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संपादकीय

स्वयं में मंत्र मुग्ध होना

हमारे परिचित एवं मित्र ने कुछ पुस्तकें भेजी। पढ़ना शुरू किया। मुनि क्षमा सागर जी का साहित्य मैंने पूर्व में भी पढ़ा है। उसी कड़ी में यह पुस्तक हमारे मित्र ने भेजी थी। आदरपूर्वक एवं स्नेह भाव से भेजी थी। कुछ को पढ़ा कुछ को यथा समय पढ़ूंगा ही।

पढ़ना आवश्यक है। पढ़ने का शब्दार्थ एकांगी नहीं है। उक्त शब्द में दो अर्थ तो निश्चित है। हम पढ़ने का अर्थ केवल अध्ययन से लेते हैं। अध्ययन तो तब होगा जब उसे बाँचेंगे।

तो बाँचने की क्रिया आवश्यक है। जब **बाँचना** है तो निश्चित ही जिस किसी ने लिखा है उसके विचारों को **समझना** है। विचारों को जब समझा जाना है तो हमें स्वयं की **तार्किक शक्ति** (रीज़निंग पावर) को विकसित करते जाना है। तार्किक शक्ति वो शक्ति है जिससे हम किसी तर्क या अभिव्यक्ति का विश्लेषण करते हैं। जब **विश्लेषण** करते हैं तो अपने अनुभव में वृद्धि कर रहे होते हैं। रीज़निंग शब्द का अर्थ दिया है 'To find an answer to a problem by considering various possible solutions' (To reason something out) एक अन्य अर्थ है 'To argue in order to convince or persuad somebody (To reason with some body) एक और अर्थ। सर्वनाम के रूप में Reasoned शब्द को देखें। अर्थ है The action or process of using one's ability to think, form opinion etc. etc. इसी शब्द से बनते हैं Reasonable (एडजेक्टिव– विशेषण) अर्थात तर्क संगत, विवेकयुक्त, समझदारी पूर्ण एवं पुनः उसी से बना सर्वनाम है Reasonableness अर्थात औचित्य।

तो बाँचना यह मूल आधार है। यदि बाँचा जावे तो उक्त शब्द से प्रवाहित सभी बातें हमारे मस्तिष्क पटल पर अंकित होंगी उसे ही हम कहेंगे पढ़ना अर्थात अध्ययन करना। इस सम्पूर्ण व्याकरण में कहीं भी अंदाज या अनुमान काल्पनिकता का आभास तक नहीं है।

तो मुनि क्षमासागर जी की कविताएँ पढ़ रहा था। वे कोई तर्क शास्त्र तत्व ज्ञान की औपचारिक डिग्री प्राप्त किए व्यक्ति नहीं है न ही अपने एम. टेक. करने के अंतराल में ऐसे शास्त्रों में प्रवीणता प्राप्त करने हेतु स्कूल में गए होंगे लेकिन सम्पूर्णता जब प्रत्येक कविता में हो तो हम आसानी से कह सकते हैं कि उन्होंने किसी बात को विस्तार से देखा होगा, यद्यपि रासायनिक या भौतिक रूप से उसका परीक्षण विश्लेषण करने की संभावना नहीं हो परंतु उसके प्रत्येक पहलू को कई दृष्टिकोणों से देखा होगा। समझा होगा।

इन सभी क्रियाओं को पढ़ समझकर स्वयं को शब्द में विसर्जित कर दें तो स्वयं का विसर्जन उस विषय में हो जाता है।

विसर्जन समर्पण है। समर्पण वो है जो स्वयं को अन्य के साथ विलीन करना।

मुनि क्षमासागर जी का संसार भौतिक नहीं अध्यात्मिक है इहलौकिक नहीं पारलौकिक है, स्वार्थ नहीं परमार्थ है, व्यक्ति नहीं समिष्टि है। निसर्ग से जुड़ने का उनका भाव बड़ा स्वाभाविक है। ऐसा स्वभाव एकाकार होने की प्रवृत्ति को प्रदर्शित करता है।

तो कहना यह है कि हमें पढ़ना है। पढ़ने के सम्बन्ध में केवल यह कहा जा सकता है कि हमें विषय पर ध्यान केंद्रित करना है। विषय के प्रति अभिमुख होना होगा परिज्ञान–बोध धारणा प्राप्त करनी होगी।

हमारे ज्ञान का संवर्धन इसी से होगा। प्रवीणता प्राप्त होगी।

ऐसा तभी हो सकता है जब हम मिथ्या, अभिमान, अहम्मन्यता से दूर रहेंगे। मिथ्या अभिमान या अहम्मन्यता हम उसे कह सकते हैं जब हम यह समझ बैठे कि जानने के लिए कुछ भी शेष नहीं है। अमुक समस्या है? अमुक विषय है? निर्णय लिखना है? आदेश देना है? अमुक विधि के आधार से लेख लिखना है? लाओं अभी निपटा देते हैं। अर्थात हम यह मान कर बैठे हैं कि हम सब विषयों के ज्ञाता हैं बस आप कहो, हमने सब समझा ही हुआ है लिख भर देंगे।

नहीं ! हमें प्रेरणा चाहिए। तर्क वितर्क यहां तक कि कुतर्क सुनने की क्षमता होना चाहिए, विषय की पृष्ठभूमि ज्ञात होना चाहिए, अनुशीलन परिशीलन क्षमता हो तथा बहुआयामी दृष्टिकोण हो। विषय से साक्षात्कार होने की क्षमता हो। ऐसा होने से सुस्पष्ट, सुनिश्चित चिंतन की ओर अग्रसर हो सकेंगे व विषय वस्तु का उचित मूल्यांकन कर पाएँगे।

कोई हमें प्रेरित करे उससे बेहतर है प्रयत्न करे कि हम स्वयं ही प्रेरित हो।

बड़ा कठिन काम है। चिड़िया को मैं आप और सभी देखते हैं। वृक्ष के सूखे पत्तों को तो उपेक्षा से ही देखते हैं। लेकिन मुनिश्री ने जिन आंखों से देखा उसी आंखों से मैंने देखने का प्रयत्न भर किया तो मेरे पैरों के नीचे की धरती ही खिसक गई। सारा घमंड चूर चूर हो जाता है गर्मी उर्मी सभी जमींदोस्त हो जाती है।

बानगी देखें। स्वयम् को जांचें परखें व चिंतन करें, स्वयं के ही प्रति कि हम क्या हैं क्या और क्यों होना चाहिए। अपने दृष्टिकोण से ही देखें। मैंने अपना दृष्टिकोण बता दिया है।

दो कविताएँ है मुनिश्री की। मैं उन्हें सुक्ति रूप में देखता हूँ। वे इस प्रकार हैं।

खेल

देखा,
एक वृक्ष के नीचे
टूटे गिरे
छिन्न सूखे
पत्तों पर
उछल–कूद करती
चिड़ियों का
अपने ही पैरों की
ध्वनियाँ सुनना
औ मुग्ध हो
कुछ कहकर
फिर चुप रहकर
विस्मय से
सब ओर देखना
लगा, जगत का खेल
यही है इतना,
अपनी ही
प्रति ध्वनियों में
विस्मय विमुग्ध हो
खोए रहना

साधना

अभी मुझे
और धीमे
कदम रखना है,
अभी तो
चलने की
आवाज आती है

मुझे भी बचना है। बचो ! अपने मुंह मियाँ मिट्ठू एवं Me Deep से।

पुरूषोत्तम विष्णु नामजोशी

आत्म दीपोभव

हेलो हॉय, दीपावली की छुट्टियां खत्म हो गई। दीवाली पर जलाये गये दिये तो तेल खत्म होते ही बुझ गये होंगे लेकिन मन में दिल में जले दिये अभी रोशनी दे रहे हैं और अंतिम सांस तक रोशनी देते रहेंगे। हमें इन दियों को जलाये रखना है, ज्योति को बुझने से बचाना है। इसके लिये हमें सतत् प्रयास करना होगा सचेत रहना होगा, वरना लापरवाही की हवा इन दियों को बुझा देगी।

लापरवाही की हवा ! जी हां हवा तो हवा ही है। लापरवाही वह है जो हमारे स्वभाव में बरसों से बसी है जो हर मेहनत का काम करने में पहले हमें भड़काती है उकसाती है कि कुछ भी करो कोई देखने वाला नहीं है। ऐसी बात नहीं है, लापरवाही की आदत हमेशा दुख देती है अतः इससे बचना होगा इसे सुधारना होगा। बताईये इससे बचने का क्या तरीका है?

हम जिस पद पर पदस्थ हैं उसका हमें ध्यान रखना होगा उसका मान रखना होगा क्योंकि हम जो भी आदेश निर्णय देते हैं, जैसा व्यवहार पक्षकारों वकीलों से न्यायालय में करते हैं इस सबका बहुत दूरगामी प्रभाव पड़ता है। हम अपने न्यायाधीश बंधुओं से वरिष्ठ साथियों से कनिष्ठों से कैसा व्यवहार करते हैं यह भी कम महत्वपूर्ण नहीं है। हम चाहे किसी की कोई मदद न कर पावें लेकिन उनसे अच्छा सम्मानजनक व्यवहार तो कर ही सकते हैं उसमें तो कोई खर्चा नहीं है, फिर क्यों हमारे साथ रोज काम करने वाले, हमारे लिये काम करने वाले हमारे घरवालों को हम कटु व्यवहार से दुखी करते हैं?

मैं जानती हूं कि बहुत बार ऐसा कटु व्यवहार परिस्थिति वश हम करते हैं। लेकिन इन परिस्थितियों के लिये हम कुछ हद तक जिम्मेदार हैं और उसका कारण ये है कि जहां हमें संबंधित कानून नियमों को पढ़कर काम करना हो वहां हम बिना पढ़े अंदाज से, या पहले पढ़े हुए की हलकी सी यादों के आधार पर काम करते हैं। जब आदेश या निर्णय हम कर चुके होते हैं तब उन प्रावधानों को पढ़ते हैं और पढ़ते पढ़ते ही हमें गुस्सा, पसीना आता है और यह आवेश ही हमें गुस्सा दिलाता है। हम अपने कार्य गति पर नियंत्रण खो देते हैं और एक निराशा अंधकार हताशा की भावना से हम ग्रसित होते हैं लगता है नौकरी अब गई, हो गई शिकायत।

हमारे जन्म से अब तक का समय, काल, वर्ष, माह, दिन हमारे रोज कम हो रहे हैं। साल दर साल हमारी उम्र से कम हो रहे हैं। पुराने वर्ष की आखरी तारीख को हम थोड़ा उदास होते हैं कि लो साल खत्म हो रहा है और हमने कुछ नहीं पाया। हमने कुछ नहीं किया। नये वर्ष की पहली तारीख से, माह से हप्ते के सोमवार से हम अनुशासन से जीवन जीने का टाईम टेबल बनाते हैं। कुछ दिन उस पर चलते भी हैं लेकिन कुछ दिन बाद वही पुराना राग शुरू हो जाता है। जो सजगता की ज्योति जलाने की हमने कसम खाई थी वह ज्योति पुनः बुझने लगती है और हम ये सोचते हैं कि लो यह भी हमारी जिदगी में साथ नहीं दे रही है। हम उम्र में बड़े हो रहे हैं लेकिन ऐसा लगता है कि सिर्फ उम्र बढ़ रही है। हमारा ज्ञान उस रफ्तार से नही बढ़ रहा है इसके लिये मैं तो अपने आलस्य को ही दोषी मानती हूं। आप अपनी जानों।

यह सही है कि हम सभी आलसी नहीं हैं, सभी लापरवाह नहीं हैं, हमें जो काम अच्छा लगता है हम उसे उतना ही एकाग्रता से प्रेम से रूचि से करते हैं। उसके लिये सब कुछ, जो कर सकते हैं करने के लिये तैयार रहते हैं। है ना यही बात, फिर जो नौकरी हमने न्यायाधीश पद की गरिमा पूर्ण पाई है उसके लिये हम थोड़ी भी रूचि एकाग्रता देकर निष्ठा से करे तो कोई कारण नहीं की हमें हताशा निराशा अंधकार मिलेगा। वरना हमें एक नई चमक वाली रोशनी मिलेगी। हमारी अंतरआत्मा में जो खुशी की शांति की ज्योति जलेगी वह हमारे इस नौकरी में न रहने के बाद भी जलती रहेगी। लोगों को हमारी याद दिलाती रहेगी अपने दीप आप बनो। उजाला होता रहेगा। तो दोस्तों चलें एक नये वर्ष की शुरूआत करने के लिये हम अभी भी जो कुछ हमारे पास बचा है उसे जी जान से, जतन से खर्च करने के लिये अपनी शक्ति को जगाएं उसे सचेत कर दें कि चलो जागो, उठो और चल पड़ो अपने न्यायदान की राह पर अपने निशान छोड़ते हुए।

नववर्ष की शुभकामना सहित

सौ. मंजु नामजोशी

WELCOME AND FELICITATIONS

TO

LEGAL LUMINARIES

Hon'ble Shri Justice Arun Kumar Mishra and **Hon'ble Shri Justice Abhay Manohar Sapre** who were additional Judges of the High Court of M.P. took oath as Judges of the High Court on October 24th, 2001

AND THE OTHER

Legal Luminaries who took oath as additional Judges of the High Court of M.P. on October 22nd, 2001

- **Hon'ble Shri Justice Shantilal Kochar**
- **Hon'ble Shri Justice Krishn Kumar Lahoti**
- **Hon'ble Shri Justice Uma Nath Singh**
- **Hon'ble Shri Justice Narain Singh 'Azad'**
- **Hon'ble Shri Justice Prabhat Chandra Agrawal**
- **Hon'ble Shri Justice Chandresh Bhushan**

जो जिज्ञासु नहीं वह मृत समान है।

-स्वामी विवेकानंद

न्यायदान–प्रक्रिया पालन का औचित्य

न्यायाधिपति एस.एस. झा

माननीय न्यायाधिपति श्रीमान् एस.एस. झा साहेब दिनांक 19-10-2001 को न्यायिक अधिकारी प्रशिक्षण संस्थान में व्यवहार न्यायाधीश वर्ग–2 सन् 1999–2000 के प्रथम पुनश्चर्या पाठ्यक्रम के प्रथम शिविर में समापन व्याख्यान हेतु पधारे थे। पुनश्चर्या शिविर में आपने अपने विचार सहज भाव से व्यक्त किए। समय–समय पर विचारण न्यायालयों के द्वारा किए गए कार्य के संबंध में जो अनुभूति उन्हें प्राप्त हुई उस संबंध में सीमित समय में अपने विचार व्यक्त करने का सफलतापूर्वक प्रयत्न किया। वास्तव में उनकी अनुभूति एवं अनुभव हम न्यायाधीश गणों को मार्गदर्शन पद सिद्ध होंगे, ताकि विचारण न्यायालय के रूप में कार्य करते वक्त जो भूलें, चाहे अनावधानता से अथवा उपेक्षा के कारण होती है वे ठीक करने का अवसर हमें मिल सके।

