VOL. III PART-VI DECEMBER 1997

JOTI JOURNAL

न्यायिक अधिकारी प्रशिक्षण संस्थान

उच्च न्यायालय जबलपुर 482007

JUDICIAL OFFICERS' TRAINING INSTITUTE

HIGH COURT OF MADHYA PRADESH

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संपादकीय

आत्मावलोकन

व्यवहार न्यायाधीश के रूप में 1997 के नव नियुक्त 30 न्यायिक अधिकारियों के द्वितीय समूह का प्रशिक्षण वर्ग दिनांक 23 नवंबर 1997 से 7 दिसंबर तक चला है। कुल 54 अधिकारियों का प्रशिक्षण का यह कार्यक्रम संपन्न हुआ। शेष बचे 42 अधिकारियों का सत्र भी निकट भविष्य में प्रारंभ होने की आशा है। म.प्र. न्यायिक सेवा का परिवार लगभग 1000 की संख्या को पार कर जाएगा। विभिन्न न्यायालयों में कार्य का भार अधिक होने के नाते प्रत्येक न्यायिक अधिकारी का कार्य निष्पादन का दायित्व भी वृद्धि पर है। उक्त दायित्व का निर्वाह हम आपको हर स्थिति में निष्ठापूर्वक समर्पण भाव से करना है।

वर्तमान संक्रमण काल में पालिका की महत्वपूर्ण, अहम भूमिका पर विभिन्न सत्रों में मार्गदर्शन प्राप्त होता रहा है। न्यायिक कार्य में न्यायिक अधिकारी गणों की सक्रिय भूमिका है। उनके आचरण व्यवहार, योग्यता, व कार्यक्षमता पर प्रत्येक नागरिक की सूक्ष्म दृष्टि है क्योंकि भारत का नागरिक आज भी ऐसे वातावरण में न्यायपालिका के प्रति न्याय के लिए आशावान है, आश्वस्त है।

न्यायाधीश के रूप में प्रत्येक न्यायिक अधिकारी लोक न्याय का न्यासी है। प्रत्येक न्यायिक अधिकारी अपने दैनंदिन व्यवहार के लिए दायित्वाधीन हो कर उत्तरदायी भी है। न्यायपालिका किसी एक न्यायधीश के नाम से पहचानी नहीं जाती है। अपितु सामूहिक रूप से उसको जाना पहचाना जाता है। ऐसी स्थिति में प्रत्येक न्यायिक अधिकारी का यह कर्त्तव्य है कि हर कोई अपनी ओर से तथा सामूहिक रूप से ऐसा कोई कार्य न करे जिससे न्यायपालिका को किसी भी दृष्टि से दोषी ठहराया जा सके।

इसलिए यह आवश्यक हो गया है कि न्यायिक अधिकारियों ने अपना सार्वजनिक जीवन शुद्ध निष्कलंक रखना है न्यायिक कार्य में निष्पक्षता पूर्ण रूप से तथा सतत रूप से अनुभव होती रहना है। कार्य अत्यंत कठिन है। भौतिक सुखों से स्वयं को सीमित तथा नियंत्रित रखने पर ही ऐसा कार्य किसी सीमा तक पूर्ण करने का प्रयत्न किया जा सकता है। लेकिन ऐसा प्रयास हमें सतत रूप से करते रहना होगा। यदि हमारा पतन होता है तो इस के लिए बाहरी तत्वों को दोष देने का कोई भी औचित्य नहीं हो सकता है। स्वयं का आत्म परीक्षण करना होगा व तब हम पाएंगे कि यदि हम अधोगति की ओर बढ़ रहे हों तो इसके लिए अन्य कोई नहीं अपितु हम स्वयं ही इसके लिए दोषी हैं।

गीता के अध्याय ६(५) में कहा है कि

"उद्धरेत्, आत्मना, आत्मानम्, न आत्मनम्, अवसादयेत्,

आत्मा, एव, हि, आत्मनः, बन्धु, आत्मा, एव, रिपुः आत्मनः

हम स्वयम् ही अपने अपकर्ष (अवनति) एवं उत्कर्ष हेतु स्वयं जवाबदार हैं उत्तरदायी हैं। कर्म निर्वाह के दायित्व को स्वीकार न करने के लिए हम स्वयं जिम्मेदार हैं व उत्तरदायी हैं। लेकिन हम किसी न किसी बहाने अपने दायित्वों से बचना चाहते हैं। हम जब ऐसा करते हैं तो स्पष्ट है कि हमारा मन, हमारा सोच विचार भ्रष्ट मार्ग की ओर जा रहा है। मन की क्रिया चैतन्य क्रिया है। इसलिए यह जरूरी है कि हम सब ने मिलकर न्यायिक कार्य को ओर अधिक तीव्रगति से निष्ठा व समर्पण भाव से करना चाहिए। हम वृथा अहंकार से मुक्त हों आपस में भाईचारा हो, विश्वास हो तथा सम्मादर हो। हमारे मिथ्या अहंकार के कारण हम अपना स्वयं का नुकसान करेंगे। हमें स्वयं को ही इस प्रकार से प्रशिक्षित करना होगा जिससे भौतिक चमक दमक से बच सकें व लोभ संवरण कर सके। स्वयं को अहंकार से विरत करने का सर्वोत्तम साधन है निष्काम कर्म भाव फल की आशा रहित कर्म करना अर्थात कर्म करने से प्राप्त होने वाला संतोष ही फल मानना होगा। न्यायिक कार्य निष्पादन में हमारी एकजुटता, समर्पण व आस्था की भावना ही समाज में विश्वास उत्पन्न कर सकेगी जिससे इस राष्ट्र का प्रजातंत्र सशक्त हो।

प्रत्येक न्यायिक अधिकारी स्वयं के लिए मददगार है तो स्वयं का शत्रु भी है। इस लिए यह आवश्यक है कि हमने अपनी ओर से सतत रूप से ऐसा प्रयत्न करते रहना है ताकि अपनी न्यायिक छवि धूमिल न हो तथा न्यायपालिका की प्रतिष्ठा सतत रूप से ऊंची होती रहे। इस के लिए यह भी आवश्यक है कि हमारा आत्मविश्वास बुलंद हो जिससे हमें आत्मिक शक्ति प्राप्त हो सके। सतत रूप से हम स्वयं का परीक्षण करते रहें जिससे सही मार्ग पर चलते–चलते कहीं भटक न पावें। यह प्रक्रिया सतत रूप से जारी रखना होगी। न्यायदान के इस महान पवित्र कार्य के लिए ईश्वर ने हमें चुना है यह हमारा अहो भाग्य है। सभी को ऐसा पावन अवसर प्राप्त होता नहीं है। इसलिए हमें चाहिये कि हम कर्म करते हुए भी कर्म से अलिप्त रहने का प्रयत्न करें। कर्वन्नपि न लिप्यते।

पुरुषोत्तम विष्णु नामजोशीं

HE WHO LOSES HONESTY HAS NOTHING ELSE TO LOSE.

गरिमामयी बनो

व्यवहार न्यायाधीश वर्ग–2 के 96 पदों हेतु चयन प्रक्रिया समाप्त होने के पश्चात नव नियुक्तियां एवं पदस्थापनाएं प्रारम्भ हो चुकी हैं। 24 अधिकारियों की नियुक्ति व पदस्थापना होने के पश्चात दिनांक 13.10.97 से 25.10.97 तक का प्रथम प्रशिक्षण सत्र संचालित किया गया। द्वितीय सत्र 23 नवंबर से 7 दिसंबर 97 तक चला।

इन सत्रों के शुभारंभ के लिए माननीय मुख्य न्यायाधिपति श्रीमान ए.के. माथुर साहेब का गरिमामयी आगमन संस्था में हुआ। अपने प्रभावशाली एवं चित्ताकर्षक वक्तव्य में आपने नवनियुक्त न्यायिक अधिकारियों को शुभाशीषों से सिंचित किया तथा कहा कि न्यायदान की प्रत्यक्ष प्रक्रिया से जुड़ने का सौभाग्य जब प्राप्त हुआ है तब वास्तविक रूप से न्यायदान करने का संकल्प कर कार्य प्रारम्भ करें। प्रथम पग जो न्यायमार्ग पर रखा है से विचलित मत हों। न्यायमार्ग सरल भी है तो वह निःकंटक भी नहीं है। न्यायपालिका की समाज में जो प्रतिष्ठा व गरिमा है उसे बनाए रखने तथा वृध्दि करने हेतु अथक परिश्रम व प्रयत्न करने हेतु माननीय मुख्य न्यायाधिपति महोदय ने प्रेरित करते हुए कहा कि न्यायिक कार्य पूर्ण निष्ठा ईमानदारी तथा समर्पण भाव से करें व निष्पक्ष रूप से व्यक्तिगत मोह –लोभ , राग द्वेष से परे रहकर करें। न्यायालयों की प्रतिष्ठा न्यायिक अधिकारियों के हाथों में है ऐसा अभिव्यक्त करके माननीय माथुर महोदय ने यह भी बात कही कि आपकी प्रतिष्ठा को यदि ठेस लगती है तो प्रकारांतर से न्यायपालिका की प्रतिष्ठा को ठेस पहुंचेगी।

उन्होंने अपने मार्गदर्शक विचारों में यह भी कहा कि यदि कोई अधिकारी न्यायदान का कार्य सकारात्मक ध्येय के साथ नहीं करना चाहता है तो प्रारम्भ में ही स्वयं ने पदमुक्त हो जाना चाहिये। चटपटे लुभावने भौतिक साधनों को लक्ष्य रखकर न्यायदान नहीं होगा ऐसा आहवान भी उन्होंने किया तथा कहा कि भौतिक सुखों से वंचित रहना न्यायदान की प्रथम शर्त न्यायाधीश के लिए होती है। न्यायाधीश के रूप में समाज में निश्चित ही प्रतिष्ठा मिलेगी व गरिमामयी जीवन यापन करने लायक वेतन भत्ते सुविधाएं भी मिलती रहेंगी अतः प्रथम डग यदि निष्ठा, ईमानदारी के साथ न्यायमार्ग पर रखेंगे तो न्यायाधीश की उच्च व साफ–सुथरी छवि के साथ अंतिम लक्ष्य को प्राप्त कर सकोगे।

मार्गदर्शन के रूप में श्रीमान माथुर साहेब ने यह भी व्यक्त किया कि ऐसी उजली छवि बनाने के लिए यह आवश्यक है कि न्यायिक अधिकारी न्यायालय में समय पर आवें तथा समय पूर्व नहीं जावें। समय पर ही कार्य करना होगा व कार्य निराकरण में किसी भी प्रकार की कोई देरी नहीं होना चाहिये। अधिवक्तागण अथवा पक्षकार समय पर नहीं आते हैं अतः न्यायिक अधिकारी भी समय पर नहीं आएंगे यह चिंतन कभी भी स्वीकार्य नहीं हो सकता ऐसा भी स्पष्ट अभिमत उन्होंने व्यक्त किया। उचित गणवेश धारण करने व शिष्टाचार से व्यवहार करने की अपेक्षा भी उन्होंने की।

समाज के साथ घुल मिलकर रहने सम्बन्धी विषय पर चिंतन प्रस्तुत करते उन्होंने अभिव्यक्त किया कि समाज में इस प्रकार से व्यवहार न करें जिससे सतत् संपर्क

सर्वसाधारणजन अथवा अधिवक्तागणों के साथ स्थापित हो। न्यायिक अधिकारीगणों का आशय यद्यपि सद्भावपूर्ण हो सकता है लेकिन सामान्य रूप से गलत धारणाएं निर्मित हो सकती हैं (यद्यपि सत्यम लोक विरूध्दम् नाचरणीयम नाचरणीयम्)

न्यायालयीन कार्य तब ही सफलतापूर्वक निर्वाहित किया जा सकता है जब न्यायिक अधिकारी स्वयं घर पर पूर्व तैयारी करके आएंगे। पूर्व तैयारी करकें आने की अपेक्षा करके माननीय माथुर साहेब ने यह कहा कि पूर्व तैयारी करके आने से न्यायालयीन कार्य निष्पादन में पूर्ण नियंत्रण रहता है। न्यायिक अधिकारियों को सतत् अध्ययनरत रहना है क्योंकि विधि का ज्ञान अथाह है, विशाल है, गहन है विधि की सीमाएं नहीं हैं अतः हमें सतत् रूप से सिर्फ सीखते ही रहना है व अनुभव प्राप्त करते रहना है। अतः विद्यार्थी जैसा सतत् अध्ययनशील बने रहने हेतु भी श्रीमान माथुर साहेब ने कहा। विश्व कम्प्यूटर युग की ओर तेजी से अग्रेषित होने के कारण वर्तमान प्रक्रिया एवं पध्दतियाँ तीव्रगति से पिछड़ रही है, वैचारिक वैज्ञानिक क्षेत्र का अत्याधिक विस्तार हो चुका है अतः न्यायिक अधिकारियों की मानसिकता भी विधि के विशाल क्षेत्र के प्रति रचनात्मक व विकासशील तथा पुरोगामी होने की अपेक्षा की गई।

अपने विचारों को व्यक्त करते हुए माननीय मुख्य न्यायाधिपति महोदय श्रीमान माथुर साहेब ने यह कहा कि मनुष्य सामाजिक प्राणी है व समाज के प्रति वह ऋणी होता है। अतः समाज से उसने जो ग्रहण किया है उसका कुछ अंश समाज को लौटाया जाना चाहिये। इस लिए एक आदर्श व्यक्ति के रूप में न्यायिक अधिकारियों को प्रस्तुत होना चाहिये व ऐसा करने हेतु त्यागभावना जागृत होना चाहिये। उन्होंने अपने भाषण के अंत में कहा कि न्यायालयों के प्रति जनता की धारणा शुद्ध व स्वच्छ है उसे बनाए रखने का दायित्व न्यायिक अधिकारियों का है।

Let us, then, be up and doing,
with a heart for any fate,
Still achieving, Still pursuing,
Learn to labour and to wait.

