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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice A.K. Patnaik**	Chief Justice & Patron
2.	**Hon'ble Shri Justice R.S. Garg**	Chairman
3.	**Hon'ble Shri Justice Dipak Misra**	Member
4.	**Hon'ble Shri Justice S. K. Kulshrestha**	Member
5.	**Hon'ble Shri Justice Arun Mishra**	Member
6.	**Hon'ble Shri Justice K. K. Lahoti**	Member
7.	**Hon'ble Shri Justice R.S. Jha**	Member

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EDITOR

J.P. Gupta — Director

SUB-EDITOR

Manohar Mamtani — Addl. Director

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

PART-III
(CIRCULARS/NOTIFICATIONS)

FROM THE PEN OF THE EDITOR

J.P. Gupta
Director

At the very outset, let me put forth my deep regret for the late delivery of JOTI Journal, August 2008 issue. Due to continuous training programmes, we could not spare time for the work relating to publication of JOTI Journal.

Seneca, the Greek Philosopher rightly said – *"Man is a social animal" and also "Man is a reasoning animal".* Humans are at par amongst other animals created by the Almighty. Being a social animal, man needs the company of other people, due to which the formation of society took place. To avoid anarchy and for peaceful co-existence, the rule of law came into being otherwise jungle raj would have prevailed. To live in a congenial and peaceful atmosphere, people reposes its faith in the judiciary. Hence, as Judicial Officers it becomes very important for us to uphold this belief as the reasoning of a Judge is more than that of the people of other walks of life. Therefore, to improve the skill of reasoning, Judicial Officer should always be in continuous process of learning. The Institute is doing its best to help the Judicial Officers in sharpening their skills by way of imparting training.

Apart from that, morality is also very essential for everyone and it has to be even higher for a judicial officer because society places a Judicial Officer next to the God. Hence from the very beginning, a judicial officer should cultivate the quality of morality as it is not a natural sentiment. Keeping this in mind, the Institute is trying to inculcate the qualities of moral uprightness, sincerity and hard working in the Judicial Officers because of the nature of our profession, which is a noble one i.e. dispensation of justice. The overall goal of the Institute is to help the Judges in rendering quick

and qualitative justice with confidence and determination in order to make the system more responsive to the needs of the society so that it strengthens the confidence of the people.

During this year, the Institute is totally engrossed in imparting training to the newly appointed Civil Judges Class II and the training has been arranged at three places namely Jabalpur, Gwalior and Bhopal. The First Phase of Induction Training of 21 days' duration, in two batches, to these Civil Judges will commence from 18th August and will go up to 9th September, 2008 simultaneously at Jabalpur, Gwalior and Bhopal.

In Part I of the Journal, bi-monthly articles on varying subjects have been included. In Part II of the issue most of the pronouncements of the Apex Court as well as our own High Court have been included so as to keep the Judicial Officers abreast with the latest developments in the field of law.

In Part III as usual amendments are being included. Due to lack of space, Part IV does not find place.

Thank you.

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Anyone who stops learning is old, whether at 20 or 80. Anyone who keeps learning stays young. The greatest thing in life is to keep your mind young.

– HENRY FORD

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 (15.08.2008)

HON'BLE SHRI JUSTICE A.K. GOHIL DEMITS OFFICE

Hon'ble Shri Justice A.K. Gohil demitted office on July 1, 2008 on His Lordship's attaining superannuation. Born on July 1, 1946. Was enrolled as an Advocate on April 15, 1968 and practiced in Constitutional, Civil, Criminal, Labour, Arbitration, Revenue, Co-operative, Service and Administrative matters in the Madhya Pradesh High Court, Central and State Administrative Tribunals, Madhya Pradesh Arbitration Tribunal, Industrial Court and Board of Revenue. Appointed as an Additional Judge of the Madhya Pradesh High Court on April 26, 1999 and permanent Judge on March 27, 2000.

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

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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, 2008. The Institute has received articles from various districts. Articles regarding topic no. 2 and 4 received from Mandla and Dhar respectively, are being included in this issue. As we have not received worth publishing articles regarding topic no. 1, 3 and 5, therefore, Institutional Article on topic no. 1 and an Article by Shri Gopal Shrivastava, ADJ, Jabalpur on topic no. 5 are being published. Regarding topic no, 3 it shall be sent to other group of districts for discussion in future:

1. Which decrees are required to be prepared on stamp paper and to be registered?

   किन अनुज्ञप्तियों का मुद्रांक पत्र पर तैयार किया जाना और पंजीयन होना आवश्यक हैं ?

2. Whether the registered document relating to transfer of property is a public document or a private document? Explain the mode of proof of such document?

   संपत्ति के अंतरण संबंधी पंजीकृत दस्तावेज लोक दस्तावेज है या निजी दस्तावेज ? ऐसे दस्तावेज के सिद्ध किये जाने की रीति समझाइये?

3. Whether Lok Adalat can pass an award to compensate victims or complainant as per conditions of compromise for disposal of a criminal case and whether such award may be executed by the Civil Court?

   क्या लोक अदालत आपराधिक प्रकरण के निराकरण के लिये राजीनामे की शर्तों के अनुसार पीड़ित को क्षतिपूर्ति प्रदान करने का पंचाट प्रदान कर सकती है एवं क्या ऐसा पंचाट सिविल न्यायालय द्वारा निष्पादित हो सकता हैं ?

4. Whether the revisional court has power to direct the magistrate to take cognizance of a particular offence and to issue process u/s 204 Cr.P.C. in revision against dismissal of complaint u/s 203 Cr.P.C.?

   क्या धारा 203 दं.प्र.सं. के अतंर्गत परिवाद निरस्त किये जाने पर प्रस्तुत पुनरीक्षण में पुनरीक्षण न्यायालय मजिस्ट्रेट को किसी विशिष्ट अपराध का संज्ञान लेने और धारा 204 दं.प्र.सं. के अतंर्गत आदेशिका जारी करने का आदेश दे सकता हैं ?

5. What is the procedure of Criminal trial where accused appears to be lunatic or of unsound mind?

   ऐसे आपराधिक मामले के विचारण की प्रक्रिया क्या होगी जहाँ अभियुक्त विकृत चित्त अथवा मानसिक रूप से अस्वस्थ प्रतीत होता है ?

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PART - I

DECREES WHICH ARE REQUIRED TO BE PREPARED ON STAMP PAPER AND REGISTERED

Manohar Mamtani
Additional Director, JOTRI
Institutional Article

Generally, a decree or any order deemed to be decreed passed by a Court is not required to be prepared on stamp paper or registered. But exceptionally, some provisions of Indian Stamp Act, 1899 and Registration Act, 1908 mandates that certain decrees would be valid and executable only after being prepared on stamp paper and/or registered.

Going ahead with the subject it will be useful to see relevant legal provisions first:

I. Indian Stamp Act, 1899

Section 2(14) Instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded

Section 2(15) Instrument of Partition means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and include & also –

(i) a final order for affecting a partition passed by any revenue authority or any civil court;

(ii) an award by an arbitrator directing a partition; and

(iii) when any partition is affected without executing any such instrument, any instrument or instruments, signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners :

II. Registration Act, 1908

Section 17 (1).– The following documents shall be registered ..... namely : –

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, tos or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to yesar, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

.....

Section 17 (2) .– Nothing in clauses (b) and (c) of sub-section

(1) applies to–

(i) to (v) ****

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding or

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It is clear that a final order (decree) affecting a partition passed by Civil Court would be treated as instrument of partition and it should be drawn up on a stamp paper according to schedule of Indian Stamp Act. Apart from partition decree passed by Civil Court, an award passed by the arbitral Court under the Arbitration and Conciliation Act, 1996 is also required to be prepared on stamp paper and as per Section 36 of the Act, such award is enforceable under the Code of Civil Procedure, 1908 in the same manner as if it was a decree of the Court.

In *Dr. Chiranji Lal (D) by L.Rs. v. Hari Das (D) by L.Rs., 2005 AIR SCW 2860* a three-Judge Bench in paras 25 & 26 has observed : (SCW p. 2867)

> 25. "A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a dsecree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon."

26. "The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari (1950 SCR 852)* it was said that the payment of court fee on the amount found due was entirely in the power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed."

So period of limitation under Article 136 of Limitation Act, 1963 will start from the date of judgment/decree itself.

Sub section (1) of Section 17 of the Registration Act, 1908 specifies what are the documents that are to be registered. Sub-section (2) excludes the operation of clauses (b) and (c) of Sub-section (1) of Section 17. Clause (vi) of sub-section (2) provides that a decree or order of Court need not be registered.

A decree or order of court need not be registered on the basis that it comes within the purview of Section 17(1)(b) or 17(1)(c) of the Act as an instrument purporting to or operating to create, declare, assign, limit or extinguish any right, title or interest in immovable property. It may further be seen that a compromise decree also does not require registration in terms of Clauses (b) and (c) of sub-section (1) of Section 17 of the Registration Act unless that decree takes in immovable property valued above Rs.100/-, that is not a subject matter of the suit or the proceeding giving rise to the compromise decree. In other words, only if the compromise also includes in any property that is not the subject matter of the suit, it would require registration. If the compromise is confined to the subject matter of the suit, it would not.

In *Bhoop Singh v. Ram Singh Major, AIR 1996 SC 196* the Apex Court has observed:

"Something more is required to be said to find out the real purport of Clause (vi). It needs to be stated that sub-section (1) of Section 17 mandates that the instrument enumerated in Clauses (a) to (e) shall be registered compulsorily if the property to which they relate is immovable property value of which is Rs. 100/- or upwards. When the document purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest therein, whether vested or contingent, it has to be registered compulsorily. The Act does not define "instrument". Section 2(14) of the Indian Stamp Act, 1899, defines "instrument" to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Sub-section (2) of Section 17 of the Act engrafts exceptions to the instruments covered only by Clauses (b) and (c) of sub-section (1). We are concerned with Clause (vi) of sub-section (2). Clause (vi) relates to any decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding."

"The Court must enquire whether a document has recorded unqualified and unconditional words of present demise of right, title and interest in the property and included the essential terms of the same; if the document, including a compromise memo, extinguishes the rights of one and seeks to confer right title or interest in prasenti in favour of the other, relating to immovable property of the value of Rs.100/- and upwards, the document or compromise memo shall be compulsorily registered..... Any other view would find the mischief of avoidance of registration, which requires payment of stamp duty, embedded in the decree or order."

"It would, therefore, be the duty of Court to examine in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the Court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or interest in praesenti in immovable property of the value of Rs. 100/- or upwards in favour of other party for the first time, either by compromise or pretended consent. If latter be the position, the document is compulsorily registerable."

In *Som Dev and others v. Rati Ram and another, AIR 2006 SC 3297,* the Apex Court has laid down in para 7 :

> 7. "On a plain reading of Section 17 of the Registration Act, with particular reference to clause (vi) of sub-section (2) it is clear that a decree or order of a court and a compromise decree that relates only to the subject matter of the suit need not be registered on the ground that it is a non-testamentary instrument which purports to or operates to create, declare, assign, limit or extinguish any right to or in immovable property or which acknowledges receipt or payment of any consideration on account of a transaction which brings about the above results. But if a suit is decreed on the basis of a compromise and that compromise takes in property that is not the subject matter of the suit, such a compromise decree would require registration. Of course, we are not unmindful of the line of authorities that say that even if there is inclusion of property that is not the subject matter of the suit, if it constitutes the consideration for the compromise, such a compromise decree would be considered to be a compromise relating to the subject matter of the suit and such a decree would also not require registration in view of clause (vi) of Section 17(2) of the Registration Act. ..... Suffice it to say that on a plain reading of clause (vi) of Section 17(2) all decrees and orders of Court including a compromise decree subject to the exception as regards properties that are outside the subject matter of the suit, do not require registration on the ground that they are hit by Section 17(1)(b) and (c) of the Act. But at the same time, there is no exemption or exclusion, in respect of the clauses (a), (d) and (e) of Section 17(1) so that if a decree brings about a gift of immovable property, or lease of immovable property from year to year or for a term exceeding one year or reserving an yearly rent or a transfer of a decree or order of a Court or any award creating, declaring, assigning, limiting or extinguishing rights to and in immovable property, that requires to be registered."

When a compromise is to be recorded and decree is to be passed, the terms to the compromise should be reduced in writing and signed by parties as per Order 23 Rule 3 of the CPC and unless a decree is passed in terms thereof, it may not be possible to recognize the same as a compromise decree. Even if the immovable property included in compromise is other than the subject matter

of the suit could, indisputably, in terms of Order 23 Rule 3 of the CPC, a compromise decree is permissible but the same would require registration as it would come within the purview of exception contained in Clause (vi) of Section 17 (2) of the Registration Act, 1908. The provisions of Civil Procedure Code, 1908 does not and cannot override the provisions of the Registration Act, 1908 (Please see *K. Raghunandan & Ors. v. Ali Hussain Sabir & Ors., 2008 AIR SCW 3844*)

In *Som Dev (supra)* it was also observed that:

> "It must be pointed out that a decree or order of a Court does not require registration if it is not based on a compromise on the ground that Clauses (b) and (c) of Section 17 of the Registration Act are attracted. Even a decree on a compromise does not require registration if it does not take in property that is not the subject matter of the suit. A decree or order of a Court is normally binding on those who are parties to it unless it is shown by resort to Section 44 of the Evidence Act that the same is one without jurisdiction or is vitiated by fraud or collusion or that it is avoidable on any ground known to law. But otherwise that decree is operative and going by the plain language of Section 17 of the Registration Act, particularly, in the context of sub-clause (vi) of sub-section (2) in the background of the legislative history, it cannot be said that a decree based on admission requires registration."

A statute must be construed having regard to the purpose and object thereof. Sub-section (1) of Section 17 of the Act makes registration of the documents compulsory. Sub-section (2) of Section 17 of the Act excludes only the applications of Clauses (b) and (c) and not clause (e) of Sub-section (1) of Section 17. If a right is created by a compromise decree or is extinguished, it must compulsorily be registered. Clause (vi) of Sub-section (2) of Section 17 of the Act is an exception to the exceptions. If the latter part of the Clause (vi) applies, the first part thereof shall not apply. [Please see *K. Raghunandan (supra)*]

In *S. Noordeen v. V.S. Thiru Venkita Reddiar and Ors., AIR 1996 SC 1293*, the Apex Court held that: (para 12)

> 12. ".....In a case where the plaintiff had obtained an attachment before judgment on certain properties, the said properties would become subject matter of the suit and a compromise decree relating to those properties came within the exception in Section 17(2)(vi) of the Act and such a compromise decree did not require registration.".

Similarly in *Ramdas Sah and another v. Jagarnath Prasad and others, AIR 1960 Patna 179* it was observed that:

> "The question whether a particular term of a compromise relates to the subject-matter of the suit is obviously a question to be answered on the frame of the particular suit, the relief claimed in the suit and the matters arising for decision on the pleadings of the parties. The term is comprehensive enough, and if the compromise relates to all the matters which fall to be decided in the case, it cannot be said that any part of the compromise is beyond the subject-matter of the suit."
>
> "In other words where the compromise is really an adjustment of the rights and differences in respect of all matters in dispute between the parties and the compromise purports to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all, it must be held to relate to the suit."

In *Karunakar Rout v. Daulat Bihari Biswas, AIR 1995 Orissa 110* the Division Bench observed that if the consent decree or order of the suit or proceeding covered the property although it was not in the plaint or in dispute, such property constituting an inseparable part of the consideration for the compromise may well be regarded as the subject-matter of the suit. This is because the decree having been passed on the basis of the compromise, cannot stand without the property. Therefore, such consent decree was not required to be compulsorily registered in view of Section 17 (2) (vi) of the Registration Act.

If any immovable property is included in compromise which does not form part of the suit property, but parties does not seek to either create, declare, assign, limit or extinguish either in present or in future, any right, title or interest, in the property within the meaning of Section 17 (1) (b) of the Registration Act and it is only to clarify a previous deal and does not affect any change to any legal rights in the property and merely recites what the existing rights are, then such decree does not require registration as it will come within the scope of exception to Section 17 (2) (vi) of the Registration Act. (Please see: *Amteshwar Anand v. Virendra Mohan Singh, AIR 2006 SC 151*)

CONCLUSION

Thus the legal position on the aforesaid subject may be summarized as under:

(i) A decree in a suit for partition declares the right of the parties in the immovable properties and divides the shares by metes and bounds to be considered as an instrument liable for the payment of stamp duty. Similarly, other decrees which comes under the purview of the required provisions of Stamp Act are also to be stamped accordingly.

(ii) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.

(iii) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100/- upwards in favour of any party to the suit, the decree or order would require registration.

(iv) If the decree were not to attract any of the Clauses of sub-section (1) of Section 17, it is apparent that the decree would not require registration.

(v) If a decree brings about a gift of immovable property, or lease of immovable property from year to year or for a term exceeding one year or reserving an yearly rent or a transfer of a decree or order of a Court or any award creating, declaring, assigning, limiting or extinguishing rights to and in immovable property, the decree would require registration.

(vi) If the property dealt with by the decree be not the "subject matter of the suit or proceeding", sub-section (2) of Section 17 of Registration Act would not operate.

(vi) Whether a particular term of a compromise relates to the subject-matter of the suit, as required under Clause (vi) of Sub-section (2) of Section 17 of the Act, is to be answered on the frame of the particular suit, the relief claimed in the suit and the matters arising for decision on the pleadings of the parties.

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संपत्ति के अंतरण संबंधी पंजीकृत दस्तावेज लोक दस्तावेज हैं या निजी दस्तावेज ? ऐसे दस्तावेज के सिद्ध किए जाने की रीति

न्यायिक अधिकारीगण
मण्डला

संपत्ति अंतरण अधिनियम, 1882 की धारा 5 में संपत्ति के अंतरण को परिभाषित किया गया है, जिसके अंतर्गत 'संपत्ति के अंतरण' से ऐसा कार्य अभिप्रेत है जिसके द्वारा कोई जीवित व्यक्ति एक या अधिक अन्य जीवित व्यक्तियों को या स्वयं को अथवा स्वयं और एक या अधिक अन्य जीवित व्यक्तियों को वर्तमान में या भविष्य में संपत्ति हस्तांतरित करता है और संपत्ति का अंतरण करना ऐसा कार्य करना है। संपत्ति के अंतरण के अन्तर्गत सम्पत्ति अंतरण अधिनियम की धारा 54 के अंतर्गत विक्रय द्वारा स्थावर संपत्ति का अंतरण, धारा 58 के अन्तर्गत बंधक द्वारा अंतरण, धारा 105 के अन्तर्गत स्थावर संपत्ति का पट्टा देकर संपत्ति के उपभोग करने के अधिकार का अंतरण, धारा 118 के अंतर्गत विनिमय के द्वारा परस्पर संपत्ति का अंतरण, धारा 122 के अन्तर्गत दान के द्वारा जंगम या स्थावर संपत्ति का अंतरण तथा धारा 130 के अंतर्गत अनुयोज्य दावों के अंतरण संबंधी प्रावधान हैं ।

परन्तु उक्त प्रावधान स्थावर संपत्ति के अंतरण के लिए आत्यंतिक नहीं हैं, अपितु वसीयत के द्वारा अथवा पारिवारिक व्यवस्था पत्र द्वारा भी अचल संपत्ति को अन्य को अंतरित किया जा सकता है। इसके अतिरिक्त उत्तराधिकार एवं उत्तरजीविता के आधार पर भी संपत्ति का न्यायगमन होता है ।

जहाँ तक संपत्ति के अंतरण संबंधी पंजीकृत दस्तावेज लोक दस्तावेज अथवा निजी दस्तावेज होने संबंधी प्रश्न हैं, इस संबंध में मान्नीय मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टान्त ***जगन्नाथ प्रसाद निगम विरूद्ध विशेश्वर प्रसाद, 1977 (1) एम.पी.वीकली नोट 210, भगवान शरण विरूद्ध मानसिंह, 1986 (1) एम. पी. वीकली नोट 59 तथा गोपाल शर्मा वि. सावित्री देवी ओझा, 1994 (1) एम.पी.वीकली नोट 192*** में विक्रय विलेख को लोक दस्तावेज नहीं होना माना गया तथा यह विनिश्चत किया गया कि जब तक मूल विक्रय पत्र खो जाना अथवा नष्ट हो जाना साबित न कर दिया जाए, तब तक उक्त विक्रय विलेख को मात्र प्रमाणित प्रतिलिपि प्रस्तुत करके साबित नहीं किया जा सकता है।

उक्त न्याय दृष्टांतों के विपरीत मान्नीय उच्च न्यायालय द्वारा न्याय दृष्टांत ***वासुदेव विरूद्ध टीकाराम, 1994 (1) एम.पी.वीकली नोट 198 तथा नवाब साहब विरूद्ध फिरोज अहमद, 2002 (3) एम.पी. एच.टी. 414*** में यह अभिनिर्धारित किया गया है कि रजिस्ट्रीकृत विक्रय विलेख लोक दस्तावेज हैं।

उपरोक्त भिन्न मतों से उपजी भ्रमपूर्ण स्थिति को मान्नीय मध्यप्रदेश उच्च न्यायालय की खण्डपीठ द्वारा अपने निर्णय ***रेखा एवं अन्य विरूद्ध श्रीमती रत्नाश्री, 2006 (2) जे.एल.जे. 275 (डी.बी.)*** में स्पष्ट करते हुए यह अभिनिर्धारित किया है कि रजिस्ट्रीकृत विक्रय विलेख तथा अन्य कोई रजिस्ट्रीकृत दस्तावेज प्राइवेट दस्तावेज हैं तथा ऐसे दस्तावेज भारतीय साक्ष्य अधिनियम, 1872, की धारा 74 के अधीन बताए गए लोक दस्तावेज के नहीं है। विक्रय विलेख एक प्रकार का हस्तांतरण पत्र है। किसी व्यक्ति द्वारा निष्पादित कोई हस्तांतरण पत्र अथवा दस्तावेज किसी प्रभुता संपन्न

प्राधिकारी का अथवा किसी शासकीय निकाय या अधिकरण का या किसी लोक अधिकारी का, विधायी, न्यायिक और कार्यपालक कार्य अथवा कार्य का अभिलेख नहीं है और न ही यह किसी राज्य में रखे गए किसी प्राइवेट दस्तावेज का लोक अभिलेख ही है। कोई विक्रय विलेख अथवा अन्य कोई हस्तांतरण पत्र (conveyance) जब रजिस्ट्रीकरण अधिनियम के अधीन रजिस्ट्रीकरण के लिए प्रस्तुत किया जाता है तब रजिस्ट्रीकरण के पश्चात् किसी राज्य के लोक अभिलेख में रोका या रखा नहीं जाता है, बल्कि यह दस्तावेज रजिस्ट्रीकरण की प्रक्रिया पूरी होने पर उस व्यक्ति को लौटा दिया जाता है, जिसने ऐसा दस्तावेज रजिस्ट्रीकरण के लिए प्रस्तुत किया था। इसलिए कोई मूल रजिस्ट्रीकृत दस्तावेज, किसी राज्य द्वारा रखा गया प्राइवेट दस्तावेज का लोक अभिलेख नहीं है। परिणाम स्वरूप विक्रय का अभिलेख अथवा अन्य रजिस्ट्रीकृत दस्तावेज, धारा 74 में वर्णित लोक दस्तावेजों के दो वर्गों में से किसी के भी अधीन नहीं आएगा। कोई दस्तावेज जो लोक दस्तावेज नहीं है, वह साक्ष्य अधिनियम की धारा 75 के अन्तर्गत प्राइवेट दस्तावेज की श्रेणी में आएगा।

इस प्रकार उपरोक्त न्याय दृष्टांत के आलोक में कोई रजिस्ट्रीकृत विक्रय विलेख अथवा संपत्ति के अंतरण संबंधी अन्य पंजीकृत दस्तावेज लोक दस्तावेज नहीं है, अपितु प्राइवेट दस्तावेज हैं।

उक्त न्याय दृष्टांत में आगे यह निर्धारित किया गया है कि रजिस्ट्रेशन अधिनियम के अन्तर्गत पंजीयन कार्यालयों में संधारित की जाने वाली पुस्तक क्रमांक–1, जिसमें निजी दस्तावेजों के पंजीयन होने पर उनकी प्रतिलिपि की जाती है, प्रविष्टि की जाती है या नस्ती रखी जाती है, एक लोक दस्तावेज है।

न्याय दृष्टांत ***रेखा एवं अन्य*** (उपरोक्त) में यह विधि भी प्रतिपादित की गयी है कि रजिस्ट्रीकरण अधिनियम, 1908 की धारा 51 तथा धारा 57 एवं साक्ष्य अधिनियम, 1872 की धारा 74 के सन्दर्भ में उप रजिस्ट्रार कार्यालय में पुस्तक क्रमांक–1 से लेकर पुस्तक क्रं–4 संधारित करने का प्रावधान है तथा रजिस्ट्रीकरण अधिनियम की धारा 52 के अनुसार दस्तावेज के प्रस्तुत किए जाने पर रजिस्ट्रीकरण पदाधिकारी कार्यवाही करते हुए उक्त दस्तावेजों के रजिस्ट्रीकरण का कार्य करता है तथा धारा 57 के अन्तर्गत रजिस्ट्रीकरण पदाधिकारी द्वारा पुस्तकों एवं अनुक्रमणिकाओं (indices) का उक्त आशय का शुल्क प्रदान किए जाने के बाद शर्तों के अधीन रहते हुए संबंधित व्यक्तियों को निरीक्षण करने देने एवं प्रविष्टियों की प्रमाणित प्रतियाँ दिए जाने का प्रावधान है, ऐसी दशा में रजिस्ट्रीकृत दस्तावेज की पुस्तक–1 से जो प्रमाणित प्रतिलिपि जाती है, वह लोक दस्तावेज नहीं है और न ही उसे प्राइवेट दस्तावेज की प्रमाणित प्रतिलिपि ही कहेंगे, अपितु यह पुस्तक क्रमांक–1 जो लोक दस्तावेज है, उसकी प्रमाणित प्रतिलिपि कहलाएगी।

संपत्ति के अंतरण संबंधी पंजीकृत दस्तावेजों को प्रमाणित करने की प्रक्रिया

दस्तावेजों को सिद्ध किए जाने के संबंध में माननीय म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत ***रेखा एवं अन्य*** (उपरोक्त) में निम्नानुसार विधि प्रतिपादित की गयी है :–

(1). पंजीकृत विलेख/दस्तावेज की पुस्तक क्रं–1 से तैयार कर पंजीयन अधिकारी द्वारा दी गयी प्रमाणित प्रतिलिपि लोक दस्तावेज की प्रमाणित प्रतिलिपि होने के कारण एवं अन्य लोक दस्तावेजों की प्रमाणित प्रतिलिपि ऐसे लोक दस्तावेज या उसके भाग की अर्न्तवस्तु के प्रमाण के लिये उनकी द्वितीयक साक्ष्य के रूप में साक्ष्य अधिनियम की धारा 65 (ड़) सहपठित धारा 77 के अन्तर्गत प्रस्तुत एवं प्रदर्शित की जा सकेगी और उसके लिए द्वितीयक साक्ष्य प्रस्तुति के लिए

आवश्यक आधार दर्शाने की आवश्यकता नहीं होगी किन्तु ऐसे प्रस्तुतिकरण से मात्र मूल दस्तावेज की अर्न्तवस्तु ही प्रमाणित होगी और उससे मूल दस्तावेज का निष्पादन प्रमाणित नहीं होगा।

माननीय म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत ***रेखा एवं अन्य*** (उपरोक्त) में आगे यह स्पष्ट किया गया है कि विक्रय विलेख या अन्य प्रकार के निजी पंजीकृत दस्तावेजों या अन्य अपंजीकृत निजी दस्तावेजों की द्वितीयक साक्ष्य के रूप में उनकी प्रमाणित प्रतिलिपि का प्रस्तुतीकरण एवं प्रदर्श किया जाना तभी अनुज्ञेय है जबकि उसके लिए साक्ष्य अधिनियम की धारा 65 के खण्ड (क), (ख) या (ग) के अन्तर्गत द्वितीयक साक्ष्य की प्रस्तुति के लिए आवश्यक आधार दर्शित किये जा चुके हो।

उक्त न्याय दृष्टांत में यह भी विनिश्चित किया गया है कि किसी दस्तावेज की मूल या प्रमाणित प्रतिलिपि का प्रस्तुतीकरण एवं प्रदर्श किया जाना उसके निष्पादन को सिद्ध किये जाने की आवश्यकता से अभिमुक्ति प्रदान नहीं करता है एवं दस्तावेज का निष्पादन साक्ष्य अधिनियम की धारा 67 तथा 68 एवं अध्याय 5 की अनुवर्ती धाराओं के प्रावधानों में वर्णित रीति से सिद्ध करना ही होगा। इस संबंध में म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत ***ग्वालियर सिरेमिक एवं पॉटरिज प्राइवेट लिमिटेड विरूद्ध करमचंद थापर एवं ब्रदर्स कोल सेल्स लिमिटेड ग्वालियर, 1996 एम.पी.एल.जे. पृष्ठ 772*** भी दृष्टव्य है।

इस बिंदु पर भारतीय साक्ष्य अधिनियम, 1872 की धारा 64 में यह प्रावधान है कि दस्तावेजों को प्राथमिक साक्ष्य द्वारा साबित किया जा सकेगा परंतु धारा 65 में उन अवस्थाओं का उल्लेख है, जिनमें दस्तावेज के संबंध में द्वितीयक साक्ष्य दिए जाने का प्रावधान है। जहाँ रजिस्टर्ड विक्रय पत्र की या अंतरण संबंधी दस्तावेजों की प्राथमिक साक्ष्य उपलब्ध है, व्रहाँ उसे धारा 67 के अनुसार प्राथमिक साक्ष्य प्रस्तुत करके, जिस व्यक्ति के बारे में अभिकथित है कि उसने पेश किये गये दस्तावेज को हस्ताक्षरित किया था या लिखा था, उस व्यक्ति के हस्ताक्षर या हस्तलेख में होना साबित किया जा सकेगा तथा इस संदर्भ में धारा 68 एवं 69 ऐसे दस्तावेजों के निष्पादन को साबित करने संबंधी प्रक्रिया का वर्णन करते हैं, जिनके अनुप्रमाणक साक्षी का पता न चले। इसी प्रकार धारा 70 के अनुसार अनुप्रमाणित दस्तावेज के पक्षकार द्वारा निष्पादन की स्वीकृति किया जाना उस पक्षकार के विरूद्ध, जिसके द्वारा स्वीकृति की गयी है, पर्याप्त सबूत है तथा धारा 71 में यह प्रावधान हैं कि जब अनुप्रमाणक साक्षी उसके समक्ष दस्तावेज के निष्पादन होने से इंकार करे या निष्पादन का स्मरण न होने का अभिवाक करे तब उसका निष्पादन अन्य साक्ष्य द्वारा साबित किया जा सकेगा। धारा 72 के अनुसार किसी अनुप्रमाणिक दस्तावेज को जिसका अनुप्रमाणित होना विधि द्वारा अपेक्षित नहीं है, ऐसे साबित किया जा सकेगा, मानो वह अनुप्रमाणित नहीं हो। धारा 73 एवं धारा 47 साक्ष्य अधिनियम में दस्तावेज पर किए गए हस्ताक्षर, लेख या मुद्रा की तुलना अन्य दस्तावेज, जो स्वीकृत या साबित हैं, से करने का प्रावधान है तथा धारा 47 के तहत कोई दस्तावेज किसी व्यक्ति के हस्तलेख में होने अथवा उसके द्वारा हस्ताक्षरित होने के बारे में जब न्यायालय को राय बनानी होती है तो उस व्यक्ति के हस्तलेख से, जिसके द्वारा वह लिखी या हस्ताक्षरित की गई अनुमानित की जाती है, परिचित किसी व्यक्ति की यह राय कि वह दस्तावेज उस व्यक्ति द्वारा लिखा या हस्ताक्षरित किया गया था अथवा लिखा या हस्ताक्षरित नहीं किया गया था, सुसंगत होती हैं।

मूल विक्रय विलेख अथवा किसी व्यक्ति द्वारा निष्पादित कोई अन्य रजिस्टर्ड हस्तांतरण पत्र, जिसका विधि द्वारा सत्यापित किया जाना अपेक्षित नहीं है, का निष्पादन साबित किए जाने के लिए यदि उक्त मूल विक्रय विलेख या दस्तावेज उपलब्ध नहीं है, तब धारा 65 साक्ष्य अधिनियम के खण्ड (क) के अनुसार यदि यह दर्शित कर दिया जाए कि मूल ऐसे व्यक्ति के कब्जे में या उसके शक्त्यधीन हैं, जिसके विरूद्ध उस दस्तावेज का साबित किया जाना ईप्सित है अथवा वह व्यक्ति न्यायालय की आदेशिका की पहुँच के बाहर है, जो उसे पेश करने के लिए वैद्य रूप से आबद्ध है अथवा ऐसे व्यक्ति को धारा 66 में वर्णित सूचना के पश्चात् उसके द्वारा ऐसा दस्तावेज पेश नहीं किया जाता है तब मूल दस्तावेज की द्वितीयक साक्ष्य पेश की जा सकती हैं। धारा 65 (ख) के अनुसार किसी दस्तावेज के संबंध में द्वितीयक साक्ष्य उस दशा में दी जा सकती हैं जबकि मूल का अस्तित्व, दशा या अन्तर्वस्तु उस व्यक्ति द्वारा, जिसके विरूद्ध उसे साबित किया जाना है या उसके हित प्रतिनिधि द्वारा लिखित रूप में स्वीकृत किया जाना साबित कर दिया गया है अथवा धारा 65 (ग) के अन्तर्गत जबकि मूल नष्ट हो गया है या खो गया है अथवा जबकि उसकी अन्तर्वस्तु का साक्ष्य देने की प्रस्थापना करने वाला पक्षकार अपने स्वयं के व्यतिक्रम अथवा उपेक्षा से अनुद्भूत (not arising from) अन्य किसी कारण से उसे युक्तियुक्त समय में पेश नहीं कर सकता हो तब द्वितीयक साक्ष्य दी जा सकती हैं।

इस प्रकार विक्रय विलेख अथवा अन्य किसी पंजीकृत हस्तातंरण विलेख की द्वितीयक साक्ष्य आने देने के लिए उक्त आधार दर्शित करने पर ही द्वितीयक साक्ष्य की भांति उक्त दस्तावेज को साक्ष्य के रूप में प्रस्तुत करने की प्रस्थापना की जा सकती है।

जहाँ पर मूल विक्रय पत्र अथवा पंजीकृत अन्य मूल हस्तांतरण पत्र किसी भी समय पर प्रस्तुत नहीं किया जाता है तथा उस पक्षकार द्वारा, जिसके द्वारा उसका उपयोग किया जाना आशयित है, वह द्वितीयक साक्ष्य दिए जाने के लिए कोई आधार स्थापित नहीं कर पाता है, वहाँ मात्र मूल विक्रय पत्र की अंथवा अन्य रजिस्टर्ड मूल हस्तांतरण पत्रों की, प्रमाणित प्रतिलिपियाँ साक्ष्य में ग्राह्य नहीं होगी। इस बिंदु पर माननीय उच्चतम् न्यायालय का न्याय दृष्टांत ***रोमन कैथोंलिक मिशन विरूद्ध मद्रास राज्य, ए.आई.आर. 1966 सुप्रीम कोर्ट 1457*** अवलोकनीय है।

न्यायालय के समक्ष द्वितीयक साक्ष्य दिए जाने का आधार मौजूद होना साबित करने पर न्यायालय द्वितीयक साक्ष्य द्वारा उस दस्तावेज का निष्पादन सिद्ध करने की अनुमति दे सकता है परंतु किसी दस्तावेज का रजिस्ट्रीकरण उस दस्तावेज के निष्पादन का सबूत नहीं है, अपितु उस दस्तावेज का निष्पादन सम्यक् रूप से हुआ है, यह उस पक्षकार को उपरोक्तानुसार साबित करने की आवश्यकता होगी, जिसके द्वारा उसका उपयोग किया जाना आशयित है तथा वह पक्षकार जिसके विरूद्ध उसका उपयोग किया जाना आशयित है, वह यह साबित कर सकेगा कि उक्त दस्तावेज का निष्पादन सम्यक् रूप से नहीं हुआ है।

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WHETHER THE REVISIONAL COURT HAS POWER TO DIRECT THE MAGISTRATE TO TAKE COGNIZANCE OF A PARTICULAR OFFENCE AND TO ISSUE PROCESS U/S 204 CR.P.C. IN REVISION AGAINST DISMISSAL OF COMPLAINT U/S 203 CR.P.C.?