माननीय महोदय के विचार अविकल रूप से प्रस्तुत किए हैं।

संपादक

श्री नामजोशी साहब, मिसेस नामजोशी एवं व्यवहार न्यायाधीश वर्ग–दो के उपस्थित सभी न्यायिक अधिकारीगण। कल जब मुझसे श्री नामजोशी जी ने कहा कि हमारा बैच आ गया है और उनको कुछ मार्गदर्शन दें तो मन में एक विचार आया कि श्री नामजोशी स्वयं बड़े सक्षम न्याय अधिकारी हैं और उन्होंने अपने बोर्ड का संचालन बखूबी किया है और उन्हें बहुत ही अच्छा अनुभव है और उनके प्रशिक्षण के बाद कोई किसी बात की आवश्यकता पड़ेगी यह भी मुझे सोचने में कुछ संकोच सा हुआ। खैर, आप लोगों ने जो कार्य लिया है उसके विषय में मैं एक बात कहना चाहता हूं, यह जो न्यायाधीश का कार्य है, यह कोई छोटा मोटा कार्य नहीं है। अमूमन सामान्य जनता में भी विश्वास रहता है कि दो के बीच विवाद हो तो कोई उसमें पड़ना नहीं चाहता है। दो के झगड़े–पचड़े में कौन पड़े। इस कठिन कार्य का आप निर्वाह कर रहे हैं। यह बड़ी भारी जिम्मेदारी आपने अपने ऊपर ली है और इसका निर्वाह करने के लिये बहुत सी चीजों का ध्यान रखना जरूरी है। जब आप न्यायालय में बैठते हैं तब आपका स्थान पीठासीन अधिकारी का होता है मतलब उस न्याालय के आप सर्वोच्च अधिकारी है उस न्यायालय में आने वाला कोई भी आपसे बड़ा नहीं है। आप सर्वोच्च पद पर हैं।

जब आपके सम्मुख प्रकरण आता है तो यह एक आवश्यकता है आपकी, और आपको जो करना चाहिये, जब प्रकरण आता है तो उसको अवश्य पढ़ें। खास तौर से नया प्रकरण जब प्रस्तुत होता है उसको पढ़ें और देखें कि उसमें कुछ कमियां तो नहीं हैं, न्याय शुल्क दिया गया है या नहीं दिया गया है। **प्लीडिंग्स** जो है वो पूरी है या अधूरी है या व्हेग (अस्पष्ट) है। यदि आप **बिना देखें नोटिस निकालें तो उसके बाद आपका कार्य बढ़ेगा।** वह कार्य इस तरह से बढ़ेगा कि आवेदन पर आवेदन आयेंगे, जिसका निराकरण करेंगे आप, शायद हो सकता है कि उसके निराकरण में कुछ आदेश आप दें, रिवीजन हो, स्टे हो, तो बहुत सारी चीजों से बचेंगे। जब भी **प्रकरण** प्रस्तुत हो उसे **जरूर देखें, पढ़ें**

ओर उसमें कुछ कमियां हो नियमानुसार उसे दूर करें। एक बात और आवश्यक है कि जो हमारे यहां **रूल्स एण्ड आर्डर** प्रोसीजर बनाया गया है, **सिविल** कोर्ट रूल्स, **क्रिमिनल** कोर्ट मैन्युअल है **उसका भी अध्ययन जरूर कर लें,** जिससे आपको मार्गदर्शन मिलेगा कि हर कार्य करने का तरीका क्या है उसका प्रोसीजर लेड डाउन किया गया है। इसकी जानकारी आपको होनी चाहिये और यदि आप उसको पढ़ लेंगे तो आपको भविष्य में बहुत सुविधा रहेगी और बहुत सी अकारण गल्तियां नहीं होंगी।

दूसरा मैंने यह पाया है कि जब आवेदन आते हैं किसी धारा के अंतर्गत आता है उसका निर्णय कर दिया जाता है, परन्तु ऐसा प्रतीत होता है, मुझे, उस धारा में **जिस धारा का आवेदन प्रस्तुत हुआ है उसको पढ़ने का प्रयास नहीं किया जाता है** न्यायिक अधिकारियों द्वारा, और तर्क सुनकर आदेश दे दिया जाता है। जब तक आप जिस धारा का आवेदन प्रस्तुत हुआ है **उस धारा को नहीं पढ़ेंगे उसकी मंशा क्या है उसको जानेंगे नहीं, तब तक आपका आदेश हमेशा अधूरा रहेगा।** किस कारण से कब उस आवेदन को स्वीकार किया जा सकता है कब नहीं स्वीकार किया जा सकता है यह पुस्तक में लिखा हुआ है चाहे वह व्यवहार प्रक्रिया संहिता हो या दण्ड प्रक्रिया संहिता हो।

चार्ज के लिये क्रिमिनल केसेस में आपके पास कागजात आते हैं उसमें कुछ धारायें लिखी होती हैं। **चार्ज को निर्धारित करने के पूर्व, कम से कम उन धाराओं को पढ़ लें।** उन धाराओं से चालान के कागजों का मिलान कर लें वे धारायें बनती है अथवा नहीं बनती है। इसका मैं एक उदाहरण दे सकता हैं, प्रकरण इसेंशियल कमोडिटीज एक्ट में दर्ज किया, चालान पेश हुआ, दर्ज हो गया, चार्ज बन गया और सजा भी हो गई और सजा उन सेक्शनों में हुई थी, जिसका विलोपन हो गया था, जिस दिन चार्ज फ्रेम हुआ उससे तीन साल पहले वे धारायें विलोपित हो चुकी थी। इसके बावजूद कुछ लोगों को अकारण ही सजा भुगतनी पड़ी। कालान्तर में उच्च न्यायालय से निर्णय रद्द हो गया, यही कहते हुए कि इसमें तो सजा ही नहीं हो सकती, यह जो धारायें हैं विलोपित कर दी गई। इसी प्रकार कुछ धाराओं में मैंने पाया जिसमें कम से कम सजा का प्रावधान है, क्योंकि प्रावधान नहीं पढ़ा तो उसमें कम सजा देकर, उससे अधिक सजा दे दी या अधिकतम सजा जहां पर जुर्माने का है उससे कहीं ज्यादा सजा दे दी गई। इस तरह के आदेश हो जाते हैं। इसलिये मैं चाहूंगा कि आप लोग **किसी भी विषय का निराकरण करने के पूर्व उस धारा का अध्ययन जरूर कर लें।** उस धारा का अध्ययन करने के बाद आपको बहुत लाभ होगा और भविष्य में यह आपको काम आयेगा। एक दफे आपको पढ़कर नया करने की आदत पड़ जायेगी तो यह भविष्य में आपके लिए बहुत लाभकारी हो जायेगा।

विभिन्न प्रकार के आवेदन आते हैं कई बार धाराओं का उपयोग भी नहीं किया जाता है। कई अधिवक्ता महोदय सी.पी.सी. में केस है तो **धारा 151** लिख देंगे किन्तु आपको देखना पड़ेगा कि धारा 151 के अतिरिक्त कहीं इसका प्रावधान है और यदि प्रावधान है तो उस प्रावधान के अंतर्गत ही उसका निराकरण करें न कि 151 में 151 का उपयोग तो तब किया जाता है जब जिस चीज का प्रावधान नहीं है। पाया यह जाता है कि 151 के नाम से कुछ आदेश ऐसे हो जाते हैं, जो नियम के विरूद्ध हो जाते हैं। कारण यह है कि एक तो अधिवक्ताओं की तरफ से कोई मार्गदर्शन नहीं मिलता, पर उसका अर्थ यह नहीं है कि हम अपने कार्य में पीछे रहें। इसकी जानकारी तो हमको रखना ही पड़ेगी क्योंकि ऐसी

कहावत भी है कि जज को समस्त कानून की जानकारी है। यह एक प्रीजमशन है। यह प्रीजमशन जो लिया गया है यह बड़ा भारी उत्तरदायित्व न्यायाधीशों के कंधे पर डाल दिया गया है कि कुछ भी हो न्याय की, कानून की सबसे अच्छी जानकारी जो न्यायाधीश है उसको है, तो इसलिये यदि यह कहा जाय कि मार्गदर्शन ठीक नहीं मिला या बहस में ये बातें नहीं बतायी गई तो उससे आपको कोई लाभ नहीं मिलेगा। आपको अपने उच्च पद की गरिमा को भी बनाये रखना है। मैं शब्द उच्च पद बड़े ध्यान से और उससे कह रहा हूं। यह जो न्यायिक पद है हमारे भारत की यदि पुरानी परम्परा देखी जाए उस हिसाब से यह पद हमेशा ईश्वर के समतुल्य माना गया है। इसलिये जो न्यायदान है, दान कई प्रकार के हैं पर न्यायदान एक बड़ा भारी दान माना गया है और इसको न्यायदान करने वाले को न्याय करने वाले को ईश्वर के समकक्ष माना गया है। इसलिये आपका जो पद है वह काफी गरिमामय पद है और इसलिये मैं उसको अति उच्च पद कह सकता हूं।

एक गलती आप लोगों से हो जाती है जो भी पीठासीन अधिकारी हैं आदेश पारित करते समय उनके नाम लिखे जाते हैं (नाम नहीं लिखने से कोई आदेश हो जाता है)। कालान्तर में जब उसका निर्णय होता है और यदि आदेश गलत हो उसके बाद जो पीठासीन अधिकारी उस कुर्सी पर बैठता है संभवतः दोष उसका होता है क्योंकि अदालत के नाम से कुछ लिख दिया जाता है कि इनको जानकारी नहीं है इसलिये आप लोग हमेशा अपना नाम आदेश के नीचे (आदेश पत्रिका में भी) लिखें जिससे किसी दूसरे की गलती का नुकसान आपको न भुगतना पड़े।

आप लोगों को अपने **न्यायिक कार्य के लिये थोड़ा कठोर भी होना पड़ेगा।** अधिवक्ताओं को पूरी कोशिश रहती है, एक पक्ष चाहेगा समय बढ़ जाये, एक पक्ष चाहेगा समय हो जाये (न बढ़ जावे)। आपको इसी बीच में **कड़ा और लचीला दोनों रूख अपनाते हुए यह संदेश अधिवक्ताओं के बीच और पक्षकारों के बीच देना पड़ेगा कि चाहे कुछ हो जाये हमारे न्यायालय में मामला बढ़ेगा नहीं।** शुरू में कुछ तकलीफ होगी, किन्तु बाद में जब यह मनःस्थिति मालूम हो जायेगी कि इस न्यायालय में मामला बढ़ेगा नहीं। इसमें तो मामला हो जायेगा, सुना ही जायेगा तो आप पायेंगे भविष्य में बड़ा आराम रहेगा। कोई भी मुकदमा बढ़वाने के लिये आपकी अदालत में नहीं आयेगा। किन्तु यदि शुरू में ही आपने, प्रारंभ में ही, लचीला और नरम रूख अपना लिया और बातें माननी शुरू कर दी आपको बाद में बहुत ही, काफी, कठिनाईयों का सामना करना पड़ेगा। यह जो बार (अधिवक्ता वर्ग) है, एक बड़ा होशियार सम्प्रदाय वर्ग है और जब इसको एक दफे मालूम हो जाता है कि इस न्यायालय में काम नहीं बढ़ेगा तो उस न्यायालय का हमेशा कार्य करने के लिये तत्पर रहेंगे और यदि मालूम हो गया यहां पर बढ़ता रहता है केस, तो वहां कभी भी कार्य करने को तत्पर नहीं रहेंगे। इस चीज को आप अपने मन में रखें। इस हिसाब से कार्य करेंगे तो आपको भविष्य में किसी भी प्रकार की कठिनाईयां नहीं होंगी।

एक बात और आपको विशेष ध्यान में रखना पड़ेगी। प्रकरण प्रस्तुत होते हैं काफी बहस होती है, दोनों तरफ से होती है। यदि आप लोग **अपना रजिस्टर या कुछ फाईल बनाकर न्यायिक दृष्टान्तों को लिखकर रखेंगे इसमें आपको लाभ यह होगा कि यदि कभी किसी विषय पर आपको अधिवक्ताओं के द्वारा कोई असिस्टेन्स नहीं मिला तो भी आप निर्णय करने में, उचित निर्णय करने में सक्षम रह सकेंगे।**

मैं नामजोशी साहब से भी निवेदन करूंगा कि आप लोगों को जो **पूर्ण पीठ के,** उच्च न्यायालय के, **निर्णय** हुए हैं और जिन निर्णय से आपको प्रायः रोज काम पड़ता है उनकी जानकारी आपको जरूर दें और आप लोग भी जो पूर्ण पीठ के उच्च न्यायालय के निर्णय हैं उनको पढ़ने का प्रयास करें और उसको पढ़कर आपको जानकारी होगी कि बहुत सी बातें जो आपको बहुत जटिल लगेंगी उसमें उसका निराकरण मिलेगा और उससे आपको अपना कार्य करने में सफलता भी मिलेगी और सहज हो जायेगा। सन् 56 से आज तक कई पूर्ण पीठें बनी हैं। बहुत से महत्वपूर्ण प्रश्नों का निराकरण हुआ है और उन प्रश्नों का निराकरण यदि आपके ज्ञान में रहेगा तो आपको अपना कार्य करने में सुविधा ही नहीं होगी बल्कि आपके निर्णय करने की गति में तेजी आ जायेगी। इस प्रकार प्रकरणों से निपटने के लिए, जो निर्णय है उनकी जानकारी होना आवश्यक है और जिसे कि आप लोग पढ़ेंगे उससे आपको लाभ होगा।

न्यायालय में जब अभी आप प्रारंभ में हैं आप लोगों ने महसूस किया होगा आप नये हैं। कुछ आप लोगों के मन में लगता होगा कोर्ट बॉयकॉट मतलब आपके न्यायालयों को थोड़ा अव्हार्डड कर रहे हैं। इस चीज को मन में आने नहीं दीजिये, मगर अपना कार्य भी पूर्ण निष्ठा से करें और अपने न्यायालय के रीडर के ऊपर अधिक भरोसा न रखें। आदेश पत्रिका, जो लिखी जाती है, उसका अवलोकन कर लें तथा उसमें यह भी देखें कहीं कुछ गलत या ऐसी बात तो नहीं लिखी जो बाद में कुछ कठिनाईयां उत्पन्न करें। प्रकरण में, हमेशा आवेदन आते हैं यह वाद प्रांग न्याय से बाधित है धारा 11 से, व्यवहार प्रक्रिया संहिता से। मैं चाहूंगा कि जितनी बार इस प्रकार के आवेदन आयें आप **धारा 11 को जरूर** पढ़ें एक बार फिर पढ़ें, **जितनी बार उसको पढ़ेंगे पढ़ें, हर बार पढ़ने पर उसकी आपको एक नयी अनुभूति होगी।** नये प्रकार का अनुभव होगा। उसको पढ़कर ही निराकरण करें। एक सामान्य नॉलेज के हिसाब से यह उससे रेसजुकेटा हो गया, प्रांग न्याय हो गया, पूरा डिसाइड हुआ इस तरह से न करके उसके साथ एक्सप्लेनेशन भी है उसका पूरा ध्यान करें।