सत्रों में विभिन्न वक्ताओं ने मार्गदर्शक विचार विभिन्न विषयों पर प्रस्तुत किए। माननीय न्यायाधिपतिगण श्रीमान डी.एम.धर्माधिकारी, श्रीमान सी.के. प्रसाद, श्रीमान आर. एस. गर्ग, श्रीमान एस. सी. पांडेय, ने संबोधित किया। कलकत्ता उच्च न्यायलय के माननीय न्यायाधिपति श्रीमान एस.के. तिवारी एवं राज्य प्रशासनिक न्यायाधिकरण के अध्यक्ष माननीय न्यायाधिपति श्रीमान आर.पी. अवस्थी महोदय ने भी प्रशिक्षुओं को मार्गदर्शित किया। श्रीमान ए.डी. देवरस सेवानिवृत्त जिला न्यायाधीश एवं अधिवक्ता, निरीक्षण न्यायाधीश श्री पी.सी. अग्रवाल, रजिस्ट्रार जनरल श्री सी.एस. गुप्ता, जिला न्यायाधीश, इन्दौर श्री बी.के. श्रीवास्तव सतर्कता रजिस्ट्रार श्री एन.एल. श्रीवास्तव, श्री आर. सी. मिश्रा एवं श्री एन.एस. राजपूत एडिशनल रजिस्ट्रार, प्राध्यापक डॉ. एम.एल. उपाध्याय एवं डॉ. प्रमोद पांडेय तथा व्यवहार न्यायाधीश वर्ग–1 डॉ. व्ही. के. अग्रवाल ने भी अपने सशक्त विचारों व अनुभवों से प्रशिक्षणार्थियों को संबोधित किया। द्वितीय सत्र में अन्य वक्ताओं के अतिरिक्त जिला एवं सत्र न्यायधीश रायपुर श्री नारायण सिंह आजाद ने भी विद्वत्तापूर्ण विचार व्यक्त किए।

POINTS TO NOTE

LIMITATION ACT (1963)

P.V. NAMJOSHI

LIMITATION :

The term 'limitation' in its orginal sense restriction or circumseption; in its original legal and popular sense, the word refers to the time within which an action may be brought, or some act done, to prevent a right. It means the time which is prescribed by the authority of the law, during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment of the time and the end of which no action or suit can be maintained.

PURPOSE OF THE ACT :

The purpose of the law of limitation is regarding certainity. The general principle is that a right not exercised for a long time is non-existent. Thus a person who has not been in possession of a particular property for a long time, the presumption is that he is not the owner there of. The doctrine of limitation and presumption is that it is necessary that the title to property and matters of right in general should not be in a state of consistent uncertainity, doubt and suspense. The object of limitation is to prevent disturbances of deprivation of what may have been acquired in equality and justice by long enjoyment or what may have been lost by parties own in action, negligence or laches. ***(Rajendra Singh Vs. Santa Singh, A.I.R. 1973 SC 2537.)***

The another principle is enunciated in legal maxim "Interest reipublica ut sit finis litium" - Interest of the state is that there should be limit to law suits. It means the public interest requires that disputes should be finally settled and there should be an end to litigation.

In ***Madhav Vs. S.G. Chandravarkar, 50 Bom. LR.747 AIR 1949 Bom.104*** it was held that, "A party cannot be deprived of his resort to court action unless his right is expressly barred by a provision of the statute. There is no power in the court to deny him this right nor can the court extend the scope of the Limitation Act by implication and inference. In ***Sunder Vs. Saligram, 9 IC 300 (FB)***, it was held that, Access to court action is always open unless specifically and clearly shut out by a provision of the statute in precise terms."

NATURE OF LAW :

Though it is true that the law of limitation is adjective or procedural law but at the same time it can be well said that to some extent it may be substantive law also, because some of its provision provide for the acquisition of title to immovable property including easements by prescription which is regarded by jurists as mode of original acquisition as distinguished from derivative acquisition. Reference may be made to Section 25 of the Limitation Act regarding acquisition of easements by presciption and Section 27 of the Limitation Act regarding extinguishment of right to property. This section deals with extinguishment of rights and it applies to all property, immovable and movable. Time barred debt is not extinguished but only unenforceable in court of law. The

lapse of time not only bars the remedy to extinguish the title of a claimant as per the provisions of Section 27 of the Act. Thus the Act embodies both adjective and substantive law (Section 27). When it postulates the law of prescription as that confers a right it is substantive in nature. It is further to be noted that the law of Limitation does not create rights. It only bars the remedy. It also does not apply to defences. The Act does not revive barred rights. Ignorance, mistake or heart sick does not save limitation; nor does poverty of parties. At the same time justice, equality and good conscious do not over ride the law of limitation. The fundamental principle is to induce the claimants to be prompt in claiming rights. Unexplained dealy or laches on the part of those who are expected to be aware and conscious of the legal position and who have facilities for pormpt legal assistance can hardly be encouraged or countensanced. ***(State Vs. Vikhal Chand A.I.R. 1966 Rajasthan 213).***

SCHEME OF THE ACT :

This Act is divided in two parts. One relates mainly sections and the other relates to articles prescribing period of limitation. This will further be clear by definition under Section 2 (j) which runs as under :

"Period of limitation" means the period of limitation prescribed for any suit, appeal or aplication by the schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act.

Again attention may be invited to Section 3 of the Limitation Act in which also the word prescribed period has been used with reference to Section 4 to 24 of the Limitation Act. Therefore, there is a vast difference between the words **"period of limitation"** and **"prescribed"** period. Therefore we as Judicial Officers must be very much conscious about these words where-ever they occur. If the word 'period of limitation' occurs then it means the period of limitation prescribed in the schedule and the courts have no jurisdiction or any right or authority to extend the period of limitation mentioned in the schedule. But when the word 'prescribed period' is used in a section it requires the Court to calculate what is the precribed period, looking to the circumstances provided from Section 4 to 24. For example if the Court is closed on any day within the meaning of Section 4 the Court has to consider what should be the prescribed period. That is the Court has to calculate the commencement of the date of the period of limitation according to the prescribed period.

Section 3 of the Limitation Act enjoins a duty on the Courts to dismiss every suit instituted, appeal preferred and application made after the prescribed period although limitation has not been set up as defence. It is further to note that under Section 3(2) (b) in case of set off and counter claim different limitations have been prescribed. In the case of a set off on the same date as the suit in which the set off is pleaded and in case of counter claim on the date on which the counter claim is made. Again in case of pauper when an application for leave to sue as pauper is made is the date of the institution of the suit. Section 4 provides that Court shall be deemed to be closed on any day within the meaning of that section if during any part of its normal working hours it remains closed on that day.

Section 5 of the Limitation Act is the most important Section. It is divided in two parts. The first part deals with suits and applications under Order 21 of the C.P.C. Though there is no direct use of the word suit but the terminology of the Section clearly reflects that the Courts have no jurisdiction to condone delay in cases of suits and applications under Order 21 C.P.C. For example Order 21 Rule 85 CPC. Against this, the court has jurisdiction to condone delay with reference to appeals and applications. It is to be remembered that a revision is an application because the definition clause (Section 2) says that application includes a petition, and revision is also a petition.

Under Section 5 of the Limitation Act the word "sufficient cause" has been used. What is sufficient cause is a question of fact to be decided according to the circumstances of a particular given case. The general notion is this that every day's delay is to be explained by the party who has moved an application under Section 5 of the Limitation Act. But attention is drawn to ***Collector, land Acquisition Vs. Mst. Katiji and others, A.I.R. 1987 SC 1353 para 3 (3)*** in which several instances are shown regarding appreciation of sufficient cause. In it, it is said that, "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

Section 8 of the Limitation Act has reference to Section 6 and 7 of the Act. (Please refer to Article "Cmbined effect of Section 6,7 & 8 of the Limiation Act" published in 'JOTI JOURNAL' Vol. 3 part V October 1997 issue where several examples are given to consider Section 6,7 read with Section 8). It is further to note that whenever we Judicial Officers read any section read the words used in it in proper prospective. For example in Section 6 (1) the words used are "suit or application for the execution of a decree". Therefore Section 6 (1) would not be made applicable to appeals. Again in Section 7 also the words used are "suit or an application for the execution of a decree". Under Section 8 the Court has jurisdiction to grant extended time of 3 years but this relates to period of limitation only. Section 9 of the Limitation Act deals with continuous running of time and says that subject to proviso where once time has begun, to run, no subsequent disability or inability to institute a suit or make an application stops it.

Section 10 deals with suits against trustees S. 11 deals with suits on contracts entered into out side the territoties to which the Act extends. Again Sections 12 to 24 deal with the computation of period of limitation. these are very important sections. Section 12 relates to exclusion of time in legal proceedings and says that in computing the period of limitation for any suit, appeal or application, the date from which such period is reconed shall be excluded. In case of appeal or application the time spent for obtaining certified copies is also to be excluded that is the date on which the application is made and the date on which the copy is received (both dates inclusive).

Explanation to Section 12 is very important. It says that in computing period under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an

application for a copy there of is made shall not be excluded. The attention of the Judicial Officers is drawn to the provisions of General Clauses Act 1897 (Central Act) and General Clauses Act 1957 (M.P. State Act). In both these Acts few important provisions relating to commencement and computation of period of limitation can be seen. In Section 9 of the Central Act the word 'from' and the word 'to' have been explained that is in computing the period of limitation first day is to be excluded as is made clear in part I of Section 12 of the Limitation Act. Again attention is drawn to the provisions of Section 10 which has direct relation with the provisions of Section 4 of the Limitation Act. Judicial Officers are requested to go through the provisions of the General Clauses Act to enable them to have new ideas relating to new aspects of law of day to day nature.

The intention behind framing General Clauses Act is to avoid superfluity and repetition of language, and to palce in a single Act, provisions as regards definition of words and legal principles of interpretation which would otherwise have to be incorporated in many different Acts and Regulations.

Section 14 of the Act deals with exclusion of time of proceedings bonafides in Courts without jurisdiction. The meaning of the word "bonafides" is good faith. Thus a person who has prosecuted a case in a Court having no jurisdiction, has to establish good faith as to why he has prosecuted the case in that Court.

Section 15 of the Limitation Act is an important section which deals with exclusion of time in which statutory notice is required to be served by the actioner or exclusion of time during which proceedings are suspended. This section deals in 5 parts. (1) Sub-clause 1 deals with stay by injunction or order, (2) permission to institute proceedings (3) liquidation proceedings, (4) proceedings to set aside a sale and (5) absence from India.

Section 16 deals with effects of death on or before the accrual of cause of action.

Section 17 deals with effect of fraud or mistake.

Sections 18, 19 and 20 of the Limitation act deal with effect of acknowledgment in writing and effect of payment on account of debt or of interest on legacy etc. etc.

Again the attention of the Judicial Officers is invited to the words "acknowledgment" and "promise to pay". The acknowledgment should be within the prescribed period where as the promise to pay may even be after the right to sue is barred. Therefore attention is drawn to Section 25 of the Contract Act read with Section 29 (1) of the Limitation Act.

Section 21 is divided in 3 parts. It relates to effect of substituting or adding new plaintiff or defendant and adding a party after assignment or devolution. The proviso also says that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

Section 22 deals with continuing breaches and torts and it says that fresh period of limitation begins to run on every moment of time during which the breach or the tort, as the case may be, continues.

Section 23 deals with suits for compensation for acts not actionable without special damage.

Section 24 refers to mode of calculating prescribed period with reference to instruments executed otherwise than according to Gregorian calendar. If a document is executed in Native date even then it will be deemed to be made with reference to the date and month according to the Gregorian calendar.

Section 25 to 27 deal with acquisition of ownership by possession. It is acquired either by easement by prescription or exclusion or under the provision of Section 26 relating to exclusion in favour of reversional or of servient tenements. Both the Sections 25 and 26 should be read togehter. It may be noticed that Section 25 relates to exclusion of certain periods in computing the period of 20 years postulated in Section 25.

Section 26 postulates that "The period during which the owner of the sevient tenement has not been VOLENS AGERE in consequences of the existence of a lease for life or for more than three years, is altogether excluded in the computation of the 20 years, where such owner contests the claim within three yeras after the lease expires. The time of enjoyment, during the lease is excluded but there is nothing to prevent the tacking together of the period during which there might have been a valid enjoyment."

As seen above Section 27 deals with extinguishment of Right of property. Articles 64 and 65 of the Act deals with right to repossess the property and adverse possession.

The last important Section is relating to savings clause. The provisions of this Act does not apply to section 25 of Contract Act, that is a debtor has a choice to promise to pay a time barred debt. And if he so promises the creditor acquires a right against the debtor subject to the provisions of Section 25 of the Contract Act. Again where some special law provides special limitation then Section 29 has no application. Sub-clause (2) to Section 29 runs as under :

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Section 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law".

The Limitation Act has no application to cases relating to marriage and divorce subject to any other provision in any other law.

Following are few articles under Schedule 1 of the Limitation Act which are frequently applied during the course of judicial work.

ARTICLE 15 :

In commercial transactions goods are sold subject to the conditions that if payment is not received within time fixed, interest at the rate Rs. 12 would be charged. In fact this itself means that the cause of action will accrue after the expiry of a fixed period of credit. Therefore the time will begin when the period of credit expired. Reference can be made to ***AIR 1925 Mad. 161 K.M.D.R.N.M. Firm Vs. M. Somasundaran Cheth, AIR 1931 All 229, (1969) 11Suth W.R. 529.***

ARTICLE 24 :

Sometimes by mistake Banks or other commercial firms or a person may give credit of some amount to debtor by mistake to which the debtor is not entitled. But if the mistake comes to the knowledge of the creditor he has a right to file a suit to recover that amount and for that this article is made applicable. Reference may be made to ***1971 JLJ 505 Clatex Vs. Asst. commissioner*** in which it was held that money paid under mistake time would commence to run form the knowlege of the mistake. Section 17 and Article 24 (Old Art. 96) may be referred.

Attention is drawn to Articles 36, 37 and 62. Generally in Bank cases money is lent on the basis of a promissory note payable by instalments and the pronote provides that if default be made in payment of one or more instalments the whole shall be due. In these cases Article 36 or 37 is to be used according to the circumstances of the case. At the same time if the property is mortgaged otherwise charged upon immovable property to enforce the payment of money Article 62 should be used and the period of limitation is 12 years.

In cases of promissory notes and other transactions of money the period of limitation is to be calculated according to suits relating to contracts (Arts. 6 to 55).

ARTS. 120 AND 121 :

These Articles relate to bringing legal representatives on record and abatement of the suit or apeal. Art. 122 relates to restoration of suit or appeal or application, particularly under Order 9 Rule 9 CPC and Order 41 Rule 19 and application for review under Order 47. The another important article is article 123 which relates to setting aside ex-parte decree or re-hearing of an appeal decreed or heard ex-parte. Mind that there is an explanation to Article 123 under which for the purposes of Art. 123 substituted service under Rule 20 of Order 5 of the CPC shall not be deemed to be due service. It is important to note that if the court proceeds ex-parte in a case under Order 9 Rule 7 then the opposite party has right to apply to the court of setting aside the ex-parte order as per the provisions of Order 9 Rule 7 and there is absolutely no time limit for filling such application. But the only restriction is this that such application should be filed before the hearing is concluded and the case is fixed for judgment. Reference may be made to ***Sangram Singh Vs. Election Tribunal, AIR 1995 SC 425*** and ***Arjun Singh Vs. Mohindra, AIR 1964 SC 993.*** So far as easement is concerned reference is made to Article 111 and Section 28 of the

Limitation Act. The period of limitation would be 30 years if the Government is a party to the proceedings. In case of adverse possession or for seeking re-possession Art. 65 or 64 may be made applicable.