Judicial Officers
District Dhar

Before going through the main issue, it will be useful to see the relevant provisions of Criminal Procedure Code, 1973 in this regard:

> **398. Power to order inquiry.–** On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (4) of section 204, or into the case of any person accused of an offence who has been discharged:
>
> .....
>
> **399. Sessions Judge's powers of revision.–** (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.
>
> **(2) .....**
>
> **(3) .....**
>
> **401. High Court's powers of revision.–** (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391.....

Although a bare perusal of Section 398 clearly reveals that if a complaint is dismissed under Section 203 of the Code, bare the Revisional Court can only remand the case for further inquiry into the complaint and it cannot make any direction for registration of the case. In other words, Section 398 of the Code does not permit the Revisional Court to direct the Magistrate to take cognizance and issue process under S. 204 of the Code, but powers given under Section 399 (1) r/w/s 401 (1) Cr.P.C. are wider in which a Revisional Court can exercise any of the powers conferred on the Court of appeal by Sections 386, 389, 390 and 391 of Cr.P.C. There are two judgments of our High Court - one is *Rewaram and another v. State of M.P., 2005 (1) MPHT 85* (decided on 06-09-2004) and another is *Major Subodh v. Major R.S. Dudee, 2007 (1) MPHT 431* (decided on

11.05.2006). In *Rewaram's case (supra),* reliance has been placed on *Rajaram Gupta and others v. Dharamchand and others, 1983 MPLJ 56, G.D. Singh v. State of M.P., 1990 MPLJ 39 and Harun Khan v. Maheshchand, 1997 (2) Crimes 301 (MP).* In these cases it has been held that while allowing revision against Magistrate's order dismissing a complaint u/s 203 of the Code, the Revisional Court has no jurisdiction to direct the Magistrate to register a case against an accused. The Revisional Court can only direct the Magistrate to make further inquiry.

There are two more judgments of our own High Court which do not support the view taken in the above cases. One such judgment is *Hansraj Sharma v. Shivcharan, 2004 (3) MPLJ 485* (decided on 14.05.2004) and another is *Ashok Maheshwari Rajkamal Prakashan (P) Ltd. v. Dinesh Puranik, 2007 CrLR (MP) 376* (decided on 08.12.2006).

In *Hansraj's case (supra),* all the three judgments referred in *Rewaram's case (supra)* have been considered and distinguished on the ground that in these cases the scope of Section 398 of the Code alone had been considered and the scope of Section 399 of the Code was neither considered nor discussed at all. In *Hansraj's case (supra)* it has been held that Sections 398 and 399 of the Code would have to be read together as one integral whole. Under Section 398 of the Code, the Revisional Court cannot issue direction to the Magistrate for registration of complaint or for taking cognizance of a particular offence but under Section 399 r/w/s 401 (1) of the Code, direction of such nature can legally be given. Para 8 of this judgment is useful to be quoted:

> "8. Section 399 of the new Code prescribes the larger field of revisional powers of the Court of Sessions. In *Bal Kishan Jain v. Indian Overseas Bank* decided by the Division Bench of Punjab and Haryana High Court reported in *1981 Cri.L.J. 796,* the scope of revisional power of the Sessions Court under Sections 398 and 399 of the Code of Criminal Procedure has been discussed at length and this case renders considerable help in examining the joint scope of Sections 398 and 399 of the Code. Section 398 of the Code is in *pari materia* with Section 436 of the Code of Criminal Procedure, 1898 and with section 437 of the earlier Code of Criminal Procedure, 1882. The necessity for having a separate provision like Section 436 in the earlier Code was felt as the Court of Sessions in its revisional jurisdiction was primarily a reporting or a recommendatory Court and basic revisional powers were vested in High Court alone under Section 439 of the Code. For meeting situation where a complaint was wrongly dismissed as a whole or an accused had been wrongly discharged, the Court of Sessions was given a larger power at par with the High

> Court, namely, that of the directing further enquiry into such cases. This was done by virtue of Section 436 of the old Code. It was not necessary for the Court of Sessions to report the matter to High Court, but it could in its own right direct further enquiry within the narrow field of section 436 of the Code in sharp distinction to other cases where the court could only recommend to the High Court for necessary action."

Where as in the case of *Rewaram (supra)* it has been held that if general power as prescribed under Section 397 r/w/s 399 of the Code would be applicable then there was no need for the law makers to make a specific provision for remanding the case for further inquiry under Section 398 of the Code and Section 398 would become redundant.

It is interesting to note that the judgment in *Hansraj's case (supra)* was delivered on 14.05.2004 and the judgment in *Rewaram's case (supra)* taking contrary view was delivered on 06.09.2004. In both the cases provisions of Sections 398, 399 r/w/s 401 of the Code have been considered and the same previous judgments rendered by our High Court were taken note of, but contrary conclusions have been drawn on the basis of different reasoning. In *Rewaram's case (supra)* there is no reference of *Hansraj's case* (supra).

In the aforesaid circumstances, it is to be seen as to which of the two views of the High Court will have binding effect. In this regard in *Wali Mohammad v. Batulbai, 2003 Cr.L.J. 2755,* it has been held by a Full Bench of M.P. High Court that if there is conflict between two decisions of the High Court rendered by the Benches of equal strength, decision earlier in time shall hold the field unless it is referred and explained in the later decision in which case the later one shall be binding.

Therefore, although there are two conflicting views of our High Court available on the problem in issue, in the light of law laid down in *Wali Mohammad's case (supra)*, the view taken in *Hansraj's case (supra)* would prevail.

It is pertiment to note that later on in *Ashok Maheshwari's case* (supra) (decided on 08.12.2006). after referring to both *Hansraj's case* (supra) and *Rewaram's case* (supra) the view taken in *Hansraj's case* (supra), has been followed.

CONCLUSION

On the basis of above analysis, it can be concluded that in revision against dismissal of complaint u/s 203 of Cr.P.C., though the Revisional Court u/s 398 Cr.P.C. has no jurisdiction to make an order of taking cognizance of a particular offence and to issue process u/s 204 of the Code, yet such direction can be issued in exercise of its powers u/s 399 r/w/s 401 of the Code.

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PROCEDURE OF CRIMINAL TRIAL WHERE ACCUSED APPEARS TO BE LUNATIC OR OF UNSOUND MIND

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Often a problem comes before the Court at different stages of the proceedings i.e (i) when Magistrate conducts inquiry, it appears that accused is unable to understand nature of proceedings by reason of unsoundness of mind; or (ii) during trial it appears that accused is unable to defend himself due to mental illness or unsoundness of mind; or (iii) it appears from the record or is established by the evidence that at the time of incident accused was insane or lunatic; or (iv) accused is unable to understand the proceedings due to language problem or some reason other than unsoundness of mind. Chapter XXV of the CrPC which contain Sections 328 to 339 deals with the problem except contingency enumerated in category (iv) of which Section 318 of CrPC takes care.

AT THE STAGE OF INQUIRY

Section 328 of the Code says that when a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall enquire into the fact of such unsoundness of mind and shall cause such person to be examined by the Civil Surgeon of the district and thereupon shall examine such surgeon and shall reduce the examination into writing. If Magistrate is of opinion that person referred is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

The words 'reason to believe' indicates that when an accused person is presented before a Magistrate for inquiry, who, is alleged, to be suffering from unsoundness of mind, the Magistrate has, on such materials, as are brought before him to inquire before he proceeds with the inquiry whether there are reasons to believe that the accused before him is suffering from any such infirmity. The next step is to institute an inquiry into the fact of unsoundness of mind and cause him to be examined by the civil surgeon. (See *Jai Shankar v. State of Himachal Pradesh, AIR 1972 SC 2267*).

SCOPE AND APPLICABILITY OF THE PROVISION

The wordings of the Section suggest that it applies only where the accused is suffering from unsoundness of mind. If complainant is of unsound mind, proceeding cannot be postponed and Court may conduct inquiry by either substituting any legal representative or may call witnesses suo motu. Law is well settled in this field that status of complainant is nothing but of a witness. If complainant becomes insane at the time of incident, limitation for filing of complaint does not stop to run. The provisions of Sections 6, 7 and 8 of the Limitation Act, 1963 does not apply in such a case as it applies to civil cases

only, therefore, criminal proceedings cannot be postponed. If complaint is not filed within the period of limitation, it would be time barred. However, it may be the ground to condone the delay u/s S 473 of CrPC. The procedure laid down under Section 328 of CrPC does not strictly apply to proceedings under Section 125 of CrPC because non-applicant is not an accused. However, the Madras High Court in the case of *Appachi, AIR 1948 Mad 388* held that the provisions of the Section is based on equity and good conscience so it may be applied to proceedings of Section 125 of CrPC. In the case of *State of Maharashtra v. Sindhi, AIR 1975 SC 1665,* the Apex Court held that the provisions of this Chapter are also applicable in appeal.

AT THE STAGE OF TRIAL

Section 329 of the CrPC prescribes that if at the time of trial of any person, it appears to the Magistrate or Court of Sessions that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him is satisfied of the fact, he shall record a finding to that effect and postpone further proceedings in the case. Sub section (2) provides that trial of the fact of unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court.

From a bare perusal of Section 329 CrPC, it appears that it contemplates two stages of procedure. The first stage is that it must appear to the Magistrate or Court of Session that the accused was of unsound mind and consequently incapable of making defence. The second stage consists of an inquiry into the unsoundness of mind and incapacity of the accused when the accused appearing before the Court of Session appears to be of unsound mind or such a plea is raised before the trial, then a preliminary inquiry, as to whether the accused is capable of defending himself, must be held before proceeding further. [See *State of Jharkhand v. Lakhan Rai, 2007 CriLJ 2410 and Satya Devi v. State, 1969 CriLJ 1424 (SC)*]. Thus, law enjoins on the Sessions Judge or Magistrate to hold a trial regarding the soundness of the accused's mind when it appears to him that the person brought before him is of unsound mind and consequently incapable of making his defence. According to the requirement, he shall in the first instance, try the fact of such unsoundness as incapacity. He can proceed only if he is satisfied that the accused is of sound mind and is capable of making his defence. The word 'appears' in Section 329 is of lesser degree of probabilities than the word 'proof'. (See *Sankaran v. State, 1994 CrLJ 1173.*) The word 'appears' though imports a lesser degree of probability than 'proof' but then this would not mean that the Magistrate or Court must proceed to try the question on mere asking. There must be something either in the form of medical record or other material to raise a reasonable doubt in the mind of the Magistrate or Court that the accused is of unsound mind. Even the demeanor of the accused may sufficiently lead to such a doubt. It is only on the crossing of this hurdle that it

becomes obligatory on the Magistrate or Court to try the fact of such unsoundness of mind and incapacity of the accused. (See *Yogesh Kumar v. State, 1996 CriLJ 2724* and *I. V. Shivaswamy v. State of Mysore, AIR 1971 SC 1638*).

PROCEDURE FOR DETERMINATION

To obey the mandate of Section 329 of the Code, the court should follow summary procedure. When the plea of insanity is raised before a Court, it shall try the fact of unsoundness of mind and incapacity of the accused in the first instance. Sub-section (2) of this Section makes preliminary trial of this fact a part of the trial before the Court. When an accused raises the plea of unsoundness of mind, the onus is upon him to prove it. He has to lead evidence. If the opinion of the medical expert examining the accused does not favour him, he can lead other permissible evidence to prove his mental condition. The prosecution has a right to rebut the evidence led by the accused. The procedure for the trial of the fact of unsoundness of mind and consequent incapacity to make a defence by the accused postulates recording of evidence in support and in rebuttal of it. The statement of the doctor, who examines the accused and certifies him to be of unsound mind, should be recorded as a witness. [See *Sankaran v. State (supra)*]

EFFECT OF NON-OBSERVANCE

Commencement of trial by Magistrate or Court without recording medical evidence or without satisfying himself or without recording of finding on the material placed before him, will vitiate the trial. If a doubt is raised in the mind of the Court that the accused is of unsound mind, it is obligatory on the Court to try the fact of such unsoundness of mind and incapacity of the accused. Failure to do so would defeat the mandatory requirement of these provisions and vitiate the whole trial. The provisions of Sections 328 and 329 do not embrace an idle formality but are inserted to ensure a fair trial to an accused which cannot obviously be afforded to an insane person and the non-observance of these provisions must be held to convert a trial into a farce. Any violation by a Court in not examining proper evidence for recording a finding as directed by Sections 328 and 329 of the Code is to vitiate the trial or inquiry and whole proceeding would be void. *See Satya Devi v. State, 1969 CriLJ 1424 (SC), Abdullah Jhat v. State of Jammu and Kashmir, 1999 CriLJ 3034 and Sankaran v. State (supra).* If issue is raised and the Magistrate if without making any inquiry, records the evidence, the subsequent inquiry about soundness or unsoundness of mind does not cure the defect. (See *Jhabhu v. State, ILR 42 All 137*)

HOW TO DEAL WITH LUNATIC PERSON PENDING INQUIRY OR TRIAL

Section 330 of Cr.P.C says that whenever a person is found, under Section 328 or Section 329, to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given to the effect that he shall be properly taken care of, shall be prevented from causing

any injury either to himself or to any one else, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf as and when required. Once the Magistrate is of the opinion that accused is of unsound mind and unable to make his defence, he cannot release the accused on his own personal bond. Sub section (2) of Section 330 provides that if in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such a place and manner as he thinks fit and shall report the action taken to the State Government.

REGARDING PROVISIONS OF BAIL

Sometimes question arises, if the accused ceases to be of unsound mind and trial resumes, whether the bail granted to the said accused would automatically stand cancelled or whether Court can cancel bail? Section 330 CrPC provides for release of lunatic or unsound mind on sufficient security being given, irrespective of the nature of the offence. In Chapter XXV of the Code of Criminal Procedure, power of cancellation of bail is not specifically given to any Court like in Chapter XXXIII wherein sub section (2) of Section 439 CrPC empowers the Court to cancel the bail. But again the power given under Sub section (2) of Section 439 CrPC is restricted to the bail granted under Chapter XXXIII only which clearly shows that the power of Sub section (2) of Section 439 CrPC cannot be used for cancelling the bail granted under Chapter XXV. (See *Amar Singh v. State of Maharashtra, 2006 CriLJ 1538*)

RESUMPTION OF INQUIRY OR TRIAL

Section 331 provides that Court may at any time after the accused has ceased to be of unsound mind, resume the inquiry or trial and if accused is released under Section 330 of CrPC, may order that the accused be brought before him or may order his production before any doctor or officer and when the surety produces him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence, shall be receivable in evidence. Section 332 CrPC empowers the Court that if the accused is capable of making his defence the Court shall proceed with inquiry or trial. If the Court considers that the accused is still incapable of making his defence, it shall act according to the provisions of Section 328 or Section 329 of CrPC, and if the accused is found to be of unsound mind and consequently incapable of making his defence, Court shall deal with such accused in accordance with provisions under S. 330 of CrPC.

GUIDELINES BY THE SUPREME COURT

In case of Re: Illegal detention of Machallalaung, WP (Crl) 296 of 2005 connected with WP (Crl) 18 of 2006 Re: News Item "38 years in jail without trial" Published in *Hindustan Times dt. 6.2.2006 v. Union of India, decided on 24.10.2007* the Apex Court issued the following guidelines:

(i) Whenever, a person of unsound mind is ordered to be detained in any psychiatric hospital/nursing home under Section 330(2) of the Code of Criminal Procedure, of the reports contemplated under Section 39 of Mental health Act, 1987 shall be submitted to the concerned Court/ Magistrate periodically. The Court/Magistrate shall also call for such reports if they are not received in time. When the reports are received, the Court/Magistrate shall consider the reports and pass appropriate orders wherever necessary. In regard to prisoners covered by sub-section (1) of Section 30 of the Prisoners Act, 1900, the procedure prescribed by sub-Sections (2) and (3) of that Section read with Section 40 of the Mental Health Act, 1987 shall be followed.

(ii) Wherever any undertrial prisoners is in jail for more than the maximum period of imprisonment prescribed for the offence for which he is charged (other than those charged for offences for which life imprisonment or death is the punishment), the Court/Magistrate shall treat the case as closed and report the matter to the medical officer in charge of the psychiatric hospital, so that the Medical officer in charge of the hospital can consider his discharge as per Section 40 of the Mental Health Act 1987.

(iii) In case where the undertrial prisoners (who are not being charged with offence for which the punishment is imprisonment for life or death penalty), their cases may be considered for release in accordance with sub-section (1) of Section 330 of the Code of Criminal Procedure, if they have completed five or more years as inpatients.

(iv) As regards the undertrial prisoners who have been charged with grave offences for which life imprisonment or death penalty is the punishment, such persons shall be subjected to examination periodically as provided in sub-sections (1), (3) and (4) of Section 39 of the Mental Health Act Act and the officers named therein (visitors medical officer respectively) should send the reports to the court as to whether the under trial prisoner is fit enough to face the trial to defend the charge. The sessions Court where the cases are pending should also seek periodic reports from such hospitals and every such case shall be given a hearing at least once in three months. The Sessions Judge shall commence the trial of such cases as soon as it is found that such mentally ill person has been found fit to face trial.

RELEVANT TIME FOR CONSIDERATION

From perusal of Sections 328 and 329 of CrPC, it is explicit that this Section relates to unsoundness of mind at the time of inquiry or trial and not at the time of commission of the offence. The unsoundness of mind dealt with in this section is the one which such an accused person alleges to be suffering from at the time of the inquiry before the Magistrate and not at the time of the incident during which he is said to have committed the offence in question. (*See Nandeswar Das v. State of Assam, 2004 CriLJ 4723.*)

Section 333 makes it clear that when the accused appears to be of unsound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused has committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be tried by the Court of Sessions, commits him for trial before the Court of Sessions. In the case of *Daljit Kaur v. State of Orrisa, 1968 CriLJ 1090* it was held that even if on a perusal of the documents and consideration of the evidence the Magistrate is inclined to view that by reason of unsoundness of mind at the time the act was committed, the accused was incapable of knowing that the act was wrong or contrary to law, yet he has to commit the accused to take his trial before the Court of Sessions.

Section 84 of IPC says that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. Then why should an accused be tried or committed to Court of Sessions when the act committed by him is not an offence? This is because of Section 105 of the Evidence Act which places the burden of proof on the accused to show that his case falls under any of the provisions of General Exceptions. Every person is presumed to be sane unless proved otherwise. Law presumes that every person knows the consequence of his act. So once the prosecution establishes that accused has committed an offence, it is the duty of the accused to show that his case is covered under the General Exceptions. Section 333 CrPC embodies this general principle of law and mandates that Court must continue the trial if accused is not insane at the time of inquiry or trial.

PROCEDURE

Section 334 says that whenever any person is acquitted on the ground that, at the time at which he alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged is constituting an offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not. Section 335

CrPC provides that if the accused has committed a crime and it is proved that he was insane and was not capable to understand whether the act was wrong or contrary to law at the time of the incident, though he is entitled to benefit of Section 84 of IPC, he cannot go scot-free. Court may detain him and send him in safe custody or give him to any relative or friend on his furnishing a security of the nature provided under sub section (3) of Section 335 of the Code to the satisfaction of the Court.

At times, looking to the nature of the offence and mental disorder of the accused, court may not find it fit to give the accused to his relative and is of the opinion that accused should be lodged in mental asylum so that he may get proper treatment then the Court may make an order to that effect. Sub section (2) of Section 335 CrPC says that order for the detention of the accused in lunatic asylum shall be made in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912). Now this Act has been repealed by Mental Health Act, 1987. Section 20 of the said Act provides that no person shall be admitted without the reception order of the Magistrate. Section 22 prescribes the procedure to be followed by the Magistrate. In case of *Niman Sha v. State of M. P., 1996 CriLJ 3395,* Their Lordships held that the accused comes within the definition of a 'criminal lunatic' as per sub section (4) of Section 3 of the Indian Lunacy Act and according to Section 27 of the Mental Health Act, an order passed under Section 330(2) and 335 of Criminal Procedure Code, 1973 directing the reception of criminal lunatic to any asylum, which is prescribed for the reception of criminal lunatics shall be sufficient authority for the reception and detention of any person in such asylum. In case of *Chandrashekar v. State of Karnataka, 1998, CriLJ 2237,* it has been held that the authorities will have to keep the accused under observation and treatment and will have to decide as to whether or not he qualifies for being retained in that institution. If his mental condition requires that he must be retained in the institution, then such a course of action shall be followed. On the other hand, if after observation or at some future point of time, a stage comes when the doctors are of the opinion that the accused is perfectly safe both to himself and to the society, in that event, it shall be open to them to release the accused. Sections 338 and 339 of CrPC also says that after passing the order under Section 330(2) or 335 of the Code, it is for the State Government that has to deal with the accused and not the Court. The cost of the maintenance is to be borne by the State Government. (See *State of Gujarat v. Kanaiyalal Manilal, 1997 CriLJ 4245*)

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विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या विचारण न्यायालय में लंबित किसी सांपतिक प्रकरण में अपीलीय/ पुनरीक्षण/ वरिष्ठ न्यायालय से प्रकरण की अग्रिम सुनवाई को स्थगित कर दिये जाने पर विचारण न्यायालय को उसके अन्तर्गत कोई भी कार्यवाही करने का अधिकार शेष नहीं रहता है ?

सामान्यतः यह भ्रांति होती है कि किसी लंबित सांपत्तिक प्रकरण में किसी अंतरिम आदेश के विरूद्ध अपील/पुनरीक्षण/रिट याचिका संस्थित होने पर अपीलीय/उच्च न्यायालय द्वारा लंबित प्रकरण की अग्रिम कार्यवाही स्थगित किये जाने पर उसमें विचारण/अधीनस्थ न्यायालय को अन्य कोई कार्यवाही करने का कोई अधिकार नहीं रहता है लेकिन यह पूर्णतः स्वीकार योग्य नहीं है।

सामान्यतः अपीलीय/उच्च न्यायालय द्वारा पारित स्थगन आदेश आंशिक अथवा पूर्णतः प्रकृति के होते हैं जैसे प्रवर्तन प्रकरण में स्थगन पूर्णतः होने से उसके अन्तर्गत कोई कार्यवाही किया जा सकना प्रवर्तन न्यायालय के लिए संभव नहीं रहता है लेकिन जब किसी सांपत्तिक प्रकरण में उसके अन्तर्गत अग्रिम कार्यवाही स्थगित किये जाने का आदेश दिया जाता है तो उसका तात्पर्य ऐसे प्रकरण में मूलतः विचारण की अग्रिम कार्यवाही को ही स्थगित किया जाना है। ऐसी स्थिति में विचारण/अधीनस्थ न्यायालय को प्रकरण में ऐसी कोई कार्यवाही या कार्य करने का अधिकार नहीं रहता है जिसे विचारण का गुण दोषों पर निराकरण के लिए अग्रसर होने के सदृश्य माना जावे, लेकिन इसका तात्पर्य विचारण/अधीनस्थ न्यायालय को ऐसे प्रकरण के संबंध में किसी आवश्यक सम्पार्श्विक या सहायक कार्य को कर सकने के अधिकार से भी विरत रहना नहीं माना जा सकता है।

इस संबंध में माननीय मध्य प्रदेश उच्च न्यायालय की खंडपीठ द्वारा विधि दृष्टांत ***मदन लाल अग्रवाल विरूद्ध श्रीमती कमलेश निगम, ए.आई.आर 1975 मध्य प्रदेश पृष्ठ 132*** में विचार करते हुए यह प्रतिपादित किया गया है कि इस प्रकार के स्थगन के मामलों में विचारण/अधीनस्थ न्यायालय को किसी पक्षकार की मृत्यु होने की स्थिति में उसके वैद्य उत्तराधिकारियों को अभिलेख पर लिये जाने

के संबंध में आदेश 22 नियम –3 अथवा 4 सिविल प्रक्रिया संहिता के अन्तर्गत प्रस्तुत आवेदन पत्र का निराकरण कर सकने का अधिकार है। इसी प्रकार इन्हीं परिस्थितियों में आवश्यकतानुसार सिविल प्रक्रिया संहिता के अधीन आदेश 39 नियम 1 या 2, के अन्तर्गत अस्थायी निषेधाज्ञा बाबत्, आदेश 40 नियम 1 के अन्तर्गत रिसीवर नियुक्ति बाबत् और आदेश 38 नियम 5 के अन्तर्गत निर्णय पूर्व कुर्की के आवेदन पत्र प्रस्तुती और प्रचलन योग्य हैं क्योंकि इस प्रकार की कार्यवाही को स्थगित सांपत्तिक प्रकरण के गुण दोषों पर निराकरण की ओर अग्रसर होना नहीं माना जा सकता है बल्कि ऐसी कार्यवाही सम्पार्श्विक अथवा विवाद की विषय वस्तु का संरक्षण करने वाली या उसे जीवित रखने वाली मानी जा सकती है।

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धारा 98 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत आवेदन पत्र के निराकरण की प्रक्रिया क्या होनी चाहिए?

धारा 98 दण्ड प्रक्रिया संहिता के अन्तर्गत आवेदन पत्र प्रस्तुत होने पर उसके निराकरण हेतु क्या प्रक्रिया अपनायी जावे इसमें भ्रमपूर्ण स्थिति रहती है क्योंकि इस धारा के अन्तर्गत इसके लिए कोई प्रक्रिया विहित नहीं है।

इसके अन्तर्गत किसी स्त्री या 18 वर्ष की कम आयु की किसी बालिका के किसी विधि विरूद्ध प्रयोजन के लिए अपहृत किये जाने या विधि विरूद्ध रखे जाने का शपथ पर परिवाद किये जाने की दशा में जिला मजिस्ट्रेट, उपखंण्ड मजिस्ट्रेट या प्रथम वर्ग मजिस्ट्रेट यह आदेश कर सकता है कि उस स्त्री को तुरंत स्वतंत्र किया जावे या वह बालिका उसके पति, माता–पिता, संरक्षक या अन्य व्यक्ति को, जो उस बालिका का विधि पूर्ण भार साधक है, तुरन्त वापस कर दी जावे और ऐसे आदेश का अनुपालन ऐसे बल के प्रयोग द्वारा, जैसा आवश्यक हो, करा सकता है।

इसके लिए सर्वप्रथम यह आवश्यक है कि शपथ पर परिवाद किया जावे। ऐसे परिवाद प्रस्तुती पर इसका संक्षिप्त जांच उपरान्त निराकरण अपेक्षित है जिसके लिए यह आवश्यक है कि संबंधित मजिस्ट्रेट परिवाद प्रस्तुत करने वाले परिवादी का शपथ पर परीक्षण करे और अनावेदक को परिवाद के संबंध में कारण बताओ सूचना पत्र जारी करते हुए ऐसी स्त्री अथवा बालिका को विधि अनुसार कार्यवाही के लिए प्रस्तुत करने का कहें। (देखें – विधि दृष्टांत ***कृष्णा साहू विरूद्ध मध्य प्रदेश राज्य, 1989 जे.एल.जे पृष्ठ 110***)

शपथ पर परिवाद का केवल यह तात्पर्य नहीं है कि न्यायालय के समक्ष ही परिवादी का कथन लिया जावे, यदि परिवाद के समर्थन में परिवादी का शपथ पत्र प्रस्तुत किया गया है तो यह पालन पर्याप्त है (देखें – **तुलसी दास विरूद्ध चेतनदास, ए.आई.आर. 1933 नागपुर पृष्ठ 374**)

ऐसे मामले में मजिस्ट्रेट को दोनों पक्षों को सुनवाई का अवसर दिये जाने के उपरांत ही दोनों परिस्थितियाँ यथा, विधि विरूद्ध रखा जाना और ऐसा विधि विरूद्ध प्रयोजन के लिए होना, पाये जाने पर ही उचित आदेश दिया जाना चाहिए (देखें–***जीनत के.व्ही. विरूद्ध कदीजा एवं अन्य, 2007 क्रिमनल लॉ जर्नल पृष्ठ 600*** एवं ***राज्य विरूद्ध बिल्ली एवं अन्य, ए.आई.आर. 1953 नागपुर 128***)

मजिस्ट्रेट को ऐसी सुनवाई के दौरान पक्षकारों के सिविल अधिकारों का विनिश्चय करने का अधिकार नहीं है। ऐसा विवाद संबंधित सक्षम सिविल न्यायालय द्वारा ही निराकृत किया जा सकता है। (देखें ***धापू विरूद्ध पूरीलाल, ए.आई.आर. 1959 एम.पी. 356***)

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नोट: स्तंभ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते है। चयनित समस्याओं के समाधान आगामी अंको में प्रकाशित किये जाएंगे – **संचालक**

Knowledge is proud that he has learn'd so much; Wisdom is humble that he knows no more.

– **WILLIAM COWPER**

PART - II

NOTES ON IMPORTANT JUDGMENTS

*322. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12

(i) Suit house rented out to the tenant for 11 months – Written rent note was executed – After the efflux of contractual tenancy, tenant continued to reside in it on the same terms and conditions and on same rate of rent – No fresh rent note was executed – Held, after the expiry of contractual tenancy, the tenant still remains as tenant and he becomes statutory tenant thereafter.

(ii) In a suit on the ground referred to in S. 12 of the Act or in an appeal or other proceedings the tenant is obliged to deposit entire rent due as required u/s 13 (1) of the Act – He is further required to deposit monthly rent by the 15th day of each succeeding month in terms of S. 13 (1) of the Act – If the tenant does not deposit the rent in terms of S.13 (1) of the Act, his defence may be struck off u/s 13 (6) of the Act.

Rukhmanibai (dead) through her L.R. Gendalal Gupta v. Ramdayal (dead) through L.Rs Ramesh and others

Reported in 2008 (2) MPLJ 457

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*323. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 23-A

(i) Contract to create perpetual lease, effect of – Lease executed between landlord and tenant that till the pleasure of tenant, he shall enjoy the suit accommodation on the tenancy basis – Rent Control Authority dismissed the application for eviction owing to the perpetual lease – Held, in the opening sentence of S.23-A of the Act there is non-obstante clause which overrides all the contracts which run contrary to the Section – Therefore, the agreement contrary to S. 23-A of the Act executed to create perpetual lease between landlord and tenant is not having any sanctity in the eye of law and the application for eviction cannot be thrown like a waste paper on this ground.

(ii) S.23-A and 23-A (b) – Bonafide requirement –

(a) In order to get eviction decree, plaintiff is not required to prove his/her absolute title; and

(b) Old age of the landlord as well as small income in the form of family pension and rent would not be sufficient to refuse his/her claim for eviction on the ground of bonafide need to start business.

Shyama Bai v. Murlidhar

Reported in 2008 (II) MPJR 391

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324. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 23-A (b) & 23-J (iv)
EVIDENCE ACT, 1872 – Section 116
WORDS AND PHRASES:

(i) Eviction suit – Ownership, proof of – The burden of proving ownership in eviction suit is not as heavy as in the case of title suit.

(ii) Principle of estoppel u/s 116 of Evidence Act, applicability of – Tenants were paying rent to landlord (applicant) continuously for more than 23 years – They raised objection in respect of his ownership for the first time when proceedings for eviction was initiated before RCA – Held, by their conduct, tenants are stopped from raising such dispute – Principle of estoppel would apply against tenants u/s 116 of Evidence Act.

(iii) 'Physically handicapped person', meaning of – The person must be proved to be prevented from pursuing ordinary daily pursuits.

Karan Lal Kesharwani v. Sardar House, Jabalpur and others
Reported in 2008 (2) MPHT 168 = 2008 (2) MPLJ 365

Held:

There is sufficient force in the submission of Shri R.S. Tiwari, learned counsel for the applicant, that the degree of proving ownership in the matter between landlord and tenant under the proceedings of eviction as envisaged under Section 23-A(b) of the Act cannot be equated and would not be that much higher as required to be proved in a suit for establishing title. There is much substance in the submission of Shri Tiwari, learned counsel for the applicant, that continuously for last 23 years the tenants/respondents were paying rent to the applicant and during this long period of 23 years, they never challenged or disowned the ownership of the applicant. Indeed, in his cross-examination the tenant has admitted that he is paying rent to the applicant and has paid rent to him up to the year 2001. Thus, I am of the view that since for a considerable long period for more than 23 years, without any hindrance, the respondents were paying rent to the applicant and they never raised any objection in respect of his ownership during a very long period of 23 years and has raised this objection only when the present proceedings for eviction was filed by the landlord, by his conduct he is estopped from raising the dispute of title of the landlord and principle of estoppel would apply against the tenants under Section 116 of the Indian Evidence Act, 1872.