अभी आज ही मैं एक प्रकरण सुन रहा था। एक ही विषय पर पक्षकारों के बीच में दो विवाद चल रहे हैं। प्रतिवादी ने एक आवेदन धारा 10 व्यवहार प्रक्रिया संहिता का दिया, क्योंकि इसे मुद्दे पर दूसरा वाद चल रहा है तो इसको स्थगित किया जाये। **न्यायालय** ने इस आवेदन को निरस्त कर दिया। **धारा 10 पढ़ने का प्रयास ही नहीं किया।** जिसमें लिखा हुआ है, स्पष्ट रूप से, कि इसमें जो विवाद्यक है इश्यू जो हैं डायरेक्ट एंड सबसटेंशियल इश्यू मतलब जो इश्यू हैं दोनों पक्षों के बीच, दोनों मुकदमें में समान हैं। और पक्षकार समान हैं या पक्षकार इसके पक्षकार के द्वारा उसमें अपना वही इश्यू क्लेम कर रहे हैं तो पक्षकार समान होना एक बात है पक्षकार समान नहीं हो पर दोनों एक ही व्यक्ति से उसमें टाइटल्ड डिराइव कर रहे हों। एक ही चीज का निराकरण होना है उस आवेदन को निरस्त कर दिया गया। दोनों इश्यूज के बारे में दोनों प्रकरणों में क्या इश्यूज बने थे, वाद विषय बने थे, उसका कोई भी हवाला नहीं दिया गया और चार लाईन में लिख दिया गया कि मैं उचित नहीं समझता हूं। जबकि इस बात को तय करना आवश्यक था और लिखना आवश्यक था कि इसमें यह वाद प्रश्न, यह वाद प्रश्न ये दोनों वाद प्रश्न समान है, जो स्थगित करने हैं नहीं समान है तो कुछ कारण तो लिखना पड़ेगा किन्तु बिना पुस्तक देखे बिना धारा देखे हुए निर्णय करने से नुकसान होता है तो उसमें आपका ही कार्य बढ़ता है। आपके न्यायालय का जो प्रकरण है वह स्टे हो जायेगा फिर उसके बाद लंबित प्रकरणों की संख्या

आपके न्यायालय में बढ़ेगी। इस सबको ध्यान में रखते हुए आपको प्रावधान को बिना पढ़े आदेश पारित करने में यह तकलीफ होगी। (कृपया **ज्योति अक्टूबर 2001 पृष्ठ 338** पर इसी विषय पर लिखे लेख को देखें।)

इसी प्रकार आदेश 7 नियम 11 का रिजेक्शन आफ प्लेंट के आवेदन पेश होता है आर्डर 7 रूल 11, उसमें कुछ न्यायालयों ने दावा खारिज कर दिया, जबकि खारिज नहीं किया जाता है रिजेक्शन आफ प्लेंट यदि उसे डिक्री की परिभाषा में देखें तो आदेश अपने आपमें डिक्री है। उसमें निरस्त करने की कोई आवश्यकता नहीं है और यह आवेदन को जब देखते हैं तो मैंने पाया है और **बिना वाद पत्र को पढ़ें हुए जो प्लेंट है उसको बिना पढ़े हुए उसका निराकरण हो जाता है। कम से कम वाद पत्र को पढ़ने के बाद कारण है या नहीं या आ. 7 नियम 11 में जो निर्णय दिये हैं** उसके मुताबिक वाद पत्र है अथवा नहीं है। बिना उसको पढ़े या किसी कानूनी रूप से बाधित है उसको बिना देखे या तो आवेदन अस्वीकार कर दिया जाता है या स्वीकार करके वाद निरस्त कर दिया जाता है। ये दोनों प्रक्रिया गलत है। आवेदन स्वीकार आपको करना है, यदि आवेदन गलत है, आवेदन अस्वीकार होगा मगर प्रक्रिया अपनायें, प्रावधान पढ़ें उसके बाद करें।

इसी प्रकार जब इश्यूज बन जाते हैं तो तमाम एप्लीकेशन सूट में आती है प्रोडक्शन ऑफ डाक्यूमेंट, डिस्कवरी ऑफ डाक्यूमेंट/ ये सब आती है इसका भी निराकरण करने के लिए आपको प्रावधान पढ़ना पड़ेगा। **किस स्टेज में यह आवेदन आना चाहिये।** सामान्यतः जब आप वाद प्रश्न बनाते हैं, सेटलिंग डेट के समय आर्डर शीट में यह लिख दिया जाता है कि चाहे तो इसका उपयोग कर सकते हैं यदि आप निर्देश दे दें तो जिस दिन इश्यू बनते हैं जिस दिन वाद प्रश्न बनने हैं जो इसके बारे में चाहे पक्षकार चाहें इन प्रावधान का उपयोग कर सकते हैं उसके बाद नहीं करें तो उसका आप लाभ अग्रिम कार्यवाही के समय ले सकते हैं उससे आपको लाभ नहीं मिलेगा, आपको जानकारी हो जायेगी कि प्रकरण विलंब करने के लिऐ अकारण आवेदन तो प्रस्तुत नहीं हो रहे हैं।

एक तरीका जो अधिवक्ता का रहता है जब साक्ष्य के लिये मुकदमा रहता है। साक्ष्य उपस्थित होता है तो एक आवेदन संशोधन का लगा दिया जाता है। इसमें न्यायालय को न तो कुछ होना चाहिये न कुछ और यदि लगता है संशोधन आवेदन है और यह प्रतीत होता है कि इस आवेदन को, विलम्ब करने के दृष्टि से पेश किया है मगर आवेदन को स्वीकार करने में कुछ परिवर्तन नहीं होता है तो न्यायालय आवेदन को स्वीकार करके पक्षकारों से गवाह देने के लिये कह सकता है। जब प्रतिवाद पत्र में संशोधन होता हो तो उसका आवश्यक नहीं है उसका **पारिणामिक संशोधन** वाद में हो। यह अवधारणा है कि जो भी प्रतिवाद पत्र लिखा गया हो वह वादी के द्वारा इंकार किया गया इट इज डिनाइड बाय प्लेंटिफ। इसलिये प्रतिवादपत्र के संशोधन के उसमें उसके तारतम्य में संशोधन की अनुमति देकर विलंब करने की आवश्यकता नहीं है। आज कल इतना अधिक यह मैं पा रहा हूं कि जब भी प्रतिवाद पत्र में संशोधन होता है तो, **कांसिक्वेंशियल,** पारिणामिक संशोधन के लिये वादी को समय दे दिया जाता है। जब वादी संशोधन करता है तो प्रतिवादी पुनः आवेदन लेकर आता है कि उसे इंकार करना है और उसके बाद जब फिर प्रतिवादी दूसरा आवेदन लेकर आता है तो न्यायालय निरस्त कर देता है, बोले वो तो पारिणामिक संशोधन हो चुका है और फिर उसको लाभ मिल जाता है। इस चीज

को यदि आप ध्यान में रखेंगे कि पारिणामिक संशोधन सिर्फ वाद पत्र में संशोधन का ही होगा प्रतिवाद पत्र के संशोधन का नहीं होगा। इसमें आपका काफी समय बचेगा।

एक चीज आपको और ध्यान रखना है उच्चतम न्यायालय ने कई बार कहा जब न्यायालय में **साक्ष्य उपस्थित हो तो प्रकरण को बढ़ाना नहीं चाहिये** और उसका तत्काल साक्ष्य ले लेना चाहिये, उसकी साक्ष्य होनी चाहिये। खासतौर से आपराधिक प्रकरणों में यह एक मानसिक प्रवृत्ति बन गई है कि यदि साक्ष्य उपस्थित है, आपराधिक अभियोजन का साक्ष्य, तो बचाव पक्ष प्रयास करता है कि प्रकरण बढ़ जाये, साक्षी परेशान हो 3–4 पेशी में उसके बाद न्यायालय में आना बन्द कर दे ताकि उसका अनुचित लाभ उसके पक्षकार को मिल सके इसलिये उच्चतम न्यायालय ने 3–4 बार कहा है और इसको आपको ध्यान में रखना है जब साक्षी उपस्थित हो तो किसी भी कीमत पर प्रकरण को बढ़ाये नहीं और उसकी उसी दिन साक्ष्य लेकर उसका निराकरण कर दें, जिससे साक्षी के मन में न्यायालय के प्रति आदर और एक भावना हो जायेगी कि न्यायालय में जाकर उसे परेशान, व्यर्थ परेशान नहीं होना पड़ा। आज सामान्य जनता के मन में धारणा हो गई है कि न्यायालय में जो यदि साक्षी बन जाये तो बहुत परेशान होना पड़ता है और गई बार बुलाकर कई बार भटकना पड़ता है, समय का नुकसान होता है और काम नहीं होता है और परेशान होते हैं। इसलिये इस बात को अपने मत में रख लें कि **यह साक्षी न्यायालय की सहायता करने आया है, न्यायालय का दुश्मन नहीं है** और इसको हमें जितनी जल्दी एकमोडेट करके इनका बयान करा लेना, उसमें न्यायालय को भी आराम है और पक्षकारों के मन में भी एक विश्वास उठेगा कि जब साक्षी आता है, तो उसका बयान हो जाता है। यह आपराधिक मामलों के बारे में तो कहा है, पर व्यवहार मामलों में व्यवहार वादों में भी जहां तक व्याख्या दी गई है यदि पक्षकार उसकी सूची में गवाह का नाम नहीं है, यदि न्यायालय में लेकर आता है तो न्यायालय को चाहिये कि उसकी साक्ष्य ले ली जाये ताकि अनावश्यक विलंब न हो। होता यह है कि न्यायालय में साक्षी उपस्थित है। एक आपत्ति हो गई, सूची में नाम नहीं था तब विशेष कारण में यह नहीं देखना है कि न्यायहित कहां पर है, यदि न्याय हित में वह बात है तो उसकी साक्ष्य लेना चाहिए और उसमें समय नहीं जा रहा हो तो न्यायालय को समय व्यर्थ नहीं करना चाहिये और अपना कार्य बिना झिझक के करना चाहिये।

अभी आप लोगों को समय लंबा है। अभी आप न्यायिक सेवा में आये है। और समय के साथ आपका ज्ञान बढ़ता ही जायेगा क्योंकि यह एक ऐसा क्षेत्र है, जिस पर **ज्ञान बढ़ना ही आवश्यक है** और प्रतिदिन **नये कानून और न्याय दृष्टांत** आते हैं, जिसके विषय में **आपको पूरी जानकारी रखनी होगी** और उसका प्रयास यह होना चाहिये कि अधिक से अधिक नये न्याय दृष्टान्तों की जानकारी आपको हो सके।

आप लोगों को जब आप बड़े शहर में एक जिला न्यायाधीश हैं वहां पर एक दूसरा अनुभव होगा। जब आप छोटे तहसील, प्लेस में, छोटी जगह में, जहां पर आप ही एक न्यायिक अधिकारी होंगे उस जगह पर जब आपका जो भार है जो आपकी **जिम्मेदारियां** हैं **आप गुरूतर हो जाती हैं।** मुझे विश्वास है कि मैं आपको इस छोटे समय में बहुत कुछ तो नहीं बता पाया थोड़ा ही बता पाया हूं। मैं विश्वास करता हूं कि आप इसके ऊपर ध्यान कर इस पर कार्य करेंगे तो आपको भविष्य में कठिनाईयां नहीं होंगी। धन्यवाद

जागते को जगाना है

पुराणों के अनुसार यह समय कलियुग का है। लगता भी ऐसा ही है। हम यह अनुभव कर सकते हैं अपने दैनंदिन व्यवहार से। कहाँ एक समय था जब गोखले, आगरकर, तिलक, सावरकर जैसे लोग नगरपालिका के सार्वजनिक प्रकाश स्तम्भ के नीचे बैठ कर अध्ययन करते थे और आज क्या हो रहा है। घंटे दो घंटे बिजली चली जाती है तो सारी पृथ्वी को सर पर उठा लेते हैं। चूंकि हम बौद्धिक से भौतिक विश्व में संक्रमण कर रहे हैं अतः हमारे पास वातानुकूलित व्यवस्था हो, जगमगाती रोशनी भी हो, टेबल कुर्सी भी हो तब भी क्या? पठन पाठन की इच्छा ही न हो तो पुस्तकें, पत्रिकाऐं मुफ्त में भी मिलती हो तो क्या उपयोग। कोई अनुभव करे न करे मुझे यह नियमित रूप से अनुभव होता है।

माननीय महोदय सतत् रूप से पूछते व कहते हैं कि नामजोशी, आप संस्था को इतने वर्षों से चला रहे हो, क्या न्यायाधीशों के कार्य से ऐसा लगता है कि उन्होंने किसी सीमा तक स्वयं को सुधारा हो? नामजोशी, आप क्या बताते हो? क्या पढ़ाते हो? ऐसे प्रश्न पूछने पर मेरा मुखर चरित्र एवं व्यक्तित्व ऐसा हो जाता है मानों वर्ल्ड ट्रेड सेन्टर की 108 मंजिली इमारत ध्वस्त हो चुकी हो। मेरी बुलंदियां मानों नेस्तनाबूत हुई हो। परंतु अमेरिका को जितना विश्वास उस निर्माण को पुनः बनाने का होगा उससे अधिक विश्वास मुझे है कि मैं भी हार नहीं मानूंगा। मुझे एक ही बात मालूम है कि प्रयत्न करना है। संस्था एवं संस्था की पत्रिका सशक्त माध्यम है जिसके माध्यम से अज्ञानता के विरूद्ध लड़ाई लड़ी जा सकती है।

लड़ाई का विषय निकला ही है तो ध्यान रहे वो लड़ाई ऐसी नहीं है जो मैदानों में शस्त्र अस्त्र से लड़ी जाती है अपितु ये वो लड़ाई है जिसमें जागते को जगाने का उपक्रम है। सोते को तो आसानी से जगाया जा सकता है लेकिन जागते हुए आदमी की तंद्रावस्था को भेदित करना है। शक्तिशाली राष्ट्रों के आयुध, शस्त्रास्त्र कोई काम नहीं आएंगे। यदि आना ही है तो हमारा आत्म विश्वास मात्र काम आएगा। निष्ठा, निर्धार, समर्पण एवं लगन जैसे अदृश्य लेकिन सशक्त, आत्म प्रेरित माध्यम ही होंगे जो हमें जीत दिलाएंगे। हम बढ़ेंगे यह निश्चित है। हार तो वे मानते हैं जो गिड़गिड़ाते हैं, खुशामत करते हैं या अकर्मण्य व आलसी हैं। एक योद्धा अकेले नहीं लड़ सकता। सामूहिक रूप से जागृति अपेक्षित होती है। लड़ाई पर भी कोई न्याय दृष्टांत मिलेगा ऐसा मुझे नहीं लगा था क्यों कि मैं सायटेशनिष्ट नहीं हूँ। लेकिन 'कोई मिल गया, मिल ही गया' की स्थिति हो गई जब पुस्तक के पृष्ठ पलट रहा था।

