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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The issue of JOTI for the month of August, 2010 is before you and I have another opportunity of sharing my views with you. In the earlier issue, I had stressed upon the need to work with great sincerity and commitment so as to come to the expectations of the litigant public. Moreover, Hon'ble the High Court time and again impressed upon the need for better disposals; both qualitatively and quantitatively in view of the huge pendency of cases and long pendency of cases. We all talk about mounting arrears of cases. But how to reduce it, is the moot question? The need for speedy disposals, the need to provide effective access to justice and the need to build up effective trust and confidence in judiciary should be our paramount consideration.

Our job being a pious one has to be done with all dedication. Work should be our motivating factor. Hard work is the ladder to success. The results reflect the quality and quantity of efforts that we put in. A good, honest and hardworking Judge is appreciated by all. To accomplish the goal, attitude plays a great role. We have to be rock strong in our attitude. Nothing should deter us. Set a goal everyday and work relentlessly to achieve it. By taking small strides, we can reach our goal.

Attitude towards work defines the human individual and his personality. There are three categories of people. The first category of people are the ones who identify themselves strongly with their work and are fully integrated with it. The work is not just a job for them but their mission, their calling which give them immense pleasure and they define themselves with it completely. The second category of people are those for whom a job is important for economic reasons and has to be done well. The people of the last category take work as a liability and a hindrance, so to say, they have to work because they need the money. We should place ourselves in the first category because judging is not an easy task as it is enveloped with many responsibilities.

Remember that no one is better qualified than the self to improve his personality.There is no magic formula to progress, it is only perseverance, ***WILL*** and a resolute approach that bring in the desired result. Everyone has the opportunity to make more of himself in his own environment, with his own skill, with his own energy and his own plan and strategy. A man can only rise, conquer and achieve by lifting up his thoughts, otherwise he will remain weak, miserable and a slave. We can become small or weak depending on our desire. Only thoughtless people talk about luck, fortune and chance. The determined ones create it. If all the above qualities are imbibed by the judicial officers, certainly they will succeed in their mission to serve the humanity.

The Institute is committed to help the judicial officers in its best possible way and keeping this in mind, the Academic Calendar for the year 2010-2011 (July 2010 to June 2011) was prepared. This year's academic session started with the *Training Programme on Gram Nyayalayas Act, 2008* in which training was imparted to the Nyayadhikaris in two batches. The Institute with the object to make all Judicial Officers computer friendly, started imparting training on computers since last year and it will continue this year also. Upto now three training programmes on the said subject have already been organized in this session. As the cases on theft of electricity are rising by the day and judicial officers have a prominent role to play in stopping this menace, a *Workshop on Electricity Act, 2003* was organized by the Institute for Special Judges working under the Act to update their knowledge base with the various provisions of the Act. Looking to the rise in cases relating to atrocities on marginalized society of people, especially Scheduled Castes and Scheduled Tribes and cases relating to drug trafficking, a workshop on *Key issues and challenges under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989/NDPS Act, 1985* was organized in the Institute in which Special Judges participated.

The Institute has also organized two Regional Workshops on – *Key Issues and Challenges regarding Offence of Dishonour of Cheques under Negotiable Instruments Act, 1881* at Bhopal and Gwalior respectively. The idea behind organizing these regional workshops is to acquaint a large number of judicial officers on the subject and to bring uniformity in their working. Apart that, it also saves the precious time of the Judicial Officers as well as lessen the burden on the Government Exchequer.

As usual, Part I of the Journal contains Articles, Part II consists of various pronouncements passed by the Hon'ble Supreme Court as well as our High Court. In Part III, a notification of the Ministry of Finance regarding amendment in the Narcotics Drugs and Psychotropic Substances Act, 1985 along with some other notification, is included.

Let us all work with whole heartedness and commit ourselves to the service of the society.

> We have to function in line with the highest ideals of the age we live in. Though we may add to them or seek to mould them in accordance with our National genius. Those ideals may be classified under two heads – "Humanism and the scientific spirit"
>
> PT. JAWAHARLAL NEHRU

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PART - I

PROCEDURE TO BE FOLLOWED FOR ISSUING "RECEPTION ORDER" UNDER THE MENTAL HEALTH ACT, 1987

Judicial Officers
Districts Gwalior, Katni and Jhabua

The Mental Health Act, 1987 is an Act to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for other connected or incidental matters. This Act has repealed Indian Lunacy Act, 1912. This Act is a beneficial legislation solely intended for the benefit of mentally ill persons. Part III of Chapter IV of the Mental Health Act, 1987 (in short "the Act"), which consists of four parts deals with the reception orders for the admission and detention of a mentally ill person in a psychiatric hospital or psychiatric nursing home. The provisions with regard to admission of a mentally ill person as in – patient after inquisition and other miscellaneous provisions in relation to reception order has also been made under Part III of the Act.

Mentally Ill Person

Section 2 (l) of the Act defines "mentally ill person" that means a person who is in need of treatment by reason of any mental disorder other than mental retardation. Under the erstwhile provision i. e. Section 2(5) of the Indian Lunacy Act, 1912, the term used was "lunatic" and it was confined to idiot and a person of unsound mind but the term "mentally ill person" is wider and it includes all sorts of patients of mental disorder. This definition includes idiot, person of unsound mind, lunatic and insane person and also those persons who require treatment for any mental illness. However, mental retardation has not been considered as mental disorder or mental illness as it is no disease in the eye of medical experts. It is only a temporary phase and is due to over exhaustion, hard labour and work.

Mentally ill persons have two essential ingredients: (1) mental disorder and (2) psychopathic disorder. The terms "mental disorder" and "psychopathic disorder" have been borrowed from the English Mental Health Act and also taken from Explanation to Section 13 of the Hindu Marriage Act, 1955. According to that, 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind including Schizophrenia. 'Psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient which may require medical treatment.

Reception Order

Part III of Chapter IV of the Act provides two modes for the reception order for the admission and detention of a mentally ill person in a psychiatric

hospital or psychiatric nursing home (a) reception order on application and (b) reception order on production of mentally ill person before a Magistrate. That apart, an admission of a mentally ill person as in patient in a psychiatric hospital or psychiatric nursing home can be authorized by the District Court after holding an inquisition under Chapter IV of the Act.

Reception Order on Application

Sections 20 to 22 of the Act deal with the procedure regarding reception order on application which reads as under:-

> **20. Application for reception order.** – (1) An application for a reception order may be made by –
>
> (a) the medical officer-in-charge of a psychiatric hospital or psychiatric nursing home, or
>
> (b) by the husband, wife or any other relative of the mentally ill person.
>
> (2) Where a medical officer-in-charge of a psychiatric hospital or psychiatric nursing home in which a mentally ill-person is undergoing treatment under a temporary treatment order is satisfied that –
>
> (a) the mentally ill person is suffering from mental disorder of such a nature and degree that his treatment in the psychiatric hospital or as the case may be, psychiatric nursing home is required to be continued for more than six months, or
>
> (b) it is necessary in the interests of the health and personal safety of the mentally ill person or for the protection of others that such person shall be detained in a psychiatric hospital or psychiatric nursing home, he may make an application to the Magistrate within the local limits of whose jurisdiction the psychiatric hospital or, as the case may be, psychiatric nursing home is situated, for the detention of such mentally ill-person under a reception order in such psychiatric hospital or psychiatric nursing home, as the case may be.
>
> (3) Subject to the provisions of sub-section (5), the husband or wife of a person who is alleged to be mentally ill or, where there is no husband or wife, or where the husband or wife is prevented by reason of any illness or absence from India or otherwise from making the application, any other relative of such person may make any application to the Magistrate within the local limits of whose jurisdiction the said person ordinarily resides, for the detention of the alleged mentally ill-person under a reception order in a psychiatric hospital or psychiatric nursing home.
>
> (4) Where the husband or wife of the alleged mentally ill person is not the applicant, the application shall contain the reasons for the application not being made by the husband or wife and shall indicate the relationship of the applicant with the alleged mentally ill person

and the circumstances under which the application is being made.

(5) No person, –

(i) who is a minor, or

(ii) who, within fourteen days before the date of the application, has not seen the alleged mentally ill person,

shall make an application under this section.

(6) Every application under sub-section (3) shall be made in the prescribed form and shall be signed and verified in the prescribed manner and shall state whether any previous application had been made for inquiry into the mental condition of the alleged mentally ill person and shall be accompanied by two medical certificates from two medical practitioners of whom one shall be a medical practitioner in the service of Government.

21. Form and contents of medical certificates. – Every medical certificate referred to in sub-section (6) of Section 20 shall contain a statement, –

(a) that each of the medical practitioners referred to in that sub-section has independently examined the alleged mentally ill person and has formed his opinion on the basis of his own observations and from the particulars communicated to him; and

(b) that in the opinion of each such medical practitioner the alleged mentally ill person is suffering from mental disorder of such a nature and degree as to warrant the detention of such person in a psychiatric hospital or psychiatric nursing home and that such detention is necessary in the interests of the health and personal safety of that person or for the protection of others.

22. Procedure upon application for reception order.–

(1) On receipt of an application under sub-section (2) of Section 20, the Magistrate may make a reception order, if he is satisfied that –

(i) the mentally ill person is suffering from mental disorder of such a nature and degree that it is necessary to detain him in a psychiatric hospital or psychiatric nursing home for treatment; or

(ii) it is necessary in the interests of the health and personal safety of the mentally ill person or for the protection of others that he should be so detained, and a temporary treatment order would not be adequate in the circumstances of the case and it is necessary to make a reception order.

(2) On receipt of an application under sub-section (3) of Section 20, the Magistrate shall consider the statements made in the application and the evidence of mental illness as disclosed by the medical certificates.

(3) If the Magistrate considers that there are sufficient grounds for proceeding further, he shall personally examine the alleged mentally ill person unless, for reasons to be recorded in writing, he thinks that it is not necessary or expedient to do so.

(4) If the Magistrate is satisfied that a reception order may properly be made forthwith, he may make such order, and if the Magistrate is not so satisfied, he shall fix a date for further consideration of the application and may make such inquiries concerning the alleged mentally ill person as he thinks fit.

(5) The notice of the date fixed under sub-section (4) shall be given to the applicant and to any other person to whom, in the opinion of the Magistrate, such notice shall be given.

(6) If the Magistrate fixes a date under sub-section (4) for further consideration of the application, he may make such order as he thinks fit, for the proper care and custody of the alleged mentally ill person pending disposal of the application.

(7) On the date fixed under sub-section (4), or on such further date as may be fixed by the Magistrate, he shall proceed to consider the application *in camera,* in the presence of –

(i) the applicant:

(ii) the alleged mentally ill person (unless the Magistrate in his discretion otherwise directs);

(iii) the person who may be appointed by the alleged mentally ill person to represent him; and

(iv) such other person as the Magistrate thinks fit,

and if the magistrate is satisfied that the alleged mentally ill person, in relation to whom the application is made, is so mentally ill that in the interests of the health and personal safety of that person or for the protection of others it is necessary to detain him in a psychiatric hospital or psychiatric nursing home for treatment, he may pass a reception order for that purpose and if he is not so satisfied, he shall dismiss the application and any such order may provide for the payment of the costs of the inquiry by the applicant personally or from out of the estate of the mentally ill person, as the Magistrate may deem appropriate.

(8) If any application is dismissed under sub-section (7), the Magistrate shall record the reasons for such dismissal and a copy of the order shall be furnished to the applicant.

Section 20 prescribes for the application in the prescribed proforma that is to be framed under Rule 25 of the State Mental Health Rules, 1990(in short "the State Rules"). An application can be made by the medical officer in charge

(as defined in Section 2 (j) of the Act) of a psychiatric hospital or psychiatric nursing home (as defined in Section 2 (q) of the Act) or by the husband, wife or other relative of the mentally ill person. For the purpose of this Act, the relative means any person related to the mentally ill person by blood, marriage or adoption as defined in Section 2 (t) of the Act.

A medical officer in charge of a psychiatric hospital or psychiatric nursing home can make such an application where he is satisfied that the mentally ill person, who is under temporary treatment, suffering from mental disorder of such a nature and degree that his treatment is required to be continued for more than six months or it is necessary in the interest of the health and personal safety of the mentally ill person or for protection of others that such person shall be detained in a psychiatric hospital or psychiatric nursing home. Husband or wife of the mentally ill person can also apply for detention of a mentally ill person in a psychiatric hospital or psychiatric nursing home. A relative can only apply where there is no husband or wife or where the husband or wife is prevented by any reason enumerated in sub-section (3) from making the application and in such a situation, relative-applicant is required to state such reason in the application. Thus, the preference is firstly given to husband or wife and then to the relative. The application cannot be made by a person who is a minor or who has not seen the alleged mentally ill person within fourteen days prior to filing of the application. Further, an application made by the husband or wife or relative requires signature and verification as prescribed by the State Rules and shall also be accompanied by two medical certificates from two medical practitioners of whom one shall be in Government service.

An application by a medical officer in charge of a psychiatric hospital or psychiatric nursing home must be made before the Magistrate within the local limits of whose jurisdiction such hospital or nursing home is situated. But an application made by the husband or wife or relative can be made before the Magistrate within the local limits of whose jurisdiction the mentally ill person ordinarily resides.

Section 21 of the Act specify and underlines the contents of the medical certificate which is required in Section 20(6) of the Act. Therefore, it is incumbent upon the Magistrate concerned to see whether medical certificates produced contain the requisite statements.

The procedure to be followed for issuing reception order is shorter on application by a medical officer in charge of a psychiatric hospital or psychiatric nursing home than the application by the husband or wife or, as the case may be, by relative. On receipt of an application filed by a medical officer in charge of a psychiatric hospital or psychiatric nursing home the Magistrate may make a reception order, if he is satisfied that the mentally ill person is suffering from mental disorder of such a nature and degree that it is necessary to detain him in a psychiatric hospital or psychiatric nursing home for treatment, or it is necessary in the interest of the health and personal safety of the mentally ill person or for

protection of others that he should be so detained, and a temporary treatment order would not be adequate. However, in a case of an application made by the husband or wife or relative, an inquiry would be required. In this regard, the Magistrate shall consider the statements made in the application and the evidence of mental illness as disclosed by the medical certificates and if the Magistrate considers that there are sufficient grounds for proceeding further, he shall personally examine the alleged mentally ill person unless he has reasons not to do it. Further, the Magistrate is required to follow the procedure as indicated in sub-sections (4) to (8) of Section 22 of the Act.

Reception order on production of mentally ill person before Magistrate

Sections 23 to 25 of the Act deal with the procedure regarding reception order on production of mentally ill person before magistrate which read as under:-

> **23. Powers and duties of police officers in respect of certain mentally ill persons –** (1) Every officer in charge of a police station, –
>
> (a) may take or cause to be taken into protection any person found wandering at large within the limits of his station whom he has reason to believe to be so mentally ill as to be incapable of taking care of himself, and
>
> (b) shall take or cause to be taken into protection any person within the limits of his station whom he has reason to believe to be dangerous by reason of mental illness.
>
> (2) No person taken into protection under sub-section (1) shall be detained by the police without being informed, as soon as may be, of the grounds for taking him into such protection, or where, in the opinion of the officer taking the person into protection, such person is not capable of understanding those grounds, without his relatives or friends, if any, being informed of such grounds.
>
> (3) Every person who is taken into protection and detained under this section shall be produced before the nearest Magistrate within a period of twenty-four hours of taking him into such protection excluding the time necessary for the journey from the place where he was taken into such protection of the Court of the Magistrate and shall not be detained beyond the said period without the authority of the Magistrate.
>
> **24. Procedure on production of mentally ill person. –** (1) If a person is produced before the Magistrate under sub-section (3) of Section 23, and if in his opinion, there are sufficient grounds for proceeding further, the Magistrate shall –
>
> (a) examine the person to assess his capacity to understand.
>
> (b) cause him to be examined by a medical officer, and

(c) make such inquiries in relation to such person as he may deem necessary.

(2) After the completion of the proceeding under sub-section (1), the Magistrate may pass a reception order authorizing the detention of the said person as an in patient in a psychiatric hospital or psychiatric nursing home –

(a) if the medical officer certifies such person to be a mentally ill person, and

(b) if the Magistrate is satisfied that the said person is a mentally ill person and that in the interests of the health and personal safety of that person or for the protection of others, it is necessary to pass such order :

Provided that if any relative or friend of the mentally ill person desires that the mentally ill person be sent to any particular licensed psychiatric hospital or licensed psychiatric nursing home for treatment therein and undertakes in writing to the satisfaction of the Magistrate to pay the cost of Maintenance of the mentally ill person in such hospital or nursing home, the Magistrate shall, if the medical officer in charge of such hospital or nursing home consents, make a reception order for the admission of the mentally ill person into that hospital or nursing home and detention therein :

Provided further that if any relative or friend of the mentally ill person enters into a bond, with or without sureties for such amount as the Magistrate may determine, undertaking that such mentally ill person will be properly taken care of and shall be prevented from doing any injury to himself or to others, the Magistrate may, instead of making a reception order, hand him over to the care of such relative or friend.

25. Order in case of mentally ill person cruelly treated or not under proper care and control.- (1) Every officer in charge of a police station who has reason to believe that any person within the limits of his station is mentally ill and is not under proper care and control, or ill treated or neglected by any relative or other person having charge of such mentally ill person, shall forthwith report the fact to the Magistrate within the local limits of whose jurisdiction the mentally ill person resides.

(2) Any private person who has reason to believe that any person is mentally ill and is not under proper care and control, or is ill-treated or neglected by any relative or other person having charge of such mentally ill person, may report the fact to the Magistrate within the local limits of whose jurisdiction the mentally ill person resides.

(3) If it appears to the Magistrate, on the report of a police officer or on the report or information derived from any other person, or

otherwise that any mentally ill person within the local limits of his jurisdiction is not under proper care and control, or is ill-treated or neglected by any relative or other person having the charge of such mentally ill person, the Magistrate may cause the mentally ill person to be produced before him, and summon such relative or other person who is, or who ought to be in charge of, such mentally ill person.

(4) If such relative or any other person is legally bound to maintain the mentally ill person, the Magistrate may, by order, require the relative or the other person to take proper care of such mentally ill person and where such relative or other person willfully neglects to comply with the said order, he shall be punishable with fine which may extend to two thousand rupees.

(5) If there is no person legally bound to maintain the mentally ill person, or if the person legally bound to maintain the mentally ill person refuses or neglects to maintain such person, or if, for any other reason, the Magistrate thinks fit so to do, he may cause the mentally ill person to be produced before him and, without prejudice to any action that may be taken under sub-section (4), proceed in the manner provided in Sec.24 as if such person had been produced before him under sub-section (3) of Section 23.

Section 23 of the Act provides power to Police Officer to take into protection (not custody) the wandering mentally ill persons for their safety. Such person shall be produced before the nearest Magistrate within 24 hours. These provisions are in consonance with the principle of detention and arrest in Code of Criminal Procedure. Upon production of a mentally ill person, the Magistrate will make an inquiry to satisfy whether there are grounds to proceed further. While doing so, the Magistrate shall examine the person to assess his capacity to understand, cause him to be examined by a medical officer, and make such inquiries in relation to such person as he may deem necessary. Thereafter, the Magistrate may pass a reception order authorizing the detention of the said person as an in-patient in a psychiatric hospital or psychiatric nursing home. The main considerations to pass reception order are that the said person is a mentally ill person and that in the interest of the health and personal safety of that person or for the protection of others, reception order is necessary. However, the Magistrate will not send the mentally ill person to any psychiatric hospital or psychiatric nursing home if the friend or relative of the mentally ill person takes undertaking that he will take proper care of the said mentally ill person.

Section 24 of the Act is a procedural provision therefore compliance of the Section is material because it is in the welfare and interest of the mentally ill person.

Section 25 of the Act provides power to police or to any private person to inform the Magistrate or to make a report to the Magistrate regarding any mentally ill person who is being ill treated, neglected or cruelly treated. In case

the Magistrate, within the local limits of whose jurisdiction the mentally ill person resides, comes to know that the said mentally ill person is being ill treated, neglected or cruelly treated, he is empowered under this Section, to pass orders requiring the relative or other person to take care of such mentally ill person. This section also makes provision for punishment in case of non-compliance of the aforesaid orders.

Admission as in patient after inquisition by District Court (as defined in Section 2 (b) of the Act)

Section 26 of the Act provides for admission of a mentally ill person as in-patient in a psychiatric hospital or psychiatric nursing home by District Court after inquisition under Chapter VI of the Act. The Section reads thus:-

> "**26. Admission as in patient after inquisition.-** If any District Court holding an inquisition under Chapter VI regarding any person who is found to be mentally ill is of opinion that it is necessary so to do in the interests of such person, it may, by order, direct that such person shall be admitted and kept as in patient in a psychiatric hospital or psychiatric nursing home and every such order may be varied from time to time or revoked by the District court."

Admission and detention of mentally ill prisoner

Section 27 of the Act provides that an order under Section 30 of the Prisoners Act, 1900 or under Section 144 of the Air Force Act, 1950, or under Section 145 of the Army Act 1950, or under Section 143 or Section 144 of the Navy Act, 1957, or under Section 330 or Section 335 of the Code of Criminal Procedure 1973, directing the reception of a mentally ill prisoner into any psychiatric hospital or psychiatric nursing home, shall be sufficient authority for the admission of such person in such hospital or, as the case may be, such nursing home or any other psychiatric hospital or psychiatric nursing home to which such person may be lawfully transferred for detention therein.

Detention of alleged mentally ill person pending report by Medical Officer

Section 28 of the Act provides for power to the Magistrate to make an order of detention before adjudging a person as mentally ill person. This Section provides for detention of mentally ill person pending inquiry with respect to medical certificates as required under Section 24 of the Act. When any person alleged to be a mentally ill person appears or is brought before a Magistrate, he may, authorize the detention of the alleged mentally ill person under proper medical custody in an observation ward of a general hospital or general nursing home or psychiatric hospital of psychiatric nursing home or in any other suitable place. The period of detention under this section would not exceed ten days it may, from time to time, enlarged for the periods not exceeding ten days at a time but the period of such detention shall not be beyond thirty days in the aggregate.

Temporary detention of mentally ill person after passing the Reception Order by Magistrate

The provision of Section 29 of the Act provides that after passing the reception order, the Magistrate may, after recording reasons, direct that the concerned mentally ill person may be detained for a period not extending thirty days in such a place as he may deem appropriate, pending the removal of such person to a psychiatric hospital or psychiatric nursing home. This provision empowers the Magistrate to make temporary arrangements for the welfare and care of the mentally ill person, whenever the circumstances require.

Miscellaneous Provision in relation to orders under this Chapter

Time and manner of medical examination of mentally ill patient

Section 30 of the Act provides the manner in which the two medical officers should examine the mentally ill person. It also provides the particulars which the certificate of each medical officer should contain viz. (i) that he examined the patient, mentally ill person personally; (ii) the examination is independent of each other; and (iii) the mentally ill person was examined ten clear days before the application or of the date of order. If the above noted three conditions are not fulfilled, no reception order can be passed on the basis of such certificates.

The effect of Reception Order or Importance of the Authority under Reception Order

Section 31 of the Act explains the authority for reception order passed under this Chapter.The Section says that a reception order made under this Chapter shall be sufficient authority for the applicant or any person authorized by him, or in the case of a reception order made otherwise than on an application, for the person authorized so to do by the authority making the order to take the mentally ill person to the place mentioned in such order for his admission and treatment as an in-patient in the psychiatric hospital or psychiatric nursing home specified in the order or, as the case may be, for his admission and detention, therein or in any psychiatric hospital or psychiatric nursing home to which he may be removed in accordance with the provisions of this Act, and the medical officer-in-charge shall be bound to comply with such order.

The Section provides that in any case where the medical officer-in-charge finds accommodation in the psychiatric hospital or psychiatric nursing home inadequate, he shall, after according admission, intimate that fact to the Magistrate or the District Court which passed the order and thereupon the Magistrate or the District Court, as the case may be, shall pass such order as he or it may deem fit.

Section 31 of the Act further provides that every reception order shall cease to have effect after the expiry of thirty days from the date on which it was made, unless within that period, the mentally ill person has been admitted to the place mentioned there, and on the discharge, in accordance with the provisions of this Act, of the mentally ill person.

Supply of copy of the Reception Order

Section 32 of the Act rules that every Magistrate or District Court making a reception order under this Chapter shall forthwith send a certified copy with copies of the requisite medical certificates and the statement of particulars to the medical officer in charge of the psychiatric hospital or psychiatric nursing home to which the mentally ill person is to be admitted.

Restriction as to Psychiatric Hospitals and Psychiatric Nursing Homes

Section 33 of the Act rules that no Magistrate or District Court shall pass a reception order for the admission as an in-patient to, or for the detention of any mentally ill person, in any psychiatric hospital or psychiatric nursing home outside the State in which the Magistrate or the District Court exercises jurisdiction.

Provided that an order for admission or detention into or in a psychiatric hospital or psychiatric nursing home situated in any other State may be passed if the State Government has by general or special order and after obtaining the consent of the Government of such other State, authorize the Magistrate or the District Court in that behalf.

Amendment of Order

If, after the admission of any mentally ill person to any psychiatric hospital or psychiatric nursing home under a reception order, it appears that the order under which he was admitted or detained or any of the documents on the basis of which such order was made defective or incorrect, the same may, at any time thereafter be amended with the permission of the Magistrate or the District Court as per provision of Section 34 of the Act.

Order of Substitution

Subject to the provisions of Section 35 of the Act, the Magistrate may, by order of substitution, transfer the duties and responsibilities of the person on whose application a reception order was made, to any other person who is willing to undertake the same. Provided that no such order of substitution shall absolve the person upon whose application the reception order was made or, if he is dead, his legal representatives, from any liability incurred before the date of the order of substitution. Before making any order of substitution, the Magistrate shall send a notice, specifying details as mentioned in this Section, to the person on whose application the reception order was made if he is alive, and to any relative of the mentally ill person who, in the opinion of the Magistrate, shall have notice.

In making any substitution order under this section, the Magistrate shall give preference to the person who is the nearest relative of the mentally ill person, unless, for reasons to be recorded in writing the Magistrate considers that giving such preference will not be in the interests of the mentally ill person.