The decision of *Sheela and others v. Firm Prahlad Rai Prem Prakash, 2002 (2) JLJ 312 = 2002 (20 MPHT 232* has been placed reliance by learned both the counsel for the parties. Shri Jain, learned counsel for the tenant is placing reliance on para-10 of the said decision and has contended that a person may be a landlord though not an owner of the premises. The factor determinative of relationship is the factum of his receiving or his entitlement to receive the rent

on any accommodation. Such receiving or right to receive the rent may be on the own account of landlord or on account of or for the benefit of any other person. Such landlord would be entitled to seek an eviction of the tenant on one or more of such grounds falling within the ambit of Section 12(1) of the Act which do not require the landlord to be an owner also so as to be entitled to successfully maintain a claim for eviction. By further putting emphasis on the later part of para-10 of the said decision, it has been argued that clause (f) contemplates a claim for eviction being maintained by an owner-landlord and not landlord merely.

I have considered the above said argument but in the later part of para 10 in the above said decision it has been explained by their Lordships of the Supreme Court that the concept of ownership in a landlord and tenant litigation governed by rent control law has to be distinguished from the one in a title suit. Their Lordships have further held that ownership is a relative term the import whereof depends on the context in which it is used. In rent control legislation, the landlord can be said to be owner if he is entitled in his own legal right, as distinguished from for and on behalf of someone else, to evict the tenant and then to retain control, hold and use the premises for himself. Their Lordships further explained that what may suffice and hold good as proof of ownership in a landlord and tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit and ultimately it was held in the last of para-10 that the burden of proving ownership in a suit between landlord and tenant where the landlord and tenant relationship is either admitted or proved is not so heavy as in a title suit and lesser quantum of proof may suffice than what would be needed in a suit based on title against a person setting up a contending title while disputing the title of the plaintiff.

In para 16 of the decision of *Sheela* (supra) it has been held by the Supreme Court that if the tenant having been apprised of the transfer, assignment or devolution of rights acknowledges the title of transferee either expressly or by paying rent to him, the rule of estoppel once again comes into operation for it is unjust to allow tenant to approbate and reprobate and so long as the tenant enjoys everything which his lease purports to grant how does it concern him what the tile of the lesser is. To me, since it has been admitted by tenant/ respondent that he has paid rent of suit shop for considerable long period of 23 years to the landlord, the rule of estoppel under Section 116 of the Evidence Act would be applicable against him. In an earlier decision *Anar Devi (Smt.) v. Nathu Ram, 1994 JLJ 486* the Supreme Court in para-13 held that once the tenant has acknowledged the title of landlord by attorning the rent, the tenant is estopped from raising any dispute about the ownership of the landlord. The decision of Single Bench of this Court *R.P. Sharma v. Smt. Leeladevi, 1997 (1) MPWN 75* is also on the same footing. Thus, I am of the view that for the purpose of eviction of tenant from the suit shop on the ground envisaged under Section 23-A(b) of the Act, present applicant is not only his landlord but is also owner of the suit shop. Needless to emphasis, the provisions of Section 12(1)(f) of the

act is at par with that of Section 23-A (b) of the Act and only difference is that the provisions of Section 23-A(b) can be invoked by specified landlord only who has been defined under Section 23-J of the Act. The finding of learned Rent Controlling Authority holding that the applicant is not the owner for the purpose of application for eviction, is, accordingly, set aside.

The term "physically handicapped" used in clause (iv) of Section 23-J of the Act has not been defined and, therefore, the dictionary meaning is to be seen. In Law of Lexicon Dictionary by P. Ramanatha Aiyer "handicapped" means a person with physical disability that limits the capacity to work and puts him to disadvantage. By placing reliance on the decision of *Satulal v. Mandal Abhiyanta Telegraph, 1988 (1) MPWN 154* wherein the different dictionary meaning of term "handicapped" has been mentioned, this Court in the case of *Krishan Kumar Baoriv. Ganga Prasad Singh, 1996 JLJ 386* has mentioned different meanings of term "handicapped" and "handicap" which means as under :

"(1) 'Handicapped' : (i) crippled or physically disabled;

(ii) mentally deficient;

(iii) (of a constant) marked by; being under, or having a handicap person;

The Random House Dictionary of the English language~ (The Unabridged Edn.)

(2) 'handicap'- a disadvantage that makes achievement unusually difficult esp. a physical disability that limits the capacity to work.

– Webester's Third New International Dictionary – (The Unabridged Edn.)

(3) 'Handicap'~ a person specifically children physically or mentally defective.

– A Supplement to the Oxford English Dictionary (Vol.12)"

By placing reliance on the decision of *Krishan Kumar Baori* (supra), I am of the view that word "handicapped" must mean something more than mere claim of being physically handicapped person. It was necessary to establish and satisfy the Court with regard to the nature and extent of his disablement or handicappedness and also to show as to how it has a material bearing on the need propounded by him. To me, in order to interpret the term "physically handicapped person" as envisaged under Section 23-J (iv) of the Act he must be such a person suffering from disease which may prevent him from following ordinary pursuits of his life. A person may be sound in health apparently, but he may be suffering from such a disease which may prevent him from pursuing ordinary daily pursuits, but it is for the person claiming himself to be handicapped to establish by cogent and convincing evidence that he is suffering from such disease that he cannot pursue his normal course of life.

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*325. CEILING ON AGRICULTURAL HOLDINGS ACT, 1960 (M.P.) – Section 4 (1)
REGISTRATION ACT, 1908 – Section 32 (c)

(i) Transfers or partitions made after publication of Bill but before commencement of Act – Sale deed executed between 01.01.1971 to 07.03.1974 – Civil Court cannot examine the question that whether the sale deed was executed to defeat the provisions of Act – Only competent authority can examine such question.

(ii) Registered Power of Attorney – If Power of Attorney is executed by a registered document, for its cancellation, registered document is required – Intimation of its revocation by serving notice is not a proper one.

Bhivji through LRs. & ors. v. Rajesh & ors.

Reported in I.L.R. (2008) M.P. 1199

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*326. CEILING ON AGRICULTURAL HOLDINGS ACT, 1960 (M.P.) – Section 11 (5)
CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27

(i) Plaintiffs were not party in the ceiling proceedings – Order of competent authority passed in the proceedings first came into the knowledge of plaintiffs on 31.05.1976 – They filed the suit assailing the order on 24.08.1976 within period of three months from the date of knowledge – Held, u/s 11 (5) of the Ceiling On Agricultural Holdings Act, the period of limitation of three months to file Civil Suit is applicable only for the parties to the proceedings before the competent authority – Therefore, the suit filed was within the limitation.

(ii) Plaintiffs filed application for taking on record certified copies of khasara and khatoni before first appellate court under Order 41 Rule 27 of CPC praying that after due diligence they could not obtain certified copies of revenue records which are quite old and for this reason the same could not be filed in the Trial Court – The appellate Court dismissed the said application – Held, the application is supported by affidavit and the documents sought to be produced are certified copies of the old revenue record, the authenticity of which cannot be doubted, therefore, the first appellate court erred in dismissing the application – Application allowed and documents were taken on record.

Chunnilal (since dead) through LRs Puniya Bai and ors. v. State of M.P. and others

Reported in 2008 (2) MPLJ 417

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327. CIVIL COURTS ACT, 1958 – Sections 3, 6, 7, 13, 14, 15, 18 & 19
CIVIL PROCEDURE CODE, 1908 – Section 24

(i) The term 'office', connotation of.

(ii) Powers and duties of District Judge and Additional District Judge, comparison of – It is only for the purpose of S. 24 of the Code of Civil Procedure that Courts of Additional Judges are deemed to be Courts subordinate to the District Judge – Otherwise, since 1982 the ADJ exercises the same powers and discharges the same duties as the District Judge under the provisions of the Civil Courts Act.

N.K. Saxena and another v. State of M.P. and another
Reported in 2008 (2) MPHT 365 (DB)

Held:

The term 'office' has different connotations and is not easy to interpret. As has been observed by *V.R. Krishna Iyer, J. in Madhukar G.E. Panakakar v. Jaswant Chobbidas Rajani and others, AIR 1976 SC 2283:–*

> "11. ....To begin with the very beginning; what is an office? too simplistic to answer with ease that it is derived from 'officium' and bears the same sense. Indeed, in Latin and English, this word has protean connotations and judicial choice reaches the high point of frustration when the highest Courts here and abroad have differed, dependent on varying situations, or statutory schemes, the mischief sought to be suppressed and the surrounding social realities. ....."

In *Statesman (Private) Ltd. v. H.R. Deb and others, AIR 1968 SC 1495,* however, the Supreme Court observed: –

> "An office means no more than a position to which certain duties are attached. According to Earl Jowitt's Dictionary a public office is one which entitles a man to act in the affairs of others without their appointments or permission."

In *Ku. Srilekha Vidyarthi and others v. State of U.P. and others, (1991) 1 SCC 212* the Supreme Court similarly held that 'office' means the rights and duties attached to an authority.

A reading of the provisions of the Civil Courts Act, as amended by the Act No. 17 of 1982 show that although the Court of District Judge and the Court of Additional District Judge have been classified as two separate classes of Court under sub-section (1) of Section 3, they belong to one and the same cadre, namely, the cadre of Higher Judicial Service and that the Additional District Judge and the District Judge exercise almost the same judicial powers. Under sub-section (1) of Section 6 of the Civil Courts Act, the Court of District Judge and the Court of Additional District Judge have jurisdiction to hear and determine

any suit or original proceeding without restriction as regards value. Under sub-section (2) of Section 7, the Additional District Judge shall discharge any of the functions of a District Judge including the functions of Principal Civil Court of original jurisdiction which the District Judge may by general or special order assign to him and in the discharge of such functions, he can exercise the same powers as the District Judge. Under sub-section (1) of Section 13 of the Civil Courts Act, appeals from decrees or orders of Court of Civil Judge Class I or Civil Judge Class II lie to the Court of District Judge. But the explanation under sub-section (1) of Section 13 makes it clear that the Court of District Judge shall include an Additional Judge to that Court and sub-section (2) of Section 3 makes it clear that the Additional Judge to the Court of District Judge shall be from the cadre of Higher Judicial Service. Hence, an Additional District Judge and District Judge have the same appellate jurisdiction.

Section 14 of the Civil Courts Act provides for superintendence and control over the Civil Courts and such power is vested in the District Judge, Section 15 confers power on the District Judge to distribute business. Obviously, since the District Judge is the head of hierarchy of the District Courts, superintendence and control of all Civil Courts and the power to distribute business between the Civil Courts will also have to be vested in the District Judge. There can be one head in a district for purposes of administration and, therefore, Additional District Judges cannot also be heads in an administrative hierarchy of the District Court when the District Judge is available. But Section 18 of the Civil Courts Act is clear that in the absence of the District Judge or in the event of his being prevented from performing his duties, the senior most Judge according to the cadre seniority as per the hierarchy of cadres shall assume the charge of the District Court and while so in charge, shall perform the duties of a District Judge. Similarly Section 19 is very clear that any District Judge leaving the headquarters and proceeding on duty to any place within his district, may delegate to the senior most Additional Judge of his Court at the headquarters the powers of performing such duties as may be emergent. Hence, the Additional District Judges can also exercise powers of superintendence and control, distribution of business and other duties of the District Judge in the absence of the District Judge.

Coming now to the decisions cited by Mr. Ankit Saxena, learned Counsel for the petitioners, in *Kuldip Singh v. State of Punjab and another, AIR 1956 SC 391,* the Supreme Court found that Section 18 of the Punjab Courts Act constituted the Court of 'Additional Judge' a distinct from 'Additional District Judge' as a separate class of Court and also found that the Punjab Courts did not provide for the Court of the Additional District Judge and accordingly held that Additional Judge was not a Judge of co-ordinate Judicial Authority with the District Judge. In *Nannulal Kishanlal (Firm) v. New Malwa Transport Co. and others, 1972 MPLJ 36,* the question which arose was whether the Additional District Judge can exercise powers of the Appellate Court without the same being assigned to him by the District Judge and learned Single Judge of this Court held that the Additional District Judge though empowered with all powers of the

District Judge can exercise such powers only when the appellate work is assigned to him by the District Judge. This only says that the Additional District Judge has the same jurisdiction as that of the District Judge but he can exercise the appellate powers only when the District Judge assigns a case to him. These two decisions are of no relevance to this case because we have found that since 1982 in the State of Madhya Pradesh, the Additional District Judges have been exercising the same powers and discharging the same duties as the District Judge under the provisions of the Civil Courts Act.

Section 24 of the Code of Civil Procedure, 1908, on which Mr. Saxena, learned Counsel for the petitioners has relied on, deals with the power of transfer and withdrawal of cases conferred on the District Court and sub-section (3) of Section 24 of the Code of Civil Procedure reads as under : –

"(3) For the purposes of this section, –

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(b) "Proceeding" includes a proceeding for the execution of a decree or order."

Hence, it is only for the purpose of Section 24 of the Code of Civil Procedure that Courts of Additional and Assistant Judges are deemed to be Courts subordinate to the District Judge. This only means that the District Judge can also withdraw cases from the Court of Additional District Judge and also transfer such cases from the Additional and Assistant Judges. Obviously, District Judge being the head of the hierarchy of the District Court has to be exclusively vested with such power and such power cannot be exercised by the Additional District Judge.

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328. CIVIL PROCEDURE CODE, 1908 – Section 2 (11) & Order 21
ACCCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a)

(i) Legal representative, connotation of – Law explained.

(ii) Decree for eviction of tenant obtained by deceased on relationship of landlord and tenant, execution of – Legatee under the Will of deceased is entitled to execute the decree.

(iii) Probate certificate, need of – If the property is situated in Madhya Pradesh, obtaining of probate is not necessary.

Gouri Bahu through LR Smt. Shashi Devi v. Gopaldas
Reported in 2008 (2) MPLJ 333

Held:

(i) I may further add that the term "legal representative" can be equated with term "personal representative". To me, the term "legal representative" is having a wider connotation and would include not only the legal heir of the deceased but also intermeddlers of the estate of the deceased and also a person who, in law, represents the estate of the deceased and the definition should not restrict and confine to heirs alone. Thus, a legatee under the Will would also

come under the ambit and sweep of "legal representative" as defined under Section 2 (11) of the Code (See *Chiranjilal Shrilal Goenka v. Jasjit Singh and others, (1993) 2 SCC 507.)*

On going through the definition of "legal representative" as defined under section 2 (11) of the Code, I am of the view that since the present applicant Smt.Shashi Devi is having the Will of deceased decree holder Gauri Bahu in her favour, the estate of Gouri Bahu is represented through Smt. Shashi Devi. To me, Smt. Shashi Devi is the person who is representing the estate of the deceased decree holder Gouri Bahu. It is not disputed that the Will has not been probated. But, at the same time, it can be held that the property has been devolved on the present applicant under the Will and, therefore, according to me, right to execute the decree could be claimed in respect of the suit property by applicant Smt. Shashi Devi who represents the estate of the deceased. In this context, I may profitably rely on the decision of the Division Bench of this Court *Shakuntala (Mst) v. Shatrughan, 1993 (2) MPWN 99.*

(ii) In this view of the matter, I am of the view that the order of the executing Court holding that the probate certificate is necessary and directing the applicant to obtain probate certificate in order to get the decree passed in favour of deceased decree holder Gouri Bahu executed, deserves and is hereby set aside. The applicant Shashi Devi is permitted to execute the decree.

(iii) In the case of *Kundanbai v. Hazaribai, 1976 JLJ S.N. 93,* Single Bench of this Court has also taken the same view that if the property is situated in the Madhya Pradesh, obtaining of probate is not necessary.

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329. CIVIL PROCEDURE CODE, 1908 – Section 9
INDUSTRIAL DISPUTES ACT, 1947

(i) Plaintiff employed on work charge basis – Dispute regarding his termination of service by employer (Government department) – Civil Court has no jurisdiction – Dispute falls under premise of Industrial Disputes Act.

(ii) Objection regarding jurisdiction at appellate stage – Doctrine of *'coram non judice'* applied.

Chief Engineer, Hydel Project & Ors. v. Ravinder Nath & Ors.
Reported in AIR 2008 SC 1315

Held:

(i) As per decisions of this Court in the *The Premier Automobiles Ltd. & Ors. v. Kamlekar Shantaram Wadke of Bombay & Ors., AIR 1975 SC 2238, Jitendra Nath Biswas v. M/s Empire of India and Ceylone Tea Co. & Anr., AIR 1990 SC 255, Rajasthan State Road Transport Corporation & Anr. v. Krishna Kant & Ors., 1995 AIR SCW 2683* and *Rajasthan State Road Transport Corporation & Ors. v. Zakir Hussain, (2005) 7 SCC 447* as discussed above, there is no doubt that in the present case the dispute and the main issue fell squarely under the

premise of Industrial Disputes Act. Further as specifically held in *Krishna Kant's case* (supra) that where the Certified Standing Orders were applicable and where the breach thereof was complained of, such issues fell in the exclusive area of the machinery provided by the Industrial Disputes Act and as such the civil court's jurisdiction was specifically barred.

In the present case while the employers-appellants claimed that the termination simpliciter was effected in the light of the Rules under the Certified Standing Orders, the plaintiffs-respondents alleged that the principles under the provisions of the Certified Standing Orders were completely ignored and a highly arbitrary, discriminatory approach was adopted by the employer by picking and choosing the plaintiffs for the purposes of termination. The dispute, therefore, clearly fell outside the civil court's jurisdiction as per the decisions of this Court relied upon earlier.

(ii) The question is that this issue of jurisdiction was not raised either before the First Appellate Court or the Second Appellate Court. We have seen the written statement. The tenability of the suit was therefore, raised and vide issue No. 3 the trial court also considered the tenability of the suit in the present form. Therefore, it is not that the respondents herein had no notice of such an objection. The High Court has very specifically held that there was no substantial question of law involved in the matter.

In our considered opinion, it cannot be said that there was no question of law involved as we have pointed out that the issues squarely fell in the area covered by the Industrial Disputes Act and was, therefore, specifically barred. The question is whether this issue regarding the jurisdiction could be allowed to be raised before us. The question of jurisdiction came up before this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd. & Anr., (2005) 7 SCC 791.* The Court therein was considering the question raised whether the court had jurisdiction under Section 16(d) CPC to deal with the matter in question. In short the court was considering whether the amendment could have been allowed raising objection to the territorial jurisdiction. This Court in para 30 observed as under:

> "We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdiction are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of

> any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."

The Court then proceeded to rely on the case in *Bahrein Petroleum Co. Ltd. v. P.J. Pappu, AIR 1966 SC 634* and observed that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. The Court further observed that:

> "It is well settled and needs no authority that where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing. A decree passed by a court having no jurisdiction is *non est* and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a *coram non judice*."

The Court also relied upon the decision in *Kiran Singh v. Chaman Paswan, AIR 1954 SC 340* and quoted therefrom:

> "It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

Though in the aforementioned decision these observations were made since the defendants before raising the objection to the territorial jurisdiction had admitted that the court had the jurisdiction, the force of this decision cannot be ignored and it has to be held that such a decree would continue to be a nullity.

Once the original decree itself has been held to be without jurisdiction and hit by the doctrine of *coram non judice*, there would be no question of upholding the same merely on the ground that the objection to the jurisdiction was not taken at the initial, First Appellate or the Second Appellate stage. It must, therefore, be held that the civil court in this case had no jurisdiction to deal with the suit and resultantly the judgments of the Trial Court, First Appellate Court and the Second Appellate Court are liable to be set aside for that reason alone and the appeal is liable to be allowed. In view of this verdict of ours, we have deliberately not chosen to go into the other contentions raised on merits. We, however, make it clear that we have not, in any manner, commented upon the rights of the plaintiffs-respondents, if any, arising out of the Labour Jurisprudence.

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330. CIVIL PROCEDURE CODE, 1908 – Section 24

Transfer of suit – Court should exercise this power only for fair trial – Paramount consideration must be to see that justice, according to law is done.

Kulwinder Kaur alias Kulwinder Gurcharan Singh v. Kandi Friends Education Trust & Ors.

Reported in AIR 2008 SC 1333

Held:

So far as the power of transfer is concerned, S. 24 of the Code empowers a High Court or District Court to transfer *inter alia* any suit, appeal or other proceeding pending before it or in any Court subordinate to it, to any other Court for the trial and disposal. The said provision confers comprehensive power on the Court to transfer suits, appeals or other proceedings 'at any stage' either on an application by any party or *suo motu.*

Similarly in *Subramaniam Swamy v. Ramakrishna Hegde, AIR 1990 SC 113,* dealing with power of this Court to transfer a case under Section 25 of the Code, A.M. Ahmadi, J (as His Lordship then was) stated:

> ".....The cardinal principle for the exercise of power under this section is that the ends of justice demand the transfer of the suit, appeal or other proceeding. The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice. It is true that if more than one court has jurisdiction under the Code to try the suit, the plaintiff as dominus litis has a right to choose the Court and the defendant cannot demand that the suit be tried in any particular court convenient to him. The mere convenience of the parties or any one of them may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Cases are not unknown where a party seeking justice chooses a forum most inconvenient to the adversary with a view to depriving that party of a fair trial. The Parliament has therefore, invested this Court with the discretion to transfer the case from one Court to another if that is considered expedient to meet the ends of justice. Words of wide amplitude for the ends of justice have been advisedly used to leave the matter to the discretion of the apex court as it is not possible to conceive of all situations requiring or justifying the exercise of power. But the paramount consideration must be to see that justice according to law is done; if for achieving that objective the transfer of the case is imperative, there should be no

hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner's plea for the transfer of the case must be tested on this touchstone".

It is true that normally while making an order of transfer, the Court may not enter into merits of the matter as it may affect the final outcome of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect applciation of mind by the Court and the circumstances which weighed in taking the action.

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***331. CIVIL PROCEDURE CODE, 1908. – Section 80**

TORTS:

(i) Notice – Object is to enable the State to avoid unwanted litigation – State has not raised the plea of dismissal of suit for want of notice in Written Statement and contested suit on merits – No issue was framed in this regard – Trial Court ought not to have dismissed the suit.

(ii) Medical negligence – Where a person is guilty of negligence *per se*, no further proof is needed – There was excess bleeding to young lady during the course of family planning operation in a camp – Death occurred in transit when she was shifted to Indore which shows that there was no proper arrangement where she was operated – Medical negligence proved.

Gowardhan Singh & ors. v. State of M.P. & ors.

Reported in I.L.R. (2008) M.P. 1183

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***332. CIVIL PROCEDURE CODE, 1908 – Order 1 Rules 8 & 10 (2)**

Representative suit – Decree obtained for the benefit of the people of the locality may be executed, but if decree was obtained for plaintiff's own benefit then those who would be affected thereby should ordinarily be made parties to the suit.

V.J. Thomas v. Pathrose Abraham and others

Judgment dated 05.02.2008 passed by the Supreme Court in Civil Appeal No. 989 of 2008, reported in (2008) 5 SCC 84

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333. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 & Order 41 Rule 27

ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) & (c)

(i) Suit for ejectment u/s 12 (1) (a) and (c) of the M.P. Accommodation Control Act dismissed as lack of evidence about the relationship of landlord and tenant – During pendency of second appeal, plaintiff/ appellant filed an application under Order 6 Rule17 of CPC for amendment to the effect that he be declared as owner

of suit property on the basis of a Will executed before filing of the suit – It cannot be said that inspite of due diligence, plaintiff could not raise such a plea before the commencement of trial – Therefore, in view of the proviso to Rule 17 and having effect to change the nature of the suit, application cannot be allowed at this stage.

(ii) Additional evidence, taking of on record – Provision cannot be invoked by a party to fill up the lacuna.

Krishnarao Kavdikar (dead) through his L.Rs. Ullas Kavdikar v. Smt. Sadhna Khanvalkar and another

Reported in 2008 (2) MPHT 529

Held:

It is well settled that by way of amendment a new case or a new cause of action cannot be allowed to be settled. The plaintiff, therefore, cannot be allowed to convert his original claim into one of different character by Act No. 22/02 Rule 17 of Order 6 is amended w.e.f. 01.07.2002. As per proviso to Rule 17, no application for amendment shall be allowed after the trial is commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.

Here, in the present case, the suit was filed on 15.05.2002. The original plaintiff Krishna Rao died on 18.04.2003. He, during his lifetime, executed Will in favour of the appellant on 02.02.2002 (Exh. P-2). The appellant immediately after substitution of his name came to know that he is owner of the suit property. He also knew that Will has been executed by his father in his favour and respondents-defendants in their written statement denied the relationship of the landlord and tenant and claimed title over the suit property on the ground that suit property is ancestral property and they are co-sharer and entitled for share over the suit house. Thus, the plaintiff from the very beginning, knew that the relationship has been denied and respondents-defendants are claiming title over the suit property but no application for amendment was filed nor the plaint was amended during pendency of the trial and, therefore, it cannot be said that inspite of due diligence, he could not raise any plea before the commencement of trial. In view of the Proviso to Rule 17, the application for amendment which will change the nature of the suit originally filed by the appellant cannot be allowed at this stage. The amendment application filed by the appellant will change the nature of the suit and, therefore, by way of amendment, no permission can be granted to the appellant to convert his suit for ejectment into a suit for declaration and title. It is not in dispute that suit property was ancestral property of the original plaintiff Krishna Rao. All the decisions cited by the learned Counsel for the appellant is of prior to 01.07.2002. The application is accordingly dismissed.

The appellant filed and application for taking additional evidence on record vide, I.A. No. 2348/08. Alongwith this application, the appellant filed a copy of the plaint of Civil Suit No. 1-A/04 and order dated 07.02.2005, by which the suit

filed by the respondent No.1 for declaration and permanent injunction was dismissed for want of prosecution. This application has been filed on 07.02.2008. There was no plea that the documents sought to be produced by way of additional evidence could not be produced earlier despite efforts diligently made by the appellant or that such evidence was not within its knowledge. The documents sought to be brought on record are not documents which were discovered later or came into existence after judgment and decree of the Courts below. It is well settled that Order 41 Rule 27 of CPC cannot be invoked by a party to fill up the lacuna in this case. The appellant was party in the said civil suit and he was represented through his Counsel on 07.02.2005 when the suit of the respondent No. 1 was dismissed for want of prosecution. The Trial Court dismissed the suit of the appellant on 25.04.2006 and the appeal against the said judgment and decree was dismissed on 25.01.2007. The appellant had sufficient opportunity to bring the evidence on record before the Trial Court.

Learned Counsel for the appellant submits that respondent No. 1 was a Government Teacher and she filled up the Form-F in which she gave an undertaking that she is residing in a rented premises and paying the rent. The appellant applied for copy of this document under the provisions of Right to Information Act, 2005 on 22.05.2006. He received the copy on 25.05.2006 and filed the application for taking the said document on record. It is not in dispute that Right to Information Act came into force in the year 2005. The appellant from the very beginning knew that respondent No. 1 was a Government employee and, therefore, he could have applied earlier for a certified copy of the Form F by which respondent No. 1 made a declaration regarding house rent allowance etc. There was no plea that the documents sought to be produced by way of additional evidence could not be produced earlier despite efforts diligently made by the appellant or that such evidence was not within its knowledge. Held, lower applicate cant rightly rejected the aforesaid application.

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334. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 proviso
Amendment of pleading after commencement of trial – Conditions of 'due diligence' explained.

Chander Kanta Bansal v. Rajinder Singh Anand

Judgment dated 11.03.2008 passed by the Supreme Court in Civil Appeal No. 1893 of 2008, reported in (2008) 5 SCC 117

Held:

With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This Rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the Rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso of Order 6 Rule 17 of the

CPC lays down that no application for amendment shall be allowed after the commencement of trial, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.

The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

Though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

The words "due diligence" has not been defined in the Code. According to *Oxford Dictionary* (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per *Black's Law Dictionary* (18th Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to *Words and Phrases* by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness.

As rightly referred to by the High Court in *Union of India v. Pramod Gupta (dead) by LRs and Others, (2005) 12 SCC 1*, this Court cautioned that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings.

As observed earlier, the suit filed in the year 1986 is for a right of passage between two portions of the same property dragged for a period of 21 years. In spite of long delay, if acceptable material/materials placed before the court show that the delay was beyond their control or diligence, it would be possible for the court to consider the same by compensating the other side by awarding cost. As pointed out earlier, when she gave evidence as D.W.1, there was no whisper about the written document/partition between the parties. On the other hand, she asserted that partition was oral. Now by filing the said application, she wants to retract what she pleaded in the written statement, undoubtedly it would deprive the claim of the plaintiff. We are also satisfied that she failed to substantiate inordinate delay in filing the application that too after closing of evidence and arguments. All these aspects have been considered by the High Court. We do not find any ground for interference in the order of the High Court, on the other hand, we are in entire agreement with the same.

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335. CIVIL PROCEDURE CODE, 1908 – Order 8 Rules 3 & 5
EVIDENCE ACT, 1872 – Sections 18 & 115
Admission in reply to notice, effect of – Defendant admitted payment of rent in reply to the notice sent by the plaintiff – In view of this admission, it may be inferred that he is the tenant of the plaintiff.
Mahant Onkar Das v. Gopal Das (dead) through L.Rs. & Anr.
Reported in 2008 (II) MPJR 323

Held :

The defendants sent reply vide Ex. D-1 and stated therein that they were always paying monthly rent to the plaintiff though it has also been stated that they are the tenants of the Trust.

Defendant Rajkumar (DW-1) has admitted that he sent reply of the notice (Ex. D-1) to plaintiff's counsel against notice of plaintiff Ex. P-1. In para 13 of his deposition he has stated that he offered to plaintiff to accord him permission to construct the suit shop pucca by enhancing the rate of rent. Further he has stated that whatever enhanced rate of rent shall be offered by plaintiff Mahant Onkar Das, he will accept. Thus, according to me, there is a clear admission of defendants and he can be validly inferred that they are the tenants of plaintiff.

It can be inferred from the above-said material placed on record, the defendants are the tenants of plaintiff since there is an admission of defendant. The Supreme Court in *Chitra Kumari (Smt.) v. Union of India and others, (2001) 2 SCC 208* has held that the admission is a relevant piece of evidence if not explained away. In this context I may further place reliance on *Narayan Bhagwantrao Gosavi*

Balajiwale v. Gopal Vinayak Gosavi and others, AIR 1960 SC 100 wherein it has been held in para 11 that an admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous.

Apart from this in a very specific manner it has been pleaded by the plaintiff in para 1-A of the plaint that he is the owner of the suit property. The defendants in their written statement in para 1-A have pleaded whether plaintiff is owner of the suit property, is not in their knowledge and hence denied. To me, this amounts to admission as envisaged under Order VIII Rules 3 and 5 CPC. In this context I may profitably place reliance on the decision of Supreme Court in *Jahuri Sah v. D.P. Jhunjhunwala, AIR 1967 SC 109 and Division Bench of this Court in Dhanbai v. State of M.P. and others, 1978 JLJ 879.* Thus the defendants are also admitting the ownership of plaintiff, and if that is the position, it cannot be said that plaintiff who is the owner of suit property is not the landlord of defendants. For all practical purposes it is hereby held that the defendants are the tenants of plaintiff.

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***336. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 9 and Section 115**
Money suit was fixed for filing of Commissioner's Report – Neither plaintiff nor his counsel appeared when it had been called out – Trial Court dismissed the suit – Also dismissed the application for restoration of suit on ground that no sufficient and good cause was made out – Held, suit could not have been dismissed on the date fixed for return of the Commissioner's report as it was not fixed for hearing.
Girdharilal v. Brajmohan and others
Reported in 2008 (2) MPLJ 293

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337. CIVIL PROCEDURE CODE, 1908 – Order 21, Rules 1, 3 & 4 (2)
Pronouncement of judgment – Procedure therefor – Explained.
Declaration of final result orally by a Judge before concise statement of case the points for determination, the decision thereon and reasons for such decision – Held, improper and against the public policy.
K.V. Rami Reddy v. Prema
Reported in AIR 2008 SC 1534

Held:

In *Balraj Taneja and Anr. v. Sunil Madan and Anr., 1999 AIR SCW 3345,* it was *inter-alia* held as follows:

> "Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should

contain is indicated in Order 20 Rule 4(2) which says that a judgment "shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision". It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment."

Order XX Rule 1 CPC postulates that after the case has been heard, the court hearing the same shall pronounce the judgment in open court by dictation to the shorthand writer, wherever it is permissible. It bears the date on which it is pronounced. The date of the judgment is never altered by the date on which the signature has been put subsequently. The mere fact that a major portion has been dictated by the learned Judge in the judgment already dictated, will not, by itself, lead to the conclusion that the judgment had been delivered.

In *Smt. Swaran Lata Ghosh v. Harendra Kumar Banerjee and Anr., AIR 1969 SC 1167,* it was *inter-alia* held as follows (at Para 6):

"Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on question of law as well as fact, ascertainment of facts by means of evidence tendered by the parties and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest; it is also intended to ensure adjudication of the matter according to

law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just."

The declaration by a Judge of his intention of what his 'judgment' is going to be, or a declaration of his intention of what final result it is going to embody, is not a judgment until he had crystallized his intentions into a formal shape and pronounced it in open court as the final expression of his mind.

The CPC does not envisage the writing of a judgment after deciding the case by an oral judgment and it must not be resorted to and it would be against public policy to ascertain by evidence alone what the 'judgment' of the Court was, where the final result was announced orally but the 'judgment', as defined in the CPC embodying a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, was finalized later on.

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***338. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 22 & 23 and Section 11 Explanations IV & VII**

No objection raised when notice under Order 21 Rule 22 was served – Warrant of attachment issued – Objections under Order 21 Rule 23 of CPC cannot be raised at a subsequent stage as same were barred by constructive *res judicata*.

Barkat Ali and another v. Badrinarain (Dead) By LRs.

Judgment dated 06.02.2008 passed by the Supreme Court in Civil Appeal No. 1383 of 2002, reported in (2008) 4 SCC 615

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339. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 25

Powers of appellate Court to frame additional issues and procedure to be adopted thereafter, explained.

Smt. Bachchan Devi & Anr. v. Nagar Nigam, Gorakhpur & Anr.