Reed, Stanley, in Toth vs. Guarles 350 U.S. II, 29 (1955) को देखने योग्य हैं। उसमें कहा है कि War is a Grim (कठोर, गंभीर प्रकृति) Business, Requiring sacrifise of ease, opportunity, Freedom from restraint, and liberty of action. अर्थात लड़ाई (किसी के विरूद्ध भी क्यों न हो) एक कठोर गंभीर प्रकृति का कार्य है जिसमें सुख सुविधाओं का एवं अवसरों का त्याग निग्रह से मुक्ति एवं कृतित्व की स्वतंत्रता अपेक्षित होती है।

मित्रों ! कुछ समय से ऐसा अनुभव हो रहा है हमारा लक्ष्य कुल मिलाकर यूनिट्स अर्जित करना मात्र रह गया है। इस यूनिट्स के चक्कर में शेष कुछ रहा नहीं है जो किया जाना हो। ये व्यथा **अक्टूबर 2001 की ज्योति में पृष्ठ 316** पर भी व्यक्त की थी। मेरे विश्वास को ठेस तब पहुंची जब मुख्य न्यायिक दंडाधिकारी के स्तर के न्यायाधीश ने 279-337 भा.दं.वि. में क्रमशः 1000 रू. एवं 500 रू. कुल 1500 रू. अर्थदंड किया।

प्रशिक्षण कक्षाओं में सम्भवतः प्रत्येक बार पुस्तकों से बताया है, व्यवस्थित रूप से बताया है, न्याय दृष्टांतों के आधार से भी बताया है कि धारा 279–337 भा.द.वि. में आप सिद्ध दोष (गिल्टी) पाते हुए दोष सिद्ध (कन्विकट) तो कर सकते हो लेकिन सजा (सेन्टेक्स) केवल एक ही दे सकते हो दो नहीं। पत्रिका के माध्यम से भी बताया है। तब अनुभवी न्यायाधीश क्यों कर भूल करते है। यदि वे इस सिद्धांत से सहमत नहीं हैं तो कक्षा में क्यों नहीं बताते कि ऐसा करना ठीक क्यों नहीं है या अपने न्याय निर्णयों में सकारण बात क्यों नहीं लिखी जाती।

आप कुछ न्याय दृष्टांतों को व विधि प्रावधानों को पुनः पढ़े एवं देखें। समझे भी। आप सहमत नहीं भी हो तो न्यायिक अनुशासन के लिए आपको न्याय दृष्टांत बंधनकारी तो है ही।

बनेसिंह वि. राज्य 1989 सी. सीआर.जे. एन. ओ. सी. नं. 57 में कहा है कि "accused found guilty of driving rashly or negligently on a public way and causing grievous hurt to complainant, court cannot sentence under both the sections i.e. 279 338 No separate sentence was awarded u/s 279 I.P.C.

ए.आई.आर. 1956 मध्य भारत 141 (गुलाम मीर) (पूर्ण पीठ) (यह दृष्टांत विषय वस्तु को समझने हेतु पढ़ने लायक भी है) में कहा है कि "an offence under S. 279 is distinct from an offence under S. 337 or S. 338 and therefore, a person **convicted** of an offence under S.337, or S. 338 can also be **convicted** for an offence under S. 279. If, however, the two offences are committed in the same transaction, S. 71 will govern the assessment of punishment." यही बात **ए.आई.आर. 1969 गुजरात पृष्ठ 62** पर बताई है। इस सिद्धांत का मूल आधार धारा 71 भा. द. वि. है एवं धारा 220 दं.प्र.सं. है। प्रशिक्षण हेतु आने वाले न्यायाधीश ने यदि उचित समझते हुए नोट्स बनाए होंगे तो निश्चित ही ये दृष्टांत व धारा लिखी होगी। एक अन्य दृष्टांत ***रूपचंद वि. राज्य, 2001(1) एम.पी.एच.टी. 22 (छग)*** देखने योग्य है। बताया है कि **"I.P.C., Sections 279, 337 and 338 :-** Applicant convicted for rash and negligent driving. Trial Court convicting him separately under Sections 279 and 338 of the Code. Whether justified ? Held, rash act provided under S. 279 provides foundation for conviction under sections 337 and 338. Constitutents of offences under Ss. 279, 337 and 338 are common. Separate sentences could not be passed as act of negligent driving would merge in act covered under section 338. Conviction under sections 279 and 338 maintained but separate sentence awarded under Section 279 set aside, **being smaller offence.**" कृपया उक्त धाराओं का विस्तार से अध्ययन अच्छी पुस्तक से किया भी जा सकता है।

एक माननीय न्यायाधिपति महोदय कह रहे थे कि अंधा बांटे रेवडी अपने अपने को दे। कोई कुछ भी कर सकता है सब स्वतंत्र हैं। माननीय महोदय ने भरण पोषण एवं वार्षिकीयों के सम्बन्ध में कोर्ट फी विषय में बताया कि न्यायाधीशगण कोर्ट फीस के विषय में अंदाज से काम करते हैं तथा केवल घोषणात्मक सहायता के आधार से कोर्ट फीस मान्य करते हैं। धारा 7(ii) कोर्ट फीस अधिनियम इस प्रकार है।

FOR MAINTENANCE AND ANNUITIES :- In suits for maintenance and annuities or other sums payable periodically according to the value of subject matter of the suit, and **such value shall be deemed to be ten times the amount claimed to be payable for one year.** कृपया धारा 7 (i) के प्रावधान को भी अवश्य पढ़ लें। उक्त प्रावधानानुसार वार्षिकी अथवा वार्षिक भरणपोषण भत्ते की रकम का दस गुना मूल्यांकन कर कोर्ट फी मूल्यानुसार देना है न कि घोषणात्मक सहायता हेतु। फिर भी कोर्ट फी केवल घोषणा के लिए ली जा रही है।

एक और उदाहरण भी देख लें। एक दंडाधिकारी के सामने अपराधिक प्रकरण लंबित था वाहन वापसी का आवेदन पत्र प्रस्तुत हुआ। आवेदक का कहना था वाहन जो जब्त हुआ है वह उसने दूसरे से क्रय किया था लेकिन पंजीयन पंजी में नाम नामांतरित नहीं हुआ है। न्यायालय ने मूल स्वामी को सूचना पत्र भेज कर तथ्य जानने हेतु सूचित किया लेकिन वह नहीं आया। आवेदक से शपथ पत्र मांगा, आर.टी.ओ. से जानकारी ली व वाहन आवेदक को देते समय मूल स्वामी, आर.टी.ओ. को भी सूचित किया। निश्चित ही किसी प्रकार कोई बात बाद में उद्‌भुत हो एवं अनावश्यक विवाद होने से तो बेहतर है कि पहले ही सावधानी ले लें। अच्छा लगा कि कर्तव्य बोध है। मैं होता तो हमेशा जैसा यह भी आदेश पारित करता कि इस न्यायालय द्वारा पारित आदेश का क्रियान्वयन आज से दस दिन बाद हो सकेगा। इस बीच व्यथित पक्षकार वरिष्ठ न्यायालय में कार्यवाही करके उचित आदेश स्थगन हेतु प्राप्त कर सकेगा।

JUDGE WHO IS A MAN FIRST

In handling men, there are three feelings that a man must not possess-fear, dislike and contempt. If he is afraid of men he cannot handle them. Neither can he influence them in his favour if he dislikes or scorns them. He must neither cringe nor sneer. He must have both self-respect and respect for others.

CASSON.

FOR WHAT SHALL IT PROFIT A MAN, IF HE SHALL GAIN THE WHOLE WORLD. AND LOSE HIS OWN SOUL.

-St. Mark

INHERENT POWERS OF THE SUBORDINATE CRIMINAL COURTS - IN PROFILE

P.V. NAMJOSHI

The dictionary meaning of the word 'inherent' is existing as a natural or permanent feature or quality of something or somebody. A quality or attribute is 'inherent', when it is firmly or permanently contained or joined; infixed, indwelling, involved in the constitution or central character of anything or anybody. It is an adjective.

The moment the child is conceived or born it starts breathing. To breath is its inherent right. For that it has not to seek permission from its parents or doctors or nurses who treat it. It has not to teach how to breath. It is the central character of it.

A spider makes a web. It is not trained in any technical institution or has not to complete a course in architecture. By its birth it starts webbing. The cobweb is a net of fine threads made by a spider to catch insects in it as its prey.

The young ones of cornivorous animals or beast of prey have their natural instinct to hunt down their prey. If the child is hungry and if mother gives it breast or top feeding, it will start sucking but if we want to administer medicine orally it will shut its mouth with full force and will also tighten its lips and fix them tightly closed. Therefore, what one has to do with the child is to close its nostrils so that it cannot breath and it has to open the mouth. The moment child opens mouth medicine can easily be administered. Who trains them, no one. It is a natural phenomenon.

These phenomenon are but natural. It is by birth a child, a breast, an insect or an animal, etc. etc. acts according to the nature.

Now let us turn to the inherent powers of the Courts. Under Criminal Procedure Code and under Civil Procedure Code :

Cr.P.C., S. 482	C.P.C., S. 151
SAVING OF INHERENT POWERS OF HIGH COURT :- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of **any Court** or otherwise to secure the ends of justice.	**SAVING OF INHERENT POWERS OF COURT :** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of **the Court** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The comparative table reveals that on face of reading these sections one can apparently say that under Criminal Procedure Subordinate Criminal Courts have no inherent powers and the inherent powers of the High Court are being saved by Sec. 482 Cr.P.C. Perhaps by using the words "being saved", one intends to say that if such powers of the High Court were not saved nothing unusual would have happened.

On the administration of justice such argument appears to be of negative approach. If this contention is accepted, it could mean that the Subordinate Criminal Courts have no such powers. Let us read S. 482 in negative manner in such fashion;

"Everything in this Code shall be deemed to limit or affect the (inherent) powers of the Subordinate courts to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of the Court"

Certainly this is not the purpose of the Code. The law defines the inherent powers of the High Court. By defining the powers of the High Court, the Code has not withdrawn or curtail the powers of the subordinate Criminal Courts. The inherent powers of every court whether civil or criminal or of any other Court which comes within the definition of the 'Court' are in-born powers. These powers are not vested conferred or bestowed on the Court by same authority. In fact one can submit that even in the absence of Section 482 High Court will have inherent powers to do justice. Let us look to the objects and reasons to add the provision (Old Section 561A of 1898 Act)(New S. 482 of Cr.P.C.) was inserted by the Code of the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923), S. 156. The objects and Reasons for amendment were thus :

"We have slightly elaborated the provisions of the clause. We understand that a High Court has recently held that it had no power to direct the expunction of objectionable matter from a record (See. Vol. 9 1922 All. 107). We think it desirable that it should be made clear that this clause is intended to meet such a case."

S. 482 of the New Code is a verbatim, reproduction of the corresponding Section 561-A of the 1898 Code, except that the words "inherent powers" have been substituted for the words "inherent power". The recommendations of the Law Commission of India, 41st Report at page 359, Paragraph 46.23 said that there should be a statutory recognition of the inherent powers of Subordinate Courts made in its earlier report and agreed to in the 41st Report was, however, was not accepted by the Parliament.

Thus one can safely say that the scope of the inherent powers of the High Court are quite wider than those of the subordinate criminal courts. Subordinate criminal courts may not have the powers to quash certain proceedings, may not proceed for contempt or may not expunge remarks etc. etc. but this does not mean that subordinate criminal courts lack in any way. They are well equipped with inherent powers. For example there is no specific provision for ordering medical examination of a victim by a doctor. If the victim appears before a criminal court and applies to it that police is not getting him properly examined by competent doctor or is not ready to have his X-Ray of the affected part of the body done, will Court refuse to ask Civil Surgeon to get him examined ? Under what powers of the Cr.P.C., the Criminal Court asks the name, address, etc. of a witness or of an accused? Look to any digest. Take out the titles 'Criminal Trial' 'Criminal Practice'. Each and every citation covered under these titles reflects on the inherent powers of the criminal Courts whether subordinate or not.

In re-State of Kerala, 1973, Cr.L.J. 1288, a Division Bench of the Kerala High Court held that though Section 482 (561 A old) is silent with regard to the inherent power that can be exercised by the subordinate courts, that omission (in my opinion there is nothing like omission because S. 482 Cr.P.C. defines the powers of High Court and does not keep the subordinate Courts out of bond) does not mean that subordinate courts in any circumstances exercise inherent powers.

Here is the case of ***Dr. Raghubir Sharan Vs. State of Bihar,*** **AIR 1964 SC 1,** it was held that all Courts including the High Court can exercise such inherent powers to do

justice as are prescribed expressly or are not taken away by a statute. It was further held that High Court has inherent powers to expunge objectionable remarks in judgments or order of subordinate court against stranger.

In case of ***Jai Berham Vs. Kedarnath, AIR 1922 PC 269,*** it was held that (on page 271 referring to case ***Rodger Vs. Comptoir d'*** **Escompte de Paris, L.R. 3 PC 465 (475)** the Privy Council said that one of the first and highest duties of all Courts is to take care that the act of the Court does not injure to any of the suitor and when the expression "the act of the Court is used", it does not mean merely the act of the Primary Court or any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest court. The purpose of law is that an accused person should get a fair trial in accordance with the accepted principles of natural justice.

The case of ***Bindeshwari Prasad Singh Vs. Kalisingh, AIR 1977 SC 2432*** says that subordinate criminal courts have no inherent power. This citation does not make reference of Raghubir's case and/or of **Jai Berhma's case.** Bindeshwari's case is also distinguishable. It makes reference of the case of ***Pramathnath Talukdar Vs. Saroj Rajan Sarkar, AIR 1962 SC 876.*** It relates to the power of the Division Bench hearing criminal appeal to refer the case to larger bench and inherent power of the Chief Justice to refer the matter to the Bench of 3 Judges. Another reference is that of **1976 Cr.L.J. 1515 (Patna)** which is the subject matter of the case and that judgment of the Patna High Court was reversed. What the Supreme Court says is recall of the case disposed of by a judicial order not possible for any Magistrate. But this does not mean lack of jurisdiction to exercise of the inherent powers by subordinate criminal courts. Because the law is very much specific in this regard. The subordinate Courts or the High Courts have no jurisdiction to alter or review their judgments as said in Section 353 r/w/s 362 of the Cr.P.C. relating to the chapter "The Judgment". Therefore there is no question of exercising inherent power when there is a specific provision not to alter or recall the orders.

In addition to Section 483 Cr.P.C. (Duty of High Court to exercise continuous superintendence over the courts of **Judicial Magistrates(only)** to ensure that there is an expeditious and proper disposal of cases by such Magistrate) the main object of the provision is to provide supervisory power of High Court, so that by using that power it can able to give effect to any order under this Code or to prevent the misuse of the process **of any court (1995) Cr.L.J. 1664, *Abubacker Kunju Vs. Tulsidas.***

The words **'any court'** appearing in S. 482 are of very importance. The term will be discussed at a latter stage.