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वाद की सुनवाई जिस दिन के लिए स्थगित हुई है, यदि उस दिन पक्षकार या उनमें से कोई अनुपस्थित हो, चाहे उनके अधिवक्ता उपस्थित रहें, तब उस स्थिति में, आदेश 17 सिविल प्रक्रिया संहिता के अधीन विधिक स्थिति

न्यायिक अधिकारीगण
जिला बैतूल

व्यवहार प्रक्रिया संहिता आदेश 17 नियम 1 व्य.प्र.सं. के अनुसार न्यायालय वाद के किसी भी प्रक्रम में पर्याप्त हेतुक दर्शित किये जाने पर वाद की सुनवाई को समय–समय पर स्थगित कर सकेगा। नियम 2 व्य.प्र. सं. में न्यायालय द्वारा अपनाई जाने वाली उस प्रक्रिया को उपबंधित किया है जबकि वाद की सुनवाई जिस दिन के लिये स्थगित हुई है, यदि उस दिन पक्षकार या उनमें से कोई उपस्थित होने में असफल रहते है तो न्यायालय आदेश 9 व्य.प्र.सं. द्वारा उस निमित्त निर्दिष्ट ढंगों में से एक से वाद का निपटारा करने के लिये अग्रसर हो सकेगा, या ऐसा अन्य आदेश कर सकेगा जो वह ठीक समझे। नियम 3 व्य.प्र.सं. न्यायालय की उस कार्यवाही को इंगित करता है जबकि वाद का कोई ऐसा पक्षकार जिसे समय अनुदत्त किया गया है, अपना साक्ष्य पेश करने में या अपने साक्षियों को हाजिर कराने में या वाद की आगे प्रगति के लिये आवश्यक ऐसा कोई अन्य कार्य करने में जिसके लिये समय अनुज्ञात किया गया है, असफल रहता है वहां न्यायालय ऐसे व्यतिक्रम के होते हुये भी (क) यदि पक्षकार उपस्थित हो तो वाद को तत्क्षण विनिश्चित करने के लिये अग्रसर हो सकेगा, अथवा (ख) यदि पक्षकार या उनमें से कोई अनुपस्थित हो तो नियम 2 व्य.प्र.सं. के अधीन कार्यवाही कर सकेगा।

आदेश 17 व्य.प्र.सं. के उपरोक्त प्रक्रियात्मक उपबंधों के अवलोकन से यह स्पष्ट होता है कि इनका ''वाद की सुनवाई'' से महत्वपूर्ण संबंध है, आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत अपनाई जाने वाली प्रक्रिया के अंतर्गत न्यायालय को आदेश 9 व्य.प्र.सं. में वर्णित प्रावधान के अंतर्गत वाद का निपटारा किया जाना होता हैं, इस प्रकार आदेश 9 एवं आदेश 17 नियम 2 व्य.प्र.सं. एक दूसरे से संबंधित हैं। आदेश 9 व्य.प्र.सं. में भी वाद की सुनवाई का यथास्थान उल्लेख किया गया है, इस प्रकार विषयांतर्गत प्रसंग में विश्लेषण से पूर्व ''वाद की सुनवाई'' को विश्लेषित किया जाना आवश्यक है।

सामान्य अर्थ में सुनवाई का अर्थ सुनवाई की तिथि व विशेष अर्थ में साक्ष्य की तिथि जिसमें कि अंतिम तर्क की तिथि भी सम्मिलित होती है, माना गया है। आदेश 9 व्य.प्र.सं. में सुनवाई शब्द को विस्तृत रूप से बताया गया है, सुनवाई शब्द पर मार्गदर्शक न्याय दृष्टांत *संग्राम सिंह विरूद्ध इलेक्शन ट्रिब्यूनल, ए.आई.आर. 1955 सु.को. पेज 425 व अर्जुन सिंह बनाम महेन्द्र कुमार, ए.आई.आर. 1964*।

सु.को. पेज 937 अवलोकनीय है। इन संदर्भित न्याय दृष्टांतों के आलोक में जब वाद वादप्रश्न के स्थरीकरण हेतु नियत हो तो उसे वाद की प्रथम सुनवाई तिथि माना गया है। आदेश 10 नियम 2 व्य.प्र.सं. के अनुसार न्यायालय वाद की इस प्रथम सुनवाई में पक्षकार की या पक्षकार के साक्षी की मौखिक परीक्षा कर सकता है, तत्पश्चात् यदि आगे कार्यवाही किये जाने योग्य वाद है तब आदेश 18 नियम 2 व्य.प्र.सं. के अनुसार वाद

* बैतूल जिले से प्राप्त मूल लेख की संस्थान द्वारा सारभूत रूप से संपादित किया गया है।

की सुनवाई तिथि पर साक्ष्य अभिलिखित की जावेगी या वह तिथि जिस तिथि के लिये सुनवाई स्थगित की गई हो, पक्षकार अपनी साक्ष्य आरंभ करेंगे। आदेश 20 नियम 1 व्य.प्र.सं. के अनुसार न्यायालय मामले की सुनवाई कर लेने के पश्चात् अर्थात अंतिम तर्क सुने जाने के पश्चात् निर्णय घोषित करेगा, तात्पर्य यह है कि वाद में अंतिम तर्क वाद प्रश्न के स्थिरीकरण हेतु नियत प्रथम सुनवाई तिथि एवं इसके पश्चात् साक्ष्य तिथि व अंतिम तर्क की तिथि को सुनवाई तिथि माना गया है और न्यायालय आदेश 9 व्य.प्र.सं. के अंतर्गत वाद की सुनवाई पर ही आदेश पारित कर सकता है क्योंकि जैसा कि आदेश 9 नियम 3 व्य.प्र.सं. वाद का निरस्त किया जाना या आदेश 9 नियम 6 व्य.प्र.सं. वाद में एकपक्षीय आदेश करना या आदेश 9 नियम 8 व्य.प्र.सं. में वाद निरस्त किया जाना की कार्यवाही है, जब वाद सुनवाई तिथि हेतु नियत होगा तभी संपादित की जा सकती है। यदि वाद किसी अंर्तवर्ती आवेदन पर सुनवाई हेतु नियत है तब दोनों ही पक्षकारों एवं उनके अधिवक्ता की अनुपस्थिति में न्यायालय ऐसे आवेदन का गुण दोषों पर निराकरण करेगा किंतु न्यायालय वाद को खारिज नहीं करेगा क्योंकि अंर्तवर्ती आवेदन की सुनवाई की तिथि वाद की सुनवाई तिथि के अंतर्गत नहीं आती हैं। *हरदत्त विरूद्ध सत्यनारायण 1959 एम.पी.एल.जे. नोट 191* में माननीय उच्च न्यायालय द्वारा अभिमत प्रकट किया है कि लिखित कथन में संशोधन हेतु प्रस्तुत आदेश के जवाब के लिये नियत दिनांक को वादी की अनुपस्थिति पर वाद इस कारण से निरस्त नहीं किया जा सकता। न्यायालय चाहे तो स्वीकार कर सकती है। *जानकी बाई बनाम जानकीदास 1952, एन.एल.जे. नोट 221* में मत व्यक्त किया है कि अंतरवर्तीय आदेश के लिये नियत तिथि पर वादी की अनुपस्थिति पर आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत वाद निरस्त नहीं किया जा सकता क्योंकि उक्त स्थिति में उक्त प्रावधान आकर्षित नहीं होते हैं।

अतएव जब वाद सुनवाई तिथि हेतु नियत हो तभी न्यायालय को आदेश 9 व्य.प्र.सं. के प्रावधान के अंतर्गत प्रक्रिया अपनाई जानी होती हैं।

आदेश 17 नियम 2 व्य.प्र.सं. का प्रत्यक्ष संबंध आदेश 9 व्य.प्र.सं. से हैं। जब वाद की सुनवाई स्थगित तिथि पर नियत है और उस दिन पक्षकार उपस्थित नहीं होते हैं तो न्यायालय आदेश 9 व्य.प्र.सं. के अधीन आदेश पारित करता हैं या तो वाद खारिज किया जा सकता है व प्रतिवादी की अनुपस्थिति में एक पक्षीय डिक्री पारित की जा सकती है, न्यायालय के समक्ष प्रतिवादी की अनुपस्थिति में आदेश 17 नियम 2 व्य.प्र.सं. के अधीन कार्यवाही करने के अलावा कोई विकल्प नहीं हैं, यदि पक्षकारों में से कोई एक अनुपस्थित रहता है तो न्यायालय को आदेश 9 व्य.प्र.सं. के अधीन दिये गये तरीकों में से किसी एक के अनुसार कार्यवाही करनी चाहिए। इस प्रकार आदेश 17 नियम 2 व्य.प्र.सं. उन परिस्थितियों में लागू होते है जबकि वाद में सुनवाई जिस तिथि के लिये नियत है अर्थात पूर्व तिथि पर वाद का स्थगित होना आवश्यक है, और उस तिथि पर पक्षकार उपस्थित नहीं होता हैं किंतु नियम 3 व्य.प्र.सं. लागू होने के लिये की तीन परिस्थितियां महत्वपूर्ण है (अ) वाद की कार्यवाही किसी पक्षकार के निवेदन पर किसी कार्य के संपादन हेतु बढ़ाई गई हो, (ब) वह कार्यवाही करने में पक्षकार विफल रहा हो, (स) न्यायालय में वह पक्षकार पेशी तारीख को उपस्थित हो। यदि न्यायालय द्वारा वाद स्वेच्छया से स्थगित किया गया है और सुनवाई तिथि स्थगित की गई है और उस तिथि पर वादी अभिभाषक निर्देश नहीं व्यक्त करते है तब उस स्थिति में यदि वाद खारिज किया जाता है तब नियम 3 व्य.प्र.सं. के अंतर्गत कार्यवाही नहीं मानी जावेगी। यदि वादी साक्ष्य समाप्त होने के पश्चात् प्रकरण प्रतिवादी साक्ष्य हेतु नियत हुआ है, प्रतिवादी उपस्थित नहीं है, उसके अधिवक्ता उपस्थित होकर कोई निर्देश नहीं है व्यक्त करते है तब उस स्थिति में न्यायालय को आदेश 17 नियम 3 व्य.प्र.सं. के अधीन आदेश पारित नहीं करना चाहिए क्योंकि पूर्व में

प्रकरण प्रतिवादी की प्रार्थना पर स्थगित नहीं हुआ था, ऐसे मामले में आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत आदेश पारित होगा।

वाद की सुनवाई जिस दिन के लिये स्थगित हुई है उस तिथि पर यदि पक्षकार या उनमें से कोई अनुपस्थित होता है, चाहे उसके अधिवक्ता उपस्थित रहे तब उस स्थिति में आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत ही आदेश पारित किया जावेगा। *मोहनदास व अन्य बनाम घिसियाबाई व अन्य ए.आई.आर. 2002 एस.सी. पेज 2436* में माननीय सर्वोच्च न्यायालय द्वारा पक्षकार के अनुपस्थित रहने पर अधिवक्ता की उपस्थिति को पक्षकार की उपस्थिति नहीं माना, इस मामले में वादी साक्ष्य के प्रक्रम पर वादी अधिवक्ता द्वारा अंर्तवर्ती आवेदन प्रस्तुत किये गये, जो न्यायालय द्वारा निरस्त किये गये, वादी व साक्षी उपस्थित नहीं थे, इन परिस्थितियों में माननीय सर्वोच्च न्यायालय द्वारा आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत कार्यवाही किये जाने को विधि सम्मत माना हैं। *सेन्ट्रल बैंक ऑफ इण्डिया बनाम मेसर्स अरिस्तन, 2005 (2) एम.पी.जे.आर. 186* में माननीय उच्च न्यायालय द्वारा पक्षकार के उपस्थित न होने पर अधिवक्ता द्वारा मामले में स्थगन चाहा गया, जिससे इंकार किया गया तब उस स्थिति में मामला आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत माना गया, न कि नियम 3 व्य.प्र.सं. के अंतर्गत। *सिद्धू बनाम गोरेलाल 2000 (2), एम.पी. विकली नोट 37, भूरी बाई बनाम लक्ष्मीबाई 1995 म.प्र. लॉ जर्नल 13, रानी इंटरप्राइजेस बनाम स्टेट बैंक ऑफ इण्डिया 1997 (2) म.प्र. लॉ जर्नल 89* में भी यही विधिक स्थिति को स्पष्ट किया है कि जब वाद में अधिवक्ता द्वारा उपस्थित होकर कार्यवाही में स्थगन चाहा गया, तब यह नहीं माना गया कि अधिवक्ता ने वाद की प्रगति की अग्रसरता में कोई कदम उठाया था और यह नहीं माना जा सकता कि ऐसी सुनवाई के समय वादी उपस्थित था। परिणामतः मामला आदेश 17 नियम 3 व्य.प्र.सं. से आच्छादित नहीं होगा। *स्टेट बैंक ऑफ इण्डिया बनाम नंदराम 1999 (1) म.प्र. लॉ जर्नल 719* में माननीय उच्च न्यायालय द्वारा अधिवक्ता की उपस्थिति व आदेश 17 नियम 3 व्य.प्र.सं. की प्रयोज्यता के संदर्भ में अभिमत प्रकट किया है कि वाद की प्रगति के लिये पक्षकार को समय प्रदान किया जाना चाहिए, इस हेतु पक्षकार द्वारा चूक की गई हो और संबंधित पक्ष न्यायालय में उपस्थित हो तब नियम 3 व्य.प्र.सं. के उपबंध लागू होते हैं यदि ऐसी स्थगित की गई दिनांक पर पक्षकार न्यायालय में उपस्थित नहीं हो और अधिवक्ता मात्र स्थगन चाहने के लिये उपस्थित हो तो ऐसी परिस्थिति में पक्षकार की उपस्थिति आदेश 17 नियम 3 व्य.प्र.सं. के अंतर्गत नहीं मानी जा सकती हैं। *नवीनतम न्याय दृष्टांत में माननीय उच्च न्यायालय द्वारा राजकुमार पटेल बनाम शिवराज सिंह चौहान आई.एल.आर. 2009 एम.पी. पेज 3063* में जो कि चुनाव याचिका का मामला था, जबकि निर्वाचन याचिका में सुनवाई की पूर्ववर्ती तारीख पर याची को अपनी साक्ष्य अभिलिखित करने हेतु अंतिम अवसर प्रदान किया गया था, किंतु पुनः स्थगन आवेदन प्रस्तुत किया गया, ऐसी परिस्थिति में आदेश 17 नियम 2 व्य.प्र.सं. के अंतर्गत अपनाई जाने वाली प्रक्रिया को मान्य किया गया।

रामराव बनाम शांतिबाई 1977 एम.पी.एल.जे., पेज 364 (पूर्ण पीठ) माननीय उच्च न्यायालय द्वारा मामले में अधिवक्ता की उपस्थिति की भिन्न–भिन्न परिस्थितियों के संदर्भ में विस्तृत रूप से विवेचना की गई है जो कि इस प्रकार है :–

a. When a suit is called for hearing, party's counsel appears and seeks adjournment but when adjournment is refused, he retires saying that he has no instructions because he was instructed by his client to ask for an adjournment only and not to proceed with the trial if adjournment was refused, it will be no appearance of the party and Rule 2 of Order 17 CPC would be attracted. However, in such a case the defaulting party must show 'sufficient cause' for non-appearance as well as for not fully instructing the counsel.

b. When a suit is called for hearing, party's counsel appears and seeks adjournment so that he may prepare himself and on his own, seeks adjournment, it will be no appearance of the party and Rule 2 of Order 17 CPC alone would be attracted.

c. When a case is called on for hearing, the counsel appears (without making any request for adjournment) merely to inform the Court that he has no instructions and, therefore, would not appear, it will be no appearance of the party and Rule 2 of Order 17 CPC alone would be attracted.

d. When the plaintiff had not been asked to do something and he did not appear when the case was called for hearing or when the plaintiff was asked to do something which he did not do, nor did he appear when the case was called for hearing, Order 17 Rule 2 CPC would be attracted and an application under Order 9 Rule 9 CPC would lie for setting aside the dismissal of a suit.

e. When defendant had not been asked to do something and he did not appear and the Court decided the suit on the basis of the existing material without or after taking any further evidence on record, or when the defendant had been asked to do something which he did not do, nor appeared when the case was called for hearing and the Court decided the suit on the existing material without taking any further evidence for the plaintiff, or when the defendant was asked to do something which he did not do and did not appear when the case was called for hearing and therefore, on the same day, the Court took on record ex-parte evidence produced by the plaintiff, or when the defendant was asked to do something which he did not do, nor appeared when the case was called for hearing and the trial Court adjourned the hearing for recording plaintiff's evidence ex-parte and on the next date, after recording plaintiff's ex-parte evidence, passed an ex-parte decree against him, the provisions of Order 17 Rule 2 CPC would be attracted and the defendant could apply under Order 9 Rule 13 CPC for setting aside an ex-parte decree.

The aforesaid discussion makes it clear that when the Court records non-appearance of the parties or any of them at the time of hearing of the case, the Court is required to follow the further course as prescribed under Order 17 Rules 2 and 3 of CPC. In this regard, the provision of Order 17 Rule 3 (b) of CPC and amendment of Madhya Pradesh in Order 17 Rule 3 CPC should also be kept in mind. According to these provisions where there is default under Order 17 Rule 3 CPC as well as default of non-appearance under Order 17 Rule 2 of CPC, the Court will proceed under Order 17 Rule 2 of CPC. It means in case of default of non-appearance of parties, the Court has to follow the further course as prescribed under Order 17 Rule 2 of CPC.

Now let us see what options are available to the Court under Order 17 Rule 2 of CPC? This provision permits the Court to adopt any of the modes provided under Order 9 of CPC or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear.

The explanation to Rule 2 of Order 17 of CPC is in the nature of an exception to the general power given under the rule, conferring discretion on the Court to act under the specified circumstances i.e. where evidence or substantive portion of evidence of any party has been already recorded and such party failed to appear on the day to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. The power conferred is permissive and not mandatory. The explanation to Rule 2 of Order 17 of CPC is in the nature of deeming provision when under given circumstances, the absentee party is deemed to be present. The crucial expression in the explanation is 'where the evidence or the substantial portion of the evidence of the party'. There is positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record such satisfaction in that perspective. [See *Prakash Chander v. Janki Manchanda, AIR 1987 SC 42* and *B. Jankiramiah Chetty v. A.K. Parthasarthy, AIR 2003 SC 3527*]

इस प्रकार उपरोक्त विधिक स्थिति से स्पष्ट है कि वाद की सुनवाई जिस दिन के लिये स्थगित हुई है यदि पक्षकार या उनमें से कोई उपस्थित नहीं होता है और उनके अधिवक्ता उपस्थित रहे तब यह परिस्थिति आदेश 17 नियम 2 व्य.प्र.सं. की परिधि में आती है क्योंकि अधिवक्ता की उपस्थिति को पक्षकार की उपस्थिति ऐसी सुनवाई तिथि पर नहीं मानी गई है। ऐसी स्थिति में न्यायालय आदेश 9 व्य.प्र.सं. के अंतर्गत कार्यवाही करने के लिये अग्रसर हो सकेगा या अन्य ऐसा आदेश पारित करेगा जो वह उचित समझे अर्थात जहां किसी पक्षकार का साक्ष्य या साक्ष्य का पर्याप्त भाग पहले ही अभिलिखित किया जा चुका है और ऐसा पक्षकार किसी ऐसे दिन जिस दिन के लिये वाद की सुनवाई स्थगित की गई है, उपसंजात होने में असफल रहता है वहाँ न्यायालय स्वविवेकानुसार उस मामले में इस प्रकार अग्रसर हो सकेगा मानो ऐसा पक्षकार उपस्थित हो।

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MEANING AND IMPORT OF EXPRESSIONS DEBT AND SECURITY IN THE CONTEXT OF PART X OF INDIAN SUCCESSION ACT, 1925

Judicial Officers
District Sehore

The Indian Succession Act, 1925 (for short 'the Act') has been enacted for consolidating the law applicable to intestate and testamentary succession. It repealed various Acts relating to succession, including the Succession Certificates Act, 1889. The relevant provisions of the Succession Certificates Act find place in Part X and Section 214 of 'the Act'. The Provisions contained in Part X of 'the Act' are there to facilitate the collection of debts on succession and afford protection to parties paying debts to the representatives of deceased persons. A succession certificate is effective throughout India. A payment made on the basis of the succession certificate affords full indemnity to the person making payment, provided such payment is made in good faith. (See – *Sharda Chopra and Others v. State Bank Of India, AIR 1997 M.P. 196*) Section 374 of 'the Act' prescribes the contents of a succession certificate.

An application for a succession certificate is to set forth the particulars mentioned in the Section 372 of 'the Act'. The important particulars are those mentioned in Clause (f) of Sub-Section (1) of Section 372 being "the debts and securities in respect of which the certificate is applied for." The position that a succession certificate can be issued only in respect of a debt or security is further reinforced from the wording of Sub-section (3) of Section 372 which says that an application for a succession certificate can be made in respect of any debt or debts due to a deceased creditor or in respect of portions there of. Thus, a cumulative reading of Section 214, 370 and 372 of the Act, particularly, Clause (f) of Sub-section (1) of Section 372 of the Act, will show that a succession certificate can be applied for and granted only in respect of debts and securities.

Courts very often come across the questions as to whether a suit for a particular relief is a suit for a 'debt' of 'security' within the meaning of Section 214 of 'the Act' so as to necessitate the obtaining of a probate or letters and administration or a succession certificates before a decree can be passed in favour of the plaintiff. Therefore, it becomes necessary to ascertain the true legal meaning and purport of expressions 'debt' and 'security' as used in Section 214, 370 and 372 of 'the Act'.

Expression "Security" has been defined in Sub-section 2 of Section 370 of 'the Act', but expression "Debt" has not been defined in Part X of the Act, though an exclusive definition is to be found in Section 214(2) of 'the Act'. The said expression has also not be defined in General Clauses Act, therefore, its connotation has to be examined and explored in the light of judicial pronouncements.

Securities:

As regards 'security', Sub-section 2 of Section 370 of 'the Act' enumerates various securities envisaged therein. They are as under:

(a) any promissory-note, debenture, stock or other security of the Central Government or of a State Government;

(b) any bond, debenture, or annuity charged by Act of Parliament (of the United Kingdom) on the revenues of India;

(c) any stock or debenture of, or share in, a company or other incorporated institution;

(d) any debenture or other security for money issued by, or on behalf of, a local authority;

(e) any other security which the (State Government) may, by notification in the Official Gazette, declare to be a security for the purposes of Part X of 'the Act'.

The definition being quite elaborate and exhaustive, hardly there may arise any problem in deciding as to whether a particular property is held as security within the meaning of section 370 of 'the Act' or not. However, a lot of controversy has been there in respect of the pledged articles and articles kept in bank locker.

Pledged Articles Whether Security?

Succession Certificate can be granted under S. 372 of 'the Act' in respect of a debt of a Security. Interpreting S.370 of 'the Act', which defines 'security' as any pronote, debenture, stock of debenture or share in a company etc. Orissa High Court held in *Branch Manager, S. B. I. Puri Branch v. Satyaban Pathal, AIR 1989 Ori. 236* that articles pledged with the bank do not come within any of the categories mentioned above and as such, gold articles pledged with the Bank cannot be held as securities and hence, in such a case the question of obtaining a succession certificate does not arise. In *Branch Manager, State Bank of Hyderabad v. G.R.B. Viswanadh Raju, AIR 1993 A.P. 337,* a loan of Rs. 8000/- was borrowed from the bank. The borrower died having executed a registered will bequeathing his immoveable and moveable properties to the plaintiff who filed suit to recover the pledged gold jewellery with the bank after discharging the principal together with interest. However, the bank did not return the gold articles and demanded a succession Certificate. It was held that the bank is not a debtor of the deceased and that pledged articles are not a security as contemplated under S. 370 of 'the Act'. Therefore, the question of submitting a probate or letters of administration or a succession certificate does not arise.

Articles Kept In Bank Locker:

Regarding articles kept in bank locker and their return on the death of the hirer to the person claiming under him, the provisions of Section 45 of the Banking Regulation act, 1949 are apposite which are as under;

45-F. Notice of claims of other persons regarding safety lockers not receivable.-

No notice of the claims of any person, other than hirer or hirers of a locker, shall be receivable by a banking company nor shall the banking company be bound by any such notice even though expressly given to it;

Provided that where any decree, order, certificate or other authority from a court of competent jurisdiction relating to the locker or its contents is produced before the banking company, the banking company shall take due note of such decree, order, certificate or other authority.

After scanning through various judicial pronouncements dealing with the issue as well as considering the effect of Section 45-F of the Banking Regulation Act, 1949 it has been laid down in *Sharda Chopra and Others v. State Bank of India* (supra) that the requirements to have a succession certificate *vis-à-vis* the articles lying in a bank's locker is not envisaged by Section 370 of the Indian Succession Act because the same are not kept by the bank as security and in such a case execution of indemnity bound will be sufficient. It was pointed out that cases may arise where there is a serious dispute as to who should represent that estate of the deceased. In such a case, the bank would be within its right to contend that letter of administration is necessary. Taking similar view it was held in *State Bank of India v. Netai Ch. Pore, AIR 1982 CAL. 92* that ornaments kept in safe deposit locker in the Bank, not being a debt or a security within meaning of Sec. 370, a succession certificate cannot be granted in respect thereof.

Security Money Under Leases Agrement:

In *Budhwant Kaur v. Rawat Singh, AIR 1988 Raj. 1,* mines were taken on lease by the deceased, Rule 14 of Rajasthan Minor Mineral Concession Rules, 1977 required lease to deposit one fourth of deed rent as security in cash or in form of National Saving Certificates, etc. Security has to be deposited for enjoying rights in mining leases. It was held, the deposit under the lease did come under the definition of security under S. 370, therefore, succession certificate could be issued in respect of such securities.

Debt :

Following questions may arise regarding the meaning and connotation of word 'debt' as used in section 370 of 'the Act' –

- What are the elements of debt: as the whether the amount payable should be certain or contingent, whether it should be liquidated or un-liquidated.
- Whether the definition of the words "debt" as given in Section 214 (2) of 'the Act', exhaustively conveys the meaning of expression 'debt'?

- Whether 'the Act' is a fiscal statute, therefore, the word 'debt' used in Part X must be given a strict interpretation or a liberal interpretation, being the widest dictionary meaning.
- Whether it includes claims covered in tort, or those forming the basis for a cause of action in equity.
- Whether it includes damages for breach of covenant;
- Whether it includes goods, which one person is bound to return to another, or services which one person is bound to perform for the benefit of another, and anything due under any form of obligation or promise;
- Whether it includes any thing had or held of or from another, his property or right;

The Definition:

The definition of the word 'debt' given in Section 214 (2) of the Act, is as under:

> Section 214(2)- The Word 'debt' in: Sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

The expression used in Section 214(2) is – "includes any debt except" and not 'means', therefore, instead of being a definition or description of expression 'debt' it simply enumerates what is not included within 'debt'. The obvious question, therefore, may be what is included within the expression 'debt'; and whether obligation of every kind must be held to be a debt, except those expressly excluded by the definition, namely – rents, revenue or profits payable in respect of land used for agricultural purposes.

Before pondering over the expanse of the language used in the definition 'debt' it may be useful to keep in mind the words of the P.N. Bhagwati J. to the effect that – 'language is at best an imperfect medium of expression and a variety of meanings may often lie in a work or expression. The exact colour and shape of the meaning of any word or expression should not be ascertained by reading it in isolation, but it should be read structurally and in its context, for its meaning may vary with its contextual setting. (See: *Union of India v. Raman Iron Foundry, 1974 AIR SC 1265*). Therefore, it is but necessary to find out the contextual meaning and purport of word 'debt' as used in Section 370 of 'the Act'.

The Dictionary Meaning Of 'Debt':

According to Webster's Third New International Dictionary, word 'debt' is- "....something (as money, goods, or services) owed by one person to another (a mortgage debt): something that one person is bound to pay to another or perform for his benefit: something owed...: the common-law action for the

recovery of a certain specified sum of money held to be due or, of a sum that can be simply and certainly ascertained called also action of debt."

The Concise Oxford Dictionary defines word 'debt' as meaning "Money, goods, or service, owing". Murray's English Dictionary defines the word 'debt' inter alia as meaning "That which is owed or due; anything (as money, goods, or service) which one person is under obligation to pay or render to another: a sum of money or a material thing."

As per West's Encyclopedia of American Law, (IInd Edition), a debt is a sum of money that is owed or due to be paid because of an express agreement; a specified sum of money that one person is obligated to pay and that another has the legal right to collect or receive. In a still more general sense, that which is due from one person to another, whether money, goods, or services, In a broad sense, any duty to respond to another in money, labor, or service; it may even mean a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total some of the existing claims against a person or company.

According to Nol's Plain-English Law Dictionary, 'debt' is a sum of money due by certain and express agreement. In a less technical sense, it means a claim for money, In a still more enlarged sense, it denotes any kind of a just demand; such as the debts of a bankrupt. Debts arise or are proved by matter of record, as judgment debts; by bonds or specialties; and by simple contracts, where the quantity is fixed and specific, and does not depend upon any future valuation to settle it.

Definition-Judicial Pronouncements:

In *Dina Nath v. Balkrishna, AIR 1963 All 46,* the Court was inclined to take the liberal view where under even the goods have been included within expression 'debt'. In this case the petitioner applied for return of certain cash and ornaments, which were found on the person of petitioner's deceased aunt and were taken possession of by the district authorities. The Authorities demanded from the petitioner a succession certificate. The petitioner's application seeking succession certificate was, however, dismissed in respect of the ornaments. In revision, directing the issue of certificate the Allahabad High Court was pleased to observe that what is ordinarily understood by the word 'debt' is a liability owing from one person to another whether in cash or kind, secured or unsecured, whether ascertained or ascertainable, arising out of any obligation, express, or implied. The Court was of the view that having regard to the wide definition of the word 'debt' it will appear that the refund of the ornaments, recovered from the person of the dead lady, became an obligation on the authorities to hand over the same or their value to rightful claimant of the deceased and for it an application for a succession certificate could be made in law and should not have been refused.

However, a note of disagreement with the aforesaid view was expressed by the Bombay High Court in *Ranchhoddas Govinddas Banatwala, (1976) 78 Bom.L.R. 219.* "A comprehensive analysis and discussion about meaning and legal import of word 'debt' in the light of various dictionary definitions and judicial pronouncements is found in this case. Referring to definition of 'DEBT' in Corpus Juris Secundum"[Vol. 26 (PP.1 to 17)] it has been observed in the aforesaid case that in American Jurisprudence the word 'debt' has acquired a technical meaning as being an ascertained or specific sum of money. The position under the English jurisprudence and under the jurisprudence of our country is the same. There is no well-known law lexicon or book on the judicial interpretation of words and phrases which gives a contrary meaning to the word 'debt', and apart from the Allahabad case of *Dina Nath* (Supra) not a single decision is there to indicate that movable property other than a specific or ascertained or liquidated sum of money has ever been considered a debt at law or in legal language. The Court also referred to the discussion under the heading 'DEBT' in Vol. 2 of Stroud's Judicial Dictionary, fourth edn., pp. 696 to 699, highlighting that in England the word 'debt' has never been held to mean anything else but a specific or a liquidated sum of money.

In this regard reference may be made to the view expressed by the Calcutta High Court in *Assam Bengal Railway Company v. Atul Chandra, AIR 1937 Cal. 314 and by the Patna High Court in Shyam Sundari Devi v. Sarti Devi, AIR 1962 Pat. 220* wherein it was held that succession certificate is not to be granted qua articles which are laying in the locker of a bank. The Madhya Pradesh High Court in *Sharad Chopra* case (supra) showing disagreement with the view taken by the Allahabad High Court in *Deenanath* (supra), opined that the view taken by the Calcutta and Patna High Courts is not only correct but a just view.

The meaning of the word 'debt' also came to be considered by the apex Court, though in a different context, in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central) Calcutta, AIR 1966 SC 1370,* Wherein it was observed as under :

> "We have briefly noticed the judgment cited at the Bar. Therefore is no conflict on the definition of the word 'debt' may take colour from the provisions of the concerned Act, it may have different shades of meaning. But the following definition is unanimously accepted : "a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation *debitum in praesenti, solvendum in futuro"*. The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in *praesenti* or in futuro till the contingency happened. But if there is a debt the fact that the amount is to be ascertainable does not make it any the

> less a debt if the liability is certain and what remains is only the quantification of the amount........."

In *Union of India v. Raman Iron Foundry, 1974 AIR SC 1265,* the apex court while exploring the meaning and purport of expression "Recovery of Sum Due" had an occasion to refer to the concept of expression 'debt'. The court observed that the classical definition of 'debt' is to be found in *Web v. Stenton, [1883] 11 Q.B.D. 518* where Lindley, L.J., said : "a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be *debitum in praesenti, solvendum in futuro* i.e. there must be an existing obligation to pay a sum, of money now or in future."

It was further observed in the aforesaid case that the following passage from the judgment of the Supreme Court of California in *Peole v. Arguello, [1869] 37 Calif. 524* which was approved by the apex Court in *Kesoram Industries v. Commissioner of Wealth Tax, [1966] 2 S.C.R. 688* clearly brings out the essential characteristics of a debt-

> "Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to sum now due and payable, It we wish to distinguish between the two, we say of the former that it is debt owing, and of the latter that it is debt due."

Specific Situations:

Movable property other than a liquidated sum of money:

The question whether movable property other than a liquidated sum of money is a 'debt' as contemplated by part X of the Act, so as to require a the Court to issue a succession certificates in respect thereof was considered in *Ranchhoddas Govinddas Banatwala,* (supra). In this case during her lifetime the deceased pledged gold ornaments with the bank as security for a loan. After the death of the debtor, the petitioner paid off the full amount of the loan along with the interest accrued thereon to the said bank. The bank, however, demanded letters of administration or succession certificate was required in respect of the said gold ornaments. After a detailed analysis it was held that the movable property pledged with the bank, on the debt being discharged is not a 'debt' within the meaning of that term as used in part X of 'the Act' and that the word 'debt' does not include any movable property other than a specific or ascertained or liquidated sum of money.

Immovable property other than a liquidated sum of money:

In *Vishalakshi v. Bank of India, AIR 2006 Ker. 255* a petition was filed praying for succession certificate in respect of certain bank deposits and in respect of 6 cents of landed property with a building thereon. The court disallowed relief in respect of the immovable property. It was held that the trial court was perfectly justified in declining to grant a succession certificate in respect of the immovable property.

Damages for breach of Contract:

Considering the issue as to whether determination of damages by a court for breach of contract is ascertainment of an existing pecuniary liability, *Chagla, C.J. observed in Iron & Hardware (India) Co. v. Firm Shamlal and Brothers, 1954 AIR Bom. 423* that- 'damages are the compensation which a Court of law gives to a party for the injury which he has sustained, But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the part complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is not liability at all upon the defendant.'

Endorsing the aforesaid view it was laid down by the apex Court in *Union of India v. Raman Iron Foundry, AIR 1974 SC 1265,* that the law is well settled that a claim for un-liquidated damages for breach of the contract does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, not does the part complaining of the breach becomes entitled to a debt due from the other party. The Court observed that the only right which the party aggrieved by the breach of the contract has is the right to sue for damages which is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.