There are 3 residuary articles. The first is Art. 58, The Second is Art. 113 and the third is Art. 137. Art 137 is a residuary Article in which it was provided that any other application for which no period of limitation is provided is provided else where in the Application Division the period of application would be 3 years from the date the right ot apply accrues. Thus if an application under Order 9 Rule 13 is dismissed for want of appearance and party wants to file an application for restoration of those proceedings such application would be governed by this article. Suits relating to declaration about property may be governed by Article 113. There are few declarations to which Art. 58 is made application.

The new Limitation Act does not provide illustrations to Sections. The law Commission says that illustrations are unnecessary and sometimes mislead. But at the same time it is requested that when-ever a Section is to be understood the Judicial Officers as students of law may refer to the relative old provisions and illustrations under the provisions so that they may be able to follow the principle laid down under a particular Section. It will always be helpful.

The Articles in the Act fall under 3 divisions. Namely :-

(1) Suits, (2) Appeals and (3) Applications.

The Articles relating to suits are also grouped under 10 parts. Following is the chart for ready reference to the Judicial Officers. A part of the chart was made available to Judicial Officers who came for training in previous batches since June 1996 onwards.

To conclude with the Article it can be very well said that "Ex diuturnitate temporis omnia praesumuntur rite se solemniter esse acta-antiquity of time fortifies all titles and supposes the best beginning the law can give them".

(समय की प्राचीनता सब स्वत्वों को सशक्त करती है और विधि के लिए ऐसा मानकर चलना उत्तम होता है।) "Longa patientiatrahitur ad consensum" - acquiescence for long means consent." (दीर्घ काल तक प्रतिवादहीनता का अर्थ सम्मति है) "Longa possessio paritjus possidendi et tollit actionem vero domino - possession for long gives rise to right to possess and snatches action from real owner." (दीर्घकाल और दीर्घ प्रयोग जो मानवीय स्मरण से परे है, अधिकार के लिए पर्याप्त है।)

(For further detailed sutdies please go through the Law of Limitation by P. Basu, Law of Limitation by V.G. Ramachandran and A.I.R. publication. on which this article is based.)

First Division : Suits

Part I Suits Relating to Accounts	Arts. 1 to 5
Part II Suits Relating to Contracts	Arts. 6 to 55
Part III Suits Relating to Declaration	Arts. 56 to 58
Part IV Suits Relating to Decrees and Instrutments	Arts. 59 to 60
Part V Suits Relating to Immovable Property	Arts 61 to 67
Part VI Suits Relating to Movable Property	Arts. 68 to 71
Part VII Suits Relating to Tort	Arts. 72 to 91
Part VIII Suits Relating to Trust & Trust Property	Arts. 92 to 96
Part IX Suits Relating to Miscellaneous Matter	Arts. 97 to 112
Part X Suits for which there is no prescibed period	Art. 113

Second Division : Appeals

Arts. 114 to 117

Third Division : Applications

Part I Specified Cases	Arts 118 to 136
Part II Other applications	Art. 137

Different Periods Prescribed under Ddifferent Articles

First Division : Suits

Part I to IV	3	years
Part V Art. 61	(a)	30 years
	(b)	12 years
	(c)	3 years
Art 62		12 years
63	(a)	30 years
	(b)	12 years
Arts.64 to 66		12 years
Part VI		3 years
Part VII		1 year
Part VIII	Arts. 92,94,96	12 years
	Arts. 93, 95	3years
Part IX	Arts. 97 to 100	1 year
	101 to 105	3years
	106 to 110	12 years
	111 to 112	30 years
Part X	Art. 113	3 years

Second Division : Appeals

Arts. 114 (a), 116 (a)	20 days
Arts. 115 (b)(i)	60 days
Arts. 114(b), 115(b)(ii), 116(b), 117	30 days

Third Division : Applications

Part I Application in Specified Cases :

Art 118	10 days
Arts. 119, 122 to 129, 130(b)	30 days
Arts. 121, 130(a), 132, 133(a)(b)	60 days
Arts. 120, 131, 133(c)	90 days
Art. 134	1 year
Art. 135	3 years
Art. 136	12 years

Part II Other Application

Art 137	3 years

समंस प्रक्रिया की व्यवहारिक आवश्यकता

श्री खेलनदास
अति. जिला न्यायाधीश, राजनांदगांव

वर्तमान समय में अधीनस्थ न्यायालयों में अत्यधिक दांडिक प्रकरणों के निराकरण की समस्या दिनोंदिन दुरूह होती जा रही है। ऐसी परिस्थिति में म. प्र. शासन ने कम गंभीर मामलों को दण्ड प्रक्रिया संहिता की धारा 321 के तहत वापस लेने का, लोक न्यायालय लगाकर या ग्राम पंचायतों को अधिकार देकर समस्या का समाधान निकालने पर विचार व कार्यवाही कर रही है।

इन्हीं समस्याओं को ध्यान में रखते हुए नई दण्ड प्रक्रिया संहिता 1973 लागू की गई जिसका मूल उद्देश्य दांडिक प्रकरणों के निराकरण की प्रक्रिया को सुगम व सरल बनाना है जिसमें सत्र न्यायालय द्वारा विचारणीय अपराधों में उपार्पण कमिटल प्रक्रिया को सरलतम कर दिया गया। इसी तरह दांडिक प्रकरणों में अंतरिम आदेशों के पुनरीक्षण को प्रायः समाप्त कर दिया गया है।

दंड प्रक्रिया संहिता सन् 1973 में समंस मामलों के विचारण की प्रक्रिया को भी सरल कर त्वरित निराकरण का प्रावधान किया गया है, लेकिन मध्यप्रदेश के न्यायालयों में समंस द्वारा विचारणीय प्रकरणों में समंस प्रक्रिया को विद्वान न्यायाधीशगणों ने नजर अंदाज ही कर दिया है। समंस द्वारा एवं वारंट द्वारा विचारणीय प्रक्रिया में कोई अंतर ही नहीं रह गया है। जबकि वर्तमान समय में समंस प्रक्रिया अपनाया जाना प्रकरणों की अत्यधिक संख्या के दबाव को देखते हुए नितांत आवश्यक है।

अधीनस्थ न्यायालयों में 50 से 60 प्रतिशत दांडिक प्रकरण समंस के या समरी विचारणीय मामले ही लंबित हैं जैसे भा.द.वि. की धारा 294, 341, 323, 279, 337, 338, 353, 354, 211, 177, 186, 224, 379, 380, 411, 414 (जिसमें संपत्ति की कीमत 200/– रु. से अधिक न हो) 427, 447, 448, 454, 456 तथा खाद्य अपमिश्रण की धारा 7/16 आबकारी अधिनियम की धारा 34–36 आदि आदि।

त्वरित विचारण के उद्देश्य से दंड प्रक्रिया संहिता में जो प्रावधान दिये गये हैं उनकी ओर विद्वान दंडाधिकारी का सम्मानपूर्वक ध्यान आकर्षित करना उचित समझता हूं। समरी व समंस मामले की परिभाषा दंड प्रक्रिया संहिता की धारा 2 ब में दी गयी है जिसमें समंस मामले से वे मामले अभिप्रेरित हैं जो वारंट मामले नहीं हैं। वारंट मामले से

अभिप्रेरित वे मामले हैं, जो मृत्यु या आजीवन कारावास या दो वर्ष से अधिक के कारावास से दंडनीय अपराध है।

समरी प्रक्रिया दंड प्रक्रिया की धारा 260 में बताया गया है जिसमें मृत्यु दंड, आजीवन कारावास या दो वर्ष से अधिक के कारावास से दंडनीय नहीं है ऐसे अपराध का समरी प्रक्रिया द्वारा विचारण किया जा सकता है। किन प्रकरणों में समरी व किन प्रकरणों में समंस प्रक्रिया अपनाया जाना चाहिए इसके लिए दंड प्रक्रिया संहिता में विशेष भेद नहीं किया गया है। लेकिन समरी विचारण में दंड प्रक्रिया संहिता की धारा 262 में यह प्रावधान है कि समरी प्रक्रिया द्वारा विचारण किये गये मामले में तीन माह से अधिक का दंड नहीं दिया जा सकता है। यदि कोई मामला समरी विचारणीय है लेकिन उस अपराध में तीन माह से ज्यादा सजा देना आवश्यक प्रतीत हो तो उसका विचारण समरी प्रक्रिया द्वारा नहीं किया जाना चाहिए।

समरी प्रक्रिया द्वारा विचारणीय मामले की प्रक्रिया को अत्यधिक सरल एवं अभिलेखों को संक्षिप्त बनाये जाने का आदेशात्मक प्रावधान किया गया है। दंड प्रक्रिया संहिता की धारा 263 के अध्ययन से ज्ञात होता है। राज्य शासन द्वारा निर्धारित प्रारूप में धारा 263 में दी गई जानकारी को ही उल्लिखित करना है। संक्षिप्त विचारण में निर्णय, साक्ष्य का सारांश और निष्कर्ष के कारणों का संक्षिप्त कथन देते हुए निर्णय अभिलिखित करने का निर्देश है।

संक्षिप्त विचारण की प्रक्रिया समंस मामले की प्रक्रिया से भी त्वरित प्रक्रिया अपनाये जाने की मंशा से विधायनी ने धारा 263 दंड प्रक्रिया संहिता में, संक्षिप्त विचारण के क्या और कैसा अभिलेख रखा जावेगा, उसे भी स्पष्ट कर दिया गया है। और इसीलिये संक्षिप्त विचारण की प्रक्रिया के लिये अनुभवी दंडाधिकारी जिसे संक्षिप्त विचारण के लिए उच्च न्यायालय शंसक्त करें, वे ही दंडाधिकारी संक्षिप्त विचारण कर सकते हैं। दूसरी ओर विधायनी ने संक्षिप्त विचारण में अधिकतम दंड तीन माह तक देने का प्रावधान रखा है। कहने का तात्पर्य यह है कि संक्षिप्त विचारण की प्रक्रिया आरोप पत्र या परिवाद पत्र प्रस्तुत होने के तीन या चार पेशियों में अभिलेख करने व निर्णय निर्दिष्ट प्रारूप में देने की अपेक्षा की है। लेकिन व्यवहारिक रूप से देखा जावे तो जिस मामले में अभियुक्त आरोप स्वीकार नहीं करता है वे मामले वारंट विचारणीय प्रक्रिया की तरह ही वर्षों तक चलाये जाते हैं, जो विधान की मंशा के अनुरूप और न्याय संगत नहीं कहा जा सकता।

समंस मामलों में विचारण की प्रक्रिया में विधायनी ने समरी विचारण से कुछ विस्तृत प्रक्रिया अपनाये जाने का प्रावधान रखा है।

वारंट मामलों में आरोप लिखित में विरचित करना आवश्यक होने का आदेशात्मक प्रावधान है जबकि समंस मामले में लिखित आरोप विरचित करने को वर्जित किए जाने का निर्देश है। व्यवहारिक रूप से यह देखा गया है कि समंस मामलों में जो कुल दांडिक प्रकरण के 50 से 60 प्रतिशत मामले होते हैं में कई पेशियाँ आरोप पर तर्क हेतु नियत किये जाते हैं जबकि ऐसा कोई प्रावधान नहीं है। दूसरी ओर समंस मामलों में अलग प्रपत्र में आरोप लिख कर अभियुक्त के लिखित अभिवचन (प्ली) रिकार्ड की जाती है। जबकि अभियुक्त अपराध स्वीकार नहीं करता तो अलग से लिखित में प्ली रिकार्ड करने की आवश्यकता नहीं है परन्तु यदि अभियुक्त अपराध स्वीकार करता है तो धारा 252 के तहत उसी के शब्दों में उसे प्ली रिकार्ड दिये जाने का निर्देश है। समंस विचारण में धारा 253 के तहत जहां केवल अर्थ दंड देना ही न्यायोचित हो अभियुक्त उन परिस्थितियों में भी उनके अभिभाषक द्वारा आरोप स्वीकार करने पर अर्थदंड दिया जा सकता है।

1. के.एम. मैथ्यू वि. स्टेट ऑफ केरल 1992 (1) म.प्र. वि.नो. 30
2. राधेश्याम वि. राधेश्याम 1993 (2) म.प्र. वि. नो. 209
3. भूपेंद्र शाह वि. महेंद्र 1993 (2) म.प्र. वि. नो. 40
4. नरेद्र कुमार वि. राज्य 1993 (2) म.प्र. वि.नो. 106
5. वीरेंद्र कुमार वि. राधेश्याम 1994 (2) म..प्र. वि.नो. 5
6. त्रिचिन्नोपाली वि. कृपाशंकर 1991 एम.पी.एल.जे. 597
7. बच्चू वि. अशोक 1991 एम.पी.एल.जे. 23
8. खचेरु सिंह वि. राज्य ए.आई.आर. 1982 सु.को. 784

समंस मामले में वारंट मामले के विचारण की प्रक्रिया से भिन्न, सरल व त्वरित कार्यवाही की मंशा से विधायिका ने भिन्न प्रक्रिया अपनाने हेतु दंड प्रक्रिया संहिता 1973 में अलग अध्याय देकर प्रक्रिया बनायी है। अध्याय 19 में वारंट मामले में अपनाये जाने की प्रक्रिया दी गयी है जबकि अध्याय 20 में समंस मामले में अपनाये जाने की प्रक्रिया दी गयी है। यदि दोनों तरह के विचारण में मूलभूत अंतर रखने की मंशा नहीं होती तो ऐसा क्यों किया जाता, लेकिन व्यवहारिक तौर से देखा जाये तो मजिस्ट्रेट इन दोनों प्रक्रियाओं में कोई भिन्नता नहीं रखते। जैसे दंड प्रक्रिया संहिता की धारा 227–239 में उन्मोचित करने का प्रावधान दिया गया है कि यदि धारा 173 के अधीन पुलिस रिपोर्ट और उस के साथ भेजे गये दस्तावेज पर विचार कर लेने पर और अभियुक्त की ऐसी परीक्षा यदि कोई हो जैसे मजिस्ट्रेट आवश्यक समझे कर लेने पर और अभियोजन और अभियुक्त को सुनवाई का अवसर देने के पश्चात (अर्थात आरोप पर उभय पक्ष को सुनने का प्रावधान है) मजिस्ट्रेट अभियुक्त के विरुद्ध आरोप को निराधार समझता है तो वह उसे उन्मोचित कर देवेगा और ऐसा करने का अपना कारण लेखबद्ध कर देगा।

