was unnecessary and had no impact on the decision of the suit it could not operate as res judicata."

In case of *Vidya v. Hans Raj, AIR 1993 Delhi 187*, where Rent Control Authority dismissed the petition of the tenant for fixation of standard rent. The adverse finding of the Rent Control Authority as to the applicability of Delhi Rent Control Act, will not operate as res judicata since the land lord had no right to appeal against the adverse finding.

In case of *Bhagwati Prasad v. Usha Devi & Others, AIR 1995 MP 205* it is held that when a suit is dismissed against a party and a finding is recorded not affecting the decree in favour of other party, such party is not competent to file appeal u/s 96 C.P.C. against the decree on the ground that an issue is found against him - finding would not operate as res-judicata in subsequent suit between parties.

Again in case of *M/s Ram Mohan & Company and another v. Ganesar Ginning Company P.Ltd. Coimbatore and others, AIR 2000 Madras 1,* Hon'ble the Madras High Court expressed – that a party in whose favour the proceedings have ended, could not have filed an appeal against a finding then such a finding can not operate as res judicata.

This principle was affirmed in case of *Commissioners for the Port of Calcutta v. Bhairadinram Durga Prasad, AIR 1961 Calcutta 39 (Full Bench), Tara Singh v. Smt. Shakuntala, AIR 1974 Rajasthan 21, Corporation of Madras v. P.R. Ramachandriah* and *others, AIR 1977 Madras 25 (DB), Indraj and others v the Collector Delhi & others, AIR 1981 NOC 150 (Delhi)* and *Ramesh Chandra v. Shiv Charan Das and others, AIR 1991 SC 264* and recently in case of *Munnir Mahammod v. Noor Mohammad and others, AIR 2005 Rajasthan 48.*

Therefore, it is well settled from the catena of decisions of the Apex Court and other High Courts that when a party succeeds in a suit or appeal, an adverse finding against him cannot be the basis of a plea of res judicata, for having succeeded he had no occasion to prefer an appeal or have no right to challenge such adverse finding in appeal.

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दोषमुक्ति के विरुद्ध अपील में दण्ड अधिरोपित करने की अपीलीय न्यायालय की अधिकारिता का विस्तार

न्यायिक अधिकारीगण
जिला उज्जैन

धारा 378 दण्ड प्रक्रिया संहिता (संशोधन के पूर्व) में दोषमुक्ति के विरूद्ध अपील की अधिकारिता माननीय उच्च न्यायालय को थी किन्तु दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम 2005 की धारा 378 में संशोधन के पश्चात् अब दोषमुक्ति के विरूद्ध अपील की अधिकारिता सत्र न्यायालय को भी है। ऐसी स्थिति में अब सत्र न्यायालय को भी यह जानने की आवश्यकता है कि दोषमुक्ति के विरूद्ध अपील में दण्ड अधिरोपित करने की अपीलीय न्यायालय की अधिकारिता का विस्तार क्या है।

दण्ड प्रक्रिया संहिता (एतत्मिन पश्चात् मात्र संहिता) की धारा 386 में अपीलीय न्यायालय की शक्तियों का उल्लेख किया गया है। दण्ड प्रक्रिया संहिता की धारा 386 (क) निम्नानुसार है :–

संहिता की धारा 386 (क) :– अपीलीय न्यायालय दोषमुक्ति के आदेश से अपील में ऐसे आदेश को उलट सकता है और निर्देश दे सकता है कि अतिरिक्त जाँच की जाए अथवा अभियुक्त, यथास्थिति, पुनः विचारित किया जाए या विचारार्थ सुपुर्द किया जाए, अथवा उसे दोषी ठहरा सकता है और उसे विधि के अनुसार दण्डादेश दे सकता है।

उपरोक्तानुसार यदि कोई अपीलीय न्यायालय दोषमुक्ति के विरूद्ध अपील की सुनवाई करता है और अधीनस्थ न्यायालय के आदेश को उलटकर अभियुक्त को दोषी ठहराता है तो उसे विधि अनुसार दण्डादेश देने का अधिकार है। लेकिन संहिता की धारा 386 (क) के अपीलीय न्यायालय के इस अधिकार कि, ''उसे विधि अनुसार दण्डादेश दे सकता है'', की सीमाएं इसी धारा के ''द्वितीय परन्तुक'' में दी गई है जो निम्नानुसार है :–

संहिता की धारा 386 (द्वितीय परन्तुक) :– परन्तु यह और कि अपील न्यायालय उस अपराध के लिए जिसे उसकी राय में अभियुक्त ने किया है उससे अधिक दण्ड नहीं देगा, जो अपीलाधीन आदेश या दण्डादेश पारित करने वाले न्यायालय द्वारा ऐसे अपराध के लिए दिया जा सकता था।

इस तरह संहिता की धारा 386 (क) एवं धारा 386 (द्वितीय परन्तुक) अपीलीय न्यायालय के दोषमुक्ति के विरूद्ध अपील में दण्डा अधिरोपित करने के विस्तार/सीमाओं को बताती है उक्त प्रावधानों के अनुसार न्यायालय ऐसा दण्डादेश दे सकता है ''जो विधि अनुसार है और उस दण्डादेश से अधिक नहीं देगा जो अपीलाधीन आदेश या दण्डादेश पारित करने वाले विचारण न्यायालय द्वारा दिया जा सकता है।'' संहिता की धारा 386 में जो अपीलीय न्यायालय की शक्तियाँ दी है उसका मूल आधार एवं विचार यह है कि अपील मूल विचारण के निरन्तरता में ही होती है और इसलिए अपीलीय न्यायालय अपील की सुनवाई के दौरान ऐसा कोई आदेश या निर्णय या कार्य नहीं कर सकता जो विचारण न्यायालय द्वारा नहीं किया जा सकता हो।

दोषमुक्ति के विरूद्ध अपील में दण्ड अधिरोपित करने की अपीलीय न्यायालय की अधिकारिता के विस्तार के संबंध में न्याय दृष्टान्त **जगत बहादुर विरूद्ध म.प्र. राज्य, ए. आई. आर. 1966, एस.सी. 945** एवं न्याय दृष्टान्त **शंकर करबा जाधव एवं अन्य विरूद्ध महाराष्ट्र राज्य, ए.आई.आर. 1971 एस.सी. 840** में माननीय सर्वोच्च न्यायालय ने संहिता (1898) की धारा 423 (1) (ए) (संहिता 1973 की धारा 386 के द्वितीय परन्तुक की व्याख्या की है) एवं अभिनिर्धारित किया है कि :–

If the appeal is from an order of acquittal with no prior order of sentence, the punishment must be commensurate with the gravity of the offence. But if the order of acquittal is preceded by an order of conviction the Court hearing the appeal from acquittal should not impose a sentence greater than what the Court of first instance could have imposed inasmuch as if the trial Court had given him the maximum sentence which it was competent to give and no appeal was preferred by the accused, the State could not have approached the High Court under any provision of the Code for enhancement of the sentence. The interposition of the order of an intermediate Court of appeal and acquittal of the accused by it should not put the accused in a predicament worse than that before the trial Court.

ठीक इसी प्रकार न्याय दृष्टान्त **के. भास्करन विरूद्ध शंकरन वैद्यन बालन** एवं **अन्य, 2000 (1)** एम. पी. एल. जे., पेज –1 में माननीय सर्वोच्च न्यायालय ने धारा 386 एवं 29 (2) संहिता की व्याख्या करते हुए अवधारित किया है कि ''उच्च न्यायालय धारा 138 परक्राम्य लिखत अधिनियम के तहत किसी अपराध के संबंध में दोषमुक्ति अपास्त करके एवं अभियुक्त को दोषी ठहराते हुए उस दण्डादेश से अधिक दण्डादेश अधिरोपित नहीं कर सकता जो दण्ड प्रक्रिया संहिता की धारा 386 के परन्तुक के अनुसार विचारण न्यायालय द्वारा अधिरोपित किया जा सकता था तथापि मजिस्ट्रेट समुचित मामलों में संहिता की धारा 357 (3) की अवलम्ब लेते हुए परिवादी की समस्या के निवारण के लिए बतौर मुआवजा कोई भी राशि प्रदान करने का अधिनिर्णय कर सकता है। इस न्याय दृष्टान्त में माननीय सर्वोच्च न्यायालय ने यह पृथक से व्याख्या की है कि विचारण न्यायालय को धारा 357 (3) संहिता के तहत प्रकरण की परिस्थितियों को देखते हुए हर्जाना आरोपित करने के अधिकार सीमित नहीं है। ऐसी स्थिति में दोषमुक्ति के विरूद्ध अपील की सुनवाई में दण्डाज्ञा के विस्तार के समय हर्जाना आरोपित करने की अपीलीय न्यायालय की शक्ति प्रकरण की परिस्थितियों को देखते हुए असीमित है।

न्याय दृष्टान्त **शंकर करबा जाधव विरूद्ध महाराष्ट्र राज्य, ए. आई. आर. 1971 एस. सी. 840 में** माननीय सर्वोच्च न्यायालय के समक्ष जो मामले के तथ्य आए थे वे इस प्रकार थे कि विचारण न्यायालय द्वारा अभियुक्तगण को धारा 147, 447, 325, 149 में दोषसिद्ध पाते हुए दण्डित किया गया जिसे सत्र न्यायालय द्वारा अपील में उलट दिया गया और अभियुक्तगण को दोषमुक्त कर दिया गया। इस दोषमुक्ति के आदेश के विरूद्ध अपील माननीय उच्च न्यायालय में की गई जहाँ माननीय उच्च न्यायालय ने सत्र

न्यायालय के निर्णय को अपास्त करते हुए दण्डाधिकारी के द्वारा दी गई दोषसिद्धी को कायम रखा लेकिन दण्डाधिकारी द्वारा दी गई दण्डाज्ञा से अधिक गंभीर दण्डाज्ञा पारित की जिसकी अपील माननीय सर्वोच्च न्यायालय में गई तो माननीय सर्वोच्च न्यायालय ने संहिता 1898 की धारा 423 (1) (ए) = संहिता 1973 की धारा 386 द्वितीय परन्तुक की व्याख्या करते हुए यह अवधारित किया कि दोषमुक्ति के विरूद्ध अपील सुनते समय अपीलीय न्यायालय (उच्च न्यायालय) की दण्डाज्ञा की सीमा का विस्तार केवल विचारण न्यायालय द्वारा दी गई दण्डाज्ञा तक सीमित नहीं है बल्कि उसका विस्तार विचारण न्यायालय की दण्डाज्ञा की अधिकारिता तक सीमित है अर्थात् विचारण न्यायालय विधि अनुसार उस मामले में जितना अधिकतम दण्ड दे सकता था उतना अपीलीय न्यायालय भी दे सकता है।

दण्ड प्रक्रिया संहिता के अध्याय 3 में न्यायालयों की दण्डादेश देने की शक्तियों का उल्लेख किया है और अध्याय – 3 की धारा 29 में दण्डाधिकारी के दण्डादेश देने की अधिकारिता का उल्लेख किया गया है जिसके अनुसार मुख्य न्यायिक मजिस्ट्रेट मृत्यु दण्ड, आजीवन कारावास या सात वर्ष से अधिक की अवधि के कारावास के दण्डादेश के सिवाय विधि द्वारा प्राधिकृत कोई भी दण्डादेश दे सकता है। प्रथम वर्ग मजिस्ट्रेट तीन वर्ष से अनाधिक अवधि के कारावास एवं 10,000/– रूपये से अनाधिक जुर्माने का दण्डादेश या दोनों दे सकता है और द्वितीय वर्ग मजिस्ट्रेट एक वर्ष से अनाधिक अवधि के कारावास एवं 5,000/– रूपये से अनाधिक का जुर्माना या दोनों दण्डादेश दे सकता है।

दण्ड प्रक्रिया संहिता की धारा 386 (क) एवं धारा 386 के द्वितीय परन्तुक और उपरोक्त न्याय दृष्टान्त में प्रतिपादित सिद्धांत से यह स्पष्ट है कि दोषमुक्ति के विरूद्ध अपील में अपीलीय न्यायालय अभियुक्त को विधि अनुसार दण्डादेश दे सकता है किन्तु उसकी सीमा का विस्तार विचारण न्यायालय के लिये धारा 29 संहिता में दी गई सीमा के परे नहीं होगा। यहाँ पर यह भी उल्लेख करना आवश्यक होगा कि धारा 357 (3) संहिता में दण्डाधिकारी को हर्जाना आरोपित करने की कोई सीमा नहीं है बल्कि वह परिस्थतियों के परिप्रेक्ष्य में उचित होना चाहिए। ऐसी स्थिति में धारा 386 दण्ड प्रक्रिया संहिता के तहत अपीलीय न्यायालय को भी दोषमुक्ति के विरूद्ध अपील में हर्जाना अधिरोपित करते समय कोई सीमा नहीं है बल्कि वह हर्जाना परिस्थितियों के परिप्रेक्ष्य में उचित होना चाहिए।

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Presumption means nothing more than, as stated by Lord Mansfield, the weighing of probabilities, and deciding, by the power of common sense, on which side the truth is.

- BEST, J.

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 2006 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 विश्लेशणात्मक दृष्टिकोण अपनाया जावे)

क्या विद्युत अधिनियम 2003 के अन्तर्गत आने वाले आपराधिक मामलों का ऐसी लोक अदालत, जिसके पीठासीन अधिकारी विशेष न्यायाधीश नहीं हैं के द्वारा निपटारा किया जा सकता है ?

विधिक सेवा प्राधिकरण अधिनियम 1987 की धारा 19(5) यह प्रावधान करती है कि लोक अदालत को उनके समक्ष लम्बित अथवा उनके अधिकारिता के भीतर उत्पन्न किसी ऐसे मामले, जो उनके समक्ष नहीं लाया गया है का अवधारण करने और पक्षकारों के मध्य समझौता करने की अधिकारिता होगी परन्तु लोक अदालत को किसी ऐसे अपराध से सम्बनधित किसी मामले या विषय के बारे में कोई अधिकारिता नहीं होगी जो किसी विधि के अधीन शमनीय अपराध नहीं है।

दूसरे शब्दों में स्थानीय अधिकारिता के अधीन रहते हुये लोक अदालत को सभी सिविल मामलों में एवं ऐसे अपराध के मामले में जो शमनीय है अवधारण करने की अधिकारिता है।

विद्युत अधिनियम 2003 की धारा 154 (1) सर्वोपरीय खण्ड के साथ यह प्रावधान करती है कि अधिनियम की धारा 135 से 139 के अधीन दण्डनीय अपराध का विचारण मात्र धारा 153 (1) के तहत अधिसूचित विशेष न्यायाधीश ही कर सकेंगे। ऐसे विशेष न्यायालय इस अधिनियम के अन्तर्गत उक्त अपराधों के मामलों के शीघ्र निराकरण के आशय से राज्य सरकार द्वारा जारी अधिसूचना से गठित होंगे।

इसके साथ ही विधिक सेवा प्राधिकरण अधिनियम 1987 की धारा 25 यह प्रावधान करती है कि इस अधिनियम के प्रावधान तत्समय प्रवृत्त किसी अन्य विधि में या इस अधिनियम से भिन्न किसी विधि के आधार पर प्रभाव रखने वाली किसी लिखित में अन्तर्विष्ट उससे असंगत किसी बात के होते हुये भी प्रभावी होंगे। स्पष्ट है कि विधिक सेवा प्राधिकरण के प्रावधान अन्य विधियों पर अध्यारोही प्रभाव रखते हैं।

विघुत अधिनियम 2003 में धारा 135 के अधीन दण्डनीय अपराध धारा 152 के अनुसार शमनीय अपराध है इसलिये लोक अदालत को धारा 135 विघुत अधिनिमय के अपराध का ही अवधारण करने की अधिकारिता हो सकती है शेष अपराधों के सम्बन्ध में अधिकारिता नहीं हो सकती क्यों कि वे शमनीय नहीं है।

विघुत अधिनियम 2003 की धारा 174 में भी यह प्रावधान हैं कि इस अधिनियम के प्रावधान तत्समय प्रवृत्त किसी अन्य विधि में या इस अधिनियम से भिन्न किसी विधि के आधार पर प्रभाव रखने वाली किसी लिखित में अन्तर्विष्ट उससे असंगत किसी बात के होते हुये भी प्रभावी होंगे। इस प्रकार विद्युत अधिनियम 2003 के प्रावधान भी अन्य विधियों के असंगत प्रावधानों पर अध्यारोही प्रभाव रखते हैं।

विद्युत अधिनियम 2003, विधिक सेवा प्राधिकरण अधिनियम 1987 से पश्चात् का है। ऐसी स्थिति में यदि विधिक सेवा प्राधिकरण अधिनियम में यदि विद्युत अधिनियम 2003 से असंगत कोई प्रावधान है तो उनके स्थान पर विद्युत अधिनियम 2003 के प्रावधान प्रभावी होंगे।

परन्तु उपरोक्त संदर्भ में उपरोक्त विधानों के अन्तर्गत कोई असंगत या विरोधाभास पूर्ण प्रावधान नहीं है साथ ही दोनों विधानों के अन्तर्गत उक्त प्रावधानों के उद्देश्यों में भी कोई विसंगति न होकर समानता है।

विद्युत अधिनियम की धारा 153 (i) के अन्तर्गत विशेष न्यायालय गठित करने का उद्देश्य शीघ्र विचारण (Speedy Trial) बताया गया है। लोक अदालत द्वारा शमनीय अपराध के मामले के आधार पर मामले का निराकरण इस उद्देश्य की ही पूर्ति ही करता है।

विशेष न्यायालय को एक मात्र विचारण का अनन्य क्षेत्राधिकार है। जबकि लोक अदालतों को सभी शमनीय अपराधों का शमन के आधार पर निराकरण करने की अधिकारिता है चाहे वे अपराध किसी भी न्यायालय द्वारा विचारणीय हो। विचारण करने वाले न्यायालय, चाहे सामान्य न्यायालय जो द. प्र. सं. में परिभाषित है या विशेष अधिनियम द्वारा परिभाषित व गठित न्यायालय हो, उससे लोक अदालतों को धारा 19 (5) विधिक सेवा प्राधिकरण अधिनियम 1987 के प्रावधानों पर कोई प्रभाव नहीं पड़ेगा।

फलतः विद्युत अधिनियम 2003 में चाहे विचारण का एक मात्र अधिकार विशेष न्यायाधीश को ही हो तो भी लोक अदालत शमनीय मामलों का समझौते के आधार पर निराकरण कर सकेगी।

इसके अतिरिक्त यदि हम विद्युत अधिनियम 2003 की धारा 152 का परिशीलन करे तो स्पष्ट है कि शमनीय अपराध में न्यायालय की कोई भूमिका नहीं है शमन करने की अधिकारिता न्यायालय को नहीं अपितु समुचित सरकार अथवा उनके द्वारा नियुक्त अधिकारी को है। यदि उसने अभियुक्त से धारा 152(1) में निर्धारित राशि ले ली तो प्रक्रिया स्वमेव समाप्त हो जावेगी और इसका प्रभाव दोष मुक्ति का होगा। समझौता स्वीकार करने या न करने में विचारण न्यायालय की भूमिका नहीं रखी गई है। ऐसी स्थिति में यदि लोक अदालत समझौते के लिये प्रेरित करती है और ऐसी प्रेरणा से समझौता हो जाता है तो 152 (2) विद्युत अधिनियम के तहत मामले के विचारण की प्रक्रिया स्वमेव समाप्त हो जाने का प्रभाव रखेगी।

इसलिये भी यह कहा जा सकता है कि विशेष न्यायालय और लोक अदालत के क्षेत्राधिकार में विरोधाभास नहीं है। विद्युत अधिनियम 2003 की धारा 135 के अपराधों का लोक अदालत द्वारा समझौते के आधार पर निराकरण किया जाना विधि अनुकूल है ।

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दावों के साथ प्रस्तुत शपथ पत्र, आदेश 18 नियम 4 व्य.प्र.सं. के अधीन प्रस्तुत शपथ पत्र, जमानत पत्र एवं बन्धपत्र के साथ प्रस्तुत शपथ पत्र पर क्या न्याय शुल्क एवं स्टाम्प शुल्क देय हैं ?

व्यवहार प्रक्रिया संहिता 1908 की धारा 139 के अनुसार संहिता के अधीन प्रस्तुत शपथ पत्रों के अभिसाक्षी को निम्न व्यक्तियों द्वारा शपथ दिलाई जा सकेगी :–

अ, किसी न्यायालय या मजिस्ट्रेट अथवा

ब, नोटरी अधिनियम 1952 के अधीन नियुक्त नोटरी अथवा

स, ऐसे किसी भी अधिकारी या अन्य व्यक्ति द्वारा जिसे उच्च न्यायालय ने इस निमित्त नियुक्त किया है अथवा

द, किसी अन्य न्यायालय द्वारा, जिसे राज्य सरकार ने इस निमित्त साधारणतः या विशेष रूप से सशक्त किया है, नियुक्त किये गये अधिकारी।

दण्ड़ प्रक्रिया संहिता 1973 की धारा 297 भी व्यवहार प्रक्रिया संहिता 1908 की धारा 139 के अनुरूप ही शपथ पत्रों पर शपथ ग्रहण या प्रतिज्ञान के सबंध में प्रावधान करती हैं। यह धारा उच्च न्यायालय के साथ--साथ सत्र न्यायाधीश को भी शपथ आयुक्त (दाण्डिक मामलों के लिये) नियुक्त करने का अधिकार देती है।

सामान्यतः न्यायालय के समक्ष :– (1) नोटरी नियमावली 1956 की धारा 8 द्वारा नियुक्त नोटरियों द्वारा दिलाए गए शपथ पत्र अथवा (2) उच्च न्यायालय द्वारा/सेशन न्यायालय द्वारा नियुक्त शपथ आयुक्तों द्वारा प्रमाणित एवं हस्ताक्षरित किए शपथ पत्र ही प्रस्तुत होते हैं।

न्यायशुल्क अधिनियम 1870 शपथ पत्रों पर कोई शुल्क प्रभार्य नहीं करता, इसलिए शपथ पत्रों पर न्याय शुल्क अधिनियम के अधीन कोई शुल्क देय नहीं हैं।

भारतीय स्टाम्प अधिनियम ''1899 की अनुसूची 1 (क)'' (मध्यप्रदेश सरकार द्वारा संशोधित) के अनुच्छेद 4 के अनुसार शपथ पत्रों पर दस रूपयें शुल्क प्रभार्य है परन्तु यदि शपथ पत्र किसी न्यायालय या किसी न्यायालय के आफिसर के समक्ष फाइल किये जाने या उपयोग में लाए जाने के ''एक मात्र प्रयोजन'' के लिए दिए गए है तो ऐसे शपथ पत्रों को शुल्क से छूट प्राप्त हैं।

नोटरी द्वारा प्रमाणित शपथ पत्र के सम्बन्ध में स्थिति भिन्न हैं। भारतीय स्टाम्प अधिनियम 1899 की अनुसूची 1 (क) के अनुच्छेद 42 के अनुसार ''नोटरी कार्य'' को परिभाषित करते हुए यह कहा गया है कि कोई ऐसी लिखित, पृष्ठाकंन नोट, अनुप्रमाणन प्रमाण पत्र या प्रवृष्टि (जो प्रोटेस्ट क्रमांक 50 का न हो) और नोटरी द्वारा अपने पदीय कर्तव्य के निष्पादन में लिखी गई हो या हस्ताक्षरित की गई हो तो ऐसी लिखित दस रूपये के स्टाम्प शुल्क से प्रभार्य होगा । नोटरी अधिनियम 1952 की धारा 8 (e) के अधीन अन्य कार्यों के अतिरिक्त अभिसाक्षी को शपथ दिलाना तथा शपथ पत्रों को प्रमाणित करना भी उनका कर्तव्य है दूसरे शब्दों में नोटरी द्वारा भी शपथ पत्र वैधानिक रूप से तस्दीक एवं हस्ताक्षरित किए जा सकते है। इसमें विवाद नहीं किया जा सकता कि नोटरी द्वारा दिलाई गई शपथ एवं उसका अनुप्रमाणन भी एक नोटरी कार्य है। देखिये ***काशी प्रसाद सक्सेना विरूद्ध उ. प्र. राज्य, ए. आई. आर. 1969 इलाहाबाद 195 ।***

भारतीय स्टाम्प अधिनियम 1899 की अनुसूची 1 (क) के अनुच्छेद 4 द्वारा न्यायालीन उददेश्यों के लिए दिए गए शपथ पत्रों पर छूट प्रदान की गई है परन्तु अनुच्छेद 42 इस प्रकार की कोई छूट प्रदान नहीं करता। न्यायालयों में अक्सर यह प्रश्न उत्पन्न किया जाता है कि नोटरी द्वारा दिए गए शपथ पत्र को भी यदि न्यायालीन उद्वेश्य के लिए तैयार किया जाता है तो उसे भी अनुच्छेद 4 के अनुसार ही समझा जावे और इस पर किसी प्रकार का कोई शुल्क प्रभार्य नहीं होगा ऐसा माना जाए।

परन्तु पूर्ववर्णित प्रावधानों के आलोक में उक्त तर्क आधारहीन है इस सम्बन्ध में ***मंगलसिंह विरूद्ध स्टेट आफ राजस्थान, राज्य ए. आई. आर 1976 राजस्थान 123*** में माननीय उच्च न्यायालय ने यह मत निर्धारित किया है कि अनुच्छेद 42 के अन्तर्गत निष्पादित हस्ताक्षरित शपथ पत्र पर अनुच्छेद 4 के शपथ पत्रों

के अनुरूप छूट प्रदान नहीं हैं। इसलिए यदि नोटरी द्वारा शपथ ग्रहण या प्रतिज्ञान शपथ पर दिलाया गया है तो वह अनुच्छेद 42 के अन्तर्गत ''नोटरी कार्य'' है, इसलिए शुल्क से प्रभार्य हैं।

न्यायालय द्वारा अथवा मजिस्ट्रेट द्वारा शपथ पत्र पर दिलाई गई शपथ ग्रहण या प्रतिज्ञान नोटरी कार्य नहीं है और न ही यह नोटरी की श्रेणी में कहे जा सकते है। उच्च न्यायालय द्वारा नियुक्त शपथ आयुक्त भी नोटरी नहीं है क्योंकि इनकी नियुक्ति नोटरी अधिनियम 1952 के अधीन नहीं की गई है इसलिए इनके द्वारा भी शपथ पत्र पर दिलाया गया शपथ या प्रतिज्ञान नोटरी कार्य नहीं हैं। इसलिए न्यायालय या शपथ आयुक्त द्वारा यदि शपथ पर प्रतिज्ञान दिलाया गया है तो वह अनुच्छेद 42 की श्रेणी में नहीं आता अपितु अनुच्छेद 4 की श्रेणी में आता है और यदि उनके द्वारा न्यायालीन उद्देश्यों के लिए शपथ पत्र पर प्रतिज्ञान दिलाया गया है तो उसे अनुच्छेद 4 के तहत छूट प्राप्त होगी।

निष्कर्ष

(1) यदि शपथ पत्र न्यायालीन उद्देश्यों के लिए (चाहे दाण्डिक मामलों में या सिविल मामलों में) न्यायालय द्वारा अथवा मजिस्ट्रेट द्वारा अथवा शपथ आयुक्त द्वारा अथवा ऐसे व्यक्ति द्वारा, जिसे किसी ऐसे न्यायालय ने नियुक्त किया है, जिसे राज्य सरकार ने अधिकृत किया है, तस्दीक किए गए है तो उन पर किसी प्रकार का शुल्क प्रभार्य नहीं है।

(2) यदि शपथ पत्र नोटरी द्वारा तस्दीक किए गए है चाहे वह न्यायालीन उद्देश्य के लिए हो अथवा अन्य उद्देश्य के लिए उन पर दस रूपये का शुल्क स्टाम्प अधिनियम 1899 के अन्तर्गत प्रभार्य होगा।

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

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We can conclude not that the law is unknowable, not that judging is impossible, but that it takes a great deal of hard work to be a good judge.