Reported in AIR 2008 SC 1282

Held:

A bare reading of the provisions of Order 41 Rule 25 of the CPC makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try an issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact

which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in *Gogula Gurumurthy and others v. Kurimeti Ayyappa, AIR 1974 SC 1702*, where it was *inter-alia* observed in para 5 as follows:

> "We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in *Gopi Nath Shukul v. Sat Narain Shukul, AIR 1923 All 384*"

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***340. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 9**

Setting aside abatement – Death of principal respondent informed by her Counsel on 94th day from the death – Application for bringing her LRs on record filed on 60th day from the date of information – Application not accompanied by application for setting aside abatement – Appeal dismissed as abated with liberty to file application for setting aside abatement – Application for setting aside abatement, alongwith condonation of delay filed – Held, Applicant/appellant filed

application for bringing LRs. on record within 60 days from receiving information – Bonafides to bring LRs on record is apparent from record – Applications allowed – Abatement set aside – Appeal is restored on its original number.

Laxmi Chand (Deceased) through LRs. & Ors. v. Bhawati Bai & anr.

Reported in I.L.R. (2008) M.P. 1305

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***341. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 10-A**

Abatement of appeal – Non-performance of duty by counsel to communicate the Court about the death of a party, effect of – Held, it is the duty of the counsel of party to inform the Court about the death of the party and thereafter the Court has to give a notice of such death to the other side – Since the Counsel for respondent failed in discharging his duties, therefore, the application filed by the appellants to bring legal representatives on record and setting aside abetment cannot be dismissed on the ground that no sufficient ground is made out for condoning the delay.

State of M.P. and others v. Prem Singh

Reported in 2008 (2) MPLJ 237

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342. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 1 (3) (b)

Application for withdrawal of first suit filed after filing of second suit – Withdrawal allowed without liberty to file fresh suit – Order 23 Rule 1 (3) (b) not applicable – Second suit cannot be dismissed.

Vimlesh Kumari Kulshrestha v. Sambhajirao and another

Judgment dated 05.02.2008 passed by the Supreme Court in Civil Appeal No. 2976 of 2004, reported in (2008) 5 SCC 58

Held:

Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the respondent in regard to payment of proper court fee. We, therefore, are of opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case. The application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. Respondent, therefore was aware thereof. They objected to the withdrawal of the suit only on the ground that legal costs therefor should be paid. The said objection was accepted by the learned Trial Court. Respondent even accepted the costs as directed by the Court, granting permission to withdraw the suit. In a situation of this nature, we are of the opinion that an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the order passed by the Court. It is trite that even a presumption of implied grant can be drawn.

A somewhat similar question came up for consideration in *Mangi Lal v. Radha Mohan, AIR 1930 Lah. 599 (2),* wherein it was held: (AIR p. 599)

> "Order 23, Rule 1, refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. Order 23, Rule 1, cannot be read so as to bar a suit which has already been instituted before the other suit has been abandoned or dismissed. The rule is clear and can only be applied to suits instituted after the withdrawal or abandonment of previous suits".

The said view was followed by the Kerala High Court *in P.A. Muhammed v. The Canara Bank and another, AIR (1992) Ker. 85.*

An identical view was also taken in *Girdhari Lal Bansal v. The Chairman, Bhakra Beas Management Board, Chandigarh and others, AIR 1985 Punj and Har 219* wherein it was held: (AIR p. 220, para 4)

> "4.... The earlier application was filed on 6th Oct, 1982 and the present application was fixed on 26th Oct., 1982 and the first application was withdrawn vide order dt. 18-11-1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then O. 23, C.P.C. is not attracted and the second suit cannot be dismissed under O.23, R.1(4) of the Civil Procedure Code Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under O. 23, C.P.C."

We agree with said views of the High Courts.

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343. CIVIL PROCEDURE CODE, 1908 – Order 37 Rule 3 (5)

Summary suit – Leave to defend – Procedure explained – When condition to deposit an amount before further proceedings is justified? Held, if the defendant has no defence or the defence is illusory or sham or practically moonshine and the Court gives relief to defend to enable him to try to prove defence, then the imposition of condition is justified.

Sify Ltd. v. First Flight Couries Ltd.

Judgment dated 08.01.2008 passed by the Supreme Court in Civil Appeal No. 90 of 2008, reported in (2008) 4 SCC 246

Held:

A bare reading of Sub-rule (5) of Rule 3 of Order 37 would clearly indicate that leave to defend may be granted to a defendant unconditionally or upon such terms as may appear to the Court or Judge to be just, that is to say, the

discretion is left to the Court to put the defendant on terms, in the facts and circumstances of a particular case, on compliance whereof the defendant shall be entitled to defend the suit. Proviso to Sub-rule (5) lays down that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

In *M/s Mechelec Engineers & Manufacturers v. M/s Basic Equipment Corporation, (1976) 4 SCC 687,* this court enumerated certain propositions as to when an unconditional leave can be granted or the defendant can be put on terms. The said propositions, as enumerated by this court in the aforesaid decision, may be stated as follows:-

(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and 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 positively good defence the plaintiff is not entitled to sign judgment and 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 to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and 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 then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

On the same lines is the decision of this court in *Sunil Enterprises & Anr. v. SBI Commercial & International Bank Ltd, (1998) 5 SCC 354* wherein the propositions, as noted herein above, were summed up.

From the propositions, as noted hereinabove, it is clear that it is only in cases which fall in Class (e) that an imposition of the condition to deposit an amount in court before proceeding further is justifiable. In this matter looking to the conduct of defendant, some admitted facts and circumstances of the case, leave to defend the suit granted on deposit of Rs. 15 lacs in the Court was held proper as per Class (e) of the *Mechelec Engineers & Manufacturers case* (supra).

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***344. CIVIL PROCEDURE CODE, 1908 (amendment inserted w.e.f. 01.02.1977) – Order 41 Rule 22**

The decree is entirely in favour of respondent – Though an issue has been decided against respondent or a finding in the judgment is against the respondent – Held, respondent has right to challenge the findings in an appeal filed by appellant – Even without filing a cross-objection or cross-appeal.

Executive Engineer (Vigilance), M.P. State Electricity Board, Khargone v. Jaswant Singh & anr.

Reported in I.L.R. (2008) M.P. 1187

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***345. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27**

Additional evidence – One more defendant impleaded subsequently – Case remanded for *de novo* trial with direction to hear the case insofar as the impleaded defendant is concerned and considering the validity of decree during absence of impleaded defendant amongst other matter on merits – There is no need to record the evidence afresh in respect of all issues – Plaintiff confined himself to the case as against newly impleaded defendant, so other defendants cannot be permitted to lead evidence afresh on all the issues – Parties are at liberty to lead fresh evidence only in respect of defence/stand taken by the newly impleaded defendant in his written statement.

K.S. Krishna Sarma v. Kifayat Ali

Reported in AIR 2008 SC 1337

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346. CONSTITUTION OF INDIA – Articles 14, 19 (1) (a), 21, 25 & 26

(i) Reasonable restrictions on Fundamental Rights, determination of.

(ii) Subordinate/delegated legislation – Concept, nature and limitations of – A piece of delegated legislation is statutory in character, if not violating the provisions of the Constitution or of the parent statute.

(iii) Court should exercise judicial restraint while judging constitutionality of a delegated legislation – Presumption of constitutionality applies in favour of both Statute Law as well as delegated legislation.

Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat and others
Judgment dated 14.03.2008 passed by the Supreme Court in Civil Appeal No. 5469 of 2005, reported in (2008) 5 SCC 33

Held:

Municipal Corporation of Ahmedabad had passed two resolutions regarding closure of slaughter houses for nine days during the religious festival of Paryushan of Jain community which were under consideration in this case.

However, in the present case, the closure of the slaughter houses is only for 9 days and not for a considerable period of time. We have, therefore, to take a balanced view of the matter.

In this connection it may be mentioned that there is a large population of the Jain community in the States of Rajasthan and Gujarat. The Jains have a religious festival called *Paryushan* during which they do penance. Out of respect, for their sentiments surely the non-vegetarians can remain vegetarians for 9 days in a year.

Mr. Soli Sorabjee, learned senior counsel for one the appellants submitted that even non-vegetarians can get meat from other cities of Gujarat or from other States during these 9 days' period of *Paryushan* and they will not be compelled to become vegetarians. Learned counsel submitted that it is only the municipal slaughter houses which are closed for 9 days, but there is no ban on eating meat during those 9 days which can easily be procured from outside.

We have to take a practical view of the matter. Most people do not have the money to purchase meat from other cities or other States and bring it to Ahmedabad. Almost all meat eaters get their meat from the local butcher shop in the city, usually from a shop which is close to their residence. Hence, closure of the slaughter house, in substance, means compelling the non-vegetarians to become vegetarians for 9 days.

However, we agree with Mr. Sorabjee that the restriction is only a partial restriction for a limited period, and it is not disproportionate. Hence it is not an unreasonable restriction.

While it is true that the fundamental right of the writ petitioners under Article 19(1)(g) is affected by the impugned resolutions of the Municipal Corporation, we have further to examine whether the resolutions are saved by Article 19(6) which states that reasonable restrictions can be put on the right to freedom of trade and occupation under Article 19(1)(g) of the Constitution.

Had the impugned resolutions ordered closure of municipal slaughter houses for a considerable period of time we may have held the impugned resolutions to be invalid being an excessive restriction on the rights of the butchers of Ahmedabad who practise their profession of meat selling. After all, butchers are practicing a trade and it is their fundamental right under Article 19(1)(g) of the Constitution which is guaranteed to all citizens of India. Moreover, it is not a matter of the proprietor of the butchery shop alone. There may be also several workmen therein who may become unemployed if the slaughter houses are closed for a considerable period of time, because one of the conditions of the licence given to the shop-owners is to supply meat regularly in the city of Ahmedabad and this supply comes from the municipal slaughter houses of Ahmedabad. Also, a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court. In *R. Rajagopal v. State of T.N., AIR 1995 SC 264 (vide para 28)* this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21. It is a 'right to be let alone'.

In this connection, we may now refer to the well known Constitution Bench decision of this Court in *State of Madras v. V.G. Row, 1952 SCR 597,* where this Court observed that while determining the reasonable restriction, the Court should consider not only the factors of the restriction such as the duration and the extent but also the circumstances and the manner in which the imposition has been authorized. The Court further observed: (AIR p. 200, para 15)

> "15. .....It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with

> legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable".

The aforesaid observations have become *locus classicus*. In the present case we have noticed that the closure of the slaughter house is only for 9 days and not for a considerable period of time. This decision indicates that the restriction is reasonable. A period of 9 days is a very short time and surely the non-vegetarians can become vegetarians during those 9 days out of respect for the feeling of the Jain community. Also, the dealers in meat can do their business for 356 days in a year, and they have to abstain from it for only 9 days in a year. Surely this is not an excessive restriction, particularly since such closure has been observed for many years.

In the above observation in *State of Madras v. V.G. Row* (supra) mention has been made therein of the things to be seen in judging whether the restriction is reasonable or not, and one important consideration is whether the restriction is disproportionate. In our opinion, there is no disproportionate restriction because the restriction is only for a short period of 9 days. Moreover, in the above observation in *V.G. Row's* case (supra), it is also mentioned that Courts must act with a sense of responsibility and self-restraint with the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have in authorizing the imposition of the restrictions considered them to be reasonable.

Judging from that angle mentioned above in *V.G. Row's* case (supra), which has been consistently followed thereafter, in our opinion the closure of slaughter house cannot be said to be an unreasonable restriction on the writ petitioners right to do their trade and business of slaughtering animals.

It may be mentioned that the impugned resolutions which have been made under Section 466(1)(D)(b)of the Bombay Provincial Municipal Corporations Act, 1949 amount to a piece of delegated legislation. A piece of delegated legislation is also statutory in character and the only limitation on it is that it should not violate the provisions of the parent statute or of the Constitution. In our opinion, the impugned resolutions of the Corporation do not violate the parent statute or any constitutional provisions.

We have recently held in *Govt. of Andhra Pradesh v. Smt. P. Laxmi Devi, JT 2008(2) 8 SC 639* that the Court should exercise judicial restraint while judging the constitutional validity of statutes. In our opinion, the same principle also applies when judging the constitutional validity of delegated legislation and here also there should be judicial restraint. There is a presumption in favour of the constitutionality of statutes as well as delegated legislation, and it is only when

there is a clear violation of a constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the Court should declare it to be unconstitutional.

In the present case, we do not find any clear violation of any constitutional provision by the impugned resolutions. As already stated above, had the closure of the slaughter houses been ordered for a considerable period of time, we would have declared it to be unconstitutional on the ground of violation of Articles 14, 19(1)(g) as well as 21 of the Constitution. However, in the present case, the closure is only for a few days and has been done out of respect for the sentiments of the Jain community which has a large population in Gujarat. Moreover such closure during *Paryushan* has been consistently observed in Ahmedabad for a very long time, at least from 1993 and probably for a longer period.

In the present case we have seen that for a long period slaughter houses have been closed in Gujarat for a few days out of respect for the sentiments of the Jain community, which has a sizable population in Gujarat and Rajasthan. We see nothing unreasonable in this restriction.

As already stated above, it is a short restriction for a few days and surely the non-vegetarians can remain vegetarian for this short period. Also, the traders in meat of Ahmedabad will not suffer much merely because their business has been closed down for 9 days in a year. There is no prohibition to their business for the remaining 356 days in a year. In a multi cultural country like ours with such diversity, one should not be over sensitive and over touchy about a short restriction when it is being done out of respect for the sentiments of a particular section of society. It has been stated above that the great Emperor Akbar himself used to remain a vegetarian for a few days every week out of respect for the vegetarian section of the Indian society and out of respect for his Hindu wife. We too should have similar respect for the sentiments for others, even if they are a minority sect.

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***347. CONSTITUTION OF INDIA – Article 233 (2)**
UCHCHATAR NYAYIK SEWA (BHARTI TATHA SEWA SHARTEN) NIYAM, 1994 (M.P.) – Rule 7 (c)
STATE BAR COUNCIL OF M.P. RULES – Rule 14 (proviso) (i)
If a person has been enrolled as an advocate under the Advocate's Act, 1961 and has thereafter been appointed as Public Prosecutor/ Assistant Public Prosecutor or Assistant District Public Prosecutor and by the terms of his appointment continues to conduct cases on behalf of the State Government before the Criminal Courts – He does not cease to be an Advocate within the meaning of Article 233 (2) of the Constitution and Rule 7 (1) (c) of M.P. Uchchatar Nyayik Sewa (BhartiTatha Sewa Sharten) Niyam, 1994 for the purpose of recruitment to the post of District Judge (Entry level) in the M.P. Higher Judicial Service.

Jyoti Gupta v. Registrar General, High Court of M.P., Jabalpur and another
Reported in 2008 (2) MPLJ 486

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348. CONSUMER PROTECTION ACT, 1986 – Sections 2 (o) & 21
MEDICAL COUNCIL ACT, 1956 – Section 33

(i) Principle relating to duties of the doctor while taking patients consent to undergo treatment – Summarized.

(ii) Whether treatment without consent amounts to medical negligence? Explained.

(iii) In absence of consent, treatment given – Held, illegal – Payment of fee charged for surgery withheld and directed to pay compensation.

Samira Kohli v. Prabha Manchanda & Anr.
Reported in AIR 2008 SC 1385

Held:

(i) The consent given by the patient authorizes the doctor to carry out only the procedure for which express consent is given. The only exception to this rule is the principle of necessity by which the doctor is permitted to perform further or additional procedure. The exception is restricted to cases where the patient is temporarily incompetent (being unconscious), and permits the procedure delaying of which would be unreasonable because of the imminent danger to the life or health of the patient. Reasons such as it is quite possible that if the patient been conscious, and informed about the need for the additional procedure, the patient might have agreed to it, that the additional procedure is beneficial and in the interests of the patient, that postponement of the additional procedure (say removal of an organ) may require another surgery whereas removal of the affected organ during the initial diagnostic or exploratory surgery, would save the patient from the pain and cost of a second operation, may be practical or convenient but they are not relevant. What is relevant and of importance is the inviolable nature of the patient's right in regard to his body and his right to decide whether he should undergo the particular treatment or surgery or not.

We may now summarize principles relating to consent as follows:

(i) A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what is consenting to.

(ii) The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and

experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.

(ii) The appellant, an unmarried woman aged 44 years, visited the clinic of the respondent complaining of prolonged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test on the same day. After examining the report, the appellant was advised laparoscopy test under general anesthesia, for making an affirmative diagnosis. Accordingly, the appellant went to the respondent's clinic with her mother. On admission, the appellant's signatures were taken on – (1) admission and discharge card; (2) consent form for hospital admission and medical treatment; and (3) consent form for surgery. The Admission Card showed that admission was "for diagnostic and operative laparoscopy". The consent form for surgery described the procedure to be undergone by the appellant as "diagnostic and operative laparoscopy. Laparotomy may be needed." Thereafter, appellant was put under general anesthesia and subjected to a laparascopic examination. When the appellant was still unconscious, the doctor, who was assisting the respondent , came out of the Operation Theatre and took the consent of appellant's mother, who was waiting outside, for performing hysterectomy under general anesthesia. Thereafter, the respondent performed abdominal hysterectomy (removal of uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes).

Held, the removal of uterus and ovaries of the appellant on consent given for diagnostic surgery was unauthorized and unwarranted.

(iii) In view of our finding that there was no consent by the appellant for performing hysterectomy and salpingo-oopherectomy, performance of such surgery was an unauthorized invasion and interference with appellant's body which amounted to a tortuous act of assault and battery and therefore a deficiency in service. But as noticed above, there are several mitigating circumstances. The respondent did it in the interest of the appellant. As the appellant was already 44 years old and was having serious menstrual problems, the respondent thought that by surgical removal of uterus and ovaries she was providing permanent relief. It is also possible that the respondent thought that the appellant may approve the additional surgical procedure when she regained consciousness and the consent by appellant's mother gave her authority. This is a case of respondent acting in excess of consent but in good faith and for the benefit of the appellant. Though the appellant has alleged that she had to undergo Hormone Therapy, no other serious repercussion is made out as a result of the removal. The appellant was already fast approaching the age of menopause and in all probability required such Hormone Therapy. Even assuming that AH-BSO surgery was not immediately required, there was a reasonable certainty that she would have ultimately required the said treatment for a complete cure. On the facts and circumstances, we consider that interests of justice would

be served if the respondent is denied the entire fee charged for the surgery and in addition, directed to pay Rs. 25,000 as compensation for the unauthorized AH-BSO surgery to the appellant.

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349. CONTRACT ACT, 1872 – Sections 29 & 60

(i) Definite price is essential statement of a binding agreement.

(ii) Novation of contract – Cannot be made by a unilateral act unless there exist any provision either in contract itself or in law.

Delhi Development Authority, N.D. & Anr. v. Joint Action Committee, Allottee of SFS Flats & Ors.

Reported in AIR 2008 SC 1343

Held:

(i) A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Indian Contract Act reads as under:

> "***Section 29 – Agreement void for uncertainty.***– Agreement, the meaning of which is not certain, or capable of being made certain, are void."

A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot thrust upon a contracting party.

It is settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative.

(ii) It is well known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice.

The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law.

Novation of contract in terms of S. 60 of the Contract Act must precede the contract making process. The parties thereto must be *ad idem* so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allocatee. Having not done so, it, relying on or on the basis of the purported office orders which is not backed by any statute, new terms of contract could thrust upon the other party to the contract. The said purported policy is therefore, not beyond the pale of judicial review. In fact, being in the realm of contract, it cannot be stated to be a policy decision as such.

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350. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Muslim man married with his wife's sister during his wife's lifetime – Marriage is irregular, unless declared void by the competent Court – Till then such second wife and children are entitled to claim maintenance u/s 125 CrPC.

Chand Patel v. Bismillah Begum and another

Judgment dated 14.03.2008 passed by the Supreme Court in Criminal Appeal No. 488 0f 2008, reported in (2008) 4 SCC 774

Held:

Under the Muslim law also a distinction has been drawn between void marriages and irregular marriages. The same has been dealt with in Mulla's *"Principles of Mahomedan Law"* in Paras 260 to 264. Paras 260, 261 and 262 deal with complete prohibition of marriage between a man and the persons included therein and any marriage in violation of such provision would be void from its very inception *(batil)*. Paras 263 which is relevant for our purpose reads as follows:-

> *"263. Unlawful conjunction* – A man may not have at the same time two wives who are so related to each other by consanguinity, affinity and fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void."

Paras 264 which deals with the distinction between void and irregular marriages reads as follows:-

"264. Distinction between void and irregular marriages –

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by reason of consanguity, affinity, or fosterage is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely~

(a) a marriage contracted without witness;

(b) a marriage with a fifth wife by a person having four wives;

(c) a marriage with a woman undergoing *iddat;*

(d) a marriage prohibited by reason of difference of religion;

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried.

The reason why the aforesaid marriages are irregular, and not void, is that in clause (a) the irregularity arises from an accidental circumstance; in clause (b) the objection may be removed by the man divorcing one of his four wives; in clause (c) the impediment ceases on the expiration of the period iddat; in clause (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in clause (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself."

Paras 266 deals with the effects of a void *(batil)* marriage and provides that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate. Paras 267 which deals with the effects of irregular *(fasid)* marriages reads as follows:-

"267. Effect of an irregular (fasid) marriage –

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place –

(i) the wife is entitled to dower, proper or specified, whichever is less;

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three courses;

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife (Baillie, 694, 701)."

On consideration of the decisions of the various High Courts referred to hereinabove and the provisions relating to void marriages and marriages which are merely irregular, we are also of the view that the decision rendered by the Bombay High Court in the case of *Tajbi v. Mowla Khan, ILR (1917) 41 Bom 485* is correct. Since a marriage, which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is in our view irregular *(fasid)* and not void *(batil)*.

The answer to the question raised at the very outset, therefore, is that the bar of unlawful conjunction *(jama bain-al-mahramain)* renders a marriage irregular and not void. Consequently, under the Hanafi law as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance under the provisions of Section 125 of the Code of Criminal Procedure.

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351. CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Information regarding commission of a cognizable offence – Duty of Officer in Charge of a police station to reach the place of occurrence as early as possible – Not required to be preceded by FIR.

(ii) FIR – Each and every detail need not be stated – Probable physical and mental condition of informant is relevant – Noting of a report regarding cognizable offence in the general diary by Investigating Officer – Not to be treated as FIR.

(iii) Driver and Conductor of bus in which the incident of murder took place not disclosing the details in order to save their skin is not unnatural keeping in view of the present societal condition.

Animireddy Venkata Ramana and others v. Public Prosecutor, High Court of Andhra Pradesh

Judgment dated 05.03.2008 passed by the Supreme Court in Criminal Appeal No. 917 of 2006, reported in (2008) 5 SCC 368

Held:

Deceased died in the bus at about 10.30 p.m. on 23.06.1998 while travelling to his village home from Tuni. Conductor and driver of the bus on request of son of the deceased took the bus to his house. The dead body of the deceased was brought down from the bus and taken to the house. The conductor of the bus sent an information to the Depot Manager of the State Road Transport Corporation at Tuni. The investigating officer was also informed. A report to that

effect might have been noted in the general diary but the same could not have been treated to be an FIR. When an information is received by an officer incharge of a police station, he in terms of the provisions of the Code was expected to reach the place of occurrence as early as possible. It was not necessary for him to take that step only on the basis of a First Information Report. An information received in regard to commission of a cognizable offence is not required to be preceded by a First Information Report. Duty of the State to protect the life of an injured as also an endeavour on the part of the responsible police officer to reach the place of occurrence in a situation of this nature is his implicit duty and responsibility. If some incident had taken place in a bus, the officers of the Road Transport Corporation also could not ignore the same. They reached the place of occurrence in another bus at about 1 a.m. The deceased and the injured were, only then, shifted to the Tuni hospital.

In the First Information Report all the accused persons were named and overt acts on their part were also stated at some length. Each and every detail of the incident was not necessary to be stated. A First Information Report is not meant to be encyclopedic. While considering the effect of some omissions in the First Information Report on the part of the informant, a court cannot fail to take into consideration the probable physical and mental condition of the first informant. One of the important factors which may weigh with the court is as to whether there was a possibility of false implication of the appellants. Only with a view to test the veracity of the correctness of the contents of the report, the court applies certain well-known principles of caution.

Once, however, a First Information Report is found to be truthful, only because names of some accused persons have been mentioned, against whom the prosecution was not able to establish its case, the entire prosecution case would not be thrown away only on the basis thereof. If furthermore the purported entry in the general diary, which had not been produced, is not treated to be a First Information Report, only because some enquiries have been made, the same by itself would not vitiate the entire trial. Enquiries are required to be made for several reasons; one of them is to ascertain the truth or otherwise of the incident and the second to apprehend the accused persons. Arrest of accused persons, as expeditiously as possible, leads to a better investigation.

The High Court has rightly noticed that PWs 3 and 4 tried to save their own skin. They never informed about the particulars of the incident. They only stated that there had been commotion. They did not disclose any details about the incident. On the aforementioned premise the High Court had observed that they might have been desisted from giving the particulars expecting that there may be a trouble to them if the names of the accused are disclosed. Their behaviour, keeping in view the present societal condition, cannot be said to be wholly unnatural.

A court in the process of its job of appreciation of evidence may rely on a

statement of a witness or may not. It may even accept the evidence of a witness in part. But without taking recourse to the right methodology of appreciation of evidence, no court of law should jump to the conclusion that a prosecution witness is wholly untrustworthy only because his evidence has not been corroborated by other witnesses.

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352. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2) Proviso
Compulsive release on bail – Indefeasible right to be released on bail when investigation is not completed within the specified period is not affected on chargesheet being filed after presentation of the application for bail.

Mahesh v. State of M.P.
Reported in 2008 (3) MPHT 47

Held:

The applicants were arrested on 22.1.2007 in connection with Crime No. 29/07 registered at P.S. Kuthla Distt. Katni in respect of the offences punishable under Sections 395 of the IPC and 30 (iii) of the Ancient Monuments and Archaeological Sites and Remains Act, 1958. The corresponding trial is pending as S.T. No. 79/07 in the Court of IInd ASJ, Katni. On 23.1.2007 they were first produced before the Trial Magistrate who authorized their detention in the police custody till 31.1.2007 and 27.1.2007 respectively.

On expiry of the period of 90 days, they claimed benefit of the proviso by filing an application on 25.04.2007. On the following day, i.e. 26.04.2007 only, the chargesheet against the applicants and the other persons arrayed as co-accused was filed.

Learned Magistrate computing the statutory period from the respective dates on which the applicants were remanded to judicial custody, *viz.*, 31.01.2007 and 27.01.2007 proceeded to reject the application.

In revision, the learned ASJ, without entering into the question as to whether the learned Magistrate has erred in calculating the actual period of detention and placing reliance on the decision of *Sanjay Dutt v. State through CBI, Bombay, (1994) 5 SCC 410,* declined to interfere for the reason that the applicants' right to be released under the proviso did not survive on the charge-sheet being filed. However, while doing so, she completely lost sight of the object, scope and effect of the proviso as explained by the Supreme Court in a subsequent decision rendered in *Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453,* as under:–

> "accused has an indefeasible right to be released on bail when investigation is not completed within the specified period – in order to avail of such right, accused is only required to file an application before the Magistrate seeking release on bail alleging that no challan has been filed within the period prescribed and he is prepared to offer bail on

being directed by the Magistrate. Expression "if not already availed of" used by Supreme Court in *Sanjay Dutt's* case (supra), has to be understood in this manner – Magistrate has to dispose of such application forthwith and on being satisfied that the accused has been in custody for the specified period, that no charge-sheet has been filed and that accused is prepared to furnish bail, Magistrate is obliged to grant bail even if after filing of the application by accused, a charge-sheet had been filed."

Accordingly, the applicant's right would have been extinguished only in case, they had failed to furnish the bail as directed by he Magistrate. However, as pointed out already, no order of their release on bail was passed by the Magistrate before filing of the charge-sheet. In this view of the matter, it is a fit case for interference under the inherent powers.

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***353. CRIMINAL PROCEDURE CODE, 1973 – Section 174**

Inquest report – Scope of S. 174 is limited and is confined to the ascertainment of the apparent cause of death – It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted – It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined u/s 175 – The details of the overt acts are not necessary to be recorded in the inquest report – The question regarding the details as to as how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings u/s 174 – Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details – In view of aforesaid mention of the details, names of the accused in the inquest was not at all necessary

State of M.P. v. Gopal Singh & ors.

Reported in I.L.R. (2008) M.P. 1265

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354. CRIMINAL PROCEDURE CODE, 1973 – Section 195 (1) (a)

Complaint should be in writing of the public servant himself or his superior officer – He cannot delegate this power.

P.D. Lakhani and another v. State of Punjab and another

Judgment dated 22.04.2008 passed by the Supreme Court in Criminal Appeal No. 693 of 2008, reported in (2008) 5 SCC 150

Held:

Section 195 of the Cr.P.C. provides for prosecution for contempt of lawful authority of public servant, for offences against public servant and for offences relating to documents given in evidence. It contains an embargo stating that 'no court shall take cognizance of an offence punishable, inter alia, under the aforementioned provision except on the complaint in writing by the public servant concerned or by some other public servant to whom he is administratively subordinate'. 'Contempt of a public servant' has a definite connotation. Such contempt must be provided for by law. It must be found to be false.

The fact that the search was made pursuant to the directions issued by the Senior Superintendent of Police, Jalandhar is not in dispute. Section 195 contains a bar on the Magistrate to take cognizance of any offence. When a complaint is not made by the appropriate public servant, the Court will have no jurisdiction in respect thereof. Any trial held pursuant thereto would be wholly without jurisdiction. In a case of this nature, representation, if any, for all intent and purport was made before the Senior Superintendent of Police and not before the Station House Officer. No complaint, therefore, could be lodged before the learned Magistrate by the Station House Officer. Even assuming that the same was done under the directions of Senior Superintendent of Police, Jallandhar, Section 195, in no uncertain terms, directs filing of an appropriate complaint petition only by the public servant concerned or his superior officer. It, therefore, cannot be done by an inferior officer. It does not provide for delegation of the function of the public servant concerned.

We may notice that in terms of sub-section (3) of Section 340 of the Code, a complaint may be signed by such an officer as the High Court may appoint if the complaint is made by the High Court. But in all other cases, the same is to be done by the presiding officer of the court or by such officer of the court as it may authorize in writing in this behalf. Legislature, thus, wherever thought necessary to empower a court or public servant to delegate his power, made provisions therefor. As the statute does not contemplate delegation of this power by the Senior Superintendent of Police, we cannot assume that there exists such a provision. A power to delegate, when a complete bar is created, must be express; it being not an incidental power.

In *Daulat Ram v. State of Punjab, (1962) 2 SCR 812,* Hidayatullah, J. (as the learned Judge then was), held as under:

> "... In our opinion, this is not a due compliance with the provisions of that section. What the section contemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in this case."
>
> The said decision was followed by a Division Bench of this Court in *State of U.P. v. Mata Bhikh & Ors., (1994) 4 SCC 95,* stating

"A cursory reading of Section 195(1)(a) makes out that in case a public servant concerned who has promulgated an order which has not been obeyed or which has been disobeyed, does not prefer to give a complaint or refuses to give a complaint then it is open to the superior public servant to whom the officer who initially passed the order is administratively subordinate to prefer a complaint in respect of the disobedience of the order promulgated by his subordinate. The word 'subordinate' means administratively subordinate, i.e., some other public servant who is his official superior and under whose administrative control he works."

The said decisions are squarely applicable to the facts of the present case.

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***355. CRIMINAL PROCEDURE CODE, 1973 – Sections 200 & 202**

Postponement of issue of process – Trial Magistrate recorded the statement of complainant and postponed the case for recording of evidence of remaining witnesses – On next date complainant expressed that he does not want to examine any other witness – Trial Court after considering the allegations made in complaint and the statement issued process against applicants – Held, it cannot be said that Trial Court committed an illegality or irregularity.

LML Limited & ors. v. Kailash Narain Rai

Reported in I.L.R. (2008) M.P. NOC 33

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356. CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 228, 239 & 240

At the stage of framing of charge, Court exercises a limited jurisdiction – It has to see whether *prima facie* case has been made out or not – Concern of the Court should be to see whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation – Defence and documents filed by accused are not to be considered at this stage.

Hem Chand v. State of Jharkhand

Judgment dated 13.03.2008 passed by the Supreme Court in Criminal Appeal No. 470 of 2008, reported in (2008) 5 SCC 113

Held:

It is beyond any doubt or dispute that at the stage of framing of charge, the Court will not weigh the evidence. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on records at the trial.

It is one thing to say that on the basis of the admitted documents, the appellant was in a position to show that the charges could not have been framed against him, but it is another thing to say that for the said purpose he could rely upon some documents whereupon the prosecution would not rely.

The Court at the stage of framing charge exercises a limited jurisdiction. It would only have to see as to whether a *prima facie* case has been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the Court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily not consider as to whether the accused would be able to establish his defence, if any.

In *State of M.P. v. Mohanlal Soni, (2000) 6 SCC 338,* this Court has held: (SCC p. 342, para 7)

> "7. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

It was furthermore observed: (SCC p. 344, para 11)

> "11. ....As is evident from the paragraph extracted above if the court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. Per contra, if the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the particular offence then the charge can be quashed."

We agree with the said view. See also *State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568.*

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357. CRIMINAL PROCEDURE CODE, 1973 – Sections 233, 243 & 312
RULES AND ORDERS (CRIMINAL) – Rule 558
Defence witness in a sessions trial on Government expenses, summoning of – Subject to the rules made by State Government under S. 312 of the Code, the discretion to make payment of the expenses of the defence witnesses is vested in the Sessions Court and this discretion is to be exercised judicially – In exercising the discretion, the financial ability of the accused to bear the expenses of his witnesses would not be a decisive factor.
Nandlal and others v. State of Maharashtra
Reported in 2008 (3) MPHT 50

Held:

The rule, though framed under Section 544 of the Old Code, which corresponds to Section 312 of the New Code, was duly adopted by the State of Madhya Pradesh as constituted under the State Reorganization Act, 1956.

As explained by the Madras High Court in *Re Vendata, AIR 1950 Mad. 283,* although the word "witness" in Section 312 (supra), includes both prosecution and defence witnesses yet, the power given to the Criminal Court under this provision is discretionary. In this regard, the following guidelines have already been laid down by a Division Bench of this Court in *Kodu v. Banmali, 1968 JLJ 530:* –

(i) the discretion must be exercised according to rules if any made by the State Government.

(ii) the discretion, as any other, must be exercised judiciously.

(iii) whether such payment of expenses would be "directly in furtherance of the public interest".