As a matter of general principle prohibition cannot be presumed. In ***Sashibhushan v. Radhanath*** **(20 CLJ p. 433-439)** held that inherent power has not been conferred upon the court; it is a power inherent in the court by virtue of its duty to do justice between parties. See also, ***Manhar Vs. Hiralal.*** **AIR 1962 SC 527** and ***Padam v. State*** **AIR 1961 SC 218.**

The High Court is empowered under S. 482 of the Cr.P.C. to protect its powers as well as the powers of the subordinate Courts. Therefore, the words **"any court"** has been inserted which are lacking in Section 151 of the C.P.C. because according to that provision **every Court** has inherent powers as defined in that section. But at the same time one

cannot say that the subordinate Courts have no inherent powers under code of criminal procedure. For example under Chapter 9 of the Cr.P.C. relating to maintenance if an amendment application is filed for amending the pleadings, the subordinate criminal court has jurisdiction to allow such type of application though the Cr.P.C. does not empower subordinate courts to exercise powers alike O. 6 R. 17 CPC. Then it is said that these proceedings resemble (quasi) those like of civil proceedings. But this is also not said in any provision of the Cr.P.C. Therefore, this is mental fabrication of thoughts of the judiciary and there is no specific provision in the Cr.P.C. or any other law. Granting interim maintence u/s 125 of the Cr.P.C. is also the inherent power of the subordinate criminal Courts. It is not only because of the celebrated judgment of the apex court in ***Savitry vs. Govindsingh, AIR 1986 SC 985.*** If the court has jurisdiction to grant maintence it has jurisdiction to grant interim maintence also.

Secondly, if accused has not produced from judicial custody for whatsoever reason every court grants remand for the production of the accused. If the accused is hospitalised and is not in a position to attend the Court and the police wants police remand, even the court has no jurisdiction to grant police remand in absence of the accused person. There is no provision in Cr.P.C. that the Magistrate should visit the hospital for granting police remand or judicial remand. Virtually it is against the mandatory provisions of Section 167 Cr.P.C. The words used in Section 167 (2) Proviso (a)(i)(ii)(b) which runs thus :

> "No Magistrate **shall authorise** detention in any custody under this section unless the accused is produced before him."

But what Karnataka High Court says in ***Smt. Noorjahan Vs. State, 1993 Cr.L.J. 102*** that the law is not unreasonable and it does not expect any impossible thing to be performed. Therefore, the Magistrate ought to have passed an order continuing accused in judicial custody. In that case the accused was hospitalised and could not be produced before the Magistrate. If the Magistrate has no inherent power, Magistrate cannot leave his court to verify the presence of accused in the hospital. Occasions arise when the Magistrate has to go to jail for granting remand or one has to go to the Circuit house where the accused is produced in isolation because of the highest security requirements, law and order problem. Thus, here the subordinate courts exercise their inherent powers and such powers are inborn powers of the Court. No one should expect in such cases that the Magistrate should make a Reference through the sessions Court for advising suitable steps to be taken. The moment court is established it has such instinctive powers. True it is that these powers described under S. 482 Cr.P.C. regarding expunction of remarks, proceedings for contempt of court and like nature may not be exercised by the subordinate Courts. Subordinate criminal courts should exercise such powers by which the object of the law is properly secured. It is well said that no procedural law is exhaustive. The essence of a Code is to be exhaustive on the matters in respect of which it declares the law. On points specifically dealt with by it, the Code must be taken to be exhaustive. Whether there is no specific provision, no less than the civil Court has inherent power to mould the procedure to enable it to face such situations as the ends of justice requires. This is what in case of ***Pulin Behari Das Vs. King Emperor, 16 Cal W.N. 1105*** says. The words quoted in the judgment are as no criminal courts have equally with civil courts inherent power to mould its procedure subject to statutory provision, to enable them to discharge their func-

tions as courts of justice". A criminal court has power to permit the prosecution to withdraw charges the joinder of which is objected as illegal. In the absence of any provision on any particular matter the court may act on the principle that **"every procedure should be understood as permissible till it is prohibited by law."** The Code professes to deal exhaustively with law of procedure and provides in the minutest detail the procedure to be followed in every matter pertaining to the general administration of criminal law. Where in the particular circumstances of a case there is a conflict between the law of procedure and the substantive rights of the parties, it is the duty of the Judge. to ignore the procedure. This has reference to **Rupendra's case 53 CWN 770 relevant page 778.**

So far as it deals with any point specifically, the Code must be deemed to be exhaustive and the law must be ascertained by reference to its provision; but where a case arises, which demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of Justice required. **Nagen Kundu's case, (1934) 01 Cal 498.** Absence of any provision on a particular matter in the Code does not mean that there is no such power in criminal Court which may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law. **Hansraj's Case, (1942) Nag. 333.** Making a reference to ***State of U.P. Vs. Mohd. Naim A.I.R. 1964 SC 703*** and ***Jage Ram Vs. Hans Raj, AIR 1972 SC 1140,*** we can say that it is a principle of cardinal importance in the administration of justice that the proper freedom and independence of judges and Magistrates must be maintained and they must be allowed to perform their functions freely and without undue interference by anybody even by the Supreme Court. Attempts have sometimes been made by the Superior Courts to restrict the discretion conferred by the Legislature. upon all Courts by formulating Rules as to how the discretion has to be exercised but it is legal nor desirable nor are the Courts bound by such decisions. Let us see to ***ILR ALL. Series vol. 5, 1883, Narsingh Das Vs. Mangal Dubey (FB).*** That was a case of multifarious suit under section 28 (45) of the CPC of Act No. X of 1877. The Full Bench consisted of 5 Hon. Judges, Hon'ble Justice Shri Robert Stuart, K.T., C.J. All Hon'ble Mr. Straight, Mr. Brodhurst, Mr. Tyrrena and Mr. Mahmood. Hon'ble Justice Mohamood in the celebrated judgment wrote as under: (on page 172 at the bottom side)

> "The Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Court. But on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law".

The principle was adopted by **Hon'ble Justice late Shri Hargovind Mishra in 1981 MPWN (2) Note 187, *Nagarpalika Maheshwar Vs. Dwarakadas.***

This principle rests on legal maxims which are as under :-

1. **QUANDO ALIQUID MANDATUR, MANSATUR ET OMNE PER QUOD PERVENITUR AS ILLUD :-** When the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command.

   जब विधि किसी कार्य को करने का समादेश देती है तो वह उस कार्य को सम्पन्न करने के लिए आवश्यक बातें करने को भी अधिकृत करती है।

2. **QUANDO ALIQUID PROHIBETER, PROHIBETER ET OMNE PER QUOD DEVENITUR AS ILLUD :-** When anything is prohibited by law directly, the same is prohibited indirectly as well.

   जब विधि किसी बात को प्रत्यक्ष रूप से प्रतिसिद्ध करती हैं तब वह परोक्ष रूप से भी प्रतिसिद्ध करती हैं।

3. **QUANDO ALIQUIS ALIQUID CONCEDIT CONCEDERE VIDETUR ET SINE QUID RESULITINON POTEST** :- Whenever someone makes gift of a thing, it is assumed that he gifted that thing as well without which the thing gifted cannot be used.

   जब कोई व्यक्ति किसी व्यक्ति को देता है तो मान्यता है कि उसने उस व्यक्ति को भी दे दिया जिसके बिना दान की गई वस्तु का उपयोग नहीं किया जा सकता।

4. **QUANDO LEX ALIQUID ALIQUE CONCEDIT, CONCEDITUR ET ID SINE QUO RES IPSA ESSE NON POTEST :-** When the law authorities to do any thing it also authorities to do the thing without which the former cannot be done.

   विधि किसी काम को सम्पन्न करने का अधिकार देती है तो वह उस काम को भी करने का अधिकार देती है जिसके बिना काम सम्पन्न नहीं हो सकता।

5. **QUANDO LEX ALIQUID ALICUI CONCEDIT OMNIA INCIDENTIAL TACITE CONCEDUNTUR :-** When the law gives someone a thing, it impliedly gives all the incidental things also.

   जब विधि किसी को कोई चीज देती है तब वह बोले बिना ही सभी प्रासंगिक चीजें भी दे देती हैं।

6. **TOUR CEQUE LA LOI NE DEFAND PASEST PERMIS :-** That which is not barred by law, is permissible.

   जो विधि द्वारा वर्जित नहीं हैं वह अनुज्ञेय हैं।

7. **EX DEBITO JUSTITIAF :** A remedy which the applicant gets as of right.

   अधिकार पूर्वक।

8. **EX DEBITO NATURALLY :** From natural expectations (V.C. Shukla Vs. State AIR 1980 SC 962 67)

   स्वाभाविक – अनुशांगिक रूप से अपेक्षित – अनुगृहीत।

9. **CUICUNQUE ALIQUIS QUID CONCEDIT CONSIDERE VIDETUR ET ID SINE QUE RES IPSA NON POTUTI :-** who ever grants a thing is deemed to have granted that also without which the grant it self would be of no effect.

   ऐसा माना जाता है कि किसी वस्तु के संदाता ने उस वस्तु को भी संदत्त किया है जिसके बिना उस वस्तु का संदान निष्प्रभावी हो जाएगा।

Inherent powers are wide in nature and this provision in Cr.P.C. having been made to secure the ends of justice or to prevent abuse of the process of courts, such powers are to be exercised with great restrain. The principle is "wide would be the power greater should

be the restrain". In ***Anisha Begum Vs. Masoom Ali, 1986 Cr.L.J., Delhi 503,*** it was held that inherent jurisdiction cannot be exercised against the provisions of law. If the law prohibits the modification of an order it cannot be modified in exercise of jurisdiction under S. 482 Cr.P.C. (***Shamshad Haq Vs. Civil Judge 1964 All L.J. 668.***) It was further held in that case that save when there is the violation of principle of natural justice on account of a mistake on the part of office of the Court, in which case the order may be treated as no legal order. A relief however, equitable cannot be granted by exercising the inherent powers in contravention of the specific provisions of law. Therefore, the principle would be where there is a specific provision that provision should be adopted and applied but where there is no specific provision and the principles of natural justice and equitable relief can be granted, inherent powers may be exercised. The power to enforce obedience (the words used in Section 482 are to be give effect to any order under this section) to the mandate of the Court necessarily considering from the very existence of the authority to issue the mandate and if that power is not expressly given by the statute, it must be deemed to be inherent in the court. The Latin maxim "Quando Lex Aliquid Alique Concedit ance ditur et id sine qua Res Ipsa eesu non protest" where the law authorises to do anything it also authorises to do the thing without which the former cannot be done. For that subordinate court need not seek any reference from High Court under the provisions of Section 395 Cr.P.C. and thus if attempt is made to abuse the authority in absense of Inherent powers will fail to serve the purpose for which alone the court exists, namely to promote justice and to prevent injustice. ***Mahipat Vs. State, 1986 MPLJ 5.*** Thus the jurisdiction under S. 482 Cr.P.C. is exercised to **prevent and not to cure abuse of process of the court** in respect of any matter before it. The concluding words under section 482 Cr.P.C. "or otherwise to secure the ends of justice" can only mean that every inherent power as the court possess is likewise preserved. The High Court is not given nor did it possess an unrestricted and undefined power to make any order. It might please to consider was in the interest of justice. Powers of the High Court under this section are as much controlled by principles and precedents as are its expressed powers by the statute. **Thus if the abuse is to be prevented subordinate courts - can exercise the inherent powers and if the abuse is to be cured High Court will exercise inherent powers.**

Thus where two cases from one incidence are pending in which the accused of one case is complainant and the complainant of one case is accused, generally these cases should be tried simultaneously by one court. This is nowhere mentioned specifically in Cr.P.C. But the practice is that these cases should be tried simultaneously by the Court. For different examples one can go through the titles of 'criminal trial' and 'criminal practice' through any digest.

Now let us look to different citations in this regard. ***Hansraj Vs. Emperor, AIR 1940 Nag 390.*** The relevant paragraph is on page 392 where in referring to ***Mahabir Vs. Emperor AIR 1922 Oudh 109 Note No. (g),*** the High Court said that in some cases there may be accidental gaps in the evidence which render it desirable to call additional evidence. Thus the court had the power to act as it did, (Now refer to S. 311 of the Cr.P.C.) and no illegality is proved. It is said that the Criminal Procedure Code is an exhaustive one. That is so only with regard to matters specifically dealt with by it. Absence of any provision on a particular matter does not mean that there is no such power and the court may act on the principle that "very procedure should be understood as permissible till it is

shown to be prohibited by law". Thus if a classroom has four doors for entry and exit and the authorities have restricted the entry and exit by one door. This means the prohibition relates to one door only but impliedly, it is permitted to have entry or exit from any other door, though the rule does not say that students have permission to have entry and exit from door Nos. 2, 3 or 4, therefore, students have inherent rights to enter the classroom and exit from any door except door no. 1.

Two cases were also referred in this judgment. They are ***Mohd. Suleman Khan Vs. Mohd. Yar Khand, Indian Cases 11 All 267*** relevant **page 272** which was discussed above. The another case referred to is ***Rahim Sheikh Vs. Emperor, 50 Cal 872=AIR 1923 Cal 724.***

Another citation is ***Krishan Mohan Vs. Sudhakar Das, AIR 1953 Orissa 281*** in which it is said that a Magistrate cannot invoke his inherent jurisdiction to revise his order under S. 145 (146) because the expressed terms of that section confers finality on that order. Where, however order, under Section 145(6) Cr.P.C. is itself a nullity due to the failure to serve the required preliminary notices under sub section (1) of section 145 on all the parties, the Magistrate may invoke his inherent powers and ignore the same. But he cannot revise merely because he considers that a party who had due notice of the proceeding and was absent on the date fixed for hearing, satisfied him that there were sufficient reasons for his absence on that date.

The other citation is ***Rami Bai Vs. Madhav Singh, AIR 1961 MP 25*** which says that subordinate courts have inherent powers to prevent abuse of process of the courts or to secure ends of justice **in absence of expressed provision.**

In **State of M.P. Vs. Murari Singh, 1975 JLJ 418 (DB),** it was held that inherent powers of the subordinate courts are explained regarding withdrawal of appeal. ***Hariram Vs. State, AIR 1956 MB 17,*** where in it is said that, Section 561-A (old)(Section 482 New) saves the inherent powers of the High Court but silent with regard to any such powers possessed by subordinate courts. This omission, however, does not mean that subordinate courts can not exercise powers. When necessary exercise inherent powers. It is requested that if Judges find time, kindly go through para 5 of the judgment which will help to understand the subject further.

Another citation is ***Ram Cherey Vs. Bab Ram, AIR 1951 All 435*** in which extent of inherent power of the subordinate courts is also discussed in para 6 of the judgment. It is said that there is no doubt that the inherent powers of the Civil Courts as well as criminal Courts are wide but the powers so recognised by the law are defined to meet only those cases for which there is no provision in the Code. In this regard we can refer some commentaries from different books.