EASTLAND, Terry.

PART - II

NOTES ON IMPORTANT JUDGMENTS

194. ADMINISTRATIVE LAW:

Cancellation of allotment of dealership – Income shown by applicant was not found true – Undertaking given by the applicant that if any information supplied by him is found untrue, Corporation would have right to terminate dealership – Held, cancellation of dealership is valid – Importance of undertaking restated.

Shiv Kant Yadav v. Indian Oil Corpn. and others

Judgment dated 09.04.2007 passed by the Supreme Court in Civil Appeal No. 1844 of 2007, reported in (2007) 4 SCC 410

Held :

With reference to the application form and the undertaking the High Court held that it was obviously clear that the income was not fully disclosed.

The plea that the income was less than rupees two lakhs, did not materially affect the eligibility of the appellant, was not accepted and accordingly, the writ petition was dismissed.

★ ★ ★

Learned counsel for the respondents on the other hand supported the order saying that once there is suppression in view of the undertaking the allotment was to be cancelled.

★ ★ ★

There was a requirement to disclose the true and correct fact which does not appear to have been done.

The undertaking reads as follows :

> "That I am fully aware that Indian Oil Corporation (name of the oil company) under its policy will not appoint me as their dealer/distributor, if I am employed. I shall have to resign from the service and produce proof of acceptance of my resignation by my employer to Indian Oil Corporation Ltd. (name of the oil Company) before issuance of letter of appointment for the dealership/distributorship.
>
> That if any information/declaration given by me in my application or in any document submitted by me in support of my application for the award of SKO/LDO dealership/distributorship or in this undertaking shall be found to be untrue or incorrect or false Indian Oil Corporation (name of the oil Company) would be within its rights to withdraw the letter of intent/terminate the dealership/distributorship (if already appointed) and that, I would have no claim, whatsoever, against Indian Oil Corporation (name of oil company) for such withdrawal/termination."

In view of the undertaking that if any factual misstatement or declaration is made that permits cancellation of the allotment. The order of the High Court does not suffer from any infirmity to warrant interference.

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195. ARBITRATION AND CONCILIATION ACT, 1996 – Section 37(1) (b)

Appeal against award on ground 'no arbitration clause' stipulated in the contract – No such objection was raised in written statement before arbitrator – The said plea was not advanced before civil Court in arbitration case – No objection was raised before High Court during proceeding u/s 11 – Not asking arbitrator to rule on its own jurisdiction – Both parties consented and accepted that there was an arbitration clause and proceeded on that basis – Held, such plea cannot be raised.

Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy & Anr.

Reported in AIR 2007 SC 817

Held :

We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the Arbitrator. The said plea was not advanced before the civil court in Arbitration Case No. 1 of 2001. On the contrary, both the courts below on facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the Arbitrator. It gave consent to the appointment of the Chief Engineer as an Arbitrator. It filed its written statements to the additional claims made by the contractor. The executive engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal. He did not call upon the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10-9-99 passed in C.M.P. No. 26/99. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now allowed to contend that Clause 29 of the Contract did not constitute an arbitration agreement.

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196. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 37(2) (a) 16 (2), 16 (3) & 34

WORDS AND PHRASES :

(i) Appeal against the partial award of the Arbitral Tribunal u/s 37(2) is maintainable only when Tribunal ruled that it has no jurisdiction or Arbitral Tribunal exceeds its authority – Arbitral Tribunal rejected the counter claim on the ground that it has

been already settled by the parties – This is not equivalent to the question pertaining to the jurisdiction of Tribunal.

(ii) 'Jurisdiction' contemplated u/s 16, meaning of.

NationalThermal Power Corpn. Ltd. v. Siemens Atkeingesellschaft Judgment dated 28.02.2007, passed by the Supreme Court in Civil Appeal No. 1953 of 2006 reported in (2007) 4 SCC 451

Held :

(i) We have heard learned counsel for the parties and perused the records. The question before us in the present appeal is whether the view taken by the learned Single Judge of the High Court that the appeal under Section 37 of the Act is maintainable against the interim award or not. Learned counsel for the appellant took us through all the details of the pleadings and tried to persuade us that the question of jurisdiction and limitation is involved, therefore, the appeal is maintainable under Section 37 of the Act. The first and foremost question before us is to examine the provisions of Section 37 read with Section 16 of the Act. Section 37 of the Act reads as under :

"37. *Appealable orders.*– (1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely –

(a) granting or refusing to grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a court from an order of the Arbitral Tribunal–

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

So far as Section 37(1) (a) of the Act is concerned, it contemplates that no appeal shall lie from any orders except, namely, granting or refusing to grant measure under Section 9. Section 9 deals with interim orders and Section 37(1) (b) relates to order passed under Section 34 i.e. setting aside or refusing to set aside an arbitral award under Section 34. Sub-Section (2) (a) of Section 37 provides that appeal shall also lie to the court from an order of the Arbitral Tribunal accepting the plea under sub-section (2) or sub-section (3) of Section 16 and sub-section (2) (b) contemplates appeal against the order granting or refusing to grant an interim measure under Section 17 i.e. at the time of pendency of the arbitration proceedings by the Tribunal. Sub-section (3) says that no second appeal shall lie from the orders passed in appeal under this section. Now we shall examine the scope of Section 16, which reads as under :

"16. *Competence of Arbitral Tribunal to rule on its jurisdiction.* – (1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,–

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

Sub-sections (2) and (3) of Section 16 deal with jurisdiction. Sub-section (2) of Section 16 says that a plea of lack of jurisdiction of the Tribunal should be raised at the earliest i.e. not later than submission of statement of defence and it further says that a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator. Sub-section (3) says that the plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised during the arbitral proceedings. A reading of sub-sections (2) and (3) of Section 16 makes it clear that it deals with jurisdiction i.e. that the Arbitral Tribunal has no jurisdiction or that the Arbitral Tribunal has exceeded its jurisdiction. In either of the two situations, a direct appeal is maintainable under sub-section (2) of Section 37...

(ii) The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. *SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618* in a sense confined the operation of Section 16 to cases

where the Arbitral Tribunal was constituted at the instance of the parties to the contract without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression "jurisdiction" and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37 (2) (a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

In a case where a counterclaim is referred to and dealt with and a plea that the counterclaim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudication by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction

to entertain the claim and hence the award or order made by it, comes within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2)(a) of the Act.

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197. CIVIL PROCEDURE CODE, 1908 – Sections 38, 39, 42 & 136

Territorial jurisdiction of executing Court – Normally the Court that passed the decree is the executing Court – Exception – Other Court can exercise jurisdiction only when property is situated in their jurisdiction – Court passing the decree may transfer the decree for execution to the other Court where the property is situated – Court passing the decree may also issue order of percept u/s 46 of the Act to the other to attach the property which is situated in their jurisdiction – But Court passed the decree has jurisdiction to pass restraint orders in respect of person or property situated outside the jurisdiction to deliver possession to judgment debtor.

Mohit Bhargava v. Bharat Bhushan Bhargava and others

Judgment dated 20.04.2007 passed by the Supreme Court in Civil Appeal No. 2078 of 2007, reported in (2007) 4 SCC 795

Held:

There cannot be any dispute over the proposition that the court which passed the decree is entitled to execute the decree. This is clear from Section 38 of the Code which provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 42 of the Code indicates that the transferee court to which the decree is transferred for execution will have the same powers in executing that decree as if it had been passed by itself. A decree could be executed by the court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorised by Order 21 Rule 3 or Order 21 Rule 48 of the Code or the judgment-debtor is within its jurisdiction, if it is a decree for personal obedience by the judgment-debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the court which passed the decree acting as the executing court, there was a conflict of views earlier, some courts taking the view that the court which passed the decree and which is approached for execution cannot proceed with execution but could only transmit the decree to the court having jurisdiction over the property and some other courts taking the view that it is a matter of discretion for the executing court and it could either proceed with the execution or send the decree for execution to another court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 1-7-2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 of the Code shall be deemed to authorise the court to proceed with the execution. In the light of this, it may not be possible to accept the contention that it is a matter of discretion for the court either to

proceed with the execution of the decree or to transfer it for execution to the court within the jurisdiction of which the property is situate.

Pending a suit, the court approached with the suit, may have jurisdiction to order attachment of a property even outside its jurisdiction. In execution, under Order 21 Rule 54 of the Code, it may also have jurisdiction to order attachment of the property prohibiting the judgment-debtor from transferring or charging the property in any way when it exercises its jurisdiction over the judgment-debtor though not over the property itself. It could in such a case issue a precept in terms of Section 46 of the Code and thereupon, the court to which the precept is sent, has to actually attach the property in the manner prescribed. Section 136 of the Code provides for an order of attachment in respect of a property outside the jurisdiction of the court and sending the order of attachment to the District Court within whose local limits the property sought to be attached is situate, as provided for therein. But Section 136 clearly excludes execution of decrees from within its purview. An execution against immovable property lying outside the jurisdiction of the executing court is possible in terms of Order 21 Rule 3 of the Code which governs a case where the particular item of immovable property, forms one estate or tenure situate within the local limits of jurisdiction of two or more courts, and one of those courts is approached for execution of the decree against that property. In a case where Order 21 Rule 3 has no application, the position seems to be that if a decree-holder wants to proceed against a property situate outside the jurisdiction of the court which passed the decree, he has to get the decree transferred to the appropriate court for execution on moving the executing court in that behalf. Whatever doubts there might have been earlier on this question, must be taken to have been resolved by the introduction of sub-section (4) of Section 39 of the Code which is a mandate to the executing court to desist from proceeding against a property situate outside its jurisdiction unless it be a case coming under Order 21 Rule 3 of the Code.

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... By order dated 19-3-2003 what the executing court did was, to direct a third party, who had subsequently acceded to the jurisdiction of the executing court, hot to hand over possession of the building in question and the documents concerned, to the judgment-debtor. It is seen that the third person submitted to the jurisdiction of the court and surrendered the documents in his possession to the executing court and prayed to that court that he be relieved from the responsibility of managing the property in the circumstances stated by him in his application. It was in that context that the executing court passed another order dated 7-7-2003 that the documents produced by the third party be kept in safe custody of the court. These two orders are certainly within the jurisdiction of the court which passed the decree since they are only orders of restraint being issued to a person from handing over a property in his possession to the judgment-debtor along with the documents concerned and keeping the

documents in safe custody. They are in the nature of a "freezing order" or a "Mareva injunction" and an order akin to an Antion Pillar order, orders that can be issued even if the property or the person concerned is outside the jurisdiction of the court.

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198. CIVIL PROCEDURE CODE, 1908 – Section 151

WORDS AND PHRASES :

'Fraud', meaning of – Decree obtained by fraud is nullity and can be challenged in any Court whenever in any proceeding decree is sought to be enforced – It has no effect of res judicata – Court can recall such judgment or order by using its inherent power u/s 151 of the Act and it can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings – It is an exception to Article 141 of the Constitution and doctrine of merger – Law explained.

A.V. Papayya Sastry and others v. Govt. of A.P. and others

Judgment dated 07.03.2007 passed by the Supreme Court in Civil Appeal No. 5097 of 2004, reported in (2007) 4 SCC 221

Held:

Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

> "Fraud avoids all judicial acts, ecclesiastical or temporal."

It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order – by the first court or by the final court – has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

In the leading case of *Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341* Lord Dinning observed: (All ER p. 345 C)

> "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud."

In *Duchess of Kingston, Smith's Leading Cases,* 13th Edn., P. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none *(fraus et dolus nemini patrocinari debent)*.

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or underserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

In *S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1* this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as "wholly perverse", Kuldip Singh, J. stated: (SCC p. 5, para 5)

> "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. *We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."*
>
> (emphasis supplied)

The Court proceeded to state: (SCC p. 5, para 6)

> "A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

The Court concluded: (SCC p. 5, para 5)

> "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants."

In Indian Bank v Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550 referring to *Lazarus Estates Ltd. (supra)* and *Smith v. East Elloe Rural Distt. Council, 1956 AC 336* this Court stated: (SCC pp. 562-63. para 22)

> "22. The judiciary in India also possesses inherent power, specially under Section 151 CPC to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. *This power is necessary for the orderly administration of the court's business."*
>
> (emphasis supplied)

In *United India Insurance Co. Ltd. v. Rajendra Singh, (2000) 3 SCC 581* by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On Coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court.

Allowing the appeal and setting aside the orders, this Court stated: (SCC pp. 587-88, paras 15-17)

> "15. It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.
>
> 16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to

fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

17. The allegation made by the appellant Insurance Company, that the claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. The claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, *we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to a serious miscarriage of justice.*"

(emphasis supplied)

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The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is nonexistent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior.

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199. CIVIL PROCEDURE CODE, 1908 – Order I Rule 13, Order II Rule 7 Objections as to non-joinder/mis-joinder of necessary parties and cause of action – Are to be taken at the earliest possible opportunity – Otherwise shall be deemed to have been waived.

Zamku and others v. Masari and others

Reported in 2007 (2) MPLJ 580

Held:

After having heard learned counsel for the parties and going through the material available on the record, I am of the clear view that the Court below acted with material irregularity, if not illegality and committed a jurisdictional error in allowing the application for amendment to incorporate the plea of non-joinder/mis-joinder of necessary parties and cause of action. Order I and II of the Civil Procedure Code deals with the necessary parties and the cause of action. Order I, Rule 13, Civil Procedure Code provides that all objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity. Similarly Order II, Rule 7, Civil Procedure Code provides that all objections on the ground of mis-joinder or cause of action are required to be taken at the earliest possible opportunity. The underlying idea behind this provision is to put on guard plaintiff so that he is not taken by surprise at the end of the trial and suffers defeat on that score. That is why the legislature has thought it fit to provide that if such objection is not taken at the earliest possible opportunity, it shall be deemed to have been waived. In the present case, as has been pointed out herinabove, the respondents after they lost in the suit have preferred first appeal and during the pendency of that appeal, they came out with the amendment in the written statement with regard to the mis-joinder or non-joinder of necessary parties and cause of action. According to learned counsel for the respondents, the plea raised in the written statement is only elaboration of the plea taken in the written statement does not impress me. If the pleas are already in the written statement then there was no occasion for the respondents herein to move the application for amendment and if the pleas are not pleaded in the written statement then in view of the provisions contained in Order I, Rule 13, Civil Procedure Code and Order II, Rule 7, Civil Procedure Code such objection shall be deemed to have been waived and the parties proceeded with the trial without there being any objection on that behalf. Learned counsel for the respondents also submitted that the Court should not adopt rigid attitude with regard to the amendments in the pleadings is of no assistance in the facts and circumstances of the case, inasmuch as the proposed amendments are not based upon any subsequent events and no latitude could be given to introduce pleas which ought to have been taken at the earliest possible opportunity or the vexatious pleading which are not necessary for the disposal of the appeal pending before the Court below.

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200. CIVIL PROCEDURE CODE, 1908 – Order XLI Rule 22, Order II Rule 2 & Order 34 Rule 14

(i) Filing of memorandum of cross-objection by respondent is not necessary for challenging a particular finding rendered against him while the decree itself is in his favour.

(ii) Mode of proof for plea of bar under O.2 R.2 of CPC – Production of plaint in earlier suit mandatory.

(iii) Suit for recovery of money simplicitor loan transaction – Decree awarded – Subsequent suit for enforcement of equitable mortgage – Not barred under O.2 R.2 in view of O.34 R. 14 of CPC – Law explained.

S. Nazeer Ahmed v. State Bank of Mysore & Ors.
Reported in AIR 2007 SC 989

Held :

The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of O. XLI, R. 22 of the Code, could not challange the finding of the trial Court that the suit was not barred by O.2 R. 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial Court even by challenging any of the findings that might have been rendered by the trial Court against himself. For supporting the decree passed by the trial Court, it is not necessary for a respondent in the appeal, to file a memorandum of cross- objections challenging a particular finding that is rendered by the trial Court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections needed only if the respondent claims any relief which had been negatived to him by the trial Court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of O. 2, R. 2 rendered by the trial Court.

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Now, we come to the merit of the contention of the appellant that the present suit is hit by O. 2, R. 2 of the Code in view of the fact that the plaintiff omitted to claim relief based on the mortgage, in the earlier suit O.S. No. 131 of 1984. Obviously, the burden to establish this plea was on the appellant. The appellant has not even cared to produce the plaint in the earlier suit to show what exactly was the cause of action put in suit by the Bank in that suit. That the production of pleadings is a must is clear from the decisions of this Court in *Gurbux Singh v. Bhooralal, (1964) 7 SCR 831 and M/s Bengal Waterproof Limited v. M/s. Bombay Waterproof Manufacturing Co. & another, (1996) Supp 8 SCR 695.* From the present plaint, especially paragraphs 10 to 12 thereof, it is seen that the Bank had earlier sued for recovery of the loan with interest thereon as a money suit. No relief was claimed for recovery of the money on the foot of the equitable

mortgage. In that suit, the Bank appears to have attempted in execution, to bring the mortgaged properties to sale. The appellant had objected that the suit not being on the mortgage, the mortgaged properties could not be sold in execution without an attachment. That objection was upheld. The Bank was therefore suing in enforcement of the mortgage by deposit of title deeds by the appellant.

From this, it is not possible to say that the present claim of the plaintiff-Bank has arisen out of the same cause of action that was put forward in O.S. No. 131 of 1984. What O.2, R.2 insists upon is the inclusion of the whole of the claim which the plaintiff is entitled to make in respect of the cause of action put in suit. We must notice at this stage that in respect of a suit in enforcement of a mortgage, the bar under O.2, R.2 has been kept out by O.34, R. 14 of the Code. Rule 15 of O.34 makes the rules of O. 34 applicable to a mortgage by deposit of title deeds. We may quote O.34, R. 14 hereunder :

> **"Suit for sale necessary for bringing mortgaged property to sale.** – (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O.2 R. 2.
>
> 2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended."

It is clear from sub-rule (1) of R. 14 of O. 34 of the Code that notwithstanding anything contained in O.2, R. 2 of the Code, a suit for sale in enforcement of the mortgage can be filed by the plaintiff-Bank and in fact that is the only remedy available to the Bank to enforce the mortgage since it would not be entitled to bring the mortgaged property to sale without instituting such a suit. Be it noted, that R. 14 has been enacted for the protection of the mortgagor. In the context of R. 14 of O.34 of the Code, it is difficult to uphold a plea based on O.2, R. 2. If the appellant wanted to show that the causes of action were identical in the two suits, it was necessary for the appellant to have marked in evidence the earlier plaint and make out that there was a relinquishment of a relief by the plaintiff, without the leave of the Court. Even then, the effect of R. 14 will remain to be considered.

That apart, the cause of action for recovery of money based on a medium term loan transaction simplicitor or in enforcement of the hypothecation of the bus available in the present case, is a cause of action different from the cause of action arising out of an equitable mortgage, though the ultimate relief that the plaintiff-Bank is entitled to is the recovery of the term loan that was granted to the appellant. On the scope of O. 2, R.2, the Privy Council in *Payana Reena Saminatha and another v. Pana Lana palaniappa (XLI Ind App 142)* has held that O.2, R. 2 is directed to securing an exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes

of action, even though they may arise from the same transactions. In *Mohammad Khalil Khan and others v. Mahbub Ali Mian and others (AIR 1949 PC 78 : (75 Ind App 121),* the Privy Council has summarised the principle thus :

> "The principles laid down in the cases thus far discussed may be thus summarised :
>
> (1) The correct test in cases falling under O.2, R. 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit." *Moonshee Buzloor Ruheem v. Shumsunnissa Begum (1867-11 MIA 551 : 2 Sar 259 PC)* (Supra).
>
> (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. *Read v. Brown (1889-22 QBD 128 : 58 LJQB 120)* (supra)
>
> (3) If the evidence to support the two claims is different, then the causes of action are also *different. Brundsden v. Humphrey (1884-14 QBD 141 : 53 LJQB 476)* (supra)
>
> (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. *Brundsden v. Humphrey (1884-14 QBD 141 : 53 LJQB 476)* (supra)
>
> (5) The causes of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers ..... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. *Muss. Chandkour v. Partab Singh (15 IA 156 : 16 Cal 98 PC)* (supra). This observation was made by Lord Watson in a case under S. 43 of the Act of 1882 (corresponding to O.2, R. 2), where plaintiff made various claims in the same suit."

A Constitution Bench of this Court has explained the scope of the plea based on O.2, R.2 of the Code in *Gurbux Singh v. Bhoorala* (supra). It will be useful to quote from the head note of that decision :

> "Held : (i) A plea under O.2, R.2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under O.2, R. 2 of the Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. In other words a plea under O.2, R. 2 of the Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction

what those facts might be with reference to the reliefs which were then claimed. On the facts of this case it has to be held that the plea of a bar under O.2, R. 2 of the Code should not have been entertained at all by the trial Court because the pleadings in Civil Suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under O. 2, R.2 (3) of the Code should succeed the defendant who raises the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief (iii) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed."

It is not necessary to multiply authorities except to notice that the decisions in *Sidramappa v. Rajashetty and others, (1970) 3 SCR 319; Deva Ram and another v. Ishwar Chand and another, (1995) Supp 4 SCR 369 and State of Maharashtra and another v. M/s. National Construction Company, Bombay and another, (1996) 1 SCR 293* have reiterated and re-emphasised this principle.

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201. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17 and Proviso

Amendment of written statement – Proviso creates a bar – Amendment filed after evidence of three plaintiff witnesses – No ground why amendment could not be brought before the commencement of trial – Granting amendment in such a situation – Serious prejudice may cause to the other parties.

Trial commences – When issues are settled and case is set down for recording evidence.

Ajendraprasadji N. Pande & Anr. v. Swami Keshavprakeshdasji N. & Ors.

Reported in AIR 2007 SC 806

Held:

We have carefully perused the pleadings and grounds which are raised in the amendment application preferred by the appellants at Ex. 95. No facts are pleaded nor any grounds are raised in the amendment application to even remotely contend that despite exercise of due diligence these matters could not be raised by the appellants. Under these circumstances, the case is covered by proviso to Rule 17 of Order 6 and, therefore, the relief deserves to be denied. The grant of amendment at this belated stage when deposition and evidence of three witnesses is already over as well as the documentary evidence is already tendered, coupled with the fact that the appellants' application a: Exh, 64 praying for recasting of the issues having been denied and the said order never having been challenged by the appellants, the grant of the present amendment as

sought for at this stage of the proceedings would cause serious prejudice to the contesting respondents – original plaintiffs and hence it is in the interest of justice that the amendment sought for be denied and the petition be dismissed.

An argument was advanced by Mr. Parasaran that affidavit filed under Order 18, Rule 4 constitutes Examination-in-Chief. The marginal note of Order 18, Rule 4 reads recording of evidence. The submission is that after the amendments made in 1999 and 2002 filing of an affidavit which is treated as examination-in-chief falls within the amendment of phrase recording of evidence.

It is submitted that the date of settlement of issues is the date of commencement of trial. [*Kailash vs. Nankhu & Ors., 2005 AIR SCW 2346].* Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in- chief as date of commencement of trial, the matter will fall under proviso to Order 6, Rule 17, CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter- affidavit which proves lack of due diligence on the part of the defendant Nos. 1 and 2 (appellants).