In petitioners' earlier revision, the direction to deposit expenses of witness *viz.,* G.V. Rao sought to be re-summoned was set aside, vide the order, cited as 2005 (4) MPLJ 98, on the ground that it might have caused prejudice to them. It is relevant to note that for arriving at this conclusion. reference had been made to the decision in *Kodu's case* (supra)

The payment of expenses of witnesses in the State of Madhya Pradesh is regulated by the Rules including Rule 558. It may be pointed out here that neither sub-section (3) of Section 233 nor Rule 558 of the Code lays down that expenses of every defence witness in a Sessions Trial shall be paid by the State Government.

Subject to the rules made by State Government under Section 312 of the Code, the discretion to make payment of the expenses of the defence witnesses is vested in the Court and this discretion is to be exercised judiciously.

Financial status of the accused would not be a decisive factor to make them liable for bearing the expenses of the witnesses but, it may often give considerable assistance in deciding the relevant aspects of prejudice or the public interest as highlighted above.

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***358. CRIMINAL PROCEDURE CODE, 1973 – Section 243**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

(i) Defence witnesses – Fair trial – Includes fair and proper opportunities allowed by law to prove innocence – Request for leading defence evidence should be considered unless Magistrate finds the object of accused is to vexatious or delaying criminal proceedings – Accused is permitted to call defence witness.

(ii) Handwriting expert – Applicant has not denied his signatures on cheque – No question in this regard was put to Bank Manager also – Other columns of cheque may be filled by anyone on the instructions of applicant himself – No useful purpose will be served by getting cheque examined by handwriting expert.

Narendra Dhakad v. Anand Kumar

Reported in I.L.R. (2008) M.P. 1309

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*359. CRIMINAL PROCEDURE CODE, 1973 – Section 293

Report submitted by Government Scientific Expert as per provisions of S. 293 of CrPC – Whether his examination is necessary? Held, it is not obligatory that such an expert should be of necessity made to depose in proceedings before the Court (Also see *Ukha Kolhe v. State of Maharashtra, AIR 1963 SC 1531* and *Bhupinder Singh v. State of Punjab, AIR 1988 SC 1011*)

Rajesh Kumar and another v. State Government of NCT of Delhi

Judgment dated 25.02.2008 passed by the Supreme Court in Criminal Appeal No. 380 of 2008, reported in (2008) 4 SCC 493

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*360. CRIMINAL PROCEDURE CODE, 1973 – Section 313

EVIDENCE ACT, 1872 – Section 30

(i) Examination of accused – Is not a mere formality – Court is required to put proper questions to accused relating to material which is against interest of accused and seek explanation of accused.

(ii) Confessional statement of co-accused, when to be considered – Held, it is true that the confession of co-accused can be used against the other accused u/s 30 of the Evidence Act, but S. 30 of the Evidence Act is not a blanket provision – It provides that when more persons than one are being tried jointly for the same offence, and a confession made by one such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession – If there is no joint trial then such confession cannot be used against other persons – Apart from this, such confession must be proved like any other fact and document as required to be proved under the law – In the present case the statement of co-accused, who was juvenile, recorded u/s 164 cannot be relied upon.

Bhoorelal v. State of M.P.

Reported in I.L.R. (2008) M.P. 1229

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361. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Power u/s 319 of the Code, exercise of – Court has to be circumspective while exercising power to summon an additional accused – If it appears from all the evidence available on record that an offence has been committed by a person not being the accused, then only such power may be exercised.

Kailash v. State of Rajasthan & Anr.

Reported in AIR 2008 SC 1564

Held:

A glance of provisions of S. 319 of the CrPC would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this Section are "it appears from the evidence"...."any person"....."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion under Section 319 Cr.P.C. has to be exercised very sparingly and with caution and only when the concerned court is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence. The words "it appears" are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the Section demands.

In a reported decision in *Mohd. Shafi v. Mohd. Rafiq & Anr., 2007 AIR SCW 3399* to which one of us (Sinha, J.) was a party, this Court had observed in para 7 as under:

> "Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appear to the court concerned. It cannot be *ipse dixit* on the part of the court. Discretion in this behalf must be judicially exercised. It is incumbent that the court must arrive at its satisfaction in this behalf."

In the above case this Court referred to the decision reported in *Municipal Corporation of Delhi v. Ram Krishan Rohtagi & Ors., AIR 1983 SC 67* and highlighted the following remarks made in para 19 therein which are to the following effect:

> "19. ..... But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken...."

It was further stated in para 13:

> ".....it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at *inter alia* upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence."

In *Krishnappa v. State of Karnataka, 2004 AIR SCW 4809* this Court, while relying on another reported decision in *Michael Machado v. Central Bureau of Investigation, 2000 AIR SCW 734* went on to hold that the power under Section 319, Cr.P.C. is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. The Court further observed:

> "....a judicial exercise is called for, keeping in conspectus of the case, including the stage at which the trial has already proceeded with the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence."

The Court further observed:

> "The Court, while examining an application under Section 319 Cr.P.C., has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 Cr.P.C., all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused."

On this backdrop when we see the order passed by the High Court, there does not appear to be any such effort on the part of the High Court. The High Court should have applied itself independently to the question as to whether there was any material in the evidence not only to connect the appellant but whether it was sufficient to justify the words "it appears that such person has committed the crime".

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***362. CRIMINAL PROCEDURE CODE, 1973 – Section 391**
PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 17 (2)

(i) Additional evidence – The nomination order is a material document – Appellate Court cannot refuse to take additional evidence on the grounds that at the initial stage the partner of a firm who was wrongly prosecuted, did not mention the fact of nomination and if such additional evidence is taken on record at appellate stage, trial will start *de novo*.

(ii) Offences by companies or partnership firms – Nominations – Nominee alone can be prosecuted – But in exceptional cases, Director of a company or partners of a firm or the concerned person can be prosecuted.

Hindustan Food Products India v. State of M.P. & anr.

Reported in I.L.R. (2008) M.P. 1313

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***363. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439**

First bail application was rejected on valid grounds – Second bail application allowed after 19 days without any change in circumstances – Whatever grounds were urged in the second bail application could have been stated in the first bail application – The reasons given for grant of bail by the Sessions Judge in the second bail application were in utter violation of the settled principles of judicial propriety.

Akhilesh Kumar Singh v. State of Uttar Pradesh through DGC (Crl.) and another

Judgment dated 27.02.2008 passed by the Supreme Court in Criminal Appeal No. 399 of 2008, reported in (2008) 4 SCC 449

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364. CRIMINAL PROCEDURE CODE, 1973 – Sections 438 & 439

Regular bail application after grant of anticipatory bail, consideration of – Where, considering the nature of offence and having regard to other facts and circumstances, if the anticipatory bail application is allowed by a Higher Court, then it is necessary for the Regular Court to pass a speaking order showing that there is something more on which the application for regular bail cannot be allowed.

Katua Patel and another v. State of M.P.

Reported in 2008 (3) MPHT 43

Held:

The applications under Section 439 of the Code have been filed in this Court on the grounds that the anticipatory bail was granted to the applicants by the High Court and when the application for regular bail was filed in the Sessions Court, the reference of the case of *Chhotelal Rai v. State of Madhya Pradesh,*

2007 (I) MPJR 117, was made in those bail applications and the Counsel also cited this judgment at the time of arguments, but instead of applying the principles laid down by the High Court, the Sessions Court rejected the bail applications and the Court below refused to follow the ratio of the judgment passed in *Chhotelal Rai's case (supra).*

After considering all the circumstances, the explanation of concerned Additional Sessions Judge was called for.

As per explanation of Additional Sessions Judge, the case of *Chhotelal Rai* (supra), was not in his knowledge and the citation was not produced before him. This explanation is neither sufficient nor proper. If in any application or written arguments or during oral arguments, the citations have been mentioned or the cases decided by the High Court or Apex Court are referred, it is duty of the Judge to go through all those citations and he must explain in his order or judgment as to why the principles laid down in those case laws, are not applicable to the case on hand. Even if, any citation is not available to the Judge or it was not produced at the time of arguments, the Judge could have asked the Advocates to produce the citation and after perusal of that citation, he could have passed the orders. Apart from that, if the Advocates do not extend their held even then, it is duty of a Judge to make every effort to find out the correct law.

There is no explanation of Additional Sessions Judge in this respect as to why he failed to find out the referred case law from the library? Why did he not ask the Advocates to show the citation which was referred in the bail applications? Why he failed to request the District Judge to make available the citation? Why he passed the order without perusal of the citation? Why he failed to write this fact in the order that he tried his level best to find out the citation and the Advocates also refused to produce the citation or its photocopy? All these unanswered questions clearly indicate that either the learned Additional Sessions Judge was of the view that whatever the Higher Courts decided, he is not bound by it or he was of the view that whatever he is doing, is correct and he is at liberty to give any finding irrespective of the principles laid down by the High Courts or the Supreme Court or he thinks that he is above the law and whatever he wants, he can pass the orders without paying any heed to the laws of or the principles laid down by the higher Court. If this was not the intention of the Additional Sessions Judge, then it can be presumed that the concerned Additional Sessions Judge does not want to take pains to know the latest legal position. This type of attitude amongst Judicial officers is growing day-by-day which is highly improper and also alarming. A Judge sits to impart justice and he has to make all efforts to do his pious duty of dispensation of justice.

In the case of *Chhotelal Rai* (supra), it has been held that–

> "It is desirable for the Regular Court to appreciate the evidence available in the case diary or the charge-sheet against the applicant who filed the bail application. Here, I must repeat that no doubt, the Regular Court has discretion

to decide the bail application either way, irrespective of the order of High Court passed on anticipatory bail application, but where, considering the nature of offence and having regard to other facts and circumstances, if the anticipatory bail application is allowed by a Higher Court, then it is necessary for the Regular Court to pass a speaking order showing that there is something more on which the application for regular bail cannot be allowed. In such circumstances, it is not sufficient to say that the offence is of serious nature and sufficient evidence is available against the applicant, therefore, the application cannot be allowed. It is necessary for the Lower Court to lay down emphasis, while rejecting the regular bail application on that evidence also which was collected after the order passed an anticipatory bail application by Higher Court."

On a perusal of orders passed by the Additional Sessions Judge for rejecting the regular bail applications, I found that only on these grounds that sufficient evidence is available against the applicants and offence is quite serious, the applications were dismissed. These orders are totally against the principle laid down in *Chhotelal Rai's case* (supra). When the anticipatory bail was granted to these applicants thereafter, nothing incriminatory evidence was collected by the Investigating Officer to come to this conclusion that the applicants were not entitled for regular bail even then, the Additional Sessions Judge rejected the bail applications of these applicants showing total disregard to the principles laid down by the High Court in the abovementioned citation.

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***365. CRIMINAL PROCEDURE CODE, 1973 – Section 439**

Accused granted bail by the High Court in connection with a particular crime – Jail authorities refused to release the accused on the pretext that particular section is not mentioned in the bail order – Held, the person can be enlarged on bail in connection with a particular crime or a particular case registered at police station or in the Court – The bail order is not granted in respect of the section – It is not a condition precedent of bail order to mention the section under which the crime is registered – Further held, concerned jail authority had no right to raise an objection that a particular section has not been written by the Court in its order – Concerned Magistrate ought to have directed the concerned jail authority to release the accused on bail irrespective of the fact whether a particular section had been mentioned in the order or not.

Dharmendra Pratap Singh @ Kunwar Singh v. State of M.P.

Reported in 2008 (2) MPHT 477

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366. CRIMINAL PROCEDURE CODE, 1973 – Sections 439 (1) & (2)

(i) Bail and cancellation of bail, principles reiterated – Conditions laid down u/s 437 (1) (i) is a *sine qua non* for granting bail even u/s 439 (1).

(ii) Substantially irrelevant materials taken in and/or relevant material kept out of consideration – Granting bail was certainly vulnerable, hence cancellation of bail u/s 439 (2) of Cr.P.C. held proper.

Dinesh M.N. (S.P.) v. State of Gujarat

Judgment dated 28.04.2008 passed by the Supreme Court in Criminal Appeal No. 739 of 2008, reported in (2008) 5 SCC 66

Held:

Though the High Court appears to have used the expression 'ban' on the grant of bail in serious offences, actually it is referable to the decision of this Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr., (2004) 7 SCC 528* In para 11 it was noted as follows: (SCC pp. 535-36)

> "11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter or course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for *prima facie* concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
>
> (c) *Prima facie* satisfaction of the court in support of the charge.

[See *Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598* and *Puran v. Rambilas, (2001) 6 SCC 338.*

It was also noted in the said case that the conditions laid down under Section 437 (1) (i) are *sine qua non* for granting bail even under Section 439 of the Code. In para 14 it was noted as follows: [*Rajesh Ranjan's case (supra), SCC pp. 536-37*)

> "14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had

earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001. [*Union of India v. Rajesh Ranjan, (2004) 7 SCC 539*] While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is *sine qua non* for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

Even though the re-appreciation of the evidence as done by the Court granting bail is to be avoided, the Court dealing with an application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

In *Puran's case* (supra) it was noted as follows: (SCC p. 345, para 11)

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the

ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118.* In that case the Court observed as under: (SCC p. 124, para 16)

> '16. .....If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session *vis-a-vis* the High Court.' "

The perversity as highlighted in *Puran's* case (supra) can also flow from the fact that as noted above, irrelevant materials have been taken into consideration adding vulnerability to the order granting bail. The irrelevant materials should be of a substantial nature and not of a trivial nature. In the instant case, the trial Court seems to have been swayed by the fact that Sohrabuddin had shady reputation and criminal antecedents. That was not certainly a factor which was to be considered while granting bail. It was nature of the acts which ought to have been considered. By way of illustration, it can be said that the accused cannot take a plea while applying for bail that the person whom he killed was a hardened criminal. That certainly is not a factor which can be taken into account.

Another significant factor which was highlighted by the State before the High Court was that an FIR allegedly was filed to divert attention from the fake encounter. The same was not lodged by the Gujarat Police. The accused was the leader of the Rajasthan team and the other officials were Abdul Rehman, Himanshu Singh, Mohan Singh, Shyam Singh and Jai Singh. The first named Abdul Rehman had lodged the FIR. It is pointed out from the General Diary in respect of entry on 26.11.2005 that accused Dinesh was present. In FIR No. CR-I/5 of 2005 also the presence of Dinesh has been noted. The relevance of these factors does not appear to have been noticed by the High Court. In other words, relevant materials were kept out of consideration. Once it is concluded that bail was granted on untenable grounds, the plea of absence of supervening circumstances has no leg to stand.

We have only highlighted the above aspects to show that irrelevant materials have been taken into account and/or relevant materials have been kept out of consideration. That being so, the order of granting bail to the appellant was certainly vulnerable. The order of the High Court does not suffer from any infirmity to warrant interference. The appeal is dismissed. However, it is made clear that whatever observations have been made are only to decide the question of grant of bail and shall not be treated to be expression of any opinion on merits. The case relating to acceptability or otherwise of the evidence is the subject matter for the trial Court.

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***367 CRIMINAL PROCEDURE (M.P. AMENDMENT) ACT, 2007 (M.P. ACT No. 2 of 2008) – Schedule I Cr.P.C.**

Amendment dated 22.02.2008 in the Schedule I of the Cr.P.C., effect of – Law explained – In view of the law laid down by the Supreme Court in the cases of *Manujendra Dutt v. Purnedy Prosad Roy Chowdhury and others, AIR 1967 SC 1419, Commissioner of Income Tax v. Smt. R. Sharadamma, AIR 1996 SC 3199* and *R. Kapilanath v. Krishna, AIR 2003 SC 565* we are of the considered opinion that all cases pending in the Court of Judicial Magistrate First Class as on 22.02.2008 are not affected by the Amendment and will be continued to be tried by the Judicial Magistrate First Class because there is no provision in the Amendment or no clear indication in the Amendment that pending cases before the Judicial Magistrate First Class are to be made over to the Court of Sessions – All cases which were pending before the Judicial Magistrate First Class as on 22.02.2008 if, in the meanwhile, committed to the Court of Sessions will be sent back to the Judicial Magistrate First Class for trial in accordance with law.

In reference:

Order dated 13.05.2008 passed by the High Court of Madhya Pradesh (Main Seat) in Misc. Criminal Case No. 4548 of 2008 (FB) = I.L.R (2008) M.P. 1035 (FB)

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368. DRUGS AND COSMETICS ACT, 1940 – Sections 17, 18, 21, 27 & 32 and Chapter IV & IV-A

Allopathic drug used as active ingredient in preparation of an ayurvedic drug unauthorisedly by the manufacturer – Constitutes offence u/s 18 (a) (b) & (c) punishable u/s 27 (b) (ii) – Prosecution can be launched by an inspector appointed under Chapter IV and also by an inspector authorized under Chapter IV-A – Both the prosecution can be tagged and tried together by trial Court.

Drugs Inspector and another v. Fizikem Laboratories (P) Limited and another

Judgment dated 24.03.2008 passed by the Supreme Court in Criminal Appeal No. 533 of 2008, reported in (2008) 4 SCC 784

Held:

Section 3(e) of Drugs and Cosmetics Act, 1940 defines Inspector which reads as under :

> *"3. (e) "Inspector" means* – (i) in relation to Ayurvedic, Siddha or Unani drug, an Inspector appointed by the Central Government or a State Government under section 33G; and
>
> (ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under section 21;"

Section 16 under this Chapter deals with standard and quality. As per Section 16, all drugs comply with the standard set out in the Second Schedule. Section 17 deals with misbranded drugs. Section 17A deals with adulterated drugs. Section 17B deals with spurious drugs. Section 17C deals with misbranded cosmetics and Section 17D deals with spurious cosmetics. Section 18 deals with prohibition of manufacture and sale of certain drugs and cosmetics.

Punishment has been prescribed under Section 27. Any person who manufactures for himself or by any other person on his behalf, manufactures for sale or for distribution, or sells or stocks or exhibits or offers for sale or distributes any adulterated, spurious or misbranded drugs then he shall be punished under Section 27.

Chapter IVA which was introduced with effect from 1.2.1969 deals with provisions relating to Ayurvedic, Siddha and Unani drugs. Here also identical provisions are there. Section 33E deals with misbranded drugs, Section 33 EE deals with adulterated drugs and Section 33EEA deals with spurious drugs and it is punishable under Section 33-I. Section 33 G deals with the Inspectors which says that the Central Government or a State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having certain prescribed qualifications and it has laid down their duties, functions who could launch prosecution for breach of any of the provisions.

Section 13 deals with offences. Chapter IV deals with Manufacture, sale and distribution of drugs and cosmetics. Section 16 under this Chapter deals with standard and quality. As per Section 16, all drugs comply with the standard set out in the Second Schedule. Section 17 deals with misbranded drugs. Section 17A deals with adulterated drugs. Section 17B deals with spurious drugs Section 17C deals with misbranded cosmetics and Section 17D deals with spurious cosmetics. Section 18 deals with prohibition of manufacture and sale of certain drugs and cosmetics.

Section 18 prohibits any person from manufacturing for sale or for distribution or sell or stock or exhibit or offer for sale or distribute any drug which is not of a standard quality or is misbranded, adulterated or spurious. Section 18 (c) says that no person shall himself or by any other person on his

behalf manufacture for sale or for distribution, or sell or stock or exhibit or offer for sale or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter.

Section 21 deals with Inspectors. The Inspectors can be appointed by the Central Government or the State Government by notification in the Official Gazette having the prescribed qualifications and they may perform such duties for drugs or classes of drugs, or cosmetics or classes of cosmetics and they shall be public servant within the meaning of Section 21 of the Penal Code, 1860.

The provisions in Chapter IV and Chapter IV-A are almost identical. Chapter IV-A deals with special branch of medicines like, ayurvedic, siddha and unani drugs whereas Chapter IV deals with branches other than Chapter IV-A.

The accused has used sildenafil citrate which is an allopathic drug. It is patent and proprietary medicine. The respondent accused company was holding allopathic as well as ayurvedic license but the company does not hold the licence to manufacture Sildenafil citrate. The brand name is Viagra and generic name is sildenafil citrate. This is an allopathic drug and by no stretch of imagination it can be said as an Ayurvedic drug. Therefore, learned counsel for the appellants appears to be justified that since it is an allopathic drug and it cannot be used by anybody else unless a person who holds the licence for it. It is an admitted position that the accused does not possess the licence. Therefore, the very fact of selling this drug as one of the ingredients in the Ozomen capsule and not displaying the name in the prescribed manner in the drugs will also constitute an offence under Section 18 (a), (b) & (c) punishable under Section 27(b) (ii). Therefore, it is erroneous to say that the accused is dealing with ayurvedic drugs therefore, only the Inspector who is authorized under Chapter IVA could launch the prosecution and not the Inspectors appointed under Chapter IV. The Inspector appointed under Chapter IV is competent to launch prosecution for the aforesaid sections against the accused. We have also been informed in the alternative prosecution has also been launched against the accused under Chapter IVA. Both the prosecution can be tagged together and the learned trial court should proceed with the matter.

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***369. ESSENTIAL COMMODITIES ACT, 1955 – Section 6-C (2)**

(i) Co-operative Societies three in number were allotted fair price shops – They were prosecuted for violation of the provisions of MP (Khadya Padarth) Sarvjanik Nagrik Purti Vitran Scheme,1991 framed u/s 3 of the Act – During the pendency of the case, sugar as well as wheat were sold – On conclusion of trial, while acquitting the accused persons, the Court ordered for confiscation of the said sale proceeds – Held, as there was acquittal, there was no justification for confiscating sale proceeds – Further held, upon acquittal, by virtue of S. 6-C (2) of the Act, the person from whom essential commodity was

seized and confiscated, becomes entitled to the sale proceeds of the commodity with interest.

(ii) Under the scheme of the E.C. Act, there are two authorities created, viz., one for trial of offences and another for seizure, passing of order of confiscation and to dispose of the essential commodities – Duty to make payment of the price and interest, in case of acquittal or in case of order of confiscation being set aside, is that of the Collector and not of the Judicial Magistrate – An application for refund of the price of essential commodity with reasonable interest thereon shall lie to the Collector and not to the Judicial Magistrate.

Prathmik Mahila Sahkari Upbhokta Bhandar and others v. State of M.P. and others

Reported in 2008 (3) MPHT 140

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*370. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – Material prosecution witnesses in examination-in-chief deposed against the accused persons – Were not cross-examined by the defence counsel on the date of recording of their evidence – They were recalled and cross-examined after lapse of 10 months – In cross-examination they changed their version and tuned hostile – In re-examination they were confronted with their earlier version by prosecutor – They admitted that their earlier version was correct – Thereafter, no further cross-examination was done by defence – Earlier version in their examination in-chief is reliable.

Kamal & anr. v. State of M.P.

Reported in I.L.R. (2008) M.P. 1214

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*371. EVIDENCE ACT, 1872 – Section 9

(i) Test identification parade – Test identification parade conducted by Naib Tahsildar is not substantive piece of evidence – Complainant not identified appellants in Court – Court relied upon evidence of test identification parade as substantive piece of evidence – Held, substantive evidence is the statement of witnesses given in Court on oath – Complainant did not identify the appellants in Court – Identification not proved.

(ii) Recovery of mobile phone and golden ring – Complainant has nowhere stated about snatching of golden ring – Complainant admitted that seized articles were shown to him prior to holding of test identification parade – Held, evidence of test identification parade and identification of articles in Court loses its sanctity and evidentiary value – Conviction of appellants set aside – Appeal allowed.

Sachin & anr. v. State of M.P.
Reported in I.L.R. (2008) M.P. 1242

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***372. EVIDENCE ACT, 1872 – Sections 9 & 60**

(i) Test identification parade – Golden chain recovered from possession of appellant was identified by complainant in test identification parade conducted by Tahsildar – Neither chain was produced nor was it identified in Court – Held, evidence of test identification parade is not a substantive piece of evidence and can be used only for contradiction and corroboration purposes – Trial Court erred in relying on evidence of identification of golden chain.

(ii) Hearsay evidence – Prosecution witnesses said that they were informed by the eye witness regarding incident – Eye witness did not depose that he had informed other prosecution witnesses – Held, evidence of prosecution witnesses not admissible as hit by S. 60 of the Act.

Ganpat v. State of M.P.
Reported in I.L.R. (2008) M.P. 1235

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373. EVIDENCE ACT, 1872 – Sections 9 & 145
CRIMINAL PROCEDURE CODE, 1973 – Section 154
CRIMINAL TRIAL:
INDIAN PENAL CODE, 1860 – Section 376 (2) (g) and its Explanation I

(i) Evidentiary value of FIR explained.

(ii) Test identification parade – Requirement of statement of natural witness is acceptable – Victim grown up girl – Not suffered any injury – Is not negative circumstance.

(iii) Accused were charged only u/s 376 – Common intention also proved – The accused could also be convicted u/s 376 (2) (g), if not prejudiced.

Vishwanathan and others v. State represented by Inspector of Police, Tamil Nadu
Judgment dated 29.04.2008 passed by the Supreme Court in Criminal Appeal No. 97 of 2004, reported in (2008) 5 SCC 354

Held:

(i) The allegations made in the First Information Report are not evidence. She might have named four persons, namely, accused Nos. 1 to 4 in the FIR, but, as indicated hereinbefore, she named only accused Nos. 1 to 3 in her deposition. Only accused No. 1, Babu, has been named by PW 7 and none other. She, therefore, knew only the four persons. She had not named accused

Nos. 5 and 6 either in the FIR or in her deposition. They had been arrested on the basis of the statements made by their co-accused. They had not been put to Test Identification Parade. The prosecutrix, in her deposition before the learned Trial Judge, neither named nor identified accused Nos. 4 to 6. On what basis, therefore, their guilt is said to have been established is not known. Both, the learned Trial Judge as also the High Court, in their judgments did not deal with this aspect of the matter.

In a situation of this nature, a Test Identification Parade was required to be held at least for the purpose of identification of accused Nos. 5 and 6. Some weight should have been given for arriving at a finding as regards the guilt of accused Nos. 5 and 6, as they had not been identified in the court.

We, therefore, are of the opinion that in absence of any Test Identification Parade having been held or they having been identified in court, the accused Nos. 4 to 6 cannot be held guilty of commission of the said offence. They are, in our opinion, have wrongly been convicted.

Some delay has occurred in the lodging of the FIR but keeping in view the trauma suffered by the victim, her statement that she had regained her composures only in the evening cannot be disbelieved particularly in view of the evidence of PW 8.

In a situation of this nature and particularly having regard to the sociological backgrounds from which PW 6 and PW 7 and other witnesses hail, we are not in a position to agree with the submissions of Mr. Viswanathan that the prosecution's case should be thrown out only on the ground of delay in lodging the FIR.

(ii) PW 7 also is a natural witness. He was slapped. He was put to fear. He was chased. He had run away to his village, collected some people and came back to the scene of occurrence. We do not see as to why he should be disbelieved. If he was to lodge a false case, he could have done so even otherwise. The fact that the incident of the nature disclosed in the FIR had taken place is not in question. The only question which arises for consideration therefore, is as to who were the persons responsible therefor. Indisputably, the prosecutrix did not suffer any injury. For the purpose of proving commission of the offence of rape, however, the same was not necessary as she was a grown up girl aged between 22 to 23 years as opined by Dr. Gopikrishnan. She was, furthermore, mother of two children.

(iii) Explanation-I appended to Section 376 (2) (g) of the Code clearly states that the persons who have common intention to commit the said offence would also be liable in terms of Section 376(2)(g) of the Act. The common intention of all the accused need not be supported by the fact that each one of them took part in actual commission of the offence. The very fact that they came on cycles and dashed with the cycle of PW7 would clearly show that they had a common intention to commit the offence. If they had the common intention of committing the offence, they although were charged under Section 376 in general, they could be convicted also under Section 376(2)(g) as the latter is merely a graver

form of the offence of rape as defined in Section 375 of the Code. In any event, we do not find that they were prejudiced in any manner whatsoever; as evidently:

(1) they not only gathered and obstructed her from proceeding towards her residence with her brother in the bicycle but also deliberately made her and her brother to fall down from the cycle; and

(2) She was physically removed to a secluded place and at least three of them took part in committing the offence of rape on her one by one.

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374. EVIDENCE ACT, 1872 – Sections 24 & 27

(i) Delay in filing of FIR properly explained by the circumstances – Held, apathy on the part of the police officers to accept complaint promptly is a well known phenomenon – The Courts cannot be oblivious of such conduct on the part of the police officers.

(ii) Voluntary and truthful extra judicial confession leading to discovery of dead body of the wife of appellant/accused and other material objects – Other circumstantial evidence also proved against the accused.

(iii) Absence of marks of strangulation on the deceased does not negate the prosecution case – Conviction – Held, proper.

Ponnusamy v. State of Tamil Nadu

Judgment dated 10.04.2008 passed by the Supreme Court in Criminal Appeal No. 429 of 2006, reported in (2008) 5 SCC 587

Held:

Deceased wife last seen with the appellant/accused (husband). There was no eyewitness to the occurrence and prosecution case was based on circumstantial evidence.

Indisputably some delay took place in lodging the first information report but no one was sure about the death of the deceased. Only when the extra judicial confession was made by the appellant/accused, an attempt was made to lodge the FIR. The contention of the learned counsel that the statement to the said effect, purported to have been made by PW1 should not be relied upon as no officer from the police station had been examined to establish the said fact, cannot be accepted for more than one reason. PW 1 is a rustic villager. She is an illiterate lady. According to her, she had been turned away from the police station on the premise that no dead body was recovered or there being no other evidence relating to her death. No exception to such a statement can be taken. The courts cannot be oblivious of such conduct on the part of the police officers. Apathy on the part of the police officers to accept complaints promptly is well-known phenomenon.

They were searching for the deceased earlier but without success. Only on the disclosure statement made by the appellant before PW 10 and the police officer at Sathyamangalam Police Station having refused to record the first information report, they started searching for the body on the bank of the canal. The investigating officer, Village Administrative Officer as also other prosecution witnesses, clearly proved the discovery of a dead body. Identification of the dead body on the basis of the mangalsutra, saree as also the silver ring on the toe of the deceased is not in dispute. Significantly, a key was also recovered. PW 22, a responsible officer, with a view to satisfy himself as regards the identity of the dead body, with reference to the key tied at the end of the saree, asked PW 2 to bring the trunk and found it to be of the lock put on the said trunk. Chemical examination report of the dead body also corroborated the prosecution case.

The appellant is said to have thrown the dead-body in the canal. The fact that there was sufficient water in the canal has also been established. In a situation of this nature, a presumption about the knowledge of the appellant in regard to location of the dead body of 'Selvi' can be drawn. His confession led to a discovery of fact which had a nexus with commission of a crime.

This Court in *State of Mahasrashtra v. Suresh, (2000) 1 SCC 471* opined (SCC pp. 479 - 80, para 26):-

> "26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

We have to consider the factual background of the present case in the light of the relationship between the parties. If his wife was found missing, ordinarily, the husband would search for her. If she has died in an unnatural situation when she was in his company, he is expected to offer an explanation

therefor. Lack of such explanation on the part of the appellant itself would be a circumstantial evidence against him.

In *Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681,* it was observed (SCC p. 694, para 22) :-

> "22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

[See also *Raj Kumar Prasad Tamarkar v. State of Bihar and another, (2007) 10 SCC 43*].

It is true that the autopsy surgeon, PW-17, did not find any fracture on the hyoid bone. Existence of such a fracture lead to a conclusive proof of strangulation but absence thereof does not prove contra. In Modi's Medical Jurisprudence and Toxicology, 23rd Edn. at page 584 a difference between hanging and strangulation has been stated. Our attention in this connection has been drawn to point No.12 which reads as under:-

Hanging	Strangulation
Fracture of the larynx and trachea – Very rare and that too in judicial hanging.	Fracture of the larynx and trachea ~ Often found also hyoid bone.

A bare perusal of the opinion of the learned Author by itself does not lead to the conclusion that fracture of hyoid bone, is a must in all the cases.

We must also take into consideration the fact that the dead body was decomposed with maggots all over it. Other marks of strangulation which could have been found were not to be found in this case. The dead body was found after a few days. We are, therefore, of the opinion that medical evidence does not negate the prosecution case.

There cannot be any doubt that extra judicial confession is evidence of weak nature as has been held in *Kuldip Singh and another v. State of Punjab, (2002) 6 SCC 757.* However, it must also be noticed that therein, not only the confession made by the appellant was found to be unbelievable, even the recovery of the dead body, pursuant to the disclosure statement made, was also found to be so. There was no other evidence on record on the basis of which the conviction of the appellant could be sustained.

In this case, however, not only an extra judicial confession was made by the appellant before PW-10, the same was also made before PW-11. The jewellery which had been put on by the deceased was produced by the appellant. Only upon the disclosure made by the appellant that the dead body had been thrown in the canal, a search was made and it was found. The dead body was also identified to be that of the deceased.

We have been taken through the evidence of PW-10 and PW-18. We have no reason to differ with the findings of the learned trial Judge as also the High Court that the extra judicial confession was voluntary or truthful. We, therefore, are of the opinion that no case has been made out for interference with the impugned judgment.

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375. EVIDENCE ACT, 1872 – Section 32 (1)

No reason to doubt veracity of consistent multiple dying declarations – Concerned witnesses reliable – Conviction on these dying declarations proper – Principles of dying declaration restated.

Bijoy Das v. State of West Bengal

Judgment dated 28.01.2008 passed by the Supreme Court in Criminal Appeal No. 188 of 2008, reported in (2008) 4 SCC 511

Held:

We see no reason to doubt the veracity of the dying declarations especially since there is consistency between them. We see no reason why the doctor or the other witnesses should make a false statement about the dying declaration. There is no allegation of enmity between the accused and these persons.

As observed by this Court in *Narain Singh v. State of Haryana, AIR 2004 SC 1616,* vide para 7:

> "7. .....A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by cross-examination. The dying declaration if found reliable can form the base of conviction."

In *Babulal v. State of M.P., (2003) 12 SCC 490* this Court observed vide in para 7 of the said decision as under: (SCC p. 494)

> "7. .....A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets

altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is 'a man will not meet his Maker with a lie in his mouth' (*nemo moriturus praesumitur mentiri*). Mathew Arnold said, 'truth sits on the lips of a dying man'. The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

In *Ravi v. State of T.N., (2004) 10 SCC 776* this Court observed that: (SCC p. 777, para 3)

> "3. .....if the truthfulness ..... of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever, in law."