However, in *Beena S. Nair, v. P. Rajamma, AIR 2002 Ker. 378,* where two kidneys of husband of the petitioner were removed by hospital authorities with consent of petitioner (wife) and respondent (mother) as price of said organ, an amount of Rs. 2,70,000/- was allowed, it was held that Since kidneys were removed while deceased was alive hence amount of Rs. 2,70,000/- is debt due to deceased and not compensation. Thus petition seeking grant of succession certificate in respect of said amount was allowed.

Sum Payable Under A Money Decree/Award:

In *Narayanaswami Naidu v. Chellammal and Ors., 1970 (2) M.L.J. 633* (Madras) it has been held that Section 214 (2) of the Act does not purport to define the word "debt", but merely states that it includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes. The meaning of the word "debt" has therefore to be ascertained by reference to the judicial decisions. It was observed that the meaning adopted by the Courts

tallies with the ordinary connotation of the word as accepted in public parlance, The word "debt" is defined in Concise Oxford Dictionary as money, goods or services owing. The emphasis is upon the word "Owing" and this necessarily connotes that there must be a pre-existing debt. Repelling the contention that, once a decree or order had been passed for payment of money to the deceased, it was incumbent upon the legal representatives to produce a succession certificate and holding that in view of the provisions of Section 214(2) of the Succession Act the Succession Certificate was necessary only if the decree had been obtained on the basis of a pre-existing debt, the Court observed as follows:

> '......I agree that a plain reading of Section 214 (1) (a) and (b) clearly shows that the intention of the legislature was that a succession certificate was necessary only if a decree had been obtained on the basis of a pre-existing debt. The emphasis throughout is on the word "debt". In my view, in order to attract the provisions of Section 214 (1)(a), a decree must be sought for on a pre-existing debt due to the deceased and the order sought to be executed by the legal representatives must be for the payment of a debt due to the deceased. If the decree is not for the payment of money due prior to the institution of the suit but for damages or compensation for breach of contract or for tort, then the decree would not be one for a debt due to the deceased.'

Money decree would also fall within the definition of 'debt' and accordingly Section 214 (1) (b) of the Act would be attracted. Therefore, the bar created by Section 214 (1) (b) is equally applicable to the execution application instituted by the decree-holder himself and sought to be prosecuted further upon his death by his legal representative who claim to his estate on succession. This view was taken by the Nagpur High Court in *Tejraj Rajmal v. Rampyari, AIR 1938 Nag. 528* which has been followed by the M.P. High Court in *Mathura Prasad v. Ghasiram, 1997 (1) M.P.L.J. 187 and reiterated in Tarabai Jain v. Shivnarayan, 1997 (2) 287. In case of Kariyamma v. Asstt. Commr. and Land Acquisition Officer, AIR 1993 Kant. 321, Basappa v. Siddamma, AIR 1966 Mysore 198 and in Aparti Panda v. Govinda Sahu, AIR 1984 Ori 1,* it has been held that in an execution application by a legal representative a succession certificate is necessary if a debt is to be recovered.

However, money decree is debt but cost alone awarded under decree would not fall within the meaning of debt as lay down by the Andhra Pradesh High Court in *S. Rajyalakshmi v. S. Sitamahalakshmi, AIR 1976 AP 361 and in V.T.V.R. Swamy v. S.R. Gnaneshwar, AIR 1973 A.P. 38.* Therefore, if execution is for recovery of cost alone then the succession certificate is not necessary.

Retiral dues Provident Fund and Insurance Money:

By a catena of cases it is buy now well settled that retrial dues, including provident fund and insurance amount, are debt within the meaning of expression 'debt' used in *Part X of the Act. It was held Lass v. District IVth Upper District Judge, AIR 1999 All. 342* that amount of provident fund as well as insurance money are debts hence heir of deceased employee is entitled to issue of succession certificate in respect thereof. Likewise in *Abdul Karim v. Raheesa Ansari, AIR 1986 Kerela 183* it was held that Legal heirs of deceased who are not nominees under insurance policy, are entitled to succession certificate in respect of insurance amount, as such amount belonged to estate of deceased which vested in the heirs. In *Krishna Pyari Bai Dixit v. Gobind Mishra, AIR 1992 M.P. 145,* where deceased women was in Govt. service, succession certificate was granted in favour of her mother to realize her dues from government. However, as regards the claim for family pension it was held in *Pabitra Mohan Pradhan v. Damayanti Pradhan, AIR 2003 Orrissa 1* that family pension is neither debt nor security hence succession certificate is not necessary to receive it.

Compensation in Tort & Land Acquisition Cases :

In *Smt. Rukhsana v. Smt. Nazrunnisha, 2000 AIR SCW 4941* the apex Court held that the succession certificate as "envisaged under the Indian Succession Act was only granted in respect of "debt" or securities" to which the deceased was entitled. The compensation awarded under the Motor Vehicles Act was not a debt, therefore, a succession certificate was not required to be obtained in order to claim the compensation awarded under the motor vehicles Act. Similarly, it was held in *Chitrapu Chinabapanaiah v. Union of India, AIR 2004 A.P. 413* that claim amount awarded Under Railway Claims Tribunal Act, 1987 as compensation to individual in the train accident can never be treated as debt or security, therefore, no succession certificate can be issued in relation to amount awarded as compensation to deceased-claimant.

As regards compensation in land acquisition cases, in *Ramkali v. State of U.P., AIR 2007 All. 8* it was held that amount of compensation awarded under Land Acquisition Act is not a debt as contemplated under Section 214 of the Act and therefore, claimants are not required to furnish succession certificate for claiming amount of compensation.

In the case of *Resilikutty Chacko v. State of Kerala, AIR 1999 Kerala 56* it has been held that compensation amount payable under the Land Acquisition Act is not a 'debt' within the meaning of S. 214(2), therefore, production of succession certificate is not necessary.

Charge:

In the case of *T. Rama Seshagiri Rao v. N. Kamalakumari, AIR 1982 A.P. 107* and *Mahadev Ratarekar v. Sita Ram, AIR 1991 Raj. 97,* it has been held that a charge can be created by act of parties or by operation of law, in which case,

it will be a charge within the meaning of S.100 of the T.P. Act. It cannot be disputed that, in order to enforce such a charge, no succession certificate is necessary. If so, the mere fact that a charge is created by a decree of a Court cannot make any difference in principle, When a person is trying to execute a maintenance decree with a charge, he is really trying to enforce a charge, He is not trying to recover a debt within the meaning of S. 214 of the Succession Act. If so there is no need for him to obtain a Succession Certificate (AIR 1952 Nag 88 relied on).

Compromise decree:

In *Rani Pravabati v. Saileshnath, AIR 1978 Cal 147,* when a decree was passed in an administration suit in terms of orders passed on compromise, in execution proceeding in respect of claims against an executor, S.214 was held not applicable, Similarly, in *H.V. Veerabhadraiah v. H. S. Kanteeravachar, AIR 2001 Kant. 171* proof of representative title of legal heirs of deceased decree-holder has been held to a condition precedent for execution of decree for payment of debt. But not for a decree for delivery of possession of land passed in terms of compromise as it is not a decree for recovery of debt. Hence succession certificate is not required in the later case.

Mortgage:

In *Bankimchandra v. Vishnuprasad, AIR 1973 Guj. 78* held that non production of probate by legal representatives of mortgagee does not bar a suit for sale as the decree in the suit cannot be one against a debtor for payment of debt within the meaning of S. 214 of the Act. In *Aysha Beevi v. Abdul Karim, AIR 1972 Kerala 64* also it has been held that succession certificate or probate is not necessary for mortgagee's legal representatives for filing a suit to recover the mortgage money by sale of the charged property since "debt" in the provision does not include such decree.

Dividend:

In *Viyyumma v. Official Liquidator, AIR 1999 Kerala 190* succession certificate was held necessary in matter for payment of dividend in a claim by heirs of deceased to Official Liquidator and production of mere a certificate from a Tehsildar certifying that claimants are wife and children of deceased held not a substituted for succession certificate or certificates from Administrator General.

To sum up, a succession certificate is issued to a claimant only in those cases, where the claim pertains to debts, and securities. The above discussion endeavourers to examine and explain that though the expressions 'debt' and 'security' as used in Part X of 'the Act' are of wide import but their have been used, Every time when a question is posed before the court in this respect a judicious approach has to be made after pondering over the facts of the case in the light of the legal position explored above on the basis of various judicial pronouncements.

MEANING AND SCOPE OF THE WORDS "OFFENCE IS ALLEGED TO HAVE BEEN COMMITTED IN OR IN RELATION TO ANY PROCEEDING IN ANY COURT AND IN RESPECT OF A DOCUMENT PRODUCED IN ANY COURT" OCCURRING IN SECTION 195(1) (b) (i) & (ii) OF CR.P.C.

Judicial Officers
District Dhar

Introduction :

Section 190 Cr.P.C. provides that a Magistrate may take cognizance of any offence – (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Section 195 Cr.P.C. is a sort of exception to this general provision and creates an embargo upon the power of the Court to take cognizance of certain types of offences enumerated therein. Broadly, Section 195 Cr.P.C. deals with three distinct categories of offences which have been described in clauses (a), (b) (i) and (b)(ii) and they relate to (1) contempt of lawful authority of public servants, (2) offences against public justice, and (3) offences relating to documents given in evidence.

Section 195 (1) (b)(i) refers to offences under Sections 193 to196 (both inclusive) 199, 200, 205 to 211 (both inclusive) and 228 and requires the complaint in writing of the Court before whom the offence is alleged to have been committed in or in relation to any proceeding in any Court. Section 195 (1) (b) (ii) relates to offences under Sections 463, 471, 475 or 476 when the offence is committed by a party to any proceeding in any Court in respect of a document produced or given in evidence, in such proceeding a complaint in writing by the Court is required. Chapter XI of the Indian Penal Code relates to false evidence and offences against public justice. In cases of offence such as under Sections 463, 471, 475 or 476 alleged to have been committed by a party in a proceeding in any Court in respect of a document produced or given in evidence in such proceeding, the complaint in writing by such Court is required. The policy behind the bar for institution of criminal proceedings by a private party is that when offences are committed against lawful authority or false evidence given or offence committed against public justice, it should be the concerned authority that should prefer a complaint and no one else.

As a general rule, any person having knowledge of the commission of an offence may set the law in motion by a complaint even though he is not a person interested in or affected by the offence. To this general rule, Section 195 (1) CrPC provides an exception and forbids cognizance being taken of the offence referred there in except where there is a complaint in writing of that Court or by such officer of the Court as that Court may authorize in writing in

* The article received from District Dhar has been substantially edited by the Institute.

this behalf or of some other Court to which that Court is subordinate. The object of these provisions are to preserve purity of the administration of justice.

The relevant portion of Section 195 (1) (b) of Criminal Procedure Code, 1973 is as under:

> "*195. Prosecution for contempt of lawful authority of public servants, for offence against public justice and for offences relating to documents given in evidence* – (1) No Court shall take cognizance –
>
> (a) x x x
>
> (b)(i)of any offence punishable under any of the following sections of the Indian Penal Code, 1860 (45 of 1860), namely, Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or
>
> (ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or
>
> (iii) of any criminal conspiracy to commit or, attempt to commit, or the abatement of any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or by such officer of the Court as that Court may authorize in writing in this behalf, or of some other Court to which that Court is subordinate".

Purpose and Object :

The purpose and object of the legislature in creating the bar against cognizance of private complaints in regard to the offences mentioned in Section 195 (1) (b) and (c) [new section 195 (1) (b) (i) and (ii)] is both to save the accused person from vexatious or baseless prosecutions inspired by feelings of vindictiveness on the part of the private complainants to harass their opponents and also to avoid confusion which is likely to arise on account of conflicts between findings of the Courts in which forged documents are produced, false evidence is led and the conclusions of the criminal Courts dealing with the private complaint. It is for this reason as suggested earlier, that the legislature has entrusted the Court, whose proceedings had been the target of the offence of perjury to consider the expediency in the larger public interest of a criminal trial of the guilty party. This section is aimed at giving protection to parties and witnesses, against vexatious or frivolous prosecutions for their resorting to Courts and giving evidence therein and such protection is afforded by prescribing the necessity of a complaint by the Court in or in relation to whose proceedings the offence is alleged to have been committed, or in whose proceedings the

document in respect of which the offence is alleged to have been committed is produced or given in evidence. (See: *Patel Laljibhai Somabhai v. The State of Gujarat, AIR 1971 SC 1935*)

Complaint only in the interest of justice:

Section 195 (1) CrPC empowers the concerned Court or other authorized persons to file complaint as prescribed for the offences enumerated therein. But the procedure for filing such complaint is given in Section 340 CrPC which reads as under:

"**340. Procedure in cases mentioned in Section 195. –** (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, –

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the First Class having jurisdiction:

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this Section shall be signed, –

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint ;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorize in writing in this behalf.

(4) In this section, "Court" has the same meaning as in Section 195."

In view of the language used in Section 340 CrPC, the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. [See *Iqbal Singh Marwah and another v. Meenakshi Marwah and another, AIR 2005 SC 2119*]

In *Meera Bai & anr. v. State of M.P., I.L.R. (2009) M.P. 2443* our own High Court also has held that the enquiry as contemplated in Section 340 of the Code of Criminal Procedure is an enquiry by the trial Court itself for reassuring that the offence which appears to have been committed is in or in relation to the proceeding in that Court. Recording a finding by the trial Court regarding commission of the offence is a condition precedent to the prosecution. Sometimes, in many cases lack of truthfulness may be noticed in the evidence of witnesses, but it would not call for their prosecution in all the cases. It must be a prima facie case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for the charge.

On main topic:

The principal controversy in this given topic revolves around the expression "when such offence is alleged to have been committed in or in relation to any proceeding in any Court or in respect of a document produced or given in evidence in a proceeding in any Court" occurring in clause (b) (i) and (ii) of sub-section (1) of Section 195 Cr.P.C.

For grasping the meaning of phrases given in topic, meaning of important words occurring in the phrases has to be understood.

"Any Proceedings"- Cl. (b) (i) & (ii).

Under the present Code both under this section and Section. 340, the complaint can only be by a Court in respect of an offence specified in Cls. (b) (i)

and (ii) when it is committed in, or in relation to any proceeding before such Court. [See: *Kamla Prasad Singh v. Hari Nath Singh and another, AIR 1968 SC 19*]

In *Kamalapati Trivedi v. State of W.B., AIR 1979 SC 777* the 3-Judge Bench of the Apex Court has observed that while deciding the question of bail, therefore, a Magistrate must be held to be acting as a Court and not in any other capacity, irrespective of the stage which the case has reached by then, that is, whether it is still under investigation by the police or has progressed to the stage of an inquiry or trial by the Magistrate. The taking of a cognizance of any offence by a Magistrate under Section 190 is not a condition precedent for him to be regarded as a Court. An order of bail passed by a Magistrate also decides the rights of the State and the accused and is made by the Magistrate after the application of his mind and therefore in the discharge of his judicial duties, which factor constitutes it an act of a Court.

A Magistrate while passing an order releasing an accused person on bail or discharging him in pursuance of a report submitted by the police to the effect that the evidence was insufficient to sustain the charge, acts judicially and therefore is a 'Court' within the meaning of that term as used in Cl. (b) of sub-section (1) of Section 195 of the Code. Hence, the offence under Section 211 of the I. P. C. which is the subject matter of the complaint can be said to have been committed "in relation to" those proceedings. Both the orders resulted directly from the information lodged with the police against the accused and in this situation there is no getting out of the conclusion that the said offence must be regarded as one committed in relation to those proceedings.

The proceeding need not be a judicial one provided it is that of a Court. An officer who has been appointed as a 'Court' and has also an executive capacity, and acts in his executive capacity is not a "Court" at all and this Section or Section 340 does not apply to an offence committed in or in relation to a proceeding before him in such capacity. Where there are no proceedings in Court, the provisions of Cl. (b) (i) and (ii) do not apply.

"Court", meaning of:

In *Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin, AIR 1988 SC 2267*, the Apex Court has taken into consideration the entire judicial precedent available till the date of the judgment and came to a conclusion upon reliance of the Madhya Pradesh High Court judgment in *Puhupram v. State of Madhya Pradesh, 1968 MPLJ 629* that the same lays down the correct law. The Court observed :

> "36. .... The least that is required of a Court is the capacity to deliver a 'definitive judgment', and merely because the procedure adopted by it is of a legal character and it has power to administer an oath will not impart to it the status of a Court. That being so, it must be held that a Commission of Inquiry appointed by the appropriate Government under Section 3(1) of the Commissions of Inquiry Act is not a Court for the purposes of Section 195 of the Code."

In *Manoharlal v. Vinesh Anand, AIR 2001 SC 1820,* the Apex Court has observed that the clear language of Section 195(3) Cr.P.C. unmistakably depict the restrictive intent of the legislature and if the intent was otherwise to include Arbitral Tribunal within the fold of Section 195 (3) of the Code, that is to say, if the legislature wanted to confer such a status there was no difficulty as such in incorporating thereunder a provision as is contained in a Debt Recovery Act (vide Section 22): Income Tax Act (vide Section 136): Motor Vehicles Act (vide Section 169(2): Administrative Tribunals Act (vide Section 22 (3): Consumer Protection Act: M.R.T.P. Act: Companies Act etc. Since these statutes have definitely included and declared the Tribunal being ascribed to be a 'Court' within the meaning of Section 195 of the Criminal Procedure Code. The inclusion of explanatory provision by way of sub-section (3) makes the situation abundantly clear.

Two tests should be applied in order to see whether a particular officer is a 'Court', and they are –

(i) authority to take evidence on oath; and

(ii) authority to give justice, i.e., to give a final decision in the matter.

The word 'Court' in the Criminal Procedure Code certainly has a wider meaning than the words "Court of justice" as defined in the Penal Code.

In *Balkrishna v. Madhusudan and others, 2005 (4) MPLJ 127,* our High Court has held that:

> "Section 340 to be read with Section 195 (3), Criminal Procedure Code in clause (b) of Sub-section (1) the term 'Court' means a Civil, Revenue or Criminal Court, and includes a tribunal considered by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this Section".

[Also see – *Jagannath Prasad and another v. State of U.P., AIR 1963 SC 416*]

In *State of A.P. v. Sarma Rao, AIR 2007 SC 137* it has been held that 'Courts' to mean only those Courts as described under Section 195 (3) of the Code. Section 195 (3) of Criminal Procedure Code broadly divides the Courts into Civil, Revenue and Criminal as also a Tribunal constituted by or under a Central, Provincial or State Act. If a statute constitutes such Tribunal and declares it to be a Court for the purport of the said Section, Section 195 of the Criminal Procedure Code shall apply. It is, thus, the presiding officers of those forums only, which are specified under sub-section (3) of Section 195 of the Criminal Procedure Code, may file a complaint petition in relation to the offence punishable under the sections specified in Section 195 (1) (b) of the CrPC.

When a question arises as to whether an authority created by an Act is a 'Court' as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court.

"In relation to any proceeding," meaning of :-

To attract the applicability of Cl. (b), an offence, if not alleged to be committed in a proceeding in Court must at least be in relation to the proceeding in Court. If the offence is not committed in a judicial proceeding, then it will fall outside Section 195 (1) (b), which applies only when it is committed in or in relation to a proceeding in Court, and there is in consequence no bar to a complaint being made in respect thereof unaffected by the restrictions contained in Section 195 (1) (b). (See – *Virindar Kumar Satyawadi v. The State of Punjab, AIR 1956 SC 153*)

Cognizance of only such offences is barred under Section 195 (b) (ii) which are alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court.

In *State of U.P. v. Suresh Chandra Shrivastava, AIR 1984 SC 1108,* the Apex Court has observed that it is well settled that where the accused commits some offences which are separate and distinct from those contained in Section 195 CrPC, Section 195 will affect only the offences mentioned therein unless such offences form an integral part so as to amount to offences committed as a part of the same transaction, in which case the other offences would also fall within the ambit of Section 195 CrPC. [Also see – *K.A. Kuttiah v. The Federal Bank Ltd., Ernakulam and Ors., 2006 Cri LJ 3541*]

The expression "in relation to" occurring in Section 195 (I)(b) (corresponding to Section 195 (I)(b)(ii) of the Code of 1973) means a "nexus". Thus, where X makes a complaint against B for an offence under Section 211 Penal Code for making a false complaint against X, there is a nexus between the two proceedings. [See *Baburam and another v. Ram Nath And another, 1977 Cri LJ (NOC) 173*]

In *State of Maharashtra v. Sk. Bannu and Shankar, [AIR 1981 SC 22] = 1980 Cri.L.J. 1280* the Apex Court has also included bail proceedings under the term "in or in relation to a proceeding in that Court".

"In respect of a document produced or given in evidence in a proceeding in any Court"

Section 195(I)(b)(ii), Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court.

In *Budhu Ram v. State of Rajasthan, 1963 (2) Cri L J 698,* the 3-Judge Bench of the Apex Court has observed that a complaint by the Court is required where the offence is of forging or of using as genuine any document which is known or believed to be a forged document when such document is produced or given in evidence in Court. It is only when the forged document is produced in Court then a complaint by the Court is required. Where, however, what is produced before the Court is not the forged document itself, S.195 (1) (c) [new S.195(1) (b) (i)] will not apply on its terms.

In *Sushil Kumar and others v. State of Haryana, AIR 1988 SC 419* again the Apex Court has reiterated the above principles and has held that without the production of original Partnership Deed forged by the accused, cognizance of offence on the basis of its copy could not be taken by the Court as sub-section (1)(b)(ii) of Section 195 of the Code lays down that no Court shall take cognizance of any offence described in the sections mentioned therein when such offence is alleged to have been committed in respect of "a document produced or given in evidence in a proceeding in any Court.

Interpreting similar language of the corresponding provision in the earlier Criminal Procedure Code of 1898, the Privy Council in *Sanmukhsingh v. The King, AIR 1950 PC 31 : (1950 (51) Cri LJ 651)*, observed that by production of a copy of the allegedly forged document, it cannot be said that the document itself was given in evidence. Accordingly, the Court held that the document alleged to have been forged was not in the present case produced in the Court and hence, provisions of Section 195(1)(b)(ii) of the Code have no application. [See *Sushil Kumar's case* (supra)]

The term "produced" has been held to mean produced for the purpose of being tendered in evidence or for some other purpose. (See – *Nirmaljit Singh Hoon v. The State of W.B. and others, AIR 1972 SC 2639*)

The Constitution Bench of the Apex Court in *Iqbal Singh Marwah case* (supra) has finally set at rest the controversy involved in this context by its earlier two conflicting views in *Surjit Singh v. Balbir Singh, AIR 1996 SC 1592* and *Sachidanand Singh v. State of Bihar, AIR 1998 SC 1121,* by accepting the view taken in *Sachidanand case* (supra) and observed that:

> "The expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in a Court" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the Court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in Court, does not appear to be in tune with clauses (a) (i) and (b)(i) and consequently with the scheme of Section 195 Cr.P.C. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court.
>
> Section 195(1) mandates a complaint in writing of the Court for taking cognizance of the offences enumerated in clauses (b)(i) and (b)(ii) thereof. Sections 340 and 341, Cr.P.C. which occur in Chapter XXVI give the procedure for filing of the

complaint and other matters connected therewith. The heading of this Chapter is - 'Provisions As to Offences Affecting The Administration of Justice'. Though, as a general rule, the language employed in a heading cannot be used to give a different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning, but they are not to be treated as if they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the Sections which immediately follow them, as a preamble to a statute may be looked to explain its enactments, but as affording a better key to the constructions of the Sections which follow them than might be afforded by a mere preamble. (See Craies on Statute Law, 7th Ed. Pages 207, 209). The fact that the procedure for filing a complaint by Court has been provided in Chapter XXVI dealing with offences affecting administration of justice, is a clear pointer of the legislative intent that the offence committed should be of such type which directly affects the administration of justice, viz., which is committed after the document is produced or given in evidence in Court. Any offence committed with respect to a document at a time prior to its production or giving in evidence in Court cannot, strictly speaking, be said to be an offence affecting the administration of justice."

The Apex Court finally held that Section 195(1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in *custodia legis*.

Conclusion:

Thus it is abundantly clear from the above discussion that for attracting the provision contained in Section 195 (b) (1) (i) the commission of offences as shown in this sub-section must be in or in relation to any proceeding in a Court and for attracting the provisions of Section 195 (b) (1) (ii) the offence of forgery and other offences as shown in the sub-section must be committed after its production or giving in evidence in a proceeding i.e. during the time when the document was in *custodia legis* in a Court and if forgery etc is committed prior to its production in a Court then the bar contained in Section 195 (1) (b) (ii) CrPC is not applicable and complaint by private person will be maintainable with regard to such an offence.

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किसी मूर्ति या देवता के स्वामित्व की सम्पत्ति पर प्रतिकूल आधिपत्य के आधार पर स्वत्व अर्जन संबंधी विधिक स्थिति

न्यायिक अधिकारीगण
जिला गुना एवं देवास

भारत वैयक्तिक (personal) विधि की विविधता का देश है। हर धार्मिक सम्प्रदाय अपनी पृथक वैयक्तिक विधि द्वारा शासित होता है। हिन्दुओं पर हिन्दु विधि मुसलमानों पर मुस्लिम विधि, ईसाइयों पर ईसाई विधि, पारसियों पर पारसी विधि व यहूदियों पर यहूदी विधि लागू होती है। लगभग प्रत्येक सम्प्रदाय की वैयक्तिक विधि में कुछ न कुछ धार्मिक अंश विद्यमान हैं। मूर्ति या देवता की प्रतिस्थापना व उनके द्वारा सम्पत्ति रखने का संप्रत्य (concept) वैयक्तिक विधि में विद्यमान इसी धार्मिक अंश का प्रभाव है। मूर्ति या देवता के स्वामित्व की सम्पत्ति के सम्बंध में मुख्यतः हिन्दु विधि में उपबंध हैं।

मूर्तिपूजा के प्रारम्भ के साथ–साथ ही मूर्ति की स्थापना और मन्दिरों के सृजन के लिए सम्पत्ति का समर्पण आरम्भ हुआ। इस कृत्य को विधिक समर्थन धार्मिक और पुण्यार्थ उद्‌देश्य के लिए हिन्दुओं की दान परम्परा से प्राप्त हुआ। वैदिक युग से आज तक हिन्दु इष्ट और पूर्त के लिए दान देते रहे हैं। इष्ट से तात्पर्य वैदिक यज्ञ और अनुष्ठान से संलग्न दान और पूर्त से तात्पर्य अन्य धार्मिक और पुण्यार्थ कृत्यों के लिए दान। आध्यात्मिक ज्ञान और साधना का प्रवर्तन करने, किसी मत या शाखा के विद्वान्तों को सुदृढ़ करने व प्रचार करने व आध्यात्मिक शिक्षकों और साधुओं के निवास स्थल हेतु मठों की स्थापना भी की गई। मठों के अस्तित्व में आने से मठों को भी सम्पत्ति का समर्पण होने लगा।

मूर्ति या देवता को सम्पत्ति का समर्पण व विधिक व्यक्ति की हैसियत

धार्मिक और पुण्यार्थ विन्यासों (Religious and charitable endowments), मठों व मन्दिर या मूर्ति के विन्यासों की स्थापना के लिए सम्पत्ति का समर्पण आवश्यक है। समर्पण के लिए दो तत्व – प्रथम, संकल्प अर्थात् सम्पत्ति को विन्यास के लिए देने की इच्छा और द्वितीय उत्सर्ग अर्थात् सम्पत्ति में स्वामित्व का परित्याग, आवश्यक है। समर्पण का अनुष्ठान संकल्प लेने से आरम्भ होता है। संकल्प इस बात का प्रतीक है कि सम्पत्ति के स्वामी ने सम्पत्ति को विन्यास में देने की दृढ़ इच्छा कर ली है। यह इस तथ्य का लौकिक प्रकटीकरण है। उत्सर्ग से तात्पर्य है कि विन्यासकर्ता ने सम्पत्ति में अपने स्वामित्व का त्यजन कर दिया है। उत्सर्ग द्वारा दान पूर्ण हो जाता है। इस प्रकार विन्यासकर्ता के अर्थात् संकल्प व उत्सर्ग द्वारा सम्पत्ति का स्वामित्व देवता या मूर्ति, मठ में निहित हो जाती है।

वर्तमान हिन्दु विधि में मूर्ति या देवता में सम्पत्ति के समर्पण के लिए संकल्प, उत्सर्ग और प्रतिष्ठा के अनुष्ठान सम्पन्न करना आवश्यक नहीं है। संकल्प और उत्सर्ग विन्यासकर्ता के विन्यास बनाने की इच्छा के द्योतक हैं। यह आवश्यक है कि विन्यासकर्ता की विन्यास बनाने की इच्छा स्पष्ट होनी चाहिए, उसका प्रकटीकरण किसी भी रूप में क्यों न हो। यदि यह स्थापित होता है कि विन्यास बनाने की इच्छा थी और उसने सम्पत्ति में अपने स्वमित्व का त्यजन कर दिया है तो विन्यास की संरचना हो जायेगी, अनुष्ठानों के पूर्ण न होने मात्र से विन्यास शून्य नहीं होगा। दूसरी ओर यदि यह स्थापित्त हो जाय कि विन्यास बनाने की कोई इच्छा थी ही नहीं तो

विन्यास स्थापित नहीं होगा। (देखें *देवकी नंदन बनाम मुरलीधर एवं अन्य ए.आई.आर. 1957 एस.सी. 133*)

देवोत्तर में सम्पत्ति का समर्पण मूर्ति को नहीं किया जाता है बल्कि उस देवी या देवता को जिसकी मूर्ति मन्दिर में स्थापित होती है, को होता है। देवी या देवता को समर्पित सम्पत्ति का स्वामित्व मूर्ति या देवता में निहित होता है। मूर्ति या देवता को इस हेतु विधिक व्यक्ति (juristic person) माना जाता है। ऐसा विधिक व्यक्ति जो विधि की दृष्टि में समस्त मामलों में संव्यवहार करने की क्षमता रखता है। वह वाद दायर कर सकता है व उसके विरूद्ध वाद दायर भी किया जा सकता है। मन्दिर के शेबायत, प्रबंधक या मठ के महंत में सम्पत्ति निहित नहीं होती है, लेकिन मन्दिर मठ या धार्मिक संस्था की कार्यवाही को व्यवहारिक रूप वह नैसर्गिक व्यक्ति देता है जो मूर्ति या मन्दिर का प्रबंधक है। देवता की ओर से यही प्रबंधक सब कार्य, व्यापार या संव्यवहार उसी भांति करता है जैसे संरक्षक अव्यस्क की ओर से करता है परंतु इसका तात्पर्य यह नहीं है कि मूर्ति अंततः अव्यस्क है (देखें *जोगेन्द्र नाथ नसकर बनाम कमिश्नर आफ इन्कम टैक्स ए.आई.आर. 1969 एस.सी. 1089*)

विश्वनाथ विरूद्ध ठाकुर राधा वल्लभी ए.आई.आर. 1967 एस.सी. 1044 में माननीय उच्चतम् न्यायालय द्वारा यह अभिनिश्चित किया गया है, कि –

> "(1) An idol is a juristic person in whom the title to the properties of the endowment vests. But it is only in an ideal sense that the idol is the owner. It has to act through human agency, and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its behalf. The personality of the idol might, therefore, be said to be merged in that of the Shebait.
>
> (2) Where, however, the Shebait refuses to act for the idol, or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol. The law accordingly recognizes a right in persons interested in the endowment to take proceedings on behalf of the idol."