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The above averment, in our opinion, does not satisfy the requirement of Order VI, Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held by this Court in *Kailash vs. Nankhu & Ors.* (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

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202. CIVIL PROCEDURE CODE, 1908 – Order VII Rule 10 and Sections 16 (b) and 16 (d), proviso & Section 20

Return of plaint – What is to be considered ? Meaningful reading of the plaint averments to find out the real intention – Suit for partition, declaration and injunction of immovable properties – Situated beyond the jurisdiction of the Court – Held, Ss. 16(b) and 16 (d) will be applicable – Proviso of S. 16 attracts only where relief could be obtained by a personal obedience to the decree by the defendants or compensation for wrong to immovable property – S. 20 is residuary in nature and it is attracted only where S.16 has no relevance.

Begum Sabiha Sultan v. Nawab Mohd. Mansur Ali Khan and others

Judgment dated 12.04.2007 passed by the Supreme Court in Civil Appeal No. 1921 of 2007, reported in (2007) 4 SCC 343

Held :

Reading the plaint as a whole in this case, there cannot be much doubt that the suit is essentially in relation to the relief of partition and declaration in respect of the properties situate in Village Pataudi, Gurgaon, outside the jurisdiction of court at Delhi. It is no doubt true that there is an averment that an alleged oral will said to have been made at Delhi by the deceased mother and presumably relied on by Defendants 1 and 2 was never made. But on our part, we fail to understand the need for claiming, such a negative declaration. After all, the plaintiff can sue for partition, rendition of accounts and for setting aside the alienation effected by Defendant 2 without the junction of the plaintiff on a claim that the plaintiff is also one of the heirs of the deceased mother. If in such a suit, the defendants propound any oral will as excluding the plaintiff from inheritance, the burden would be on them to establish the making of such an oral will and the validity thereof. The negative declaration sought for by the plaintiff appears to us to be totally superfluous and unnecessary in the circumstances of the case. It may be noted that it is not the case of the plaintiff that an oral will was made at Delhi. It is the case of the plaintiff that no oral will was made at Delhi. It is debatable whether in such a situation it can be said that any cause of action arose at all within the jurisdiction of the court at Delhi. On a reading of the plaint, the trial Judge and the Division Bench have come to the conclusion that in substance the suit was one relating to immovable property situate outside the jurisdiction of the trial court in Delhi and hence the plaint had been presented in a court having no jurisdiction to entertain the suit. We are inclined to agree with the said understanding of the plaint by the trial Judge and the Division Bench, on a reading of the plaint as a whole.

On a reading of the plaint as a whole, it is clear, as we have indicated above, that the suit is one which comes within the purview of Sections 16 (b) and (d) of the Code. If a suit comes within Section 16 of the Code, it has been held by this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd., (2005) 7 SCC 791* that Section 20 of the Code cannot have application in view of the opening words of Section 20 "subject to the limitations aforesaid". This Court has also held that the proviso to Section 16 would apply only if the relief sought could entirely be obtained by personal obedience of the defendant. The relief of partition, accounting and declaration of invalidity of the sale executed in respect of immovable property situate in Village Pataudi, Gurgaon, could not entirely be obtained by a personal obedience to the decree by the defendants in the suit. We are in respectful agreement with the view expressed in the above decision. Applying the test laid down therein, it is clear that the present suit could not be brought within the purview of the proviso to Section 16 of the Code or entertained relying on Section 20 of the Code on the basis that three out of the five defendants are residing within the jurisdiction of the court at Delhi.

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203. CIVIL PROCEDURE CODE, 1908 – Order VIII Rule 6-A

Counter claim – Can be filed after filing of the written statement – It cannot be dismissed on the ground of limitation – It should be decided with the suit.

Atmaram Gangadhar Deshwali & Anr. v. Noormohammad & Ors.
Reported in AIR 2007 MP 81

Held :

From perusal of the record, it appears that counterclaim was not filed at the time of filing of the written statement but the same was filed subsequently. Learned Court below has also examined the counterclaim of limitation and has dismissed the same. Since the application was filed by the petitioners under Order VIII, Rule 6-A of the CPC, therefore, it was expected by the learned Court below that the counter - claim of the petitioners ought to have been decided in accordance with law. Since counter-claim has been dismissed on threshold even without recording of any evidence, therefore, the impugned order dated 15-12-2004 is hereby set-aside and the learned Court below is directed to decide the application filed by the petitioners for counter-claim along with suit after giving an opportunity to file the written statement to the respondents and also after framing of issues and recording of evidence.

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204. CIVIL PROCEDURE CODE, 1908 – Order XIV Rule 2

Preliminary issues, determination of – Law explained.

Question of valuation and of limitation raised in written statement – Questions being mixed questions of law and fact – Cannot be decided as preliminary issues.

Shadab Grih Nirman Sahakari Sanstha Maryadit, Bhopal v. Parita Grih Nirman Sahakari Samity Maryadit, Bhopal and another
Reported in 2007 (2) MPLJ 524

Held:

First we advert to the question of payment of Court fee : Earlier the matter has travelled to this Court, this Court held in W.P. No. 3615/2006 and W.P. No. 4199/2006 as per order dt. 20-5-2006 that ad valorem Court fee was required to be paid at Rs. 18 lakh, the valuation of the sale-deed. If it was a case that valuation of the land had increased to Rs. 8 crores approximately and it was necessary to make the payment of Court fee for possession. It appears prima facie that ad valorem Court fee paid as per valuation of the sale-deed was enough. Valuation at present whether it was 8 crores was a question of fact, it could not have been decided as preliminary issue. Trial Court has to decide such question of valuation not as preliminary issue if it is raised, in written statement it would be adverted to only at the time final decision after recording evidence.

Coming to the question of limitation, in our considered opinion, this question being mixed question of law and fact could not have been decided as a preliminary issue, in the peculiar facts and circumstances of the case considering the nature of transaction, as per the plaint the sale consideration was not to be paid at the time of execution of sale-deed on 2-12-2000. The sale consideration was required to be paid w.e.f. 7-7-2001 on 7th day of each of succeeding month by way of post dated cheques. Instalments were to be over on a subsequent date on 7-10-2002. Thus, it was not possible for the plaintiff as per the plaint averments if averments are taken to be correct, to know that intention of the defendants was not to make the payment in future in instalments and it is not the case that even in the case of default of one instalment entire amount became recoverable at once. Thus, prima facie the suit was filed within a period of 3 years from the date of last instalment and dates of several instalments fell within the zone of 3 years. We hold that at was not proper for the trial Court to dismiss the suit as barred by limitation at threshold under Order 7 Rule 11 of the Civil Procedure Code. Apart from that may be for the first time plea has been raised for invoking section 14 of the Limitation Act, it is apparent from averments made to the plaint that the dispute for declaring the sale-deed as void was raised before the Registrar, Co-operative Societies, it was dealt with by Dy. Registrar, the nominee of the Registrar, the period spent in proceedings under section 64 was claimed to be excluded for considering the aforesaid plea also, it was necessary to record the evidence, consider the pleadings made in the application filed under section 64 of the Act, the issues involved and the order passed in the dispute under section 64. It was also to be considered whether such a dispute was raised bona fidely and perused with due diligence and good faith. All these questions being mixed questions of law and fact could not have been decided by way of preliminary issues, thus, we have no hesitation in setting aside the dismissal of the suit as barred by limitation and we direct the trial Court to decide the question of limitation also after recording evidence at the time of final hearing.

The Apex Court in *Balasaria Construction (P) Ltd. vs. Hanuman Seva Trust and others, (2006) 5 SCC 658* has laid down that the words "barred by any law" in Rule 11(d) of Order 7, Civil Procedure Code would also include barred by the law of limitation. The Apex Court has held that the suit cannot be dismissed as barred by limitation without proper pleadings, framing of issue of limitation and taking of evidence. Question of Limitation is a mixed question of law and fact and ex facie on reading of the plaint, suit cannot be held to be barred by limitation.

Shri Ravindra Shrivastava, learned Sr. counsel has relied upon the decision of the Apex Court in *Ramti Devi (Smt.) vs. Union of India, (1995) 1 SCC 198* in which the sale-deed was executed by the defendant to discharge pre-existing debts and got registered and came to the knowledge of the plaintiff on the same day, suit for declaration that the plaintiff was the owner of the house and that the said sale deed, having been executed to stifle the proposed prosecution of the defendant, was void and not binding on the plaintiff, filed beyond three years

from the date of execution/registration of the sale-deed, was held to be barred by limitation applying the Article 59 of the Limitation Act. Facts are quite different in the instant case. In the said case cause of action had accrued on date of execution of sale-deed itself. Here there are two other questions, as per plaint, consideration was agreed to be paid later in instalment and relief has been claimed for payment of sale consideration along with interest. The sale consideration was payable in monthly instalments. Payment of sale consideration in an instalment had to commence after six months of execution of the sale-deed. Thus, prima facie limitation could not have been computed w.e.f. 2-12-2000, the date of execution of the sale-deed, but, after defaults were made cause of action accrued as per the plaint due to non–payment of sale consideration on a future date. It is not a case of fraud played while getting the sale-deed executed or a case of impersonation. Thus, the facts are different in the instant case.

In *Prem Singh and ors. vs. Birbal and others, (2006) 5 SCC 353* the Apex Court has dealt with Article 59 with reference to void and voidable transactions as referred in section 31 of the Specific Relief Act, 1963, dealing with cancellation of documents. When a document is valid, no question arises of its concellation 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 law, as it would be a nullity. However, a suit is filed by a plaintiff for cancellation of transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be applicable. Article 59 would apply to such case of instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. In the instant case in view of peculiar transaction as set out in plaint we find that there is mixed question of law and fact to be decided when limitation envisaged under Article 59 commenced. Article 59 reads thus:

	Description of suit limitation	**Period of begins to run**	**Time from which period**
59.	To cancel or set aside an instrument or decree on for the rescission of a contract	Three years	When the facts entitling the plaintiff to have instrument or decree cancelled or set aside or the contract rescinded first become known to him.

The limitation under Article 59 of the Limitation Act begins to run when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. As already mentioned by us in the instant case consideration was agreed to be paid as per plaint on subsequent dates running w.e.f. 7-7-2001 to 7-10-2002. Thus, the correctness of the aforesaid averment is a question which has to be gone by the Court-below after recording evidence. Thus, applicability of Article 59 has to be decided in the context whether the consideration became payable on the date of

execution of the sale-deed itself or on subsequent date as mentioned in the plaint. There is no dispute with proposition laid down by the Apex Court, we respectfully follow it, but, such a question depends on investigation of facts, correctness of averments made in the plaint. Thus, this question has to be decided at a subsequent, i.e. final stage being mixed question of law and fact not as a preliminary issue.

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205. CIVIL PROCEDURE CODE, 1908 – Order XVII, Rule 2 Explanation
Before application of the Explanation of O. XVII R.2 of the Code, Court has to record its satisfaction.
Mahalaxmi Traders and another v. Sudarshan Industries
Reported in 2007 (2) MPLJ 174

Held :

As has been seen above that on 29.8.2006 when an Advocate other than arguing counsel made application for time for evidence of defendants the Court below refused the prayer, but did not record satisfaction in terms of explanation to Order XVII, Rule 2 of the Code that the evidence of defendants on record was sufficient for disposal of the suit. It is imperative for the Court to record its satisfaction in this perspective when it intends to use the provisions of the said explanation and in the absence of recording of such satisfaction application of explanation is not attracted. In this connection beneficial reference with reverence is made to *(2003) 5 SCC 641, B. Janakiramaiah Chetty vs. A.K. Parthasarthi and others.*

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206. CIVIL PROCEDURE CODE, 1908 – Order XXI Rules 84 & 85
Meaning of the term 'immediately' – Not instantaneously but within reasonable time – Auction sale – Confirmed within a period of 30 days from date of acceptance of bid – Cannot be sole ground to set aside sale after 8 years.
Rosali V. v. Taico Bank & Ors.
Reported in AIR 2007 SC 998

Held :

The term immediately has two meanings, one, indicating the relation of cause and effect and the other, the absence of time between two events. In the former sense, it means proximately, without intervention of anything, as opposed to 'immediately'. In the latter sense, it means instantaneously. It is a well settled principle of interpretation of a statute that where literal meaning leads to anomaly and absurdity, it should be avoided. It is equally well settled that the Parliament must be held to have intended to lay down a reasonable statute unless a plain meaning of the Act leads to different conclusion. It is trite that a statute must be read reasonably. The principles of *"Actus curiae neminem gravabit and lex non cogit ad impossibilia* have also to be kept in mind while interpreting a statute. The term "immediately" in O. 21, R 84 is, thus, required to be construed as

meaning with all reasonable speed, considering the circumstances of the case. In a given situation, the term "immediately" may mean "within reasonable time." Where an act is to be done within reasonable time, it must be done immediately.

The auction deal was accepted at 4.00p.m. As the banks at that time were closed Executing Court directed deposit of the stipulated 25% bid amount on the next day. The purchaser deposited the 25% of bid amount on next day and proved his intention to abide by the orders. Having regard to the order of Court and the other circumstances of the case the fact that appellant's predecessor-in-interest was not able to deposit the 25% of the bid amount upon acceptance of bid did not render the auction sale void.

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We do not know under what circumstances the decree-holder himself filed an application for setting aside the sale. Only because the sale was confirmed within a period of 30 days from the date of acceptance of the bid, the same by itself, in our opinion, was not decisive to set aside the sale after 8 years. We, therefore, are unable to agree with the findings of the Executing Court or the High Court.

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207. CIVIL PROCEDURE CODE, 1908 – Order XXII Rule 4

Legal representative of deceased – Is entitled to file written statement to make defence appropriate to his character as L.R.

Munna Lal and others v. Chironjilal and others

Reported in 2007 (2) MPLJ 104

Held:

In the present case, learned Court below while rejecting the prayer made for taking the written statement on record has only held that the written statement cannot be taken on record and for doing so has placed reliance on a judgment of Supreme Court, in the case of *Gajraj v. Sudha, 1999 (II) MPWN 60.* In the aforesaid case Supreme Court has only held that a legal heir cannot take plea inconsistent to that of a predecessor. However, this judgment does not indicate anything to suggest that a legal heir is not entitled to take a defence appropriate to his character as indicated by the Supreme Court in the judgments in the case of *J.C. Chatterjee and others v. Shri Srikishan Tandon and another, AIR 1972 SC 2526* and *Vidhyawati v. Man Mohan and others, AIR 1995 SC 1653.* The Court below has not examined the matter in accordance with law. It was incumbent upon the learned Court to examine both the written statements and permit the petitioners to raise such defence which they could raise in accordance with law keeping in view the defence apprpriate to their character as a legal representative.

Learned Court having decided the question without considering the legal principle appropriately it is a fit case where matter should be remanded back to the court below for deciding the question again. Accordingly, this petition is allowed. Order impugned Annexure P/1 dated 22-12-2005 is quashed. Learned

Court is directed to re-examine the matter in the light of the legal principles as indicated hereinabove and decide it afresh after giving opportunity of hearing to the parties concerned. Learned Court after examining the pleadings now raised by the petitioner shall permit the petitioner to raise such pleadings as are permissible under the law.

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208. CIVIL PROCEDURE CODE, 1908 – Order XXII Rule 5

Legal representative brought on record – He steps into the shoes of original party– He cannot litigate his personal right as legal representative.

Shivmangal through LRs. v. Narainprasad and others

Reported in 2007 (2) MPLJ 445

Held:

A combined reading of section 8 to section 13 of the Hindu Succession Act, 1956 shows that there are four categories of heirs of a male dying intestate and lay down the general rule of succession to the inheritable property. Accordingly, the property of such deceased would devolve firstly upon the class I heirs specified in the Schedule and in absence of class I heir, upon Class II heir specified in the Schedule. In absence of class I or II heir, then upon agnates of the deceased and lastly in absence of above three, upon the cognates of the deceased.

From the family tree as mentioned in the plaint, it is clear that Shivcharanlal was one of the agnates i.e. first cousin from male side of the deceased. Definitely he was coming under the third category. Could he took precedence over Shivmangal? The answer is obviously no. Ramcharanlal was the real brother of Gouribai, mother of Shivmangal. Shivmangal was one of heirs covered by Item IV of class II heirs at the time of death of Remcharanlal, being sister's son. It is in this backdrop, trial Court rightly held that original plaintiff Shivcharanlal had no right to seek declaration and other reliefs in respect of the suit house. Trial Court also rightly rejected the claim of Shivmangal, who was simply substituted under Order XXII, Rule 5 in the cause title in place of Shivcharanlal on the basis of a Will alleged to have been executed in the favour of Shivmangal. Law in this regard is quite clear. A legal representative is brought on record to continue the suit or proceedings on the same cause of action on which the suit wa. 'nstituted by the deceased plaintiff. In other words, the legal representative step into the shoes of the original plaintiff and he cannot litigate his personal right as a legal representative. See *(1999) 3 SCC 109, Gajraj vs. Sudha and others.* In this view of the matter and the emerging legal position, no infirmity or illegality could be attributed to the judgment and decree of the trial Court so far as appellant/ plaintiff is concerned on that score.

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209. CIVIL PROCEDURE CODE, 1908 – Order XXXVII Rules 1 & 3 (5) Principles to be followed while granting leave to defend – Court may grant leave to defend even though defence appears to be moonshine – Court may impose condition that disputed amount should be paid into Court or otherwise secured.

Uma Shankar Kamal Narian and another v. M.D. Overseas Ltd. Judgment dated 14.03.2007 passed by the Supreme Court in Civil Appeal No. 1344 of 2007, reported in (2007) 4 SCC 133

Held:

According to learned counsel for the appellants the High Court was not justified in directing the entire decretal amount to be deposited after having held that leave to defend was to be granted.

Learned counsel for the respondent on the other hand submitted that the high Court's order is not only fair but it is equitable. The amount which appears to be prima facie undisputed is much more than the amount which the High Court has directed to deposit.

The position in law has been explained by this Court in *Milkhiram (India) (P) Ltd. v. Chamanlal Bros, AIR 1965 SC 1698 and Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687.* In *Sunil Enterprises v. SBI Commercial & International Bank Ltd., (1998) 5 SCC 354* the position was again highlighted and with reference to the aforesaid decisions it was noted as follows: (SCC pp. 356-57, para 4)

> "(a) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.
>
> (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend – the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.
>
> (d) If the defendant has no defence or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.
>
> (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured."

The said principles were recently highlighted in *Defiance Knitting Industries (P) Ltd. v. Jay Arts, (2006) 8 SCC 25*

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210. CONSTITUTION OF INDIA – Article 12

Expression 'State' as used in Art.12, meaning of – Law explained. M.P. State Co-operative Dairy Federation is 'State' within the meaning.

M.P. State Co-operative Dairy Federation and others v. Madan Lal Chourasia

Reported in 2007 (2) MPHT 485 (FB)

Held :

We find on reading the opinion of the Full Bench in the case of *Dinesh Kumar Sharma v. M.P. Dugdh Mahasangh Sahakari Samiti, Maryadit, 1993 MPLJ 786,* that the Full Bench noted six authoritative tests laid down by the Supreme Court in the cases of International Airport Authority (AIR 1979 SC 1628) and *Ajay Hasia's case* (AIR 1981 SC 487) to decide whether a body would be an instrumentality of the State Government and would be 'State' within the meaning of Article 12 of the Constitution. The Full Bench also found that in latter decisions of the Supreme Court in the case of *Tekraj Vasandi (AIR 1988 SC 469) and Unni Krishanan, J.P. Vs. State of A.P. (1993 AIR SCW 863),* the Supreme Court had reiterated the aforesaid authoritative tests culled out in the case of *Ajay Hasia* (supra) These tests were : (i) whether the entire share capital of the Corporation is held by Government. (ii) whether the financial assistance of State is so much as to meet almost entire expenditure of the Corporation, (iii) whether the Corporation enjoys monopoly status, which is State conferred or State protected, (iv) whether the State's control on the Corporation is deep and pervasive, (v) whether the functions of the Corporation are closely related to Government functions, and (vi) whether the Department of the Government is transferred to a Corporation. The Full Bench thereafter applied these six authoritative tests to the Federation in Paragraphs 14, 15, 16, 17, 18 and 19 of its opinion as reported in 1993 MPLJ 783, at Pages 293, 294 and 295 and found that : (i) the State Government did not hold the entire share capital of the Federation (Para 14), (ii) the financial assistance of the State is not so much as to meet almost the entire expenditure of the Federation (Para 15), (iii) the Federation did not enjoy the monopoly status which was State conferred or State protected (Para 16), (iv) under the bye-laws of the Federation, there was no deep and pervasive control over the federation inasmuch as the State Government did not have total control on the Board of Directors or the general body or the management of the federation (para 17), (v) functions of the federation are not closely related to Government functions such as health, safety or general affairs of public (Para 18), and (vi) no Government department was transferred to the Federation (Para 19).

But we find that the six authoritative tests culled out in the case of *Ajay Hasia* (supra), were reconsidered in the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others, (2002) 5 SCC 111,* by a seven Judge

Bench of the Supreme Court and Ruma Pal, J., speaking for the majority of the Judges held in Paragraph 40 of the judgment as reported in SCC :

> "The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

In the opinion of the majority Judges in the case of *Pradeep Kumar Biswas* (supra), therefore, for determining whether a body is to be considered to be 'State' within the meaning of Article 12 of the Constitution, the Court in the light of facts established has to find out whether the body is financially, functionally and administratively dominated by or under control of the Government and whether such control is pervasive ?

In the case of *Pradeep Kumar Biswas* (supra), the facts were that the Council of Scientific and Industrial Research (for short 'CSIR'), a body registered under the Registration of Societies Act, 1860, formed by initial capital of rupees ten lakhs provided by the Central Government and at least 70% of its funds were from grants made by the Government of India. The Prime Minister of India was the ex-office President of the CSIR, the Minister in-charge of the ministry or department was the ex-officio Vice President of the CSIR and the Minister in-charge of Finance and Industry was also member of the CSIR. The Governing Body of the CSIR consisted of the Director General, Member Finance, Directors of two national laboratories, two eminent Scientists/Technologies, and heads of two scientific departments/ agencies of the Government of India. The Governing Body was required to administer, direct and control the affairs and funds of the CSIR and to exercise all the powers of the CSIR subject nevertheless in respect of expenditure to such limitation as the Government of India may, from time to time, impose. The Governing Body had also the power to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India. The Central Civil Services (Classification, Control and Appeal) Rules and the Central Civil Services (Conduct) Rules were applicable to the employees of the CSIR and the scales of pay applicable to all the employees of CSIR were those prescribed by the government of India for similar personnel, and in regard to all matters concerning service conditions of employees of CSIR, the Fundamental and Supplementary Rules framed by the Government of India and such other rules and/orders issued by the Government of India from time to time, were also applicable. Further, the budget estimates of the CSIR were to be prepared

by the Governing Body, keeping in view the instructions issued by the Government of India, from time to time and the accounts of the CSIR were required to be audited by the Comptroller and Auditor General and placed before the table of both Houses of Parliament. On these and other facts, the majority judgment held that the dominant role played in the CSIR was evident and that CSIR is 'State' within the meaning of Article 12 of the Constitution.

After the aforesaid decision of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra), the Supreme Court had the occasion to consider in the case of *General Manager, Kisan Sahakari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad and others, (2003) 8 SCC 639, whether Kisan Sahakari Chini Mills Ltd.* (for short 'the Mill'), a Co-operative Society registered under the Uttar Pradesh Co-operative Societies Act, 1965, was a 'State' within the meaning of Article 12 of the Constitution of India. The facts were that the Government of Uttar Pradesh held only 50% shares in the Mill. Under the bye-laws of the Mill, membership was open to the cane-growers, other societies, Gram Sabha, State Government etc. and under the bye-law 52, a Committee of Management consisting of fifteen members was constituted, out of whom, five members were required to be elected by the representatives of individual members, three out of the Co-operative Society and other institutions and two representatives of financial institutions and five members were required to be nominated by the State Government. The ratio of the nominees of the State Government in the Committee of the Mill was only 1/3rd and the management of the Committee was dominated by 2/3rd non-Government members. Under the bye-laws, the State Government could neither issue any direction to the Mill nor determine its policy and the Mill was an autonomous body. On these facts, the Supreme Court held that the State Government had no control at all in the functioning of the Mill much less a deep and pervasive one. The Supreme Court, thus, held that the Mill was not an instrumentality nor an agency of the Government and was not State within the meaning of Article 12 of the Constitution.

The tests laid down in the case of *Pradeep Kumar Biswas* (supra), were applied in *Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan Nigam [(2005) 1 SCC 149]* for determining whether *U.P. Raj Karmachari Kalyan Nigam* (for short 'the Corporation'), a Society formed and registered under the Societies Registration Act, 1860, was 'State' within the meaning of Article 12 of the Constitution. The facts were that the Corporation was an agent or stockist on behalf of the Government and the members and office bearers of the Corporation were all executive officers of the State representing different departments concerned with civil supplies and were in the management of the Corporation in the capacity as officers of the State Government. The financial control of the Corporation was to a large extent with the State Government inasmuch as 100% grant was made for payment of the salary of the employees of the headquarters of the Corporation and 75% grant was given for employees working in the canteens of the Corporation and the working capital to the Corporation was

made available by the Food Department to the extent of 10 corers. On these facts, the Supreme Court held that there is complete functional control of the Corporation by the State and this was evident from the fact that the officers of the State were ex-officio members and office bearers of the Corporation and that even day to day functioning of the Corporation was watched, supervised and controlled by the various departmental authorities of the State particular the Department of Food and Civil Supplies. On these facts, the Supreme Court held that the multiple tests stated in *Pradeep Kumar Biswas* (supra), were fully satisfied for concluding that the Corporation was an agency and instrumentality of the State and is covered under the definition of 'State' in Article 12 of the Constitution.