दूसरी ओर धारा 240 (1) में यदि ऐसे विचार परीक्षा यदि कोई हो और सुनवाई कर लेने पर मजिस्ट्रेट की यह राय है कि ऐसी उपधारणा करने का आधार है कि अभियुक्त ने इस अध्याय के अधीन विचारणीय ऐसा अपराध किया है जिसका विचारण करने के लिए वह मजिस्ट्रेट सक्षम है और जो उसकी राय में उसके द्वारा पर्याप्त रूप से दंडित किया जा सकता है तो वह अभियुक्त के विरुद्ध आरोप लिखित रूप से विरचित करेगा, तब वह आरोप अभियुक्त को पढ़कर सुनाया व समझाया जावेगा और उससे पूछा जावेगा कि वह उस अपराध का जिसका आरोप लगाया गया है दोषी होने का अभिवाक् करता है या विचारण किये जाने का दावा करता है।

समंस मामले में धारा 227–239 के समान अभियुक्त व अभियोजन पक्ष को आरोप पूर्व सुनने का कोई प्रावधान नहीं है। धारा 240 के अनुरूप धारा 251 में अभियुक्त मजिस्ट्रेट के समक्ष हाजिर होता है या लाया जाता है, तब उसे उस अपराध की विशिष्टियां बतायी जावेंगी, जिसका उस पर अभियोग है और उससे पूछा जावेगा कि क्या वह दोषी होने का अभिवाक् करता है अथवा प्रतिरक्षा करना चाहता है किन्तु यथा रीति आरोप विरचित करना आवश्यक न होगा।

संपादकीय नोट :

निम्नलिखित दृष्टांतों की ओर ध्यान आकृष्ट किया जाता है जिससे यह निष्कर्ष निकाला जा सकता है कि आरोपी उक्त स्टेज पर यह बता सकेगा कि उसके विरूद्ध प्रकरण चलाने हेतु आधार अस्तित्व में नहीं है –

इस लेख को लिखने का मेरा मूल आशय यह है कि म.प्र. में मजिस्ट्रेट समंस मामले में दिये गये विशेष प्रक्रिया का पालन न कर वारंट मामले के ही तरह समंस मामलों में भी आरोप पर तर्क हेतु कई पेशियाँ देते रहते हैं। यह कहा जावे कि पेशी देने के लिए यह भी अच्छा बहाना है कि अभियुक्त के अभिभाषक तर्क हेतु समय चाहते हैं। दं.प्र.सं.की धारा 251 की वास्तविक मंशा तो यही है कि जैसे ही पुलिस द्वारा अभियुक्त के विरुद्ध चालान पेश किया जाता है और अभियुक्त भी हाजिर है तो अभियुक्त को चालान की नकल देने के बाद प्रथम दिन ही आदेश पत्रिका में आरोप की विशिष्टियां अभियुक्त को बता देना चाहिये। जैसे अभियुक्त पर मानव शरीर पर अपराध करने का अभियोग है तो आर्डरशीट पर ही लिख देना चाहिए कि अमुक तारीख को अमुख व्यक्ति को उसके द्वारा गाली देने धमकी देकर भयभीत करने, स्वेच्छापूर्वक चोट पहुंचाने या स्त्री पर आपराधिक बल प्रयोग कर लज्जा भंग करने के अपराध जो अमुख धारा के अंतर्गत दंडनीय हैं अभियोग है। यदि वह स्वीकार करता है तो उसके शब्दों में पर उसके अभिवाक् लिखकर अभियुक्त के हस्ताक्षर ले-लेने की प्रक्रिया अपनायी जाना चाहिए तथा यथा संभव जो आरक्षक वह आरोप पत्र जिस थाने से लाया है उसी के द्वारा

अभियोजन साक्षियों के समंस तामीली हेतु दे देना चाहिये इससे दूसरी पेशी में ही अभियोजन साक्षी उपस्थित हो सकते हैं।

वारंट ट्रायल और समंस ट्रायल में साक्षियों के कथन लिपिबद्ध करने के तरीके में भी मूलभूत अन्तर दिया गया है जिसका भी मूल उद्देश्य समंस ट्रायल में त्वरित विचारण करना ही है।

धारा 274 में समंस मामलों में साक्षियों के कथन लिखने का प्रावधान तथा धारा 275 में वारंट मामलों में साक्षियों के कथन लेने की प्रक्रिया है जिसमें मूलभूत अंतर यह है कि समंस मामलों में जैसे जैसे प्रत्येक साक्षी की परीक्षा होती जाती है वैसें वैसें उसके साक्ष्य का सारांश का ज्ञापन न्यायालन की भाषा में तैयार किया जायेगा जबकि वारंट मामले में मजिस्ट्रेट को साक्षियों के कथन सारांश में लिखने के लिए अधिकृत नहीं किया है।

मजिस्ट्रेट और न्यायाधीश द्वारा समंस मामले में साक्षियों के कथन व्यवहारिक रूप से सारांश में लिखा जा सकता है कि नहीं इस संबंध में मतभेद है। चर्चा के दौरान यही कहा जाता है कि अभिभाषकों द्वारा प्रतिपरीक्षण में पूछे गये सवालों को व्यवहारिक तौर से संक्षिप्त या सारांश में लिखा जाना संभव नहीं है। इस संबंध में मेरा विचार है कि यदि प्रावधानों का पालन मजिस्ट्रेट या न्यायाधीश भी नहीं कर सकेंगे तो अधिनियम या प्रावधानों का अस्तित्व ही क्या रह जावेगा। मेरे विचार से मजिस्ट्रेट व अपील न्यायालय को इस प्रावधान के उद्देश्य को समय की मांग को देखते हुए समंस द्वारा विचारणीय मामलों को विधान की मंशा के अनुरूप व्यवहारिक उपयोग में लाने हेतु प्रोत्साहित किया जाना नितांत आवश्यक है।

समंस विचारणीय मामले की एक अन्य विशेषता यह भी है कि धारा 258 के तहत कार्यवाही को किसी भी प्रक्रम में कोई निर्णय सुनाये बिना भी रोका जा सकता है और जहां मुख्य साक्षियों के साक्ष्य को अभिलिखित किये जाने के पश्चात इस प्रकार की कार्यवाही रोकी जाती है वहां दोषमुक्ति का निर्णय सुनाया जा सकता है। किसी अन्य दशा में अभियुक्त को छोड़ा जा सकता है और ऐसा छोड़ने का प्रभाव उन्मोचित होगा।

जिन प्रकरणों में धारा 258 के तहत अभियुक्त उन्मोचित किया गया है उसके विरुद्ध दंड प्रक्रिया संहिता की धारा 300 (5) के अधीन उन्मोचित किये गये व्यक्ति का उसी अपराध के लिए पुनः विचारण उस न्यायालय की जिसके द्वारा वह उन्मोचित किया गया था या अन्य किसी ऐसे न्यायालय की जिसके प्रथम वर्णित न्यायालय अधीनस्थ है, सहमति से किया जा सकेगा अर्थात समंस मामलों को शीघ्र निपटाने के उद्देश्य से धारा 258 में किसी भी प्रक्रम में प्रकरण को रोक देने की शक्ति दी गई है। दूसरी ओर न्यायहित में उस न्यायालय को यह अधिकार दिया गया है कि शीघ्र विचारण के उददेश्य से कोई समंस मामला रोक देने से किसी का अन्यायपूर्ण उन्मोचन हो जावे तो वही न्यायालय पुनः उन्मोचित व्यक्ति के विरुद्ध विचारण प्रारंभ कर सकता है।

RIGHT TO BAIL AS A CONSTITUTIONAL RIGHT

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INTRODUCTION

Krishna Iyer : J., remarked that the subject of bail :-

> "..... belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench. otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process."[1]

1. It is precisely this much needed jurisprudence of bail which is disucssed in the course of this paper in the light of the personal liberty of a person and the value of that personal liberty under our constitutional system. This study attempts to explore the varied dimensions of the concept of bail - as a right that must be respected by the courts and as a matter of concession left to the judicial discretion of the courts. It does not however, attempt to be an exhaustive case analysis of all provisions relating to bail in the Cr. P.C. and confines itself merely to the constitutional implications of bail in India.

2. The right to bail is inextricably linked to the knowledge and awareness of the accused of his right to obtain release on bail; this is further linked to Article 22(1) of the Constitution which provides that no person who is arrested shall be denied the right to counsult, and to be defended by a legal practitioner of his/her choice. It however remains an issue to be examined- whether this provision carries with it the right to be provided the services of a legal practitioner at state cost, particularly in the light of Article 39A of the Constitution which directs the State to provide free legal aid - but is this an obligation on the part of the State, enforceable in a Court of law?

3. Where does the right to bail fit into the constitutional scheme in the context of criminal jurisprudence contained in Articles 20, 21 and 22 of the Constitution? How may these human rights of the accused as conferrd by the Constituion be balanced against the growing crime rate and the need to protect society from criminals? Thus the law of bails

> "..... has to dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded form the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty."[2]

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1. Gudikanti Narasimhulu V. Public Prosecutor, AIR 1978 SC 429 at 430
2. Supdt. and Remembrancer of Legal Affairs V Amiya Kumar Roy Choudhry(1974) 78 cal. W.N. 320, 325 c.f. Kelkar R.V. Criminal Procedure, 3rd Edn. Eastern Book Company, Lucknow, 1993, p. 201.

4. Thus another fundamental issue to be focussed on, in the course of this paper, is the recognised trend in the criminal justice system from presumption of innocence to presumption of guilt.[3] The truth behind this statement and its consequent impact on pre-trial procedures such as attainment of bail is also sought to be studied in the light of the relevant Cr.P.C. provisions as well as the NDPS Act and erstswhile TADA Act, 1987, where necessary. Finally the consequences of the incorporation of section 438 and section 167 of Cr.P.C. with respect to bail and its nexus with necessary concern over the temporary loss of liberty of an individual as dictated by Article 21 of the Constitution, shall be attempted to be analysed.

WHY BAIL?

5. Before actually determining the place of bail within the human rights (in criminal jurisprudence) framework as conferred by the Constitution, it is important to examine the object and meaning of bail, such that an analysis of these fundamental objects and change therein may reveal a change, it any, from -

'Bail as a rule and 'no bail' as an exception,

-to-

'No Bail as rule and bail as an exception'

6. The object detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found guilty. If his/her presence at the trial could be reasonably ensured other than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of the criminal proceedings.[4]

7. Thus it is important to note the relevant provisions enshrined in the Universal Declaration of Human Rights :-

Article 9 : No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 : Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11 (1) : Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

There are thus several reasons which have been enumerated as to why bail ought to be allowed to prevent pre-trial detention:[5]

(a) **Presumption of Innocence :** Imprisonment before conviction has a punitive content and those who are guilty should not be punished before they have been convicted and so adjudged to be guilty

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3. See, H.R. Khanna 'Some Reflections on Criminal Justice' 17 JILI 505 (1975).
4. R.V. Kelkar, Criminal Procedure, 3rd Edn., Eastern Book Company, Lucknow, 201
5. See S.D. Balsara, "Bail, not Jail - Empty the Prisons" 22 JILI 343 (1980)

(b) **Effect of detention on prisoner's life :** It is universally recognised that the economic consequences and stigma may be disastrous to the prisoner's life both in monetary as well as psychological terms.

(c) **Prospect for acquittal become bleak :** Research conducted in the United States and Canada reveal that chances of acquittal may be less for those in custody than for those on bail.[6] (No worthwhile study, conducted on similar lines, undertaken in India.) The detained undertrial starts with a crippling handicap, as a lawyer will not be able to achieve as much as the client him/herself in tracing witnesses, checking on points of fact and generally assembling the case for the defence.

(d) **Higher Sentence for Undertrial Prisoners :** Studies made in England show that of persons on bail, 40 percent were convicted whereas 78 percent of those already in custody, were convicted.[7] A study of 946 cases in Philadelphia found that 22% of those on bail were convicted and sent to prison compared with 59 percent of those in custody pending trial and when an accused was sentenced to imprisonment, he/she received a longer sentence if he/she been in custody prior to the trial, than when he/she had not (irrespective of previous convictions).[8]

(e) **Over crowding of prisons :** The public exchequer has to bear the cost of maintaining the accused undertrial in jail.[9]

DEFINITION :

8. There is no definition of bail in the Criminal Procedure Code, although the terms 'bailable offence' and 'non-bailable offence' have been defined in section 2 (a) Cr.P.C. Bail has been defined in the Law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation.[10] What is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court." [11]

9. Thus having discussed the object and meaning of the concept of bail, it becomes important to fit this concept within the criminal justice jurisprudence as conferred by the Constitution of India.

RIGHT TO BAIL AND ARTICLE 21'S RIGHT TO PERSONAL LIBERTY :

10. The right to bail is concommittant of the accusatorial system which favours a bail system that ordinarily enables a person to stay out of jail until a trial has found him/her guilty.[12] In India, bail or release on personal recognizance is available as a right in bailable offences not punishable with death or life imprisonment and only to women and children in non-bailable offences

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6. Missing 7. Ibid 8. Id.
9. 22,000 undertrials were found languishing in prisons in Hussainara Khatoon V.State of Bihar, Air 1979 SC 1362
10. Law Lexicon. 11. Black's Law Dictionary,4th Edn., p. 177
12. Mohammod Ghouse. "The Pre-trial Criminal Process and the Supreme Court, Vol. 13 (1980) Indian Bar Review, 22 at

punishable with death or life imprisonment. The right of the police to oppose bail, the absence of legal aid for the poor and the right to speedy trial reduce to the vanishing point the classification of offences into bailable and non-bailbale and make the prolonged incarceration of the poor inevitable during the pendency of investigation by the police and trial by a court.

11. The fact that undertrials formed 80 percent of Bihar's prison population, their period of imprisonment ranging from a few months to ten years; some cases wherein the period of imprisonment of the undertrials exceeded the period of imprisonment prescribed for the offences they were charged with - these appalling outrages were brought before the Supreme Court in the celebrated ***Hussainara Khatoon Vs. State of Bihar.***[13] Justice Bhagwati found that these unfortunate undertrials languished in prisons not because they were guilty but because they were too poor to afford bail. Following ***Maneka Gandhi Vs. Union of India,***[14] he read into fair procedure envisaged by Article 21 the right to speedy trial and sublimated the bail process to the problems of the destitue. He thus ordered the release of persons whose period of imprisonment had exceeded the period of imprisonment for their offences. He brought into focus the failure of the Magistrates to respect section 167 (2) of the Criminal procedure Code which entitles an undertrial to be released from prison on the expiry of 60 days or 90 days as the case may be.

12. In **Mantoo Majumdar**[15] the Apex Court once again upheld the undertrials right to personal liberty and ordered the release of the petitioners on their own bond and without sureties as they had spent six years awaiting their trial, in prison. The Court categorically deplored the delay in police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of the undertrials, and the magistrate's failure to monitor the detention of the undertrials remanded by them to prisons.