विधिक व्यक्ति होने के लिए मूर्ति किसी देवता की होनी चाहिए। देवी देवता की हर मूर्ति विधिक व्यक्ति नहीं मानी जाती है। मूर्ति को विधिक व्यक्ति मानने के लिए वह किसी लोक स्थान में स्थापित होनी चाहिए व उसे लोक मूर्ति होनी चाहिए। तात्पर्य यह कि मूर्ति प्राइवेट व्यक्ति के स्वत्व की न होकर लोक हित की होनी चाहिए। माननीय उच्चतम न्यायालय ने न्याय दृष्टांत *शिरोमणि गुरूद्वारा प्रबंधक कमेटी अमृतसर बनाम श्री सोमनाथ, ए.आई.आर. 2000 एस.सी. 1421* में विधिक व्यक्ति के संप्रत्य (concept) को स्पष्ट करते हुए मत व्यक्त किया है कि मूर्ति, मठ, मस्जिद, गुरूद्वारा विधिक व्यक्ति माने गये हैं व मूर्ति के विधिक व्यक्ति होने के लिए लोक मूर्ति होकर लोक स्थान में स्थापित होनी चाहिए।

उपरोक्त विवेचन से यह स्पष्ट है कि मूर्ति या देवता एक विधिक व्यक्ति होते हुए अपनी संपत्ति में स्वत्व का अधिकार रखते हैं, परंतु ऐसी संपत्ति का व्यवस्थापन स्वयं उनके द्वारा नहीं किया जाता, बल्कि उनकी ओर से प्राकृतिक व्यक्ति या प्राकृतिक व्यक्तियों की संस्था के द्वारा किया जाता है।

मूर्ति या देवता के विरूद्ध प्रतिकूल कब्जा –

प्रतिकूल आधिपत्य से तात्पर्य है, कि आधिपत्यधारी द्वारा स्पष्ट रूप से या गर्भित रूप से वास्तविक स्वामी के स्वत्व को अस्वीकार करना। जब कोई व्यक्ति किसी दूसरे के स्वत्व की संपत्ति पर बिना उसकी अनुमति से साशय वास्तविक कब्जा कर वास्तविक स्वामी के स्वत्व को इंकार कर कब्जा बनाए रखता है, तो निश्चित समयावधि पश्चात् कब्जाधारी व्यक्ति स्वत्व के अधिकार को प्राप्त कर लेता है। प्रतिकूल कब्जे की अवधारिता करने हेतु वास्तविक आधिपत्य का संपत्ति पर होना जितना आवश्यक है, उतना ही आवश्यक उसे धारित करने वाले की, मनः स्थिति का होना है। जब दोनों तत्व साथ–साथ सक्रिय होंगे, तभी प्रतिकूल कब्जे की स्थिति निर्मित होगी। इनमें से एक तत्व के अभाव में कब्जे की प्रकृति प्रतिकूल नहीं हो सकेगी। अर्थात् कब्जे के संदर्भ में भौतिक और मानसिक दोनों स्थितियों का विद्यमान होना आवश्यक है।

प्रतिकूल आधिपत्य के लिए आवश्यक तत्वों के संदर्भ में *हेमाजी वाघाजु जाट विरूद्ध भीका भाई खेंगरा भाई हरिजन, ए.आई.आर. 2009 सुप्रीम कोर्ट 103* में माननीय उच्चतम न्यायालय द्वारा अभिनिश्चित किया गया है, कि – plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

परिसीमा अधिनियम, 1963 (जिसे आगे अधिनियम कहा जायेगा) की धारा 27 के अनुसार –

किसी व्यक्ति द्वारा किसी सम्पत्ति के कब्जे के लिए वाद संस्थित करने के लिये एतद्द्वारा जो कालावधि परिसीमित की गई है, उसके खत्म होने पर ऐसी सम्पत्ति पर उसका अधिकार समाप्त हो जाएगा।

यह धारा इस सामान्य सिद्धांत का अपवाद है कि म्याद–रोध केवल उपचार का रोध करता है, किसी अधिकार को समाप्त नहीं करता। यह धारा मुख्य विधि की तहत म्याद बीतने पर न केवल उपचार को अवरूद्ध करती है बल्कि सम्पत्ति पर दावेदार के स्वत्व को भी समाप्त कर देती है। सामान्य रूप में परिसीमा विधि एक प्रक्रियात्मक विधि (Procedural law), है मुख्य विधि (substantive law) नहीं है। प्रक्रिया विधि वे अधिकार जो अस्तित्व में नहीं हैं उन्हें जन्म नहीं देती न ही वे अधिकार जिनका अस्तित्व है, उन्हें समाप्त करती है, लेकिन धारा 27 के उक्त उपबंध उक्त सामान्य सिद्धांत के अपवाद हैं। यदि किसी व्यक्ति का किसी सम्पत्ति पर कब्जा नहीं है व उसे उस सम्पत्ति पर कब्जा प्राप्त करने का अधिकार है और वह इस अधिनियम द्वारा निर्धारित अवधि के भीतर वाद संस्थित नहीं करता है, तो विहित अवधि की समाप्ति पर, उक्त सम्पत्ति पर

से उसका अधिकार समाप्त हो जायेगा। सम्पत्ति की मुख्य विशेषता यह होती है कि वह स्वामी के बिना नहीं रहती है इस कारण सम्पत्ति में वादी का स्वत्व समाप्त हो जाने के कारण वह स्वत्व कब्जाधारी में निहित हो जाता है व वह उस सम्पत्ति का स्वामी हो जाता है। विरोधी आधिपत्य के आधार पर स्वत्व प्राप्त करने के मूल इसी धारा में समाहित हैं।

धारा 27 में इस प्रकार का कोई भेद नहीं किया गया कि उक्त उपबंध मूर्ति, मठ, देवता या अन्य धार्मिक संस्था के स्वत्व की सम्पत्ति के बारे में लागू नहीं होगी। इस स्थिति में यदि मूर्ति या देवता की सम्पत्ति में किसी व्यक्ति के द्वारा प्रतिकूल कब्जा कर लिया गया है और मूर्ति या देवता की ओर से विहित समय सीमा में यदि दावा नहीं लाया जाता तो धारा 27 के अनुसार उस सम्पत्ति में मूर्ति/देवता के अधिकार समाप्त होकर कब्जाधारी में निहित हो जायेंगे।

मूर्ति या देवता के स्वामित्व की सम्पत्ति पर प्रतिकूल आधिपत्य के आधार पर स्वत्व अर्जन की विधिक स्थिति समझने के लिए निम्नलिखित तीन परिस्थितियों पर विचार किया जाना अपेक्षित है –

(1) (अ) मूर्ति के प्रबंधक या शेवाइत, महंत आदि या उनके विधिक प्रतिनिधियों के संबंध में

(ब) मूर्ति के प्रबंधक या शेवाइत महंत आदि के समुनुदेशितियों (Assignees), (जो मूल्यवान प्रतिफलार्थ समुनुदेशिती) के संबंध में

(2) अन्य व्यक्तियों के द्वारा मूर्ति की सम्पत्ति में कब्जा किए जाने की परिस्थिति में

(1) (अ) एवं (ब) मूर्ति या देवता के शेबायत, प्रबंधक या महंत आदि के द्वारा प्रतिकूल कब्जे के संबंध में –

इस संबंध में परिसीमा अधिनियम 1963 की धारा 10 के प्रावधान सुसंगत है जो इस प्रकार है –

> ''एतत्पूर्व अन्तर्विष्ट किसी बात के होते हुए भी किसी ऐसे व्यक्ति के खिलाफ जिसमें कोई सम्पत्ति किसी यथोल्लिखित प्रयोजन के लिए न्यास के रूप में निहित की गई है, या उसके वैध प्रतिनिधियों या समनुदेशितियों के खिलाफ, जो मूल्यवान प्रतिफल के लिए समुदेशिती नहीं हैं, उसके या उनके हाथों में ऐसी सम्पत्ति या उसके आगमों का पीछा करने के लिए, या ऐसी सम्पत्ति या उसके आगमों के लेखे के लिए कोई वाद समय की दीर्घता से वर्जित न होगा''।
>
> स्पष्टीकरण :–
>
> ''इस धारा के प्रयोजनार्थ हिन्दु, मुसलमान या बौद्ध धार्मिक या पूर्त धर्मस्व में समाविष्ट किसी सम्पत्ति के बारे में इस धारा के प्रयोजनों के लिए यह समझा जायेगा कि वह यथोल्लिखित प्रयोजन के लिए न्यास में निहित सम्पत्ति है और सम्पत्ति का प्रबंधन उसका न्यासधारी समझा जायेगा''।

उक्त स्पष्टीकरण से यह स्पष्ट है कि धारा 10 के उक्त उपबंध मूर्ति या देवता की सम्पत्ति का व्ययन /अंतरण किये जाने की परिस्थिति में लागू होंगे। यदि मूर्ति की सम्पत्ति शेबायत या प्रबंधक के द्वारा बिना

प्रतिफल के अंतरित की गई है, जैसे दान दी गई है, वहां ऐसी सम्पत्ति को वापस प्राप्त करने के लिए वाद समय की दीर्घता से वर्जित नहीं होगा। वाद अंतरण के बाद कभी भी संस्थित किया जा सकता है, इसके लिए कोई मर्यादा काल विहित नहीं हैं। अंतरती जिसने अंतरित की गई सम्पत्ति पर कब्जा प्राप्त कर लिया है प्रतिकूल आधिपत्य के आधार पर स्वत्व प्राप्त होने का अभिवाक नहीं ले सकता है। बिना प्रतिफल के अंतरण होने के कारण अंतरती उसी सीमा तक उत्तरदायी होते हैं जहां तक न्यासधारी या उसका विधिक प्रतिनिधि उत्तरदायी होता है। धारा 10 का यह विधिक प्रभाव यह भी है कि मूर्ति के न्यासधारी /प्रबंधक के विरूद्ध मूर्ति की सम्पत्ति के लिए वाद कभी भी लाया जा सकता है व वह समय की दीर्घता से वर्जित नहीं होता है।

अधिनियम की धारा 10 के ऊपर उल्लिखित उपबंधों से यह स्पष्ट है कि न्यासधारी तथा उनके वैध प्रतिनिधियों के खिलाफ न्यास की सम्पत्ति के बावत वाद, समय की दीर्घता से वर्जित नहीं होगा। अर्थात् न्यास में हितकारी हित रखने वाला व्यक्ति उस न्यास के प्रवर्तन के लिए परिसीमा विधि द्वारा बिना किसी रोध के, चाहे जितने समय बाद ऐसे न्यासधारियों के विरूद्ध वाद प्रस्तुत कर सकता है। धारा 10 में दी गई व्याख्या से यह स्पष्ट है कि उक्त उपबंध धार्मिक या पूर्त धर्मस्व में समाहित सम्पत्ति के बारे में भी लागू होते हैं। इस प्रकार यदि मूर्ति के प्रबंधन या शेबायत जिनकी प्रास्थिति (Status) न्यासी की ही होती है, मूर्ति में निहित सम्पत्ति को हड़प लिया है या अवैध कब्जा बनाये है, उससे उस सम्पत्ति का कब्जा प्राप्त करने के लिए मूर्ति की ओर से कभी भी वाद संस्थित किया जा सकता है। उसके लिए मर्यादा का कोई रोध नहीं है। मर्यादा का प्रश्न वही उठा सकता है जिसको वह प्राप्त हो। मूर्ति के प्रबंधक को म्याद की अवधि प्राप्त नहीं है इसलिए वह म्याद का प्रश्न नहीं उठा सकता है। उक्त उपबंध का प्रभाव यह है कि मूर्ति के प्रबंधक, शेबायत प्रतिकूल आधिपत्य के आधार पर मूर्ति की किसी सम्पत्ति में स्वत्व का दावा नहीं कर सकता है।

यदि कोई व्यक्ति विश्वास पर आश्रित हैसियत (in a fiduciary capacity) में या चाहे एक नौकर के रूप में किसी चल या अचल सम्पत्ति का कब्जा प्राप्त करता है तो वह इसी हैसियत से उस सम्पत्ति पर हमेशा काबिज माना जाता है। वह उस व्यक्ति के हक या हितों को कभी भी चुनौती नहीं दे सकता न ही उस सम्पत्ति पर अपना हक स्थापित कर सकता है। वह सम्पत्ति के स्वामी के विरूद्ध अपना हक स्थापित करने से विबंधित (estopped) रहता है। मूर्ति के प्रबंधक भी मूर्ति की ओर से मूर्ति की सम्पत्ति में वैश्वासिक हैसियत से कब्जा रखते है व उनकी हैसियत मूर्ति के नौकर की होती है इसलिए वह सम्पत्ति पर मूर्ति के स्वत्व को अस्वीकार करके विरोधी कब्जा के आधार पर अपना हक व स्वत्व स्थापित नहीं कर सकते है। वे मूर्ति का स्वत्व इंकार करने से विबंधित है। (देखें *बलराम चुन्नीलाल बनाम दुर्गालाल शिवनारायण, ए.आई.आर. 1968 एम.पी. 81* खण्डपीठ)।

माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत *श्री ईश्वर श्रीधर जिव बनाम सुशीला बाला देसाई एवं अन्य, ए.आई.आर. 1954 एस.सी. 69* में निर्धारित किया है –

> "If a shebait by acting contrary to the terms of his appointment or in breach of his duty is such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is

> dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interest of the idol, his possession of the dedicated property in the possession of the idol whose sevait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession of the property against the idol. No shebait can, so long as he continued to be the sevait, ever claim adverse possession against the idol."

न्याय दृष्टांत *मोहम्मद शाह बनाम फसीहुद्दीन अंसारी, ए.आई.आर. 1956 एस.सी. 713* में माननीय उच्चतम न्यायालय के तीन न्यायाधीशों की पीठ ने मस्जिद/वक्फ की सम्पत्ति पर मुतवल्ली के कब्जे को स्पष्ट करते हुए निर्णय के पैरा 53 में अभिनिर्धारित किया है –

> "It is true that a stranger to the trust could have encroached on the trust estate and would in course of time have acquired a title by advese possession. But a Mutwalli cannot take up such a position.
>
> Both Gulab Shah and the defendant have described themselves Mutwallis of the mosque ...., and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends."

इस प्रकार मूर्ति या देवता में निहित सम्पत्ति का स्वत्व उसी में निहित रहता है। महंत, शेबायत, प्रबंधन आदि में मूर्ति की सम्पत्ति निहित नहीं होती है। वे केवल प्रबंधक के रूप में सम्पत्ति की देखरेख व संरक्षण करते हैं।

(2) अन्य व्यक्तियों द्वारा मूर्ति या देवता की सम्पत्ति में कब्जा किए जाने पर प्रतिकूल आधिपत्य –

अधिनियम के अनुच्छेद 65 के अनुसार –

स्वत्व के आधार पर स्थावर सम्पत्ति या उसमें किसी हित के कब्जे के लिए कोई वाद जब प्रतिवादी का कब्जा वादी के प्रतिकूल हो जाय, से 12 वर्ष की अवधि में पेश किया जा सकता है।

उक्त अनुच्छेद में कब्जे का प्रतिकूल होना लेख किया गया है लेकिन अधिनियम में प्रतिकूल कब्जा को परिभाषित नहीं किया गया है न ही इस बावत् उपबंध किए गये है कि कब प्रतिवादी का कब्जा वादी के प्रतिकूल हो जाता है। प्रतिकूल कब्जा निर्णय विधि में परिभाषित किया गया है। लेकिन प्रतिकूल कब्जा के साथ कब्जे की विधि शास्त्रीय संकल्पना का उल्लेख किया जाना सुसंगत है।

विधि शास्त्र के अनुसार कब्जा के लिए दो आवश्यक तत्व हैं – प्रथम, कार्पस (corpus) व द्वितीय, एनिमस (animus)। कार्पस से तात्पर्य किसी सम्पत्ति में व्यक्ति के वास्तविक एवं अनन्य भौतिक नियंत्रण से है। यह सम्पत्ति पर किसी व्यक्ति के भौतिक कब्जे को प्रकट करता है। एनिमस मानसिक तत्व है जिससे सम्पत्ति पर अनन्य रूप से कब्जा बनाये रखने का कब्जाधारी का आशय व इच्छा प्रकट होती है। यह तत्व सम्पत्ति से दूसरे व्यक्ति को बेदखल करके सम्पत्ति पर नियंत्रण व अधिभोग बनाये रखने का द्योतक है। एनिमस दूसरे व्यक्तियों को सम्पत्ति में कब्जा करने से विरत करता है। इस प्रकार एनिमस एवं कार्पस अर्थात् भौतिक एवं मानसिक दोनों तत्वों से सम्पत्ति पर वयक्ति का विधिक कब्जा निर्मित होता हैं इस प्रकार कब्जा से आशय सम्पत्ति में अनन्य रूप से भौतिक नियंत्रण होने के साथ उस पर कब्जा को एक अधिकार के रूप में बनाये रखने का आशय भी स्पष्ट होना चाहिए।

प्रतिकूल आधिपत्य में कब्जे के मूल तत्वों एनिमस व कार्पस का मौजूद होना आवश्यक है। इसके साथ ही सम्पत्ति के वास्तविक स्वामी के स्वत्व को इंकार करते हुए खुद को उस सम्पत्ति का स्वामी मानते हुए कब्जाधारी का कब्जा होना चाहिए। विरोधी आधिपत्य के लिए विवादित सम्पत्ति में दूसरे व्यक्ति का कब्जा अनन्य, खुलेआम, निरंतर एवं विरोधात्मक होना चाहिए। यह कब्जा सम्पत्ति के स्वामी सहित अन्य की जानकारी में होना चाहिए।

जहां प्रश्न मूर्ति या देवता के स्वामित्व की सम्पत्ति पर प्रतिकूल आधिपत्य से संबंधित है, तो प्रतिकूल आधिपत्य से संबंधित वाद सम्पत्ति के वास्तविक स्वामी के विरूद्ध ही संभव है, वास्तविक स्वामी से भिन्न व्यक्ति के विरूद्ध तदविषयक वाद संभव नहीं है। जब सम्पत्ति की वास्तविक स्वामी मूर्ति है, उसका विधिक अस्तित्व है, उसे न्यायिक व्यक्ति होने की मान्यता प्रदान की गयी है, वह अपने प्रतिनिधियों (मैनेजर या व्यवस्थापक, कस्टोडियन, ट्रस्टी, पुजारी सेवायत इत्यादि) के माध्यम से संपत्ति का दान प्राप्त कर सकती है, संपत्ति पर नियंत्रण रख सकती है, संपत्ति संबंधी संव्यवहार कर सकती है, वह सम्पत्ति संबंधी स्वत्व धारण करने में समर्थ है, तब मूर्ति भी अपने प्रतिनिधियों के माध्यम से प्रतिकूल आधिपत्य के आधार पर स्वत्व अर्जित कर सकती है। इसी प्रकार मूर्ति की संपत्ति पर भी व्यक्ति (Stranger) द्वारा प्रतिकूल आधिपत्य अर्जित किया जा सकता है।

न्याय दृष्टांत *मोहम्मद शाह बनाम फसीहुद्दीन अंसारी, ए.आई.आर. 1956 एस.सी. 173* में माननीय उच्चतम न्यायालय के तीन न्यायाधीशों की पीठ ने मस्जिद/वक्फ की सम्पत्ति परं मुतवल्ली के कब्जे को स्पष्ट करते हुए निर्णय के पैरा 53 में यह भी अभिनिर्धारित किया है –

> "It is true that a stranger to the trust could have encroached on the trust estate and would in course of time have acquired a title by advese possession......"

माननीय उच्चतम न्यायालय ने न्याय दृष्टांत *सारंगदेवा पेरिया मातम बनाम रामास्वामी गोंडर, ए.आई.आर. 1966 एस.सी. 1603* में मठ की सम्पत्ति में प्रतिकूल आधिपत्य के प्रश्न का विनिश्चिय करते हुए अभिनिर्धारित किया है –

> "Under Article 144 of the Indian Limitation Act, 1908 limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it run from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of

the endowed properties. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency .... It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property."

माननीय उच्चतम न्यायालय ने ही विधि दृष्टांत *वल्ली मोहम्मद विरूद्ध रहमत् बी., ए.आई.आर. 1999 सुप्रीम कोर्ट 1136* के निर्णय पैरा 30 में मुल्ला की मुस्लिम विधि (19वां संस्करण, वर्ष 1990) के पैरा 217 का उल्लेख निम्नानुसार किया है–

"Wakf property may be lost by adverse possession of a stranger to the trust,"

इसी प्रकार धारा 10 परिसीमा अधिनियम, 1963 के संदर्भ में उक्त निर्णय के पैरा 33 में स्पष्ट किया है कि वर्ष 1963 के पश्चात् मुतवल्ली या उसके प्रतिफल रहित अन्तरिती को प्रतिकूल कब्जे के आधार पर स्वत्व अधिकार नहीं मिल सकते हैं।

इस प्रकार अप्रत्यक्षतः अजनबी (stranger) व्यक्ति को प्रतिकूल कब्जे के आधार पर वक्फ की सम्पत्ति पर स्वत्व अर्जित हो सकने को स्थापित करता है, जैसा कि मुल्ला के मुस्लिम विधि के उल्लिखित पैरा 217 से भी स्पष्ट है।

मूर्ति या देवता की सम्पत्ति पर प्रतिकूल आधिपत्य के सम्बंध में यह तर्क हो सकता है कि प्रतिकूल आधिपत्य के लिए यह आवश्यक है कि कब्जाधारी का कब्जा सम्पत्ति के स्वामी के ज्ञान में होना चाहिए। जहाँ कब्जे का ज्ञान सम्पत्ति के स्वामी को नहीं होता वहां कब्जा प्रतिकूल नहीं कहा जा सकता। मूर्ति को अवयस्क के समान मानते हैं। अवयस्क को अवयस्कता के कारण प्रतिवादी के कब्जे का ज्ञान होना नहीं कहा जा सकता जिससे मूर्ति के लिए भी कह सकते हैं कि उसकी सम्पत्ति में दूसरे के द्वारा कब्जा किए जाने का ज्ञान विधितः मूर्ति को नहीं है इसलिए मूर्ति के विरूद्ध विपरीत कब्जा का अभिवाक नहीं लिया जा सकता लेकिन यह तर्क सहीं नहीं है। विधिक दृष्टि से मूर्ति को केवल इस कारण अवयस्क माना जाता है क्योंकि मूर्ति की सम्पत्ति का प्रबंधन व रख रखाव आदि मूर्ति या देवता द्वारा खुद नहीं किया जा सकता है। इस हेतु नैसर्गिक व्यक्ति की जरूरत होती हैं लेकिन सम्पत्ति धारण करने, उस पर स्वत्व निहित होने, उसकी सुरक्षा के लिए वाद पेश करने व उसके विरूद्ध वाद पेश किए जाने के कारण मूर्ति को विधिक व्यक्ति मानने पर उसे अवयस्क के समान नहीं माना जा सकता है। मूर्ति के विरूद्ध उसकी सम्पत्ति में कब्जे का ज्ञान मूर्ति का प्रबंधन करने वाले नैसर्गिक व्यक्तियों को होने से यह माना जायेगा कि मूर्ति को भी दूसरे के कब्जे का ज्ञान हो गया। अधिनियम की धारा 6 व 7 में मूर्ति या देवता की इस मानी गई अवयस्कता को विधिक निर्योग्यता (legal disability) जिसके कारण म्याद का चलना रूक जाता है, भी नहीं मानी गई। इसके साथ ही अवयस्क के विरूद्ध भी विरोधी आधिपत्य का अभिभावक् लिया जा सकता है।

न्याय दृष्टांत सेठ *नारायणभाई इच्छाराम कुर्मी एवं अन्य बनाम नर्वदा प्रसाद शिवसहाय पाण्डे एवं अन्य ए.आई.आर. 1941 नागपुर 357* में अवयस्क के सम्बन्ध में प्रतिकूल आधिपत्य को स्पष्ट करते हुए अभिनिर्धारित किया है कि–

> "Minority does not prevent ouster and does not stop the commencement or running of adverse possession. The only privilege which a minor gets is another three years after attaining majority, if the time expires before the three years. Occupation by a minor is not equivalent to possession by him. Strictly speaking, there can be no such thing as possession by minor *qua minor* because he is incapable of having *animus possidendi* and of exercising legal rights of ownership. They are exercised on his behalf by others and the question always is whether they were so exercised or not. If they were, then whether the minor was in occupation or not would be immaterial. So also if there is nobody on the property, the law will then impute possession to the rightful owner. But that is a rule which apply universally and is not special to minor. But if a stranger enters on the land and physically ousts the minor from occupation as well as from possession and set up an adverse title in himself, then time begins to run against the minor from that moment."

माननीय म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत *करणसिंह विरूद्ध म.प्र. शासन, 1994 आर.एन. 72 (म.प्र. उच्च न्याया.)* में यह व्यवस्था अवश्य निर्धारित की गयी थी कि देवता की भूमि पर लंबे समय से आधिपत्य किसी प्रकार का हक प्रदान नहीं करता है, प्रतिकूल कब्जे के आधार पर देवता की भूमि पर स्वत्व अर्जित नहीं किया जा सकता है, क्योंकि देवता सदैव अवयस्क है, परंतु यह न्याय दृष्टांत देवस्थान के पुजारी द्वारा वादी के पूर्वजों को संस्थान की भूमि किराये पर दी जाने संबंधी परिस्थितियों पर आधारित है जिसके संबंध में प्रतिकूल आधिपत्य की संकल्पना लागू नहीं होती है।

इस प्रकार अधिनियम के अनुच्छेद 65 एवं धारा 27 के उपबंधों को एक साथ विचार करने से यह स्पष्ट है कि जब मूर्ति या देवता की सम्पत्ति में प्रतिवादी का कब्जा मूर्ति के प्रतिकूल हो जाता है और उस समय से 12 वर्ष के अंदर मूर्ति या देवता की ओर से मूर्ति की उक्त सम्पत्ति पर कब्जा वापिसी के लिए दावा नहीं किया जाता तो मूर्ति के स्वत्व व हित उस सम्पत्ति से समाप्त हो जाते हैं और वह स्वत्व व हित कब्जाधारी में निहित हो जाने से वह उस सम्पत्ति का स्वामी मान लिया जाता है। कोई मूर्ति या देवता विधिक व्यक्ति के रूप में सम्पत्ति धारण कर सकती है व उस सम्पत्ति का स्वत्व उसमें निहित होता है। मूर्ति के द्वारा या मूर्ति के विरूद्ध वाद लाया जा सकता है। इसका आशय यह है कि मूर्ति के द्वारा मूर्ति के विरूद्ध एक सामान्य व्यक्ति की तरह सम्पत्ति में के अधिकारों के लिए दावा लाया जा सकता है। इस स्थिति में मूर्ति के विधिक प्रतिनिधियों को मूर्ति की सम्पत्ति से बेदखल किए जाने पर उस सम्पत्ति पर कब्जा प्राप्त करने के लिए विहित परिसीमा काल में मूर्ति की ओर से दावा लाना आवश्यक है। इसी प्रकार यदि किसी व्यक्ति को मूर्ति के विरूद्ध वाद हेतुक प्राप्त है तब

उसे भी विधिक कालावधि में दावा लाना *आवश्यक* है। यहां सामान्य व्यक्ति की सम्पत्ति और मूर्ति की सम्पत्ति के बावत कोई अंतर नहीं है। जिस प्रकार सामान्य व्यक्ति की सम्पत्ति में प्रतिकूल आधार पर स्वत्व अर्जित किए जा सकते हैं उसी प्रकार मूर्ति या देवता की सम्पत्ति में भी स्वत्व अर्जित हो सकते हैं।

निष्कर्ष –

उपर्युक्त अनुसार सारतः यह स्पष्ट है कि जहाँ किसी व्यक्ति ने मूर्ति या देवता की सम्पत्ति में अवैध रूप से कब्जा कर लिया है व परिसीमा अधिनियम, 1963 के अनुच्छेद 65 में विहित कालावधि में मूर्ति की ओर से कब्जा वापिसी के लिए दावा नहीं किया गया वहां अधिनियम की धारा 27 के प्रभाव से विरोधी आधिपत्य के आधार पर कब्जाधारी उस सम्पत्ति में स्वत्व प्राप्त कर सकता है। परंतु जहां संपत्तिक विशेष प्रयोजनों के लिये न्यस्त की गई है वहां ऐसे न्यासियों, प्रबंधकों सेवायत महंत आदि या उनके विधिक प्रतिनिधियों या समनुदेशितियों (जो मूल्यवान प्रतिफलार्थ समनुदेशिती न हो) के विरूद्ध परिसीमा अधिनियम की धारा 10 के अनुसार दावा पेश करने की कोई परिसीमा निश्चित न होने से कभी भी उनके विरूद्ध दावा किया जा सकता है और उन्हें प्रतिकूल आधिपत्य के आधार पर सम्पत्ति में स्वत्व प्राप्त नहीं होगा। परिसीमा अधिनियम की धारा 10 व साक्ष्य अधिनियम में उपबंधित विबंधन की विधि के कारण मूर्ति या धार्मिक संस्था के शेबायत, महंत, प्रबंधक या मुत्तवल्ली के विरूद्ध दावा पेश करने के लिए कोई रोध नहीं है। वे मूर्ति या देवता के स्वत्व को इंकार करने से विवंधित हैं इसलिए उनका कब्जा कभी भी मूर्ति के प्रतिकूल नहीं होता है। इसलिए उन्हें प्रतिकूल आधिपत्य के आधार पर मूर्ति या देवता की सम्पत्ति में स्वत्व प्राप्त नहीं होते हैं।

विरोधी आधिपत्य पर नवीन चिंतन

दिये गये बिन्दु पर ऊपर दिये गये निष्कर्ष के साथ विरोधी आधिपत्य के संबंध में माननीय उच्चतम न्यायालय के नवीन मत का उल्लेख करना भी समीचीन है। माननीय उच्चतम न्यायालय ने विरोधी आधिपत्य की वर्तमान विधि को अतार्तिक एवं अनुचित मानते हुये न्याय दृष्टांत *हेमाजी वागाजी जाट विरूद्ध भीकाभाई कंजराभाई हरिजन, ए.आई.आर. 2009 एस.सी.103* में मत व्यक्त किया है कि –

> "The law of adverse possession which ousts an owner on the basis of in action within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who has illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. There is, therefore, an urgent need of fresh look regarding the law of adverse possession. The Union of India is recommended to seriously consider and make suitable change in the law of adverse possession.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

197. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (d) Eviction on the ground of non-user of accommodation – Burden of landlord to prove – It has to be proved that suit accommodation was not used by the tenant "without reasonable cause" – If landlord establishes his claim, the onus shifts on the tenant to establish "reasonable cause" of non-user.