The law as laid down by the Supreme Court in Paragraph 40 of the judgment in the case of *Pradeep Kumar Biswas* (supra), quoted above was quoted by two Judges Bench of the *Supreme Court in Gurucharan Singh Vs. Registrar, Co-operative Societies, H.P. and others , (2005) 7 SCC 565,* in which the question to be decided was whether the respondent Co-operative Society was 'State' within the meaning of Article 12 of the Constitution. After having found that the basic factual aspects were not placed, the Supreme Court held that it would be appropriate for the High Court to examine the question in the background of what has been stated in the case of Pradeep Kumar Biswas (supra).

The tests laid down in the case of *Pradeep Kumar Biswas* (supra), were again applied by the two Judges Bench of the Supreme Court in the case of *S.S. Rana Vs. Registrar, Co-operative Societies and another, J.T. 2006 (5) SC 186,* in which the question to be decided was whether Kangra Central Co-operative Bank Ltd. (for short 'Co-operative Bank') registered under the Himachal Pradesh Co-operative Societies Act, 1968, (for short 'the Act of 1968') was 'State' within the meaning of Article 12 of the Constitution. The Supreme Court found that the functions of the Co-operative Bank were only regulated in terms of the provisions of the Act of 1968 and the State had no say in the functions of the Co-operative Society. That the State did not exercise any direct or indirect control over the affairs of the Co-operative Bank under the bye-laws made under the Act of 1968 and the State had the power only to nominate one director and not the majority of directors and, therefore, the State did not exercise any control over the affairs of the Co-operative Bank. The Supreme Court also found that the State is not a majority shareholder of the Co-operative Bank. Accordingly, the Supreme Court held that the Co-operative Bank did not satisfy any of the tests laid down in the case of Pradeep Kumar Biswas (supra), and is not 'State' within the meaning of Article 12 of the constitution.

Keeping in mind the tests laid down by the majority judgment in the case of *Pradeep Kumar Biswas* (supra), and the manner in which the said tests have been applied in the subsequent decisions of the Supreme Court discussed above, we may now examine whether the Federation is a body which can be held to be State under Article 12 of the Constitution. The Federation was registered as a

Co-operative Society under the M.P. Co-operative Societies Act, 1960 on or about 13.5.1980. Bye-law 3.1 of the Bye-laws of the Federation states that the main object of the Federation comprised of conducting various programmes of manufacture, collection, processing, distribution and sale of milk and milk products for the economic development of the farmers and for developing and safeguarding the milk business, milk producing animals and for the economic development of the groups engaged in milk production and spreading and developing other joint activities. Bye-law 3.2 states that for accomplishing the object indicated in bye-law 3.1, the Federation will perform various other functions mentioned therein. It is not necessary to refer the functions of the Federation stated in bye-law 3.2 of the bye-laws of the Federation as the main subject of the Federation discussed above clearly show that the work of the Federation relates to economic development of farmers, who are engaged in production and sale of milk in the State of Madhya Pradesh and this work has been taken up by the State Government through the agency of the Federation because development of milk and milk products and economic development of farmers carrying the business of sale of milk and milk products are part of the functions of a welfare State.

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On a reconsideration of the facts as placed before us we hold that since the year 2001 when the Federation took the impugned decisions to compulsory retire its employees, the Federation was financially, administratively and functionally dominated or controlled by the Government and that such domination or control is pervasive and, therefore, the Federation is State within the meaning of Article 12 of the Constitution of India as per the law laid down in the majority judgment of the Supreme Court in the case of Pradep Kumar Biswas (supra). The opinion of the Full Bench in the case of Dinesh Kumar Sharma (supra), based on the six authoritative tests laid down in the case of Ajay Hasia (supra), as applied to the facts then found by the Full Bench that the Federation is not State within the meaning of Article 12 of the Constitution, no longer holds good. Our opinion in this judgment that the Federation is 'State' within the meaning of Article 12 of the Constitution will apply to all cases pending before the High Court and other Courts and which may arise in future, and will not apply to those cases which have been finally disposed of.

The consequence of our opinion that the Federation is 'State' within the meaning of Article 12 of the Constitution of India is that a writ petition will be maintainable against the Federation for violation of fundamental rights. But this is not to say that in every case, the Court will have to entertain a writ petition against the Federation irrespective of whether an alternative efficacious remedy is or is not available to the petitioner. The Court will or will not entertain a writ petition depending upon the facts of the each case and on the nature of right violated.

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211. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (d) & (o)

(i) Jurisdiction of Consumer Forum – Unless there is an express provision prohibiting the consumer forum to exercise its jurisdiction over the matter which falls within the jurisdiction of the Civil Court, the Forum has jurisdiction to entertain the matter which other Courts would also have jurisdiction to adjudicate – The Act being a beneficial legislation, should receive liberal construction.

(ii) Consumer Forum has jurisdiction to adjudicate a complaint regarding deficient and negligent medical service rendered by the E.S.I. doctor or dispensary to appellant's wife.

Kishore Lal v. Chairman, Employees' State Insurance Corpn.

Judgment dated 08.05.2007 passed by the Supreme Court in Civil Appeal No. 4965 of 2000, reported in (2007) 4 SCC 579

Held:

(i) The trend of the decisions of the Supreme Court is that the jurisdiction of the Consumer Forum should not and would not be curtailed unless there is an express provision prohibiting the Consumer Forum to take up the matter which falls within the jurisdiction of civil court or any other forum as established under some enactment. The Supreme Court has gone to the extent of saying that if two different fora have jurisdiction to entertain the dispute in regard to the same subject, the jurisdiction of the Consumer Forum would not be barred and the power of the Consumer Forum to adjudicate upon the dispute could not be negated.

Spring Meadows Hospital v. Harjol Ahluwalia, (1998) 4 SCC 39: AIR 1998 SC 1801 ; State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412 : AIR 2003 SC 1043; Secy. Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha, (2004) 1 SCC 305, relied on

The submission of ESI Corporation that the claim made by the appellant before the Consumer Forum raises a dispute in regard to damages for negligence of doctors in the ESI hospital/dispensary and would tantamount to claiming benefit and the amount under the ESI Act provisions and would fall within Section 75 (1) (e) and, therefore, it is the Employees' Insurance Court alone which has the jurisdiction to decide it, cannot be accepted.

The appellant's claim has no relation to any of the benefits which are provided in the Employees' State Insurance (Central) Rules, 1950 for which the claim can be made in the Employees' Insurance Court. The appellant's claim is for damages for the negligence on the part of ESI hospital/dispensary and the doctors working therein. A bare perusal of the provisions of Sections 75(1) (a) to (g) clearly shows that it does not include a claim for damages for medical negligence, like in the present case.

(ii) The cause of action for negligence arises only when damage occurs and thus the claimant has to satisfy the court on the evidence that the three ingredients of negligence, namely, (a) existence of duty to take care; (b) failure

to attain that standard of care; and (c) damage suffered on account of breach of duty are present, for the defendant to be held liable for negligence. Therefore, the claimant has to satisfy these ingredients before he can claim damages for medical negligence of the doctors and that could not be a question which could be adjudicated upon by the Employees' Insurance Courts which have been given specific powers of the issues which they can adjudicate and decide. Claim for damages for negligence of the doctors or the ESI hospital/dispensary is clearly beyond the jurisdictional power of the Employees' Insurance Court. An Employees' Insurance Court has jurisdiction to decide certain claims which fall under Section 75(2) of the ESI Act. A bare reading of Section 75(2) also does not indicate, in any manner, that the claim for damages for negligence would fall within the purview of the decisions being made by the Employees' Insurance Court. Further, it can be seen that any claim arising out of and within the purview of the Employee's Insurance Court is expressly barred by virtue of Section 75 (3) to be adjudicated upon by a civil court, but there is no such express bar for the Consumer Forum to exercise the jurisdiction even if the subject-matter of the claim or dispute falls within Sections 75(1) (a) to (g) or where the jurisdiction to adjudicate upon the claim is vested with the Employees' Insurance Court under Sections 75(2)(a) to (f) if it is a "consumer dispute" falling under the CP Act.

Jacob Mathew v. State of Punjab, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369, relied on

Ratanlal & Dhirajlal : Law of Torts, 24th Edn. 2002, Justice G.P. Singh (Ed.), relied on

Hence, it is held that the appellant is a consumer within the ambit of Section 2(1) (d) of the Consumer Protection Act, 1986 and the medical service rendered in the ESI hospital/dispensary by the respondent Corporation falls within the ambit of Section 2(1)(o) of the Consumer Protection Act and, therefore, the Consumer Forum has jurisdiction to adjudicate upon the case of the appellant. It is further held that the jurisdiction of the Consumer Forum is not ousted by virtue of Sections 75(1) or (2) or (3) of the Employees' State Insurance Act, 1948.

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212. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (o)
Meaning of 'service' – Railways Hospital set up by Union of India for Railways employees as part of service conditions – Service rendered by such hospitals are not gratuitous service – Such service falls within the definition of 'service' u/s 2 (1) (o) of the Act – Forum has jurisdiction to entertain complaints regarding deficiencies of such Railways Hospitals – Law laid down in the case of *State of Orissa v. Divisional Manager, LIC, (1996) 8 SCC 655* expressly overruled.
Laxman Thampappa Kotgiri v. G.M. Central Railway and others
Judgement dated 06.01.2005 passed by the Supreme Court in Civil Appeal No. 171 of 2004, reported in (2007) 4 SCC 596

Held:

There is no dispute that the hospital in question has been set up for the purpose of granting medical treatment to the railway employees and their dependants. Apart from the nominal charges which are taken from such an employee, this facility is part of the service Conditions of the Railway employees. *Indian Medical Assn. v. V.P. Shantha, (1995) 6 SCC 651* has made a distinction between non-governmental hospital/nursing home where no charge whatsoever was made from any person availing of the service and all patients are given free service [vide para 55(6) at p.681] and services rendered at government hospital/ health centre/dispensary where no charge whatsoever is made from any person availing of the services and all patients are given free service [vide para 55(9)] on the one hand and service rendered to an employee and his family members by a medical practitioner or a hospital/nursing home which are given as part of the conditions of service to the employee and where the employer bears expenses of the medical treatment of the employee and his family members [para 55 (12)] on the other. In the first two circumstances, it would not (sic) be free service within the definition of Section 2(1) (o) of the Act. In the third circumstance it would (sic not) be.

Since it is not in dispute that the medical treatment in the said hospital is given to employees like the appellant and his family members as part of the conditions of service of the appellant and that the hospital is run and subsidised by the appellant's employer, namely, the Union of India, the appellant's case would fall within the parameters laid down in para 55(12) of the judgment in and not within the parameters of either para 55 (6) or para 55 (9) of the said case.

It is true that the decision in *State of Orissa v. Divisional Manager, LIC, (1996) 8 SCC 655* relied upon by the learned counsel for the respondents appears to hold to the contrary. However, since the decision is that of a smaller Bench and the decision in *V.P. Shantha case* (supra) was rendered by a larger bench, we are of the opinion that it is open to this Court to follow the larger Bench which we will accordingly do.

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213. CRIMINAL PROCEDURE CODE, 1973 – Section 127 (3)
Order of awarding maintenance passed u/s 125 – Application u/s 127(3) is filed imputing order on ground of second marriage – Staying order of maintenance not proper.
Shabnam v. Jamil Khan
Reported in 2007 (2) MPLJ 111

Held :

On perusal of the order dt. 17.3.2005, it appears that one application under section 127 (3) of Criminal Procedure Code was filed on behalf of the respondent, alleging therein that the petitioner has remarried on 5th June 2001. The learned counsel appeared on behalf of the petitioner had refused to receive

the notice about that application. In view of that it was ordered that till disposal of that application under section 125 (3) of Criminal Procedure Code, no order about further recovery could be passed against the respondent, particularly, in view of the fact that he has already served jail sentence with regard to the arrears. By non-impugning that order by the petitioner, the argument of the respondent that the petitioner is estopped or prohibited by the principles of res judicata from impugning the second order staying the recovery cannot be sustained. The earlier order was not a final decision of the case, it was passed through the proceedings and as argued by Shri Gupta on behalf of the petitioner, that order passed on 17th March, 2005 had automatically became ineffective, hence there was no necessity for the petitioner to challenge that order in the higher Court. Awarding maintenance is always considered for the sake of livelihood for the wife or children. Mere filing an application under section 127(3) of Criminal Procedure Code, impugning that order of maintenance on the ground of second marriage, ought not to be stayed. In such cases, the learned Magistrate ought to have decided the application at an early stage. In view of this granting stay against the recovery of the maintenance allowance by the learned Magistrate appears to be an abuse of the process of the Court, which requires to be set aside.

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For the present, sub-section (3) of section 125 and first proviso appended therein are relevant. On perusal of the aforementioned provisions the following status appears –

1. That the person against whom an order of maintenance is passed fails to comply the same and;
2. That the person in whose favour the order of maintenance is passed applies within a period of one year from the date it has become due and;
3. That even after issuance of warrant of levy, the amount remains unpaid.

   Then the person against whom the order was passed becomes liable to imprisonment for a term which may extend to one month or until payment if sooner made. Meaning thereby that during undergoing imprisonment if amount is paid, then before the period of one month, he can be released.
4. That such imprisonment cannot exceed one month for one default whether that default exceeds one month. Meaning thereby, if an application is filed for recovery of an amount of last 12 months and that amount or any part thereof remains unpaid as despite demand, a warrant of levying the same, shall be issued and if even thereafter full amount of 12 months or any part thereof remains unpaid, then for that default the person against whom the order was passed, becomes liable for imprisonment only for one month as mentioned hereinabove.

Because that default of 12 months will be counted as single default as demanded for one time. It is pertinent to mention here, that it is not necessary for a person in whose favour the order was passed to wait for a period of 12 months or any other period exceeding one month. He can apply for recovery of the maintenance amount even for a period of one month and if that amount remains unpaid and as mentioned above for that period of one month the person against whom the order was passed, becomes liable to imprisonment for a period of one month and for every successive month such applications can be repeated.

5. That the person who has served such imprisonment for a particular default then in that case he will not be liable to any further imprisonment for the default of that period even that remains unpaid after serving the imprisonment. Thereafter, the person entitled for maintenance can take recourse to recover the amount only through a warrant of recovery.

Consequently, the approach of the learned Magistrate, while disagreeing the aforementioned contention dismissing her application for the purpose does not appear erroneous.

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214. CRIMINAL PROCEDURE CODE, 1973 – Sections 161 & 172
Interpretation or gist of statement of witness recorded by I.O. in case diary – Is not a statement recorded u/s 161 – Accused is not entitled to get copy of the same recorded by I.O. in case diary.
State of NCT of Delhi v. Ravi Kant Sharma & Ors.
Reported in 2007 CrLJ 1674 (SC)

Held:

Sections 161 and 172 Cr.P.C. read as follows :

"Section 161 : Examination of witnesses by police : (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Section 172 : Diary of proceeding in investigation : (1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, nor as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they are entitled to see them merely because they are referred to by the Court ; but if they are used by the police officer who made them to refresh his memory or if the Court; uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872) shall apply.

Under Section 161, Cr.P.C. the police officer may reduce into writing any statement made to him in the course of examination under that provision and if he does so he shall make separate and true record of the statement of each such person whose statement he records. The provision in other words authorizes the police officer to reduce into writing any statement made by a witness. In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of section 172, Cr.P.C. It is only when the investigating officer decides to record the statement of witnesses under Section 161, Cr.P.C. that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gists of statement. At this stage it will be necessary to take note of sub-section (b) of Section 173, Cr.P.C. which authorises the police officer to claim a sort of privilege in respect of any statement recorded under Section 161, Cr.P.C. after giving reasons as to why such statement may not be provided to the accused. Such privilege can only be claimed in respect of statement recorded under Section 161, Cr.P.C. and not in respect of what the officer records in the case diary i.e. the gist of the statement under Section 172, Cr.P.C. It will also be necessary to take not of Section 207, Cr.P.C. The Magistrate has to, in terms of that provision, provide to the accused, free of cost, copies of statements recorded under Section 161 (3) subject to the exceptions in terms of Section 173(6). A categorical statement has been made by the learned counsel for the appellant that the gist of the statement has not been produced by the prosecution to prove the guilt of the accused and the gists of the statements were not recorded in terms of Section 161, Cr.P.C. and accused has no right to ask for the gists of such statements if recorded under Section 172.

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215. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 & 228

Police filed chargesheet u/s & 498-A, 323 & 504 IPC – Complainant filed application before Magistrate to the effect that on the basis of evidence collected by police cognizance ought to be taken u/s 406 and 307 IPC – Magistrate ordered that prayer could be considered after evidence – Whether the order of Magistracy is correct ? Held, No – Proper stage is stage of framing of charge

Anurag Rastogi and others v. State of U.P. and another

Judgment dated 07.02.2007 passed by the Supreme Court in Criminal Appeal No. 177 of 2007, reported in (2007) 4 SCC 771

Held :

Learned counsel for the appellants submitted that the approach of the High Court is clearly erroneous. It rightly held that at the time of framing charge the Magistrate could consider as to what are the offences for which the accused persons have to be tried. Having held so, the High Court could not have found fault with the Magistrate's observations to similar effect.

We find that the High Court has unnecessarily made certain observations which lead to contrary conclusion. Having held that the proper stage for consideration is stage of framing charge, there was no necessity for further observations and/or directions. It rightly held that the Magistrate is not bound to take cognizance of the offences indicated in the police report. That being so, the ultimate directions of the High Court materially differ from its earlier conclusions.

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216. CRIMINAL PROCEDURE CODE, 1973 – Section 220 (4)

Consolidation of two challans/chargesheet – Two different chargesheets were filed against the same accused one u/ss 302, 420 and 465 IPC and another u/s 25 Arms Act – Chargesheet u/s 25 Arms Act was an offshoot of the main case – Both chargesheets were consolidated and were tried together – Framing charge and trying both the challans together – Not illegal in view of S.220 (4) Cr.P.C.

Paramvir Singh v. State of Punjab

Reported in 2007 CrLJ 2028 (P&H)

Held:

In the last, counsel for the petitioner contends that the trial Court has committed procedural irregularity while ordering consolidation of two challans. In view of Section 220 (4) of the Code of Criminal Procedure, the accused of several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of such offence may be charged with, and tried at one trial for the offence constituted by such acts. Therefore, in the instant case, accused in

both the challans were challenged together and both the challans were ordered to be consolidated, so that they can be tried in one trial. There is no illegality in framing the charge and trying both the challans together.

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217. CRIMINAL PROCEDURE CODE, 1973 – Section 319

S. 319, applicability of – Application filed u/s 319 of the Act, consideration of – Should be decided on worth of witnesses – Report of investigation officer is irrelevant

Y. Saraba Reddy v. Puthur Rami Reddy and another

Judgment dated 07.05.2007 passed by the Supreme Court in Criminal Appeal No. 689 of 2007, reported in (2007) 4 SCC 773

Held:

We find that the High Court has failed to notice the fact that there was in fact no delay in making the application. Though the charge-sheet was filed on 7-11-1997, charges were framed on 25.8.2003. The order-sheet shows that the delay cannot in any way be attributed to the complainant. There is a basic fallacy in the approach of the High Court. It called for the file to be satisfied as to whether the enquiry conducted was to be preferred to the evidence of PW 1. If the satisfaction of the investigating officer or supervising officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the investigating officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be given primacy is unsustainable. The High Court was not justified in holding that there was belated approach.

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218. CRIMINAL PROCEDURE CODE, 1973 – Section 322

Counter case – Could not be tried by the same Court one after another – Accused failed to draw attention of the Court about pendency of the counter case – No application was moved for holding trial by the same court – Held, trial is not vitiated – Accused cannot claim prejudice.

Ananta Deb Singha Mahapatra and ors. v. State of West Bengal

Reported in 2007 CrLJ 1705 (Cal)

Held:

Mr. Basu next contended that the accused persons were seriously prejudiced as the case and counter case were not tried by the same Court. The settled principle of law laid down by the Supreme Courts that the case and counter case should be tried by same Court even though the counter case may not be a

sessions triable case. This is necessary to avoid contrary findings and the Court which proceeds with trial of case and counter case can be the best judged to ascertain who were the aggressors. In this case, this was most vital as possession of land of plot No. 122/470 of mouza Dakshinbaid was crucial due to the rival claim of complainant party and accused party concerning possession over the said land and also cultivation and growing of Kalinga' variety of paddy in the said land. As the case and counter case were not tried in same Court it caused serious prejudice to the accused persons and the trial Court failed to appreciate that which party in fact was the real aggressor.

We do not find force in this submission as in our opinion it was the fault of the accused persons during trial to mention before the trial Court that a counter case being Khatra P.S. Case, No 41 dated 13-9-1990 under Section 324 of the I.P.C. was pending and this case and the counter case should be tried in same Court one after another and the judgment should be delivered by same Court one after another. The trial Court cannot be blamed for this as from defence it was not pointed to the trial Court that counter case was pending and according to the principle of law both case and counter case should be tried in same Court. The accused persons could have moved this Court in criminal revision for necessary direction upon the trial Court to hold the trial of both case and counter case one after another in the same Court. When the accused persons themselves failed to draw attention of the trial Court about pendency of the counter case, and did not prefer any application for holding trial of this case and counter case in same Court after disposal of this case the appellants cannot claim that they were seriously prejudiced.

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219. CRIMINAL PROCEDURE CODE, 1973 – Section 378

What are the powers of an appellate Court against an order of acquittal ? Held – The appellate Court has full power to review, re-appreciate and reconsider the evidence etc.

Chandrappa and others v. State of Karnataka

Judgment dated 15.02.2007 passed by the Supreme Court in Criminal Appeal No. 853 of 2006, reported in (2007) 4 SCC 415

Held :

From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge :

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

Applying the above principles to the case on hand, we are of the considered view that the learned counsel for the accused is right in submitting that the High Court ought not to have disturbed an order of acquittal recorded by the trial court. For acquitting the accused and extending them the benefit of doubt, the trial court observed that the prosecution had failed to examine certain persons who could have unfolded the genesis of the prosecution case. The trial court indicated that the root cause of the quarrel was refusal to exchange copper vessel (kolaga) to Nagaraj, winner of the draw, but he was not examined. Likewise, Krishnaiah, son of Oblaiah, who accompanied the injured (the deceased) Anjinappa to the hospital, was not brought before the court. Though it is in evidence that Accused I Chandrappa was injured and was also taken to the hospital along with Anjinappa, some witnesses had denied the fact as to injuries sustained by Accused 1. The High Court did not give much weight to the said circumstance observing that Accused 1 was neither examined by a doctor nor was a cross-complaint filed by him against the prosecuting party. In our view, the submission of the learned counsel for the appellants is well founded that it is not material whether Accused 1 had or had not filed a complaint or he was or was not examined by a doctor, but the fact that even though it was the case of prosecution that Accused 1 was injured during the course of incident, prosecution witnesses tried to suppress that fact which would throw doubt as to the correctness of the case or the manner in which the incident had happened. The trial court had also stated that it was unnatural that the prosecution witnesses and the deceased Anjinappa could have gone to Hanumanthapura bypass at about 9.30 p.m. when a shorter route was available for going to their destination.

The trial court observed that there was inconsistency in prosecution evidence as to availability of electric light at the time of incident. The court also noted that the knife produced before the court as mudammal article was not the same which was used by Accused 8 for inflicting injury on the deceased. There was also no consistency in evidence as to injuries sustained by prosecution witnesses.

In our view, if in the light of above circumstances, the trial court felt that the accused could get benefit of doubt, the said view cannot be held to be illegal, improper or contrary to law....

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220. CRIMINAL PROCEDURE CODE, 1973 – Sections 389 (1) & (3) Suspension of sentence – Power of Courts – Trial Court empowered to suspend sentence of jail only – Appellate Court can suspend sentences of jail as well as fine.

Brijesh Kumar v. Ramprakash Kulshreshtha

Reported in 2007 (2) MPLJ 605

Held:

... On perusal of the impugned order, it appears that the learned Judge having appellate jurisdiction, while disposing of an application under section 389 of Criminal Procedure Code, has observed in para 5, that under the provision the sentence of fine cannot be suspended by him i.e. by the Appellate Court. This observation in the order is not correct. To understand it in a better way, perusal of the provision will be beneficial, which is quoted hereinbelow :–

> "389. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.
>
> (2) ....
>
> (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall –
>
> (i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
>
> (ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,
>
> order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended".

Emphasis supplied.

On perusal of the provision, particularly the highlighted part of sub-section (1) an sub-section (3), it appears that the powers of the trial Court and the Appellate Court are different. The trial Court can suspend a sentence of jail only while the Appellate Court can suspend whole or the part of the sentence, which may included jail as well as the fine sentence.

Coming to the prayer for which the petition has been filed, that the condition of depositing the amount of Rs. 1,35,000/- has only been prayed to be set aside. As observed hereinabove the imposition of such amount of fine appears to be an abuse of the process of the Court, which has been further enhanced/ aggravated by the aforesaid observation of the Appellate Court. In view of this, invoking the inherent powers to set at naught this abuse of the process of the Court, appears to be justified.

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221. CRIMINAL PROCEDURE CODE, 1973 – Section 394

Abatement of appeal – If it is filed on the ground of inadequacy of sentence or against acquittal – Shall finally abate on the death of appellant – Appeal against conviction also abate if fine is not a part of sentence – If fine is part of sentence, Court is duty bound to decide appeal even no legal heir obtains leave of Court to continue appeal.

Mani Madavalappli v. C.I. of Police, Netwashawar

Reported in 2007 CrLJ 1755 (Ker)

Held :

To appreciate the contention raised, it is necessary to read Section 394 of the Code. I shall extract Section 394 of the Code as hereunder:

"394. Abatement of appeals. –

(1) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Provided that where appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives, may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate."