In ***Raja Soap & Co. Vs. Shanth Raj, AIR 1965 SC 1449,*** it was said that the powers may be exercised where there may be proceeding lawful before the High Court and it does not authorise the High Court to invest itself with jurisdiction where it is not conferred by law. This is a citation under Section 151 of the C.P.C. but the spirit is the same under criminal procedure also. Inherent powers cannot be exercised beyond reasonable ambit and scope to do justice.

One more citation is from **Sohani's Cr.P.C., 1995 Edition at page 5300, *Ravindra Singh Vs. Desh Raj Singh, 1983 Cr.L.J. (U.P.) = (1983) 2 Crimes 301,*** in which it was said that the High Court is not competent to exercise its powers under Section 482 of Cr.P.C. to perpetuate an illegality in favour of the petitioners.

In ***M. Abu Beker Kunju Vs. R. Tulasidas, (1995) Cr.L.J.. 1664,*** it was said that jurisdiction of High Court under section 482 is not an original jurisdiction. Order of High Court passed in exercise of its inherent powers, appeal is not maintainable. It is further said that the Supreme Court though recognised powers ***(AIR 1992 SC 404, State of Haryana Vs. Bhajan Lal)*** to quash FIR while exercising the inherent powers envisaged in Section 482, it does not mean that powers are under exercise of original jurisdiction of the High Court.

In ***Jai Berham Vs. Kedarnath, AIR 1922 P.C. 269 and Rami Bai Vs. Nathu, AIR 1961 M.P. 25 (27),*** it was held that in practice, the Code seeks to be exhaustive, so that the occasion for exercise of inherent power by a subordinate criminal court (unlike a civil court) arises very rarely. Further, it would be an occasion very similar to one arising under this or that express provision in the Code, with the difference that it does not quite fall within the four corners of that section. It is the duty of every such court to act rightly and fairly according to the circumstances towards all parties involved, even in the absence of an express provision in the Code. The only caution is that there should be a pressing call for justice, and the cause is generally similar to the under the nearest analogous section of the Code.

In ***Nagen Kundu Vs. Emperor, 519 L.R. Cal. Series (1934) 498.*** The ***case of Reg. Vs. Ward (1867) 10 Cox. C.C. 573,*** was referred to. It was further held that so far as it deals with any point specifically the Code must be deemed to be exhaustive and the law must be ascertained by reference to its provisions but where a case arises which demands interference and it is not within those for which the Court specifically provides, it may not be reasonable to say that the Court had no power to make such order as the ends of justice requires.

This section was inserted first in the Code of 1908, but it is merely a legislative recognition of a power which was exercised since the creation of Courts viz. that every court has inherent power to act exdebito justitiae and to do that real and substantial justice for which alone it exists. ***Rushmoni Dasi Vs. Ganoda 19 CWN 84 AIR 1933 Cal. 926 Sumat Kumar Vs. Narayan.***

It is well settled that the provisions of the Code are not exhaustive for the simple reason that the provisions of the legislature is incapable of contemplating all the possible circumstance which may arise in future litigation and consequently for providing the procedure for them. It cannot be said that the code is exhaustive so far as Subordinate Criminal Courts are concerned and it is not exhaustive so far as High Court is concerned.

The inherent powers are not to be conferred upon the court. It is a power inherent in the court by virtue of its duty to do justice (best possible) between the parties before it. The inherent powers are to be exercised by the Court in very exceptional circumstances for which the court lays no procedure. **AIR 1962 SC 57.**

Whenever any situation arises either in a suit or proceeding which is productive of considerable hardship or injustice unless it is remedied, but there is provision in the Code

to fall back upon one should turn to S. 151 of the C.P.C. and weigh carefully whether it can be invoked.

The inherent power of the court is in addition to and complementary to the powers expressly conferred on the Court but that power will not be exercised if its exercise is inconsistent with or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code.

The purpose of inherent power saved by the Code is with respect to the procedure to be followed by the court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. (**AIR 1961 SC 218.**)

Kammari Brahmaiah and other Vs. Public Prosecutor, H.C. of A.P. AIR 1999 SC 775 says that Cr.P.C. is a procedural law and is designed to further the ends of justice not to frustrate them by the introduction of endless technicalities.

Ramdeo Chouhan Vs. State of Assam, (2001) 5 SCC 714, it was said that technicalities of law should not come in the way of dispensing justice. (para 17)

Now let us look to the phraseology and the terms of Section 482 Cr.P.C. to understand the meaning of those terms.

The "Inherent Powers" to make such orders as may be necessary to give effect to any order under this Code, to prevent "abuse" of the "process" (of any court) otherwise to secure the "ends of justice".

"Administration of Justice and its short comings". In administering justice as prescribed by the Code of Criminal Procedure.

INHERENT :-

Inherent means permanent by virtue of position. Existing as a natural or permanent feature or quality of somebody or thing. A quality or attribute is said to be "inherent" when it is firmly or permanently contained or joined; infixed; indwelling; invoked in the constitution or central character of anything. "Inherent" is defined as an authority possessed without its being derived from another, a right, ability or faculty or doing a thing without receiving that right, ability or faculty from another.

The word "inherent", as applied to the inherent right of the court to direct and control the conduct of attorneys or its officers, does not mean a power essential to the existence of the court and the proper exercise of those functions, but is limited to the power of the court to regulate and deal with such matters in the absence of legislation on the subject. The word "inherent" may mean permanently or inseparably existing in a subject but not pertaining to a subject. In the former sense we use the word in speaking of the inherent powers of courts. Powers which the Legislature did not give and cannot take away at least without (destroying the very existence of the affected.) Existing as an element of original quality; naturally pertaining to, and permanently or inseparably existing in, a subject. Inherent has been said to be a word of the same class as, or synonymous with "essential" "instrinsic" and "organic" and has been compared with or distinguished from "inalienable" and "restrainable".

POWER :-

Power to administer the law. Power is synonyms with Word 'Jurisdiction' when applied to Courts,. "Judicial power" includes "Jurisdiction", "Jurisdiction" being generally used

in reference to the exercise of that power in Court. "Jurisdiction" relates solely to competency of a particular court to determine controversies of general clause to which case then presented for its considerations dealings; "Power" on the other hand means ability of decision making body to make order effect a certain result. In relation to Courts the words "Jurisdiction" and "power" are not interchangeable; the test of jurisdiction being where the Court has power to enter on the enquiry.

"Power of the Court" is the power to determine the law.

"Powers necessary" are ordinarily construed to include means and measure which are reasonably useful and appropriate. Power to carry out purposes.

Generally speaking "power" means ability, whether physical, mental or moral, to set the ability to act, regarded as latent or inherent; an ability to do; the faculty of doing or performing something; capacity for action or performance or for receiving external action or performance or for receiving external action or force; the capacity to be acted on in some particular manner, capability of producing or undergoing an effect, whether physical, mental or moral.

The word "power" is further defined as meaning as right or authority by which one person is enabled and permitted to perform some act for another. In this sense the word is defined as a liberty or authority reserved by, or limited, to, a person to dispose of real or personal property for his own benefit, or for the benefit of others, and operating on an estate or interest, vested either in himself or some other person, the liberty or authority, however, not being derived out of such estate or interest, but over reaching or superseding it, either wholly or partially.

Use of one who possesses it in a manner contrary to law. Improper use of power, distinguished from usurpation of power which presupposes exercise of power not vested in the offender.

INHERENT POWERS :

The "Inherent Powers of a court" are those reasonably necessary for administration of justice. "Inherent Powers" of Court are those which are essential to their existence and to the due administration of justice. The power of courts of general jurisdiction to grant equitable relief is not only conferred by our Code of Practice but has often been recognised as among their inherent powers necessary to the complete administration of justice. "Jurisdiction" is conferred on court by Constitutions and statutes, where as **"inherent powers" of court are those necessary to ordinary and efficient exercise of jurisdiction already conferred.** "Inherent Power" of legislative and judicial departments of government is essentially a protective power and strictly speaking is that which is necessary to their existence and due functioning in exercise of powers granted.

The "inherent powers" of a court are such a result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice.

"Inherent Powers" of a court are such powers which were not given by legislation and which cannot be taken away by legislation and which are essential to court's existence and protection and to due administration of justice."Inherent Power" is the right that each department of the government has to execute the powers falling naturally within its orbit

when not expressly placed or limited by the existence of a similar power in one of the other departments.

The "inherent power" of courts of general jurisdiction has to do with the incidents of litigation, the control of the court's process and procedure, the control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings.

The "Inherent Powers" of a court are such as result of the very nature of its organization and are essential to its existence and protection and to the due administration of justice, and the "inherent power" of a court is the power to do all things that are reasonably necessary for administration of justice within scope of court's jurisdiction.

The "inherent powers" of a court are as unexpressed quantity and undefinable term, and courts have indulged in more of less loose explanations concerning it. It must necessarily be that the court has inherent power to preserve its existence, and to fully protect itself in the orderly administration of its business. Its inherent power will not carry it beyond this.

The courts of justice possess powers which were not given by legislation, and which no legislation can take away. These are "inherent powers" resident in all courts of superior jurisdiction. These powers spring not from legislation, but from the nature and constitution of the tribunals themselves.

The courts possess certain "inherent powers" means that when the Constitution declares that the legislative, judicial and executive powers shall remain separate, it thereby invests those officials charged with the duty of administering justice according to law with all necessary authority to efficiently and completely discharge those duties and to maintain the dignity and independence of the courts.

"Inherent Power" is an authority possessed without its being derived from another; a right, ability, or faculty of doing a thing without receiving that right ability, or faculty from another.

"ABUSE", "PROCESS" AND "ABUSE OF PROCESS" EXPLAINED :-

ABUSE :- "Abuse" implies irregular and improper use - not merely regular and proper use with a bad motive. To abuse is composed of 'ab' and 'utor'; and in strictness it signifies to injure, diminish any value or wear away by using improperly. Abuse includes misuse.

"Abuse" means using something wrongly. "Abuse of Power" means using legal power in an illegal or harmful manner. "Abuse of process" means suing someone in bad faith or without proper jurisdiction or for malicious reasons . (Law Lexicon by Collin)

An abuse or malicious abuse of process is its wilful or malicious use to obtain a result which the process was not intended by law to effect oppressive use after issuance or process. It is misapplication of the process and resulting damage. A vulgar abuse, insult or vituperation afford in general no ground for an action for definition.

Everything which is contrary to good order established by usage. Departure from reasonable use; immoderate or improper use. Physical or mental maltreatment. Misuse, deception. To make excessive or improper use of a thing or to employ it in a manner contrary to the natural or legal rules for its use. To make an extravagant or excessive use, as to one's authority.

PROCESS :- A process is a mode, method, or operation whereby a result or effect is produced. The term 'process' is an act or a mode of acting. It is a mode, method, or operation where by a 'result or effect' is produced. 'Process of law' in its broad sense, is a form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. Ordinary meaning of process is summons, motions etc. (Osborn) is defined as law in its regular course of administration through courts of justice.

ABUSE OF PROCESS :- Abuse of legal procedure, a frivolour entirely vaxatious action, as for example setting up a case which has already deduced by a competent court. If a plaintiff induces the defendant by fraud to come within the jurisdiction, so that he may be serviced with a writ, the Court will set aside the services has an abuse of process of the Court. This may be referred to as a vexatious action. (Osborn's Law Dictionary).

"Abuse of Legal Process" is employment of process for doing an act clearly outside authority conveyed by express terms of writ.

An "abuse of legal process" occurs where party employs a legal process for some unlawful object, not the purpose which it is intended by law to effect.

The gist of an action for "abuse of process" is improper use or prevention of process after it has been issued.

PREVENT :- To hinder, frustrate, prohibit impend or preclude, to obstruct to intercept. To stop or intercept. To stop or intercept the approach access or performance of a thing.

"END" "JUSTICE" AND "END(S) OF JUSTICE" EXPLAINED :-

END :- "End" means ultimate object or purpose in View.

JUSTICE :- "Justice" means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts. It means exact conformity to some obligatory law; to secure the object of law.

END(S) OF JUSTICE :- It means best interests of the public within law where such ends and interest will be served thereby require preservation of proper balance between rights of all people to have laws enforced and constitutional rights of individual

The upholding of rights and punishment of wrongs by the law. The constant and perpetual wish to give each man his due (justinian) **comparison of S. 482 Cr.P.C. and S. 151 C.P.C.**

Let us compare the provisions of Section 482 Cr.P.C. with S. 151 C.P.C. They have been tabulised in the very beginning of this article. The important words used in Section 482 Cr.P.C. are "High Court" give effect to any order under this code" and lastly "any court" or "otherwise to secure the ends of justice". Where as Section 151 C.P.C. does not say in wider scope. It limits to the inherent powers of the respective Courts exercising civil jurisdiction and also limits the powers of those Courts to "prevent abuse of the process of the Court". Where as in Section 482 Cr.P.C. the powers of the High Court are being explained and the powers extend to "any Court". (i.e. the Courts subordinate to it).

In **I.L.R. (1980) 2 Kerala 167 (173)**, it was said that the words "any court" referred to only the Courts subordinate to the High Court exercising the inherent powers, again under Section 482 the words used are "give effect to any order under this Code". Thus the High

Court is vested with inherent powers to give effect to any order under this Code. That is where there is neither any specific provision of law nor any general principle of criminal jurisprudence which would conflict with the exercise of the inherent powers, it can be exercised, if it is necessary to do so, by the High Court to give effect to any order under the Code. We can make a reference to ***Madhao Vs. Ishwardas,* AIR 1949 Nag. 334.** Next important phraseology is "otherwise to secure the ends of justice". This is in fact a privilege only to the High Court and not of the subordinate Courts. For example, the words "otherwise to secure the ends of justice" are wide enough to interfere with the improper refusal by Government to grant parole in appropriate cases. ***Vishwanath Vs. Commissioner of Police, (1986) Cr.L.J. 800.*** The term "to secure the ends of justice" is more powerful than the term "to meet the ends of justice". Under Section 151 CPC, these terms are not used. The word "Court" has reference to the Court exercising jurisdiction over a particular case and "to prevent the abuse of process of the Court" also means the Court exercising jurisdiction over a case. What is generally said is the trial Court has no inherent powers under Cr.P.C. but this is half truth. The reality is every Court has inherent powers to do justice and to prevent the abuse of process of the Court. For securing the ends of justice the High Court may expunge remarks and exercise the powers of contempt proceedings also. But the powers of the High Court would not override expressed provisions of law and limitation imposed on courts. The High Court can exercise inherent powers relating to quashing of proceedings and also. Such powers are not exercised by the subordinate criminal courts. To that extent one should understand the main distinction between the exercise of the Inherent powers by the subordinate criminal courts and the High Court.

We can, here, very well remember the work of **Hon'ble Justice Late Shri M.W. Deo** with tributes, who exercised the Inherent powers in granting interim compensation in a case based on negligence under the tort, in gas disaster case when he was District Judge, Bhopal. For the first time in the history of law theory of interim relief for compensation under tort was enunciated by his Lordship and for which **Lord Denning, M.R.** wrote a letter congratulating Shri M.W. Deo.