13. In **Kadra Pahadiya**[16] the Supreme Court observed that the Hussainara judgment had not brought about any improvement and reiterated that -

> ....in Hussainara Khatoon it was held that the right to a speedy trial is implicit, in the rights enshrined in Article 21 and the court, at the instance of an accused, who was denied this right, is empowered to give instructions to the State Governments and to other appropriate authorities to secure this right of the accused.

In order to make this right meaningful in Bihar, the Supreme Court proceeded to pass orders to ensure institutional improvement in order to make speedy trial a meaningful reality. The Court therefore indicated the remedy in the event of denial of the accused's right to personal liberty enshrined in Art. 21 namely that the Supreme Court may be approached in order to enforce the right and the Supreme Court in pursuance of its

13. AIR 1979 SC 1360 14. AIR 1978 SC 597
15. AIR 1980 SC 846 16. AIR 1982 SC 1167

constitutional power may direct the State Government and other appropriate authorities accordingly. Thus orders requesting the High Court to furnish the Supreme Court with the number of Sessions Courts in Bihar, the norms of disposals fixed by the High Court; the steps, if any, taken to ensure compliance with those norms and considering the number of pending sessions cases, the adequacy of the number of sessions court in Bihar. In regard to prisoners awaiting commitment, Court might suo motu consider granting of bail in accordance with the above mentioned principle laid down in Hussainara.

14. The travails of illegal detainees languishing in prisons, who were uninformed, or too poor to avail of, their right to bail under section 167 Cr.P.C. was further brought to light in letters written to justice Bhagwati by the Hazaribagh Free Legal Aid Committee in ***Veena Sethi Vs. State of Bihar*** [17] ***and Sant Bir Vs. State of Bihar.***[18] The Court recognised the inequitable operation of the law and condemned it - "The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of status quo... but it exists also for the poor and the downtrodden.... and it is the solemn duty of the Court to protect and uphold the basic human rights of the weaker sections of society. Thus having discussed the various hardships of pre-trial detention caused, due to unaffordability of bail and unawareness of their right ot bail, to undertrials and as such the violation of their right to personal liberty and speedy trial under Article 21 as well as the obligation of the Court to ensure such right. It becomes imperative to discuss the right to bail and its nexus to the right of free legal aid to ensure the former under the constitution - in order to sensitise the rule of law of bail to the demands of the majority of poor and to make human rights of the weaker sections a reality."

RIGHT TO BAIL AND RIGHT TO FREE LEGAL AID-ARTICLES 21 AND 22 READ WITH ARTICLE 39A:

15. Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. the Supreme Court had for almost 27 years after the enactment of the Constitution taken the view that this Article merely embodied a facet of the Diceyian concept of the rule of law that no one can be deprived of his life and personal liberty by executive action unsupported by law.[19] If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and personal liberty. However ***Maneka Gandhi Vs. Union of India***[20] marked a water-shed in the history of constitutional law and Article 21 assumed a new dimension wherein the Spureme Court for the firsrt time took the view that Article 21 affords protection also against legislation (and not just executive action) and no law can deprive a person of his/her life or personal liberty unless it prescribes a procedure which is reasonable, fair and just it would be for the Court to determine whether the procedure is reasonable, fair and just; if not, it would be struck down as invalid.

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17 (1982)2 SCC 583 18. (1982)3 SCC 131
19. Supra. n 17 at 586 20. AIR 1978 SC 597

16. In Hussainara Khatoon's case the Supreme Court, inter alia, observed that the undertrials languishing in jail were in such a position presumably because no application for bail had been made on their behalf either because they were not aware of their right to obtain release on bail or on account of their poverty they were unable to engage a lawyer to apply for bail and in quite a few cases, being too poor, they were unable to furnish bail. The present law of bail thus operates on what has been described as a property oriented approach.[21] Thus the need for a comprehensive and dyanmic legal service programme was left in order to revitalise the bail system and make it equitably responsive to the needs of poor prisoners and not just the rich.

17. In the Indian Constitution there is no specifically enumerated constitutional right to legal aid for an accused person. Article 22(1) does provide that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice, but according to the interpretaition placed on this provision by the Supreme Court in Janardhan's case[22] this provision does not carry with it the right to be provided the services of a legal practitioner at State cost. Also Article 39-A introduced in 1976 enacts a mandate that the State shall provide free legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities - this however remains a Directive Principle of State Policy which while laying down an obligation on the State does not lay down an obligation enforceable in a court of law and does not confer a constitutional right on the accused to secure free legal assistance.

18. However the Supreme Court filled up this constitutional gap through creative judicial interpretation of Article 21 following Maneka Gandhi's Case. The Supreme Court held in ***M.H. Hoskot Vs. State of Maharashtra***[23] and Hussainara Khatoon's case that a procedure which does not make legal services available to an accused person who is too poor afford a lawyer and who would, therefore go through the trial without legal assistance cannot be regarded as reasonable, fair and just. It is an essential ingredient of reasonable, fair and just procedure guaranteed under Article 21 that a prisoner who is to seek his liberation through the court process should have legal services made available to him.

> The right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.[24]

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21. See Supra n. 14 at 325 wherein Justice Bhagwati describes the bail system as proceeding from an erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice.
22. Janardhan Reddy V. State of Hyderabad, AIR 1951 SC 227 23. AIR 1978 SC 1548
24. See Id. at 1555- wherein need for conferment of fundamental right status on right to counsel and consequently State's duty not charity to provide free legal services in a country like India discussed - However, this analysis is with respect to right to appeal- i.e., Art. 142 read with Art. 39-A and Art. 21 - same analogy applicable, it is submitted, to right to bail

Thus the Supreme Court spelt out the right to legal aid in criminal proceeding within the language of Article 21 and held that this is.....

> "a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."[25]

PROOF OF INNOCENCE BEFORE BAIL

19. The broad change that has been witnessed in the special statutes of the criminal justice from presumptions of "innocence" to "presumption of quilt."[26] is beginning to affect even pre-trial procedures. the very concept of bail is based on the presumption of innocence till guilt is proved. Curtailment of an individual's freedom on the ground of yet-to-be-proven guilt can be seen as unwarranted - Liberty is subject only to social defence considerations like apprehension that the suspect would tamper with evidence and judicial process or free justice, when only bail is denied. Therefore the two doctrines of "presumption of innocence" and "bail as the rule" are as an integrated whole, mutually supportive - if one is tampered with, the other is disturbed.

20. Such stringency may be seen in section 37(b) of the NDPS Act 1985, section 20(8) - of the erstwhile TADA 1987 and section 15(5) of Terrorist Special Courts Act, 1984, all mandate first a hearing of the public prosecutor to oppose bail application and then require findings on the following two grounds before bail can be granted :

    i. A preliminary belief on reasonable grounds that the accused is "not guilty" and

    ii. the accused is not likely to commit any offence while on bail.

    The first ground is a modification of section 437 of Cr.P.C. contrary to its requirement of refusal of bail on belief, based on reasonable ground that the accused is guilty, the new provision requires bail to be granted only after both the above enumerated grounds are satisfied. Here the condition precedent for bail is belief of 'not guilty' on reasonable grounds and section 37(2) NDPS Act, section 20(90) TADA Act and section 15(6) Terrorist Special Courts Act provide that the new provisions are in addition to any limitations on granting of bail under Cr.P.C.

21. The power of the High Courts to grant bail has been read by the Supreme Court as completely excluded by these Acts.[27] In ***Kartar Singh Vs. State of Punjab***,[28] the Supreme Court has upheld the constitutionality of the bail

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25. Ibid
26. For a constitutional critique of these statutory presumptions See. Vikramjit Reen, "Presumptions: Irreverence and Irrelevance" 36 J.I.L.I 247 (1994)
27. Narcotics Control Bureau V Kishan Lal 1991 Cri. L.J. 654; Kamala Bai v. State of Karnataka, 1992 Cri.L.J. 561.
28. 1994 (3) SCC 569 at 707. Also See, Sanjay Dutt. v. State. (1994)5 SCC 410 at 443

provision on the narrow technicality that the first condition (i.e. grounds for believing that he is not guilty of an offence) in a different form is also incorporated in section 437(1)(i) Cr.P.C. section 35(1) FERA and section 104(1), Customs Act and cannot be said to be unreasonable. The presumption of innocence, right of bail and fair trial are an integrated whole and mutually reciprocative the presumption is done away with and a belief on reasonable grounds that the accused is 'not guilty' and is not likely to commit any offence, while on bail, is substituted. That effectively destroys the right to bail. Vikramjit Reen[29] cities Overstringency as the main difficulty of these enactments as these provisions lead to absurd situations so that even if the FIR and case diaries adduced do not contain a shred of connection between the accused and commission of the offence how can the court be sure of the (ii) grounds as it involves a prediction of future conduct of the accused and bail may be refused on this ground alone. In ***Bimal Kaur Khalsa Vs. Union of India***[30] the second ground of not likely to commit any offence was struck down as unconstitutional because :-

> "The Court is not in a position to say with certainty and clear conscience that the accused, if released on bail, would not commit any offence."[31]

22. These provisions are also seen as self-defeating and contradictory[32] as neither release by the investigation officer under Section 169 Cr.P.C. nor discharge by the court under section 227 Cr.P.C. (both of which are applicable to a trial under these Acts) require such conditions if belief in innocence of the accused is reasonably possible, where as in case of bail the court is saddled with strict conditionalities.[33]

23. The solution to the stringent formulae provisions is a suggested redrafting of the provision such that it may read as:

> "where the Public Prosecutor opposes the application the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that on basis of past conduct, links or association he is not likely to commit any offence of a similar nature or class or any other connected offence, while on bail".[34]

24. The above provision seeks to introduce flexibility for judicial discretion while simultaneously preserving the stringency of the provision in adequate measure. Thus upholding presumption of innocence as a canon of the criminal justice system, which therein renders incarceration the exception rather than the rule, as opposed to granting of bail.

RIGHT TO BAIL (SECTION 167(2) CR.P.C.) AND DELAY IN INVESTIGATION.

25. With the incorporation of section 167(2) Cr.P.C. the investigating agency is required to complete the job of investigation and file the charge-sheet within the time limit of either 60 or 90 days as the case may be. In case the above is not completed within the definite period a most valuable right

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29. Vikramjit Reen, "Proof of innocence Before Bail. 37 JILI 256 (1995)
30. 1988 Cri. L.J. 869. 31. Ibid., at 896 32. Supra, n.26 at 258.
33. See. Q.M. Qureshi V. A.S. Sanra AIR 1994 SC 1333 34. Supra, n 26 at 259

accrues to the accused. The accused is, in that eventuality, entitled to be released on bail.

26. It would be seen that the whole object of providing for a prescribed time limit under section 167(2) Cr.P.C. to the investigation agency to complete the investigation was that the accused should receive expeditions treatment at the hands of the criminal justice system, as it is implicit in Article 21 that every accused has a right to an expeditions disposal of his case. Section 167 has been criticized[35] with respect to the fact that the prescribed time limit relates only to the investigation aspect and does not touch other segments of the criminal-justice-system, thus the object (of speedy trial) behind section 167 stands frustrated. Moreover section 167 (2) is seen[36] to paradoxically serve as a way of grant of liberty to some dangerous criminals who would otherwise not be able to get it under our system (for example they may not be otherwise entitled to bail by virtue of nature and gravity of Offence.) Thus the utility of section 167 Cr.P.C. may be thus questioned in the light of the above, as to whether it really serves the purpose enshrined in Article 21 of the Constitution, particularly in the light of viewing the criminal justice system as a whole not confined solely to investigation-it therefore follows that to achieve the right to speedy trial (as enshrined in Section 163 (2) Cr.P.C.) it is important to overhaul the system in its entirety and not parts of the system in isolation.

CONCLUSION

27. This paper has attempted to explore the various dimensions of the RIGHT TO BAIL within the constitutional framework. It is of prime significance to note that the very concept of bail arises from a presumption, of the accusatorial system, of 'innocent till proven guilty.' As such an individual's personal liberty wihch is a fundamental right under Article 21 of the Constitution, cannot be compromised until he/she is convicted and thus proven guilty.Thus he/she is allowed to furnish security (in the form of bail) to secure the accused's presence for trial while enabling him/her to retain his/her personal liberty.

28. However, as was brought to light, in the famous Hussainara Khatoon Case, personal liberty as operating within the domain of the criminal justice system remains the cherished prerogative of the rich. While those who can ill afford legal counsel to inform them of their right to bail. (i.e. in non-bailable offences - section 2(a) Cr.P.C.) and consequently are unable to pay the amount, are relegated to languish in prisons, often for terms longer than the period of punishment precribed for the offence they are charged with. Thus in order to extend the fundamental right of personal liberty under Article 21 of the Constitution, to even the economically weaker sections of the population (who form a majority of the prison population), the right to free legal aid must be made a constitutional right. Thus the decision in the

35. Jagdeep Dhankhar, "The Right to Bail and Delay in investigation", Vol. 8 (1981) India Bar Review. 441

36. Ibid.

same case, as also in ***M.H. Hoskot Vs. State of Maharashtra***[37] making legal aid a constitutional mandate under Article 21 is welcome in paving the way towards upholding human rights in criminal jurisprudence.

29. However in order to ensure one's right to a speedy trial-and thus consequently minimum infringemnt on the accused's right to personal liberty an overhaul of the criminal justice system in its entirety is called for. A mere emphasis on the investigation machinery by prescribing a time limit as per section 167(2) Cr.P.C. will not suffice to attain the desired object. Moreover it is interesting to note that on lapse of the prescribed period bail as of right accrues to the accused, even if his accused of a grave, heinous non-bailable offence and in other circumstances would have definitely been refused bail. Thus the backlash of section 167(2) as well as its possible effectiveness ought to be considered in the light of its object of ensuring a right to speedy trial under Article 21 of the Constitution.

30. Finally a marked trend away from the 'bail -as-a- rule,-no-bail-as-an-exception' standard towards 'no-bail-as-a-rule-bail-as-an-exception' must be noted in the light of the shift from the fundamental presumption of innocence towards a presumption of guilt in the light of the special legislations of NDPS Act, 1985; and Terrorist Special Courts Act. While it become significant to recognise the need for stringency in such legislations the degree of stringency must not be overstretched to the extent of making bail not merely an exception, but an impossibility.

31. Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and to give way to the humanization of the criminal-justice-system and to sensitise the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.

Courtesy : Central India Law Institute, Jabalpur [38]

The Judicial process demands that a Judge moves within the framework of relevant legal rules and the covenated modes of thought for ascertaining them. He must think dispassionately and submerge private feelings on every aspect of a case

Justice Frank Further

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37. AIR 1978 SC 1548
38. Article appeared in Vol. X Part III July-Sep. 1997 issue of Central India Law Quarterly

EARLY DISPOSAL OF CASES IN MAGISTRATES COURTS

DR. V.K. AGRAWAL
Civil Judge, Guna (M.P.)