Mazhar Khan and another v. Shyamkishore and others
Judgment dated 13.01.2010 passed by the High Court in Second Appeal No. 207 of 2009, reported in 2010 (3) MPHT 16

Held:

For obtaining decree under Section 12 (1) (d) of the Act a landlord is required to prove that the suit accommodation has not been used by the tenant without reasonable cause for which it was let. A landlord seeking eviction under clause (d) has only to satisfy the Court that he has pleaded and proved the non-user of the accommodation for a continuous period of six months immediately preceding the date of filing of the suit. If the plaintiff establishes his claim, the onus shifts on the tenant to establish that his default which rendered him liable to eviction was condonable by the Court because of a "reasonable cause". It is not necessary for the landlord to plead that the non-user by tenant was "without reasonable cause".

From perusal of the judgment passed by the learned Courts below it is evident that the learned Courts below have not taken into consideration the fact that the appellants are unable to carry on business in the suit accommodation with reasonable cause. In the facts and circumstances of the case, this Court is of the view that the learned Courts below were not justified in not considering the reasonable cause of the appellant No. 1 in not running the business in the suit accommodation due to *malafide* of the respondents who restrained the appellant No. 1 to run his business therefrom. This Court is also of the view that the learned Courts below were not justified in reading the statement of Nandkishore, Exh. D-1, who has stated that he has an objection if the appellant No. 1 construct the shade in the suit accommodation and runs his business. This Court is also of the view that the learned Courts below committed error in misreading the decree passed in Civil Suit No. 110-A/95 whereby the injunction was granted against the respondents. In view of this, appeal filed by the appellants is allowed and the judgment and decree passed by the learned Courts below whereby decree of eviction was passed against the applicants under Section 12 (1) (d) of the Acts is set aside.

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198. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 13 (6)
Striking out defence on account of non-depositing of due rent, effect of – Counter claim for eviction by defendant in plaintiff's suit for declaration and injunction – Plaintiff did not deposit the rent as per Section 13 of the Act – Hence, trial court struck out the defence of the plaintiff – Subsequently, at the stage of recording of evidence, plaintiff not permitted to cross-examine defendant's witness – Held, even if the defence is struck off, other defence under the general law is always available to the tenant – Hence, the tenant has right to cross examine landlord and his witnesses to point out falsity or weakness of the case.

Kiran (Smt.) & Ors. v. Ramesh Gugnani & Ors.
Judgment dated 13.08.2009 passed by the High Court in W.P. No. 3384 of 2009, reported in 2010 (II) MPJR 177 (DB)

Held:

The Apex Court in its judgment in the case *Modula India v. Kamakshya Singh Deo, AIR 1989 SC 162* has held that even if defence under the Accommodation Control Act is struck off, other defence available under the general law is always available to the tenant and therefore, the tenant has right to cross examine and landlord and his witnesses to point out falsity or weakness of the case.

Division Bench of this Court in the case of *Kewal Kumar Sharma v. Satish Chandra Gothi, 1991 JLJ 86,* has held that even if defence available to the tenant under the provisions of the Accommodation Control Act is struck down, still defence which is available to the tenant under the general law is always open.

In such a situation, we find that the trial court has committed jurisdictional error in refusing to grant permission to the present petitioner plaintiff to cross-examine the defendant and his witnesses.

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199. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2(h) and 7
COMPANIES ACT, 1956 – Sections 34 and 149
SPECIFIC RELIEF ACT, 1963 – Section 15
Whether it can be said that there is an arbitration agreement between the parties where one of the parties seeking arbitration is a company which came into existence subsequent to the contract containing the arbitration agreement? Held, No – Parties to the agreement must be person in existence – The scope of Section 15 of Specific Relief Act is different.

Andhra Pradesh Tourism Development Corporation & Anr. v. M/s. Pampa Hotels Ltd.
Judgment dated 20.04.2010 passed by the Supreme Court in Civil Appeal No. 3272 of 2007, reported in AIR 2010 SC 1806

Held:

Section 34 (2) of the Companies Act, provides that from the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of memorandum and other persons as may from time to time be members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the function of an incorporated company. Section 149 of Companies Act provides that the company can commence business from the date certified by Registrar. Section 7 of 1996 Act defines an arbitration agreement as an agreement by the parties to submit to arbitration. The word 'party' is defined in Section 2 (h) of the 1996 Act as a party to an arbitration agreement. An agreement has to be between two or more persons. Therefore, if one of the two parties to the arbitration agreement was not in existence when the contract was made then obviously there was no contract and if there was no contract there is no question of a clause in such contract being an arbitration agreement between the parties. Thus where a company which was a party to arbitration agreement was issued a certificate of incorporation only on date subsequent to the agreement the agreement was not between two persons who are in existence and was not therefore an arbitration agreement.

It is evident from Section 15 (h) of Specific Relief Act that if the lease agreement and the management agreement had been entered into by the promoters of the company stating that they are entering into the contract for the purpose of the company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the incorporation of the company, the agreement would have been valid; and the terms regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters of Pampa Hotels Ltd., on behalf of a company proposed to be incorporated by them, but by a non-existing company claiming to be an existing company. This clearly shows that there is o arbitration agreement between the respondent (applicant in the application under section 11 of the Act) and APTDC against whom such agreement is sought to be enforced.

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200. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 and 37
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17
Amendment application under Order 6 Rule 17 CPC filed to incorporate additional grounds for setting aside arbitral award under Section 34 filed after expiry of limitation under Section 34 (3) – Bar under Section 34 of Arbitration and Conciliation Act would not invariably be applicable to such amendment in the interest of justice.

State of Maharashtra v. Hindustan Construction Company Limited

Judgment dated 01.04.2010 passed by the Supreme Court in Civil Appeal No. 2928 of 2010, reported in (2010) 4 SCC 518

Held:

There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed under sub-section (3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. [Also see: *Union of India v. Popular Construction Co., (2001) 8 SCC 470*] Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of Legislature while enacting Section 34.

More so, Section 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.

L.J. Leach & Co. Ltd. v. Jardine Skinner & Co., AIR 1957 SC 357 (5-Judge Bench) and *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil, AIR 1957 SC 363* (3-Judge Bench) seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment in the grounds of appeal under Section 37 of 1996 Act.

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201. CIVIL COURTS ACT, 1958 (M.P.) – Section 15 (3)

Reference to District Judge to pass appropriate order for transfer a case to the competent jurisdiction – Both parties have lead their evidence and trial is over, only final arguments are to be heard and final decision is to be rendered – Trial Court returned the plaint for want of pecuniary jurisdiction after revaluation of the plaint – Held, such return of plaint would result in a fresh trial – Hence, the order of return of plaint is set aside and the trial Court is directed to refer the matter to District Judge to pass appropriate order under Section 15 (3) of M.P. Civil Courts Act, 1958.

Durgesh Chaurasiya v. Prakash Kushwah and another
Judgment dated 08.02.2010 passed by the High Court in W.P. No. 4577 of 2009, reported in 2010 (2) MPHT 369 (DB)

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202. CIVIL PROCEDURE CODE, 1908 – Sections 34 & 146 and Order 21 Rule 30
Money decree – Death of decree–holder during pendency of execution proceeding – Executing Court directed heirs of the deceased on the objection of judgment-debtor to obtain succession certificate so that the execution proceeding may be continued – Executing Court granted interest on decretal amount for the period of which the heirs of decree holder have taken for obtaining the succession certificate – Held, Executing Court did not exceed its limit by passing the order.

Municipal Corporation, Gwalior and another v. Jai Kishan Das Padmnani and others
Judgment dated 26.03.2010 passed by the High Court in W.P. No. 1414 of 2010, reported in 2010 (2) MPLJ 601 (DB)

Held:

It has been contended by learned counsel for the judgment–debtor that the executing Court exceeded its jurisdiction by holding that the heirs of the original decree-holder are also entitled for the interest on the decretal amount for the period during which they obtained the succession certificate, and hence, the impugned order be set aside.

According to us, the argument at the first blush appears to be quite attractive, however, on deeper scrutiny the same is found to be devoid of any substance, it was the judgment-debtor who objected the status of the legal representatives of the original decree-holder and on their objection, order was passed by the learned Executing Court directing the heirs of the decree holder to obtain succession certificate, and therefore, if some period had elapsed during which the succession certificate was obtained, it was on account of the part of the learned Executing Court and equally the judgment debtor is also responsible because on his objection only the Executing Court directed the heirs of original decree-holder to obtain succession certificate so that they may be impleaded as the legal representatives of the deceased decree-holder and may be permitted to continue the execution. Hence, the legal representatives/respondents cannot be blamed. In this context, we may profitable place reliance on legal maxim *actus curie neminem gravabit* and *also actus curiae nemine facit injuriam* which would mean that Court's action or inaction should not prejudice any party and the act of the Court does wrong to on one. Indeed, on account of the objection raised by the judgment-debtor the Executing Court directed respondents to obtain the succession certificate, and therefore, from this angle also the respondents cannot be blamed and we find that the ball is in the court of the judgment-

debtor and they are responsible for their own act. In this context we may profitably place reliance on the legal maxim *alii per alium non acquiritur obtigatio* meaning thereby one man cannot incur a liability through another.

We have gone through the reasonings assigned by the learned Executing court rejecting the objections raised by the judgment-debtor and we find that reasons are cogent and we hereby extend our stamp of approval to those reasonings by affirming the impugned order.

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203. CIVIL PROCEDURE CODE, 1908 – Order 12 Rules 1 and 6
TRANSFER OF PROPERTY ACT, 1882 – Section 114

(i) Scope of Order 12 Rule 6 in comparison to Order 12 Rule 1 is much wider – In Rule 1 admission of fact may be either in pleading or otherwise in writing whereas in Rule 6 admission of a fact may be either in pleading or otherwise, whether orally or in writing.

(ii) The object behind Order 12 Rule 6 of CPC is to enable the party to obtain speedy judgment – Under this Rule either party may get rid of so much of the rival claim "about which there is no controversy" – However, the Court always retains its discretion in the matter of pronouncing the judgment.

Karam Kapahi and others v. Lal Chand Public Charitable Trust and another

Judgment dated 07.04.2010 passed by the Supreme Court in Civil Appeal No. 3048 of 2010, reported in (2010) 4 SCC 753

Held:

If the provision of Order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider in as much as the provision of Order 12 Rule 1 is limited to admission by "pleading or otherwise in writing" but in Order 12 Rule 6 the expression "or otherwise" is much wider in view of the words used therein namely: "admission of fact.........either in the pleading or otherwise, whether orally or in writing".

Keeping the width of this provision in mind this Court held that under this rule admissions can be inferred from facts and circumstances of the case [See *Charanjit Lal Mehra and Ors. v. Kamal Saroj Mahajan (Smt.) and Anr., (2005) 11 SCC 279 at page 285* (para 8)] Admissions in answer to interrogatories are also covered under this Rule [see Mullas's Commentary on the Code, 16th Edn, Vol. II, page 2177].

In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India, (2000) 7 SCC 120,* this Court, while construing this provision, held that the Court should not unduly narrow down its application as the object is to enable a party to obtain speedy judgment.

Order 12 Rule 6 of the Code has been very lucidly discussed and succinctly interpreted in a Division Bench judgment of Madhya Pradesh High Court in the case of *Shikharchand v. Bari Bai, AIR 1974 MP 75. Justice G.P. Singh* (as His Lordship then was) in a concurring judgment explained the aforesaid rule, if we may say so, very authoritatively at page 79 of the report. His Lordship held: (AIR para 19)

> "... I will only add a few words of my own. Rule 6 of Order 12 of the Code of Civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English) , now Rule 3 of Order 27, and is almost identically worded (see Annual Practice 1965 edition Part I. p. 569). The Supreme Court Rule came up for consideration in *Ellis v. Allen (1911-13) All E.R. 906.* In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting. Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under rule 5 and as there was no substance in the plea of relief against forfeiture, the suit was decreed for ejectment under that rule. Sargent, J. rejected the argument that the rule is confined to admissions made in pleadings or under rules 1 to 4 in the same order (same as ours) and said:
>
> "The rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."
>
> Rule 6 of Order 12, in my opinion, must bear the same construction as was put upon the corresponding English rule by Sargent, J. The words "either on the pleadings or otherwise" in rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order but also admissions made elsewhere during the trial..."

This Court expresses its approval of the aforesaid interpretation of Order 12 Rule 6 by Justice G.P. Singh (as His Lordship then was). Mulla in his commentary on the Code has also relied on the ratio in *Shikharchand* (supra) for explaining these provisions.

Therefore, in the instant case even though statement made by the Club in its petition under Section 114 of the Transfer of Property Act does not come within the definition of the word "pleading" under Order 6 Rule 1 of the Code, but in Order 12 Rule 6 of the Code, the word "pleading" has been suffixed by the expression "or otherwise". Therefore, a wider interpretation of the word "pleading" is warranted in understanding the implication of this rule. Thus, the stand of the Club in its petition under Section 114 of the Transfer of Property Act can be considered by the Court in pronouncing judgment on admission under

Order 12 Rule 6 in view of clear words "pleading or otherwise" used therein especially when that petition was in the suit filed by the Trust.

However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used. But in the given situation, as in the instant case, the said provision can be applied in rendering the judgment.

204. CIVIL PROCEDURE CODE, 1908 – Order 12 Rule 6

Judgment on admission in written statement – Admission must be clear and unambiguous and this aspect is a matter of fact.

Where tenant has disputed the fact of expiry of tenancy by efflux of time as well as determination of tenancy, the provisions of Order 12 Rule 6 cannot be invoked to pass judgment on admission in written statement filed by the tenant.

M/s. Jeevan Diesels & Electricals Ltd. v. M/s. Jasbir Singh Chadha (Huf) & Anr.

Judgment dated 07.05.2010 passed by the Supreme Court in Civil Appeal No. 4344 of 2010, reported in AIR 2010 SC 1890

Held:

It is clear from a perusal of the averments in the written statement that the appellant has disputed (a) the fact of expiry of tenancy by efflux of time; (b) the appellant has also disputed that there has been a determination of tenancy. So far as receipt of notice referred to in paragraph 5 of the plaint is concerned, there has been no denial by the appellant.

Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in *Karam Kapahi & others v. M/s Lal Chand Public Charitable Trust & another, 2010 AIR SCW 2697* may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation.

In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India and others, (2000) 7 SCC 120* the provision of Order 12 Rule 6 came up for consideration before this Court. This Court on a detailed consideration of the provisions of Order 12 Rule 6 made it clear "wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed" the principle will apply. In the instant case it cannot be said that there is a clear admission of the case of the respondents-plaintiffs about termination of tenancy by the appellant in its written statement or in its reply to the petition of the respondents-plaintiffs under Order 12 Rule 6.

It may be noted here that in this case parties have confined their case of admission to their pleading only. The learned counsel for the respondents-plaintiffs fairly stated before this Court that he is not invoking the case of admission 'otherwise than on pleading'. That being the position this Court finds that in the pleadings of the appellant there is no clear admission of the case of respondents-plaintiffs.

In this connection reference may be made to an old decision of the Court of *Appeal between Gilbert vs. Smith reported in 1875-76 (2) Chancery Division 686.* Dealing with the principles of Order XL, Rule 11, which was a similar provision in English Law, Lord Justice James held, "if there was anything **clearly admitted** upon which something ought to be done, the plaintiff might come to the Court at once to have that thing done, without any further delay or expense" (see page 687). Lord Justice Mellish expressing the same opinion made the position further clear by saying, "it must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for". The learned Judge made it further clear by holding, "the rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleading which **clearly** entitles the plaintiff to an order, then the intention was that he should not have to wait but might at once obtain any order" (see page 689).

In another old decision of the Court of Appeal in the case of *Hughes vs. London, Edinburgh, and Glasgow Assurance Company (Limited) reported in The Times Law Reports 1891-92 Volume 8 at page 81,* similar principles were laid down by Lord Justice Lopes, wherein His Lordship held "judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal". Both Lord Justice Esher and Lord Justice Fry concurred with the opinion of Lord Justice Lopes.

In yet another decision of the Court of *Appeal in Landergan v. Feast reported in The Law Times Reports 1886-87 Volume 85* at page 42, in an appeal from Chancery Division, Lord Justice Lindley and Lord Justice Lopes held that party is not entitled to apply under the aforesaid rule unless there is a clear admission that the money is due and recoverable in the action in which the admission is made.

The decision in *Landergan* (supra) was followed by the Division Bench of Calcutta High Court in Koramall Ramballav vs. Mongilal Dalimchand reported in 23 Calcutta Weekly Notes (1918-19) 1017. Chief Justice Sanderson, speaking for the Bench, accepted the formulation of Lord Justice Lopes and held that admission in Order 12, Rule 6 must be a "clear admission".

In the case of *J.C. Galstaun v. E.D. Sassoon & Co., Ltd., reported in 27 Calcutta Weekly Notes (1922-23) 783,* a Bench of Calcutta High Court presided over by Hon'ble Justice Sir Asutosh Mookerjee sitting with Justice Rankin while construing the provisions of Order 12, Rule 6 of the Code followed the aforesaid decision in Hughes (supra) and also the view of Lord Justice Lopes in Landergan (supra) and held that these provisions are attracted "where the other party has made a plain admission entitling the former to succeed. This rule applies where

there is a clear admission of the facts on the face of which it is impossible for the party making it to succeed". In saying so His Lordship quoted the observation of *Justice Sargent in Ellis vs. Allen [(1914) 1 Ch. D. 904]* {See page 787}.

Similar view has been expressed by Chief Justice Broadway in the case of *Abdul Rahmân and brothers v. Parbati Devi reported in AIR 1933 Lahore 403.* The learned Chief Justice held that before a Court can act under order 12, Rule 6, the admission must be clear and unambiguous.

For the reasons discussed above and in view of the facts of this case this Court cannot uphold the judgment of the High Court as well as of the Additional District Judge. Both the judgments of the High Court and of the Additional District Judge are set aside.

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205. CIVIL PROCEDURE CODE, 1908 – Order 15 Rule 1
EVIDENCE ACT, 1872 – Section 58
Admission made in the pleadings – Value of – Such admission has higher evidentiary value than oral evidence.

Vishambhardayal and others v. Nagar Palika Parishad, Kailaras
Judgment dated 04.03.2010 passed by the High Court in Second Appeal No. 130 of 2000, reported in 2010 (3) MPHT 22

Held:

Looking to the admission of the defendant made in its pleadings (Para 1 of the written statement), that the plaintiffs are possessing the disputed Well, it is proved that the plaintiffs are having possession on the disputed Well. Decision of the Supreme Court in *Vimal Chand Ghevarchand Jain vs. Ramakant Eknath Ladoo, (2009) 5 SCC 713,* is squarely applicable in the present case, wherein it has been categorically held that it is well settled principle of law that admission made by a party in his pleadings is admissible against him proprio vigore. Hence, according to me, pleadings of the defendant specifically admitting the possession of the plaintiffs on the disputed Well is having higher evidentiary value and is having higher footing than that of oral evidence. I may also profitably place reliance on the decision of the Supreme Court in *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others, AIR 1974 SC 471,* wherein at page 477 this proposition has been laid down. I would like to quote that portion of the decision of the Supreme Court laying down the aforesaid principle, which reads thus:-

> "Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a

> waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

Hence, according to me, the learned First Appellate Court erred in substantial error of law in dismissing the suit of the plaintiffs for injunction.

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206. CIVIL PROCEDURE CODE, 1908 – Order 16 Rule 6
EVIDENCE ACT, 1872 – Section 81
Contents of document – Mode of proving – If the contents of the document are denied by the person concerned, the maker of the document has to be summoned for proving the same.

Jogendra Singh Pal v. Om Prakash Gupta and others

Judgment dated 25.01.2010 passed by the High Court in W.P. No. 6109 of 2009, reported in 2010 (2) MPLJ 289 (DB)

Held:

A perusal of sub-rule (6) of Order 16 of Civil Procedure Code demonstrate that a Court possesses the power to issue a summon for the production of the document and the Court is required to ascertain the justification of the documents sought to the summoned during the course of the Trial. The pleadings and arguments of the parties demonstrate that the plaintiff Radhelal Gupta has admitted the fact of publication of the Magazine but has clearly denied the details concerning his occupation of running a Readymade Garments Shop, which was mentioned in the column of the occupation of the father of the daughter Pinki Gupta and in this background it becomes absolutely necessary for the defendant to summon the documents and the prayer of calling the Editor/Publisher/Maker of the magazine. It is not a case where the plaintiff Redhelal Gupta had admitted the contents of the document whereafter the requirement of sections 61, 67 and 81 of Indian Evidence Act would have been accomplished but when he has emphatically denied the contents, a party is left with no choice, except to summon the Maker of the document, because without calling the Maker of the document, the contents could neither be proved nor a presumption could be drawn in terms of Section 81 of the Indian Evidence Act. The Learned Counsel for the Tenant/ petitioner has rightly relied upon the two judgments of the *Supreme Court reported as AIR 1971 SC 1864, Mukhtiar Singh v. State of Punjab and AIR 1988 SC 1274,* Laxmi Raj Shetty and another v. State of Tamil Nadu, where the Supreme Court has found the necessity of recording the statement of the maker of the document.

While examining the analogy of Section 81 of the Indian Evidence Act in the case of *Laxmi Raj Shetty and another v. State of Tamil Nadu, reported as AIR 1988 SC 1274,* the Supreme Court has recently relied upon the same analogy, which was propounded in its earlier Judgment while pronouncing the latest

Judgment in the case of *Bharat Sanchar Nigam Limited and another v. BPL Mobile Cellular Limited and others*, reported as *(2008) 13 SCC 597*, which clarifies that the view taken in the Year 1988 by the Supreme Court has still been found to be correct in relation to the newspaper report being hearsay evidence as also the necessity of examining the Maker of the document.

Since the plaintiff Radhelal Gupta has denied the contents of the document, it would be useful to make a reference to another latest decision of the *Supreme Court reported as (2009) 5 SCC 417*, All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi and others, where the Supreme Court has observed that when the witness denies the fact, which needs to be proved in terms of provisions of Sections 61 and 67 of the Indian Evidence Act, therefore for that purpose the Maker of the document should be examined.

In yet another Judgment reported as *(2005) 11 SCC 600, State (NCT of Delhi) v. Navjot Sandhu,* the Supreme Court has observed in paragraph No. 154 and 155 that the question of admissibility of Evidence should be strictly examined by the Courts.

It would not be out of place to mention another analysis of the situation, where is forced to appear before the Court for deposing about a fact which also infringes the right or a privilege available to him under any independent law but even in this situation the Supreme Court has found the necessity to summon the witness for the just decision of the case, when a question of calling witnesses in a Election matter arose, for the purposes of putting several questions, including the question relating to the fact about casting of vote in favour of a particular candidate, the Supreme Court, while examining this aspect in the case of *Nayini Narasimha Reddy v. Dr. K. Laxman & others, reported as (2006) 5 SCC 239* has observed that even when the voter has a privilege of not making disclosure of the fact about casting of vote in favour of a particular candidate, the Court has observed in the following terms, the necessity of summoning a witness:

> "14. It is one thing to say that the civil Court while issuing a summon must exercise its jurisdiction in terms of sub-rule (2) of Rule 1, Order 16 of the Code of Civil Procedure but it is another thing to say that the Court would refuse to summon the witness only because a question as regards exercise of the privilege of the witness may arise. The Court may not refuse to exercise its jurisdiction only on the ground that by reason thereof the privilege of a voter may be violated."

In the backdrop of aforesaid factual and legal discussion, it is apparent that when the plaintiff Radhelal Gupta had denied correctness of the contents of the Maker of the document during the course of his cross-examination, the allegations or arguments about the delay being caused in preferring an application for summoning the document/witness could not be treated to be a convincing argument although in the peculiar facts and circumstances of the

case, the application was moved by the Tenant/petitioner soon after completion of the statements of the witnesses, when he denied the contents of the documents and as such the prayer made in terms of Order 16, Rule 6 of Civil Procedure Code could have not been refused by the Court below. Similarly, the arguments of learned Counsel for the plaintiff would have no relevance or significance when he argues that the evidence was being led in rebuttal and it was not original evidence or information given by the plaintiff himself and the Maker of the document could have not been summoned.

Therefore, in view of the provisions of law holding the field in relation to Order 16, Rule 6, Civil Procedure Code as also in view of the Judgment of the Supreme Court, we find that the trial Court has committed a serious error of law in not allowing the application preferred by the tenant under Order 16, Rule 6 of Civil Procedure Code and as such the impugned order is set aside and the application moved by the Tenant/petitioner under Order 16, Rule 6 of Civil Procedure Code is allowed with a direction to the Court below to summon the documents and proceed in terms of Order 16 of Civil Procedure Code.

207. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3

(i) Consent decree – Validity – The appellants have challenged on the ground of fraud but have failed to furnish the full and precise particulars with regard to the alleged fraud – The objective must fail.

(ii) Coercion or fraud – Burden of proof – Held, it is settled position of law that the burden to prove a compromise, arrived at under Order 23 Rule 3 CPC, was tainted by coercion or fraud, lies upon the party who alleges the same – Legal position reiterated.

Shanti Budhiya Vesta Patel and others v. Nirmala Jayprakash Tiwari and others

Judgment dated 21.04.2010 passed by the Supreme Court in Civil Appeal No. 3549 of 2010, reported in (2010) 5 SCC 104

Held:

The appellants have challenged the consent decree passed by the High Court praying that the same should be set aside as it was obtained by playing a fraud upon them. We do not feel persuaded to hold so for a number of reasons.

It is a plain and basic rule of pleadings that in order to make out a case of fraud or coercion there must be a) an express allegation of coercion or fraud and b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars.

In *Bishundeo Narain v. Seogeni Rai, AIR 1951 SC 280* it was held thus: (AIR p. 283, paras 24-25)

"24. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. [See Order 6 Rule 4 of the Civil Procedure Code.]"

In the present case, the appellants have, however, failed to furnish the full and precise particulars with regard to the alleged fraud. Since the particulars in support of the allegation of fraud or coercion have not been properly pleaded as required by law, the same must fail. Rather the affidavits-cum- declarations executed by the appellants indicate that no coercion or fraud was exercised upon the appellants by respondent no. 8 or 9 at any point of time and thus the consent decree cannot be said to be anything but valid.

It is settled position of law that the burden to prove that a compromise arrived at under Order 23 Rule 3 of the Code of Civil Procedure was tainted by coercion or fraud lies upon the party who alleges the same. However, in the facts and circumstances of the case, the appellants, on whom the burden lay, have failed to do so. Although, the application for recall did allege some coercion, it could not be said to be a case of established coercion. Three criminal complaints were filed, but the appellants did not pursue the said criminal complaints to their logical end.

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208. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

Grant of temporary injunction to restrain defamatory publication. No restraint can be made on the publication even if the publication is based on untrue statement until it is established that the publication was made with reckless disregard to truth.

Therefore, when author and publisher of the book have given justification for every assertion which is based on research work with a view to bring before public, correct facts about the manner and act of Police Superintendent, Bhopal (as the plaintiff then was) during the industrial disaster known as Bhopal Gas Tragedy – Temporary injunction should not be granted.

Dominique Lapierre & Ors. v. Swaraj Puri
Judgment dated 07.08.2009 passed by the High Court in Misc. Appeal No. 3017 of 2009, reported in AIR 2010 MP 121

Held:

The suit was filed for declaration and injunction for restraining the defendants, appellants herein, from publishing and circulating a book titled "It was Five Past Midnight in Bhopal". It is stated that the said book was authored by defendants 1 and 2 (appellants 1 and 2 herein) and was printed and published by defendant No. 3 (appellant No.3 herein). The book pertained to an industrial disaster which took place at Bhopal in the night intervening 2nd and 3rd of December, 1984, when certain poisonous gas from a plant owned by M/s. Union Carbide leaked, causing widespread damage to public property, human life ad destruction of animals. The tragedy is classified as one of the worst "industrial disasters" ever to have occurred in the world. Be that as it may at the relevant time when the aforesaid mishap occurred, plaintiff respondent was holding the post of Superintendent of Police in Bhopal city and in the book in question certain acts of the plaintiff in the discharge of his official duties as Superintendent of Police are criticized and he is shown to have not taken proper steps in the discharge of his duties.

If the pleadings of the parties are scrutinized meticulously, it would be seen that the five statements made in the book, as referred to hereinabove in pages 329, 336, 337, 316 and 235, are the ones which are said to be imaginary, false and made with a view to lower the esteem of the plaintiff in the eyes of the others. Appellants have given justification for each and every assertion made and it is their case that it is done after research and interview from eminent persons and victims of the tragedy and the records of the interview ad the data collected are available with them. It is, therefore, a case where the defendants are justifying their comments and assertions by pleading truth as a defence.

In the case of *R. Rajagopal alias R.R. Gopal and another v. State of Tamil Nadu and others, AIR 1995 SC 264,* in paragraph 28, the broad principles for restraining publications of the nature as done in the present case is taken note of and in sub-para 3, certain exceptions to the general rule of protecting the rights available to a citizen under Article 21 in the matter of safeguarding his privacy is carved out and it is so held by the Supreme Court:

> "28(3): There is yet another exception to the Rule in (1) above – indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with

reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts, it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and 2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of Court and the Parliament and Legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule."

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209. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 14 (M.P. State Amendment)

Whether it is necessary to send notice of appeal to such defendants who were *ex parte* in the trial Court after filing written statement and cross examine the plaintiff? Held, Yes – It is always not necessary under Order 41 Rule 14 (M.P. Amendment) to dispense with the service of the defendants who remained *ex parte* in trial Court from the very beginning particularly when the defendants have filed written statement and cross examined the plaintiff – In this circumstance, notice of appeal should have been sent to the defendants.