ADMINISTRATION OF JUSTICE, ITS SHORTCOMINGS AND INHERENT POWERS:-

In administering justice as prescribed by a Code, there are necessarily two shortcomings as described by the Code of **Criminal Procedure, AIR Publication Vol. 4, 8th Edition, 1982 at page 666.**

Following is the extract with the courtesy of AIR Publishers :-

1. There will always be cases and circumstances, which are not covered by the express provisions of the Code wherein justice had to be done. The reason is that the Legislature can foresee only the most natural and ordinary events; and no rules can regulate for all time to come, so as to make express provision against all inconveniences, which are finite in number, and so that their dispositions shall express all the cases that may possibly happen.
2. The prescribed rules of procedure may be abused or so used as to give a mere formality the significance of substantive effect and thus obstruct instead of facilitating, the administration of justice.

It cannot be said that, in the above circumstance, Court have no power to do justice or redoes a wrong merely because no express provision of the Code can be found to meet the requirements of a case. Every Court, whether civil or criminal must, therefore, in the absense of express provision in the Code for that purpose be deemed to possess, as inherent in its very constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration justice. This is based on the principle embodied in the maxim quando lex a liquid alicui concede it, concedere videture id sine quo res ipsa esse non potest - when the law gives a person anything, it gives him that, without which it cannot exist. Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms by also done, then that something else will be supplied by necessary intendment.

The above principle will apply to all Courts in respect of proceedings before them. The High Court has, in addition thereto, and in view of its general jurisdiction over all the criminal Courts subordinate to it, inherent power under this section to give effect to any order of any such Court under the Code, and to prevent the abuse of process of any such Court, or otherwise to secure the ends of justice.

ROUND OFF -

To conclude we can refer to para 1 of Chapter 18 from L.B. Kurzon's Jurisprudence, 1993 Edition at page 178 which runs as under :

THE UNBLIND-FOLDING OF JUSTICE :-

In spite of Frank's scepticism as to the reliability of trial procedures in the process of discovering the essence of law, he was concerned with the question of attaining justice as the end of those procedures. He urged, therefore, the enlargement of the bounds of judicial discretion so that rules might be made more flexible in individual cases. Every legal hearing is, in a sense, unique, and a judge ought not to be tied to the demand of 'rigid universal and abstract generalisation's. This is essential if justice is to be 'unblindfolded.'

BOOKS REFERRED WITH COURTESY :-

1. Sarkar on Criminal Procedure, 1996 Edition,
2. Ratanlal Dhirajlal on Code of Criminal Procedure, 1996 Edition,
3. Sohani on Cr.P.C., 1995 Edition,
4. Modern Legal Usages by Garner,
5. Law Lexicon by Collins,
6. Law Lexicon by Osborn,
7. Law Lexicon by Mulchandani,
8. Corpus Juris Secundum and Words and Phrases by West Publishing Company.
9. Lecture Notes on Jurisprudence by L.B. Curzon,
10. A.I.R. Manual 5th Edition, 1989,
11. A.I.R. Commentaries on C.P.C., 1982.

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प्रथम बार आरोप का प्रत्याख्यात करने के पश्चात आरोपी द्वारा आरोप की स्वीकृति संभव है? - एक विचार

पुरूषोत्तम विष्णु नामजोशी

प्राक्कथन :

यह विषय सतत् रूप से चिंतन का रहा है कि आरोप विरचित करके जब आरोपी को सुनाए जाते हैं तो वह स्पष्ट शब्दों में उन्हें अस्वीकार कर देता है लेकिन पश्चात प्रकरण की सुनवाई के अनुक्रम में वह अपराध की स्वेच्छा से स्वीकृति करना चाहता है तब न्यायालय ने क्या करना चाहिए ?

दिनांक 12.8.2001 को जिला न्यायालय में आयोजित न्यायाधीशों के सेमिनार में यह विषय पुनः जोर शोर से प्रस्तुत किया गया था। इसका उत्तर देना तो कठिन है क्यों कि सभी एक मत नहीं है। जहां तक विमत का प्रश्न है उनके कुछ तर्क हैं।

सिक्के का प्रथम पहलू :

प्रथमतः यह कि सम्पूर्ण दंड प्रक्रिया में ऐसा कहीं भी प्रावधान नहीं है कि एक बार आरोपी को आरोप विवरण सुनाए जाने के पश्चात उसने यदि अपराध किए जाने से मना किया है तो प्रकरण के अनुक्रम में दुबारा प्ली रिकार्ड नहीं की जा सकती।

यह बात दृष्य रूप से सही है। दंड प्रक्रिया संहिता को शाब्दिक रूप से पढ़ें तो यही बात धारा 228 (सत्र प्रकरणों की सुनवाई), धारा 240 (वारण्ट प्रकरणों की सुनवाई), धारा 251 (समन प्रकरणों की सुनवाई) एवं धारा 262 (संक्षिप्त प्रकरणों की सुनवाई) से ज्ञात होगी। उक्त प्रावधानों के तहत आरोपों के सम्बन्ध में आरोपी ने एक बार अपराध स्वीकार किए जाने के पश्चात दुबारा वह आरोप स्वीकार नहीं कर सकता। यह भी कहा जाता है कि तत्पश्चात आरोपी के सम्बन्ध से प्रकरण का निराकरण साक्ष्य लिपिबद्ध करके ही किया जा सकेगा। यह बात भी सही है क्योंकि दंड प्रक्रिया संहिता की शब्दावली यही ध्वनि अभिव्यक्त करती है। लेकिन इस विषय को इतना लिखकर समाप्त करना तब अनुचित होगा जब तक सिक्के के दूसरे पहलू पर समग्र रूप से चिंतन न किया जावे।

सिक्के का दूसरा पहलू :

सिक्के का दूसरा पहलू भी सूक्ष्म रूप से चिंतनीय है तथा यह भी जानना चाहिए कि विचारण न्यायालय क्या प्रक्रिया अपनाता है। यह धारणा सही नहीं है कि आरोपी के कहने पर या आवेदन पत्र के प्रस्तुत करने पर न्यायालय दुबारा प्ली रिकार्ड करती है। न्यायालय ऐसा तो कभी करता ही नहीं है। विचारण न्यायालय भलीभांति जानता है कि आरोप विरचित होने के पश्चात उसकी स्वीकृति–अस्वीकृति होने के पश्चात पुनः उस प्रक्रिया को अपनाया नहीं जाना होता है। कोई भी न्यायालय ऐसा करना सोचता भी नहीं है। क्योंकि यह स्थापित बात है।

दुबारा प्ली रिकार्ड करने की बात जो विभिन्न न्यायदृष्टांतों में आती है उसकी पृष्ठ भूमि ज्ञात नहीं हो पाती है। यह एक भ्रामक कल्पना है कि विचारण न्यायालय दुबारा प्ली (अभिवाक्) रिकार्ड करता है तथा आरोपी से दोषी होने का अभिवचन करवाती है।

वास्तविकता क्या है :

प्रकरण विभिन्न प्रकार के हो सकते हैं। तुच्छ कोटि के प्रकरण जिसमें अपराध करने का आशय न हो (मेन्सरिया) आशयित अपराध एवं घृणित–जघन्य अपराध। तुच्छ कोटि के अपराधों में उपेक्षा असावधानी से वाहन चलाना, परिणाम स्वरूप दुर्घटना होना, पुलिस अधिनियम एवं अन्य स्थानीय अधिनियमों के तहत तुच्छ कोटि के अपराध जैसे गाली गलोच करना आदि।

सर्व विदित है कि पक्षकार को अभियुक्त के रूप में न्यायालय में प्रस्तुत करने के पश्चात उसे लगता है कि अब तो उसे काल कोठरी में ही जाना होगा। अभी तो यह कहने में अतिश्योक्ति नहीं होगी कि जिन्हें विधि, विधि प्रक्रिया से परिचित होना अपेक्षित है वे ही कितने परिचित हैं, तब साधारण व्यक्ति और वह भी भारतीय वातावरण में कहां से परिचित होंगे। फिर सलाह देने वाले उन्हें जेल जाने के विषय में भी अवगत कराते होंगे। ऐसा इस लिए भी कि प्रावधानों में ऐसा ही लिखा होता है कि यहां तक कि धारा 510 भा.द.वि. के प्रावधान में भी। धारा 34 पुलिस एक्ट में भी अर्थदंड न देने पर जेल जाना ही है। अपरिचित वातावरण में व्यक्ति आता है तब स्थिति यही होती है। हमारे शरीर पर कभी अचानक धब्बा दिख जाता है तो कुष्ठ रोग, सफेद दाग हो तो कोढ़ सर्दी हो जाय तो निमोनिया खांसी आवे तो टी.बी. मान बैठते हैं। लेकिन पेशंट जैसे जैसे बीमारी के लक्षणों से परिचित होता जाता है तो वो ही अपना इलाज करने लायक हो जाता है।

यही स्थिति न्यायालय में भी हो सकती है। प्रथम बार आरोपी आया तो हम आप कितने जनों को उस अपराध के विषय में जानकारी देते हैं। वास्तव में हम केवल मशीनीकृत व्यवहार करते हैं। अस्पतालों में, आरक्षण खिड़की पर ऐसा व्यवहार हमें सहन न भी हो। हम तुरन्त फुरन्त चार्ज आदि लगाते हैं व प्रकरण में साक्ष्य आहूत करने की कार्यवाही करते हैं जो अविरत चलती है व पक्षकार कंदरा जाता है। हमारी बीमारी चलते चलते हम भी उस बीमारी की दवा दारू करने में सुज्ञ हो जाते हैं। अभियुक्त भी न्यायालय में आते जाते अपने अपराध विषय में सुज्ञ हो जाता है। वो जानता है कि धारा 279–337 भा.द.वि. के अपराध में न्यायालय अधिकतम 500 (पांच सौ रूपये) अर्थदंड कर सकती है व अपवादात्मक रूप से ही जेल भेजेगा। वो यह भी अनुमान लगाता है कि ऐसा प्रावधान न्यायालयों को मालूम होना चाहिए व मालूम होगा। उसका यह अनुमान कभी–कभी कोरी कल्पना भी सिद्ध होता है।

ऐसा चलते चलते ऐसे तुच्छ प्रकरणों में यदि आरोपी चाहता है कि सालों बीत जाने के पश्चात प्रकरण में साक्ष्य नहीं आ रही है तो न्यायालय ने विधिवत साक्ष्य समाप्त कर देना चाहिए लेकिन न्यायालय ऐसा करना, कई कारणों से, उचित नहीं समझता है तब अभियुक्त क्या करता है यह जानना इस लेख के लिए महत्वपूर्ण है।

अभियुक्त क्या करता है? एवं न्यायालय क्या दुबारा प्ली रिकार्ड करता है? :

अभियुक्त यह करता है कि एक आवेदन पत्र धारा 313 दं.प्र.सं. के अंतर्गत देता है तथा दूसरा आवेदन पत्र धारा 294 दंड प्रक्रिया संहिता के अंतर्गत देता है। अभियोजन साक्षी नहीं आ रहे हैं, तुच्छ अपराध है, कई वर्ष बीत गए हैं व प्रकरण की सब खूबियाँ अभियुक्त समझ जाता है।

धारा 313 एवं 294 के अंतर्गत प्रकरण के किसी भी प्रक्रम में ऐसा करने का अधिकार है। धारा 294 की प्रक्रिया का पालन तो कभी कभार ही होता है विशेष कर आरोप विवरण (चार्ज भी सम्मिलित है) निर्मिति के पूर्व तो लगभग नहीं के बराबर। समय किसको है। यदि ऐसा आवेदन पत्र प्रस्तुत होते हैं तो क्या न्यायालय का यह सुखद कर्तव्य नहीं है कि वह आरोपी से विलेखों के विषय में स्वीकृति–अस्वीकृति कराएँ। आरोपी यदि प्रथम सूचना पत्र पर लिख देता है कि विलेख एवं विलेख में उल्लेखित बात कि आरोपी ने तेजगति उपेक्षा या उतावले पन से गाड़ी चलाई थी कथन सत्य है, जब्ती स्वीकार करता है, उपहति दुर्घटना के फलस्वरूप आना स्वीकार करता है तो न्यायालय का यह कर्तव्य है कि वह ऐसी स्वीकृति धारा 294 दं.प्र.सं. के अधार से लिपिबद्ध करावें। तत्पश्चात बारी आती है आरोपी परीक्षण (आरोपी कथन) की। चूंकि बदली हुई स्थिति है तब आरोपी परीक्षण कराना कहां अनुचित है। जब आरोप पत्र मात्र प्रस्तुत होने पर न्यायालय आरोपी परीक्षण कर सकता है व बाद में आरोप लगाने के विषय में चिंतन कर सकता है तो धारा 294 दं.प्र.स. की प्रक्रिया पश्चात भी ऐसा कर सकता है। इन दोनों ही प्रावधानों के लिए प्रकरण के प्रक्रम का समय एवं अनुक्रम निर्धारित नहीं है। यदि ऐसा होता है व उसमें आरोपी प्रत्येक बात स्वीकार करता है तो न्यायालय ऐसे तुच्छ प्रकरणों में ऐसी स्वीकृति पश्चात क्या आरोपी को सिद्ध दोष (गिल्टी) ठहराते हुए दोषसिद्ध (कन्व्हिक्ट) नहीं कर सकता। क्या यह करना अनुचित होगा तथा उस प्रकरण में जहां साक्ष्य नहीं आ रही हो प्रकरण को लंबित रखा जाता रहेगा। वास्तव में प्रारम्भिक न्यायालय कभी भी दुबारा प्ली रिकार्ड नहीं करता न ऐसा करने हेतु दुबारा चार्ज लगाता है। प्रथम बार जब चार्ज आदि लगाया जाता है तब आरोप विवरण सुनाए समझाए जाने पर आरोपी की स्वीकृति–अस्वीकृति अंकित की जाती है व प्रकरण के निर्णय तक वही कायम होती है। इसलिए यह भ्रम दूर होना चाहिए कि एक बार आरोपी ने अपराधिक कृत्य उसके द्वारा किए जाने से मना किया है तो उसके साथ सजा का सौदा (प्ली–बारगेनिंग) करके दुबारा प्ली रिकार्ड की जाएगी। विचारण न्यायालय को किसी भी दृष्टिकोण से ऐसी गरज होती भी नहीं है।