Speedy trial is the essence of Justice. Denial of speedy trial may with or without proof of something more lead to as unavoidable inference of prejudice and denial of justice.

As observed in Maneka Gandhi case Supreme Court has held that the speedy trial is a fundamental right of the person under Art. 21 of the constitution.[1]

There is an escalation in pendency of criminal litigation in subordinate criminal courts and a mounting pressure on them, for disposal of cases.The Law Commission of India[2] has observed that the chance of miscarriage of justice, as a result of delay in hearing is, much greater in criminal cases because criminal cases depend upon oral testimony of witnesses. Chances of fading of memory, in some essential matters are considerable as a result of passage of time. Apart from that, there are also possibilities of the material witnesses succumbing to undue pressure and being won over, if there be long time lag between the actual occurrence and the date of recording of their deposition in Court.

Section 437(6) Cr. P.C. also gives an indication to conclude the trial within a period of 60 days from the first day fixed for taking evidence in the case triable by a Magistrate.

The directions of the Supreme Court in Common-cause-case, cast a duty on subordinate courts to conclude the trial at the earliest, otherwise after passing of time given in the direction the accused will be entitled for release on bail (Direction No. 1) or acquittal or discharge (Direction No. 2)[3].

The Law Commission of India is of the view that criminal case should be disposed of within 6 months.[4]

The question whether the delay in disposal is indispensible. It is chronic and incurable. A diagnostic approach will go a long way in solving the problem. The genetics will have to be studied.

The root cause of delay in criminal trial is the delay in examination of witnesses. In Magistrate Courts, the cases are pending for years together without any substantial progress at the stage of prosecution evidence. The causes of adjournment at this stage are as follows :-

(1) Non-issuance of summons to the witnesses.

(2) Summons issued, but not returned served or unserved to the Court.

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(1) Maneka Gandhi Vs Union of India, AIR 1978 SC 597

(2) Delay and arrears in trial courts - 77/4 report of Law Commission of India.

(3) Common Cause Vs. Union of India, 1996 MPLJ 636

(4) Supra 2

(3) Summons returned unserved due to non availability or death of witness.

(4) Summons served on the witness but not appeared even after service.

(5) Witness present, but accused or his counsel not present.

(6) Witness, accused and his Counsel are present but the Magistrate is on leave or busy in other cases.

Under Cr.P.C ,there are various provisions for speedy trial, but the delay is caused due to non-implementation. Under S. 309 Cr. P.C., there is a provision that in every case the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined and if the Court adjourns the case beyond the following day, it must record reasons.

S. 309 is in Chapter XXIV of Cr. P. C. which is relating to General Provisions as to inquiries and trials. It means that this provision applies to all types of trials viz. Sessions trial, warrant and summons trial. The conclusion of a session trial usually takes place one or two years. In Magistrates courts a number of summons and warrants cases are pending for 5 or 6 years. Some cases are pending since above 10 years. In Magistrates Courts it is very rare that any trial takes place day to day. It shows that the provision of S. 309 is not being followed. Its non compliance resulted in non-implementation of the spirit of the legislature for early disposal of criminal cases. If the provision of day-to-day trial, is properly implemented, there is no reason why the cases should not be disposed of within reasonable period. The problem is as to how it should be implemented. Our process serving machinery which serves the summons on witnesses is police, which is over burdened in other duties. It is often seen that the summons issued by the Court, is not returned served or unserved. In that situation, the Court becomes helpless in drawing conclusion, whether the summons has been served on the witness or not. So many times, the cases are adjourned due to non issuance of summons.

In Magistrates court two types of cases are pending, one is summons case and another is warrant case. Contested summary cases are very few.

In summons cases the court generally does not state the particulars of offence to the accused on his first appearance at the time of filing of challan. Generally the process begins after passing of two or three dates.In cases when the accused are more than one and one or more of them are not present at later date, then the case adjourns for statement of particulars of offence to the accused. Although the requirement of S. 251 Cr. P.C. is that the particulars of offence in a summons case is to be stated to the accused on the very first day when he appears or brought before the Magistrate. In a Summons case it is not necessary to frame a formal charge. Therefore it is also not necessary to hear the arguments when the particulars of offence are to be stated. Therefore it is the requirement of law that in a summons case the particulars of offence are to be stated on very first day at the filing of challan or in a complaint case, when the accused appears before the Magistrate. If the particulars of offence

have been stated at the time of filing of challan then the possibility of delay at this stage is zero.If in reply to the particular of offence the accused plead not guilty, then as per the provision of Section 254 Cr. P.C. the Magistrate is required to proceeed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

In a warrant case after filing of challan and before framing of charge the legal requirement is the supply of copy of police report to the accused. After compliance of Section 207 Cr.P.C. and after hearing the argument before charge, the charge can be framed on the first day when the challan has been filed.

After framing of charge or statement of particulars of offence the case becomes ready for trial. If the Magistrates courts adopt above method the evidence stage is possible on the very first day, when the challan is presented.

At the evidence stage the cases are delayed due to non-appearance or non-production of prosecution witnesses. To avoid the delay at this stage it is possible for the Magistrate to assume the possible time which is necessary for recording the statement of porsecution witnesses. After assumption of possible time for trial the Court can fix the case continuously for two or three days for recording the prosecution evidence. The date can be given within a month. The important aspect of this method is that all the summons of prosecution witnesses can be handed over to the police personnel on the very same day when he presents the challan before the Magistrate. The acknowledgement of handing over of summons of witnesses can also be taken in the order sheet. This acknowledgement makes bound the man and he can not be negligent about the service of summons and if the witness in not present even after service, the Court can take action against him under Section 350 Cr. P. C. by punishing him for disobedience to summons.

A question arises as to how it is possible to frame the charge on the same day when the challan is filed. The Magistrate Courts are very busy because of flood of work coming in their courts in the form of new challan judl. and police remand, bail applications and their verification and supurdnama applications etc.

The answer to the above quesiton in that the presiding officer of the court must have control on his board diary. He must have control to fix a limited number of cases for hearing, so that he can spare time to frame charge on the same day. He must himself give the date of cases fixed for evidence. For this purpose he can prepare three months calender of big size kept on his table glass in which he can mention the number of cases on a particular date exclusively dealt with by the presiding officer of the court, such as cases fixed for evidence, judgement / orders and others.

To reduce the burden on the ministerial staff and avoiding error in the order sheets some model order sheets can be prepared well in advance in accordance with above procedure. The formates of charge, particulars of offences and summons to witnesses can also be prepared in advance which will be very much helpful to save the time in busy hours of courts.

By above mechanism, the statement of prosecution witnesses can very well be recorded within a short time after the filing of the charge sheet. This practice also makes sure about the availability of witnesses. The possibility of witnesses being won over also becomes very low. This practice is also helpful in presenting the real picture of the incident before the Court. The discrepencies which occur in statement of witnesses before police and the Court can very well be minimised.

The long delay also fade the memory of witnesses about the incident. It is also seen that the witnesses become disinterested about the incident after the long gap. Therefore in that situation, often they never turn-up to come to the Court even after service of summons. Therefore the early recording of statement of witnesses also rightly affect the result and fate of the case

After recording the statement of prosecution witnesses the remaining part of trial can also be concluded within few months.

The adoption of above method makes possible the proper implementation of Section 309 Cr. P.C. and can reduce the life of a criminal case upto a great extent.

TIT BITS

1. **(1997) 6 SCC 450**
   DWARIKESH SUGAR INDUSTRIES VS. PREM HEAVY ENGINEERING WORKS
   BANK GUARANTEE ; ISSUING INJUCTION

Courts should be slow in granting an injunction to restrain realisation of the bank guarantee. Courts have carved out two exceptions : (1) If there is a fraud in conneciton with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of it, then he can be restrained form doing so. But for that, the fraud has to be an established fraud. (2) Where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The resulting of irretrievable injury, has to be such a circumustance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possiblity whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

Cases referred and relied on :

U. P. State Sugar Corpn. V. Sumac International Ltd. (1997) 1 SCC 568. Svenska Handelsbanken V Indian Charge Chrome, (1994) 1 SCC 502. Larsen & Toubro Ltd. V Maharashtra SEB, (1995) 6 SCC 68; Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. (1995) 6 SCC 76; Bolivinter Oil SA v. Chase Manhattan Bank, (1984) 1All ER 351, CA : U.P. Co.op. Federation Ltd. v. Singh Consultants and Engineering (P) Ltd. (1988) 1 SCC 174.

If the bank could not in law avoid the payment, as the demand had been made in terms of the bank guarantee, as has been done in the present case, then the court ought not to have issued an injunction which had the effect of restraining the Bank form fulfilling its contractual obligation in terms of the bank guarantee. An injunction of the court ought not to be an instrument which is used in nullyfying the terms of contract, agreement or undertaking which is lawfully enforceable.

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2. (1997) 6 SCC 143

S. VANATHAN MUTHTHU RAJU VS. RAMALINGAM

S. 9 CPC, EXCLUSION OF CIVIL COURTS JURISDICTION : HOW TO DETERMINE, PRINCIPLE LAID DOWN.

When a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil courts would take congnizance of it. Therefore, the normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded.The rule of construction being that every presumption would be made in favour of the existence of a right and remedy in democratic set-up governed by rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. However, in the development of civil adjudication of civil disputes, due to pendency of adjudication and abnormal delay at hierarchical stages, statutes intervene and provide alternative mode of resolution of civil disputes with less expensive but expeditious disposal. If a tribunal with limited jurisdiction cannot assume exclusive jurisdiction and decide for itself the dispute conclusively. in such a situation, it is the court that is required to decide whether the Tribunal with limited jurisdiction has correctly assumed jurisdiction and decided the dispute within its limits. When jurisdiction is conferred on a tribunal, the court examine whether the essential principles of jurisdiction have been followed and decided by the tribunals leaving the decision on merits to the tribunal. Where a statute gives finality to the orders of the special tribunal, the civil court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion. the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a special right or liability and

provides remedy for the determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the tribunal so constituted and the question whether remedies are normally associated with the action in civil courts or prescribed by the statutes or not require examination. Therefore, each case requires examination whether the statute provides right and remedy and whether the scheme of the Act is that the procedure provided will be conclusive and thereby excludes the jurisdiction of the civil court in respect thereof.

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3. **(1997) 6 SCC 514**
STATE OF GUJARAT VS. ANIRUDHSING

(a) **Section 25 Evidence Act, Police Officer :** Reserve Police Officer appointed under Bombay S.R.P.F. Act 1995 is not a police officer within the meaning of Section 25 Cr.P.C. A confession made is not inadmissible in evidence. He is officer-in-charge of a police station only for the purposes of maintaining public order and tranquillity and not for the purposes of investigation under Chapter 12 of the Cr.P.C. The Supreme Court made a reference to another case relating to. ***Balakrishna Vs. State (1980) 4 SCC 600 and Ramesh Chandra Vs. State, A.I.R. 1970 SC 940*** and ***K.I. Pavunny Vs. Assitant Collector, Central Excise*** in which it was held that the R.P.F. Officer or a Custom officer under the Customs Act or a Customs Officer under Central Excise Act is not a police officer.

(b) **Section 25 Evidence Act : Object :** The object of Section 25 is to ensure that the person accused of the offence would not be induced by threat, coercion or force to make a confessional statement and the officers also would make every effort to collect the evidence of the commission of the crime dehors the confession to be extracted from the accused while they are in the custody of the police.

(c) **Evidence Act 154, Hostile Witness, Appreciation of Evidence :** Merely because some of the witnesses have turned hostile, their ocular evidence recorded by the court cannot be held to have been washed off or unavailable to the prosecution. It is the duty of the court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. In the instant case responsible person like the Sub-Divisional Magistrate turned hostile to the prosecution and most of the responsible persons who were present at the time of flag-hoisting ceremony on the Independence Day and in whose presence a ghastly crime of murdering a sitting MLA was committed, have derelicted their duty in assisting the prosecution and to speak the truth relating to the commission of the crime. However, the court cannot shut its eyes to the realities like the present ghastly crime and would endeavour to evaluate the evidence on record. Therefore, it is the duty of the trial Judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record

even of the witnesses turning hostile would be sufficient to bring home the commission of the crime.

(d) **Section 154 Cr.P.C. : Use of F.I.R. :** F.I.R. is not a substantial base of evidence. It can only be used for corroborating or contradicting its maker. It cannot be used to corroborate or contradict other witnesses.

(e) **Section 207, 208 Cr.P.C. read with Section 173 Cr.P.C. Non supply of copies of record to the parties :** Normally where material evidence is necessary the case is adjourned to enable the party to get entire record prepared. But case need not be adjourned where evidence is not material for the purposes of the case. The court may refuse to adjourn the case.

(f) **Criminal Trial, Appreciation of Evidence of Police witnesses :** Evidence of police officers cannot be rejected out right merely because they are so. Their evidence cannot and must not be rejected as unreliable or unworthy of acceptance. It requires to be subjected to careful evaluation like any other witness of occurance.

(g) **Motive :** The motive gets locked in the mind of the makers and it is difficult to fathom it. If motive is proved that will supply a chain of links but absence there of is not a ground to reject the prosecution case.

NOTE : Judicial Officers are requested to go through the whole case as it is an important judgment on criminal law regarding appreciation of evidence of hostile and police witnesses, use of F.I.R. and who are police officers under Sec. 25 of the Evidence Act.

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4. (1997) 6 SCC. 233
NOOR SABA KHAN VS. MOHD QUASIM
CR.P.C. SEC. 125 AND SEC. 3 (1) (b) OF MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT 1986

The 1986 Act aims to protect the rights of Muslim women who have been divorced. It was not enacted to regulate the obligations of a Muslim father to maintain his minor children unable to maintain themselves which continued to be governed by Section 125 Cr.P.C. The Children on Muslim parents are entitled to claim maintenance under Section 125 Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years form the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. Section 3(1)(b) of the 1986 Act thus provides an additional maintenance to her, which is granted on the ***claim*** of the divorced mother ***on her own behalf*** for maintaining the infant/infants for a period of two years from the date of the birth of the child concerned who is/are living with her and presumably is aimed at providing some extra amount to the mother for her nourishment for nursing or taking care of the infant/infants up to a period of two years. It has nothing to do with the right of the child/children to claim maintenance under Section 125

Cr.P.C. So long as the conditions for the grant of maintenance under Section125 Cr.P.C. are satisfied, the rights of the minor children, unable to maintain themselves, are not affected by Section 3(1)(b) of the 1986 Act. Under Section 125 Cr.P.C. the maintenance of the children is obligatory on the father (irrespective of his religion) and as long as he is in a position to do so and the children have no independent means of their own, it remains his *absolute obligation* to provide for them. In so far as children born of Muslim parents are concerned there is nothing in Section 125 Cr.P.C. which exempts a Muslim father form his obligation to maintain the children. Indeed a Muslim father can claim custody of the children born through the divorced wife to fulfil his obligation to maintain them and if he succeeds, he need not suffer an order or direction under Section 125 Cr.P.C. but where such custody has not been claimed by him, he cannot refuse and neglect to maintain his minor children on the ground that he has divorced their mother. the right of the children to claim maintenance under Section 125 Cr.P.C. is separate, distinct and independent of the right of their divorcee mother to claim maintenance for herself for maintaining the infant children up to the age of 2 years from the date of birth of the child concerned under Section 3(1) of the Act. There is nothing in the 1986 Act which in any manner affects the application of the provisions of Sections 125-128 of the Cr.P.C. relating to grant of maintenance insofar as minor children of Muslim parents, unable to maintain themselves, are concerned.