A close reading of the proviso to subsection (2) of Section 394 shows that the said provision applies only in cases where the sentence is of imprisonment alone. It is only in cases in which the sentence imposed is of imprisonment alone that the appeal shall finally abate on the death of the appellant in the absence of the near relatives of the appellant availing of the benefit under the proviso to Section 394(2). However, in cases where there is sentence of fine,

appeal shall not abate on death of appellant whether the near relatives only for leave to continue appeal or not. The proviso to Section 394(2) applies only in cases where there is sentence of imprisonment alone. If the sentence is of fine or the sentence is of imprisonment and fine, appeal shall not abate on the death of appellant, even if the near relatives do not apply for leave under the proviso to Section 394(2) of the Code. Therefore, the appellate Court is bound to dispose of on merit appeals filed against sentence of fine. Such appeals shall not abate on death of appellant, irrespective of whether the legal heirs apply for leave or not under the proviso to Section 394(2). The order passed by lower appellate Court that the appeal abated on the death of appellant is therefore, unsustainable, since sentences imposed in the case included fine also.

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222. CRIMINAL PROCEDURE CODE, 1973 – Section 439

(i) Grant of bail – Changed circumstances – Grant of bail to co-accused by High Court amounts to change in the circumstances – It entitles identically placed another co-accused for grant of bail by Lower Court on the principle of parity.

(ii) Judicial discipline – Order passed against the principles settled by higher Courts amount to contempt of Court.

Manohar v. State of Madhya Pradesh

Reported in ILR (2007) MP 837

Held :

(i) It is very difficult to understant as to what was the thinking of the Presiding Judge behing this order. If, a previous bail application of a person was dismissed on merits by the Court and thereafter, the co-accused has been granted bail by the higher Court and then another application is moved before the Court, who rejected the previous bail application, it is duty of the Presiding Judge to consider on the basis of principle of parity whether the case of applicant is identical to the case of co-accused or not. This fact has not been considered at all by the Presiding Judge, while deciding the repeat bail application of the applicant.

If an application for bail is rejected on merits by the lower Court and thereafter, the bail application of co-accused is allowed by the higher Court, certainly, it amounts to a material change in the circumstances. It is a well settled law as there are so many citations and I am of the opinion that every judicial officer must be aware of this principle that if an accused is granted bail and the case of co-accused is identical, the co-accused should also be granted bail. It has been held in the case of *Badri Nihale and others vs. State of M.P., 2006 (1) MPLJ 166*, that it is a well established principle that if an accused has been granted bail and the other accused is similarly placed, he shall also be entitled to grant of bail. It appears that this settled principle has been ignored by the Presiding Judge in this matter.

(ii) It would not be a futile exercise to mention at this stage that if a judicial officer rejects the bail applications either against the facts of the cases or without any grounds or against the principles settled by the higher Courts, it does not mean that he is an honest judicial officer. Rejection of bail applications in most of the cases cannot be a criteria of honesty. I must say that if an order or judgment is passed in bail applications or other cases against the principles settled by higher Courts and those principles are known to the subordinate Judges, certainly, it would amount to contempt of Court also. Dispensation of justice must be according to law and that too without fear or favour. One should not sit in the Court with pre-notions or reservations. Therefore, it is not proper on the part of a judicial officer to reject the bail application against the established principles of law known to him. In the present matter, it is very much clear that the Presiding Judge of Sessions Court wanted to reject the bail application any how and for that, he tried to mention baseless ground.

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223. CRIMINAL PROCEDURE CODE, 1973 – Sections 387 & 378

Reversal of order of acquittal in appeal by High Court – No counsel appeared on behalf of accused – High Court ought to have provided counsel by way of legal aid – Order of High Court reversing order of acquittal set aside – Matter remitted back to dispose of appeal after providng opportunity of hearing to accused.

Ashok Manikchand Chankeshwara and others v. H.R. Barge and another

Reported in 2007 (2) MPLJ 410 (SC)

Held :

The appellants were tried and by judgment rendered by the trial Court all of them were acquitted of the charges. On appeal being preferred, the High Court reversed the order of acquittal and convicted the appellants. Hence this appeal by special leave.

In the present case from the impugned judgment itself, it would appear that the accused were not represented by any counsel. It appears that they preferred an appeal through counsel but when the hearing of the appeal was taken up, nobody turned up on their behalf to press the appeal. The Court did not provide any counsel to the appellants by way of legal aid, but after hearing the counsel appearing on behalf of the State disposed of the appeal and reversed the order of acquittal. In the facts and circumstances of the case, we are of the view that in the absence of the counsel, the High Court should have provided a counsel to the appellants by way of legal aid and same having not been done, the impugned order is fit to be set aside, especially, in view of the fact that the appellants have been found guilty in relation to an offence for which minimum sentence provided under law is ten years.

Accordingly, the appeal is allowed, impugned order rendered by the High Court is set aside and the matter is remitted back to that Court to dispose of the appeal in accordance with law after giving opportunity of hearging to the parties. The appeal shall be disposed of as expeditiously as possible.

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224. CRIMINAL TRIAL :

EVIDENCE ACT, 1872 – Section 9

CRIMINAL PROCEDURE CODE, 1973 – Sections 386 & 378

(i) Circumstantial evidence – Conviction on the basis of such evidence – Test to be satisfied for.

(ii) Last seen together – When relevant – Necessary considerations – Duration of time gap is also material circumstance – That is material considertion – Possibility of any other person meeting or approaching the deceased could completely be ruled out.

(iii) Identification of articles – Reliability – No sufficient opportunity to see the said articles being used by the deceased for long duration – Not carrying any distinctive marks – Easily accessible and available in market – Identification of such articles could not be believed.

(iv) Scope of Appellate Court to interfere with a judgment of acquittal – Manifest illegality and perversity is prime consideration – Merely other view also possible on an appraisal of the evidence, Appellate Court cannot legally interfere with an order of acquittal – Even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is errorneous.

State of Goa v. Sanjay Thakran and another

Judgment dated 02.03.2007 passed by the Supreme Court in Criminal Appeal No. 873 of 2004, reported in (2007) 3 SCC 755

Held:

(i) The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of exaplanation of any other hypothesis than

that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

(See *State of U.P. v. Satish, (2005) 3 SCC 114, Padala Veera Reddy v. State of A.P., 1989 Supp (2) SCC 706. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, Gambhir v. State of Maharashtra, (1982) 2 SCC 351, SCC p. 355, para 9 and Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343)*

(ii) We would refer to certain decisions of this Court on the point of "last seen together". It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence. This Court has applied the abovementioned general principle with reference to the principle of last seen together in *Bodhraj v. State of J&K, (2002) 8 SCC 45* as under: (SCC p. 63, para 31)

> "31. The last seen thory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

[See *also State of U.P. v. Satish, (2005) 3 SCC 114 (SCC para 22) and Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172 (SCC para 27).*]

In *Ramreddy Rajesh Khanna Reddy* (supra) this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.

In *Jaswant Gir v. State of Punjab, (2005) 12 SCC 438* it was observed that: (SCC p. 441, para 5)

> "5.... In the absence of any other links in the chain of circumstantial evidence it is not possible to convict the appellant solely on the basis of the 'last seen' evidence, even if the version of PW 14 in this regard is believed."

From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that

the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intruction to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

(iii) ... When the persons identified these articles, they did not have sufficient opportunity to see these articles being used by the deceased for a long duration, and when the articles do not carry any distinctive marks, on the basis of which the articles can be distinguished from the similar articles which are easily accessible and available in the market, identification of the articles by the witnesses would be difficult to be believed. The recovery of these articles from the accused in the absence of their identification as belonging to the deceased, does not take the prosecution case any further.

(iv) By a series of decisions, this Court has laid down the parameters of appreciation of evidence on record and jurisdiction and limitations of the appellate court, and while dealing with appeal against an order of acquittal this Court observed in *Tota Singh v. State of Punjab, (1987) 2 SCC 529* as under: (SCC p. 532, para 6)

> "6... The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality of the conclusion recorded by the court below is such which could not hae been possibly

arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

Further, this Court has observed in *Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225 :* (SCC p. 229, para 7)

"7. .... This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then – and then only – reappraise the evidence to arrive at its own conclusions."

and in *State of Rajasthan v. Raja Ram (2003) 8 SCC 180 :* (SCC p. 186-87, para 7)

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one opinting to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is case upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See *Bhagwan Singh v. State of M.P. (2002) 4 SCC*

85) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to intefere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Babade v. State of Maharashtra, (1973) 2 SCC 793, Ramesh Babulal Doshi v. State of Gujarat (supra) and Jaswant Singh v. State of Haryana, (2000) 4 SCC 484.*

From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterised as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.

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225. CRIMINAL TRIAL :

Time of death – Exact time of death cannot be established by 'rigor mortis' – 'Rigor mortis' depends upon many factors—temperature, weather conditions, age, condition of the body etc. – Opinion of doctor about time of death based on rigor mortis – Cannot be ground to reject ocular evidence about time of death.

Ocular evidence vis-a-vis medical evidence – Ocular evidence that firing took place from long range – Medical evidence showing close range as tattooing or charring was found on the wound – It depends on propellent charge, nature of the gun and distance between victim and the gun – In such situation ocular evidence if trustworthy, should be relied upon.

Baso Prasad & Ors. v. State of Bihar

Reported in AIR 2007 SC 1019

Held:

So far as the contention in regard to distance of firing is concerned, it is true, ordinarily, charring would take place, if firing is done from a distance of less than four feet, as has been noticed in some of judgments of this Court in *Subhash and another v. State of U.P., [(1976) 3 SCC 629]; Nath Singh and others*

etc. v. State of U.P. [(1980) 4 SCC 402]; State of Punjab v. Wassan Singh and Others, [(1981) 2 SCC 1] and Sidharth and others v. State of Bihar, [(2005) 12 SCC 545].

In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The Court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor.

It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-a-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the postmortem report.

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Whereas in the body of the postmortem report, the medical expert stated, 'the margin of wound charred and inverted' at another point, he in no uncertain terms stated that firing was done from long range and distance of firing would be from more than six feet. The possibility, therefore, of his commission of some mistake in the postmortem report cannot be ruled out. It was on the said premise, it was incumbent upon the defence to bring the said fact to the notice of the doctor. Probably, knowing the futility of asking such a question, no such contention was raised either before the Sessions Judge or before the High Court. No such ground has also been taken before us.

Tattooing or charring shall depend upon the constituents of the propellant charge. It is in that context only wounds are classified by their external appearance as close contact, near contact and distant.

The doctor, in his evidence was categorically in stating that the wounds would not come within the purview of classification of near contact; but the wound should be classified under 'distant contact'.

The authorities like Taylor and HWV Cox in their treatises, state in details as to how the postmortem examination should be conducted.

The nature of the gun will also have a role to play. Unfortunately, the Investigating Officer did not make any attempt even to seize the gun. When the weapon was not seized, the question of examination of any Ballistic Expert would not arise. [See *Nirmal Singh and another v. State of Bihar, (2005) 9 SCC 725*].

Section 45 of the Indian Evidence Act, 1872 reads as under:

> "45. **Opinions of experts.** – When the court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevent facts.
>
> Such persons are called experts"

Opinion of an expert, therefore, is a relevant fact. The Court may, thus, took the expert opinion into consideration. But appreciation of evidence is the Court's job.

It is, thus, for the Court to arrive at an opinion as to which part of contradictory expert opinion should be accepted or whether in a given situation ocular evidence should be believed in preference to medical evidence or vice versa.

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226. EVIDENCE ACT, 1872 – Sections 24 & 30
CRIMINAL PROCEDURE CODE, 1973 – Section 313

(i) Confession – If found voluntary, may be the basis of conviction.

(ii) Examination of accused – Statement given by accused u/s 313 is not evidence – Conviction cannot be sustained solely upon the statement of accused – But its effect can be considered in light of the other evidence brought on record.

Bishnu Prasad Sinha & Anr. v. State of Assam
Reported in AIR 2007 SC 848

Held:

A confessional statement, as is well known, is admissible in evidence. It is a relevent fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefor the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, in our considered opinion, can be fully relied upon.

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Indisputably, Section 30 of the Indian Evidence Act, 1872, in a situation of the present nature, can be taken aid of. The courts below did take into consideration the confessional effect of the statements made by the appellant No. 1 as against the appellant No. 2 for arriving at an opinion that by reason thereof involvement of both of them amply stand proved.

The expression 'the court may take into consideration such confessions' is significant. It signifies that such confession by the maker as against the co-accused himself should be treated as a piece of corroborative evidence. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a co-accused, be it extra-judicial ocnfession or a judicial confession and least of all on the basis of retracted confession.

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It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record. (See *Mohan*

Singh vs. Prem Singh [(2002) 10 SCC 236], State of U.P. vs. Lakhmi [(1998) 4 SCC 336], and *Rattan Singh vs. State of H.P. [(1997) 4 SCC 161*].

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227. EVIDENCE ACT, 1872 – Section 120

Competent witness – Husband holding special power of attorney of wife/plaintiff – Husband is competent to depose for his wife as provided u/s 120 – No adverse inference can be drawn due to non-examination of plaintiff/wife.

Murlidhar Pinjani & anr. v Smt. Sheela Tandon & anr.

Reported in ILR (2007) MP 785

Held:

Submission raised by learned counsel that adverse inference ought to have been drawn by the trial Court due to non-examination of plaintiff/ Smt. Sheela Tandon, in view of the statement of her husband that he was special power of attorney holder of plaintiff and even otherwise spouse is competent to depose for other as provided under Section 120 of Evidence Act. It has also come on record that Satyakam was managing affairs of his wife, Ms. Sheela Tandon as such no adverse inference need be drawn in the circumstances of the case against the plaintiff.

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228. EVIDENCE ACT, 1872 – Section 137

Cross-examination is not a mere formality – It is a matter of substance – Party is required to put its version to shake the credibility of statement.

Indore Rolling Mills and another v. State of M.P.

Reported in 2007 (2) MPLJ 64

Held:

... It is clear from the statement of Balchand Jain (PW-1) Executive Engineer of Tava Project District Hoshangabad that he was an Authorised Officer In-Charge to file the suit on behalf of State meaning thereby he had competence to file the suit. He has not been cross-examined on the said aspect as such statement has not been challenged. This submission was not raised before the Court below as such it has not been dealt with in the impugned judgment. Thus I find that the objection raised by the defendant to be baseless. Cross-examination is not mere form of procedure but is a matter of substance. Party is required to put its version in the cross-examination to assail the Correctness of the statement made. The statement of the Executive Engineer has remained unchallenged, thus in my opinion there is no merit in the first submission raised by the appellant.

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

'Mental cruelty' has no comprehensive definition – Depends on the entire human behaviour – Cannot be assimilated in one definition – Instances for guidance which may infer mental cruelty is only suggestive.

Samar Ghosh v. Jaya Ghosh

Judgment dated 26.03.2007 passed by the Supreme Court in Civil Appeal No. 151 of 2004, reported in (2007) 4 SCC 511

Held :

Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

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

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

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

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

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

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

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

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

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

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-do-day life would not be adequate for grant of divorce on the ground of mental cruelty.

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

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

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

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

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage;

on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

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230. INDIAN PENAL CODE, 1860 – Sections 148 & 302/149
SCHEDULED CASTES/SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)
CRIMINAL PROCEDURE CODE, 1973 – Sections 193 & 465
Case under Special Act filed before Sessions Court which took cognizance without the case being committed.
Sessions Court did not frame charge under Special Act and proceeded – On conclusion of trial accused was convicted u/Ss 148, 302/149 – Whether non-committal of the case vitiates proceedings? Held, No. Conflicting judgments of the Apex Court as to the legality of trial without committal – Both the judgments passed by Bench of equal strength – Earlier judgment applicable as it is not discussed in the later judgment – Conviction upheld.
Chhotelal & others v. State of M.P.
Reported in ILR (2007) MP 808
Held:

The question of law involved in the case is whether the trial is vitiated on account of non compliance of the provisions of Section 193 of Cr. P.C.? This question came for consideration before the apex Court in the case of *Gangula Ashok v. State of A.P., AIR 2000 SC 740* wherein it is held that Special Court which is envisaged is Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 cannot take cognizance of any offence without the case being committed to that Court and it is held that without committal of the case under Section 193, Cr. P.C., the Special Court is not empowered to take cognizance. However, in the present case, thought Challan was filed under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, charge under section 3(1) (10) of the SC/St Act was not framed, and charges under sections 147, 148 and 302 read with 149 were framed. It is contended by the counsel for the appellants that provisions of section 193 Cr. P.C. are mandatory and without committal of the case, the Court of Sessions has no jurisdiction to decide the case. It can take cognizance only after case is committed to it as provided under the provisions of section 193 of Cr. P.C. In support of his contention, he relied on the judgment of *Gangula Ashok* (supra) which has been referred to by the apex Court in the case of *Moly v. State of Kerala, AIR 2004 SC 1890* wherein it is held that a special court under the Act is essentially a court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straightway be laid down before the Special Court under the Act and reiterating the principles

laid down in the cases of *Gangula Ashok* (Supra) and *Vijaydharan v. State of Kerala, 2003 AIR SCW 6511* the Apex Court held that no Court of Sessions can take cognizance of any offence directly without the case being committed to it by the Magistrate...

...We may mention that in the case of *Moly* (supra) there is no reference of the case of *State of Madhya Pradesh v. Bhooraji, AIR 2001 SC 3372,* which has considered the judgment of *Gangula Ashok* (supra).

Since all the judgments are of the equal strength of Bench and the subsequent judgment of the year 2004 has not considered the judgment in the case of *Bhooraji* (supra), therefore it will be proper to rely upon the judgment in the case of *Bhooraji* (supra). Our opinion is further fortified by the five Judge Bench decision of this Court in the case of *Jabalpur Bus Operators Association & ors. v. State of M.P. and anr, 2003 (I) MPJR 158* wherein it is held that in case of conflict between two decisions of the Apex Court, Benches comprising of equal number of judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the latter decision is binding.

In the light of the judgment of this Court in the case of *Jabalpur Bus Operators Association* (supra), since the subsequent judgment of the Apex Court has not referred to the judgment in the case of *Bhooraji* (supra) and the provisions of section 465, Cr. P.C., therefore we rely upon the judgment in the case of *Bhooraji* (supra). We hold that no useful purpose would be served in remanding the case after a period of more than ten years for *de novo* trial. Case, if sent back for trial, will cause undue hardship to the appellants and witnesses. They will again have to undergo the ordeal of trial.

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231. INDIAN PENAL CODE, 1860 – Section 307

S. 307, ingredients of – Court has to see whether the act has been done with the culpable intention or knowledge irrespective of result – Injury caused is not always decisive factor.

State of Madhya Pradesh v. Kedar Yadav

Reported in ILR (2007) MP 725

Held :

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

This position was highlighted in *State of Maharashtra v. Balram Barma Patil and ors., (1983) 2 SCC 28, Girija Shanker v. State of Uttar Pradesh, (2004) 3 SCC 793* and *R. Parkash v. State of Karnataka, JT 2004 (2) SC 348.*

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

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

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232. INDIAN PENAL CODE, 1860 – Section 364-A

Offence u/s 364-A of the Act of 1860 may be tried within the jurisdiction of the Court where abduction/kidnapping takes place or threat coupled with death if ransom is not paid or death has been caused.

Vishwanath Gupta v. State of Uttaranchal

Reported in 2007 CrLJ 2296 (SC)

Held:

According to Section 364A, whoever Kidnaps or abducts any person and keeps him in detention and threatens to cause death or hurt to such person and by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, and claims a ransom and if death is caused then in that case the accused can be punished with death or imprisonment for life and also liable to pay fine.

The important ingredient of Section 364A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the kinapped/abducted that if the demand for ransom is not made then the victim is likely to be put to death and in the event death is caused, the offence of section 364A is complete. There are three stages in this section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not made, then causing death. If the three ingredients are available, that will constitute the offence under Section 364A of the Indian Penal Code. Any of the three ingredients can take place at one place or at different places. In the present case the demand of the money with the threat perception has been made at (Haldwani) Nainital. The deceased were kidnapped at Lacknow and they were put to death at Unnao. Therefore, the first offence was committed by the accused when they abducted Ravi Varishney and Anoop Samant at Lucknow. Therefore, Lucknow could have territorial jurisdiction to try the case. Second, threat perception was communicated to the complainant at Haldwani, Nainital raising a demand for money. Therefore, the Court at Haldwani, Nainital could also have

territorial jurisdiction to try the matter. Likewise, ultimately the dead bodies were recovered at Unnao, therefore the District Court at Unnao could also have jurisdiction to try the offence. It is unfortunate that the learned Additional Sessions Judge, did not examine the necessary ingredients of section 364A. As a matter of fact one of the important ingredients is the threat perception coupled with the demand of money which had taken place at Haldwani, Nainital, and when the demand of payment of ransom was not satisfied, the victims were put to death. Therefore, all the three courts will have territorial jurisdiction to try the matter. In the present case two States are involved i.e. Uttaranchal and the State of Uttar Pradesh. Part of the offence was committed in Uttaranchal and part of the offence was committed in Uttar Pradesh. Therefore, both the courts at Uttar Pradesh as well as Uttaranchal will have territorial jurisdiction to try this offence.

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233. INDIAN PENAL CODE, 1860 – Sections 376 (2) and 376-B to D S. 376-B– Ingredients of – Custody contemplated, meaning of – Students of the school cannot be said to be in the custody of teacher – Distinction between Ss. 376(2) and 376-B to 376-D – U/s 376 (2) intercourse with a woman without her consent - Whereas u/s 376-B to 376-D there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as a public servant.

Omkar Prasad Verma v. State of M.P.

Judgment dated 08.03.2007 passed by the Supreme Court in Criminal Appeal No. 293 of 2007, reported in (2007) 4 SCC 323

Held :

Section 376(2) of the Penal Code provides for sentences for different nature of the offences falling in the said category. Section 376 (2) (b) provides for sentences against public servant who takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him. Section 376(2) (b) reads as under –

"376. (2) Whoever, –

(a) ★ ★ ★

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c)-(g) ★ ★ ★

shall be punished with rigorous imprisonment for a terms which shall not be less than ten years but which may be for life and shall also be liable to fine :

★ ★ ★

The ingredients of the said provision are :

(i) the accused must be a public servant;

(ii) he must take advantage of his official position;

(iii) he must induce or seduce any woman;

(i) such woman must be in his custody in such capacity or she is in the custody of public servant subordinate to him; and

(v) he must have sexual intercourse with her which does not amount to the offence of rape.

The Penal Code was amended by Act 43 of 1983 in terms whereof apart from amending Section 376 itself, various sub-sections were inserted viz. Sections 376-A to 376-D. All the aforementioned newly inserted provisions were sought to deal with such cases which are not covered by Section 376. They have thus, been inserted to meet a situation which was otherwise not provided for under Section 376. A new offence against the public servant is created under Section 376(2)(b), 376-B and 376-C of the Penal Code. Intercourse by a man with his wife during separation and by any member of the management or staff of a hospital with any woman in that hospital would be the offences falling under Sections 376-A and 376-D of the Code.

A distinction must also be made out between an offence of rape as contained in Section 375 of the Penal Code which is punishable under Section 376 and an offence of sexual intercourse with a woman in the situations specified in the aforementioned provisions. The distinction is that whereas under Section 376(2), there is no consent at all, under Sections 376-B, 376-C and 376-D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, superintendent or member of the menagement. Sections 376-A to 376-D, *stricto sensu*, therefore, do not deal with rape as is understood in its ordinary parlance.

★ ★ ★

We will assume that the appellant being a teacher of the government school was a public servant. But all the students of the school, only thereby, were not in the custody of the appellant. The expression "custody" implies guardianship. A custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a court of law or otherwise.

In. *P. Ramanatha Aiyar's Advanced Law Lexicon, p. 1170,* "custody" has been defined to mean:

> "Care keeping; charge (as parent or guardian having custody of children and minors); imprisonment; judicial or penal safe keeping (as custody of prisoner); defence from an enemy; preservation (as a fleet stationed for the *custody* of the narrow seas)." (emphasis in original)

When these two ingredients are satisfied, the third ingredient, therefore, would be as to whether the public servant has taken advantage of his official position. If a student and a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

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234. INTERPRETATION OF STATUTES :

Golden rule that statutes are to be interpreted according to grammatical and ordinary sense of the word in grammatical or literal meaning unmindful of consequence of such interpretation has given go-by – 'Rule of legislative intent' and 'purposive interpretation' is developing trend.

National Insurance Co. Ltd. v. Laxmi Narain Dhut

Judgment dated 02.03.2007 passed by the Supreme Court in Civil Appeal No. 1140 of 2007, reported in (2007) 3 SCC 700

Held :

A plea has been taken about the desirability of purposive construction.

"Golden rule" of interpretation of statutes is that statutes are to be interpreted according to grammatical and ordinary sense of the word in grammatical or literal meaning unmindful of consequence of such interpretation. It was the predominant method of reading statutes. More often than not, such grammatical and literal interpretation leads to unjust results which the legislature never intended. The golden rule of giving undue importance to grammatical and literal meaning of late gave place to "rule of legislative intent". The world over, the principle of interpretation according to the legislative intent is accepted to be more logical.

When the law to be applied in given case prescribes interpretation of statute, the court has to ascertain the facts and then interpret the law to apply to such facts. Interpretation cannot be in a vacuum or in relation to hypothetical facts. It is the function of the legislature to say what shall be the law and it is only the court to say what the law is.