Birjiya Bai v. Kailash Narayan and others

Judgment dated 30.03.2010 passed by the High Court in Second Appeal No. 180 of 2009, reported in 2010 (2) MPLJ 641

Held:

This Court finds that it is always not necessary to dispense with the service of the defendants who remained *ex parte* in the trial Court, but the discretion has been given to the learned First Appellate Court not to send the notice of appeal to any of the respondents against whom the suit was heard in *ex parte.* According to me, the discretion has not been properly exercised by the learned First Appellate Court. The position would have been different if the defendants would have remained *ex parte* right from the very beginning and would not have filed the written statement and further would not have cross examined the plaintiff. However, in the present case when the defendants have filed written statement refuting the averments made in the plaint by denying his right, title and interest in the suit property and not only this after the issues were framed also cross-examined the plaintiff, according to me, the notice of the appeal should have been sent to the defendants who were respondents before that

Court. Hence, the discretion has not been properly exercised by the learned First Appellate Court.

Indeed, the discretion has been exercised arbitrarily and capriciously by learned First Appellate Court in the facts and circumstances of the case and as a matter of fact the learned First Appellate Court should have sent the notice to the defendants, who were respondents before that Court because they filed written statement and also cross-examined the plaintiff. If a Judge proceeds on a wrong principle in a matter within his discretion, his order may be set aside by an Appellate Court. In this context, I may profitably place reliance on *Watson v. Rodwell, (1876) 3 Ch. D. 388,* in which Mellish L.J. has observed that where the Judge has adopted a wrong principle, the Appellate Court would interfere with that discretion. The Division Bench of this Court in *Laxmichand v. Brij Bhushandas and others, 1969 MPLJ 256 = 1969 JLJ 467* reiterated the same principle by placing reliance on the *Chancery Division Watson* (Supra). The substantial question of law is thus answered in favour of appellant by holding that the discretion has not been rightly exercised by the learned First Appellate Court by not sending the notice to the defendants who were respondents before that Court.

Ex consequenty this appeal succeeds and is hereby allowed.

210. CONSTITUTION OF INDIA – Articles 141, 226, 227, 323-A and 323-B Power and jurisdiction of the High Courts under Articles 226 and 227 of the Constitution of India in respect of the matters for which Tribunals have been created under Articles 323-A and 323-B of the Constitution of India, explained.

Rajeev Kumar and another v. Hemraj Singh Chauhan and others
Judgment dated 23.03.2010 passed by the Supreme Court in Civil Appeal No. 2653 of 2010, reported in (2010) 4 SCC 554

Held:

Various Tribunals created under Articles 323-A and 323-B of Constitution of India will function as the only Court of first instance in respect of areas of law in which they have been constituted. Even when any challenge is made to the vires on legislation would, excepting the legislation in which Tribunals have been set up, in such cases also litigants will not be able to directly approach the High Court "overlooking" the jurisdiction of the Tribunal. As these Tribunals are empowered to deal with constitutional questions and can also examine the vires of statutory legislation, except the vires of the legislation which creates the particular Tribunal. The ratio of the Constitutional Bench judgment in *L. Chandra Kumar v. Union of India, (1997) 3 SCC 261* explained and applied. Also held that the principles laid down in *L. Chandra Kumar (supra)* virtually embody a rule of law and in view of Article 141 of the Constitution, the same is binding on the High Courts.

211. CONSUMER PPROTECTION ACT, 1986 – Sections 2 (1) (c) (d) (g) and 14 (1) (d)
CONTRACT ACT, 1872 – Sections 69 and 140
CARRIERS ACT, 1865 – Section 9
TRANSFER OF PROPERTY ACT, 1882 – Sections 6 (e) and 130

(i) Subrogation in context of insurance policy explained.
The contract of insurance is a contract of indemnity – The doctrine of subrogation in this context is to enable the insurer to step into the shoes of the assured and enforce the rights and remedies available to the assured.

(ii) Difference between assignment and subrogation explained.

(iii) Consumer protection – Transit risk insurance – Complaint can be filed by the Insurance Company as subrogee either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider – The insurer may also request the assured to sue the wrong doer (service provider) but the insurer cannot in its own name maintain a complaint before the consumer forum under the Act even if its right is traced to the terms of a letter of subrogation cum assignment executed by the assured. (Three-Judge bench judgment of the Apex Court in *Oberai Forwarding Agency v. New India Assurance Co. Ltd., (2000) 2 SCC 407* partly overruled and partly approved.)

(iv) Presumption of negligence under Section 9 of the Carriers Act is also applicable to a complaint under the Consumer Protection Act and it is for the carrier to prove absence of negligence.

Economic Transport Organization, Delhi v. Charan Spinning Mills Private Limited and another
Judgment dated 17.02.2012 passed by the Supreme Court in Civil Appeal No. 5611 of 1999, reported in (2010) 4 SCC 114 (5-Judge Bench)

Held:

Respondent 1 was a manufacturer of certain goods. It was insured with Respondent 2 (the insurer), covering transit risks in respect of goods sent by it to various consignees through rail or road. It entrusted a consignment of goods to the appellant road carrier for transportation and delivery to the consignee at the place specified. The goods vehicle met with an accident and the consignment was completely damaged. Respondent 2 settled the claim of Respondent 1 by paying a certain amount. Respondent 1 then executed a letter of subrogation-cum-special power of attorney in favour of Respondent 2. Respondents 1 and 2 then filed a complaint under the Consumer Protection Act, 1986 (the Act) against the appellant carrier before the District Forum claiming compensation for

deficiency in service and negligence.

The District Forum allowed the complaint and the State Commission as well as the National Commission upheld the District Forum's order.

The carrier then filed the present appeal by special leave.

Initially, the appeal came up before a two-Judge Bench. Doubting the correctness of the decision in *Oberai Forwarding Agency v. New India Assurance Co. Ltd., (2000) 2 SCC 407,* the said Bench referred it to a three-Judge Bench which, in turn, referred it to the present Constitution Bench.

The appellant herein resisted the complaint on the grounds that:

(i) the insurer having already settled the claim of the insured, the latter had no surviving and enforceable claim against the carrier. More so when the insured had transferred all its interest in the claim to the insurer,

(ii) the insurer was not a "consumer" and therefore, the complaint was not maintainable,

(iii) the letter of subrogation executed after the goods were damaged amounted to a transfer of a mere right to sue which was invalid and unenforceable.

Before the Supreme Court, the appellant contended that *Oberai case* (supra) laid down the law correctly, whereas the respondents contended to the contrary.

The Apex Court dismissed the appeal and held as under:

> A contract of insurance is a contract of indemnity. The loss/ damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party or due to a wrongful act of a third party, for which he may have a remedy against such third party. In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognizes as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrongdoer stand transferred to and vested in the insurer.

The equitable assignment of the rights and remedies of the assured in

favour of the insurer, implied in a contract of indemnity, known as "subrogation", is based on two basic principles of equity:

(a) No tortfeasor should escape liability for his wrong;

(b) No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.

Subrogations may be classified under three brood categaries; (i) Subrogation by equitable assignment; (ii) Subrogation by contract; and (iii) Subrogation-cum-assignment.

An 'assignment' on the other hand, refers to a transfer of a right by an instrument for consideration. When there is an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject matter of the assignment. The difference between 'subrogation' and 'assignment' was stated in Insurance Law by MacGillivray & Parkington (7th Edn.) thus:

> "Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, as assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.
>
> Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statue should proceed in his own name ..."

The principles relating to subrogation can therefore be summarized thus:

(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrong- doer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer vis-'-vis the assured will be governed by the terms of the Letter of Subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation- cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled to the entire amount recovered from the wrong- doer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

We therefore answer the questions raised as follows:

(a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from

the service provider. The insurer may also request the assured to sue the wrong doer (service provider).

(b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

(d) Oberai is not good law insofar as it construes a Letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

(e) We reject the contention of the appellant that the presumption under section 9 of Carriers Act is not available in a proceeding under the Consumer Protection Act and that therefore, in the absence of proof of negligence, it is not liable to compensate the respondents for the loss.

We may also notice that section 2(d) of Act was amended by Amendment Act 62 of 2002 with effect from 15.3.2003, by adding the words "but does not include a person who avails of such services for any commercial purpose" in the definition of 'consumer'. After the said amendment, if the service of the carrier had been availed for any commercial purpose, then the person availing the service will not be a 'consumer' and consequently, complaints will not be maintainable in such cases. But the said amendment will not apply to complaints filed before the amendment.

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***212. CRIMINAL PROCEDURE CODE, 1973 – Sections 9 (6) and 327**

Scope of Power of High Court and Sessions Court u/s 9 (6) of CrPC about place of sitting of Session Court

(i) Section 9 (6) is divided into two parts – The first part confers power on the High Court whereas the second part thereof endows power on the Court of Session.

The power of the High Court under Section 9 (6) to notify a particular place or places where the Court of Session shall ordinarily hold its sitting is an administrative power unlike the power of the Court of Session to decide to hold its sitting at any other place under the second part of Section 9 (6) which is judicial in nature.

It is not necessary for the High Court to observe or comply with the rule of *audi alteram partem* **before notifying a shift in the venue of the trial whereas the second part of Section 9 (6) CrPC expressly requires the Court of Session to afford the prosecution and the accused an opportunity of hearing and to obtain their consent beforehand and it is intended to avoid hardship to the parties and witnesses in a particular case. [Also see** *Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609***]**

It is clear from the wording of Section 9 of the Code that there is no need for the High Court to give a hearing while deciding the venue of the trial – It is only if the Sessions Court is moving the place of trial that the parties have a right to a hearing.

(ii) Universal rule as recognized in all civilized countries governed by rule of law is that the criminal trial should be a public trial or open trial – Public access is essential if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice – But in exceptional cases there can be deviation from the universal rule in the larger public interest – Section 327 of the Code of Criminal Procedure provides that any place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them – Section 2 (p) CrPC defines place as including a house, building, tent, vehicle and vessel – So Court can be held in a tent, vehicle, a vessel or even in a jail, other than a Court – Furthermore, the proviso to Section 327, CrPC provides that the presiding Judge or Magistrate may also at any stage of trial by order restrict access of the public in general, or any particular person, in particular, in the room or building where the trial is held – In some cases, trial of criminal case is held in Court and some restrictions are imposed for security reasons regarding entry into the court – Such restrictions do not detract from trial in open Court – Section 327 proviso empowers the Presiding Judge or Magistrate to make order denying entry of public in Court.

As soon as a Court holds trial at a venue fixed for such trial, it is deemed to be an open court under Section 327 CrPC, irrespective of the place of trial – Whether it is a private house or a jail and everyone has a right to go and attend the trial – The High Court can fix a place other than the Court where the sittings are ordinarily held if the High Court so notifies for the ends of justice.

Mohd. Shahabuddin v. State of Bihar and others

Judgment dated 25.03.2010 passed by the Supreme Court in Criminal Appeal No. 591 of 2010, reported in (2010) 4 SCC 653

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213. CRIMINAL PROCEDURE CODE, 1973 – Section 154

First Information Report – Any telephonic information about commission of a cognizable offence, if cryptic in nature, cannot be treated as FIR – There must be something in the nature of complaint or accusation or atleast some information of the crime given with the object of setting the police or criminal law in motion.

Patai alias Krishna Kumar v. State of Uttar Pradesh

Judgment dated 30.03.2010 passed by the Supreme Court in Criminal Appeal No. 1718 of 2007, reported in (2010) 4 SCC 429

Held:

In order for a message or communication to be qualified to be a First Information Report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion. It is true that a First Information Report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses. But it must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a First Information Report.

In *Ramsinh Bavaji Jadeja v. State of Gujarat, (1994) 2 SCC 685,* this Court, while dealing with the issue as to when investigation commences, observed with regard to the cryptic nature of a message as follows in para 7 of that judgment:

> "7. ....If the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be first information report. The object

and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer in charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said offence including details about the participants, shall be deemed to be a statement made by a person to the police officer 'in the course of an investigation', covered by Section 162 of the Code. That statement cannot be treated as first information report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report".

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214. CRIMINAL PROCEDURE CODE, 1973 – Section 156 (3)
Power of Magistrate to send private complaint to police for investigation – Magistrate has to apply his mind on the allegations of the complaint before passing such order and private complaint must not be forwarded to police to investigate mechanically.

Arun Kumar Jain v. Dinesh Tripathi and others
Judgement dated 21.01.2010 passed by the High Court in Cri. Rev. No. 546l of 2007, reported in 2010 (2) MPLJ 621

Held :

After having heard learned counsel appearing on behalf of the parties, in the opinion of this Court, and as per the judgment of Apex Court in the case of Suresh Chand Jain v. State of M.P. and another, AIR 2001 SC 571 it is the trite law, the Magistrate is empowered to pass an order under Section 156 (3) of Criminal Procedure Code to investigate the allegations as alleged in the private complaint even if it is triable by the Court of Sessions. It is also settled that while passing such an order the Magistrate ought to have applied his mind to the allegations as alleged in the complaint. It is also settled that it an order passed by the Magistrate is without due application of mind even at the stage of direction section 156 (3) of Criminal Procedure Code, it may be liable to be set aside.

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***215. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) and 202 (1)**
The power to direct an investigation to the police authorities is available to the Magistrate both under Section 156 (3) CrPC and under

Section 202 CrPC – The only difference is the stage at which the said powers may be invoked – The power under Section 156 (3) CrPC to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under Section 202 is at the post-cognizance stage – When a Magistrate orders investigation under Section 156 (3), he is not required to examine the complainant since he is not taking cognizance of any offence therein for the purpose of enabling the police to start investigation; whereas the enquiry contemplated under Section 202 (1) by himself or investigation by a police officer or by any other person is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further on account of the fact that cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed.

Rameshbhai Pandurao Hedau v. State of Gujarat
Judgment dated 19.03.2010 passed by the Supreme Court in Criminal Appeal No. 548 of 2010, reported in (2010) 4 SCC 185

***216. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) and 202 (1) Proviso**

(i) Order under Section 156 (3) CrPC, essentials of – Whenever a Magistrate directs SHO on a complaint, to register FIR and to investigate, such direction amounts to an order under Section 156 (3) of CrPC – Previous order of Magistrate to Superintendent of Police to take action as per law on another complaint is not an order under Section 156 (3) of CrPC – Such an order does not debar the Magistrate to entertain second application and to pass an order under Section 156 (3) of CrPC.

(ii) Section 156 (3) and Proviso (a) of Section 202 (1) of CrPC, distinction between – Order of Section 156 (3) of CrPC is made before taking cognizance and the order under Proviso (a) of Section 202 (1) is made after taking cognizance – The power under Section 156 (3) can be invoked before Magistrate takes cognizance – Once he takes such cognizance, he is not empowered to switch back to the pre–cognizance stage and avail Section 156 (3) of CrPC.

Yashpal Singh v. State of Madhya Pradesh
Judgment dated 09.12.2009 passed by the High Court in Criminal Revision No. 1205 of 2009, reported in 2010 (3) MPHT 189

***217. CRIMINAL PROCEDURE CODE, 1973 – Sections 177 and 178**
DOWRY PROHIBITION ACT, 1961 – Sections 4 and 6
Territorial jurisdiction – Offence punishable under Sections 4 and 6 of Dowry Prohibition Act, 1961 – Complainant married and resided at Bhopal and on account of cruelty by her in-laws, she left her matrimonial home at Bhopal and reached the house of her parents at Guna – Complaint filed before JMFC Guna – Held, entire cause of action or bundle of facts contained in the case accrued within the territorial jurisdiction of criminal Court at Bhopal – So criminal court at Bhopal has exclusive jurisdiction to try the case and the Court of JMFC Guna has no jurisdiction to try the case.

Kirti Prakash Saxena v. State of M.P. and another
Judgment dated 27.11.2009 passed by the High Court in Misc. Cr. Case No. 7126 of 2008, reported in 2010 (2) MPHT 361

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218. CRIMINAL PROCEDURE CODE, 1973 – Section 451
WILD LIFE (PROTECTION) ACT, 1972 – Sections 39 (1) and 50 (4)
Interim custody of vehicle during trial – Vehicle seized under Section 50 of the Wild Life (Protection) Act, 1972 – Power of Magistrate – Held, Magistrate can release such vehicle in the interim custody during the pendency of trial – Mere seizure of vehicle on the charge of commission of an offence would not make the property to be of the State Government under Section 39 (1) (d) of the Act.

Onkar Prasad Loni and another v. State of M.P.
Judgment dated 17.03.2010 passed by the High Court in Criminal Revision No. 1950 of 2009, reported in 2010 (3) MPHT 170

Held:

In the case of *Madhukar Rao vs. State of M.P., 2000 (1) MPLJ 289=2000 (2) MPHT 445*, Full Bench of this court has held that any property including vehicle seized on accusation or suspicion of commission of an offence under the Act can, on relevant ground and circumstance be released by the Magistrate pending trial in accordance with Section 50 (4) of Wild Life (Protection) Act, 1972 read with Section 451 of Code of Criminal Procedure, 1973. The mere seizure of any property including vehicle on the charge of commission of an offence would not make the property to be of the State Government under Section 39 (1) (d) of the Act.

This Full Bench decision of this Court has been approved by the Apex Court in the case of State of *M.P. v. Madhukar Rao,* reported *in 2008 (1) MPJR 189.*

Thus, it is settled position that Magistrate is empowered to release vehicle on supurdnama in the interim custody during pendency of trial. In the present case, Magistrate has rightly exercised discretion in releasing the vehicle in favour of applicants because no useful purpose would be served in keeping the vehicle idle without using the same. It is common experience that trial takes a long time and possibility of vehicle being damaged during that period cannot be ruled out.

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***219. CRIMINAL TRIAL:**

Fresh injuries – Fresh injuries are the injuries which are caused within 6 hours – No doubt, there may be variation of two hours on either side – Thus, the fresh injuries could be termed injuries within 4 to 8 hours and not more than 8 hours.

State of Uttar Pradesh v. Guru Charan and others

Judgment dated 23.02.2010 passed by the Supreme Court in Criminal Appeal No. 297 of 2002, reported in (2010) 3 SCC 721

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220. ELECTION PETITION:

(i) Charge of corrupt practice during election – Nature and extent of burden of proof – Just like criminal charge.

(ii) V.H.S. tape-recorded cassette – Touchstone of the tests and safeguards regarding its admissibility in evidence, enumerated.

Tukaram S. Dighole v. Manikrao Shivaji Kokate

Judgment dated 05.02.2010 passed by the Supreme Court in Civil Appeal No. 2928 of 2008, reported in (2010) 4 SCC 329

Held:

(i) A charge of corrupt practice, envisaged by the Act, is equated with a criminal charge and therefore, standard of proof therefor would not be preponderance of probabilities as in a civil action but proof beyond reasonable doubt as in a criminal trial. If a stringent test of proof is not applied, a serious prejudice is likely to be caused to the successful candidate whose election would not only be set aside, he may also incur disqualification to contest an election for a certain period, adversely affecting his political career. Thus, a heavy onus lies on the election petitioner to prove the charge of corrupt practice in the same way as a criminal charge is proved.

(ii) Though a cassette in form of certified copy issued by Election Commission would be a public document, it cannot be read in evidence without proving the authenticity of the cassette by cogent evidence regarding the source and manner of its acquisition. It is well settled that tape-records of speeches are "documents" as defined in Section 3 of the Evidence Act and stand on no different footing than photographs. [See: *Ziyauddin Burhanuddin Bukhari v.*

Brijmohan Ramdass Mehra, (1976) 2 SCC 17, SCC p. 26, para 19]. There is also no doubt that the new techniques and devices are the order of the day. Audio and video tape technology has emerged as a powerful medium through which a first hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and alterations by transposition, excision, etc. which may be difficult to detect and, therefore, such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasised that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence.

In *Yusufalli Esmail Nagree v. State of Maharashtra, (1967) 3 SCR 720,* this Court observed that since the tape-records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness. It is necessary that such evidence must be received with caution. The Court must be satisfied, beyond reasonable doubt that the record has not been tampered with.

In *R. v. Maqsud Ali, (1996) 1 QB 688,* it was said that it would be –

> "wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded are properly identified. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case."

In *Ziyauddin Burhanuddin Bukhari* (supra), relying on *R. v. Maqsud Ali* (supra), a Bench of three judges of this Court held that the tape-records of speeches were admissible in evidence on satisfying the following conditions:

"(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

Similar conditions for admissibility of a tape-recorded statement were reiterated in *Ram Singh v. Col. Ram Singh, 1985 Supp SCC 611* and recently in *R.K. Anand v. Delhi High Court, (2009) 8 SCC 106.*

221. EVIDENCE ACT, 1872 – Section 25
TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 – Section 15
Confessional statement of accused recorded under the offence of TADA Act along with offences under IPC but later on the offences under TADA Act were dropped and the trial was made only for offences under IPC – In such trial, prosecution cannot utilize the aforesaid confessional statement as charges were framed only for offences under IPC.

Sunderlal Kanaiyalal Bhatija v. State of Maharashtra & Ors.
Judgment dated 31.03.2010 passed by the Supreme Court in Criminal Appeal No. 1222 of 2006, reported in AIR 2010 SC 1666

Held:

In the case of *Prakash Kumar @ Prakash Bhutto v. State of Gujarat, AIR 2005 SC 1075,* the Constitutional Bench had held that in a case where the accused is charged both under the TADA Act as also under other sections under the IPC and tried together, in that event, a confessional statement made by him under TADA could be utilised against him although he is acquitted of the provisions of the TADA Act. It was held in paragraph 37 of the said Constitutional Bench judgment as follows:-

> "37. The legislative intendment underlying Sections 12(1) and (2) is clearly discernible, to empower the Designated Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language "if the offence is connected with such other offence" employed in Section 12(1) of the Act has great significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is made out. This could be the only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not there."

Finally in paragraph 40 this Court answered the issues framed by them in the following manner: -

> "40. For the reasons aforestated, we are of the view that the decision in *S. Nalini v. State, AIR 1999 SC 2640 (3-Judge Bench)* case has laid down correct law and we hold that the confessional statement duly recorded under Section 15

of TADA and the Rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 of the Act, notwithstanding that the accused was acquitted of offences under TADA in the same trial."

That being the position, it is now a settled law that a confessional statement duly recorded by a police officer in a case related to TADA Act and the rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Sections 12 read with Section 15 of the Act notwithstanding that the accused was acquitted of offences under the TADA Act in the same trial. But, here is a case where the allegation was mainly for the offences under the IPC and some offences under the TADA Act were also incorporated initially but later on the same were dropped. Consequently, charges in the said case were framed only for offences under the IPC and not under the TADA Act and the trial is also only for offences under the IPC and not under the TADA Act. Therefore, such confessional statement as made by the respondent no. 4 under the TADA Act, in a different case, cannot be used or utilised by the prosecution in the present case as the charges were framed only for the offences under the Indian Penal Code.

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222. GUARDIANS AND WARDS ACT, 1890 – Sections 12 and 19
Guardianship and custody of minor child – Considerations are different – A person who is fit to be appointed as a guardian, may not be fit to get custody of the same child.

Athar Hussain v. Syed Siraj Ahmed & Ors.
Judgment dated 05.01.2010 passed by the Supreme Court in Civil Appeal No. 11 of 2010, reported in AIR 2010 SC 1417

Held:

We are mindful of the fact that, as far as the matter of guardianship is concerned, the *prima* facie case lies in favour of the father as under Section 19 of the Guardians and wards Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. In the case of *Rosy Jacob v. Jacob A. Chakramakkal, AIR 1973 SC 2090,* keeping in mind the distinction between right

to be appointed as a Guardian and the right to claim custody of the minor child, this Court held so in the following oft-quoted words:

> "Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them."

In the case of *Mt. Siddiqunnisa Bibi v. Nizamuddin Khan and Ors., AIR 1932 All 215,* which was a case concerning the right to custody under Mohammaden Law, the Court held:

> "A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."

Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

Thus the question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case.

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

Cruelty – It is not necessary for a party claiming divorce to prove that the cruel treatment is of such a nature as to cause reasonable apprehension that it will be harmful or injurious for him/her to live with the other party – Rather, it is enough that conduct of one of the parties is so abnormal and below the accepted norm that other spouse could not reasonably be accepted to put up with it.

Manisha Tyagi v. Deepak Kumar

Judgment dated 10.02.2010 passed by the Supreme Court in Civil Appeal No. 5387 of 2007, reported in (2010) 4 SCC 339

Held:

In *Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558,* this Court examined the development and evolution of the concept of mental cruelty in matrimonial cases and observed in para 35 as under:

> "35. The petition for divorce was filed primarily on the ground of cruelty. It may be pertinent to note that, prior to 1976 amendment in the Hindu Marriage Act, 1955 cruelly was not a ground for claiming divorce under the Hindu Marriage Act. It was only a ground for claiming judicial separation under Section 10 of the Act. By the 1976 amendment, cruelty was made a ground for divorce and the words which have been omitted from Section 10 are 'as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'. Therefore, it is not necessary for a party claiming divorce to prove that the cruel treatment is of such a nature as to cause an apprehension-reasonable apprehension - that it will be harmful or injurious for him or her to live with the other party."

The classic example of the definition of cruelty in the pre-1976 era is given in the well known decision of this Court in the case of *N.G. Dastane (Dr.) v. S. Dastane, (1975) 2 SCC 326,* wherein it is observed as follows: (SCC p. 337, para 30)

> "30. ... The enquiry has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner as reasonable apprehension that it would be harmful or injurious for him to live with the respondent".

This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonably be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would

cause a reasonable apprehension that it would be harmful or injurious to continue the cohabitation with the other spouse. Therefore to establish cruelty it is not necessary that physical violence should be used. However continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce.

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

Cruelty – The categories of cruelty in matrimonial cases can never be closed [Lord Denning in *Sheldon v. Sheldon, (1966) 2 All ER 257 (CA)*] **– It depends upon the type of life the parties are accustomed to or their economic and social conditions and also the culture and the human values to which they attach importance.**

Sometimes, it may be in form of violence or attitude or approach or even silence in specific situation.

Ravi Kumar v. Julmidevi

Judgment dated 09.02.2010 passed by the Supreme Court in Civil Appeal No. 1868 of 2007, reported in (2010) 4 SCC 476

Held:

There is no definition of cruelty under the Hindu Marriage Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, some time it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

Therefore, cruelty in matrimonial behaviour defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula. Cruelty in matrimonial cases can be of infinite variety it may be subtle or even brutal and may be by gestures and words.

About the changing perception of cruelty in matrimonial cases, this Court observed in *Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121.*

> "It will be necessary to bear in mind that there has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They

are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should, not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties".

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225. HINDU MARRIAGE ACT, 1955 – Section 26
Orders about custody of child and visitation rights are always considered interlocutory – They can be altered and modified as per the needs of the child.

Vikram Vir Vohra v. Shalini Bhalla

Judgment dated 25.03.2010 passed by the Supreme Court in Civil Appeal No. 2704 of 2010, reported in AIR 2010 SC 1675

Held:

In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

In *Rosy Jacob v. Jacob A Chakramakkal, (1973) 1 SCC 840* a three-Judge Bench of this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

The aforesaid principle has again been followed in *Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112.*

Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody

of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

In this connection, the principles laid down by this Court in *Gaurav Nagpal v. Sumedha Nagpal, AIR 2009 SC 557* are very pertinent. Those principles in paragraphs 42 and 43 are set out below:

> "42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.
>
> 43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force".

That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the Court's discretion in custody order. (See *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, AIR 1982 SC 1276, para 17*).

In the factual and legal background considered above, the objections raised by the appellant do not hold much water.

***226. INDIAN PENAL CODE, 1860 – Section 95**

Trivial act, determination of – The act in question should be adjudged by the nature of the injury, the position of the parties, relation between them, situation in which they are placed, the knowledge or intention with which the offending act is done and other related circumstances – The same cannot be judged solely by measure of physical or other injury the act causes (*Veeda Menezes v. Yusuf Khan Haji Ibrahim Khan, AIR 1966 SC 1773* relied on).

Athai v. State of M.P.

Judgment dated 22.10.2009 passed by the High Court in Criminal Appeal No. 77 of 1995, reported in 2010 (2) MPHT 514

227. INDIAN PENAL CODE, 1860 – Sections 107 and 306

Abetment of suicide – Necessary ingredients – Requirement to constitute 'instigation' – Explained.

Suicidal note disclosed that in regard to business transactions with the accused, deceased was pressurised to do something which he was not intending to do with alternative suggestion to die by taking poison. The conduct of the accused persons show that the deceased was left with no option except to end his life – Therefore, Clause (i) of Section 107 of IPC attracted and charge u/s 306 IPC rightly framed.

Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)
Judgment dated 10.08.2009 passed by the Supreme Court in Criminal Appeal No. 1473 of 2019, reported in AIR 2010 SC 1446

Held:

As per the Section 107 of IPC, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Explanation to Section 107 states that any wilful misrepresentation or wilful concealment of material fact which he is bound to disclose, may also come within the contours of "abetment". It is manifest that under all the three situations, direct involvement of the person or persons concerned in the commission of offence of suicide is essential to bring home the offence under Section 306 of the IPC.

As per clause firstly in the said Section, a person can be said to have abetted in doing of a thing, who "instigates" any person to do that thing. The word "instigate" is not defined in the IPC. The meaning of the said word was considered by this Court in *Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618.* Speaking for the three-Judge Bench, R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. *Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred.* A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action: provoke to action or reaction" (See: Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (See: Oxford Advanced Learner's Dictionary - 7th Edition). Similarly, "urge" means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person. Therefore, a person who instigates another has to "goad" or "urge forward" the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed in *Ramesh Kumar's case* (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

In the background of this legal position, we may advert to the case at hand. The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multifaceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, *which may either be an attempt for self-protection or an escapism from intolerable self.*

In the present case, the charge against the appellant is that he along with other two accused "in furtherance of common intention", mentally tortured Jitendra Sharma (the deceased) and abetted him to commit suicide by the said act of mental torture. It is trite that words uttered on the spur of the moment or in a quarrel, without something more cannot be taken to have been uttered with mens rea. The onus is on the prosecution to show the circumstances which compelled the deceased to take an extreme step to bring an end to his life. In the present case, apart from the suicide note, extracted above, statements recorded by the police during the course of investigation, tend to show that on

account of business transactions with the accused, including the appellant herein, the deceased was put under tremendous pressure to do something which he was perhaps not willing to do. Prima facie, it appears that the conduct of the appellant and his accomplices was such that the deceased was left with no other option except to end his life and, therefore, clause firstly of Section 107 of the IPC was attracted. Briefly dealing with the material available on record, in the order directing framing of charge against the appellant, the learned trial court has observed as under:

> "In the present case the evidence shows threatening given to the deceased. One witness called Kartar Singh says that CK Chopra was heard saying to the deceased that the deceased had become dishonest because he was refusing to sign a paper in which the share in some joint property was shown to be 10%. On another occasion Chopra was heard by this witness to say that Chopra would ruin the deceased if he did not give up his claim for 25% and did not agree to accept 10%. Witness Padam Bahadur has stated inter alia that he overheard Jahoor and Mahavir telling the deceased that Chopra had asked them to say that this was the last opportunity to sign the document and that if he wanted to live in the society he should sign the agreement or should die by taking poison. Soon thereafter the deceased committed suicide.
>
> Thus the evidence is not of a mere quarrel in which one person told the other go and die without actually suggesting that the opponent should commit suicide. In the present case the evidence collected by the investigation suggest that the deceased had been actually pushed to the wall and the escape by committing suicide was suggested by the accused persons."