Mohd. Ahmed Khan Vs. Shah Bano Begum. AIR 1985 SC 945, was also referred.

The non obstante clause with which Section 3(1) of the 1986 Act begins has nothing to do with the independent right or entitlement of the minor children to be maintained by their Muslim father. Section 3(1)(b) of the 1986 Act and Section 125 Cr.P.C. apply and cover different situations and there is no conflict, much less a real one, between the two.

It would be unreasonable, unfair, inequitable and even preposterous to deny the benefit of Section 125 Cr.P.C. to the children only on the ground that they are born of Muslim parents. The effect of a beneficial legislation like Section 125 Cr.P.C., cannot be allowed to be defeated except through clear provisions of a statute. A Muslim father's obligation, like that of a Hindu father, to maintain his minor children as contained in Section 125 Cr.P.C. is *absolute* and is not at all affected by Section 3(1)(b) of the 1986 Act. Apart from the statutory provisions, even under the Muslim Personal Law, the right of minor children to receive maintenance from their father, till they are able to maintain themselves, is absolute.

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5. 1997 MPLJ (2) 360
VACANT ACCOMMODATION : NATURE OF M.P. ACC. CON. ACT.
HAKIMUDDIN VS. PREM NARAYAN

When a case is instituted under Section 12 (1)(e) or (f) of the Act the landlord must disclose the vacant accommodation in his possession in order

to prove that alternative accommodation is not suitable for the purpose he is seeking eviction. The character of the accommodation whether it is residential or otherwise will depend upon the intention for which it was let out. But when accommodation is vacant its character becomes neutral.

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6. 1997 MPLJ (2) SHORT NOTE 11
RAM KUMAR VS. STATE

Refusal of permission of husband to wife to go to parents house would not be a penal offence and conviction under Section 306 of the I.P.C. on such count is not suspensible.

Please refer to ***1971 JLJ Short Note No. 80 Pancharam Vs. State. 1984 (2) Crimes 787 Brijlal Vs. State.***

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7. (1997) 7 SCC 431
BILAL AHMED VS. STATE
ARMS ACT 1959-S. 25 (1-B)(a) NON SEALING OF REVOLVER : EFFECT

Recovery of a revolver and two cartridges from the possession of the accused. Report of ballistic expert that the said articles were in perfect working condition. Particulars of weapon given in seizure memo which tallied with the weapon of examination by the ballistic expert. Allegation of tampering with those articles not made at any stage of the case. Identity of the weapon established beyond reasonable doubt. Non-sealing of the revolver and cartidges after seizure held, in the circumstances of the case, inconsequential. Conviction upheld. Sentence of 3 years' RI awarded by the trial court needs no interference.

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8. (1997) 6 SCC 162 = A.I.R. 1997 SC 1023
APPRECIATION OF EVIDENCE

(Please refer to 'JOTI JOURNAL' Vol. III Part IV, August 1997 page 42 Tit Bit No. 1)

The injured eye witness who filed the F.I.R. stated in the Court that it was recorded by the police in the evening while according to police it was recorded in the morning. This discrepancy on the facts of the case was not enough to castigate an important eye witness whose presence at the spot could not be doubted. The maximum consequence may be that the first information statement could not be used to corroborate the evidence of the maker of it. The evidence of the injured eye witness also cannot be rejected merely because his name was not mentioned in the F.I.R as one of those persons during incident. The condition of the maker of the F.I.R. should be seen as to whether he was in a position to reproduce the vivid details of the occurrence. This should be borne in mind. The maker of the F.I.R. named accused No. 1,3,5,6,. The names of the accused No. 2 and 4 were not in the F.I.R. The witness was not subjected to test identification parade. Therefore the High Court was right in acquitting accused No. 2 and 4 by giving benefit of doubt. But the High Court

heard in setting aside the conviction recorded by the trial court against accused nos. 1,3,5, and 6 under Section 302, 307 and 326 of the I.P.C. Side stepping of evidence of the maker of the F.I.R. and other important witnesses examined by the prosecution. The acquittal was set aside.

2. The trial judge can put any question in any form at any stage to any witness to elicit the truth. The paragraph 9 of the judgment is reproduced here for guidance so that the judicial officers may be able to know how an ambiguity can be removed by puting questions by the Court.

The High Court, having found that presence of PW 3 at the place of occurrence has been indisputably established, sidelined his testimony with a sweeping remark that it is "full of contradictions, inconsistencies and improbabilities". The learned Judges did not cite a single material from PW 3's narration of the occurrence as proof of inconsistency. Of course it is pointed from the evidence of PW 3 that the appellants had covered their faces and subsequently PW 3 has corrected it when the Court put a question on that aspect. In the deposition of PW 3 the following questions and answers have been recorded as part of cross-examination.

Question : The correct thing is that those assulters covered their faces and hence you could not recognise who had beaten whom ?

Answer : This is correct that the presons who came with the intention of killing had covered their faces.

The trial Judge then put a question as this:

Question : Once you have stated that the accused persons had covered their faces and then you have stated that they were not covering their faces. Which is the correct statement out of those two ?

Answer: Nizam met me on the way and his face was covered. But the persons who boarded the bus had never covered their faces.

The learned Judges of the High Court have observed that the said explanation offered by PW 3 is not believable at all. When the trial Judge noticed that PW 3 Badri Lal was in a bit of confusion during cross-examination he put a question to get the confusion clarified. If The witness has corrected an error which slipped out of his tongue there is no justification terming his evidence as "not at all believable", particularly occurrence during the relevant time is indisputable.

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9. 1997 (2) MPLJ 267 (S.C.) S.118 EVIDENCE ACT : APPRECIATION OF EVIDENCE - CHILD WITNESS
DATTU VS. STATE

A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand

the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.

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10. 1997 (2) MPLJ 322
FRAMING OF CHARGE; CONSIDERATION FOR
HIRAMATI VS. RAMPRASAD

The revisional Court after making detailed and maticulous scrutiny of evidence reversed the order of trial court regarding framing of charge. The revisional court has travelled behind its jurisdiction. Following cases were referred to in the judgment :

State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018, Union of India Vs. Prafulla Kumar, AIR 1979 SC 366, Superintendent Vs. Anil Kumar, AIR 1980 SC 52, Niranjan Singh Vs. Jitendra and State Vs. Rikhi Ram 1997 JLJ 477.

The substance of the ruling is if from the materials on record, inference of strong suspicion can be drawn that would be sufficient in framing charge against the accused in respect of commission of offence. It is not necessary for the revisional Court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but the revisional court may evaluate the material to find out if the facts should emerging therefrom taken at the face value establish the ingredients constituting the offence.

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11. A.I.R. 1997 SC 2914
HARPAL SINGH VS. DEVENDRA SINGH AND OTHER CASES
APPRECIATION OF EVIDENCE :

Eye witness helping injured presons to reach to hospital his clothes getting blood stained in the process. Omission of investigating agency to seize his clothes. No ground to infer that he did not see the occurrence.

The concerned person making efforts to save the life of victim who was seriously injured. Therefore resultant delay in recording F.I.R. is not a ground for vitiating Proceedings. The Supreme Court held that pendantic view is to be avoided. Section 162 Cr.P.C. F.I.R. lodged by informant of subsequent interogation police eliciting some details of occurrence from home. Evidence of informant could not be overboard on that ground.

Examination of prosecution witnesses by prosecution :

The prosecution has discretion not to examine certain witnesses so that proliferation of evidence is avoided. therefore viewing Section 114 illustration 'G' adverse influence cannot be drawn from non-examination of material witnesses.

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12. A.I.R. 1997 A.P. 347
HINDUSTHAN CORPORATION VS. UNION
SECTION 8 CARRIERS ACT (3 OF 1865)

When there is negligence on the part of carrier it cannot absolve itself of the liability by merely stating that the goods were being carried at the owner's risk. The burden is one the carrier to establish that there was no negligence on the part during the transit.

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13. PLEA OF GUILT THROUGH ADVOCATE

Where the personal attendance of an-accused has been dispensed with and he is permitted to appear by a pleader, the accused can also plead guilty or not guilty through his pleader. ***Kanchanbai Vs. State, Air 1959 MP 150 : 1959 Cr.L.J. 602.***

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14. PLEA OF GUILT SUBSEQUENT TO PLEADED NOT GUILTY

If an accused pleads guilty subsequent to the stage when he pleaded not guilty, it is not necessary for the Magistrate to continue to record the rest of the evidence. If the Magistrate is satisfied about the voluntary nature of the confession and that the accused does not want the trial to continue, it would be an abuse of the process of the Court, if the Magistrate keeps on recording the evidence. ***Shyam Singh Vs. Dharam Singh, 1968 All LJ 776.***

Denial of guilt and later admitting it -when the accused initially pleaded not guilty and later on, before any witnesses were examined, filed a memorandum admitting his guilt; held, (1) there is no provision for filling a memorandum of plea of guilty and (2) such a belated admission must have been treated as not **voluntary.** ***In re Thillan, 1982 Mad LJ (Cr) 595: 1982 LW (Cr) 213.***

In the beginning of the case, the accused moved a bail application in which they denied that they had committed any offence. The offences with which they were charged were dacoity, kidnapping, etc. Later they were said to have admitted the commission of those offences and they were convicted on their plea guilty. Held, the plea of guilty was **not voluntary** and that had not been **fairly and fully recorded**. The conviction was set aside and the matter was remanded. ***Wazamao Vs. State of Nagaland, 1983 Cr. LJ 57 (Gau).***

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CANCELLATION OF BAIL - WHO CAN?

M.C.R.C. NO. 6160/96

VEER SINGH VS. STATE

(Not yet published in any of the magazine)

Following is the extract from the Order of the Hon'ble Justice Shri Dipak Misra, M.P. High Court, Jabalpur :

It is to be borne in mind that an accused is not entitled to control the proceeding at his own sweet-will. He cannot prolong the trial at his whim and fancy. Caprice has no role to play in a criminal trial. If an accused is permitted to raise a plea that inspite of his non-appearance from time to time, the trial Judge or the trial Magistrate is bound to enlarge him on bail because there has been no cancellation of the original bail order granted by a superior court, that would be against the mandate of law and nugatory of the provisions enumerated under sections 436(2), 437(5), 439(2), 446 and 446 A of Cr.P.C. read as a harmonious whole. Sometimes a doubt arises whether the court of Session while granting bail to an accused would include a condition that is the accused fails to attend in the trial court he shall have no right to claim bail on the basis of his earlier bail order as the bail order would stand automatically cancelled and the Magistrate would be at liberty to consider the bail-application a fresh. As analysed and stated earlier, once the accused does not appear in a court and is produced in custody pursuant to a warrant of arrest having been issued by competent court, or surrenders voluntarily being aware of issue of such warrant, all other provisions of the chapter XXXIII will come into play and the Magistrate can refuse to release the accused and he would have no right in law to contend that he is entitled to be enlarged on bail, as the order by which he was enlarged has not been cancelled. In view of this, even if there is no condition at the time of grant of bail, as a consequence of non-appearance of the accused before the learned trial Judge or trying Magistrate, the said court would have complete liberty to deal with him in accordance with law. If the said Court is satisfied that there are cogent and sufficient reasons for non-appearance of the accused he may exonerate and release him on fresh bail bonds with the same conditions or more onerous conditions with regard to the surety and the sum. He is also at liberty, depending upon the facts and circumstances of the case, to refuse him to enlarge him on bail. The said order would be subject to challenge before the superior court.

Cases referred :

1. AIR 1978 SC 527, Babu Singh Vs. State,
2. AIR 1978 SC 961, State Vs. Sanjay Gandhi.
3. AIR 1958 SC 376, Talab Hazi Vs. Madhukar.
4. AIR 1967 SC 1639, Ratanlal Vs. Asst. Collector.
5. 1986 Cr.L.J. 1235, Johani Wilson Vs. State of Rajasthan.

Please refer to Article "Cancellation of Bail - who can", a debate published in Vol. III Part IV 1997 August Part.

STAY OF SUIT : SECTION 10 AND 151 C.P.C.
CIVIL REVISION NO. 1273/95
SAL UDYOG PVT. LTD. RAIPUR VS. CENTRAL BANK OF INDIA, RAIPUR
JUDGMENT OF M.P. HIGH COURT, JABALPUR

(Not yet published in any magazine)

Case decided by Hon'ble Shri Justice R.S. Garg on 8.11.97.

Applicants/defendants being aggrieved by the order passed by District Judge, Raipur rejecting the applicants application filed under Section 151 C.P.C. seeking stay of the Civil Suit, have preferred this revision petition.

The extract form the order is as under :

In the present case, breach of the contract provided a ground for institution of the Civil suit. The Bank has come with the case that the defendants took a loan with the assurance that they are export oriented industries, they would earn foreign currency and would benefit all concerned. The bank relying upon the said assurance, granted loan facility at the lower rate of interest. The bank found that instead of respecting the assurance given and contrary to the agreement entered into between the parties, the defendants were not exporting the goods but were selling the same in the open. Indian market. The Bank filed the suit for the recovery of the money and also claimed higher rate of interest. In the present suit, the bank has asked for a decree for recovery of the money by sale of the pledged and hypothecated goods and the mortgaged property. The criminal case relates to the same action on the part of some of the defendants, according to which some of the defendants have broken open the lock, removed the pledged goods from the godown and sold the goods in the local market. In the instant case, the defendants cannot say that there was no limit of the loan, they were not indebted and they were not liable to make payments. The cause of action for recovery of the loan amount is the sanction of the loan and non-payment of the said amount. It has nothing to do with the stealthy removal of the goods or its sale in the open market. If the defendants prove that the goods were not sold by them in the local market, then the question of interest alone would be affected. The liability of the defendants to pay money under the loan agreement in any case shall not be affected. When the act of the defendants provides a cause of action to the plaintiffs for instituting a civil matter, then the civil matter can continue but if the civil matter is the direct result of criminal action, then the Court may stay the civil matter. The Supreme Court in the matter of state of Rajasthan (supra) has certainly provided the guide lines to the Courts that civil matters are ordinarily not required to be stayed. The observations made by the supreme Court would certainly provide guidelines to every Court because in the matter of sherif, a larger Bench of the supreme Court has simply observed that no hard and fast rule can be laid for such matters and the discretion of every Court would by itself be the best guide. It would be appropriate at this stage to quote a passage from the judgment of Kusheshwar's case (supra):

"It is neither possible nor advisable to evolve a hard and fast, straight-jacket formula, valid for all cases and of general application without regard to the particularities of the individual situation."