In *Jt. Registrar of Coop. Societies v. T.A. Kuttappan, (2000) 6 SCC 127, Associated Timber Industries v. Central Bank of India, (2000) 7 SCC 93, Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, K. Duraisamy v. State of T.N., (2001) 2 SCC 538, Reserve Bank of India v. Peerless General Finance* and *Investment Co. Ltd., (1987) 1 SCC 424, Chief Justice of A.P. v. L. V.A. Dikshitulu, (1979) 2 SCC 34 , Kehar Singh v. State (Delhi Admn), (1988) 3 SCC 609* and *Indian Handicrafts Emporium v. Union of India, (2003) 7 SCC 589,* this Court applied the principle of purposive construction.

In *Reserve Bank of India case,* (supra) this Court observed : (SCC p. 450, para 33)

> "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a stature is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

In *Dikshitulu case* (supra) a Constitution Bench of this Court observed as under: (SCC p. 53, para 66)

> "66. The primary principle of interpretation is that a constitutional or statutory provision should be construed 'according to the intent of they that made it' (Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpreation."

In *Kehar Singh v. State (Delhi Admn.)* (supra) it was held: (SCC pp. 717-18, para 231)

"231. During the last serveral years, the 'golden rule' has been given a go-by. We now look for the 'intention' of the legislature or the 'purpose' of the statute. First, we examine the words of the statute. If the words are precise and cover the situation in hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they own their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undersirable consequences."

"A statute is an edict of the legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature. This task very often raises difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative legislature to forestall [all situations exhaustively] and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents

are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed." (See *District Mining Officer v. Tata Iron & Steel Co. (2001) 7 SCC 358,* SCC pp. 382-83, para 18.)

It is also well settled that to arrive at the intention of the legislation depending on the objects for whcih the enactment is made, the court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside.

Francis Bennion in his book *Statutory Interpretation* described "purposive interpretation" as under:

> "A purposive construction of an enactment is one which gives effect to the legislative purpose by –
>
> (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or
>
> (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose."

More often than not, literal interpreation of a statute or a provision of a statute results in absurdity. Therefore, while interpreting statutory provisions, the courts should keep in mind the objectives or purpose for which statute has been enacted. Justice Frankfurter of the US Supreme Court in an article titled as *"Some Reflections on the Reading of Statutes"* (47 Columbia Law Review 527), observed that,

> "legislation has an aim, it seeks to obviate some mischief, to supply an adequancy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statutes, as read in the light of other external manifestations of purpose."

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235. LAND REVENUE CODE, 1959 (M.P.) – Sections 257 (I-I) & 170-B Transaction took place before the period contemplated u/s 170-B for inquiry – Jurisdiction of Civil Court not barred.

Hariprasad v. Dhannu through L. Rs. Shyamlal and others
Reported in 2007 (2) MPLJ 424

Held:

.... The M.P. Land Revenue Code, 1959 came to be applied on 2-10-1959. Further it is found that as per the concurrent finding of fact recorded by both the

Courts below, the crucial date in this case relating to crucial transaction is 1-6-1958. Section 170-B encompasses an inquiry regarding transaction which took place between 2-10-1959 and 24-10-1980. Since the crucial transaction had taken place on 1-6-1958, therefore, the question of application of section 165(6) read with section 170-B of the Code does not arise and both the Courts below have rightly held so. In this view of the matter, the question of bar of jurisdiction of the Civil Court under the provisions of section 257 (I-I) of the Code also does not arise. The learned Courts below, therefore, rightly exercised their jurisdiction in the matter. In these circumstances the cases referred by the learned counsel for the appellant are distinguishable on facts and they cannot be pressed into service.

The up shot of the above discussion is that the trial Court was justified in entertaining the suit and granting the decree in favour of the plaintiffs and the jurisdiction of the Civil Court did not stand barred under the provisions of section 257(I-I) of the Code...

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236. LIMITATION ACT, 1963 – Section 14

Exclusion of time of proceeding bonafide in court without jurisdiction – Law explained.

M/s. Khemchand Motilal Jain v. State of M.P. and others

Reported in 2007 (2) MPHT 433

Held :

In *Firm Jiwan Ram Ramchandra Vs. Jagernath Sahu and another, AIR 1937 Patna 495,* a Division Bench has laid down that once the plaint has been returned for presentation before the proper Court it has to filed expeditiously and plaintiff is not entitled to exclude the time granted by the Court for re-presentation, rule of equity cannot help plaintiff, not being diligent in filing suit. In *Ramchandra and others Vs. Union of India, AIR 1961 Rajasthan 162,* it has been laid down that for exclusion of the period under Section 14, period required by the Court for return of the plaint after passing of the order could also be excluded. If the period elapses due to laches of plaintiff in taking back plaint, it cannot be excluded under Section 14. In *Deshrath Singh Vs. Managing Director, M.P. State Co-operative Oil-seed Grower's Federation Ltd. and others, 2003 (5) M.P.H.T. 529,* a Single Bench of this Court has laid down that the only period spent in the proceedings has to be excluded. In *State of West Bengal Vs. Satyanarayan Rice Mill, AIR 1985 Calcutta 391,* a Division Bench has opined that the proceedings under Article 226 of the Constitution ascertaining the vires, is a civil proceedings and as such it cannot be said that Section 14 of the Limitation Act does not apply. This Court also in *M.P. State Co-operative Marketing Federation Ltd. Bhopal Vs. Union of India, 2001 (1) MPLJ 331,* has held that in case any proceedings has been prosecuted by plaintiff for vindication of civil right, such proceeding shall be covered by words 'civil proceeding' used in Section 14 of the Limitation Act.

Section 14 of the Limitation Act, 1963 makes it clear that the period spent in prosecuting the case with "due diligence" another civil proceedings may be excluded. If further requires that proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature has not entertained it. Period spent in writ proceedings can also be excluded.

No doubt about it that the writ petition was prosecuted with due diligence. It was admitted by this Court. Thus, after exclusion of the period the suit ought to have been preferred with reasonable diligence, but, there was laches on the part of plaintiff, writ was decided on 24.1.1979, suits were filed on 18.12.1979, period of limitation stood lapsed, it commenced on 30.12.1972, fresh period of limitation did not run again after decision of the writ petition on 24.1.1979 it stood expired a long back. Thus, I find that the decision rendered by the Court below is proper. Both the suits were barred by limitation.

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237. MOTOR VEHICLES ACT, 1988 – Sections 147 & 149

Third party risk cases *vis-a-vis* own damage cases – Principle of 'pay and recover' applies in former cases and not in latter ones – *National Insurance Company Ltd. v. Swaran Singh, (2004) 3 SCC 297* has no application in the own damage cases.

National Insurance Co. Ltd. v. Laxmi Narain Dhut

Judgment dated 02.03.2007 passed by the Supreme Court in Civil Appeal No. 1140 of 2007, reported in (2007) 3 SCC 700

Held:

The inevitable conclusion therefore is that the decision in *National Insurance Company Ltd. v. Swaran Singh, (2004) 3 SCC 297* has no application to own damage cases. The effect of fake licence has to be considered in the light of what has been stated by this Court in *New India Assurance Co. v. Kamla, (2001) 4 SCC 342.* Once the licence is a fake one the renewal cannot take away the effect of fake licence. It was observed in *Kamla case (supra)* as follows : (SCC p. 347, para 12)

> "12. As a point of law we have no manner of doubt that a fake licence cannot get its forgery outfit stripped off merely on account of some officer renewing the same with or without knowing it to be forged. Section 15 of the Act only empowers any licensing authority to 'renew a driving licence issued under the provisions of this Act with effect from the date of its expiry'. No licensing authority has the power to renew a fake licence as genuine. Any counterfeit document showing that it contains a purported order of a statutory authority would ever remain counterfeit albeit the fact that other persons including some statutory authorities would have acted on the document unwittingly on the assumption that it is genuine."

As noted above, the conceptual difference between third-party right and own damage cases has to be kept in view. Initially, the burden is on the insurer

to prove that the licence was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:

1. The decision in *Swaran Singh case* (supra) has no application to cases other than third-party risks.
2. Where originally the licence was a fake one, renewal cannot cure the inherent fatality.
3. In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.
4. The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

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238. MOTOR VEHICLES ACT, 1988 – Section 147 (b)
Insurer's liability – Owner himself was driving the vehicle – He was found negligent – Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle – Held, petition u/s 166 of the Act not maintainable.
Oriental Insurance Co. Ltd. v. Smt. Jhuma Saha & Ors.
Reported in AIR 2007 SC 1054

Held:

The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

Liability of the insurer-Company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property. Thus, if the insured can not be fastened with any liability under the provisions of Motor Vehicles Act, the question of the insurer being liable to indemnify insured, therefore, does not arise.

In *Dhanraj v. New India Assurance Co. Ltd. & Anr., (2004) 8 SCC 553 (2004 AIR SCW 5438),* it is stated as follows :

> "8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is no such insurance."

The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case.

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239. MOTOR VEHICLES ACT, 1988 – Sections 166 & 168

Motor Accident – Determination of compensation – Selection of multiplier – Law explained.

The highest multiplier of 18 for the age group of 21 to 25 years – The lowest multiplier for the age group of 60 to 70 years should be selected for just compensation.

New India Assurance Co. Ltd. v. Kalpana (Smt.) and others

Judgment dated 17.01.2007 passed by the Supreme Court in Civil Appeal No. 255 of 2007, reported in (2007) 3 SCC 538

Held:

There were two methods adopted to determine and for calculation of compensation in fatal accident actions, the first the multiplier mentioned in *Devise v. Powell Duffryn Associated Collieries Ltd., (1942) 1 AII ER 657 (HL)* and the second in *Nance v. British Columbia Electric Rly. Co. Ltd., (1951) 2 AII ER 448 (PC)*. The multiplier method involves the ascertainment of the loss of dependency or the multiplicand by an appropriate multipliers. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the mulitiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.

The considerations generally relevant in the selection of multiplicand and multiplier were adverse to by Lord Diplock in his speech in *Mallet v. McMonagle, (1969) 2 AII ER 178 (HL)* where the deceased was aged 25 and left behind his widow of about the same age and three minor children. On the question of selection of multiplicand Lord Dilock observed: (AII ER pp. 191 H-191 B)

"The starting point in any estimate of the amount of the 'dependency' is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of his death. But... there are many factors which might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependants. They might have diminished with a recession in trade or he might have had spells of unemployment. as his children grew up and became independent the proportion of his earnings spent on his dependants would have been likely to fall. But in considering the effect to be given in the award of damages to possible variations in the dependency there are two factors to be borne in mind The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller is that as a matter of the arithmetic of the calculation of present value, the later the change takes place the less will be its effect on the total award of damages. Thus at interest rates of 4½ per cent the present value of an annuity for 20 years of which the first ten years are at £ 100 per annum and the second ten years at £ 200 per annum is about 12 years' purchase of the arithmetical average annuity of £ 150 per annum, whereas if the first ten years are at £ 200 per annum and the second ten years at £ 100 per annum the present value is about 14 years' purchase of the arithmetical mean of £ 150 per annum. If therefore the chances of variations in the 'dependency' are to be reflected in the multiplicand of which the years' purchase is the multiplier variations in the dependency which are not expected to take place until after ten years should have only a relatively small effect in increasing or diminishing the 'dependency' used for the purpose of assessing the damages."

In regard to the choice of the multiplicand *Halsbury's Laws of England* in Vol. 34, para 98 states the principle thus:

"98. *Assessment of damages under the Fatal Accidents Act, 1976.* – The courts have evolved a method for calculating the amount of pecuniary benefit that dependants could reasonably expect to have received from the deceased in the future. First the annual value to the dependants of those benefits (the multiplicand) is assessed. In the ordinary case of the death of a wage-earner that figure is arrived at by deducting from the wages the estimated amount of his own personal and living expenses.

The assessment is split into two parts. The first part comprises damages for the period between death and trial. The multiplicand is multiplied by the number of years which have elapsed between those two dates. Interest at one-half the short-term investment rate is also awarded on that multiplicand. The second part is damages for the

period from the trial onwards. For that period, the number of years which have elapsed between the death and the trial is deducted from a multiplier based on the number of years that the expectancy would probably have lasted; central to that calculation is the probable length of the deceased's working life at the date of death."

As to the multiplier, Halsbury states:

"However, the multiplier is a figure considerably less than the number of years taken as the duration of the expectancy. Since the dependants can invest their damages, the lump sum award in respect of future loss must be discounted to reflect their receipt of interest on invested funds, the intention being that the dependants will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that they are compensated each year for their annual loss, and the fund will be exhausted at the age which the court assesses to be the correct age, having regard to all contingencies. The contingencies of life such as illness, disability and unemployment have to be taken into account. Actuarial evidence is admissible, but the courts do not encourage such evidence. The calculation depends on selecting an assumed rate of interest. In practice about 4 or 5 per cent is selected, and inflation is disregarded. It is assumed that the return on fixed interest beating securities is so much higher than 4 to 5 per cent that rough and ready allowance for inflation is thereby made. The multiplier may be increased where the plaintiff is a high taxpayer. The multiplicand is based on the rate of wages at the date of trial. No interest is allowed on the total figure."

In both *G.M., Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 and U.P. SRTC v. Trilok Chandra (1996) 4 SCC 362* the multiplier appears to have been adopted taking note of the prevalent banking rate of interest.

In *Susamma Thomas case,* (supra) it was noted that the normal rate of interest was about 10% and accordingly the multiplier was worked out. AS the interest rate is on the decline, the multiplier has to consequentially be raised. Therefore, instead of 16 the multiplier of 18 as was adopted in *Trilok Chandra, case* (supra) appears to be appropriate. In fact in Trilok Chandra case (supra) after reference to Second Schedule to the Act, it was noticed that the same suffers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to the invariable ready reckoner. However, the appropriate highest multiplier was held to be 18. The highest multiplier has to be for the age group of 21 years to 25 years when an ordinary Indian citizen starts earning independently and the lowest would be in respect of a person in the age group of 60 to 70, as the former is the normal retirement age. (See *New Indian Assurance Co. Ltd. v. Charlie, (2005) 10 SCC 720*).

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240. MOTOR VEHICLES RULES, 1994 (M.P.) – Rule 233

Claim filed through next friend in accordance with O.XXXII Rule 1 – Rule 233 is not applicable in such a case – Claims Tribunal may appoint representative if it finds next friend to be not suitable.

The National Insurance Co. Ltd. v. Hukumchand and two others

Reported in 2007 (2) MPHT 481 (DB)

Held:

From the language of the Rule, which does not suffer from any ambiguity, it is patent that it is only where a party to a proceedings is minor or person suffering from physical disability and on that count is unable to make an appearance, the Claims Tribunal shall appoint suitable person who consents to the appoinment, to represent such party for the purpose of proceeding. The applicability of Rule 233 commences only if a party to the proceeding is a minor or a person suffering from physical disability and on that account, is unable to make an appearance. In this situation, the Claims Tribunal shall appoint suitable person to represent such party for the purpose of the proceeding. When a party sues through next friend in accordance with Order 32 Rule 1 of the CPC, it cannot be said that the party to the proceeding is minor or person suffering from physical disability, is not represented. Under these circumstances, the Rule does not become applicable where a party sues through next friend. However, the Claims Tribunal will have option to appoint a person under the said Rule, if it finds that the next friend through whom the party has initiated the proceedings is not suitable to pursue the proceedings and to protect the interests of the affected person. In such a situation it will always be open to the Tribunal to invoke the provisions of sub-rule (2) of Rule 233 of the Madhya Pradesh Motor Vehicles Rules, 1994. We are, therefore, of the considered view that there was no irregularity in filing of the claim petition through the next friend, wife of the injured.

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241. MUSLIM LAW :

Wakfs – Once created cannot be extinguished – Title rest in Almighty – Wakfs may be questioned – If it is shown that Wakifs had no intention to create a Wakf but had done to avoid a liability.

Chhedi Lal Misra (Dead) through LRs. v. Civil Judge, Lucknow and others

Judgment dated 13.02.2007 passed by the Supreme Court in Civil Appeal No. 4816 of 2000, reported in (2007) 4 SCC 632

Held:

Having gone through and considered the judgment of the learned Single Judge of the Allahabad High Court, we see no reason to take a view different from those expressed therein. In our view, the law relating to the creation and continuation of wakfs has been correctly explained by the learned Judge, in

keeping with the well-established principles that once a wakf is created, the wakif stands diversted of his title to the properties which after the creation of the wakf vests in the Almighty. It is no doubt true that in a given case the creation of a wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability. But in the instant case, such a stand is not available to the wakif or the Mutwalli since the wakf was created in 1926 and was registered under Section 38 of the 1936 Act and was also notified in the Official Gazette in January 1954. It was only thereafter in 1958, that is, after 32 years that the wakif filed a collusive suit which was decreed on compromise. The wakif did not, however, question the registration of the wakf under the provisions of the 1936 Act, nor did he challenge the gazette notification published in January 1954.

Lastly, we do not also find any force in the submission that since the revenue records were altered to show the properties to be the secular properties of the appellant, the wakf character of the properties had been obliterated. The law is well settled that once a wakf is created it continues to retain such character which cannot be extinguished by any act of the Mutwalli or anyone claiming through him.

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242. N.D.P.S. ACT, 1985

EVIDENCE ACT, 1872 – Sections 25 & 133

Evidence of accomplice – Normally, should not be accepted without corroboration.

Officer of the department of Revenue Intelligence under NDPS Act is not a Police Officer – Confession made before such officer is admissible – Yet, such confession must be subject to closer scrutiny than a confession made to private citizens or officials.

Francis Stanly alias Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram

Reported in AIR 2007 SC 794

Held:

Thus, it appears from the above decision that there is some taint in the evidence of an accomplice, and the reason for this obviously is that an accomplice's evidence is looked upon with suspicion because to protect himself he may be inclined to implicate the co-accused.

We make it clear that we are not of the opinion that the evidence of the accomplice can never be relied upon, since such evidence is admissible under Section 133 of the Evidence Act. However, Section 133 has to be read along with Section 114(b) of the Evidence Act, and reading them together the law is well settled that the rule of prudence requires that the evidence of an accomplice should ordinarily be corroborated by some other evidence vide *Suresh Chandra Bahri vs. State of Bihar, AIR 1994 SC 2420.*

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It is true that in the present case the confession was made by the accused not before an ordinary police officer, but before an officer, under the Narcotic Drugs and Psychiatric Substances Act, 1985 (hereinafter referred to as "NDPS Act") who is an Officer of the Department of Revenue Intelligence, and it is held by this Court in *Rajkumar Karwal Vs. Union of India and others, (1990) 2 SCC 409,* that such a confession is not hit by Section 25 of the Evidence Act.

We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section 25 in view of the aforesaid decisions, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required.

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243. PENALTY :

Imposition of penalty – Aggravating and mitigating factors in which offence has been committed, should be delicately balanced – Object of imposing punishment is to protect society and deter criminals.

State of Madhya Pradesh v. Kedar Yadav

Reported in ILR (2007) MP 725

Held :

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious therefore, the duty of every court to award proper, sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Nadu, AIR 1991 SC 1463*

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

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

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long turn and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."

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244. PRACTICE AND PROCEDURE :

Disparaging remarks – Relevant considerations – Not called for unless necessary for decision as an intergral part thereof.

State of Rajasthan v. Netrapal and others

Judgment dated 24.04.2007 passed by the Supreme Court in Criminal Appeal No. 711 of 1996, reported in (2007) 4 SCC 45

Held:

At the same time, however, it cannot be overlooked that judicial restraints and discipline are necessary to orderly administration of justice. One must always keep in view golden advice given by *S.K. Das, J. in State of U.P. v. Mohd. Naim, AIR 1964 SC 703* (AIR p. 707, para 10)

> "If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and

Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. *It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation* and reserve."

(emphasis supplied)

(See *also Samya Sett v. Shambhu Sarkar, (2005) 6 SCC 767,* V.G. Ramachandran, 'Law of Writs', Revised by Justice C.K. Thakker and M.C. Thakker, 6th Edn., 2006, Vol. 2, pp. 1788-91.)

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245. PREVENTION OF CORRUPTION ACT, 1988 – Section 2 (c)
Public servant – Officers/employees of State Electricity Board – Held, covered under the definition of S.2 (c) of the Act is not exhaustive – A person may be public servant in terms of another statute.
Law laid down in *Bimal Kumar Gupta v. Special Police Establishment Lokayukt, 2001 (1) MPHT 330 = 2001 (3) JLJ 2* expressly overruled.

Naresh Kumar Madan v. State of M.P.

Judgment dated 10.04.2007 passed by the Supreme Court in Criminal Appeal No. 519 of 2007, reported in (2007) 4 SCC 766

Held:

Section 15 of the 1948 Act empowers the Board to appoint a Secretary and such other officers and employees as may be required to enable it to carry out its functions under the said Act. Appointment of a Secretary of the Board is subject to the approval of the State Government. Section 65 of the 1948 Act provides for power of the Board to borrow funds for the purposes mentioned therein wherefore however, previous sanction of the State Government would be required to be obtained. Section 66 thereof provides for furnishing of guarantee in respect of such loan advanced by the State Government. Section 78 of the 1948 Act empowers the State Government to make rules for the purposes mentioned therein. Section 78-A empowers the State Government to issue directions upon the Board in the discharge of its functions. Such directions are binding upon the Board. The State, therefore, exercises a deep and pervasive control over the affairs of the Board.

The officers of the State Electricity Board are required to carry out public functions. They are public authorities. Their action in one way or the other may entail civil or evil consequences to the consumers of electrical energy. They may prosecute a person. They are empowered to enter into the house of the Board's consumers. It is only for proper and effective exercise of those powers, the statute provides that they would be public servants, wherefore a legal fiction has been created in favour of those employees, when acting or purporting to act in pursuance of any of the provisions of the Act, within the meaning of Section 21 of the Penal Code. The Penal Code denotes various persons to be public servants. It is, however, not exhaustive. A person may be a public servant in terms of another statute. However, we may notice that a person who inter alia, is in the service or pay of the corporation established by or under a Central, Provincial or the State Act, would also come within the purview thereof. Section 2 (c) of the 1988 Act also brings within its embrace a person in the service or pay of a corporation established by or under a Central Act.

We, therefore, fail to see any reason as to why the appellant would not answer the description of public servant within the provisions of the said Act. The decision of the learned Single Judge of the Madhya Pradesh High Court in *Bimal Kumar Gupta v. Special Police Establishment Lokayukt, 2001 (1) MPHT 330* in our opinion, does not lay down the correct law. Referring to Section 81 of the 1948 Act, it held: (MPHT pp. 334-35, para 14)

> "14. Considering the aforesaid provisions of law, it emerged that for the purpose of the Act of 1947, a 'public savant' is a person who is covered under the definition of 'public servant' as given under Section 21 IPC. On careful perusal of the definition of 'public servant' as given in Section 21 IPC, it is found that the employees of the Electricity Board are not covered under any of the clauses of the said section. However, by virtue of Section 81 of the Electricity Supply Act, 1948, all the members, officers and employees of the Board when acting or purporting to act in pursuance of any of the provisions of the Act are deemed to be public servant under Section 21 IPC. As such, it can be inferred that by virtue of Section 81 of the Electricity Supply Act, the Board employees when acting in pursuance of the provisions of the Act are considered 'deemed public servants' under Section 21 IPC. But as held by the Apex Court in State of *Maharashtra v. Laljit Rajshi Shah, (2000) 2 SCC 699* on the ground of 'deemed provision' a person covered under the definition of Section 21 IPC cannot be considered 'public servant' for the purpose of prosecution under the provisions of the Prevention of Corruption Act, 1947. In the aforesaid case, in view of the analogous provision of 'deemed to be public servant' for certain employees of the cooperative societies under the Maharashtra Cooperative Societies Act, were not considered as public savant for the purpose of the Act of 1947."

With respect we do not agree with the aforementioned inference of the learned Judge.

The Prevention of Corruption Act, 1947 was repealed and enacted in the year 1988. The definition of "public servant", as contained in Section 2(c) thereof, is a broad-based one. Reliance was placed by the learned Judge in *State of Maharashtra v. Laljit Rajshi Shah* (Supra). Therein the Court was dealing with a case of a member of a cooperative society. It was not dealing with the case of an employee of a statutory corporation. The said decision, therefore, has no application to the facts of the present case.

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246. REGISTRATION ACT, 1908 – Section 47
TRANSFER OF PROPERTY ACT, 1882 – Sections 54 & 58
MUTATION ENTRY :

(i) Only executed and registered document – It would be presumed that parties intended title to pass forthwith.

(ii) Document ostensibly a sale deed – Burden of proof is on the person who alleges it to be a mortagage.

(iii) Mutation entry does not confer right of title of property – Law explained.

Shantibai and others v. Phoolibai and others

Reported in 2007 (2) MPLJ 121

(i) It is true that mere registration of a document does not necessarily operate to transfer or affect the property dealt with by it without regard to the intention of the parties to the document. A party to the registered document can plead that the document in question was a mere paper transaction and it was never acted upon. The Court has power to see intention of the parties in each particular case but where document is duly executed and registered normal presumption would be that the parties intended title to pass forthwith.

Ordinarily upon the due execution and registration of the sale deed the title in the property sold passes from the vendor to the vendee. Where a sale deed was properly executed and registered and the vender recited in the deed and admitted before the Sub Registrar that he had received the entire consideration the terms of the deed coupled with the acknowledgment before the sub registrar show that the vendor intended to divest and did indeed divest himself of the ownership which immediately vested in the vendee.

(ii) Where the document is apparently a sale, the onus is on other person who allege it to be a mortgage to prove it.

It is true that the form of transaction is not final test of determining whether it is a sale or mortgage and the true test is the intention of the parties in entering the transaction but where no reliable evidence has been given to prove that the document was intended to be a mortgage Court cannot safely depart from the

contents of the documents. The lower Appellate Court rightly came to the conclusion that plaintiffs have failed to prove that the parties intended that the transfer was only by way of security. If on the face of it the document purports to be sale it cannot be turned into mortagage by reference to a host of extraneous and irrelevant considerations.