In the light of the material on record, in our judgment, it cannot be said that the trial court was in error in drawing an inference that the appellant had "instigated" the deceased to commit suicide and, therefore, there was ground for presuming that the appellant has committed an offence punishable under Section 306 read with Section 34 IPC.

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***228. INDIAN PENAL CODE, 1860 – Section 302**
CRIMINAL TRIAL:

(i) Murder trial – Appreciation of evidence – Appellants/accused stabbed the deceased by knives and caused multiple stab injuries resulting in his death – Testimony of three eye witnesses

found clinching wherein they categorically stated that three persons, who were later on identified as accused persons had stabbed the deceased – Presence of these witnesses at the scene of offence was also established by some other witnesses – Their evidence was corroborated by two independent witnesses who had identified the appellants/accused in T.I. parade – Conviction of the appellants/accused under Section 302 IPC on the basis of evidence of PWs and medical evidence confirmed.

(ii) Delay in sending vital documents to the Court – Effect of – Held, delay in dispatch of the vital documents such as FIR and statements recorded under Section 161 CrPC by itself may not be fatal to the prosecution in each and every case – This question may have to be assessed and appreciated on fact.

(iii) Defective or suspicious investigation – Effect of – Held, if the Court is convinced that the testimony of a witness to the occurrence is true, the Court is free to act on it albeit the investigating officer's suspicious role in the case (See *State of Karnataka v. K. Yarappa Reddy, (1999) 8 SCC 715*)

Abu Thakir and others v. State of Tamil Nadu represented by Inspector of Police, Tamil Nadu

Judgment dated 19.04.2010 passed by the Supreme Court in Criminal Appeal No. 168 of 2008, reported in (2010) 5 SCC 91

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***229. INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Section 32 (1)
CRIMINAL TRIAL:

(i) Murder trial – Appreciation of evidence – Presence of two eye witnesses at the time of incident reflects from FIR which was promptly lodged and revealed from the evidence of the doctor who had initially treated the injured – Presence of such eye witnesses acceptable.

(ii) Multiple dying declarations – Case diary statement of the deceased recorded by the police officer under Section 161 CrPC which had not been recorded in the manner provided by the Police Regulations with regard to the recording of dying declarations, could not be relied upon – But the second dying declaration recorded by the Executive Magistrate which was in substance identical with the statement recorded by the police officer, can be relied upon [Also see : *Balak Ram v. State of U.P., (1975) 3 SCC 219*].

Munnawar and others v. State of Uttar Pradesh and others
Judgment dated 05.05.2010 passed by the Supreme Court in Criminal Appeal No. 1680 of 2007, reported in (2010) 5 SCC 451

230. INDIAN PENAL CODE, 1860 – Sections 302, 304 Part I and Exception 4 to Section 300
Murder trial – Appellant/accused had caused one knife-blow on back and another knife-blow on chest of the deceased resulting in his death – He had inflicted six injuries on another injured who tried to save his deceased brother – Moreover, appellant/accused and his father had gone to place of incident where deceased was digging earth and after picking up a quarrel with him had murdered him – Furthermore, appellant/accused was armed with dangerous weapon – Premeditation to cause death of deceased proved – Hence, Exception 4 to Section 300 not applicable.

Shaukat v. State of Uttaranchal
Judgment dated 22.04.2010 passed by the Supreme Court in Criminal Appeal No. 757 of 2005, reported in (2010) 5 SCC 68

Held:

The learned Sessions Judge, Nainital by judgment dated September 18, 1982 passed in Criminal Sessions Trial No. 17 of 1981 convicted the appellant under Sections 302 and 307 for causing murder of deceased Wilayat and for making attempt to murder Rahmat and sentenced him to life imprisonment for commission of offence punishable under Section 302 as well as R.I. for ten years for commission of offence punishable under Section 307 IPC. His father Sabbir was convicted under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC. Mr. Sabbir was sentenced to life imprisonment for commission of offence under Section 302 read with Section 34 IPC. and R.I. for seven years for commission of offence under Section 307 read with Section 34 IPC.

Feeling aggrieved, the appellant and his father preferred Criminal Appeal No. 1034 of 2001 in the High Court of Uttaranchal at Nainital. During the pendency of the said appeal, Sabbir, who was father of the appellant, expired. Therefore, the appeal filed by the appellant was considered by the High Court.

The High Court found that there was no enmity between the parties nor there was premeditation between the appellant and his father for committing the crime. According to the High Court, the quarrel took place suddenly under the heat of passion because the time between the quarrel and the fight was stated to be few minutes. The High Court was of the view that the quarrel had taken place on account of sudden provocation in which the appellant had caused injuries to the deceased with knife and, therefore, the appellant had committed the

offence of culpable homicide not amounting to murder punishable under Section 304, Part I of the IPC. The appellant was accordingly convicted and was sentenced to undergo R.I. for ten years and a fine of Rs. 5,000 in default R.I. for one year.

The High Court was further of the view that the injuries on the person of Rahmat indicated that Rahmat had tried to apprehend the appellant when the appellant was trying to make his escape good from the place of occurrence and, therefore, it was natural for the appellant to inflict injuries on the person of Rahmat in order to make his escape good. The High Court, therefore, concluded that the appellant had, in fact, no intention to make an attempt to commit murder of Rahmat and had committed offence punishable under Section 308 IPC. Accordingly, the High Court convicted the appellant under Section 308 IPC and sentenced him to R.I. for two years and a fine of Rs. 1,000 in default R.I. for three months by judgment dated 24.12.2004. The above judgment has given rise to the two appeals.

According to the Medical Officer, Haldwani, he had conducted autopsy on the dead body of deceased Wilayat on October 14, 1980 and found a stab wound measuring about 8 cm x 4 cm x cavity deep over left side of chest about 2 cm below left nipple and one incised wound measuring about 6 cm x 2 cm x muscle deep in left luminar region about 8 cm above head of femur.

The evidence of the three eye-witnesses, namely, Chhote, who was the first informant as well as that of injured Rahmat and witness Md. Yasin would indicate that when the deceased was digging earth, he was prevented from doing so by accused Sabbir whereupon a scuffle had ensued between the deceased and accused Sabbir. All the witnesses have specifically stated that accused Sabbir had told his son, i.e., the appellant not to be a passive spectator and kill the deceased.

According to the witnesses, the appellant had thereupon taken out knife from his pant's pocket and inflicted first blow on the back of the deceased. Their evidence further shows that on receipt of the blow on his back, the deceased had immediately turned and, therefore, another blow was inflicted by the appellant on the chest of the deceased whereupon the deceased had fallen down on the ground and died on the spot. The eye-witness account further establishes that injured Rahmat had tried to save his brother Wilayat but the appellant had also injured him with the knife.

As per the medical evidence on record, injured Rahmat had received as many as six injuries. This is amply proved by PW4, Dr. Yogesh Mishra, who was the then surgeon, Primary Health Centre, Kichha.

On reappraisal of the testimony of the three witnesses, this Court finds that the version presented by them before the Court inspires confidence. Though each of them was subjected to searching cross-examination, nothing could be brought on record to impeach credibility of any of them. It is relevant to notice

that one of the eye-witnesses was injured Rahmat himself. Therefore, his presence at the place of incident can hardly be doubted. He being real brother of the deceased and he himself having received injuries, would not allow the real culprit to go scot free and involve innocent persons falsely.

The evidence of the eye-witnesses further makes it clear that there are no major contradictions or omissions. Under the circumstances, this Court is of the opinion that neither the Trial Court nor the High Court committed any error in placing reliance on the testimony of the three eye-witnesses for the purpose of coming to the conclusion that the appellant was the author of the injuries sustained by the deceased and injured Rahmat.

Premeditation to cause death of the deceased stands proved by reliable evidence adduced by the prosecution. Nothing is brought on record of the case to show that the act of mounting fatal attack on the deceased was done by the appellant in a heat of passion. The evidence adduced positively proves that the appellant had taken undue advantage while delivering fatal blow to the deceased.

The four requirements for applicability of Exception 4 to Section 300 IPC are not satisfied at all and, therefore, the conclusion of the High Court that the appellant would be guilty under Section 304 Part I IPC, being erroneous in law, is liable to be set aside. Therefore, the appellant will have to be found guilty under Section 302 IPC for causing murder of the deceased.

231. INDIAN PENAL CODE, 1860 – Section 376

Offence of rape – Appreciation of evidence – In the present case, two illiterate sisters, both victims of sexual molestation, explained how they suffered at the hands of the accused persons – Both the sisters were threatened by the accused that they will be killed if they informed anyone – No male member was available in their family – Other witnesses also corroborated the assertion of both the victims – Delay of 42 days in lodging the FIR was properly explained by the victims and the other witnesses – Discrepancies in the evidence of the victims were negligible in nature –Victims were taken to the doctor for medical examination after a month and 14 days in which circumstances it was unlikely that any sign of sexual intercourse would be visible – Version of the prosecutrix, held acceptable.

Santhosh Moolya and another v. State of Karnataka

Judgment dated 26.04.2010 passed by the Supreme Court in Criminal Appeal No. 479 of 2009, reported in (2010) 5 SCC 445

Held:

In *Sohan Singh and another v. State of Bihar, (2010) 1 SCC 68,* this Court has observed as under: (SCC p. 71, para 13)

> "13. When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR."

From the evidence of PW 1, PW 2, owner of the quarry PW 4 and mother of the victim PW-14, we are satisfied that though there was a delay of 42 days in lodging the complaint, the same was properly explained by the victims and the other witnesses. In addition to the same, we have also noticed that except the victims, no male member is available in their family to help them. In fact they came to the village where the incident occurred to teke out their livelihood. Further, PWs 1 and 2 asserted that after committing rape A-1 and A-2 threatened that they would kill them if they inform anyone. All these material aspects were duly considered by the trial Court and accepted by the High Court. We concur with the same.

Coming to the discrepancies in the evidence of PWs 1 and 2, as rightly pointed out by the prosecution and accepted by both the Courts below, they are negligible in nature and it had not affected their grievance, hence we reject the said contention also.

It was argued that the doctors PWs 7 and 8 did not notice any injury on the private part of PWs 1 and 2. It is relevant to note that due to threat from A1 and A2, coupled with illiteracy and poverty, the two victims were not taken to the doctor immediately after the incident but they were taken after a month and 14 days. In such circumstances, as rightly observed by the trial Court and the High Court, it is unlikely that any sign of sexual intercourse will be feasible (sic visible) by examining the private parts of the victims.

Added to it, PW 1 happens to be a married woman and having children which indicates that she is accustomed to sexual intercourse and in view of the same, it would be difficult to expect the doctor, who examined after quite sometime, to indicate the sign of sexual intercourse. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix.

As observed earlier, there is no reason to disbelieve the statement of the victims PWs 1 and 2. On the other hand, their oral testimony which is found to be cogent, reliable, convincing and trustworthy has to be accepted. Further, both the Courts have rightly accepted the statement of prosecutrix.

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232. INDIAN PENAL CODE, 1860 – Section 395
EVIDENCE ACT, 1872 – Section 9

(i) Dacoity in public temple – Appreciation of evidence – Suspects including accused persons were arrested on different dates and thereafter TI parade was held – Special Executive Magistrate who conducted test identification parade, proved identification memo and deposed that all possible precautions were taken while conducting TI parade – His testimony was unchallenged – There was also link evidence to show that from arrest of accused persons till being lodged in jail, faces of accused persons kept veiled – Accused persons identified by inmates of the temple in Court, whose presence in the temple was natural – There was sufficient light to identify the accused persons – Offence proved.

(ii) Test identification parade – Value of – Facts which establish identity of an accused are relevant – Purpose of TI parade is to test and strengthen trustworthiness of substantive evidence of a witness in Court – TI parade belongs to investigation stage and if adequate precautions are taken, its evidence may be used for the purpose of corroboration – Position restated.

Ram Babu v. State of Uttar Pradesh

Judgment dated 19.04.2010 passed by the Supreme Court in Criminal Appeal No. 475 of 2008, reported in (2010) 5 SCC 63

Held:

As per Section 9 of the Evidence Act, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court. It is for this reason that test identification parade is held under the supervision of a magistrate to eliminate any suspicion or unfairness and to reduce the chances of testimonial error as magistrate is expected to take all possible precautions.

In the present case, PW-14 supervised the test identification parade held in District Jail, Mathura on June 4, 1980. He proved identification memos in his deposition. He deposed that all possible precautions were taken in conduct of the test identification parade held on that date. As a matter of fact, there is no challenge to his testimony.

Insofar as substantive evidence is concerned, all the three appellants (A- 2, A-4 and A-5) have been identified by PW-3 and PW-9 in the Court. A-2 and A-4 were also identified by PW-2 in the Court. Being inmates, their presence in the temple at the time of incident was natural. All of them were having their

food in the chowk at that time. That there was sufficient light for enabling them to identify the dacoits is also established. Besides bulbs and tube lights, according to these witnesses, the light was also available from two gas petromaxes. Pertinently, learned counsel for the appellants did not contest the finding recorded by the trial court as well as the High Court in this regard.

The prosecution also examined large number of witnesses to adduce link evidence to the effect that right from the arrest of the accused persons till being lodged in jail, the faces of the suspects were kept veiled and nowhere was the opportunity to see them.

The learned counsel for the appellants, however, contended that the evidence against the appellants and A-3, A-6 and A-7 was identical and based on that evidence A-3 and A- 6 were acquitted and A-7 was discharged and on the same evidence, appellants could not have been legally convicted. Insofar as A-3 is concerned, the trial court gave him benefit of doubt as the prosecution failed to furnish any explanation as to why he could not be confined in jail or presented before a Magistrate on the day of arrest itself, i.e. April 30, 1980. The trial court found that, although A-3 was arrested on April 30, 1980 at about 6.15 a.m. but he was produced before the Court on the next day despite the fact that Magistrate was available hardly 8 kilometers away. As regards A-6, the trial court was not convinced about the date, time and place of his arrest. The trial court held that from the evidence on record, possibility of his arrest at earlier point of time and at some other place cannot be excluded.

We are afraid the grounds on which A-3 and A-6 were given benefit of doubt do not, in any manner, affect the credibility of the evidence of PW-2, PW-3 and PW-9 in the Court or the test identification parade insofar as A-2, A-4 and A-5 are concerned. These witnesses have identified the appellants not only in test identification parade but also in the Court. The identification of the appellants, thus, is established by substantive evidence duly corroborated by test identification parade.

We may also consider the contention of the learned counsel for the appellants that as the test identification parade was held belatedly and delay has not been explained sufficiently, the identification of the appellants is rendered doubtful. It is true that A-2 was arrested on April 30, 1980; A-5 on May 6, 1980; and A-4 on May 29, 1980 while the test identification parade was held on June 4, 1980 but the explanation that has been put forth by the prosecution for this delay is that the suspects (9 in number) including the appellants were arrested on different dates and the last of such arrest being of A-4 on May 29, 1980, the test identification parade was held only thereafter. In our view, in the facts and circumstances of the case explanation is acceptable and it cannot be said that test identification parade held on June 4, 1980 suffers from any undue and unexplained delay.

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***233. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 7-A**
JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007 – Rule 12
EVIDENCE ACT, 1872 – Section 35

(i) Under Section 7-A of J.J. Act, Court or Juvenile Justice Board or Child Welfare Committee has power to decide the claim of juvenility raised before them – Procedure to be followed in determination of age prescribed under Rule 12, which came into force from 26.10.2007 and thereafter, age determination enquiry has to be conducted as per provision of sub rule (3) of Rule 12 by the Court, etc.

(ii) An entry in a register maintained in the ordinary course of business by a public servant in the discharge of its official or by any other person in performance of duty specially enjoined by law of the country in which such register is kept would be relevant fact only if the conditions mentioned in Section 35 of Evidence Act are fulfilled – Hence, the entry of date of birth in the admission form, the school record and transfer certificate must satisfy the conditions laid down in Section 35 of Evidence Act. (Note: How to prove these entries are laid down by the Apex Court in *Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 1796,* **also referred in this case.)**

Jabar Singh v. Dinesh and another
Judgment dated 12.03.2010 passed by the Supreme Court in Criminal Appeal No. 487 of 2010, reported in (2010) 3 SCC 757

234. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 7–A, 15, 20 and 64
JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007 – Rule 98

Appeal by juvenile undergoing sentence under Sections 302, 304, 324 r/w/s 34 of IPC – Claim of juvenility raised in appeal and found to be correct – Appellant has already undergone imprisonment for more than the maximum period provided u/s 15 of the Act – Appellant entitled to be released under the mandate of Sections 15 and 64 of the Act and Rule 98 of the Rules.

Mohan Mali & Anr. v. State of M.P.
Judgment dated 28.04.2010 passed by the Supreme Court in Criminal M.P. No. 6426 of 2010, reported in AIR 2010 SC 1790

Held:

The learned senior counsel appearing for the Appellants, submitted that the Appellant No. 2, Dhanna Lal, although a minor, within the meaning of the 2000 Act, had not only been tried along with other co-accused, who were not juveniles, in violation of Section 18 of the 2000 Act, but had also undergone 9 years of imprisonment, despite a maximum sentence of three years which could have been imposed on him under Section 15 of the 2000 Act.

Among other questions, this question also fell for determination of this Court in the case of *Hari Ram v. State of Rajasthan & Anr., (2009) 13 SCC 211. This Court while considering the various provisions of the 2000 Act, as amended in 2006,* and, in particular, Section 7A which was introduced in the parent Act by the amending Act of 2006, held that Section 7A would have to be read in tandem with Section 20 of the 2000 Act and Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, hereinafter referred to as 'the 2007 Rules', which deal with disposed of cases of juveniles in conflict with law. Since all the three provisions are of relevance to this Appeal, the same are being separately dealt with hereinbelow.

Section 7A of the 2000 Act, which provides the procedure to be followed when claim of juvenility is raised before any Court, reads as follows:-

> "**7A. Procedure to be followed when claim of juvenility is raised before any court.**— (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.
>
> (2) If the court finds a person to be a juvenile on the date of commission of the offence under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

What is of relevance is the fact that Section 7A of the 2000 Act allows a claim of juvenility to be raised before any Court at any stage even after final disposal of the case and speaks of the procedure which the Court is required to adopt when such claim of juvenility is raised.

Section 20 of the 2000 Act specially provides for the procedure to be followed in pending cases and reads as follows:-

> *"20. Special provision in respect of pending cases.—* Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.
>
> [Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.
>
> *Explanation.—* In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.]"

What is to be noticed in the aforesaid Section is that it makes provision for continuance of trials which had been commenced prior to the coming into operation of the 2000 Act. While providing that the trial could continue before the Court, if it was found that the juvenile had committed an offence, the Court would be required to record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Juvenile Justice Board, which could then pass orders in respect of that juvenile in accordance with the provisions of the 2000 Act.

Section 64 of the 2000 Act deals with a situation where a juvenile in conflict with law is already undergoing sentence at the commencement of the Act, and the same reads as follows :-

"*64. Juvenile in conflict with law undergoing sentence at commencement of this Act.* — In any area in which this Act is brought into force, the State Government shall direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of section 16 of this Act."

The said provision has to be read along with Sections 7A and 20 of the 2000 Act, together with Rule 98 of the 2007 Rules, which deals with disposed of cases of juveniles in conflict with law, and provides as follows:

"*98. Disposed of cases of juveniles in conflict with law.* — The State Government or as the case may be the Board may, either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provisions contained in the Act and Rule 12 of these rules and pass an appropriate order in the interest of the juvenile in conflict with law under Section 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in Section 15 of the said Act."

In the facts of this case, we are faced with a situation where the juvenile, Dhanna Lal, had already been tried along with adults and had been convicted under Sections 302/34, 326/34 and 324/34 IPC and was sentenced to life imprisonment, out of which he has already undergone about 9 years of the sentence. Rule 98 of the 2007 Rules, in our view, squarely applies to Appellant No. 2 Dhanna Lal's case. His case is to be considered not only for grant of bail, but also for release in terms of the said Rule, since he has completed more than the maximum period of sentence as provided under Section 15 of the 2000 Act.

The legal position has been clearly explained in *Hari Ram's case* (supra) and does not, therefore, require any further elucidation in this case.

Having regard to the fact that the Appellant No. 2, Dhanna Lal, was a minor on the date of commission of the offence, and has already undergone more than the maximum sentence provided under Section 15 of the 2000 Act, by

applying the provisions of Rule 98 of the 2007 Rules read with Sections 15 and 64 of the 2000 Act, we allow the appeal as far as he is concerned and direct that he be released forthwith. The bail application filed on his behalf is also disposed of,. accordingly.

Note: Also See – *Dharambir v. State (NCT of Delhi) & Anr., AIR 2010 SC 1801.*

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235. LAND ACQUISITION ACT, 1894 – Sections 4 (1) and 23

When acquired lands have to be valued uniformly at the same rate and when acquired lands in different areas have to be valued at different rates? Held, it depends upon the extent of land acquired, the location, proximity to an access road/main road/Highway or to a city/town/village and other relevant circumstances – Explained with illustrations.

Determination of compensation – **Deduction towards developmental costs depends on various factors – It may vary from 20% to 70% – In case where acquired area of land is of larger extent and comparative sale transaction is related to small extent, 25% deduction is proper. Comparable sale transaction made one year before preliminary notification for acquisition of land – 10% to 12% increase in market value per year can be provided with regard to the land situated near urban area and having potential for non-agricultural development.**

Haridwar Development Authority, Haridwar v. Raghubir Singh, Etc.

Judgment dated 29.01.2010 passed by the Supreme Court in Civil Appeal No. 1150 of 2010, reported in AIR 2010 SC 1754

Held:

The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:

> (A). When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.
>
> (B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.

(C) Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometres away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.

(D) Where a very large tract of land with a radius of one to two kilometres is acquired, .but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one point to another point in the acquired lands, may be as much as two to three kilometres may not make any difference.

The acquisition with which we are concerned relates to a comparatively small extent of village land measuring about 38 biglias of compact contiguous land. The High Court was of the view that the size and situation did not warrant any belting and all lands deserved the same rate of compensation. The Authority has not placed any material to show that any area was less advantageously situated. Therefore the view of the High Court that compensation should be awarded at an uniform rate does not call for interference.

The Collector has referred to several sale transactions but relied upon only one document that is sale deed dated 19.12.1990 relating to an extent of 11,550 sq.ft. of land sold for Rs. 4,04,250/-, which works out to a price of Rs. 35 per sq.ft. The collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq.ft. and the acquired area was a larger extent 8,45,174 sq.ft. By making such deduction, he arrived at the rate as Rs. 26.25 per sq. ft. The Reference Court and the High Court have also adopted the said sale transaction and valuation.

The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed, for arriving at the market value, in view of the following factors: (i) that the acquired lands were near to the main Bye-pass Road and had road access on two sides; (ii) that many residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and (iii) that the acquired land had the potential to be used an urban residential area.

When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors [see: *Lal Chand v. Union of India, AIR 2010 SC 170.* Even if the acquired lands have situational advantages,. the minimum deduction from the market value of a small presidential plot, to arrive at the market value of a larger agricultural land, is in the usual course, will be in the range of 20% to 25%. In this case, the Collector has himself adopted a 25% deduction which has been affirmed by the Reference Court and High Court. We therefore do not propose to alter it.

Only one grievance of the claimants remains to be addressed. The claimants pointed out that the relied upon sale transaction is dated 19.12.1990, whereas the notification under section 4(1) of the Act in this case was of 7.12.1991; and as there is a gap of nearly one year, an appropriate increase in the market value should have been provided keeping in view the steady increase in prices. It is well settled that an increase in market value by about 10% to 12% per year can be provided, in regard to lands situated near urban areas having potential for non-agricultural development. [See: *Sardar Jogendra Singh v. State of UP, (2008) 17 SCC 133*].

We are therefore of the view that the value arrived at by the Collector, and accepted by the Reference Court and the High Court requires to be increased by 12% in view of the fact that the preliminary notification was one year after the relied upon sale transaction. Accordingly by increasing the value of Rs. 26/25 by 12%, we arrive at the market value as on 7.12.1991 as Rs. 29/40, rounded off to Rs. 29/50 per sq.ft.

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***236. LIMITATION ACT, 1963 – Section 5**

(I) Application for condonation of delay on behalf of the State and its agencies/instrumentalities – Consideration of – Same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State – However, certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time, causing delay.

(ii) Inordinate delay by the State in filing appeal – Condonation of – Appeal filed after more than four years – Statement made in the application to explain delay was incorrect and apparently false – Even the Department concerned was aware with the suit

proceedings but none of its officers were bothered to appear before the trial court on the dates of hearing – Held, grave error committed by the High Court in condoning the delay – The Supreme Court directed probe to be conducted against defaulting officials for fixing accountability and losses, if any, suffered by the State to be recovered from them.

Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another

Judgment dated 26.02.2010 passed by the Supreme Court in Civil Appeal No. 2075 of 2010, reported in (2010) 5 SCC 459

237. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 139
Dishonour of cheque – Scope of presumption under Section 139 of the Act – It includes the existence of legally enforceable debt or liability.
In this regard, contrary observation in para 30 of the case of *Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325 (DB)* **is not correct.**

Rangappa v. Mohan

Judgment dated 07.05.2010 passed by the Supreme Court in Criminal Appeal No. 1020 of 2010, reported in AIR 2010 SC 1898 (Three Judge Bench

Held:

With respect to the decision of *Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325* (DB), counsel appearing for the respondent-claimant has submitted that the observations to the effect that the 'existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that 'it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in *Krishna Janardhan Bhat* (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in *Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16,* it was held (Ruma Pal, J. at Paras. 22-23):

> "22. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in

> criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.
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> 23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

We are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in *Krishna Janardhan Bhat* (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be

remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

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238. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147
CRIMINAL PROCEDURE CODE, 1973 – Sections 200 and 320
Compounding of offence relating to dishonour of cheque – To curb the tendency of parties to compound the offence at last stage, the Apex Court issued guidelines to encourage them for early compounding by imposing graded costs on accused.
Filing multiple complaints about cheques issued in one transaction causes tremendous harassment and prejudice to drawers of cheque – Therefore, Apex Court has made it mandatory to complainant to file along with complaint sworn affidavit that no other complaint has been filed in other Court in respect of the same transaction.

Damodar S. Prabhu v. Sayed Babalal H.
Judgment dated 03.05.2010 passed by the Supreme Court in Criminal Appeal No. 963 of 2010, reported in AIR 2010 SC 1907 (Three Judge Bench)

Held:

The tendency of litigants to adopt compounding as a last resort to compound offence of dishonour of cheque is putting unnecessary strain on judicial system and contributing to increase in number of pending cases. Moreover the free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. Section 147 which permits compounding does not carry any guidance on how

to proceed with the compounding of offences under the Act. The Scheme contemplated under S. 320 of the Cr.P.C. cannot be followed in the strict sense. In view of legislative vacuum Supreme Court directed Courts to follow a graded system of levying costs on parties so as to encourage them to go in for early compounding. The Supreme Court framed following guidelines:

(a) Directions can be given that the writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the Court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court I revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

Any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place.

The Court made it clear that even though the imposition of costs by the competent Court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance.

We are also in agreement with the Learned Attorney General's suggestions for controlling the filing of multiple complaints that are relatable to the same transaction. It was submitted that complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. For instance, in the same transaction pertaining to a loan taken on an installment basis to be repaid in equated monthly installments, several cheques are taken which are dated for

each monthly installment and upon the dishonor of each of such cheques, different complaints are being filed in different courts which may also have jurisdiction in relation to the complaint. In light of this submission, we direct that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC. If it is found that such multiple complaints have been filed, orders for transfer of the complaints to the first court should be given, generally speaking, by the High Court after imposing heavy costs on the complainant for resorting to such a practice. These directions should be given effect prospectively.

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239. N.D.P.S. ACT, 1985 – Section 15

Possession of poppy husk – Accused persons belong to another place were found sitting on the bags of poppy husk and on seeing the police, they tried to hide themselves behind the bags – In absence of satisfactory explanation, such conduct shows their guilty mind.

Mere delay in sending the samples for forensic examination not sufficient to infer that the property must have been tampered while the chemical examiner reported that same was found in tact at the time of examination – On the aforesaid ground, adverse observation of the First Appellate Court is nothing like surmises and conjectures.

State of Punjab v. Lakhwinder Singh and Anr.

Judgment dated 05.04.2010 passed by the Supreme Court in Criminal Appeal No. 32 of 2009, reported in AIR 2010 SC 1557

Held:

Counsel appearing for the respondents disputed the fact of conscious possession by the respondents and submitted that merely because the respondents were sitting on the bags it could not be said that they were in conscious possession of the bags. The expression "possession" came to be analysed by this Court in several decisions. The first case in point of time to which our attention was drawn is the decision in the case of *Inder Sain v. State of Punjab, AIR 1973 SC 2309.* In the said decision also this Court was called upon to answer the question as to whether the appellant was in possession of opium. In the said decision, this Court held that the word "possess" connotes some sort of knowledge about the thing possessed. It was also held that the prosecution must prove that accused was in control of something in the circumstances which showed that he was assenting to being in control of it. This Court further held that once it is proved by the prosecution that the accused was in physical custody of opium, it is for the accused to prove statutorily that he has not committed an offence by showing that he was not knowingly in

possession of opium. Thus, the burden of proving the fact that the accused was not knowingly in possession of the contraband would lie on the shoulders of the accused person.

Section 15 of the NDPS Act makes possession of contraband articles an offence. Section 15 appears in Chapter IV of the Act which relates to the offence of possession of poppy straw.

In *Madan Lal and another v. State of H.P., AIR 2003 SC 3642* this Court held that once possession is established, the person who claims that it was not a conscious possession has to establish it because how he came to be in possession of the same is within his special knowledge. It was also held in that case that Section 35 of the Act gives a statutory recognition to this position by making it a statutory presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

In *Gunwantlal v. State of M.P., AIR 1972 SC 1756* it was held by this Court that possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given also is subject to such power or control.