The Court below was justified in not staying the proceedings in the present suit.

Cases referred :

State of Rajasthan Vs. Kalyan Sundaram Cement Industries (1996) Vol. 3 supreme Court Cases, 87, M.S. Sheriff and another Vs. State of Madras A.I.R. 1954 SC 397, New Bank of India Vs. M/s Radhakrishan and Co. 1988 JLJ 687, Kusheshwar Vs. Bharat Cooking Coal Ltd. A.I.R.1988 SC 2118, Central Bank of India Vs. Laxmi Cotton Co. 1996 MPLJ 1068, State of U.P. Vs. Synthetics and Chemicals Ltd. (1991) 4 S.C.C. 139, Salmond on Jurisprudence 12th Edn.P. 153, Lancaster Motor Company (London) Ltd. Vs. Bremith Ltd. (1941) 1 K.B. 675,677, Municipal Corporation of Delhi Vs. Gurnam Kaur (1989) 1 Scc 101, B. Sharma Rao Vs. Union Territory of Pondicherry. A.I.R. 1967 1480, State of U.P. Vs. Ramachandra Trivedi.

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M.CR. C. NO. 3421/97, 3422/97, 3447/97
M.P. HIGH COURT, JABALPUR

(Yet Unreported in any Magazine)

Subash Chandra Jain, Rajendra Kumar Arora and Daljit Singh Vs. State

R.P. (U.P.) Act. Offences Non-Bailable

Judgment by Hon'ble Shri Justice S.P. Khare

Offences under Section 3 of the R.P. (U.P.) Act are non-bailable offences.

Extract from the Judgment :

A question has been raised whether the said offence is bailable or non-bailable. The offence under Section 3 of the Act is punishable with imprisonment for a term which may extend to five years. If an offence under any law other than the Indian Penal Code is punishable with imprisonment for three years and upwards it is non-bailable as per Part II of schedule I to the Code of criminal Procedure, 1973. The quantum of the maximum punishment provided by the law determines whether the offence is bailable or non-bailable. Section 8 of the Act lays down the procedure for making inquiry against arrested persons by an officer of the Force. According to proviso (a) to Sub-Section (2) of Section 8, if the officer of the Force is of the opinion that there is sufficient evidence for reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. The officer of the Force has been authorised to grant bail to the arrested person in suitable cases depending upon the Facts and circumstances of the case. That does not render the offence bailable. As already stated the offence being punishable with imprisonment for five years it is non-bailable. That is also the view of Rajasthan High Court in ***Ganesh Chandra Vs. State 1987 Cr. L.J. 931.*** During the course of hearing a reference was made to the decision of Gauhati High Court in ***Union of India Vs. State of Assam 1997 Cr. L.J. 1033*** by Public Prosecutor of R.P.F., wherein it has been held relying upon Section 8 of the Act that the offence in question is bailable. For the reasons given above it is respectfully submitted that this decision of Gauhati High Court does not lay down the law correctly.

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M.P. RULES UNDER SECTION 27 (C) COURT FEES ACT

The following rules have been made by the State Government under clause (c) of S.27 of the Court Fees Act, 1870 while exercising the powers conferred under that section for regulating the renewal of damaged or spoiled stamps.

(1) "Deputy Commissioner" or "Collector" includes any other officer whom the State Government may appoint in this behalf by name or by virtue of his office.

(2) Ordinarily renewal of spoiled adhesive stamps shall not be allowed except when they are used in continuation with impressed stamps.

Note - To meet cases of special hardship, the State Government has made provisions in Chapter IX in Part II of the the Stamp Manual in respect of grant of refund. (See Executive Instructions under sections 26-27 of Refunds and Renewals).

(3) (i) If any person possessing damaged or spoiled impressed stamps delivers up the same to the Deputy Commissioner or Collector for cancellation and applies for its renewal within six months after the stamp has become damaged or spoiled, the Deputy Commissioner or Collector may, if satisfied of the sufficiency of the grounds of the application, cancel and renew such stamps.

(ii) For the purposes of this rule the renewal of a damaged or spoiled stamp means the supply in lieu thereof of a fresh stamp or stamps of a similar kind and equal value or if required and the Collector thinks fit, stamp of any other description of the same amount in value.

(iii) A stamp be deemed to be damaged or spoiled :

(a) When the stamp or paper on which it is impressed or affixed has been inadvertently or undersignedly spoiled, obliterated, or by any means rendered permanently unfit for use, whether the said paper be written on or not; or

(b) When by reason of some material error in the writing or copy of a stamped document, it has become of no avail, or

(c) When the purpose intended to be effected by stamped document has been effected by some other document duly stamped.

DIRECTION UNDER SECTION 26 COURT FEES ACT

The Provincial Government has issued the following directions under section 26 of the Court-fees Act, 1870 (VII of 1870) :

(1) When in any case the fee chargeable under the said Act is less than Rs. 25/- such fee shall be denoted by the adhesive stamps. The adhesive stamps to be used shall either be adhesive stamps of the size and pattern bearing the words "court-fee" and containing three lines in the middle with the King's head and the value printed on the left side, or adhesive stamps of any different shape, size or pattern, bearing the words "court-fee" which may

hereafter be issued for use, in supersession of or in addition to the adhesive stamps now in use.

(2) When in any case the fee chargeable under the said Act amounts to or exceeds Rs. 25/- such fee shall be denoted by impressed stamps bearing the words "court-fee", adhesive stamps being employed to make up fractions of less than Rs. 25/-.

(3) If in any case the amount of the fee chargeable under the said Act involves a fraction of an anna, such fraction shall be remitted.

(4) The additional court-fee payable under section 19E of the said Act on probates or letters of administration shall be denoted in the aforesaid manner.

Instructions under the Court-fees Act & the Stamp Act.

General - The High Court desires to remind all Civil Judges of their duty to protect the revenue of the province by seeing that the provisions of the Court-fees Act and the Stamp Act are properly enforced. This duty falls under two main heads and consists (a) of seeing that documents filed before them are properly stamped, (b) of seeing that the machinery set up to check the proper use of stamps is worked thoroughly and conscientiously both by themselves and by the subordinate staff.

Plaints, memoranda of appeals, etc. - It is the duty of the officials receiving plaints, memoranda of appeal and applications to examine them to see that they are properly stamped. This does not in any way absolve the Judge from the duty of seeing that the proper dues have been paid. When the Judge reads through the plaint or other document it is his duty to see that the valuation is clearly explained, that when two or more reliefs are asked for, their separate valuation is clearly set out, and generally that the proper dues have been paid.

Note- Order VII, rule 1, Civil Procedure Code, requires that a plaint shall contain a statement of its value for the purpose of determining court-fee. Order VII, rule 8, requires that distinct reliefs founded on separate grounds must be set forth distinctly and separately. Section 17, Court-fee Act, deals with the taxing of such suits.

Judge are not to rely on the opposite party raising the matter of valuation for court-fees, nor if the opposite party raises the matter of valuation and subsequently does not press the matter, should the Judge automatically hold against them on the analogy of an ex parte decision. In many cases the opposite party will not raise the issue of under-valuation as proper valuation may increase their costs should the final decision of the proceedings be against them. It should be noted that there is in this respect a difference between valuation for jurisdiction and valuation for assessing court-fees. In dealing with jurisdiction unless under-valuation of over-valuation is patent on the face of the plaint or other document, the Court may require the plaintiff or party filing the document to show that valuation is proper if the opposite party takes ob-

jection but not otherwise. In dealing with the assessment of court-fees it is the Court's duty, whether the opposite party takes objection or not, to see that the proper fees are paid.

At the same time it must be borne in mind that the primary business of a Court is to decide disputes between litigants and that it is very undesirable that such disputes should go off on stamp points and a Judge should accordingly be careful while requiring payment of the proper dues not, save when absolutely necessary, to so frame the order as to cause the litigation to determine.

It follows from the above instructions that the practice of admitting suits and appeals in which doubt is felt about court-fees subject to objection later by the opposite side is highly objectionable and should never occur. At the same time in cases of doubt the Judge should lean towards, the litigant and in all cases he should bear in mind that litigation should not, if possible, be allowed to go off on stamp points.

Applications - The general rule is that all applications or petitions made to a Civil Court unless otherwise provided require a court-fee stamp under Article 1, Schedule II of the Court Fees Act. While this rule is of the simplest courts appear to find difficulty in deciding when applications are necessary, some failing to obtain applications when necessary and some demanding applications when such cannot legally be demanded. For certain purposes the Civil Procedure Code requires an application to the Court precedent to action being taken. For other purpose the Judge may require an application to be filed. In both these cases it is the duty of the Judge to see that the application is properly stamped under the Court Fees Act. In other matters an application is neither necessary nor compellable. In such a case a party may or may not file an application as he chooses. If he chooses to do so the application must be stamped. If he does not choose he cannot be compelled to file an application. The principle is that the Court may require an application in all cases (a) where it is not bound to take the next steps or (b) where it has not acted suo motu in ordering the next step. The Court must require an application in cases where the code requires an application. This principle may be better explained by reference to a few examples.

(These examples are not to be read as discouraging the *issue of orders suo motu*).

(a) A Court is not bound to issue a first summons to a defendant (Order V, rule 1). Therefore, it may require an application stamped under Article I, Schedule II, Court-fees Act, before so issuing. Normally, however, the Court orders issue suo motu. Once the order has been passed an application cannot be demanded.

(b) If the first summons to a defendant is not served Order IX, rule 6, provides that the Court shall in certain circumstances issue a fresh summons (except in cases covered by Order IX, rule 5). For this purpose, therefore, the Court has no power to demand an application. But if the plaintiff elects to file an application the Court must see that it is stamped.

(c) The code lays down that when an application for the purpose is made the Court may issue a first summons to a witness or a person called to produce a document (Order XVI, rule 1). In this case therefore, the Courts, should compel an application and should not proceed suo motu. Such an application would require to be stamped under Article 1, Schedule II, Court-fees Act, but for the operation of section 19 (xiv), ibid, by which this type of application is exempted from fee.

(d) The code provides in Order XVI, rule 10, that the Court may issue a subsequent summons on failure of service under Order XVI, rule 1. Here, therefore, the Court may demand a stamped application or may proceed suo motu. Such subsequent applications are not exempt under sec. 19 (xiv), Court-Fees Act, and must be stamped.

(e) When a Court has ordered execution of a decree under Order XXI, rule 17(4), it is provided under rule 24 of Order XXI that the Court shall issue its process in execution. It is, therefore, incorrect to compel the decree-holder to file a separate stamped application for issue of process.

(f) If process issued under Order XXI, rule 24, is unserved, the Court is bound to record the result of the enquiry under Order XXI, rule 25(2), but there is no provision in the Order specifically requiring it to take further steps. The Court may, therefore, act suo motu or on an oral request in ordering the issue of fresh process or may require a stamped application to this effect.

(g) An application for execution of a decree usually contains a prayer to realize money and pay it to the decree-holder, vide Form No. 6, Appendix E, Civil Procedure Code. The Court is bound to deal with the prayer to pay out by an order and having passed an order to pay out, cannot subsequntly insist on an application for payment. The Court should, however, insist on a memorandum which should state the number of the case, the names of the parties, the amount and nature of the deposit, the amount ordered to be paid and the date of such order. The memorandum should not contain any prayer; if it does, it amounts to an application and must be stamped as such.

Attention to the Principles laid down and the above examples should obviate difficulty in the matter.

Judges have at times been led into difficulty owing to the provisions of section 19(iii) of the Court-Fees Act. Their attention is drawn to the fact that the only provision in the Court-Fees Act making written statements liable to tax is Article 1 of Schedule I which makes written statements pleading a set off or counter claim taxable. The act being a fiscal enactment will be interpreted in favour of the subject. Section 19(iii) of the Act will not exempt from liability written statements pleading a set off or counter claim even though it be called for by the Court. On the other hand, it will not render other written statements liable whether called for by the Court or not.

Copies - Under Articles 6,7 and 9 of Schedule I to the Court-Fees Act certain copies require stamping under that Act. The court-fees payable on these copies are remitted when the copies are furnished for the private use of per-

sons applying for them. Documents on which the court-fees have been remitted on the ground that they are required for private use cannot, however be filled, exhibited or recorded in any Court or received by any public officer until the court-fees remitted have been attached. It is not uncommon for parties to obtain remission by stating that documents are required for private use and then to file them as exhibits in case without paying the remitted court-fee. This practice must be stopped. Clerks appear to find difficulty in differentiating between the copying fees paid on such documents and the court-fees required, and the Judges should carefully check copies filed and aid the clerks by advice where necessary.

Courts will note that copies of documents certified to be true by a public officer and not covered by the Court-Fees Act require in certain cases stamping under Article 24, Schedule I of the Indian Stamp Act. The fees under the Stamp Act must be paid by non-judicial stamps (rule 6, Stamp Rules, at page 101 of the Stamp Manual) except in the case of copies of maps or plans, printed copies and copies of or extracts from register given on a printed form in which case court-fee stamps will be used (rule 17 (e), ibid).

Note - A general power of attorney need not be filed in original. A copy should be filed and the original presented for verification. The agent, who presents the copy, should certify it under his signature to be a true copy and the clerk who verifies it should write 'verified' above his signature and date. A copy of the registration endorsement is not necessary. A note giving the name of the registration office and the number and page of the book in which the original has been registered would suffice. The copy so filed and verified does not require any court-fee stamp under Article 8, Schedule I to the Court-fees Act, 1870.

(1) Please refer to J.O.T.I. Journal Vol. III, Part II Aprit 1997 issue for other instructions under The Court Fees Act & The Stamp Act pages 33 to 35.

(2) Attention of Judicial Officers is also invited to "The M.P. Stamp Rules 1942, M.P. Prevention of Under Valuation of Instruments Rules, 1975 which are Published in Standard Publications on Fiscal Laws" (i.e. Court Fees Act, Stamps Act and Suit Valuation Act) Judicial Officers are also requested to go through Rules and orders Civil and Criminal in this respect.