In *Muthu Kutty v. State, (2005) 9 SCC 113* vide para 15 this Court observed as under: (SCC pp. 120-21)

> "15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which

could be summed up as under as indicated in *Paniben v. State of Gujarat, (1992) 2 SCC 474 : (SCC* pp. 480-81, paras 18-19)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See – *Munnu Raja v. State of M.P., (1976) 3 SCC 104*]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar, (1983) 1 SCC 211*]

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

[See *K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618]*

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of M.P., (1974) 4 SCC 264*]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kake Singh v. State of M.P., 1981 Supp. SCC 25*]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath v. State of U.P., (1981) 2 SCC 654*]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v. Krishnamurti Laxmipati Naidu, 1980 Supp. SCC 455*]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Ojha v. State of Bihar, 1980 Supp. SCC 769*]

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanhau Ram v. State of M.P., 1988 Supp. SCC 152]*

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See *State of U.P. v. Madan Mohan (1989) 3 SCC 390*]

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See *Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700*]"

A perusal of the various decisions of this Court, some of which have been referred to above, shows that if a dying declaration is found to be reliable then there is no need for corroboration by any witness, and conviction can be sustained on its basis alone.*

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***376. EVIDENCE ACT, 1872 – Section 32 (1)**

Statement of deceased earlier made u/s 161 CrPC during investigation in the abduction case regarding alleged involvement of appellant/ accused is not admissible as his dying declaration u/s 32 (1) of Evidence Act to prove motive of appellant/accused to eliminate the deceased because earlier statement was not in regard to the cause of his death or as of any of the circumstances of the prosecution case which resulted in his death – The statement was in regard to the accused's involvement of an abduction of a boy and has no remote connection/reference to the death of the deceased.

Vinay D. Nagar v. State of Rajasthan

Judgment dated 03.03.2008 passed by the Supreme Court in Criminal Appeal No. 210 of 2007, reported in (2008) 5 SCC 597

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377. EVIDENCE ACT, 1872 – Sections 5, 6, 45, 47, 64 & 73
STAMP ACT, 1899 – Sections 35, 37 & 57

Comparison by Court itself between the disputed and the admitted thumb impression/handwriting/signature – Permissibility, limitations and authenticity there of explained.

Thiruvengadam Pillai v. Navaneethammal and another

Judgment dated 19.02.2008 passed by the Supreme Court in Civil Appeal No. 29 of 2001, reported in (2008) 4 SCC 530

Held:

Section 45 of the Indian Evidence Act, 1872 relates to 'opinion of experts'. It provides inter alia that when the court has to form an opinion as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in questions as to identity of handwriting or finger impressions are relevant

facts. Section 73 provides that in order to ascertain whether a finger impression is that of the person by whom it purports to have been made, any finger impression admitted to have been made by that person, may be compared with the one which is to be proved. These provisions have been the subject matter of several decisions of this Court.

In *The State v. Pali Ram, (1979) 2 SCC 158* this Court held that a court does not exceed its power under Section 73 if it compares the disputed writing with the admitted writing of the party so as to reach its own conclusion. But this Court cautioned: (SCC p. 168 para 30)

> "Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."

The caution was reiterated in *O. Bharathan v. K. Sudhakaran, (1996) 2 SCC 204.* Again in *Ajit Savant Majagvai v. State of Karnataka, (1997) 7 SCC 110* referring to Section 73 of the Evidence Act, this Court held: (SCC p. 122, paras 37-38)

> "The section does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself.
>
> As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the dispute signature with the admitted signature as this power is clearly available under Section 73 of the Act."

In *Murari Lal v. State of Madhya Pradesh, (1980) 1 SCC 704,* this Court indicated the circumstances in which the Court may itself compare disputed and admitted writings, thus: (SCC p. 721, para 12)

"The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusions. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence."

The decision in *Murari Lal* (supra) was followed in *Lalit Popli v. Canara Bank & Ors., (2003) 3 SCC 583.*

While there is no doubt that court can compare the disputed handwriting/ signature/finger impression with the admitted handwriting/ signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the Court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of finger prints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal. The decision in *Muralilal* (supra) and *Lalit Popli* (supra) should not be construed as laying a proposition that the court is bound to compare the disputed and admitted finger

impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further even in cases where the court is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid reaching conclusions based on a mere casual or routine glance or perusal.

(ii) The Indian Stamp Act, 1899 nowhere prescribes any expiry date for use of a stamp paper. Section 54 merely provides that a person possessing a stamp paper for which he has no immediate use (which is not spoiled or rendered unfit or useless), can seek refund of the value thereof by surrendering such stamp paper to the Collector provided it was purchased within the period of six months next preceding the date on which it was so surrendered. The stipulation of the period of six months prescribed in section 54 is only for the purpose of seeking refund of the value of the unused stamp paper, and not for use of the stamp paper. Section 54 does not require the person who has purchased a stamp paper, to use it within six months. Therefore, there is no impediment for a stamp paper purchased more than six months prior to the proposed date of execution, being used for a document.

The Stamp Rules in many States provide that when a person wants to purchase stamp papers of a specified value and a single stamp paper of such value is not available, the stamp vendor can supply appropriate number of stamp papers required to make up the specified value; and that when more than one stamp paper is issued in regard to a single transaction, the stamp vendor is required to give consecutive numbers. In some States, the rules further require an endorsement by the stamp vendor on the stamp paper certifying that a single sheet of required value was not available and therefore more than one sheet (specifying the number of sheets) have been issued to make up the requisite stamp value.

The Stamp Act is a fiscal enactment intended to secure revenue for the State. In the absence of any Rule requiring consecutively numbered stamp papers purchased on the same day, being used for an instrument which is not intended to be registered, a document cannot be termed as invalid merely because it is written on two stamp papers purchased by the same person on different dates. Even assuming that use of such stamp papers is an irregularity, the court can only deem the document to be not properly stamped, but cannot, only on that ground, hold the document to be invalid. Even if an agreement is not executed on requisite stamp paper, it is admissible in evidence on payment of duty and penalty under Section 35 or 37 of the Indian Stamp Act, 1899. If an agreement

executed on a plain paper could be admitted in evidence by paying duty and penalty, there is no reason why an agreement executed on two stamp papers, even assuming that they were defective, cannot be accepted on payment of duty and penalty. But admissibility of a document into evidence and proof of genuineness of such document are different issues. The fact that very old stamp papers of different dates have been used, may certainly be a circumstance that can be used as a piece of evidence to cast doubt on the authenticity of the agreement. But that cannot be a clinching evidence. There is also a possibility that a lay man unfamiliar with legal provisions relating to stamps, may bona fide think that he could use the old unused stamp papers lying with him for preparation of the document and accordingly use the old stamp papers.

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378. EVIDENCE ACT, 1872 – Sections 50 & 114

Presumption regarding marriage – Long cohabitation as husband and wife raises such presumption – Law leans in favour of legitimacy and frowns upon bastardy – Burden lies on the person who seeks to deprive such relationship to prove that no marriage took place.

Tulsa and others v. Durghatiya and others

Judgment dated 15.01.2008 passed by the Supreme Court in Civil Appeal No. 648 of 2002, reported in (2008) 4 SCC 520

Held:

The provisions of Section 114 of the Evidence Act, 1872 refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

In *Andrahenndige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, AIR 1927 P.C. 185* their Lordships of the Privy Council laid down the general proposition that (AIR p. 187):

> "Where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage."

In *Mohabhat Ali v. Md. Ibrahim Khan, AIR 1929 PC 135* their Lordships of the Privy Council once again laid down that: (AIR p. 138)

> "The law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for number of years."

It was held that such a presumption could be drawn under Section 114 of the Evidence Act.

Where the partners lived together for long spell as husband and wife there would be presumption in favour of wedlock. The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy. (See: *Badri Prasad v. Dy. Director of Consolidation and Ors., AIR 1978 SC 1557.*)

This Court in *Gokal Chand v. Parvin Kumari, AIR 1952 SC 231* observed that continuous co-habitation of (sic man and) woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which maybe drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

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***379. EVIDENCE ACT, 1872 – Sections 145 & 157**

Contents of complaint – It is trite law that contents of the complaint would not be treated as a substantive piece of evidence – Same can be used for contradiction and corroboration to its author/complainant as per provisions u/s 145 and 157 of the Act – The trial Court has failed to consider the fact that appellant was not confronted with the contents of the complaint and no opportunity was given to the appellant to explain this omission in the complaint, therefore, in the considered view of this Court, the trial Court could not have taken into consideration the omission against the appellant.

Kishanlal v. Murlidhar

Reported in I.L.R. (2008) M.P. 1237

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***380. EXCISE ACT, 1915 – Sections 46, 47, 47-A**

Offence u/s 34 (1) (a) of the Act – 48 bottles of beer contained in 4 crates were being transported in a jeep by the driver without any licence, permit or pass – The jeep was seized from the possession of the driver – After investigation, chargesheet was filed before CJM – The accused/driver pleaded guilty – He was convicted and sentenced by CJM u/s 34 (1) (a) of the Act – While passing judgment of conviction, the jeep was ordered to be confiscated and to be sold in auction – Held, confiscation of vehicle cannot be ordered u/s 47-A of the Act, if the quantity of liquor being transported did not exceed 50 bulk litres – Further held, the owner of the vehicle was neither present when the liquor was seized nor he had knowledge that the liquor was being transported in the vehicle owned by him – Therefore, the order of confiscation of the jeep u/s 46/47 of the Act for an offence

involving illegal transportation of only 48 bottles of beer certainly amounts to a disproportionate penalty on the owner of the jeep – Consequently the impugned order was set aside.

Harnedra SinghThakur and another v. State of Madhya Pradesh
Reported in 2008 (3) MPHT 126

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381. FAMILY COURTS ACT, 1984 – Sections 7, 8 & 20
MENTAL HEALTH ACT, 1987 – Sections 52 & 53
GUARDIANS & WARDS ACT, 1890 – Section 7
Appellant appointed as guardian of mentally ill person by Family Court – Held, Family Court also has jurisdiction to pass orders in favour of appellant/guardian regarding operation of bank account of such mentally ill person subject to provisions of Mental Health Act, 1987.

B. Raman v. To whom so ever
Reported in I.L.R. (2008) M.P. 1177

Held:

With the commencement of Family Court Act in Madhya Pradesh w.e.f. 19.11.1986 and with the establishment of Family Courts under Section 3 of the Act of 1984 and because of the exclusion of jurisdiction vide Section 8 of the Act of 1984, the Family Courts can exercise all the jurisdiction exercisable by any district court or any subordinate Civil Court for the time being in force in respect of suits or proceedings in relation to the guardianship of the person or the custody of, or access to, any minor [Section 7 (1) (b) Explanation (g)]. And though, the provisions of the Act of 1984 have the over-riding effect over other enactment by virtue of Section 20; however, the over-riding effect is to the extent of inconsistency in other law.

In the case of *State of Bihar and others v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129* in paragraph 7, Their Lordships of the Apex Court were pleased to hold that *non-obstante* clause are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the *non-obstante* clause is attached.

Thus to the extent the provisions of Mental Health Act, 1987 are not inconsistent with that of the Act of 1984, they are applicable and are within the jurisdiction of Family Court. A 'mentally ill-person' as defined under the Act of 1987 means 'a person who is in need of treatment by the reason of any mental disorder other than mental retardation.' We have seen from the facts of present case that V. Raghavan is undergoing the treatment in Dr. Bose Memorial Hospital & Mental Institute, Chennai for last 25 years and the expenses of the same were borne by his mother V. Rajeshwari till she was alive and after her death the

same treatment is being meted out by the appellant, as is reflected from the order under challenge. The Family Court in exercise of its jurisdiction as vested in it vide Section 7 of the Act of 1984 has appointed the appellant guardian of V. Raghawan but has declined the relief to operate the bank accounts in lieu of V. Raghavan on the anvil that it does not have the jurisdiction. The question is whether the Family Court is justified in its dispensation.

In *Principles of Statutory Interpretation of Law* by Justice G.P. Singh, Tenth Edition, 2006 it has been observed by the Author at Page 720 thus:

> "The courts make a distinction between jurisdictional questions of fact or law (also called collateral fact or law) and questions of fact or law which are not jurisdictional. If a question of fact or law is the former category, the tribunal though competent to inquire into that question cannot decide it conclusively, and a wrong determination of such a question results in making the final decision in excess of jurisdiction. But if a question of law or fact is of the latter category, the tribunal's determination is final and conclusive."

In the case of *Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559,* it was observed by their Lordships of the Apex Court in paragraph 27 of the judgment as under: –

> "..... The fact of facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act."

The Apex Court in the case of *Carona Ltd.* (supra) after referring to Halsbury's Laws of England and the judgments rendered in *Choube Jagdish Prasad v. Ganga Prasad Chhaturvedi, AIR 1959 SC 492, Arun Kumar v. Union of India, (2007) 1 SCC 732, Roshan Lal Mehra v. Ishwar Dass, AIR 1962 SC 646,* held in paragraph 36 as under:

> "It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory fact, or facts in issue."

Thus, having regard to aforesaid propositions, we are of the considered opinion that it is well within the jurisdiction of the Family Court to have passed orders regarding the operation of bank account of 'mentally ill person'. However, the exercise of such power would be subject to the provisions contained in the Mental Health Act, 1987.

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***382. FOREST ACT, 1927 – Section 59-B**

Confiscation of seized vehicle – To avoid confiscation of vehicle used in forest offence, the owner has to prove that not only he had knowledge or connivance about its illegal use but he had also taken all reasonable and necessary precaution against such use – The requirement is mandatory – It is a matter which is within his knowledge and this aspect has to be established by sufficient material – Mere assertion without anything else, will not suffice (Also see: *State of Karnataka v. K. Krishnan, AIR 2000 SC 2729.*)

State of West Bengal & Anr. v. Mahua Sarkar

Reported in AIR 2008 SC 1591

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***383. HINDU MARRIAGE ACT, 1955 – Section 9**

Restitution of conjugal rights – Decree for restitution of conjugal rights challenged by wife – Wife did not agree to live with husband and not even agree to live with her sons – It can be presumed that there is something panic which compelled her to live abandoned life – She cannot be compelled to live together against her wishes – A decree for restitution of conjugal rights to give a tool to husband to harass her through the process of Court – Therefore, decree is set aside.

Milan v. Sunil

Reported in I.L.R. (2008) M.P. 36

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384. HINDU SUCCESSION ACT, 1956 – Sections 4, 6 & 8

Property after being inherited by a person alongwith his sister partitioned and recorded in the name of each of them and they had right to transfer their share – S. 6 of the Act has no application – Transfer of such share in property by the person cannot be challenged by his son as the property has lost its character of being joint family property.

Bhanwar Singh v. Puran & Ors.

Reported in AIR 2008 SC 1490

Held:

The Hindu Succession Act, 1956 brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a *non-obstant* provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolve according to the provisions

of the Chapter as specified in clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed in Class-I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record of rights. A partition had taken place amongst the heirs of Bhima.

Although the learned First Appellate Court proceeded to consider the effect of Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants in common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue.

Interpretation of Section 8 of the Hindu Succession Act came up for consideration in this Court in *Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors., AIR 1986 SC 1753* wherein it was opined that :

> "In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. ..... Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.

Before we conclude we may state that we have noted the observations of *Mulla's Commentary on Hindu law* 15th Edn. dealing with Section 6 of the Hindu Succession Act at page 924-26 as well as *Mayne's on Hindu Law,* 12th Edition pages 918-919.

The express words of Section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, *inter alia,* to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

It is true that the first Court of Appeal also entered into the question of legal necessity for Sant Ram to alienate the property in favour of the contesting respondents but the said issue was considered in the alternative to the principal issue. If the First Appellate Court was correct in its opinion and we do not see any reason to differ therewith that Section 6 of the Hindu Succession Act was not attracted to the facts of this case in view of the fact that Sant Ram and his sisters having partitioned their properties became owners to the extent of 1/4th share each, he had the requisite right to transfer the lands falling within his share.

Furthermore, in terms of Section 19 of the Act, as Sant Ram and his sisters became tenants in common and took the properties devolved upon them per capita and not per stirpes, each one of them was entitled to alienate their share, particularly when different properties were allotted in their favour.

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385. INDIAN PENAL CODE, 1860 – Section 300

Murder of husband by wife and paramour – Evidence of daughter (child witness) – Her evidence found reliable after careful scrutiny – Conviction of accused can be based there on.

Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra

Reported in AIR 2008 SC 1460

Held:

The age of witness (daughter of deceased father and accused mother) during examination was taken to be about 12 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if

he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States, 159 US 523.* The evidence of a child witness is not required to be rejected *per se*, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See *Suryanarayana v. State of Karnataka, 2001 AIR SCW 81.*

In *Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341* it was held as follows: (SCC p. 343, para 5):

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

The above position was highlighted in *Ratansingh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64.* Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference.

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*386. **INDIAN PENAL CODE, 1860 – Sections 300 & 34**

When accused persons armed with deadly weapons went together and caused fatal injuries to the deceased then all of them are equally liable for the offence in view of S. 34 of IPC – Absence of evidence as to which of the accused caused which particular injury is inconsequential.

Balwant Singh & Ors. v. State of Punjab

Reported in AIR 2008 SC 1243

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387. **INDIAN PENAL CODE, 1860 – Section 302**

(i) **'Rule of Nines' for estimating percentage of body surface involved in burns, applicability of – It does not require that the part on which burns have been caused should have been completely affected.**

(ii) **Merely on account of the extent of burns being 100%, the possibility of the death having been caused by suicide cannot be ruled out.**

Thakurlal v. State of M.P.

Reported in 2008 (2) MPHT 439 (DB)

Held:

It appears that the learned Trial Judge has got himself swayed by the fact that the report states that it was a case of 100% burns and thus, the possibility of it being a case of suicide was ruled out. According to the learned Judge, had it been a case of suicide, it was not possible for the deceased to have completely drenched herself in kerosene and then to set herself afire. We are constrained to observe that the approach of the learned Trial Judge was misdirected. Before proceeding to consider the aspect further, we may point out that the degree of burns and the extent of burns are counted on the basis of the formula "Rule of Nines". The said formula is reproduced hereunder for better understanding of the factual matrix: –

"RULE OF NINES" FOR ESTIMATING PERCENTAGE OF BODY SURFACE INVOLVED IN BURNS

Anatomic area	Percent of body surface
Head	9
Right upper extremity	9
Left upper extremity	9
Right lower extremity	18
Left lower extremity	18
Anterior trunk	18
Posterior trunk	18
Neck	1

In *Modi's Medical Jurisprudence and Toxicology,* Twenty Third Edition, calculation of the burns in relation to the varying ages has been laid down as under : –

Area	Age 0 yrs.	1 yr	5 yrs.	10 yrs	15yrs.	adult
A = ½ of Head	9½	8½	6½	5½	4½	3½
B = ½ of one Thigh	2¾	3¼	4	4½	4½	4½
C = ½ of one Leg	2½	2½	2¾	3	3¼	3½

From a bare reading of the formula adopted for finding the extent of the burns, it is clear that the formula does not require that the part on which burns have been caused should have been completely affected. Thus, even if smaller portion of the head is burnt, the percentage of the body surface would remain 9 subject to the provision made for head, thigh and leg, as also in the case where the whole part is affected by burns. The above chart also provides 9% burns in the case of right upper extremity, but it does not contemplate or imply that whole body should have been affected by burns as there is no system of reducing the percentage, if the part is not wholly burnt. What is contemplated is that the limb which is affected should be taken to have been burnt to the extent of percentage mentioned against each area of the body. Under these circumstances, it was not necessary that there should have been 100% burns in case of each and every part of the body for coming to the conclusion that the extent of burns was 100%.

We may also clarify that in case of burns, even if a part is smeared with kerosene, the burnt portion extends to other part of the body which may not have been covered by kerosene poured over the body. Learned Judge has totally ignored that even if the smaller portion was smeared with kerosene, the possibility of the burns extending to the parts which were dry, was not ruled out. Under these circumstances, merely on account of the extent of burns being 100%, the learned Judge could not have ruled out the possibility of the death having been caused by suicide.

The calculation of the burns as 100% did not imply that each and every portion of the limb for which calculation is to be made, was affected by fire. The finding that it was not possible for the deceased to have poured sufficient kerosene over her body to have access to each and every part of the body was infirm in the light of the fact that even if a smaller part of the body or the limb was covered by any inflammable substance, the spread of flame may also travel to such parts which are dry. Under these circumstances many an ..... of extinct of bury being 100% the learned Judge could not have ruled at the possibility of death having ben could by suicide.

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388. INTERPRETATION OF STATUTES:

Resolution of conflict between statutory provisions – Basic rules – Harmonious construction – *Mimansa* Rules – *Samanjasya, vikalpa, badha* and *gunapradhan* axioms can be applied as well as Maxwell's and Craies's Principles.

Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.

Judgment dated 13.03.2008 passed by the Supreme Court in Civil Appeal No. 1940, reported in (2008) 4 SCC 755

Held:

It is deeply regrettable that in our Courts of law, lawyers quote Maxwell and Craies but nobody refers to the *Mimansa* Principles of Interpretation. Today many of our educated people are largely unaware about the great intellectual achievements of our ancestors and the intellectual treasury they have bequeathed us. The *Mimansa* Principles of Interpretation is part of that intellectual treasury but it is distressing to note that apart from a reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Court in *Beni Prasad v. Hardai Devi, (1892) ILR 14 All 67 (FB),* and some judgments by one of us (M. Katju, J.) there has been almost no utilization of these principles even in our own country.

It may be mentioned that the *Mimansa* Rules of Interpretation were our traditional principles of interpretation laid down by Jaimini, whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These *Mimansa* Principles were regularly used by our great jurists like Vijnaneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity, incongruity, or *casus omissus* therein. There is no reason why we cannot use these principles on appropriate occasions. However, it is a matter of deep regret that these principles have rarely been used in our law Courts. It is nowhere mentioned in our Constitution or any other law that only Maxwell's Principles of Interpretation can be used by the Court. We can use any system of interpretation which helps us resolve a difficulty. In certain situations Maxwell's principles would be more appropriate, while in other situations the Mimansa principles may be more suitable.

The *Mimansa* principles of interpretation were created for resolving the practical difficulties in performing the yagyas. The rules for performing the various yagyas were given in books called the Brahmanas (all in Sanskrit) e.g. Shatapath Brahmana, Aitareya Brahmana, Taitareya Brahmana, etc. There were many ambiguities, obscurities, conflicts etc. in the Brahmana texts, and hence the *Mimansa* Principles of Interpretation were created for resolving these difficulties.

Although the Mimansa principles were created for religious purpose, they were so rational and logical that they subsequently began to be used in law, grammar, logic, philosophy, etc. i.e. they became of universal application. The books on *Mimansa* are all in Sanskrit, but there is a good book in English by

Prof. Kishori Lal Sarkar called 'The Mimansa Rules of Interpretation' published in the Tagore Law Lecture Series, which may be seen by anyone who wishes to go deeper into the subject.

In the *Mimansa* system there are three ways of dealing with conflicts which have been fully discussed by Shabar Swami in his commentary on Sutra 14, Chapter III, Book III of Jaimini:

(1) Where two texts which are apparently conflicting are capable of being reconciled, then by the Principle of Harmonious Construction (which is called the Samanjasya Principle in Mimansa) they should be reconciled. The Samanjasya Principle has been laid down by Jaimini in Chapter II, Sutra 9 which states:

> "The inconsistencies asserted are not actually found. The conflicts consist in difference of application. The real intention is not affected by application. Therefore, there is consistency."

The Samanjasya axiom is illustrated in the Dayabhag. Jimutvahana found that there were two apparently conflicting texts of Manu and Yajnavalkya. The first stated, "a son born after a division shall alone take the paternal wealth". The second text stated, "sons, with whom the father has made a partition, should give a share to the son born after the distribution". Jimutvahana, utilizing the Samanjasya principle of *Mimansa*, reconciled these two texts by holding that the former applies to the case of property which is the self-acquired property of the father, and the latter applies to the property descended from the grand-father.

One of the illustrations of the Samanjasya principle is the maxim of lost horses and burnt chariot *(Nashtashvadaghda Ratha Nyaya)*. This is based on the story of two men traveling in their respective chariots and one of them losing his horses and the other having his chariot burnt through the outbreak of fire in the village in which they were putting up for the night. The horses that were left were harnessed to the remaining chariot and the two men pursued their journey together. Its teaching is union for mutual advantage, which has been quoted in the 16th Vartika to Panini, and is explained by Patanjali. It is referred to in Kumarila Bhatta's Tantra Vartika.

(2) The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation the Vikalpa principle applies, which says that whichever law is more in consonance with reason and justice should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is only when all efforts of reconciliation fail that the Vikalpa principle is to be resorted to.

(3) There is a third situation of a conflict and this is where there are two conflicting irreconcilable texts but one overrides the other because of its greater force. This is called a Badha in the *Mimansa* system (similar to the doctrine of ultra vires). The great *Mimansa* scholar Sree Bhatta Sankara in his book *'Mimansa Valaprakasha'* has given several illustrations of Badha as follows:

> "A Shruti of a doubtful character is barred by a Shruti which is free from doubt. A Linga which is more cogent bars that which is less cogent. Similarly a Shruti bars a Smriti. A Shruti bars *Achara* (custom) also. An absolute Smriti without reference to any popular reason bars one that is based upon a popular reason. An approved *Achara* bars an unapproved *Achara*. An unobjectionable *Achara* bars an objectionable *Achara*. A Smriti of the character of a Vidhi bars one of the character of an Arthavada. A Smriti of a doubtful character is barred by one free from doubts. That which serves a purpose immediately bars that which is of a remote service. That which is multifarious in meaning is barred by that which has a single meaning. The application of a general text is barred by a special text. A rule of procedure is barred by a mandatory rule. A manifest sense bars a sense by context. A primary sense bars a secondary sense. That which has a single indication is preferable to what has many indications. An indication of an inherent nature bars one which is not so. That which indicates an action is to be preferred to what merely indicates a capacity. If you can fill up an ellipse by an expression which occurs in a passage, you cannot go beyond it."

One of the *Mimansa* principles is the *Gunapradhan* Axiom, and since we are utilizing it in this judgment (apart from the *badha* and *samanjasya* principles) we may describe it in some detail.

'Guna' means subordinate or accessory, while *'Pradhan'* means principal. The *Gunapradhan* Axiom states:

> "If a word or sentence purporting to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be disregarded altogether."

This principle is also expressed by the popular maxim known as *matsya nyaya* i.e. 'the bigger fish eats the smaller fish'.

According to Jaimini, acts are of two kind, principal and subordinate (see Jaimini 2 : 1 : 6). In Sutra 3 : 3 : 9 Jaimini states:

गुणमुख्यव्यतिक्रमे तदर्थत्वात मुख्येन वेद संयोगः

Kumarila Bhatta, in his Tantravartika (See Ganganath Jha's English Translation Vol.3, page 1141) explains this Sutra as follows:

> "When the Primary and the Accessory belong to two different Vedas, the Vedic characteristic of the Accessory is determined by the Primary, as the Accessory is subservient to the purpose of the primary."

It is necessary to explain this sutra in some detail. The peculiar quality of the Rigveda and Samaveda is that the mantras belonging to them are read aloud, whereas the mantras in the Yajurveda are read in a slow voice. Now the difficulty arose about certain ceremonies, e.g. agnyadhana, which belong to the Yajurveda but in whichverses of the Samveda are to be recited. Are these Samaveda verses to be recited in a low voice or loud voice? The answer, as given in the above sutra, is that they are to be recited in low voice, for although they are Samaveda verses, yet since they are being recited in a Yajurveda ceremony their attribute must be altered to make it it accordance with the Yajurveda.

No doubt ordinarily the literal rule of interpretation should be followed, and hence the Court should neither add nor delete words in a statute. However, in exceptional cases this can be done where not doing so would deprive certain existing words in a statute of all meaning, or some part of the statute may become absurd.

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***389. KRISHI PRAYOJAN KE LIYE UPAYOG KE JA RAHI DAKHAL RAHIT BHOOMI PAR BHOOMISWAMI ADHIKARON KA PRADAN KIYA JANA (VISHESH UPABANDH) ADHINIYAM, 1984 (M.P.) – Section 7**

Plaintiff have a settled long possession over Government land – Entitled for a decree of perpetual injunction – However, the State Government may take possession back according to procedure established by law – Such a person, being a member of Scheduled Caste and landless, may also apply u/s 7 of the Adhiniyam to the authorized officer for conferring bhumiswami rights to him.

Prahlad v. State of M.P.

Reported in 2008 (2) MPLJ 589

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390. LIMITATION ACT, 1963 – Section 18

ARBITRATION ACT, 1940 – Sections 8 (2) & 30

(i) Extension of prescribed limitation period – Extended from the date of payment/acknowledgment only with regards to liability which was acknowledged and not regarding to future claims.

(ii) (a) Findings that the entire claim was within time, is erroneous apparent on the face of the record and a legal misconduct on the part of arbitrator.

(b) Awarded money was more than claimed – Amounts to apparent illegality and legal misconduct – Award partly set aside accordingly.

J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd. & Anr.

Reported in AIR 2008 SC 1363

Held:

(i) What can be acknowledged is a present subsisting liability. An

acknowledgement made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages.

Under Section 19 a payment made on account of a debt, enables a fresh period of limitation being computed. Therefore, the letter of OMC dated 28.10.1978 and the payment of Rs. 3,50,000/- by OMC, would result in a fresh period of limitation being computed only in regard to the 'existing debt' in respect of which acknowledgment and payment was made. Admittedly, as at that time, the claim of the contractor was only for a sum of Rs. 50,15,820. Therefore, the letter dated 28.10.1978 and payment on 4.3.1980 extended the limitation only in respect of the claim which were part of the said claim of Rs. 50,15,820. Therefore, the fresh claim of Rs. 67,64,488/- (out of the total claim of Rs. 95,96,616) is barred by limitation.

(ii) The arbitrator committed an error apparent on the face of the record and a legal misconduct in holding that the entire claim was within time. His assumption that if the application filed by the contractor in 1980 under section 8(2) of Arbitration Act for appointment of an Arbitrator was in time, all claims made in the claim statement filed before the Arbitrator appointed in such proceeding under section 8(2) are also in time, is patently erroneous and is an error apparent on the face of the record.

By awarding more than what was claimed in the claim statement (by showing a lesser amount as having been paid by OMC though claim statement showed a higher amount), the Arbitrator clearly exceeded his jurisdiction. The Arbitrator thus committed a legal misconduct and the award to that extent is liable to be set aside.

In regard to escalation in cost, the claim in the claim statement was at the rate of 15% for the value of work done in 1972-73, 28.5% in respect of value of work done in 1973-74 and 32% in respect of work done in 1974-75. But the Arbitrator has awarded escalation at a flat rate of 32.6% on the entire cost of work done from 1.4.1973 and thereby awarded an escalation in excess of what was claimed. This also amounts to exceeding the jurisdiction and therefore legal misconduct. The award in excess of what was claimed was invalid.

The award of the Arbitrator in respect of time barred claim of Rs. 67,64,488 is an error apparent on the face of the award. Award of amounts in excess of claim clearly amount to exceeding the jurisdiction. All these, that is awarding amount towards time barred part of the claim of Rs. 67,64,488, and awarding amounts of Rs. 29,86,871, Rs. 670,285 and escalation in cost at a rate more than what is claimed, are all legal misconducts and the award in regard to those amounts are null and void. There is however some overlapping of the aforesaid amounts. Does it mean that the entire award should be set aside? The answer is no. That part of the award which is valid and separable can be upheld. That

part relates to the claims which were validly before the Arbitrator, which were part of the existing or pending claims of Rs. 50,15,820 and which were not barred by limitation. Only the amounts awarded by the Arbitrator against those claims can be considered as award validly made in Arbitration, falling within jurisdiction. They are clearly severable from the other portions of the award.

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***391. LIMITATION ACT, 1963 – Article 70**
EVIDENCE ACT, 1872 – Section 43

(i) A suit to recover movable property deposited or pawned from a depositary or pawnee is to be filed within a period of three years from the date of refusal after demand.

(ii) A judgment of conviction obtained against a person in criminal proceedings is normally inadmissible under S. 43 of the Evidence Act in civil proceedings, but, if the guilt has been admitted, the said admission would certainly be admissible in evidence in the civil case if it is relevant to the matter in issue and there would be no bar of such admissibility within the scope of S. 43 of the Evidence Act.

Laxmi Prasad v. Seth Ramdayal Jat
Reported in 2008 (II) MPJR 166

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392. MOTOR VEHICLES ACT, 1988 – Sections 2 (3), 147 & 165

(i) Use of motor vehicle is a *sine qua non* for entertaining a claim for compensation.

(ii) Driver as a user and controller of vehicle and owner as the employer of the driver is constructively liable – Insurance Company as per contract of insurance is vicariously liable for the compensation.

(iii) Financer in case of hire purchase is not an 'owner' for the purpose of imposing any liability in respect of a motor accident.

Godavari Finance Company v. Degala Satyanarayanamma and others
Judgment dated 10.04.2008 passed by the Supreme Court in Civil Appeal No. 2725 of 2008, reported in (2008) 5 SCC 107

Held:

An application for payment of compensation is filed before the Tribunal constituted under Section 165 of the Act for adjudicating upon the claim for compensation in respect of accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Use of the motor vehicle is a *sine qua non* for entertaining a claim for compensation. Ordinarily if driver of the vehicle would use the same, he remains in possession or control thereof. Owner of the vehicle,

although may not have anything to do with the use of vehicle at the time of the accident, actually he may be held to be constructively liable as the employer of the driver. What is, therefore, essential for passing an award is to find out the liabilities of the persons who are involved in the use of the vehicle or the persons who are vicariously liable. The insurance company becomes a necessary party to such claims as in the event the owner of the vehicle is found to be liable, it would have to reimburse the owner inasmuch as a vehicle is compulsorily insurable so far as a third party is concerned, as contemplated under Section 147 thereof. Therefore, there cannot be any doubt whatsoever that the possession or control of a vehicle plays a vital role.

The question came up for consideration before this Court in *Rajasthan S.R.T.C. v. Kailash Nath Kothari and others, (1997) 7 SCC 481* where the owner of a vehicle rented the bus to Rajasthan State Road Transport Corporation. It met with an accident. Despite the fact that the driver of the bus was an employee of the registered owner of the vehicle, it was held:- (SCC p. 488, para 17)

> "17. ..... Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (*supra*), the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an *employer*, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the *original employer* is able to establish that when the servant was lent, the *effective control* over him was also transferred to the hirer, the original owner can avoid his liability and the *temporary employer or the hirer,* as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and

control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 and 7 (supra), which go to show that the *owner* had not merely transferred the services of the driver to the RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC."