The question whether a document which is ostensibly a sale deed is executed only as a pretence for a mortagage deed in every case is a question of fact to be determined on the contents of the document and on the surrounding circumstances. The intention of the parties should primarily be gathered from the document itself. The terms of the sale deed are clear. The document reveals that the intention of the parties to document was to treat document as an out and out sale.

(iii) The entries in the revenue records or in the record of municipality or Panchayat record are made for fiscal purposes. Such entries cannot be a source of title. In *Balwant Singh and another vs. Daulat Singh, AIR 1997 SC 2719* and *State of Himachal Pradesh vs. Keshavram, AIR 1997 SC 2181* cited by the learned counsel for the respondent it has been held that the entry in the revenue papers recording somebody's name can neither create nor extinguish the title of that person. The failure to apply for the mutation by no stage of imagination can form the basis for declaration that the document which is ostensibly a sale deed was infact a mortgage.

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247. RENT CONTROL AND EVICTION :

Sub-letting – Firm (with four partners) was tenant after dissolution of the firm – The rights of the tenant including tenancy right had been transferred to one of the partners who has constituted a new firm and continued as the owner of the firm – Held, firm is not legal entity – Possession is retained by a partner therefore no sub-letting.

Amar Nath Agarwalla v. Dhillon Transport Agency

Judgment dated 28.02.2007 passed by the Supreme Court in Civil Appeal No. 1223 of 2005, reported in (2007) 4 SCC 306

Held :

It appears that along with his written submission, the plaintiff filed certain documents which were not exhibited at the trial to prove sub-letting. In our view those documents cannot be looked into since they were not put in evidence and the defendant had no opportunity of replying to those documents.

As would be apparent from a mere reading of the submissions urged on behalf of the appellant, after dissolution of the firm all the rights of the tenant firm including tenancy rights had been transferred to one of the partners who has continued as the owner of the firm in occupation. The question is whether carrying on business by one of the partners of the firm which was originally the tenant amounts to sub-letting of the premises by the original tenant.

In *Murlidhar v. Chuni Lal, 1969 Ren CR 563* this Court had repelled the contention that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm was occupation by the legal entity other than the original tenant and such occupation proved sub-letting. Repelling the contention this Court held :

> "This contention is entirely without substance. A firm, unless expressly provided for the purpose of any statute which is not the case here, is not a legal entity. The firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. Here the firms have a common partner. Hence the occupation has been by one of the original tenants."

In *Mohammedkasam Haji Gulambhai v. Bakerali Fatehali, (1998) 7 SCC 608* this Court observed: (SCC p. 618, para 13)

> "There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on the tenant from sub-letting, assignment or disposition of his interest in the tenanted premises."

The same principle was reiterated by this Court in *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy, (2005) 1 SCC 481* wherein this Court held: (SCC p. 492, para 16)

> "The mere fact that another person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession on the premises.So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting. In *Parvinder Singh v. Renu Gautam, (2004) 4 SCC 794* a three-Judge Bench of this Court devised the test in these terms: (SCC p. 799, para 8)
>
> > 'If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of

collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant'."

Applying these principles to the instant case, it is patent that one of the partners of the firm which was the original tenant has continued in legal possession of the premises as a partner of another firm constitued after dissolution of the original firm. Thus the legal possession is retained by a partner who was one of the original tenants. In these circumstances, we find no fault with the finding of the High Court that there was no sub-letting of the premises and hence the suit for eviction deserved to be dismissed.

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248. SERVICE LAW :

Deputation, meaning of – Deputing or transferring employee to a post outside his cadre or outside parent department is deputation. Whether a deputationist has legal right to continue on deputation? Held, No.

Kamlesh Kumar v. State of M.P. and others

Reported in 2007 (2) MPLJ 535

Held:

"Deputation" means service outside the cadre or outside the parent Department. Deputation is deputing or transferring an employee to a post outside his cadre, i.e. to another department on a temporary basis. An employee has no vested right to continue on deputation, he can be sent back to his parent department where he held a lien. The petitioner is the employee of Home Department, holding the post of Constable in the Railway Police. He was taken on deputation in the department of respondent No. 3 that is to say Sports and Youth Welfare Department. Earlier, he applied for his absorption in the Sports and Youth Welfare Deptt. The respondent No. 3 vide order dated 11-9-1997 rejected his absorption and he was repatriated to his parent department. The petitioner never challenged the order dated 11-9-1997 (Annexure R/1). He has no legal right to get absorbed in the Department to which he had gone on deputation.

The respondent No. 1 vide circular dated 2-12-1988 (Annexure P/6) framed a policy for sending the employee on deputation. As per this policy, deputation is possible only with the consent and voluntary decision of the deputationist lending authority in the parent Department and the borrowing authority in the borrowing Department.

With the consent of parent department dated 17-9-1997 and borrowing department dated 6-12-1997, the services of the petitioner is repatriated by the impugned order dated 6-5-2006 (Annexure P/1) and he was relieved by the respondent No. 4 on the same day, i.e., 6-5-2006 vide Letter No. B/3643 dated 6-5-2006.

Learned counsel for the petitioner drew my attention to Rule 6 of M.P. Sports and Youth Welfare Class-III (Non Gazetted) Service Recruitment Rules, 1998, of the department of respondent No. 3, i.e. borrowing department, and submitted that as per Rules 6.1 (Gha), he can be recruited in the department of respondent No. 3. The respondent No. 3 considered the case of petitioner for absorption in the year 1997 and once the same is rejected, he cannot claim his absorption as a matter of right and the above rule will not in any way help him. The doctrine of legitimate expectation to be absorbed cannot be invoked for challenging the order of repatriation.

Learned counsel for the petitioner drew my attention to the decision of the Apex Court in the case of *Union of India and another vs. V. Ramakrishnan and others, (2005)8 SCC 394,* in which the Apex Court has held that where deputation is for a specific term, that cannot be curtailed except on such ground such as unsuitability or unsatisfactory performance and even where the tenure is not specified, reversion can be challenged if the same is mala fide.

Ordinarily, a deputationist has no legal right to continue in the post. He has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post-haste manner also indicates malice. *See, Bahadursingh Lakhubahi Gohil vs. Jagdishbhai M. Kamalia, (2004) 2 SCC 65.*

In the case of *Rameshwar Prasad vs. Managing Director, U.P. Rajkiya Nirman Nigam Limited and others, (1999) 8 SCC 381,* the Apex Court has held that deputationist's right to be considered for, when statutory rules provide for absorption. Although an employee on deputation has no right to be absorbed in the service where he is working on deputation, in some cases depending upon the statutory rules the position may be to the contrary.

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249. SERVICE LAW :

Disciplinary proceedings against a judicial Officer – Power of High Court – Considerations – High Court should take up case to protect honest Judicial Officer against false complaints by unscrupulous lawyers and litigants – Disciplinary actions against subordinate judiciary merely on the basis that orders/judgments are wrong – Not good practice – Such practice adversely affect the morale of subordinate judiciary and ability to exercise their power freely and independently.

Ramesh Chander Singh v High Court of Allahabad and another Judgment dated 26.02.2007 passed by the Supreme Court in Civil Appeal No. 2015 of 2006, reported in (2007) 4 SCC 247

Held:

This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, the High Court must take extra care and caution.

In *Ishwar Chand Jain v. High Court of P & H,(1988) 3 SCC 370* this Court observed that while exercising control over subordinate judiciary under Article 235 of the Constitution, the High Court is under a constitutional obligation to guide and protect subordinate judicial officers. An honest and strict judicial officer is likely to have adversaries. If complaints are entertained in trifling matters and if the High Court encourages anonymous complaints, no judicial officer would feel secure and it would be difficult for him to discharge his duties in an honest and independent manner. It is imperative that the High Court should take steps to protect honest judicial officers by ignoring ill-conceived or motivated complaints made by unscrupulous lawyers and litigants.

In *K.P. Tiwari v. State of M.P., AIR 1994 SC 1031* where the High Court reversed the order passed by the lower court making remarks about, interestedness and motive of the lower court in passing the unmerited order, this Court observed that one of the functions of the higher court is either to modify or set aside erroneous orders passed by the lower courts. Our legal system acknowledges fallibility of judges. It has to be kept in mind that a subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure – contestants and lawyers breathing down his neck. He does not enjoy the detached atmosphere of the higher court. Every error, however gross it may be, should not be attributed to improper motives. The Judges of the High Court have a responsibility to ensure judicial discipline and respect for the judiciary from all concerned. No greater damage can be done to the

administration of justice and to the confidence of the people in the judiciary if the higher courts express lack of faith in the subordinate judiciary for some reason or the other. That amounts to destruction of judiciary from within.

In *Kashi Nath Roy v. State of Bihar, (1996) 4 SCC 539* this Court observed under a similar circumstance that in our system appellate and revisional courts have been set up with the presupposition that the lower courts in some measure of cases can go wrong in decision-making in law and in fact. The higher courts have been established to correct errors. In cases where intolerable error is pointed out, it is functionally required to correct the error in an appropriate case and in a manner befitting maintaining dignity of the court and independence of the judiciary. The higher court should convey its massage in the judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellowed but clear and result oriented and rarely a rebuke.

In a series of other cases also, this Court disfavoured the practice of passing strictures or orders against the subordinate officers. (See *Braj Kishore Thakur v. Union of India, (1997) 4 SCC 65; Alok Kumar Roy v. Dr. S.N. Sarma, AIR 1968 SC 453.*)

In *Zunjarrao Bhikaji Nagarkar v. Union of India, (1999) 7 SCC 409* this Court held that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the judicial officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroots level.

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250. SERVICE LAW :

Disciplinary proceedings can be continued inspite of acquittal of delinquent by Criminal Court – Disciplinary authority is required to consider *factum* with regard to acquittal while imposing punishment.

Raghubir Singh v. Union of India and others

Reported in 2007 (2) MPLJ 479

Held:

On the basis of the aforesaid pronouncements of law it is apparent that in spite of the acquittal of the petitioner by the Criminal Court there is no bar that

the disciplinary proceeding shall also come to an end. Hence, the first submission urged by the learned counsel for the petitioner stands rejected.

The next submission of the learned counsel for the petitioner is that in the present case the respondents have not yet completed the enquiry and the effect of the acquittal cannot be ignored by the departmental enquiry. Learned counsel relied upon the decision in *Chairman and Managing Director, United Commercial Bank and others vs. P.C. Kakkar, (2003) 4 SCC 364.*

In *P.C. Kakkar's case* (supra) the Apex Court considered the question with regard to the consideration of the acquittal by the disciplinary authority at the time of passing the final order of punishment in case the employee is found guilty in the departmental enquiry. The Apex Court while considering the said question came to the conclusion that factum with regard to acquittal of the employee being an important circumstance the same has to be considered by the disciplinary authority at the time of inflicting the punishment and accordingly the Apex Court came to hold in para-15 of its judgment as under:

> ".... At the most the factum of acquittal may be a circumstances to be considered while awarding punishment. It would depend upon the facts of each case and even that cannot have universal application."

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251. SERVICE LAW :

Resignation – It becomes effective from the date of acceptance by the competent authority – Before acceptance, it can be withdrawn – Law explained.

Secy. Technical Education, U.P. and others v. Lalit Mohan Upadhyay and another

Judgment dated 09.04.2007 passed by the Supreme Court in Civil Appeal No. 534 of 2001, reported in (2007) 4 SCC 492

Held:

The general principle is that a government servant/or functionary who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office normally the tender of resignation becomes effective and his service/or office tenure gets terminated when it is accepted by the competent authority....

★ ★ ★

There cannot be any quarrel on the settled principle of law that an employee is entitled to withdraw his resignation before its acceptance by the competent authority....

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252. SPECIFIC RELIEF ACT, 1963 – Section 38

Suit for permanent injunction could be filed on the possessory title – Prayer for declaration is not a condition precedent to file such a suit – Plaintiff is not found in possession – Suit is liable to be dismissed – Enquiry of title is not warranted.

Ramji Rai & Anr. v. Jagdish Mallah (Dead) through L. Rs. & Anr.

Reported in AIR 2007 SC 900

Held :

... Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See : *Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815*]

In the case of *A.L.V.R. Ct. Veerappa Chettiar v. Arunachalam Chetti and others, AIR 1936 Madras 200,* it has been held that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction. There can be a suit only for an injunction. The present suit is only for permanent injunction and, therefore, the lower appellate court should have, on the facts and circumstances of this case, confined itself to its dismissal only on the ground that the appellants have failed to show that they were in possession. This has been done but the declaration that the appellants are not the owners, was not necessary.

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253. STAMP ACT, 1899 – Section 47-A (As inserted by M.P. Act 30 of 1997)

Stamp duty – Parties entered into an agreement on 28.8.78 – Suit for specific performance decreed on 13.10.95 – In execution of the decree sale deed was presented on 5.1.98 before Sub-Registrar for registration – Held, stamp duty has to be paid on market value on the date on which instrument was put to registration and snot on market value prevailing on date of agreement.

Smt. Harvinder Kaur & Ors. v. State of M.P. & Ors.

Reported in AIR 2007 MP 86

Held :

After perusing the aforesaid judgments in the case of *Sub-Registrar, Kodad Town and Mandal v. Amaranaini China Venkat Rao, AIR 1998 AP 252, S.P. Padmavathi v. State of Tamil Nadu, AIR 1997 Madras 296 and Smt. Shantidevi Prasad v. The State of Bihar, AIR 2001 Pat 161,* I find that said judgments are based on S.P. Padmavati interpretation of Section 47-A of the Act as applicable

in their respective states. So far as State of Madhya Pradesh is concerned, the position is made clear by explanation of Section 47-A of the Act, which was inserted by M.P. Act 30 of 1997 which came into effect from 15-11-1997. Said explanation reads as under:–

> "*Explanation* – For the purpose of this Act, Market Value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may be, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument."

From reading of said explanation, it is clear that for the purpose of Indian Stamp Act, market value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may be, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument.

The word "execution" is also defined under the Act and as per Section 2(12) execution of instrument means 'signed' of the said instrument. Thus, this provision makes it clear that stamp duty is payable on the date on which instrument was signed in the document and put to registration. Thus, judgments cited by learned counsel for the petitioners have no application in the State of Madhya Pradesh, as the provisions are not considered in theaforesaid judgments.

Thus, the duty of the Registrar is to see whether the stamp duty is paid on the market value prevailing on the date of presentation and if he comes to the conclusion that stamp duty has not been truly set forth in the in the instrument, he can refer the same to the Collector for determination of market value of the property. Thus, the Registrar is not concerned with the date of agreement and he has to decide the matter keeping in view the market value prevailing on the date of presentation of instrument before him.

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254. SUCCESSION ACT, 1925 – Section 372
CONTRACT ACT, 1872 – Section 171
Order granting succession certificate in ignorance of Banker's lien – Held, improper as S. 171 of the Act of 1872 recognizes Bankers such right.

State Bank of India v. Mukesh Rawat

Reported in 2007 (2) MPLJ 199

Held :

There is no material on record to disbelieve the record of the bank because there is no iota to establish that Smt. Kamla Rawat had not availed the loan during her life time and she did not own a sum of Rs. 1,23,540/- paisa 53 + interest in her demand loan account. The particulars of the demand loan account were clearly informed by the petitioner-Bank to the learned Trial Judge vide

Annexure/P-1. However, from the order of succession dated 31.3.2004 contained in Annexure/P-2, it is clear that the learned trial Judge has misconstrued the information about the particulars of the deposits furnished by the petitioner Bank (as contained in Annexure /P-1) and the demand loan account (MANG RIN KHATA) has been described in the order of succession as 'MANG MAY KHATA'. The same mistake was repeated in the succession certificate contained in Annexure/P-3. Learned counsel for the respondent has been unable to justify this error.

The reason assigned by the learned Trial Judge that the appropriation/ adjustment was not directed and/or allowed by it is not sustainable in law because the learned Trial Judge has passed the impugned order in ignorance of the Banker's lien in such matters. Section 171 of the Indian Contract Act, 1872 recognises such right in the following language :

> "171. *General lien of bankers, factors, wharfingers, attorneys and policy brokers.* – Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

It has been observed by the learned Trial Judge that no recovery proceedings were initiated with respect to the outstanding in the demand loan account of Smt. Kamla Rawat. Since, the lien was created on the fixed deposit accounts of Rs.1,25,000/- and Rs. 30,000/- and the Bank was in a position to exercise the right of lien, no recovery proceedings were required to be initiated and the bank in exercise of right of lien was well competent to recover the amount from the said fixed deposit accounts. Banker's right of lien is not barred by law of limitation. Consequently, it does not affect the fixed deposit accounts over which the petitioner Bank had a lien. No doubt that the right of general lien of the Bank could have been excluded by an express agreement between the Bank and Smt. Kamla Rawat, but no such agreement has been either pleaded or proved which could have excluded the operation of section 171 of the Indian Contract Act. Reference may be made in the matter to the decision of Calcutta High Court in the case of *Krishna Kishore Kar vs. United Commercial Bank and another reported as AIR 1982 Calcutta 62.*

The Banker's lien has been explained by the Division Bench of the Punjab High Court in the case of Firm Jaikishen Dass Jinda Ram and others vs. Central Bank of India through Manager, AIR 1960 Punjab 1 as :–

> "the right of the bank to appropriate the moneys, funds and securities of the customer coming into its possession in the course of their dealines for repayment of the customer's indebtedness."

In the present case, counsel for the Bank has contended that there was special lien on the fixed deposit accounts of Rs. 1,25,000/- and Rs. 30,000/-. Although, there is a distinction between general lien and special lein, but in the absence of any proof about special lien this Court is not required to dwell upon this point any more, moreso, in the light of classic statement made by Lord Campbell :–

> "Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien."

Accordingly, it is held that the petitioner Bank had a lien on the two fixed deposit accounts of Rs. 1,25,000/- and Rs. 30,000/- and an appropriation from the said account has been rightly made by the petitioner Bank in exercise of its right of lien. It is further held that the learned Trial Judge has committed an illegality in granting succession certificate for the entire sum of Rs. 4,36,290/-.

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255. TRADE UNIONS ACT, 1926 – Section 28 J (3)

Jurisdiction of Civil Court – Suit barred only where the matters have already been referred to Industrial Court u/s 28 (1-A) of the Act – Dispute not falling u/s 28 (1-A) of the Act may be resolved by the Civil Court.

Om Prakash Malviya v. Shambhu Nath Singh and others

Reported in 2007 (2) MPLJ 562

Held :

Apex Court in *Borosil Glass Works Ltd Employees' Union v. D.D. Bambode and others, (2001) 1 SCC 350* considered the legal position in which the Apex Court held thus:–

> "Under section 28(1-A) the jurisdiction of the Civil Court is barred only in respect of matters which have been referred to an Industrial Court under section 28(1-A). If a dispute does not fall under section 28(1-A) then that dispute can always be taken to a Civil Court. As a dispute whether a person should or should not be admitted as a member is not a dispute falling within section 28(1-A), it would always be open to such persons to approach a Civil Court for resolution of their dispute. Needless to say that if the law permits they may also raise an industrial dispute before the Industrial Court in that behalf."

The law laid down by the Apex Court makes the position clear that the civil suit is barred only in respect of matters which have been referred to an Industrial Court. If no such reference is pending or filed before the Industrial Court then the Civil Court is having jurisdiction to entertain and decide the dispute. In the present case no reference was pending on the date when the suit was filed nor any reference has been filed till date thereafter. So the civil suit which has been

filed by respondent No. 1 is not barred and the Civil Court has rightly entertained the suit. In the impugned order there is no error of jurisdiction warranting interference of this Court.

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256. TRANSFER OF PROPERTY ACT, 1882 – Section 52

Doctrine of *lis pendens* – Suit for maintenance by widow – Creating charge on the property – Property alienated during the pendency of the suit – Purchaser will get subject to the doctrine of *lis pendens* – Widow can proceed against the alienated property as it had not been alienated.

Karuppana Gounder v. Rasammal

Reported in AIR 2007 Madras 101

Held :

Ordinarily, a suit by Hindu wife for maintenance against her husband is a personal suit and any purchaser of the family property during the pendency of the suit is not affected by the rule of lis pendens. But where in a suit for maintenance the widow claims that her maintenance should be made a charge on the property, this section applies and any alienation of property made during the pendency of such suit is affected by the rule of lis pendens. In this context, it would be relevant to refer to the decision of a single judge of this Court reported in *(Ramaswamy Gounder v. Baghvammal), AIR 1967 Mad 457,* wherein in para No. 8, it was held thus :–

> "8. ..... Apart from that, the argument of Mr. Ramamurthi Iyer overlooks the effect of S. 39 which is that if an alienation is made of the husband's property with notice of the right of his wife to maintenance, the alienation will not affect her right in any way. In other words, she can proceed against the alienated property as if it had not been alienated to the extent necessary. If that were so, nothing stands in the way of the Court creating a charge over the alienated properties. I hold, therefore, that the Courts below were right in their view that it was open to them to create a charge over the alienated properties in favour of the plaintiff for her maintenance."

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PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING DATE OF ENFORCEMENT OF THE ELECTRICITY (AMENDMENT) ACT, 2007 (NO. 26 OF 2007)

[Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 12-6-2007 Page1]

Ministry of Power Notification No. S.O. 950 (E) dated the 12th June, 2007. – In exercise of the powers confered by sub-section (2) of Section 1 of the Electricity (Amendment) Act, 2007 (26 of 2007), the Central Government hereby appoints the 15th June, 2007, as the date on which the provisions of the said Act shall come into force.

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NOTIFICATION REGARDING AMENDMENT IN NOTIFICATION NO. F-30-8-02-X-3 DATED 16TH MAY, 2005 OF THE FOREST DEPARTMENT

Notification No. F-30-8-02-X-3 dated the 21st December, 2006. *[Published in M.P. Rajpatra Part IV (Ga) dated 29-12-2006 Page 822]* – In exercise of the powers conferre by clause (b) of proviso to rule 3 of the **Madhya Pradesh Transit (Forest Produce) Rules, 2000,** the State Government hereby, makes the following amendment in Notification No. F-30-8-02-X-3 dated 16th May, 2005 of the Forest Department, namely :–

Amendment

In the said Notification, the entry "(vii) Babul-Acacia nilotica" shall be omitted.

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NOTIFICATION REGARDING AMENDMENT IN THE MADHYA PRADESH TRANSIT (FOREST PRODUCE) RULES, 2000

(9) Notification No. F-30-8-02-X-3 dated the 21st December, 2006. [Published in M.P. Rajpatra Part IV (Ga) dated 29-12-2006 Page 822] – In exercise of the powers conferred by Section 76 read with Section 41 and 42 of the Indian Forest Act, 1927 (16 of 1927), the State Government, hereby makes the following **amendment in the Madhya Pradesh Transit (Forest Produce) Rules, 2000,** namely :–

Amendment

In the said rules, in rule 4, in clause (a) of sub-rule (2) of Part (B), after item (viii), the following item and entries relating thereto shall be inserted, namely :–

"(ix) Babul-Acacia nilotica.".