In the backdrop of the aforesaid settled position of law we have to examine the facts of the present case in order to hold as to whether or not the respondents could be said to have been in conscious possession of the contraband goods. Evidence was led by the prosecution to establish that the respondents were found sitting on the aforesaid bags of poppy husk. It was also stated by the Sub-Inspector as also the Assistant Sub-Inspector that the presence of the accused respondents at such an early hour, i.e., 8.00 a.m. near a religious place with such large number of bags and their sitting on them and on seeing the police party their conduct of trying to hide themselves behind the bags prove and establish that they were in possession of the aforesaid bags. The very fact that they tried to hide themselves behind the bags made the police party suspicious about the contents of the bags which led to a search of the said bags and on search being carried out in accordance with law, the aforesaid suspicion that the bags contained contraband was confirmed.

The respondents, during the trial, could not give any satisfactory reply as to how and why they came from Haryana and were found sitting on bags of poppy husk. Their subsequent conduct of hiding behind the bags also shows their guilty mind.

Reference could also be made to Exhibits PC and PD which are memos prepared by the Investigating Officer. In the said memos, it was clearly stated that the contraband was contained in the bags which were kept in the possession of the respondents. There were separate memos prepared and each one of

them is signed by the two respondents respectively and separately. The aforesaid documents, therefore, clearly establish that the respondents were in possession of the said contraband. The evidence adduced by both the Sub-Inspectors as also by the Assistant Sub- Inspector examined as PW-3 and PW-4 also prove and establish that both the respondents were in conscious possession of the contraband goods. So far as the seizure of the contraband goods is concerned, the discrepancies pointed out by the High Court in our opinion are very minor and they are not very material. The prosecution has been able to establish and prove that the aforesaid bags which were 35 in number contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the aforesaid delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion is based on surmises and conjectures and cannot take the place of proof.

We may at this stage refer to a decision of this Court in *Hardip Singh v. State of Punjab, AIR 2009 SC 432* in which there was a delay of about 40 days in sending the sample to laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.

The case property was produced in the Court and there is no evidence to show that the same was ever tampered with.

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***240. N.D.P.S. ACT, 1985 – Sections 15, 42 and 57**

(i) Conscious possession of contraband – The six bags, containing 32 kg of poppy husk in each of the bag, were not only recovered from the premises of the accused but from underneath the wheat chaff kept in the room which was opened by him with a key in his possession – Conviction under Section 15 of the NDPS Act held proper.

(ii) It cannot but be noticed that with the advancement of technology and the availability of high speed exchange of information, some of the provisions of the NDPS Act, including Section 42, have to be read in the changed context – Apart from the view expressed in *Sajan Abraham v. State of Kerala, (2001) 6 SCC 692*, that in an emergent situation it may not always be possible to strictly comply with the provisions of Section 42 since the delay involved in effecting such strict compliance could help the offender to remove the contraband or to flee the place so as to make any raid for recovery of such contraband meaningless – The decision of the Constitution Bench in *Karnail Singh v. State of Haryana, (2009) 8 SCC 539,* has also made it clear that non-compliance with the provision of Section 42 may not vitiate the trial if no prejudice is caused to the accused – Furthermore, whether there is adequate compliance with Section 42 or not is a question of fact to be decided in each case.

(iii) Compliance with the provision of Section 57 of the NDPS Act is not mandatory – Only substantial compliance is sufficient.

Bahadur Singh v. State of Haryana

Judgment dated 06.04.2010 passed by the Supreme Court in SLP (Crl.) No. 5523 of 2009, reported in (2010) 4 SCC 445

241. N.D.P.S. ACT, 1985 – Section 50
CRIMINAL TRIAL :

(i) Section 50 of NDPS Act only applies in case of personal search of a person and it does not extend to search of a vehicle or premises or container, brief case, bag etc. carried by accused person.

(ii) Co-accused is one who is awarded punishment alongwith the other accused in the same proceedings – For applying the principles of parity, both the accused must be involved in same crime and must be convicted in single trial.

(iii) It is normally expected that there should be independent evidence to support the case of the prosecution – However, it is not an inviolable rule if the police officer is not able to get public witness and Court considers it in the circumstances of the case reasonable and on appreciation, the evidence of the police officer (official witness) is otherwise reliable then it can form the basis of conviction.

Ajmer Singh v. State of Haryana

Judgment dated 15.02.2010 passed by the Supreme Court in Criminal Appeal No. 436 of 2009, reported in (2010) 3 SCC 746

Held:

The question of compliance or non-compliance of Section 50 of the N.D.P.S. Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the N.D.P.S. Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more *res integra.*

So, for applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings.

The learned counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3, PW-4 and PW-5 which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced.

We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

242. PRACTICE AND PROCEDURE:

Orders – Administrative, quasi-judicial or judicial – Orders must be supported by reasons as they are fundamentals of sound administration of justice delivery system – Reason is the heart beat of every conclusion and it ensures clarity, objectivity, transparency and fairness in decision making.

Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and others

Judgment dated 09.03.2010 passed by the Supreme Court in Civil Appeal No. 2225 of 2010, reported in (2010) 3 SCC 732 (3-Judge Bench)

Held:

It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." [Vide *State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794;* and *State of Rajasthan v. Sohan Lal & Ors., (2004) 5 SCC 573*].

Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [*Vide Raj Kishore Jha v. State of Bihar, AIR 2003 SC 4664, Vishnu Dev Sharma v. State of U.P., (2008) 3 SCC 172; SAIL v. STO, (2008) 9 SCC 407, State of Uttaranchal v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; U.P. SRTC v. Jagdish Prasad Gupta, AIR 2009 SC 2328, Ram Phal v. State of Haryana, (2009) 3 SCC 258, Mohammed Yusuf v. Faij Mohammad, (2009) 3 SCC 513 and State of Himachal Pradesh v. Sada Ram, (2009) 4 SCC 422*].

Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected.

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243. (A) PREVENTION OF CORRUPTION ACT, 1988 – Section 19

Sanction for prosecution – Competency – Even if the authority was incompetent to accord sanction, in appeal prosecution can rely upon Section 19 (3) of the Act as there was no failure of justice.

Even though, in our opinion, the sanction orders are legal and valid, even if any doubt exists, the same becomes clear in view of the provisions of Section 19 (3). It is reproduced heretobelow:

"(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),–

(a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;...

Explanation.— For the purpose of this section. –

(A) error includes competency of the authority to grant sanction;..."

What has been challenged here before us by both the accused is in fact the competence of the sanctioning authority to issue sanction orders against them. As per the said section, 'a finding' or a 'sentence' shall not be reversed by a court of appeal on the ground of any error, omission or irregularity in the sanctioning order unless a failure of justice has been occasioned thereby. In our considered opinion even if we assume for the sake of argument that the Chairman cum managing director of NHB, Shri RV Gupta was not the competent authority to pass the orders of sanction against the officials of NHB, the prosecution could still rely on the said s. 19 (3) of the Act; especially since there has been no failure of justice in the present case by the said error in the orders. The contentions of the accused, as to the validity of the Sanctioning orders, in view of the said sub section must be rejected.

(B) EVIDENCE ACT, 1872 – Sections 61 and 74

The report of the Committee enquiring into the security scam is not a judgment of Court – Therefore, its contents cannot be taken in evidence without formal proof about the contents of its report.

The Committee was not a court. It did not render any decision. It was merely a fact finding body. It was constituted for a limited purpose. Contents of the report, therefore, without formal proof, could not have been taken in evidence.

A Division Bench of the Nagpur High Court in *M.V. Rajwade v. Dr. S.M. Hassan, [AIR 1954 Nag 71]* following the judgment of the Privy Council In Re. Maharaja Madhava Singh LR , [(1905) 31 IA 239], held that a Commission is a fact finding body meant only to instruct the

mind of the Government without producing any document of a judicial nature and that findings of a Commission of Inquiry were not as definitive as a judgment.

Similarly in *Branjnandan Sinha v. Jyoti Narain, AIR 1956 SC 66* this Court held that the Commission appointed under the Public Servants (Inquiries) Act, 1850, was not a Court within the meaning of the Contempt of Courts Act, 1952.[See also *Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958 SC 538, Puhupram v. State of Madhya Pradesh, (1968) MPLJ 629* and *Sham Kant v. State of Maharashtra, AIR 1992 SC. 1879.*

Accordingly, the Janakiraman Committee report was not admissible in evidence. The report in terms of the provisions of the Evidence Act, 1872 is not a judgment. The report may facilitate investigation but cannot form basis of conviction and sentencing of the accused. For the said purpose the report was wholly inadmissible in evidence.

(C) INDIAN PENAL CODE, 1860 – Section 120-B

Criminal conspiracy – Accused, being bank employees, illegally advanced loan under disguise of Call Money transaction to broker dealing in security to willfully facilitate him to enter into securities transactions – Criminal conspiracy established.

It is contended on behalf of the respondent that the routing of call money from the National Housing Bank to the Account of the deceased Shri Harshad Mehta who was a stock broker was contrary to the provision of the National Housing Bank Act, 1987.

In terms of Section 14 of the 1987 Act, NHB could advance loans to 'housing finance institutions' and 'scheduled banks' or 'slum authority' constituted under a Central or State Legislation. Furthermore, Sub-section 4 of Section 49 of the Act lays down that if any other provision of the Act is contravened or if any default is made in complying with any other requirement of this Act, or of any order, regulation or direction made or given or condition imposed thereunder, any person guilty of such contravention or default shall be punishable with fine.

Therefore, advancement of loan to Harshad Mehta by NHB under the disguise of a call money transaction was illegal. The accused had the knowledge of the said transaction.Therefore they have been rightly convicted by the courts for commission of the offence of criminal conspiracy.

In conclusion we hold that there is sufficient evidence to hold all accused A1 to A3, all officials of UCO Bank & A5 who was working under Harshad Mehta and A6, official of NHB guilty of criminal conspiracy. But there is no sufficient evidence to show the involvement of A7, NHB in the said transactions.

(D) INDIAN PENAL CODE, 1860 – Section 409

Criminal breach of trust – Accused, being bank employees, illegally diverted huge sum which is to be used for specific purpose to a private person and allowed to retain the same for a period to make an unlawful gain therefrom – The offence of criminal breach of trust established.

Accused No. 6 and 7 allowed the diversion of a huge sum meant to be used for specific purpose, namely - 'call money' to be lent to another Nationalized Bank. We have already hereinbefore dealt with the question as to the legality of the transactions having regard to the provisions of the NHB Act. If the transaction was illegal, as result whereof, a private person, who was not expected to reap the fruit of 'call money' was allowed to retain the same for a period to make an unlawful gain therefrom, offence of criminal breach of trust must be held to have been committed.

It is for the same reason, the submission that as no body ultimately suffered any loss, an offence under Section 409 of the Indian Penal Code was not made out, cannot be accepted. A Bank or Financial Institution may not suffer ultimate loss but if the money has been allowed to be used by another person illegally for illegal purposes, the ingredients of Section 405 of the Indian Penal Code would get attracted. A case involving temporary embezzlement also attracts the ingredients of Section 405 of the Indian Penal Code.

In the present case accused No. 6 parted with money of NHB which was entrusted to him so that Harshad Mehta could get it, although not entitled therefor in Law. The conduct of accused 6 was therefore dishonest. He is guilty of the offence of criminal breach of trust. With regard to accused No. 7, Suresh Babu we have already mentioned that there is not enough evidence to show his involvement in the said transactions.

In the present case the amount of Rs. 40 crore was entrusted to accused No. 6, C. Ravi Kumar to be dealt with in accordance with the provisions of the NHB Act. As has already been noticed herein before, the 1987 Act does not permit grant of loan to an individual. Accused No. 6, in violation of the law, handed over the amount to the UCO Bank with full knowledge that the amount would be credited to the account of accused No. 4 Harshad Mehta. The call money transaction with UCO Bank was only a cover up. Thus the property which was trusted to accused No. 6 was misappropriated by him.

So far as the involvement of accused 1 to 3 is concerned, we are of the opinion that they also played an important role in diverting the supposed call money from NHB which was meant for UCO Bank to the account of Harshad Mehta. As soon as the cheque for Rs. 40

crore was received by UCO Bank the amount stood entrusted to the officials of UCO Bank. However, accused 1 to 3, in violation of law and in the absence of any contract, permitted the amount to be transferred to the account of accused No. 4 Harshad Mehta who was not entitled to it. Therefore, the offence of criminal breach of trust stands proved against them also.

(E) PREVENTION OF CORRUPTION ACT,1988 – Section 13(1)(d)(iii)

Accused, being bank employees were public servants and illegally made funds available to broker dealing in securities and thereby facilitated him to obtain pecuniary advantage within the meaning of Section 13 of the Act – Conviction under Section 13 (1)(d)(iii) upheld.

The ingredients of sub-clause (iii) of Section 13 (1) (d) contemplate that a public servant who while holding office obtains for any person any valuable thing or pecuniary advantage without any public interest would be guilty of criminal misconduct. Sub-section (2) of Section 13 provides for the punishment for such criminal misconduct.

All the accused were at the relevant time public servants. Each one of them played a specific role in diversion of funds from NHB to the account of Harsad Mehta, all ostensibly under a call money transaction. They thereby in our opinion facilitated Harshad Mehta to obtain pecuniary advantage within the meaning of the section. The acts were anything but intended to be in public interest. On the contrary the public loss and suffering occasioned thereby was immeasurable. Though it is true, as has been argued before us that all the funds diverted have subsequently been returned to NHB and no actual loss has been occasioned there by either to the UCO Bank or the NHB. But it must not be forgotten that white collar crimes of such a nature affect the whole society even though they may not have any immediate victims. We, accordingly, hold accused A1 to A3 and A6 guilty of criminal misconduct under S.13 (1) (d) (iii) of the Prevention of Corruption Act.

R. Venkatakrishnan v. Central Bureau of Investigation

Judgment dated 07.08.2009 passed by the Supreme Court in Criminal Appeal No. 76 of 2004, reported in AIR 2010 SC 1812

***244. PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971 – Section 2**

CRIMINAL PROCEDURE CODE, 1973 – Section 188 Proviso

Offence of insult to the National Flag of India – Alleged offence was committed outside India – Held, as per proviso to Section 188 of CrPC cognizance cannot be taken without obtaining prior sanction of the Central Government.

Mandira Bedi (Smt.) v. Pawan and another
Judgment dated 08.01.2010 passed by the High Court in No. 2121 of 2008, reported in 2010 (3) MPHT 64

245 PUBLIC GAMBLING ACT, 1867 – Section 4A
Whether Court can order for confiscation of amount seized inspite of acquittal of offence punishable under Section 4A of the Act? Held, No – Accused is entitled to get back the amount seized under the Act on acquittal of the offence.

Kishori Lal v. State of M.P.
Judgment dated 25.02.2009 passed by the High Court in Criminal Revision No. 69 of 2006, reported in 2010 (II) MPJR 201

246. PUBLIC LIABILITY INSURANCE ACT, 1991 – Sections 2 (c) and 3
(i) Whether electricity is a hazardous substance? Held, Yes.
(ii) No fault liability, applicability of – Deceased received the electric shock when he came in contact with the open parts of the live wire of starter – Held, the death of deceased was due to "handling" (as defined in Section 2 (c) of the Act) of hazardous substance and being the proximate cause of death, it is sufficient for the person who claims through such deceased to maintain claim for relief under the Act.

Mankeenwar v. Chairman and another
Judgment dated 01.04.2010 passed by the High Court in W.P. No. 6102 of 2009, reported in 2010 (2) MPLJ 536

Held:

Electricity is a hazardous substance is no more res-integra and has been held to be in *M.P. State Electricity Board Jabalpur v. Collector, Mandla and another, AIR 2003 M.P. 156* :-

The question is whether the respondent can be absolved from the liability on the ground that they are liable only upto outgoing terminal and if any accident occurs, as in the present case, at the consumer's end, the Electricity Supply Co. cannot be held liable; can be examined from the view point of the Statute itself.

Act of 1991 was enacted to provide for public liability insurance for the purpose of providing immediate relief to the persons effected by accident occurring while handling any hazardous substance. The expression "handling" is defined under Section 2 (c) to mean :

(c) "handling" in relation to any hazardous substance, means the manufacture, processing, treatment, package, storage, transportation by vehicle use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance;"

The use of electricity thus tantamount to handling the same. The expanse of its applicability cannot be curtailed as the respondent No. 1 wants that, the accident occurred beyond the precincts of the respondents. In the considered opinion of this Court since the death was due to 'handling' of hazardous substance being the proximate cause for death, sufficient it is for the person who claims through such deceased to maintain the claim for relief under the Act of 1991. This aspect is further strengthened when section 3 is taken into consideration which stipulates :-

"3. *Liability to give relief in certain cases on principle of no fault.* – (1) Where death or injury to any person other than a workman or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage."

(2) In any claim for relief under sub-section (1) (hereinafter referred to in this Act as claim for relief) the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person."

This being the law regarding no fault liability, the collector, i.e. respondent No. 2, in the considered opinion of this Court was not justified in rejecting the claim on the strength of the reasons therein.

247. REGISTRATION ACT, 1908 – Section 49, Proviso

Suit for specific performance of contract – Unregistered sale deed adduced in evidence – Such sale deed admissible to prove the contract as well as evidence of any collateral transaction, not required to be effected by registered document.

S. Kaladevi v. V.R. Somasundaram & Ors.

Judgment dated 12.04.2010 passed by the Supreme Court in Criminal Appeal No. 3192 of 2010, reported in AIR 2010 SC 1654

Held:

Section 17 of 1908 Act is a disabling section. The documents defined in clauses (a) to (e) therein require registration compulsorily. Accordingly, sale of immovable property of the value of Rs. 100/- and more requires compulsory

registration. Part X of the 1908 Act deals with the effects of registration and non- registration. Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. Section 49 reads thus:

> "**S. 49.** — Effect of non-registration of documents required to be registered. — No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power,
>
> unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument."

The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

248. RULE OF LAW:

CIVIL PROCEDURE CODE, 1908 – Order 14 Rule 2 and Order 20 Rules 1, 4 & 5

Facets of recording of reasons in dispensation of justice – Judgment of Courts should meet the requirement of recording of reason with higher degree of satisfaction than administrative or quasi-judicial orders – Requirement of stating reasons for judicial orders necessarily does not mean a very detailed and lengthy order but there should be some reasoning recorded by the Court for declining or granting relief.

Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers

Judgment dated 15.04.2010 passed by the Supreme Court in Civil Appeal No. 3289 of 2010, reported in (2010) 4 SCC 785

Held:

The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad.

The Courts should record reasons for its conclusions to enable the appellate or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for Their conclusions, whether disposing of the case at admission stage or after regular hearing.

Recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly,

it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment.

The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. But it is no more res integra and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

By practice adopted in all Courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of *Alexander Machinery (Dudley) Ltd. v. Crabtree, 1974 ICR 120* (NIRC), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove.

Requirement of stating reasons for judicial orders necessarily does not mean a very detailed or lengthy order, but there should be some reasoning recorded by the Court for declining or granting relief to the petitioner. May be, while dealing with the matter at the admission stage even recording of short listening dealing with the merit of the contentions raised before the High Court may suffice, in contrast, a detailed judgment while matter is being disposed off after final hearing, but in both events, in our view, it is imperative for the High Court to record its own reasoning however short it might be.

249. STAMP ACT, 1899 – Section 47-A
Undervalued instrument – How to be dealt with under the Stamp Act? Explained.

State of Haryana and others v. Manoj Kumar

Judgment dated 09.03.2010 passed by the Supreme Court in Civil Appeal No. 2226 of 2010, reported in (2010) 4 SCC 350

Held:

No sale deed can be registered for an amount which is less than the amount fixed by the Collector or by the circle rate (market value). The interpretation of Section 47-A of the Stamp Act has to be in consonance with the notified circle

rate and any value fixed below that would be in direct conflict with the prevalent law of the land and therefore, liable to be struck down by the authorities.

In *State of Punjab v. Mohabir Singh, (1996) 1 SCC 609,* this Court held as under:

> "5. It will be only on objective satisfaction that the Authority has to reach a reasonable belief that the instrument relating to the transfer or property has not been truly set forth or valued or consideration mentioned when it is presented for registration...........
>
> 6. It would thus be seen that the aforesaid guidelines would inhibit the Registering Authority to exercise his quasi-judicial satisfaction of the true value of the property or consideration reflected in the instrument presented before him for registration. The statutory language clearly indicates that as and when such an instrument is presented for registration, the sub-Registrar is required to satisfy himself, before registering the document, whether true price is reflected in the instrument as it prevails in the locality.........."

Even, a decree passed by the Court can be questioned regarding genuineness of the sale price mentioned therein to avoid collusion between the parties to evade the actual payable stamp duty. If the genuineness of the sale price entered into by the buyer and the seller cannot be questioned, then in majority of the cases it is unlikely that the State would ever receive the stamp duty according to the circle rate or the Collector rate.

It may be pertinent to mention that, in order to ensure that there is no evasion of stamp duty, circle rates are fixed from time to time and the notification is issued to that effect. The issuance of said notification has become imperative to arrest the tendency of evading the payment of actual stamp duty. It is a matter of common knowledge that usually the circle rate or the collector rate is lower than the prevalent actual market rate but to ensure registration of sale deeds at least at the circle rates or the collector rates such notifications are issued from time to time.

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***250. SUCCESSION ACT, 1925 – Section 63**
EVIDENCE ACT, 1872 – Sections 17, 58 and 68
HINDU SUCCESSION ACT, 1956 – Sections 15 and 30 and Schedule

(i) Statutory requirements for proving the Will – In the present case, none of the attesting witnesses have been examined –The scribe has not stated that he had signed the Will with the intention to attest – Admission of the plaintiff, in a subsequent suit, about the making of the Will would not amount to admission with regard

to due execution and genuineness of the Will – Thus, Will has not been duly proved.

(ii) Admissions – Evidentiary value – Held, it is undoubtedly correct that a true and clear admission would provide the best of the facts admitted – It may prove to be decisive unless successfully withdrawn or proved to be erroneous – However, an admission about the making of the Will does not amount to admission of due execution and genuineness of the Will and such admission would not finish the need for independent proof of the Will.

(iii) Rule of succession in the case of female Hindus – Object – Held, the basic aim of Section 15 (2) of the Hindu Succession Act, 1956 is to ensure that inherited property of an issueless female Hindu dying intestate goes back to the source – It was enacted to prevent inherited property falling into the hands of strangers.

S.R. Srinivasa and others v. S. Padmavathamma

Judgment dated 22.04.2010 passed by the Supreme Court in Civil Appeal No. 4623 of 2005, reported in (2010) 5 SCC 274

*251. SUCCESSION ACT, 1925 – Section 283

"Caveatable interest" – *Locus standi* to oppose probate proceedings initiated by legatee of second Will by a purchaser of the property from legatee of first Will – Term "Caveatable interest" not defined in the Act of 1925 but interpreted in some judicial pronouncements – However, conflicting views were expressed by co-ordinate Benches of the Apex Court on interpretation of term "caveatable interest" in *K.K. Birla v. Rajendra Singh Lodha, (2008) 4 SCC 300 and G. Gopal v. C. Baskar, (2008) 10 SCC 489* – In *K.K. Birla case* (supra), the Supreme Court was not inclined with the view that any person having some interest in the property of the deceased can oppose the probate proceedings, however, in *G. Gopal case* (supra), the Apex Court way of the view that a person who is having a slight interest in the estate of the testator is entitled to contest the grant of probate – Matter referred to larger Bench

Jagjit Singh and others v. Pamela Manmohan Singh

Judgment dated 10.03.2010 passed by the Supreme Court in Civil Appeal No. 8031 of 2001, reported in (2010) 5 SCC 157

252. TRANSFER OF PROPERTY ACT, 1882 – Sections 19 and 21

Transfer of property – Distinction between 'vested interest' and 'contingent interest' – Whether the instrument is *settlement* or *Will*? Held, mere form or nomenclature is not the deciding factor – Complete examination of document is must to find out the substance thereof.

P. K. Mohan Ram v. B.N. Ananthachary & Ors.

Judgment dated 15.03.2010 passed by the Supreme Court in Civil Appeal No. 6412 of 2002, reported in AIR 2010 SC 1725

Held:

Sections 19 and 21 of the Transfer of Property Act, 1882 (for short, 'the 1882 Act') which elucidate the expressions "vested interest" and "contingent interest" in the context of transfer of property read as under:

> "**19. Vested interest.**— Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.
>
> A vested interest is not defeated by the death of the transferee before he obtains possession.
>
> **Explanation.**— An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.
>
> **21. Contingent interest.** — Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

> Exception. — Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent."

A reading of the plain language of the above reproduced sections makes it clear that an interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be contingent if the right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest.

Having noticed the distinction between vested interest and contingent interest, we shall now consider whether Ex.A-2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the. Court is required to look into the substance thereof.

In *Ramaswami Naidu and another v. Gopalakrishna Naidu and others, AIR 1978 Madras 281,* the High Court laid down the following broad test for construction of document:

> "The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. But the main test to find out whether the document constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. The general principle also

> is that .-the document should be'read as a whole and it is the substance of the document that matters and not the form or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant."
>
> "If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti."

In the light of the above, we shall now consider whether the trial Court and lower appellate Court rightly treated Ex. A-2 to be a Settlement Deed and the contrary finding recorded by the learned Single Judge of the High Court is legally unsustainable. A careful reading of Ex.A-2 shows that in the title itself the document has been described as Settlement Deed. By executing that document, Shri K. Perumal Iyer expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that "from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever.' This was an unequivocal creation of right in favour of 16 persons in praesenti. Though, the beneficiaries were to become absolute owners of their respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof. The mere fact that beneficiary Nos. 1 and 2 and after them their heirs were to receive honours at the temple or that shares were to be divided after disposal of the property cannot lead to an inference that Ex.A-2 was a "Will'. If Ex.A-2 is read as a whole; it becomes clear that it was a 'Settlement Deed' and the trial Court and the lower appellate Court did not commit any error by recording a finding to that effect. As a sequel to this, it must be held that the High Court committed serious error by setting aside the concurrent judgments and decrees of the two courts.

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NOTE: Asterisk (*) denotes brief notes.

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION OF MINISTRY OF FINANACE REGARDING AMENDMENT IN THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

[Published in the Gazette of India, Ex. Pt. II, S. 3 (ii), dated 18.11.2009]

S.O. 941(E).- In exercise of the powers conferred by clause (via) and (xxiiia) of Section 2 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (61 of 1985) the Central Government, hereby makes the following amendment in the Notification S.O. 1055(E), dated 19th October, 2001, namely :-

In the Table at the end after Note 3, the following Note shall be inserted, namely :-

> "(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Under Secretary

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> The most precious gift that a man can give to others is to use his Wisdom and Skills and Compassion to help them in times of need.
>
> \- BHAGAVAD GITA

NOTIFICATION OF LAW & LEGISLATIVE AFFAIRS DEPARTMENT, M.P. REGARDING DESIGNATING SESSIONS JUDGES AS SPECIAL COURTS FOR TRYING THE CASES OF OFFENCES UNDER THE DRUGS AND COSMETICS ACT, 1940

F.No. 17(E)13/2010/21-B(1) – In exercise of the powers conferred by Sub-Section (1) of Section 36 AB of the Drugs and Cosmetics Act, 1940 (No. 23 of 1940), the State Government, in consultation with the Chief Justice of the High Court, hereby, designate the Sessions Judges specified in column (2) of the Table below, as Special Court for area within the Session Division specified in corresponding entry in column (3) thereof, to try the cases of offences relating to adulterated Drugs or Spurious Drugs and punishable under clauses (a) & (b) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28A, Section 28B and clause B of sub-section (1) of Section 30 of the said Act:-

SCHEDULE

S.No.	Designated Special Court	Area within Session Division
(1)	(2)	(3)
1.	Sessions Judge, Alirajpur	Alirajpur
2.	Sessions Judge, Anooppur	Anooppur
3.	Sessions Judge, Ashoknagar	Ashoknagar
4.	Sessions Judge, Balaghat	Balaghat
5.	Sessions Judge, Barwani	Barwani
6.	Sessions Judge, Betul	Betul
7.	Sessions Judge, Bhind	Bhind
8.	Sessions Judge, Bhopal	Bhopal
9.	Sessions Judge, Burhanpur	Burhanpur
10.	Sessions Judge, Chhatarpur	Chhatarpur
11.	Sessions Judge, Chhindwara	Chhindwara
12.	Sessions Judge, Damoh	Damoh

S.No.	Designated Special Court	Area within Session Division
(1)	(2)	(3)
13.	Sessions Judge, Datia	Datia
14.	Sessions Judge, Dewas	Dewas
15.	Sessions Judge, Dhar	Dhar
16.	Sessions Judge, Dindori	Dindori
17.	Sessions Judge, East Nimar (Khandwa)	East Nimar (Khandwa)
18.	Sessions Judge, Guna	Guna
19.	Sessions Judge, Gwalior	Gwalior
20.	Sessions Judge, Harda	Harda
21.	Sessions Judge, Hoshangabad	Hoshangabad
22.	Sessions Judge, Indore	Indore
23.	Sessions Judge, Jabalpur	Jabalpur
24.	Sessions Judge, Jhabua	Jhabua
25.	Sessions Judge, Katni	Katni
26.	Sessions Judge, Mandla	Mandla
27.	Sessions Judge, Mandsaur	Mandsaur
28.	Sessions Judge, Morena	Morena
29.	Sessions Judge, Narsinghpur	Narsinghpur
30.	Sessions Judge, Neemuch	Neemuch
31.	Sessions Judge, Panna	Panna
32.	Sessions Judge, Raisen	Raisen
33.	Sessions Judge, Rajgarh (Bioara)	Rajgarh (Bioara)
34.	Sessions Judge, Ratlam	Ratlam

S.No.	Designated Special Court	Area within Session Division
(1)	(2)	(3)
35.	Sessions Judge, Rewa	Rewa
36.	Sessions Judge, Sagar	Sagar
37.	Sessions Judge, Satna	Satna
38.	Sessions Judge, Sehore	Sehore
39.	Sessions Judge, Seoni	Seoni
40.	Sessions Judge, Shahdol	Shahdol
41.	Sessions Judge, Shajapur	Shajapur
42.	Sessions Judge, Sheopur	Sheopur
43.	Sessions Judge, Shivpuri	Shivpuri
44.	Sessions Judge, Sidhi	Sidhi
45.	Sessions Judge, Tikamgarh	Tikamgarh
46.	Sessions Judge, Ujjain	Ujjain
47.	Sessions Judge, Umaria	Umaria
48.	Sessions Judge, Vidisha	Vidisha
49.	Sessions Judge, West Nimar (Mandleshwar)	West Nimar (Mandleshwar)

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

(ए.जे. खान)
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भोपाल