The question again came up for consideration recently before this Court in *National Insurance Co. Ltd. v. Deepa Devi and others, (2008) 1 SCC 414.* This Court in that case was dealing with a matter where the vehicle in question was requisitioned by the State Government while holding that the owner of the vehicle would not be liable it was opined:- (SCC p. 417, para 10)

"10. Parliament either under the 1939 Act or the 1988 Act did not take into consideration a situation of this nature. No doubt, Respondent Nos. 3 and 4 continued to be the registered owner of the vehicle despite the fact that the same was requisitioned by the District Magistrate in exercise of its power conferred upon it under the Representation of People Act. A vehicle is requisitioned by a statutory authority, pursuant to the provisions contained in a statute. The owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put incharge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefore in terms of the Act but he cannot exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that the Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in

the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view."

In so opining the Court followed *Kailash Nath Kothari* (supra).

The legal principles as noticed hereinbefore, clearly show that the appellant was not liable to pay any compensation to the claimants.

The appellant admittedly was the financer. As the vehicle was the subject matter of Hire Purchase Agreement, the appellant's name was mentioned in the registration book.

Section 2 of the Act provides for interpretation of various terms enumerated therein. It starts with the phrase "Unless the context otherwise requires". The definition of "owner" is a comprehensive one. The interpretation clause itself states that the vehicle which is the subject matter of a Hire Purchase Agreement, the person in possession of vehicle under that agreement shall be the owner. Thus, the name of financer in the Registration Certificate would not be decisive for determination as to who was the owner of the vehicle. We are not unmindful of the fact that ordinarily the person in whose name the Registration Certificate stands should be presumed to be the owner but such a presumption can be drawn only in the absence of any other material brought on record or unless the context otherwise requires.

In case of a motor vehicle which is subjected to a hire purchase agreement, the financer cannot ordinarily be treated to be the owner. The person who is in possession of the vehicle, and not the financer being the owner would be liable to pay damages for the motor accident.

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***393. MOTOR VEHICLES ACT, 1988 – Sections 145 & 149**

Bus was being plied without permit – It met with an accident due to negligence of the driver – Number of passengers sustained injuries while awarding compensation, the Claims Tribunal directed that the insurer will have a right of recovery of amount of compensation from the owner/insurer of the vehicle as there was breach of policy – Held, direction of the Tribunal was proper and correct.

Meharban Singh v. Smt. Pushpabai and others

Reported in 2008 (2) MPHT 452

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***394. MOTOR VEHICLES ACT, 1988 – Section 149**

Own damage claim versus third party claim – Driver of offending vehicle not having valid and operating driving licence, proved by evidence – Claim filed by owner of the vehicle – Provisions of S. 149 relates only to the third party risk and claims – One thing is crystal clear that as the statute is beneficial one qua the third party but that benefit cannot be extended to the owner of the offending vehicle –

Logic of fake licence has to be considered differently in respect of third party and in respect of own damage claim – The decision in *Swaran Singh's case, (2004) 3 SCC 297* has no application to own damage case as the driver was holding fake licence, its renewal cannot take away the effect of fake licence – Hence, the Insurance Company has no liability in this case.

Oriental Insurance Co. Limited v. Prithvi Raj

Reported in AIR 2008 SC 1408

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***395. MOTOR VEHICLES ACT, 1988 – Section 149 (2)**

Liability of Insurance Company – LP Gas – Whether running a vehicle on LP Gas is a violation of policy condition? Held, No – Insurance Company is jointly and severally liable to pay compensation.

Santosh Singh @ Kishanpal v. United India Insurance Co. Ltd. & anr.

Reported in I.L.R. (2008) M.P. 39

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396. MOTOR VEHICLES ACT, 1988 – Section 163-A

Claim for compensation filed by LRs of deceased driver of the Motor Vehicle under S. 163-A of the Act – Maintainability and scope of – Law explained.

Usha Rathore and others v. National Insurance Co. Ltd. and others

Reported in 2008 (2) MPLJ 607

Held:

As per the normal interpretation of the provisions of Section 163-A of the Act of 1988, it has created a new right in favour of the claimants similar to the right under Section 140 of the Act of 1988 – Liability to pay compensation in certain cases on the principle of no fault. The purpose of introducing Section 163-A is to provide compensation on the basis of structured formula as mentioned in Second Schedule appended to Section 163-A and it is clear from the provisions of sub-section (2) that the claimant shall not be required to pled or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person, which clearly mean that in a claim petition filed under Section 163-A, which is a special provision, the question of wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or any other person shall not be examined nor required to be pleaded or established by the claimants and the Tribunal can decide compensation only on the basis of structured formula and that too instantly and expeditiously. Purpose of introducing this provision is to see that victims or injured get instant relief so far as the pecuniary loss is concerned because that loss suffered by them requires instant and immediate relief. Any delay in grant of such compensation may make their life miserable.

In the case of *K. Nandkumar v. Managing Director, Thanthai Periyar Transport Corporation Ltd., 1996 ACJ 555,* Hon'ble Supreme Court has clearly held that when there was collusion between a bus and motor cycle due to negligence of motor-cyclist and he suffered permanent disablement, even if the injured claimant was solely responsible for the accident, the compensation was not liable to be denied on the ground of no fault liability as per provision of Section 163-A of the Act of 1988.

Recently in the case of *Deepal Girishbhai Soni v. United India Insurance Co. Ltd., 2004 ACJ 934,* the question of claim petitions under Section 163-A of the Motor Accident Claims was considered in detail.

Therefore, it is clear that when the claim petition was filed strictly under section 163-A of the Act of 1988, and when it was prosecuted, there was no objection by the Insurance

Therefore, it is clear that when the claim petition was filed strictly under section 163-A of the Act of 1988, and when it was prosecuted, there was no objection by the Insurance Company in the written reply that the case will not fall under the purview of the section 163-A, then the Tribunal was not justified in recording such a finding that the case will not fall within the provisions of section 163-A, but will fall under section 166 of the Act of 1988. The Tribunal has not assigned any reason for doing so, therefore we are of the view that the finding recorded by the Tribunal to that extent is totally contrary to law. We set aside the same and hold that the appellant/claimants are entitled for compensation under section 163-A of the Act of 1988. We further hold that in that case the question of contributory negligence will not arise and cannot be examined in view of the specific provisions of sub-section (2) of section 163-A of the Act of 1988.

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***397. MOTOR VEHICLES ACT, 1988 – Section 163-A & Schedule II**

Claimant, an agriculturist owning 5 acres of land was paralysed due to head injury in motor accident – 100% disability proved – No convincing evidence to prove the income out of that 5 acre land – In this circumstance, it cannot be said that there is a total loss of income due to the injury suffered by claimant – The calculation of the amount of compensation on the basis of the notional income i.e. Rs. 15,000/- per annum cannot be faulted with.

Ponnumany alias Krishnan and another v. V.A. Mohanan and others

Judgment dated 27.03.2008 passed by the Supreme Court in Civil Appeal No. 2151 of 2008, reported in (2008) 4 SCC 717

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***398. MOTOR VEHICLES ACT, 1988 – Section 163-A r/w Schedule II & Section 166**

(i) Factors to be considered while determining quantum of compensation u/ss. 163-A and 166.

(ii) Legal principles to work out the just compensation explained.

Bangalore Metropolitan Transport Corporation v. Sarojamma and another

Judgment dated 22.04.2008 passed by the Supreme Court in Civil Appeal No. 2897 of 2008, reported in (2008) 5 SCC 142

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399. MOTOR VEHICLES ACT, 1988 – Sections 165, 168 & 170

Accident claim petition, maintainability of – Claim petition is maintainable before MACT in respect of accidents involving the death of, or bodily injury to persons arising out the use of motor vehicle or damage to property of a third party so arising, or both even if vehicle is not insured.

Subodh Sharma v. Satendra Singh

Reported in 2008 (2) MPHT 361

Held:

A conjoint reading of provisions of Sections 165, 168 and 170 of the Motor Vehicles Act, 1988 makes it clear that insurer need to be impleaded in case there is an insurance or there is collusion or owner or driver have failed to contest the claim, but Section 168 cannot be read so as to restrict claims with respect to vehicles which have been insured, that interpretation will render the efficacy of Sections 165 and 166, which provides application can be filed for claiming compensation arising out of accident of the nature specified in sub-section (1) of Section 165 may be made before the Claims Tribunals. In my considered opinion, the application can be made before the Motor Accident Claims Tribunal in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both even if vehicle is not insured. There is no room for accepting the interpretation made by Patna High Court in *Commissioner, Coal Mines Welfare Organization, Dhanbad v. Parma Nand Thakur, 1985 ACJ 290.* I with utmost respect disagree with the opinion expressed in the aforesaid decision.

The object of Motor Vehicles Act is to provide remedy and machinery for quick justice in cases arising out of motor accident as provided in Section 165 (1) of the Act. Insurer is impleaded in case where there is an insurance and even in the case of breach, liability is fastened upon the insurer *vis-à-vis* to third party as the question of breach is *inter se* the owner and insurer and insurer can be given liberty to recover the amount from the owner as held by the Apex Court in *Pramod Kumar Agrawal and another v. Mushtari Begum (Smt.) and others, (2004) 8 SCC 667.* It is nowhere imperative in the Act, there has to be insurance

of the vehicle before an application under Section 166 or Section 140 or Section 163-A of Motor Vehicles Act is entertained. Insurance of Vehicle is not *sine quo non* to entertain an application under the Act of 1988.

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400. MOTOR VEHICLES ACT, 1988 – Sections 166 & 149
CONTRACT ACT, 1872 – Section 226
Agent of the insurer collected cash amount of the premium from owner of the bus – Thereafter, the agent issued cheque under his signature to the insurer in respect of the premium amount collected in cash by him –The said cheque was dishonoured – Insurer cancelled the policy on dishonour of cheque issued by the agent – No new policy taken by the owner – Claimant sustained injuries while alighting from the said bus due to rash and negligent act of the driver – Held, the insurer was not having any authority to cancel the policy and is liable for the acts of its agents –The insurer cannot be absolved of its liability for the payment of compensation to the claimant jointly and severally alongwith the owner and driver of the offending vehicle.
Oriental Insurance Company Ltd., Bilaspur v. Indrapal and others
Reported in 2008 (2) MPLJ 400

Held:

It is proved that the amount of premium in cash was collected by Vijay Kumar Tiwari, agent of the Insurer and he was an authorized agent of the Insurance Company and, therefore, the principal i.e. Insurer is liable for the act of its agent. In this regard Section 226 of Indian Contract Act, 1872 and illustration (b) to this Section is very clear. In *Hambro v. Burnard and others, (1994) 2 King's Bench 10* the scope of contract made by agent in name of principal, has acted within the terms of a written authority given to him by the prinicpal, but in his own interests has been taken into consideration and it has been specifically held that where an agent, contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known of the other party to the contract, the principal cannot, if the other party has acted bona fide, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of his principal. Hence according to us, the principal (Insurance Company) is bound by the act of his agent with all its results. Their Lordships has further held that where authority was given to underwrite policies of insurance in the name of fraud of the principal according to the ordinary course of business at Lloyd's and the agent in fraud of the principal, underwrite certain guarantee policy, it was held that the principal was bound by the act of his agent. We are of the firm view that Section 226 of the Contract Act assumes that the contract or act of the agent is one, which, as between the principal and third persons, is binding on the principal.

We are borrowing sufficient light from Halsbury's Laws of England (fourth Edition – Volume I) page 491, paras 817 and 818. In para 817 it has been laid down that as a general rule, a principal is responsible for all acts of his agent within the authority of the agent, whether the responsibility is contractual or tortuous. Para 818 speaks that a principal is not exempt, where he would otherwise be liable in respect of an act done or bound by a contract made by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal, or otherwise to his detriment. A third party dealing in good faith with an agent, who acts within the apparent scope of his authority, and purports to act as agent, is no prejudiced by the fact that the agent is using his authority for his own benefit and not that of his principal. At this juncture, we have also gone through *Corpus Juris Secondum Vol III* from pages 138-140. In para 231 at page 138 it has been enunciated that a principal will be liable to third persons for all acts committed by the agent in his behalf within the actual or apparent scope of his agency. In the same paragraph 231 at page 141 very clearly it has been laid down that liability of principal will be present even though the acts are the result of the agent's fraud. Sufficient light has been thrown in this para in respect to the liability of principal for the acts done by his agent to third persons and we would like to quote that passage which runs as under:–

> "A principal is liable for the acts or his agent within his express authority, because the act of such agent is the act of the principal. Where the agent acts within the scope of the authority which the principal holds him out as possessing, nor knowingly permits him to assume, the principal is made responsible, *because to permit to dispute the authority of the agent in such a case would be to enable him to commit a fraud upon innocent third parties."*

The view of this Court is that if the contract is entered into or acts done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. The motive of the agent is immaterial in such a case and the principal is bound though the contract may be entered into and the act done fraudulently in furtherance of the agent's own interest, and contrary to the interests of the principal, provided the person dealing with the agent in good faith. We may further add that the transaction within the authority of the agent is valid, irrespective of whether same is beneficial to the principal or not. The Privy Council in the case of *Bank of Bengal v. Ramanathan Chetty, AIR 1915 PC 121* has held that the principal was liable for the act of the agent, the borrowing by the agent being an essential incident of the business and if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. Thus, according to us, even where agent of the Insurance Company has defrauded his principal, or the transaction made by him is to the detriment of the principal, the principal i.e. Insurance Company will still be bound by the transaction made by the owner of the vehicle because the owner of the vehicle has acted in good faith, and his act is within

the apparent scope of authority of the agent. There is no evidence on record that the owner of the vehicle has not acted in good faith and it was not in the domain of the agent to collect the cash amount of premium for the principal i.e. Insurance Company from the owner of the vehicle. Therefore, according to us the Insurer was not having any authority to cancel the policy.

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***401. MOTOR VEHICLES ACT, 1988 – Section 168**

Compensation – Deceased, a bachelor boy aged 20 years – Loss of dependency of parents aged 47 and 45 years, respectively, determined as 2/3rd of income of the deceased – Multiplier of 12 applied.

Bilkish v. United India Insurance Company Limited and another

Judgment dated 12.03.2008 passed by the Supreme Court in Civil Appeal No. 6313 of 2001, reported in (2008) 4 SCC 259

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402. MOTOR VEHICLES ACT, 1988 – Section 168 & Schedule II

(i) Determination of compensation – Only income of the deceased at the time of accident and future prospects within the parameters of legal principles should be taken into consideration.

(ii) Revision of pay scale after the death of deceased, not given effect from the date of death, should not be taken into account.

Oriental Insurance Company Limited v. Jashuben and others

Judgment dated 14.02.2008 passed by the Supreme Court in Civil Appeal No. 1272 of 2008, reported in (2008) 4 SCC 162

Held:

The amount of compensation payable to the heirs and legal representatives of a deceased victim of an accident must be a fair and reasonable one. The estimate of the amount of loss of dependency may be arrived at by adopting various methods, application of structured formula being one of them. Such a formula has also been provided for in Schedule II appended to the Motor Vehicles Act, 1988. While determining the amount of compensation, certain well known principles must be kept in mind. The amount of compensation indisputably should be determined having regard to the pecuniary loss caused to the dependents by reason of the death of the victim. It was necessary to consider the earnings of the deceased at the time of the accident. Of course, further prospect is not out of bound for such consideration. But the same should be founded on some legal principle.

In *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas, (1994) 2 SCC 176,* this Court held:

> "The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. 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 multiplicand 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 legal principle in this behalf has been laid down in the following terms:

"19. In the present case the deceased was 39 years of age. His income was Rs. 1032 per month. Of course, the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs.1032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs. 2000 as the gross income. From this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was spartan or bohemian. In the absence of evidence it is not unusual to deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents. This loss of dependency should capitalise with the appropriate multiplier. In the present case we can take about Rs. 1,400 per month or Rs. 17,000 per year as the loss of dependency and if capitalized on a multiplier of 12 which is appropriate to the age of the deceased, the compensation would work out to (Rs. 17,000 x 12 = 2,04,000 rupees) to which is added the usual award for loss of consortium and loss of the estate each in the conventional sum of Rs. 15,000/."

In *New India Assurance Co. Ltd. v. Charlie and Anr., (2005) 10 SCC 720.* The words 'net income' has been used but the same would ordinarily mean gross income minus the statutory deductions. We must also notice that the said decision has been followed in *New India Assurance Co. Ltd. v. Kalpana (Smt.) and Ors., (2007) 3 SCC 538.*

In *U.P. State Road Transport Corporation v. Krishna Bala & Ors., (2006) 6 SCC 249,* it was held: (SCC pp. 252-53, para 8)

> "The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. 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 multiplicand 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 over the period for which the dependency is expected to last."

Even certain allowances payable to the deceased could have been taken into consideration in the changing social scenario. In *National Insurance Company Ltd. v. Indira Srivastava & Ors., 2007 (14) SCALE 461,* it is useful to notice, this Court observed:

> "17. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted."

Noticing the dictionary meaning of "income", it was held:

> "19. If the dictionary meaning of the word 'income' is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income-tax or profession tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute."

It is not a case where, as on the date of death, the salary of the deceased was revised with retrospective effect from 1994. Salary would be revised or not

was not known at that part of time. Only because such salary was revised at a later point of time, the same by itself would not have been a factor which could have been taken into consideration for determining the amount of compensation. The Tribunal, therefore, committed a serious illegality in taking into consideration the latter aspect. In *N. Sivammal and Ors. v. Managing Director, Pandian Roadways Corporation and Ors., (1985) 1 SCC 18,* this Court took into consideration the pay packet of the deceased.

We, therefore, are of the opinion that what would have been the income of the deceased on the date of retirement was not a relevant factor in the light of peculiar facts of this case and, thus, the approach of the Tribunal and the High Court must be held to be incorrect. It is impermissible in law to take into consideration the effect of revision in scale of pay w.e.f. 1.1.1997 or what would have been the scale of pay in 2002.

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***403. MOTOR VEHICLES ACT, 1988 – Sections 168, 171 & 173**

Deceased was sleeping in a shadow beneath the tractor-trolley – Driver rashly and negligently started tractor due to which head of the deceased came under the rear wheel of the trolley – Claims Tribunal arrived at the conclusion that the deceased has contributed to the accident to the extent of 50% – Therefore, the Tribunal deducted 50% amount from the compensation – Held, the deceased has not at all contributed to the accident – The driver had full opportunity to avoid the accident either by awakening the deceased or by taking the tractor forward – Instead, he started the tractor without ascertaining if someone is sleeping beneath the trolley – Hence, it cannot be held that the deceased had contributed to the accident.

Shakuntala and others v. Ghanshyam Dhakad and others

Reported in 2008 (2) MPHT 449 (DB)

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404. N.D.P.S. ACT, 1985 – Sections 2 (xi), (xvi) (e), (xx), (xxiii-a), (vii-a), 8 (c) and 21

(i) Determination of – Small or commercial quantity – In relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s)

(ii) The quantity of neutral substance is not to be taken into consideration, only the weight of the actual content of the offending drug is relevant.

(iii) Quantum of punishment would depend on the actual percentage contained in narcotic drug translated into total weight of the mixture recovered from the accused.

E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau

Judgment dated 11.03.2008 passed by the Supreme Court in Criminal Appeal No. 1250 of 2005, reported in (2008) 5 SCC 161

Held:

The provisions of the NDPS Act were amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) (w.e.f. 2.10.2001), which rationalized the punishment structure under the NDPS Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substances carried. Thus, by the Amending Act, the sentence structure changed drastically. 'Small quantity' and 'commercial quantity' were defined under Section 2 (*xxiiia*) and Section 2 (*viia*) respectively. New Section 21 also provides for proportionate sentence for possessing small, intermediate and commercial quantities of offending material. As per Entry 56 of the Notification dated 19.10.2001 issued by the Central Government which deals with heroin, small quantity has been mentioned as 5 gms and commercial quantity has been mentioned as 250 gms. So, the basic question for decision is whether the contravention involved in this case is small, intermediate or commercial quantity under Section 21 of the NDPS Act, and whether the total weight of the substance is relevant or percentage of heroin content translated into weight is relevant for ascertaining the quantity recovered from the accused.

In the present case, the opium derivative which has been found in possession of the appellant accused is prohibited under Section 8 of the NDPS Act and thus punishable under Section 21 thereof. The question is only with regard to the quantum of punishment.

As a consequence of the amending Act, the sentence structure underwent a drastic change. The amending Act for the first time introduced the concept of "commercial quantity" in relation to narcotic drugs or psychotropic substances by adding Clause (vii-a) in Section 2 which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term "small quantity" is defined in Section 2 (xxiii-a), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity' or something in-between. It appears from the Statement of Objects and Reasons of the Amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms. and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending

drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gms. of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gms. is mixed with 50 kgs. of the powered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.

In *Ouseph v. State of Kerala, (2004) 4 SCC 446,* this Court in para 8 has held as under: (SCC p. 447)

> "8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words 'small quantity' have been specified by the Central Government by the notification dated 23-7-1996. Learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only .3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification."

From the aforesaid decision, we find that the Court has taken the quantity of the narcotic drug or psychotropic substance found in the mixture, relevant for the purpose of imposition of punishment.

On going through *Amarsingh Ramjibhai Barot v. State of Gujarat, (2005) 7 SCC 550* we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance(s). In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(xvi)(e) as 'opium derivative' which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity

and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance(s). Thus, *Amarsingh case* (supra) cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.

In the present case, the narcotic drug which was found in possession of the appellant as per the analyst's report is 60 gms. which is more than 5 gms., i.e. small quantity, but less than 250 gms., i.e. commercial quantity. The quantity of 60 gms. is lesser than the commercial quantity, but greater than the small quantity and, thus, the appellant would be punishable under Section 21(b) of the NDPS Act. Further, it is evident that the appellant is merely a carrier and is not a kingpin.

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***405. N.D.P.S. ACT, 1985 – Section 42**

Casual search of bus by the officers of Narcotics Department after information to the driver and conductor – Two persons were found suspicious – Option given to them in terms of Section 50 and after their consent searched before PW 4 – Panchanama prepared – Brown sugar recovered and seized – Held, it was a chance recovery in a public place during routine checking and provisions of S. 42 has no application.

Ram Kumar v. Central Bureau of Narcotics

Judgment dated 05.05.2008 passed by the Supreme Court in Criminal Appeal No. 800 of 2008, reported in (2008) 5 SCC 385

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406. N.D.P.S. ACT, 1985 – Sections 42 & 43

Offence u/s 8 r/w/s 18 – Search – Search made by police on a running motor cycle being driven by accused – On search, opium was found beneath the seat of the motor cycle – In taking search and seizure in public place or in a moving vehicle, provisions of S. 42 of the Act would not be attracted.

Pramod v. State of Madhya Pradesh

Reported in 2008 (2) MPHT 103

Held:

In this case, the search was made by the police on a running motorcycle which was being driven by the appellant and on search, opium was found beneath the seat of the motorcycle. Although on the motorcycle two persons were also

sitting, they were made accused in the case. But, they were acquitted by the learned Trial Court.

Now, the question is whether the provision of Section 42 (1) of the NDPS Act is applicable in the present case or not. It is not in a dispute that the seizure was made in a public place when the appellant was going on a motorcycle. The Hon'ble Apex Court in the case of *Directorate of Revenue and another v. Mohammed Nisar Holia, reported in 2007 AIR SCW 7864,* has also discussed in detail about the provisions of Sections 42 and 43 of NDPS Act. Regarding the power to make search and seizure at a public place, there are requirements of Sections 42 and 43 of the NDPS Act. It is laid down by the Apex Court that distinction must be borne in mind that a search conducted on basis of prior information and case where authority comes across incident of commission of an offence under Act accidentally. In the case of Directorate of Revenue (supra), in para 21, it is also observed by the Court that in the case of *Narayanaswamy Ravishankar v. Assistant Director, Directorate of Revenue Intelligence, (2002) 8 SCC 7,* while dealing with search and seizure at a public place, this Court observed: —

> "In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act, which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant."

In the case of *Directorate of Revenue* (supra), in para 13 of the judgment it is observed by the Court that requirements of Section 42 was read into Section 43 of the NDPS Act. A somewhat different view, however was taken subsequently. Decisions were rendered opining that in conducting search and seizure in public place or a moving vehicle, provision appended to sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even sub-section (2) of Section 42 need not be complied with.

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***407. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 Proviso (b) Service of demand notice, proof of – Replying to the notice by the drawer is a sufficient proof of its service.**

Prakashchand v. Sureshchand

Reported in 2008 (3) MPHT 66

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408. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 13 (2) PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rule 9-B

(i) There would be presumption of service of notice sent by registered post on the correct address in view of provisions of S. 27 of General Clauses Act as well as S.114 (Illustrations e and f) of the Evidence Act even though acknowledgment receipt was not received back.

(ii) Violation of Rule 9-B of the Rules, effect of – The copy of the report of Public Analyst and the notice u/s 13 (2) of the Act were sent to the accused after one month and seven days – Held, such a non-compliance is not fatal.

(iii) There was delay of seven months in launching prosecution – It was contended from defence side that the delay has deprived the accused of his valuable right u/s 13 (2) of the Act to have the other part of the sample analysed by the CFL as the milk does not remain fit for analysis after six months – Held, the accused/applicant did not apply for sending the other part of sample and also there was no evidence on record to hold that the sample of milk had decomposed or otherwise become incapable for analysis –Therefore, it cannot be said that applicant was deprived of his right u/s 13 (2) of the Act.

Gulab v. State of M.P.

Reported in 2008 (3) MPHT 131

Held:

There would be a presumption of service of notice sent by registered post on the correct address of the applicant in view of provisions of Section 27 of General Clauses Act as well as Section 114 (Illustrations e and f) of the Indian Evidence Act. The mere fact that A/D receipt was not received back was not sufficient to rebut or dislodge the presumption of service of notice sent by registered post in absence of any evidence to the contrary. It is a known fact that A/D receipt is sent back by ordinary post and could also be misplaced. Therefore, it could not be held that notice under Section 13 (2) of the Act alongwith the report of the Public Analyst was not served on the applicant.

Learned Counsel for the applicant also submitted that the sample of milk was taken from the applicant on 25.05.89 and complaint against him under Section 7 (i)/16 (1) (a) (i) of the Act was filed before the Court on 18.12.89 with inordinate delay. According to learned Counsel for the applicant, as per statement of Smt. Prabha Verma (P.W. 4), the copy of the report of Public Analyst alongwith the notice under Section 13 (2) of the Act was sent to the applicant on 25.01.90, i.e., after a period of nearly one month and seven days, whereas Rule 9-B of Prevention of Food Adulteration Rules, 1955 requires that the copy of the report of the Public Analyst should be sent within a period of ten days after the institution of the prosecution. Thus, there has been non-compliance of Rule 9-B of P.F.A.

Rules, 1955 on the one hand and inordinate delay of seven months in launching the prosecution on the other, which deprived the applicant of his valuable right under Section 13 (2) of the Act to have the other part of the sample analysed by the Central Food Laboratory because the milk does not remain fit for analysis after six months. Reliance was placed in this behalf on the decision of the Apex Court rendered in the case of *Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970* and Single Bench decision of this Court reported in *2005 (3) MPLJ Page 458 (Ram Singh v. State of M.P.).*

As stated earlier, there is clear finding of fact recorded by two Courts below that the notice under Section 13 (2) of the Act was sent to the applicant alongwith report of Public Analyst by registered post and was served on him. It is manifest from the record that the applicant did not apply to the Court under Section 13 (2) of the Act to send the other part of the sample to the Director Central Food Laboratory for analysis; nor did he summon the Public Analyst in evidence to establish that the sample of milk had deteriorated by that time and become unfit for analysis. The Apex Court in its three Judges Bench decision rendered in the case of *Babulal Hargovinddas v. State of Gujarat, AIR 1971 SC 1277,* distinguishing facts of the case of *Municipal Corporation of Delhi v. Ghisa Ram* (supra), observed that unless an application to send the sample to the Director Central Food Laboratory is made under Section 13 (2) of the Act by the accused, he cannot complain that the sample had deteriorated and could not be analysed.

It was again reiterated by the Apex Court in a later decision rendered by three Judges' Bench in the case *Ajitprasad Ramkishan Singh v. The State of Maharashtra,* reported in *AIR 1972 SC 1631,* that without making an application under Section 13 (2) of the Act, the vendor cannot complain that he has been deprived of any such right.

A Division Bench of this Court in the case of *Govind Prasad v. State of M.P. and another,* reported in *1996 Cr.L.J. 1238 (MP),* after going through the various decisions of Apex Court including the case of *Municipal Corporation of Delhi v. Ghisa Ram* (supra), cited by learned Counsel for the applicant observed as under: –

> "The principle of law declared in *Ghisaram's case in AIR 1967 SC 970* (supra) has been explained by Larger Benches of the Supreme Court in later cases and we are bound to follow the law declared in the later cases. Since the revision petitioner did not invoke his right under Section 13 (2) of the Act did not examine the Public Analyst to show that part of the sample of milk in the case would necessarily have become unfit for analysis by the time summons was served on him and did not adduce other evidence to that effect, it cannot be said that the part of a sample would have become decomposed and that it was futile for him to invoke his right under Section 13 (2) or that it could be

presumed or assumed under these circumstances that he has been prejudiced in his defence."

In the aforesaid case of *Govind Prasad v. State of M.P. and another* (supra), the Division Bench also considered the various other Single Bench decisions of this Court and came to hold that particular sample will necessarily decompose within a particular period cannot be a matter of assumption and presumption. In absence of application under Section 13 (2) of the Act and the evidence to the contrary, it cannot be said that on account of delay in launching the prosecution the sample must have decomposed and become unfit for analysis.

In another case of *Prabhu v. State of Rajasthan, 1994 Supp (2) SCC 177,* where the applicant after the service of notice under Section 13 (2) of the Act did not make an application under Section 13 (2) for sending the sample to the Director Central Food Laboratory, their Lordships held as under: –

> ".....Following the consistent law laid down by this Court we are of the considered view that since admittedly the applicant had not availed of the remedy under Section 13 (2) to send the sample of article of food for analysis by the Central Food Laboratory, it cannot be held that the applicant suffered prejudice on account of delay in launching the prosecution."

In the instant case also the applicant made no application under Section 13 (2) of the Act to send the other part of sample to the Director Central Food Laboratory for analysis and there was no evidence on record to hold that the other part of sample of milk had decomposed or deteriorated and become incapable for analysis. Thus, in view of the legal position discussed above, it cannot be said that the applicant was deprived of the right under Section 13 (2) of the Act or he was prejudiced in his defence due to delay in launching the prosecution or delay in despatch of notice under Section 13 (2) of the Act.

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409. PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rule 37-D
INTERPRETATION OF STATUTES : Principle of *Ejusdem generis*
Label on packet of soyabean oil containing pictures of vegetables – Not connected with soyabean oil – Whether amounts to 'misbranding'? Held, it would not fall under the mischief of R. 37-D of the residuary clause of 10 prohibited expressions – Principle of *ejusdem generis* is relevant for interpretation of this Rule.

Parakh Foods Limited v. State of Andhra Pradesh and another
Judgment dated 27.03.2008 passed by the Supreme Court in Criminal Appeal No. 559 of 2008, reported in (2008) 4 SCC 584

Held:

The relevant provision of Rule 37-D of Prevention of Food Adulteration Rules, 1955 reads as under: ~

> **"RULE 37-D** – *Labelling of edible oils and fats* – The package, label or the advertisement of edible oils and fats shall not use the expressions "Super-Refined", "Extra-Refined", "Micro-Refined", "Double-Refined", "Ultra-Refined", "Anti-Cholesterol", "Cholesterol-Fighter", "Soothing to Heart", "Cholesterol-Friendly", "Saturated Fat Free" or such other expressions which are an exaggeration of the quality of the product."

The provision for labeling of edible oils and fats is under Rule 37-D of the PFA Rules which specifies labeling of edible oils and fats. The Rule clearly states that package/labelling or advertisement of edible oils and fats shall not use the expressions such as (i) super-refined; (ii) extra-refined; (iii) micro-refined; (iv) double-refined; (v) ultra-refined; (vi) anti-cholesterol; (vii) cholesterol fighter; (viii) soothing to heart; (ix) cholesterol friendly; (x) saturated fat free, etc. It would be pertinent to say that all these expressions from (i) to (x) are prohibited because if they are mentioned on the labelling of the product they will tend to exaggerate the quality of the product. The Rule further states that all such other expressions are also prohibited which tend to exaggerate the quality of the product. For the purposes of interpretation of this Rule the principle of *ejusdem generis* can be applied; *ejusdem generis* is a Latin expression which means "of the same kind", for example where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. In other words, it means words of similar class. According to *Black's Law Dictionary* (8th Edn. 2004), the principle of *ejusdem generis* is where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned. It is a cannon of statutory construction that where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.

Keeping the above principle in mind, the words "such other" as used in Rule 37-D are to be read along with the subject matter in which they have been used. The residuary clause of the rule has to be read in light of the ten prohibited expressions, and it becomes clear that what is prohibited are only the expressions which are an exaggeration of the quality of the product.

In the present case, it is true that the appellant has used pictures of vegetables on the label of the product which is refined soyabean oil, which according to the appellant is to depict the purpose for which the oil can be used, *viz.*, preparation of the vegetables depicted thereon. Unless the picture depicted on a label of edible oils and fats exaggerates the quality of the product, it would not fall within the mischief of Rule 37-D. In the present case, the vegetables

shown on the label of soyabean oil do not in any way indicate that the quality of soyabean oil is 'super-refined', 'extra- refined', 'micro-refined', 'double-refined', 'ultra-refined', 'anti- cholesterol', 'cholesterol fighter', 'soothing to heart', 'cholesterol friendly', 'saturated fat free' etc., nor it indicates the exaggeration towards the quality of the product to come within the mischief of Rule 37-D of the PFA Rules. In our opinion the High Court has committed a serious error in arriving at a finding that the article of food (soyabean oil) was misbranded since the picture contained on the label has nothing to do with the article of food in question, completely ignoring the fact that the article of food can be used for cooking the vegetables shown in the picture which cannot be said to be exaggerating the quality of the food in question.

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410. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 17 & 20
HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Sections 4, 18 & 19
CRIMINAL PROCEDURE CODE, 1973 – Section 82 (2)

(i) Ss. 17 & 20 of Protection of Women from Domestic Violence Act provides for a higher right in favour of wife – She secures the right to be maintained and right of residence but it extends only to joint property in which husband has a share.