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लोक अदालत स्कीम, 1997 के अधीन जारी अनुदेशों में संशोधन संबंधी अधिसूचना

अधिसूचना क्रमांक फा. नं; 17–स्था. – राविसेप्रा–2006 दिनांक 18 दिसम्बर, 2006. (म.प्र. राजपत्र भाग1 दिनांक 26.01.2007 पृष्ठ 314 पर प्रकाशित) – विधिक सेवा प्राधिकरण अधिनियम, 1987 (1987 का संख्यांक 39) की धारा 7 की उपधारा (2) के खण्ड (क) एवं (ख) सहपठित धारा 2 के खण्ड (छ) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, मध्यप्रदेश राज्य विधिक सेवा प्राधिकरण, एतद्द्वारा "स्थायी एवं निरन्तर लोक अदालत आयोजित करने के लिये लोक अदालत स्कीम, 1997 के अधीन जारी अनुदेशों " में निम्नलिखित और संशोधन करता है, अर्थात्:–

संशोधन

उक्त 'अनुदेशों' में, –

(1) भाग दो – '' जिला प्राधिकरणों के लिये'' के खण्ड 1 के उपखण्ड (क) में शब्दों ''माह में एक बार'' को हटा दिया जाए।

(2) भाग दो – ''जिला प्राधिकरणों के लिये'' के खण्ड 1 के उपखण्ड (क) की अन्तिम लाइन के शब्द ''रविवार'' एवं ''को अपनी बैठक आयोजित करेगी'' के मध्य शब्द ''या अन्य दिन जो उच्च न्यायालय के मुख्य न्यायाधिपति द्वारा विनिर्दिष्ट किया जाए'' अन्त:स्थापित किया जाए।

(3) भाग दो– ''जिला प्राधिकरणों के लिये'' के खण्ड 1 के उपखण्ड (क) के पश्चात् निम्नलिखित परन्तुक अन्त: स्थापित किया जाए, अर्थात् :–

''परन्तु कोई वृहद लोक अदालत रविवार को कार्यपालक अध्यक्ष की पूर्व सहमति से आयोजित की जा सकेगी।''

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विधिक साक्षरता शिविर स्कीम, 1999 में संशोधन संबंधी अधिसूचना

अधिसूचना क्रमांक फा. नं. 17–स्था. – राविसेप्रा–2006 दिनांक 18 दिसम्बर, 2006. (म.प्र. राजपत्र भाग–1 दिनांक 26.1.2007 पृष्ठ 314 पर प्रकाशित) – विधिक सेवा प्राधिकरण अधिनियम, 1987 (1987 का संख्यांक 39) की धारा 2 के खण्ड (छ) सहपठित धारा 7 की उपधारा (2) के खण्ड (ग) तथा (घ) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए मध्यप्रदेश राज्य विधिक सेवा प्राधिकरण, एतदद्वारा ''विधिक साक्षरता शिविर स्कीम, 1999'' में निम्नलिखित संशोधन करता है, अर्थात्:–

संशोधन

उक्त 'स्कीम' में,–

(1) स्कीम 4 में शब्दों ''राज्य विधिक सेवा प्राधिकरण के अनुमोदन के अध्यधीन रहते हुए'' को हटा दिया जाए।

(2) स्कीम 5 की प्रथम लाइन के शब्द '' राज्य विधिक सेवा प्राधिकरण'' के स्थान पर शब्द ''कार्यपालक अध्यक्ष'' स्थापित किया जाए।

(3) (अ) स्कीम 7 (1) खण्ड 3 में शब्द 'सचिव' के स्थान पर शब्द 'सदस्य' स्थापित किया जाए।

(ब) स्कीम 7 (1) खण्ड 4 में शब्द "जिला समाज कल्याण अधिकारी" के स्थान पर शब्द "उपसंचालक, पंचायत एवं सामाजिक न्याय" स्थापित किया जाए ।

(स) स्कीम 7 (1) के खण्ड 6 में शब्द "संयोजक" के स्थान पर शब्द "सचिव" स्थापित किया जाए।

(4) स्कीम 9 में शब्दों "शिविर का समय पूर्वाह्न 10.00 बजे से अपरान्ह 4.00 बजे तक का होगा। शिविर दो सत्रों में होना चाहिए, प्रथम सत्र पूर्वाह्न 10.00 बजे से अपरान्ह 1.00 बजे तक और द्वितीय सत्र अपरान्ह 2.00 बजे से अपराह्न 4.00 बजे तक" को हटा दिया जाए।

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NOTIFICATION REGARDING ESTABLISHMENT OF SPECIAL COURT OF JUDICIAL MAGISTRATE FIRST CLASS DATED 28TH JUNE 2007

F.No. 1-8-79-XXI-B (1). [Published in the Madhya Pradesh Gazette Part 1 Dated 6th July, 2007 Page 1804] – In supersession of this Department Notification No. 1-8-79-XXI-B(1), dated the 21st November 1995 and in exercise of the powers conferred by the proviso to sub-section (1) of Section 11 of the Code of Criminal Procedure, 1973 (No.2 of 1974), the State Government after consultation with the High Court of Madhya Pradesh hereby establish the Special Court of Judicial Magistrate of the first class at the Head Quarter as specified in column (2) of the table below, having the territorial Jurisdicion over the districts as specified in column (3) of the said table, namely:–

TABLE

S. No.	Name of Head Quarter	Territorial Jurisdiction in Civil District
(1)	(2)	(3)
1.	Indore	Indore, Dhar, Jhabua
2.	Khandwa	Khandwa, Harda, Hoshangabad, Mandleshwar, Barwani
3.	Ujjain	Ujjain, Dewas, Shajapur
4.	Ratlam	Ratlam, Mandsaur, Neemuch
5.	Bhopal	Bhopal, Vidisha, Rajgarh (Biora), Raisen, Sehore.
6.	Chhindwara	Chhindwara, Seoni, Balaghat, Narsingpur, Betul.
7.	Jabalpur	Jabalpur, Katni, Damoh, Mandla, Rewa, Satna, Sidhi, Sagar, Panna, Chhatarpur, Shahdol.
8.	Gwalior	Gwalior, Morena, Sheopur, Bhind, Shivpuri, Guna, Datia, Tikamgarh.

The special court shall try the cases arising out of the Acts specified in the Schedule below:–

Schedule

(1) The Central Excise Act, 1944 (No. 1 of 1944)

(2) The Foreign Trade (Development and Regulation) Act, 1992 (No. 22 of 1992).

(3) The Companies Act, 1956 (No. 1 of 1956)

(4) The Wealth Tax Act, 1957 (No. 22 of 1957)

(5) The Gift Tax Act, 1958 (No. 18 of 1958)

(6) The Income Tax Act, 1961 (No. 43 of 1961)

(7) The Customs Act, 1962 (No. 52 of 1962)

(8) The Export (Quality Control and Inspection) Act, 1963 (No. 22 of 1963).

(9) The Companies (Profits) Surtax Act, 1964 (No. 7 of 1964)

(10) The Monopolies and Restrictive Trade Practices Act, 1969 (No. 54 of 1969).

(11) The Foreign Exchange Management Act, 1999 (No. 46 of 1999).

w.e.f. 1-6-2000.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
अखिल कुमार श्रीवास्तव, सचिव,

●

म.प्र. श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002 के प्रवृत्त होने की तिथि संबंधी अधिसूचना

श्रम विभाग

मंत्रालय, वल्लभ भवन, भोपाल

म.प्र. राजपत्र असाधारण दिनांक 5 अगस्त 2005 पृष्ठ 825 पर प्रकाशित

क्र. एफ. 4 (ई)–6–99–ए–सोलह– मध्यप्रदेश श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002 (क्रमांक 26 सन् 2003) की धारा 1 की उपधारा (2) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा, 5 अगस्त 2005 को उस तारीख के रूप में नियत करती हैं जिसको उक्त अधिनियम प्रवृत्त होगा।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
नीरज दुबे, उप सचिव,

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE COURT-FEES (MADHYA PRADESH AMENDMENT) AMENDMENT ACT, 2007

No. 5 of 2007

[Received the assent of the Government on the 26th March, 2007; assent first published in the "Madhya Pradesh Gazette (Extraordinary)" dated 26th March, 2007].

An Act to amend the Court-fees (Madhya Pradesh Amendment) Act, 2006.

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

1. Short title. – This Act may be called the Court-fees (Madhya Pradesh Amendment) Amendment Act, 2007.

2. Amendment of Section 1.– For sub-section (2) of Section 1 of the Court-fees (Madhya Pradesh Amendment) Act, 2006 (No. 2 of 2007), the following sub-section shall be substituted, namely :–

"(2) It shall come into force on the date of its publication in the official Gazette.".

3. Repeal and saving. – (1) The Court-fees (Madhya Pradesh Amendment) Amendment Ordinance, 2007 (No. 1 of 2007) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

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THE MADHYA PRADESH INDUSTRIAL RELATIONS (AMENDMENT) ACT, 2007

No. 10 of 2007

[Received the assent of the Governor on the 5th April, 2007; assent first published in the "Madhya Pradesh Gazette (Extra ordinary)" dated the 11th April, 2007].

An Act further to amend the Madhya Pradesh Industrial Relations Act, 1960.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-eighth Year of the Republic of India as follows :–

1. Short title and commencement. – (1) This Act may be called the Madhya Pradesh Industrial Relations (Amendment) Act, 2007.

(2) It shall come into force on the date of its publication in the official Gazette.

2. Amendment of Section 2. – In Section 2 of the Madhya Pradesh Industrial Relations Act, 1960 (No. 27 of 1960) (hereinafter referred to as the principal Act), after definition clause (25), the following clause shall be inserted, namely :–

"(25A) "Public Servant" shall have the same meaning as assigned to it in Section 21 of the Indian Penal Code, 1860 (No. 45 of 1860);"

3. Amendment of Section 63.– In Section 63 of the principal Act, the following provision shall be added, namely :–

"Provided that if an offence punishable under the Act has been committed by a public servant while acting or purporting to Act in the discharge of his official duty, then no Court shall take cognizance of such offence except with the previous sanction of the State Government:

Provided further that if cognizance of such offence has already been taken by the Court, then no Court shall proceed further except with the previous sanction of the State Government.".

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THE MADHYA PRADESH VAN UPAJ (VYAPAR VINIYAMAN) SANSHODHAN ADHINIYAM, 2006

No.14 of 2007

[Received the assent of the President on the 1st May, 2007; assent first pulished in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 10th May, 2007.]

An Act further to amend the Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-Seventh Year of the Republic of India as follows :-

1. Short title .- This Act may be called the Madhya Pradesh Van Upaj (Vyapar Viniyaman) Sanshodhan Adhiniyam, 2006.

2. Amendment of Section 15.- In Section 15 of the Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 (No. 9 of 1969) hereinafter referred to as the principal Act);-

(i) after sub-section (3), the following new sub-section shall be inserted, namely :-

"(3A) Any forest officer of a rank not inferior to that of a Ranger, who or whose subordinate, has seized any tools, boats, vehicles, ropes, chains or any other article as liable for confiscation, may release the same on the execution by the owner thereof, of a security in a form as may be prescribed, of an amount equal to double the value of such property, as estimated by such officer, of the production of the property so released, when so required, before the officer authorized to order the confiscation or the Magistrate having jurisdiction to try the offence on account of which the seizure has been made.";

(ii) after sub-section (5), the following new sub-section shall be inserted, namely :-

"(5A) When the authorised officer having the jurisdiction over the case is himself involved in the seizure or investigation, the next higher authority may transfer the case to any other officer of the same rank for conducting proceedings under this section.";

(iii) after sub-section (6), the following new sub-section shall be inserted, namely :-

"(6A) The seized forest produce or any other property, if ordered to be released by the authorised officer, shall continue to be under custody until confirmation of the order of the authorised officer by the Appellate Authority or until the expiry of the period for initiating "suo motu" action by him, whichever is earlier, as specified under Section 15-A.".

3. Amendment of Section 15-A. – In Section 15-A of the principal Act, for the words "any order of confiscation" occurring at the first place in sub-section (1), the words "any order of the authorised officer" shall be substituted, and for the words "order of confiscation" wherever they occur throughout section 15-A, the words "order of the authorised officer" shall be substituted.

4. Amendment of Section 16.– In Section 16 of the Principal Act, in clause (a), for the words "ten thousand rupees" the words "twenty five thousand rupees" shall be substituted.

5. Substitution of Section 19. – For Section 19 of the principal Act the following section shall be substituted, namely :–

"19. Composition of offence. – (1) The State Government may, by notification, empower a Forest Officer, –

(a) to accept from any person against whom a reasonable suspicion exists that he has committed an offence punishable under this Act, or the rules made thereunder, a sum of money by way of compensation for the offence which such person is suspected to have committed; and

(b) when any property other than a specified forest produce has been seized as liable to confiscation, to release the same, at any time before an order of confiscation is passed by an appropriate authority, on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money or such value, or both, as the case may be, to such officer, the suspected person shall be discharged, the property other than the specified forest produce, if any, seized shall be released, and no further proceeding shall be taken against such person or property.

(3) A Forest Officer shall not be empowered under this section unless he is a Forest Officer of a rank not inferior to that of a Ranger, and the sum of money accepted as compensation under clause (a) of sub-section (1) shall in no case be less than two times the value of the forest produce:

Provided that in case the forest produce in respect of which an offence has been committed is not the property of the Government or in case the value of the forest produce is less than one thousand rupees, and if the offender has committed the offence for the first time, the suspected person may be discharged and the property other than the forest produce, if any, seized may be released on payment of the sum of ten thousand rupees or the value of such seized property, whichever is less the seized forest produce may be released only if it is not the property of the Government or on the payment of the value thereof, as the case may be."

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THE ELECTRICITY (AMENDMENT) ACT, 2007

The following Act of Parliament received the assent of the President on 28th May, 2007 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 31, dated 29th May, 2007.

INDIAN PARLIAMENT ACT NO. 26 OF 2007

An Act further to amend the Electricity Act, 2003.

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

1. Short title and commencement. – (1) This Act may be called the Electricity (Amendent) Act, 2007.

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

2. Substitution of new section for section 6.– For section 6 of the Electricity Act, 2003 (36 of 2003) (hereinafter referred to as the principal Act), the following section shall be substituted, namely :–

"6. Joint responsibility of State Government and Central Government in rural electrification. – The concerned State Government and the Central Government shall jointly endeavour to provide access to electricity to all areas including villages and hamlets through rural electricity infrastructure and electrification of households.".

3. Amendment of section 9. – In section 9 of the principal Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:–

"Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.".

4. Amendment of section 38. – In section 38 of the principal Act, in sub-section (2), in clause (d), –

(i) in the second proviso, the words "and eliminated" shall be omitted;

(ii) the third proviso shall be omitted.

5. Amendment of section 39. – In section 39 of the principal Act, in sub-section (2), in clause (d), –

(i) in the second proviso, the words "and eliminated" shall be omitted;

(ii) the third proviso shall be omitted.

6. Amendment of section 40.– In section 40 of the principal Act, –

(i) in the second proviso, the words "and eliminated" shall be omitted;

(ii) the third proviso shall be omitted.

7. Amendment of section 42. – In section 42 of the principal Act, in sub-section (2), –

(i) in the first proviso, for the words "such open access may be allowed before the cross-subsidies are eliminated on payment of a surcharge", the words "such open access shall be allowed on payment of a surcharge" shall be substituted;

(ii) in the third proviso, the words "and eliminated" shall be omitted.

8. Amendment of section 43. – In section 43 of the principal Act, in sub-section (1), –

(i) for the words "Every distribution", the words "Save as otherwise provided in this Act, every distribution" shall be substituted;

(ii) after the second proviso, the following Explanation shall be inserted, namely :–

'Explanation. – For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances:'.

9. Substitution of new section for section 50.– For section 50 of the principal Act, the following section shall be substituted, namely:–

"50. The electricity supply code. – The State Commission shall specify an electricity supply code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, measures for preventing tampering, distress damage to electrical plant or electrical line or meter, entry of distribution licensee or by person acting on his behalf for disconnecting supply and removing the meter, entry for replacing altering or maintaining electric lines or electrical plants or meter and such other matters.".

10. Amendment of section 61.– In section 61 of the principal Act, for clause (g), the following clause shall be substituted, namely :–

"(g) that the tariff progressively reflects the costs of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;".

11. Amendment of section 126. – In section 126 of the principal Act, –

(i) for sub-section (3), the following sub-section shall be substituted, namely:–

"(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment of the electricity charges payable by such person.";

(ii) in sub-section (4), the proviso shall be omitted;

(iii) for sub-section (5), the following sub-section shall be substituted, namely:–

"(5) If the assessing officer reaches to the conclusion that unauthorized use or electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.";

(iv) in sub-section (6), for the words "one-and-half times", the word "twice" shall be substituted;

(v) in the Explanation occuring at the end, in clause (b), for sub-clause (iv) the following sub-clauses shall be substituted, namely :–

(iv) for the purpose other than for which the usage of electricity was authorised or

(v) for the premises or areas other than those for which the supply of electricity was authorised.".

12. Amendment of section 127. – In section 127 of the principal Act, in sub section (2), for the words "one- third of the assessed amount", the words "half of the assessed amount" shall be substituted.

13. Amendment of section 135. – In section 135 of the principal Act, –

"(1) Whoever, dishonestly, –

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

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

(c) damages or destroys an electric meter, apparatus, equipment or wire or cause or allows any of them to be so damaged or destroyed as to interfere with the proper accurate metering of electricity; or

(d) used of electricity through a tampered mater; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorised,

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both;

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

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

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

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred from getting supply of electricity for that period from any other source or generating station:

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

(1A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be,may, upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorized for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorized shall disconnect the supply line of electricity.

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty-four hours from the time of such disconnection:

Provided also that the licensee or supplier as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment.";

(B) in sub-section (2), for the words "Any officer authorised", the words "Any officer of the licensee or supplier as the case may be, authorised" shall be substituted.

14. Amendment of section 150. – In section 150 of the principal Act, after sub-section (2), the following shall be inserted, namely :–

'(3) Notwithstanding anything contained in sub-section (1) of section 135, sub-section (1) of section 136, section 137 and section 138, the licence or certificate of impetency or permit or such other authorization issued under the rules made or deemed to have been made under this Act to any person who acting as an electrical contractor, supervisor or worker abets the commission of an offence punishable under sub-section (1) of section 135, sub-section (1) of section 136, section 137, or section 138, on his conviction for such abetment, may also be cancelled by the licensing authority;

Provided that no order of such cancellation shall be made without giving such person an opportunity of being heard.

Explanation.– For the purposes of this sub-section, "licensing authority" means the officer who for the time being in force is issuing or renewing such licence certificate of competency or permit or such other authorization.".

15. Amendment of section 151. – In section 151 of the principal Act, the following proviso shall be inserted, namely :–

"Provided that the court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided further that a special court constituted under section 152 shall be competent to take cognizance of an offence without the accused being committed to it for trial.".

16. Insertion of new sections 151A and 151B. – After section 151 of the principal Act, the following sections shall be inserted, namely:–

"151A. Power of Police to investigate. – For the purposes of investigation of offence punishable under this Act, the police officer shall have all the powers as provided in Chapter XII of the Code of Criminal Procedure 1973 (2 of 1974).

151B. Certain offences to be cognizable and non-bailable. – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) an offence punishable under sections 135 to 140 or section 150 shall be cognizable and not bailable.".

17. Amendment of section 153. – In section 153 of the principal Act, in sub-section (1), for the words and figures "sections 135 to 139", the words and figures "sections 135 to 140 and section 150" shall be substituted.

18. Amendment of section 154. – In section 154 of the principal Act, –

(i) for the words and figures "sections 135 to 139" wherever they occur, the words and figures "sections 135 to 140 and section 150" shall be substituted;

(ii) in sub-section (5), for the words "Special Court may", the words "Special Court shall" shall be substituted.

19. Amendment of section 176. – In section 176 of the principal Act, in clause (2), in clause (b), for the brackets and words "(including the capital adequacy, credit worthiness or code of conduct)", the words "relating to the capital adequacy, credit worthiness or code of conduct" shall be substituted.

20. Amendment of section 178. – In section 178 of the principal Act, in section (2), –

(i) in clause (k), the words "and elimination" shall be omitted;

(ii) in clause (m), the words "and elimination" shall be omitted;

(iii) for clause (r), the following clause shall be substituted, namely:–

"(r) the manner for reduction of cross-subsidies under clause (g) of section 61"

21. Amendment of section 181. – In section 181 of the principal Act, in section (2), –

(i) in clause (j), the words "and elimination" shall be omitted;

(ii) in clause (m), the words "and elimination" shall be omitted;

(iii) in clause (p), the words "and elimination" shall be omitted;

(iv) for clause (zc), the following clause shall be substituted, namely :–

"(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;".

THE ENVIRONMENT (PROTECTION) SECOND AMENDMENT RULES, 2006

No. G.S.R. 640 (E), dated October 16, 2006. (Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 495, dated 16th October, 2006) – In exercise of the powers conferred by Sections 6 and 25 of the Environment (Protection) Act, 1986 (29 of 1986), the Central Government hereby makes the following rules further to amend the Environment (Protection) Rules, 1986, namely :

1. (1) These rules may be called **the Environment (Protection) Second Amendment Rules, 2006.**

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

2. In the Environment (Protection) Rules, 1986, in Schedule I:

(i) In S. No. 87 relating to the "Emission Regulation for Rayon Industry", for subparagraph c, the following sub-paragraph shall be substituted, namely :–

"c. For new plants/expansion projects being commissioned on or after 1st June, 1999.

For new plants or expansion projects, the emission standards for existing plants covered in (a) above shall apply subject to compliance of the ambient air quality norms for CS_2 and H_2S indicated in (b) above. The new plants or expansion projects shall provide adequate space for undertaking retrofittings.

(Note. – a and b above also apply to new plants or expansion projects).";

(ii) in S.No. 89 relating to "Noise standards for fire crackers", after sub-paragraph C, the following sub-paragraph shall be inserted, namely :–

"D. The fire crackers for the purpose of export shall be exempted from the subparagraphs A, B and C above, subject to the compliance of the following conditions, namely :–

(i) the manufacturer shall have an export order;

(ii) the fire crackers shall conform to the level prescribed in the country to which it is exported;

(iii) they shall have a different packing colour code, and

(iv) there shall be a declaration on the box "not for sale in India" or "only for export in other countries."

MADHYA PRADESH NYAY SEVA SADAN RULES, 2006

[Published in M.P. Rajpatra (Asadharan) dated 4-9-2006 Pages 448 (1-3)]

Rules

1. Short Title and Commencement. – (1) These rules may be called the Madhya Pradesh Nyay Seva Sadan Rules, 2006.

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

2. Definitions. – In these rules, unless the context otherwise requires, –

(a) "Act" means the Legal Services Authorities Act, 1987 (39 of 1987);

(b) "Chief Justice" means the Chief Justice of the High Court of Madhya Pradesh;

(c) "Executive Chairman" means the Executive Chairman of the State Legal Services Authority constituted under Section 6 of the Act;

(d) "State Authority" means State Legal Services Authority constituted under Section 6 of the Act;

(e) "Chairman" means the Chairman of the District Authority, or as the case may be the Chairman of the Taluk/Tehsil Services Committee;

(f) "Pakshkar" means a person, whose case is pending before the Court/Tribunal or one who wants to settle his dispute/case as pre-litigation matter;

(g) "Legal Services" includes the rendering of any service in the conduct of any case or other legal proceeding before any Court or other authority or Tribunal and the giving of advice on any legal matter;

(h) "Lok Adalat" means a Lok Adalat organized under Chapter VI of the Act;

(i) "Nyay Seva Sadan" means the Nyay Seva Sadan established in the Civil District of State of Madhya Pradesh;

(j) "Officer-in-charge of Nyay Seva Sadan" means Chairman of the concerned District Legal Services Authority.

3. Object. – Nyay Seva Sadan have been established in the Civil districts with a view to provide Lelgal Aid and Advice, to hold Lok Adalat, to organize Legal Literacy Camps and to provide accommodation for the Pakshakar belonging to poor and weaker sections of the society and coming from remote areas.

4. Management and Control. – Management and Control over the Nyay Seva Sadan shall be of the District Judge/Chairman, District Legal Services Authority (Officer-in-Charge).

5. Use of Nyay Seva Sadan. – (1) With prior permission of the Chairman of the District Legal Services Authority, the Nyay Seva Sadan will be available for providing Legal Aid and Advice, holding Lok Adalat and organizing Legal Literacy Camps etc. and it will also be available for stay of the Pakshakar, poor and belonging to weaker Sections of the society and coming from remote areas of the State.

(2) No person shall ordinarily be permitted to stay in Nyay Seva Sadan during the night except with the written permission of the Chairman, District Legal Services Authority.

(3) Accommodation in Nyay Seva Sadan will be made available to Pakshakar on the basis of first come First served.

6. Arrangement for Staying Pakshakar in Nyay Seva Sadan. – (1) Only the pakshakar poor and belonging to weaker sections of the society and coming from remote areas of the State will be allowed to stay in Nyay Seva Sadan. Apart from them, no other person/officer/employee shall be allowed to stay in it.

(2) The Pakshakar Shall not be required to pay any charge for stay in the Nyay Seva Sadan. However minimum water and electricity charges towards reimbursement, as may be fixed by the District Judge/Chairman, District Legal Services Authority, shall be leviable which may be less than Rupees 5/- and more than Rs. 7/- per day. A receipt of payment shall be given to the Pakshakar.

aintenance and upkeep of the Nyay Seva Sadan. – (1) The Officer-ge (District Judge/Chairman, District Legal Services Authority) shall ensure proper maintenance and up keep of the Nyay Seva Sadan all the time for which he will be assisted by an Assistant Grade III (Care Taker) and a Class IV employee.

(2) Any loss or damage caused to the property of the Nyay Seva Sadan, shall be intimated by the Care Taker (Assistant Grade-III) in writing to the Officer-in-Charge and the value of such loss or damage to the property shall be recoverd from the concerned occupant, failure in the discharge of official duties, Assistant Grade-III (Care Taker) shall be liable for the loss or damage.

8. Maintenance of Record. – Record relating to Nyay Seva Sadan shall be maintained in the Nyay Seva Sadan itself. Apart this, an occupancy register shall have to be maintained separately which shall contain information regarding name and address of the Pakshakar, date and time of arrival and departure, purpose of visit and the details of amount of occupancy charges alongwith amount of loss, breakage, etc. paid therefor. Signature of the Pakshakar shall also be obtained in the occupancy register.

9. Maintenance and Repairs of Nyay Seva Sadan. – The expenses likely to be incurred in the maintenance and repairs etc. of the Nyay Seva Sadan shall be made available by the State Government in Law and Legislative affairs department.

10. Nyay Seva Sadan Nidhi. – Every District Legal Services Authority shall establish a Nidhi to be called the "Nyay Seva Sadan Nidhi" and there shall be credited thereto:–

(a) All sums of money paid or any grant made by the Madhya Pradesh State Legal Services Authority to the district Legal Service Authority for the purpose of Nyay Seva Sadan;

(b) All such grants or donations that may be made to the District Legal Service authority by any person or institution, with prior approval of the State Authority for the purpose of Nyay Seva Sadan;

(c) The charges received from the Pakshakar towards use of water and electricity etc.;

(d) Any other amount received from any other source;

(e) Any other amount provided by the State Government for the purpose of Nyay Seva Sadan.

11. Accounts and Audit. – Each District legal Services Authority shall maintain proper accounts and relevant records of the Nyay Seva Sadan and prepare an annual stateent of account including receipts and expenditure and all such records be made available from, time-to-time to the audit party visiting, the office of the District Legal Services Authority.

12. Arrangement of Contingency Fund.– For the purpose to meet daya to day incidental expenditure a permanent advance of Rs. 1000/- (Rs. One Thousand) shall be at the disposal of the Secretary of the District Legal Services Authority.

13. Power to Remove Difficulties. – If any difficulty arises as to interpretation of the above rules and maintenance and uses etc. of the Nyay Seva Sadan, the decision of Hon'ble the Chief Justice of the High Court of Madhya Pradesh/Patron-in-Chief of Madhya Pradesh State Legal Services Authority shall be final.

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