(ii) S.4 of Hindu Adoptions and Maintenance Act provides for a *non obstante clause* so any objection on the part of in-laws or wife, in terms of any text, rules or interpretation of Hindu Law or any custom or usage as part of law before the commencement of the Act are no longer valid – Ss. 18 and 19 of the Act prescribes the statutory liabilities in regard to maintenance of wife by her husband which is personal obligation and only on his death upon the father-in-law – Such an obligation can also be made from the properties of which the husband is a co-sharer and not otherwise – Mother-in-law cannot be fastened with any legal liability to maintain her daughter-in-law from her own property or otherwise.

(iii) Right of a person as a tenant could not be affected by reason of any order of attachment u/s 82 of CrPC – He cannot be evicted except in accordance with law.

Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and others
Judgment dated 14.03.2008 passed by the Supreme Court in Civil Appeal No. 2003 of 2008 with Criminal Appeal No. 502 of 2008, reported in (2008) 4 SCC 649

Held:

(i) The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires

a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share. Interpreting the provisions of the Domestic Violence Act this Court in *S.R. Batra v. Taruna Batra, (2007) 3 SCC 169* held that even a wife could not claim a right of residence in the property belonging to her mother-in-law.

(ii) Section 4 of the Hindu Adoption and Maintenanace Act, 1956 provides for a non obstante clause. In terms of the said provision itself any obligation on the part of in-laws in terms of any text, rule or interpretation of Hindu Law or any custom or usage as part of law before the commencement of the Act, are no longer valid. In view of the non obstante clause contained in Section 4, the provisions of the Act alone are applicable. Sections 18 and 19 prescribe the statutory liabilities in regard to maintenance of wife by her husband and only on his death upon the father-in-law. Mother-in-law, thus, cannot be fastened with any legal liability to maintain her daughter-in-law from her own property or otherwise. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.

In *Unnamalai Ammal v. F.W. Wilson, AIR 1927 Mad. 1187* the obligation to maintain wife by a husband has been held to be a personal obligation. This Court in *Kirtikant D. Vadodaria v. State of Gujarat, (1996) 4 SCC 479* has held as under (SCC p. 485 para 8):-

> "..... According to the Law of the Land with regard to maintenance, there is an obligation of the husband to maintain his wife which does not arise by reason of any contract, express or implied, but out of jural relationship of husband and wife consequent to the performance of marriage. Such an obligation of the husband to maintain his wife arises irrespective of the fact whether he has or has no property, as it is considered an imperative duty and a solemn obligation of the husband to maintain his wife."

(iii) An order of attachment of a property has nothing to do with the right of tenancy. The terms and conditions of tenancy, being governed by statute, the tenant cannot be evicted except in accordance with law.

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411. RENT CONTROL AND EVICTION:

Eviction suit on the ground of sub-letting – Tenant parted with possession of part of suit shop in favour of sub-tenant without consent in writing either of erstwhile landlord or purchaser of suit shop – Sub-tenancy proved by evidence – Right of eviction was not proved to have been waived – Order of eviction of tenants upheld.

Vaishakhi Ram & Ors. v. Sanjeev Kumar Bhatiani

Reported in AIR 2008 SC 1585

Held:

The following ingredients must be satisfied before an order of eviction can be passed on the ground of subletting:-

(1) The tenant has sublet or assigned or parted with the possession of the whole or any part of the premises;

(2) Such subletting or assigning or parting with the possession has been done without obtaining the consent in writing of the landlord.

So far as these conditions are concerned, we find that in the facts of this case, the appellant No. 1 has parted with the exclusive possession of a part of the suit shop in favour of the appellant Nos. 2 to 4 without obtaining the consent in writing, either of the erstwhile landlord or the purchaser respondent. Now the question is whether the respondent or the erstwhile owner of the suit shop had waived the right of evicting the tenant on the ground of subletting or not. As noted herein earlier, the appellant Nos. 2 to 4 were inducted in a part of the suit shop without obtaining the consent in writing, either of the original landlord of the suit shop or of the present respondent. In *Kailasbhai Shukaram Tiwari v. Jostna Laxmidas Pujara & Anr., (2006) 1 SCC 524,* while dealing with a case of subletting under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (57 of 1947), this Court observed that the question as to whether a person is a member of the family of the tenant must be decided on the facts and circumstances of the case. It observed in paragraph 14 as follows:

> "Apart from the parents, spouse, brothers, sisters, sons and daughters, if any other relative claims to be a member of the tenant's family, some more evidence is necessary to prove that they have always resided together as members of one family over a period of time. The mere fact that a relative has chosen to reside with the tenant for the sake of convenience, will not make him a member of the family of the tenant in the context of rent control legislation."

Admittedly, in this case, the appellant Nos. 2 to 4 are neither the spouse, brothers, sisters, sons or daughters of the appellant No. 1. Although they are related to the appellant No. 1, there is nothing on record to show that the appellant Nos. 2 to 4 were residing with the appellant No. 1 for a considerable period of time as members of the family of the appellant No. 1. Therefore, only because

they were related to the appellant No. 1, in the absence of the appellant Nos. 2 to 4 being residing with the appellant No. 1, it cannot be said in the context of rent control legislation that they were residing as family members of the appellant No. 1 and therefore, the question of subletting would not arise at all.

The three courts concurrently held on facts that the appellant No. 1 had no exclusive possession in a part of the suit shop where the appellant Nos. 2 to 4 had been carrying on their separate independent business.

It is well settled that the burden of proving subletting is on the landlord but if the landlord proves that the sub-tenant is in exclusive possession of the suit premises, then the onus is shifted to the tenant to prove that it was not a case of subletting. Reliance can be placed on the decision of this Court in the case of *Joginder Singh Sodhi v. Amar Kaur, (2005) 1 SCC 311.*

Let us now revert to the question whether long exclusive possession of the appellant Nos. 2 to 4 in the suit shop would invite the court to hold that the respondent or the erstwhile owner of the suit shop had waived the right to evict the tenant on the ground of subletting. It is now well settled that to constitute waiver of benefit conferred by provisions of the Act, conscious relinquishment of such benefit must be proved. In the case of *Duli Chand (Dead) by LRs. v. Jagminder Dass, (1990) 1 SCC 169,* this Court while dealing with a case of subletting and waiver on the part of the landlord, emphasized that the consent in writing of the landlord for subletting or parting with possession was essential under Section 14 (1)(b) of the Act. The view expressed in the aforesaid decision was also the view of this Court in the case of *Pulin Behari Lal vs. Mahadeb Dutta & Ors., (1993) 1 SCC 629* in which this Court reiterated the principle that in the absence of conscious relinquishment of right to eviction, the question of waiver on the ground of subletting for eviction by the landlord did not arise at all. It is not in dispute in the present case that the respondent had purchased the suit shop from the erstwhile owner of the same. The sale deed dated 20th of October, 2000 evidencing the purchase of the suit shop by the respondent from the erstwhile owner of the same was exhibited. A perusal of the sale deed would show that the appellant No. 1 was a tenant in respect of the suit shop and there was no mention that the appellant Nos. 2 to 4 were also in possession of the suit shop, either in its entirety or in a part of it. That being the position and in the absence of any evidence on record to show that there was any conscious relinquishment of the benefit conferred by the provisions of the statute, we do not find any reason to hold otherwise to the extent that the subletting made in favour of the appellant Nos. 2 to 4 by the appellant No. 1 was proved and the right to eviction was not waived, either by the erstwhile landlord or by the respondent.

The appeal in therefore dismissed.

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***412. SALE OF GOODS ACT, 1930 – Section 16**

MPSEB purchased gear boxes which were neither satisfactory nor working properly – Goods were not repaired/replaced by the supplier – Plaintiff/Board filed suit for the recovery of balance amount paid by it – Held, where the buyer explains or gives an intimation to the seller, particular purpose for which goods are required, then there is an implied condition that the goods shall be reasonably fit for the purpose – Merely on the existence of a condition that the goods supplied may either be repaired or replaced, the plaintiff is not deprived to recover the price from the defendant if the goods supplied failed to perform inspite of repairing – Hence, the suit filed by the plaintiff Board is decreed.

Madhya Pradesh Electricity Board, Rampur v. Choudhary & Sons (Forgings) Pvt. Ltd.

Reported in 2008 (II) MPJR 253

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413. SERVICE LAW:

Appointment secured on the basis of fake caste/tribe certificate – Proper course is to cancel the appointment, so that the post may be filled up by a candidate who is entitled to the benefit of reservation.

Union of India v. Dattatray and others

Judgment dated 15.02.2008 passed by the Supreme Court in Civil Appeal No. 1639 of 2008, reported in (2008) 4 SCC 612

Held:

The decision of *State of Maharashtra v. Milind, (2001) 1 SCC 4* was related to a medical college admission. In this context, we may also refer to the decisions in *Bank of India v. Avinash D. Mandivikar, (2005) 7 SCC 690* and *Additional General Manager Human Resources, Bharat Heavy Electricals Ltd. v. Suresh Ramkrishna Burde, (2007) 5 SCC 336,* wherein this Court held that when a person secures appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. In the latter case, this Court explained in *Milind* (supra) thus: (*Suresh Ramkrishna Burde's case* (supra), SCC. 340, para 7)

> "The High Court has granted relief to the respondent and has directed his reinstatement only on the basis of the Constitution Bench decision of this Court in *State of Maharashtra v. Milind.* In our opinion the said judgment does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed if he gives an undertaking that in future he and his family members shall not take any

advantage of being member of a caste which is in reserved category."

This Court further held that even in cases of admission to educational institutions, the protection extended by *Milind* (supra) will be applicable only where the candidate had successfully completed the course and secured the degree, and not to cases where the falsehood of the caste certificate is detected within a short period from the date of admission.

We are of the view that the High Court failed to appreciate the ratio of *Milind* (supra). Having held that the first respondent had falsely claimed that he belonged to a Scheduled Tribe, it wrongly extended him the benefit of continuing in employment.

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414. SERVICE LAW:

Appointment to a service or post – Marrying before the age fixed for, effect of – After 10.03.2000 candidate who applies for appointment to a service or post will not be eligible for appointment if he had married before the minimum age fixed for marriage.

Gendlal Patel v. M.P. Public Service Commission & Anr.

Reported in 2008 (II) MPJR 180 (DB)

Held:

Rule 6 of the Rules deals with disqualification and sub-rule (5) of Rule 6 of the Rules is extracted hereinbelow:

"R.6. Disqualification –

(1) to (4) xxx xxx xxx

(5) No candidate shall be eligible for appointment to a service or post who has married before the minimum age fixed for marriage."

From the very language of sub-rule (5) of Rule 6 of the Rules, it is clear that no candidate shall be eligible for appointment to a service or post, who has married before the minimum age fixed for marriage. Sub-rule (5) of Rule 6 of the Rules was introduced with effect from 10.03.2000. Hence after 10.03.2000 a candidate who applies for appointment to a service or post will not be eligible for appointment if he had married before the minimum age fixed for marriage. Sub-rule (5) of Rule 6 of the Rules would apply to the recruitment for the year 2003 for which the appellant was a candidate.

Now coming to the contention of the appellant that sub-rule (5) of Rule 6 of the Rules is not retrospective in operation, it is clear from sub-rule (5) of Rule 6 of the Rules that the minimum age of marriage as fixed by law will be determined as on the date of the marriage of the candidate. It is not the case of the appellant that on the date of his marriage, the minimum age of marriage was not 21 years. If the minimum age at the time of his marriage was 21 years and he was

less than 21 years when he got married, he is not eligible under sub-rule (5) of Rule 6 of the Rules to be a candidate for any service or post.

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415. SERVICE LAW:

Absorption – Absorption of an employee from one department to another, consequences there of.

Chhogalal v. State of M.P. and others

Reported in 2008 (2) MPLJ 566

Held:

The absorption of an employee is independent and distinct than his posting. Whereas from the date of absorption, the employees is deemed to have severed all his links with the parent Department, the date of posting depends upon the sweet will of the new Department, assigning a place of work to the employee.

Thus, the order, Annexure P/3, whereby the powers had been given to the Commissioner, Public Instructions, to issue posting orders qua the said employees, who stood absorbed vide the said order, cannot be taken to mean that seniority of the said employees was to be determined on the basis of the posting order. If the interpretation as suggested by the respondents were to be accepted, it would lead to anomalous results. It could mean a person who was senior to another person in the parent Social Welfare Department, may become junior to the said other person on account of his posting orders being issued later by the competent authority than the posting orders of his juniors. This could never be allowed to happen nor it could be the intention of the State Government.

It is well settled that whenever a person is repatriated from one Department to another Department and absorbed in the new department, either having been declared surplus or on his own request, then for the purposes of inter se seniority viz-a-viz other existing employees of the new Department, the new entrant is always placed at the tail end of the seniority list, already existing on the date of his absorption.

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***416. SERVICE LAW:**

CIVIL SERVICES (CONDUCT) RULES, 1965 (M.P.) – Rule 22 (1)

Bigamous marriage – Government servant cannot contract another marriage without prior permission otherwise it may amount ot misconduct – Rule does not disqualify a citizen, who is aspiring to get an employment, it merely puts an embarge to seek prior permission to contract another marriage – Petitioner had performed first marriage in 1964 and second marriage in 1967, prior to entering into employment while he was not Government servant – No case of misconduct is made out – Order of compulsory retirement is set aside with grant of back wages.

Kailashvan Goswami v. State of M.P. & ors.
Reported in I.L.R. (2008) M.P. 1053

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***417. SERVICE LAW:**

STATE ADMINISTRATIVE SERVICE (CLASSIFICATION, RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1975 – Rule 21

Promotion on the basis of 'Seniority-cum-merit' – When promotion is to be made on the basis of 'seniority-cum-merit', seniority has to be given due weightage – An employee who is senior and otherwise eligible for promotion has to be promoted if there is no adverse material in his service record – Comparison of the *inter se* merit of various persons and rejecting a senior person after evaluating the *inter se* merit is not permissible when promotion is based on the principle of 'seniority-cum-merit'.

Ashok Kumar Vajpayee v. State of M.P. and another
Reported in 2008 (2) MPLJ 547

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***418. SERVICE LAW :**

Promotion – Sealed cover procedure, applicability of – Petitioner's name was not placed before D.P.C. for consideration as he was undergoing punishment at the relevant time – Held, order of punishment had not attained finality as appeal was pending when the D.P.C. met – In such circumstances, it was obligatory on the part of the authority concerned to adopt the sealed cover procedure.

Raj Kishore Jha v. State of M.P. and ors.
Reported in 2008 (2) MPLJ 215

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419. SPECIFIC RELIEF ACT, 1963 – Sections 12 & 22
CONTRACT ACT, 1872 – Section 55

Whether time is essence of contract? Held, general principle is against it – Contrary intention must be reflected by unequivocal language or strong circumstances.

Balasaheb Dayandeo Naik (Dead) Through L.Rs. & Ors. v. Appasaheb Dattatraya Pawar
Reported in AIR 2008 SC 1205

Held:

The agreement of sale clearly show (a) that the subject-matter of the property is an agricultural land/immoveable properties (b) the sale deed is to be executed within six months from the date of sale agreement i.e. 31.07.1985 (c) possession of the land to be handed over at the time of execution of sale deed (d) failure to get execute the sale deed, the earnest money will be forfeited.

In *Chand Rani (Smt.) (dead) by LRs. v. Kamal Rani (Smt.) (dead) by LRs, (1993) 1 SCC 519,* a Constitution Bench of this Court has held that in the sale of immoveable property, time is not the essence of the contract. It is worthwhile to refer the following conclusion:

> **"19.** It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."
>
> **"21.** In *Govind Prasad Chaturvedi v. Hari Dutt Shastri, (1977) 2 SCC 539* following the above ruling it was held at pages 543-544: (SCC para 5)
>
> "... It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide *Gomathinayagam Pillai v. Pallaniswami Nadar, AIR 1967 SC 868* (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."
>
> **"23.** In *Indira Kaur (Smt) v. Sheo Lal Kapoor, (1988) 2 SCC 488* in paragraph 6 it was held as under:
>
> "... The law is well-settled that in transactions of sale of immovable properties, time is not the essence of the contract."

It is true that the defendant in his written statement has made a bald claim that the time was the essence of contract. Even if we accept the recital in the agreement of sale (Exh. 18) that the sale deed has to be executed within a

period of six months, there is an express provision in the agreement itself that failure to adhere the time, the earnest money will be forfeited. In such circumstances and in view of recital pertaining to forfeiture of the earnest money makes it clear that time was never intended by the parties to be of essence. As rightly pointed out, the claim for refund of earnest money is only their alternative claim. It is not in dispute that in all suits for specific performance, the plaintiff is entitled to seek alternative relief in the event the decree for specific performance cannot be granted for any reason, hence there is no infirmity in the alternative plea of refund.

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***420. SPECIFIC RELIEF ACT, 1963 – Sections 20 & 21**

(i) Decree for specific performance is a discretionary relief – Litigation prolonged for almost 25 years – Value of the real estate has shot up very high, therefore, while exercising jurisdiction u/s 20 of the Act, to settle the equity between parties it was held that agreement to sell was genuine and it was executed for bonafide necessity but because of passage of time also, directed respondent (purchaser) to pay enhanced amount in addition to the price indicated in the agreement.

(ii) Suit for specific performance of sale agreement decreed – Third party was in possession claiming title by adverse possession but failed to prove – To prevent another round of litigation, third party directed to hand over possession to purchaser.

Pratap Laxman Muchandi & Ors. v. Shamlal Uddavadas Wadhwa & Ors.

Reported in AIR 2008 SC 1378

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421. SPECIFIC RELIEF ACT, 1963 – Sections 36, 37 & 39

CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2 and Section 151

(i) Joint Hindu family – Co-sharer separately possessing joint property by mutual consent – To safeguard the exclusive possession thereof he would be entitled to injunction – Exception to general law reiterated.

(ii) Co-sharer dispossessed during pendency of the suit – Court has jurisdiction to restore the possession of the party concerned by using power conferred u/s 151 of the CPC – If a person is entitled to prohibitory injunction, a fortiori he shall also be entitled to a mandatory injunction.

Tanusree Basu and others v. Ishani Prasad Basu and others

Judgment dated 05.03.2008 passed by the Supreme Court in Civil Appeal No. 1767 of 2008, reported in (2008) 4 SCC 791

Held:

(i) There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.

We have noticed hereinbefore that the plaintiffs - appellants themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, *viz.*, flat Nos. 201, 202 and 301. If they were in possession of the separate flats, plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiffs - appellants immediately after the appeal preferred by them in the High Court was dismissed.

The padlock was directed to be removed by the learned Civil Judge by an order dated 21.11.2006. We do not find any illegality therein. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof.

(ii) It is not the law that a party to a suit during pendency thereof shall take law into his hands and dispossess the other co-sharer. If a party takes recourse to any contrivance to dispossess another, during pendency of the suit either in violation of the order of injunction or otherwise, the court indisputably will have jurisdiction to restore the parties back to the same position.

In *Israil & Others v. Samset Rahman & Others, (1914) 18 Cal WN 176 : AIR 1914 Cal 362,* Mookerjee, J. held that a co-owner being in exclusive possession of a joint property would be entitled to injunction. If a person is entitled to a prohibitory injunction, *a fortiori* he shall also be entitled to a mandatory injunction. [See also *Spandan Diagnostic & Research Centre Private Limited v. Ritendra Nath Ghosh, 2000 (2) Cal LT 83*]

It is now a well-settled principle of law that Order 39, Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code. [See *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 and India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd., (2007) 5 SCC 510]*

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***422. STAMP ACT, 1899 – Article 23**

An agreement alleged to have been executed by the defendants in favour of the plaintiffs – It is recited that possession of the property in question had been delivered to the plaintiffs – Plaintiffs filed a suit on the basis of the said agreement – Defendants specifically denied the execution of the agreement and delivery of possession of property in their written statement – Trial Court opined that the document in question, having recited that possession of the suit property had been delivered to the plaintiffs, was insufficiently stamped as per Article 23 of the Indian Stamp Act – Held, owing to the specific denial, the recital in agreement loses all significance – In such a situation, the document cannot be held to be insufficiently stamped merely because it was not stamped in accordance with Article 23 of Stamp Act.

Laxminarayan and others v. Omprakash and others

Reported in 2008 (2) MPLJ 416

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423. STAMP ACT, 1899 – Section 33

(i) Insufficiently stamped document produced – Impounding of it by the concerned officer is mandatory.

(ii) Incharge of a public office, who may be – Registrar or Sub-Registrar acting under the Registration Act, 1908 is a person who is incharge of a public office

Government of Andhra Pradesh and others v. P. Laxmi Devi (Smt.)

Judgment dated 25.02.2008 passed by the Supreme Court in Civil Appeal No. 8270 of 2001, reported in (2008) 4 SCC 720

Held:

A perusal of the provision of Section 33 (1) of the Stamp Act, 1899 shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33 (1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word 'shall' in Section 33(1) does not mean 'may' but means `shall'. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party does not want to get it stamped is not correct.

In our opinion, a registering officer under the Registration Act (in this case the Sub-Registrar) is certainly a person who is in charge of a public office. Section 33(3) applies only when there is some doubt whether a person holds a public office or not. In our opinion, there can be no doubt that a Sub-Registrar holds a public office. Hence, he cannot return such a document to the party once he finds that it is not properly stamped, and he must impound it.

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***424. STATE FINANCIAL CORPORATIONS ACT, 1951 – Sections 29 (1) & 32-G**
CONTRACT ACT, 1872 – Section 128

(i) Right of State Financial Corporation in case of default in payment of loan to proceed u/ss. 29 & 31 against the principal debtor and guarantor/surety is distinct – None of these provisions control each other.

(ii) Rights and liabilities of surety and defence available to him are different from those of principal borrower – Surety, apart from defences available to principal borrower, can take additional defence not only against the SFC but also against the principal debtor.

Karnataka State Financial Corporation v. N. Narasimahaiah and others

Judgment dated 13.03.2008 passed by the Supreme Court in Civil Appeal No. 610 of 2004, reported in (2008) 5 SCC 176

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***425. SUCCESSION ACT, 1925 – Section 63 (c)**
EVIDENCE ACT, 1872 – Section 68

(i) Will, proof of – Though registered, Will can be proved only by an attesting witness, if alive.

(ii) Family pension – Is not an estate – Cannot be bequeathed by executing Will – However, pensionary benefits like provident fund, gratuity, etc. would be estate of deceased, therefore, can be bequeathed by him.

Sundariya Bai Choudhary v. Union of India and others

Reported in 2008 (2) MPLJ 321 (DB)

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***426. SUCCESSION ACT, 1925 – Section 372**

Succession certificate – Obtained from the competent authority without impleading the necessary party i.e. nominee of government servant – Cannot be said to be as per law.

Girijabai v. State of M.P. & ors.

Reported in I.L.R. (2008) M.P. 1167

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*427. TOWN PLANNING:

Housing/urban development authority – Duty to ensure planned development – It is a statutory authority and responsible for planned development of the city – For this purpose it is under statutory obligation to grant sanction of plans for construction of buildings. If somebody has made construction without obtaining any sanction, he must face the consequences therefor – It is idle to contend that no action should be taken against them, only because they have constructed their houses long back – Such statutes sub-serve promotion and protection of ecology which is one of the foremost need of the society. (Also see: *Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group, (2006) 3 SCC 434, M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464 and Friends Colony Development Committee v. State of Orissa and others, AIR 2005 SC 1)*

Bihar Finance Service House Construction Cooperative Society Ltd. v. Gautam Goswami and others

Judgment dated 05.03.2008 passed by the Supreme Court in Contempt Petition (C) No. 44 of 2005 in CA No. 1357 of 2003, reported in (2008) 5 SCC 339

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428. TRANSFER OF PROPERTY ACT, 1882 – Sections 58 (c) & 60
LIMITATION ACT, 1963 – Article 61
TRUSTS ACT, 1882 – Section 90 & Illustration (c)

Mortgagor remained in possession as tenant of mortgagee – Usufructuary mortgage – Mortgagee obtained a decree against the mortgagor for recovery of arrears of rent and pursuant to execution thereof also purchased mortgaged property in public auction – Barred under Order 34 Rule 14 CPC – Mortgagor's suit for redemption filed within the prescribed limitation is maintainable and his right to redeem would not extinguish even after the said purchase by the mortgagee – Purchase would only be in trust for mortgagor.

M.R. Satwaji Rao (dead) by LRs. v. B. Shama Rao (dead) by LRs and others

Judgment dated 09.04.2008 passed by the Supreme Court in Civil Appeal No. 319 of 2002, reported in (2008) 5 SCC 124

Held :

The legal representatives of defendant No. 2 are the appellants in this appeal. On 19.2.1948, the plaintiffs' predecessor executed a usufructory mortgage in favour of the appellants herein for a sum of Rs. 10,000/-. The terms of the said mortgage deed were that the mortgagee shall remain in

possession of the mortgaged property without paying rent and that the mortgage amount of Rs. 10,000/- shall carry no interest. The period of redemption was five years from the date of mortgage. However, the mortgagers continued in possession of the mortgaged property as tenants of the mortgagee on a monthly rent of Rs. 97.50. As the mortgagors failed to pay the rent, on 19.5.1952, the mortgagee filed suit being O.S. No. 120/51-52 on the file of the Ist Munsif, Bangalore for arrears of rent. The said suit was decreed. In pursuance of the said decree, the mortgagee (2nd defendant) filed Execution Petition No. 1002/51-52 and the property was put on auction sale by the executing Court. Mortgagee being the highest bidder purchased the schedule property in court auction. Sale was confirmed. The respondents/mortgagors neither objected for the sale nor confirmed the sale or taken any steps to set aside the sale over three decades.

On 18.2.1983, the respondents/plaintiffs, after nearly three decades, filed a suit being O.S. No. 632 of 1983 on the file of the III Addl. City Civil Judge, Bangalore for a decree of redemption of the mortgage of the suit schedule property sold in public auction as long back as on 11.9.1952. The Civil Judge, after considering both oral and documentary evidence, dismissed the suit with costs on 31.07.1990. Aggrieved by the said order, the plaintiffs filed RFA No. 465 of 1990 before the High Court. The High Court allowed the appeal decreeing the suit for redemption. Against the impugned judgment of the High Court, the defendants filed the present appeal by way of special leave.

Though learned senior counsel for the appellants contended that the claim and the decree in O.S. No. 120/5-52 has nothing to do with the mortgage dated 19.02.1948 or 12.12.1948, a perusal of all the details referred to above leads to an irresistible conclusion that the decree in favour of the appellant mortgagee in O.S. No. 120/51-52 was not an independent money decree against respondents but merely for satisfaction of the rents accrued on the mortgaged property, leased back to the respondents on 19.02.1948 itself up to 12.12.1948 and thereafter which was secured by a second mortgage deed dated 12.12.1948 executed by the respondents in favour of the appellants.

We have already referred to Rule 14 of Order XXXIV CPC which prohibits the mortgagee to bring the mortgaged property to sell otherwise than by instituting a suit for sale in enforcement of the mortgage. Admittedly, the said suit by the mortgagee was not in terms of Rule 14 of Order XXXIV. Therefore, bringing the mortgaged property for sale by the appellants in execution of the decree passed in O.S. No. 120/51-52 and purchasing the same by the appellants in public auction is clearly barred under Order XXXIV Rule 14 CPC.

It is useful to point out that D.W.1 has specifically stated in her examination that though the suit schedule property was mortgaged by the respondents with the appellants by way of possessory mortgage deed dated 19.02.1948, the respondents never parted with the possession thereafter, as the appellants chose simultaneously on 19.02.1948 to let the respondents continue in possession as tenants on a monthly rental of Rs. 97.50.

The High Court has also referred to the fact that on 12.12.1948 a second mortgage deed for Rs. 3,000/- was executed in favour of the appellants by the respondents towards arrears of rent for the period from 19.02.1948 to 12.12.1948. In those circumstances, we agree with the conclusion of the High Court that in O.S. No. 120/51-52 brought by the appellant was very much for seeking satisfaction of claims arising under the suit schedule property and the same not being on a suit for sale instituted in enforcement of the mortgage in question, the same is barred under Order XXXIV Rule 14 CPC. Further, we are satisfied that all the relevant materials have been specifically pleaded in the plaint in O.S. No. 632 of 1983 on the file of third Additional City Civil Judge, Bangalore.

We have already referred to Section 90 of the Indian Trusts Act. Illustration (c) of Section 90 is applicable to the case in hand. The purchase by the mortgagee in the circumstances narrated above amounts to a mere trust and either himself or his legal representatives cannot be allowed to exploit the adversity of the appellants.

In *Mritunjoy Pani and another v. Narmanda Bala Sasmal and another, (1962) 1 SCR 290,* the legal position as to right of redemption in a usufructuary mortgage and Section 90 of the Indian Trusts Act have been clearly explained. The following discussion and conclusion are relevant: (AIR pp. 135-56, paras 5 & 7-8)

> "5. ...The following three conditions shall be satisfied before S.90 of the Indian Trusts Act can be applied to a case : (1) the mortgagee shall avail himself of his position as mortgagee; (2) he shall gain an advantage; and (3) the gaining should be in derogation of the right of the other persons interested in the property. The section, read with illustration (c), clearly lays down that where an obligation is cast on the mortgagee and in breach of the said obligation he purchases the property for himself, he stands in a fiduciary relationship in respect of the property so purchased for the benefit of the owner of the property. This is only another illustration of the well settled principle that a trustee ought not to be permitted to make a profit out of the trust. The same principle is comprised in the latin maxim *commodum ex injuria sua nemo habere debet,* that is,

convenience cannot accrue to a party from his own wrong. To put it in other words, no one can be allowed to benefit from his own wrongful act. This Court had occasion to deal with a similar problem in *Sidhakamal Nayan v. Bira Naik, AIR 1954 SC 336.* There, as here, a mortgagee in possession of a tenant's interest purchased the said interest in execution of a decree for arrears of rent obtained by the landlord. It was contended there, as it is contended here, that the defendant, being a mortgagee in possession, was bound to pay the rent and so cannot take advantage of his own default and deprive the mortgagors of their interest. Bose, J., speaking for the Court, observed at p. 337, para 6 thus:

'6. The position, in our opinion, is very clear and in the absence of any special statutory provision to the contrary is governed by S. 90, Trusts Act. The defendant is a mortgagee and, apart from special statutes, the only way in which a mortgage can be terminated as between the parties to it is by the act of the parties themselves, by merger or by an order of the Court. The maxim "once a mortgage always a mortgage" applies. Therefore, when the defendant entered upon possession he was there as a mortgagee and being a mortgagee the plaintiffs have a right to redeem unless there is either a contract between the parties or a merger or a special statute to debar them.'

These observations must have been made on the assumption that it was the duty of the mortgagee to pay the rent and that he made a default in doing so and brought about the auction sale of the holding which ended in the purchase by him. The reference to S.90 of the Indian Trusts Act supports this assumption.

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7. The legal position may be stated thus: (1) The governing principle is "once a mortgage always a mortgage" till the mortgage is terminated by the act of the parties themselves, by merger or by order of the court. (2) Where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without

getting the sale set aside. (3) Where a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.

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8. ..... The said findings clearly attract the provisions of S.90 of the Indian Trusts Act. In view of the aforesaid principles, the right to redeem the mortgage is not extinguished and in the eye of law the purchase in the rent sale must be deemed to have been made in trust for the mortgagor. In the premises, the High Court was right in holding that the suit for redemption was maintainable."

Though the mortgagee purchased the mortgaged property pursuant to the decree in O.S. No. 120/51-52, as explained and interpreted the provisions of Order XXXIV Rule 14 CPC and Section 90 of the Indian Trusts Act, in the absence of recourse to Rule 14 of Order XXXIV, we hold that the relationship of mortgagor and mortgagee continues to subsist even thereafter, and his purchase is only in trust for the mortgagor. In view of the same, the right to redeem the mortgage is not extinguished and in the eye of law the purchase of the mortgaged property in pursuance of the decree for rent arrears must be deemed to have been made in trust for the mortgagor. In such circumstances, the High Court was right in granting preliminary decree for redemption. Insofar as the period of limitation is concerned, Article 61 of the Limitation Act, 1963 applies and for a mortgagor to redeem or recover possession of immoveable property mortgaged; the period of limitation provided is 30 years when the right to redeem or to recover possession accrues. In view of the same, since the mortgagee purchased the mortgaged property in court auction on 11.09.1952 and the suit for redemption of mortgaged property was filed within the time prescribed, the High Court cannot be faulted for granting preliminary decree for redemption.

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NOTE : Asterisk (*) denotes brief notes.

PART - III

CIRCULARS/NOTIFICATIONS

म.प्र. विवाहों का अनिवार्य पंजीयन नियम 2008 के अन्तर्गत कार्यवाही हेतु नोडल विभाग की घोषणा संबंधी आदेश

भोपाल, दिनांक 7 जुलाई, 2008

क्रमांक एफ ए 1–5/2008/एक/(1), राज्य शासन, मध्यप्रदेश विवाहों का अनिवार्य रजिस्ट्रीकरण नियम 2008 पर आवश्यक कार्यवाही किये जाने हेतु योजना आर्थिक एवं सांख्यिकी विभाग को नोडल विभाग घोषित करता है।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार,
सही/–
(बसंत कुर्रे)
अवर सचिव
मध्यप्रदेश शासन,
सामान्य प्रशासन विभाग

There is no penance more effective than patience, No happiness equal than joyfulness, No disease more killing than lust, No virtue richer than humility

– ANONYMOUS

NOTIFICATION REGARDING AMENDMENT IN BAR COUNCIL OF INDIA RULES

(Published in the Gazette of India, Extraordinary, Part III, Section 4, dated 16th February, 2008)

Dated January 1, 2008 – Bar Council of India at its meeting held on 14.10.2007 passed Resolution No. 128/2007 **amending Rule 7, Chapter-III, Part VI of the Rules of the Bar Council of India** which is given below:-

Rule 7 – "An officer after his retirement or otherwise ceasing to be in service for any reasons, if enrolled as an Advocate shall not practice in any of the Judicial, administrative Courts/Tribunals/authorities, which are presided over by an officer equivalent or lower to the post which such officer last held."

Explanation.- "An officer shall include Judicial Officer, Officer from State or Central Services and President Officers or Members of the Tribunals or Authorities or such Officers as referred under Section 30 (ii) of the Advocates Act, 1961".

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All great things are simple, and many can be expressed in a single word; freedom, justice, honour, duty, mercy, hope.

– WINSTON S. CHURCHILL

Judgment is not the knowledge of fundamental laws; it is knowing how to apply knowledge of them.

– CHARLES GOW