प्रकरण के किसी भी प्रक्रम में अभियुक्त ऐसा लिखकर दे भी कि वह अपराध स्वीकार करता है तब भी न्यायालय ऐसे लिखित प्ली को स्वीकार नहीं करेगा। लेकिन यदि अभियुक्त धारा 294 द.प्र.स. का आवेदन पत्र देता है व कहता है कि प्रकरण में अनावश्यक रूप से विलंब हो रहा है अतः विलेखों के विषय में स्वीकृति अस्वीकृति करा ली जावे। यदि प्रकरण के प्रक्रम में धारा 294 की कार्यवाही पूर्व में न की हो तो अब की जा सकती है। तत्पश्चात अभियुक्त यदि सभी विलेख उसके अंतर्विष्ट तथ्यों को स्वीकृत करते हुए स्वीकृत करता है तब न्यायालय क्या करेगा यह प्रश्न सहज पूछा जा सकता है। यह इसलिए भी कि न्यायालय एक प्रज्ञावान संस्था है ऐसी धारणा तो निश्चित ही है। इसी प्रक्रम में अभियुक्त धारा 313 का आवेदन पत्र देता है व निवेदन करता है कि विलेखों के स्वीकृति के परिणाम स्वरूप तथ्यों के आधार से अभियुक्त परीक्षण हेतु आरोपी कथन लिए जावे तो न्यायालय प्रथम सूचना रिपोर्ट एवं अन्य विलेखों के आधार से अभियुक्त कथन लिपिबद्ध करे तो क्या गलती है। ऐसे आरोपी कथन में अभियुक्त सभी बातें स्वीकार कर ले जो उसके विरूद्ध जाती हो तथा अपराधिक कृत्य उसके द्वारा किए जाने सम्बन्धी तत्व स्वीकृति हो जाते हैं तो क्या तब भी न्यायालय साक्षियों को बुलाने की

बात पर अड़ा रहेगा। उत्तर नकारात्मक ही होना अपेक्षित है। इस प्रकार कथित रूप से "दुबारा प्ली रिकार्ड नहीं किया जा सकता" वाली बात तो कभी सामने ही नहीं आएगी।

देखें एक न्याय दृष्टांत **ज्योति 1997(6) पृष्ठ 40** पर प्रकाशित हुआ है।

कॉमन कॉज जजमेंट की अपनी सीमाएँ हैं।

श्यामसिंह वि. धरमसिंह 1968 इलाहाबाद लॉ जनरल पृष्ठ 776=1968 इलाहाबाद वीकली रिपोर्ट 322. यही दृष्टांत सोहनी द्वारा लिखित 1982 के दंड प्रक्रिया संहिता के भाग 3 धारा 241 के टिप्पणी क्र. 2 में पृष्ठ 2647 पर भी प्रकाशित हुआ है। सिंहल द्वारा लिखित क्रिमिनल कोर्ट प्रेक्टिस एण्ड प्रोसिजर द्वितीय संस्करण के पृष्ठ 599 में टिप्पणी क्र. 6 में भी उपलब्ध है। उन दोनों पुस्तकों की संयुक्त टीप इस प्रकार है। "..... the Magistrate can convict on subsequent confession of guilt if the confession has been made voluntarily and is not the out came of any pressure."

".....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.***

एक अन्य दृष्टांत ***राम किशुन वि. स्टेट ऑफ यू.पी. 1996 क्रि.लॉ.ज. पृष्ठ 40*** का है वह भी इसी मत को ग्राह्य करता है। वह इस प्रकार है :–

Moreover, in the instant case in the statement under Section 313 Cr.P.C. also the appellant has reiterated his plea of guilt. He has said it in so many words that he had killed his wife by an axe he was carrying. Under the circumstance, the trial Judge was justified in placing reliance on the said plea of guilt and rightly closed the prosecution evidence. The necessity of evidence would arise only if and when the charge is not accepted. There is no reason to restrict the applicability of section 229 Cr.P.C. to a particular date or occasion but the purpose of section is obvious that plea of guilt can be advanced by an accused at any stage of the trial after framing charge.

In view of the aforesaid discussion there is no error in the procedure and the trial Judge has rightly convicted and sentenced the applicant. It may be noticed here that the act of causing the death by axe was of extreme brutality and the young lady has lost her life for no reason whatsoever. The charge of S. 302 I.P.C. as framed against the appellant stands fully proved on the facts and circumstances of the present case.

लेकिन उपरोक्त दृष्टांतों के विपरीत न्याय दृष्टांत भी हैं वे इस प्रकार हैं।

एक दृष्टांत **ज्योति फरवरी 1996 पृष्ठ 22** पर प्रकाशित हुआ है वो है ***गणेशीमल जयराज वि. गवर्नमेंट ऑफ गुजरात ए.आई.आर. 1980 सु.को. 264*** दूसरा दृष्टांत सिंघल की उपर उल्लेखित पुस्तक के पृष्ठ 599 व 698 पर है जो इस प्रकार है। ***जयंती लक्ष्मण वि. स्टेट ऑफ गुजरात (1964)2***

सी.आर.एल.जे. 86, स्टेट ऑफ महाराष्ट्र वि. पांडुरंग 1966 महाराष्ट्र लॉ जरनल नोट क्र. 18. इसी पुस्तक में **पृष्ठ 698 पर *प्रेमी वि. राज्य 1969 देहली लॉ टाइम्स पृष्ठ 385*** है। (ज्योति **1977 (6) पृष्ठ 40** पर भी प्रकाशित हुए है।) सार संक्षेप इस प्रकार है।

".....The prosecution closed its case and thereafter the appellant was examined by the learned Judicial Magistrate under Section 313 of the Code of Criminal Procedure. On the same day, presumably as a result of plea-bargaining to which the learned Judicial Magistrate was also perhaps a party, the appellant submitted an application admitting his guilt..... The learned Judicial Magistrate thereupon proceeded to make an order convicting the appellant of the offence.....

There can be no doubt that when there is an admission of guilt made by the accused as a result of plea bargaining or otherwise, the evaluation of the evidence by the Court is likely to become a little superficial and perfunctory and the Court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused. (Subsequent to plea of not guilty at the time of charge). In this case the Supreme Court said that here it is obvious that the approach of the Learned Judicial Magistrate was affected by the admission of guilt made by the appellant and in the circumstances it would not be right to sustain the conviction of the appellant. ***Ganeshmal Jashraj Vs. Govt. of Gujarat, AIR 1980 SC 264.***

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 filing 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 of 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.L.J. 57 (Gau).***

मित्रों, आपने उक्त न्यायदृष्टांत देखें। न्यायदृष्टांतों के आधार से समीक्षात्मक टीप की आवश्यकता नहीं है। क्या करना, नहीं करना प्रकरण की परिस्थिति पर निर्भर रहेगा लेकिन उक्त न्याय दृष्टांतों का समीक्षात्मक सूक्ष्म अध्ययन आवश्यक है। अध्ययन इस दृष्टिकोण से कि क्या हम प्ली–बारगेनिंग कर रहे हैं? क्या आरोपी के जमानत आवेदन पत्र में लिख दिया कि उसने अपराध नहीं किया व चार्ज प्ली रेकार्ड करते वक्त कहता है अपराध किया है तो क्या होगा? आरोपी धारा 294-313 के आवेदन पत्र देता है तो हम आप क्या करेंगे।

समापन :-

आप अपने स्तर पर आरोपी एवं प्रकरण की परिस्थिति, प्रकार एवं प्रकृति को देख सकते हैं। आरोपी को चार्ज से पूर्व ठीक से समझा सकते हैं व प्रयत्न यह कर सकते हैं कि साक्षी समय पर आहूत होकर परीक्षित हो। ये आदर्शवादी स्थिति है व ये ऐसी स्थिति है जो अपवादात्मक रूप से सम्भव है।

अतः प्रकरण का निर्णय कुछ भी होता रहे लेकिन यदि किसी भी समय आरोपी की ओर से औचित्यपूर्ण आधार पर धारा 294 एवं 313 द.प्र.स. के आवेदन पत्र आते हैं तो उन पर आरोपी एवं प्रकरण की परिस्थिति, प्रकार एवं प्रकृति को देखकर आदेश देना चाहिए।

ध्यान रहे 'प्ली बारगेनिंग' (सजा का सौदा) विधि में वर्तमान में मान्य नहीं है तथा चार्ज के समय भी आरोपी ने अपराध स्वीकार किया है तब भी ऐसी स्वीकृति को ग्राह्य न करते हुए भी प्रकरण को गुणदोष पर निराकरण हेतु कहा जा सकता है।

यदि कोई आवेदन पत्र प्रकरण के प्रक्रम में धारा 294 एवं/अथवा 313 दं.प्र.स. के अंतर्गत आता है तो देखा जा सकता है कि वह सद्भावनापूर्ण है क्या। सद्भावना को देखने हेतु दुर्भावनाएं ढूंढने की आवश्यकता नहीं है। स्वेच्छया, बिना किसी दबाव के तथा सजा के सौदे के बिना आवेदन पत्र है तो उसे हम असद्भावनापूर्ण क्यों कर मानेंगे।

इस लेख के माध्यम से निश्चयात्मक विचार व्यक्त करना उचित नहीं लगता क्योंकि विषय आसान नहीं है। बुनियादी रूप से वैचारिक भिन्नता है अतः विधि द्वारा या न्याय दृष्टांतों से जब तक स्थापित सिद्धांत प्रतिपादित नहीं हो जाता अपनी न्यायिक बौद्धिक क्षमता का प्रयोग न्यायिक विवेक से करना उचित होगा तथा जैसा भी प्रयोग करो सकारात्मक दृष्टिकोण को ध्यान में रखते हुए हो एवं आदेश पत्रिका एवं आदेश मुखर हो।

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READING

Of authors, be sure to make choice of the best; Reading does not only feed and entertain the understanding, but when a man is dosed with one study, he relieves himself with another; but still reading and writing are to be taken up by turns. So long as the food lies whole upon the stomach, it is burden to us; but, upon the concotion, it passes into strength and blood. And so it fares with our studies; so long as they lie whole, they pass into the memory without affecting the understanding; but, upon meditation, they become our own, and supply us with strength and virtue; the bee that wanders and sips from every flower, disposes what she has gathered into her cells.

-Seneca, Epistle II Seneca's Morals (New York; Haper & Brothers, 1917), pp. 281-82.

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WHAT'S BEHIND TRIAL

- P.V. NAMJOSHI

Section 2(g) and 2(h) of the Cr.P.C. defines the words 'Inquiry' and 'Investigation' respectively but the word 'trial' has not been defined in the Cr.P.C.

Section 2(g) of the Cr.P.C. runs as under :-

"Enquiry means every inquiry other than a trial conducted under the Code by Magistrate or Court".

Section 2(h) of the Cr.P.C. runs as under :-

"The word 'Investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

While writing this Article we shall make a reference to 'Proceeding' also. Therefore, the word 'proceeding' should also be explained. Here in Section 2 (i) of the Cr.P.C. the word 'judicial proceeding' has also been defined which runs as under :

"Judicial proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath."

But the word 'proceeding' can also be explained in some other manner.

Let us look into the word 'Inquiry' which means every inquiry other than the trial. Therefore, this word can be interpreted in plain and simple manner that the moment inquiry is completed and if the court chooses to proceed further then that proceeding will be a judicial proceeding under which question regarding framing of charge is considered. That is the beginning of the trial. Here is the crucial point whether the trial begins. This will be discussed latter on. So far as investigation is concerned, **Mulchandani on Law Lexicon cum Digest, 1990 Edition Part II at page 1515 in item No. 14379 (6)** explains and says that trial follows cognizance and cognizance is preceded by investigation. Thus when the Court takes cognizance, trial begins. Taking of cognizance is considering the case for framing of the charge. The leading case of ***Dagdu Vs. Punja, AIR 1937 Bom 55 (DB)*** and subsequent decisions will be explained later on. Judicial Officers may go through the article 'Trial when commences' (Common Cause Judgment) published in **1996 JOTI Journal, October part at page 23.** A reference can be made to ***State of M.P. Vs. Mubarak Ali, AIR 1959 SC 707*** in para 7, it is said as under :-

"Under the Code, an investigation starts after the police officer receives information in regard to an offence and consists generally of the following steps; (i) proceeding to the spot; (ii) ascertainment of the facts and the circumstances of the case; (iii) discovery and arrest of the suspected offender; (iv) collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the I.O. thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (v) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under S. 173."

In this case a reference was made to the case ***H.N. Rishbud Vs. State of Delhi, AIR 1955 SC 196-203.*** In ***State of U.P. Vs. Bhagwat, AIR 1964 SC 21*** and ***Ragmini Vs. State of Kerala, 1981 Cr.L.J. 200.*** These cases also revel the same principle.

The final step of investigation, i.e. formation of opinion as to whether the accused should be sent up for trial is to be that of the Offencer-in-charge of the police station. That function cannot be delegated. This is what is stated in **H.N. Rishbud's** case.

Investigation is the basic scheme of Cr.P.C. in case of cognizable offences, the informant approches an officer-in-charge of the police station. Police officer on receipt of the information of an offence proceeds for an investigation and after the completion of police investigation, he files a charge-sheet or a final report informing the Magistrate that police does not want to file a charge sheet against the accused, that is the final report. Filing charge sheet is also said to be a final report. But at the same time it should be remembered that filing charge sheet is not part of investigation. It is accomplishment of investigation commenced by the police. This is said in the case of ***Public Prosecutor, High Court of Hyderabad Vs. M. Prasad and others, 1978 Cr.L.J. 63 (A.P.).*** In ***Rasul Baksh Vs. Emperor, AIR 1944 Sindh 103*** it is further said that :

> "The word proceedings in Ss. 29, 30 and 33 Arms Act, means legal proceedings in a criminal Court. Such proceedings are "instituted" within the meaning of S. 29 only when under S. 190 Cr.P.C. a Magistrate takes cognizance of the offence there being no distinction between the words 'initiation of proceedings' and 'institution of proceedings'. 'Taking cognizance' does not involve any formal action or indeed action of any kind, but occurs as soon as the Magistrate applied his mind to the suspected commission of an offence. The mere presentation of a challan by the police under S. 173 Cr.P.C., in Magistrate's Court or the mere presentation of a complaint by a private individual cannot be said to constitute the institution of criminal proceedings."

Again investigation itself is a proceeding that is what ***Kaverappa Vs. Sankarannayya, AIR 1965 Mys. 214-218*** says. It is said that an investigation under the Code during which a police officer or any such person authorised by a Magistrate collects evidence, is a proceeding under the Code. Where a police officer in order to aid the investigation sought the search warrant, he was manifestly proceeding under the Code. Therefore, if police sends a requisition to the Medical Officer for examination of the accused or the victim or sends a requisition for recording of a confession under S. 164 of the Cr.P.C. may be safely said to be a proceeding under the Code for the investigation. The word 'in the course of any proceeding' also occurs in section 293 Cr.P.C. The expression proceeding under this Code is not tant amount to judicial proceeding. Thus the words "in the course of any proceeding" under this Code and the words "under this Code to appear before a Court" appears u/s 89 of the Cr.P.C. which include all the proceedings under the Code and are not confined to a proceeding instituting proceeding or initiating prosecution. Otherwise there is no question of chemical examination report being used as evidence in inquiry or trial for a Court. Therefore, the report of a chemical examiner is a proceeding under the Code as stated in ***Supiah Chettiar Vs. V. Chenna Thurai, AIR 1957 Mad 216.*** The word 'proceeding' has also been defined in ***Mohan Lahiri Vs. the King, AIR 1950 Patna, 243.*** It is said that 'proceeding' includes granting of bail before sanction. The word 'proceeding' in section 29 Arms Act, 1978 means legal proceeding in Court and in searches or arrest or

made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code. Further it is explained after due consideration that the bail application is a judicial proceeding, when a Magistrate applies his judicial mind to the question whether bail should be granted.

EVIDENCE BEFORE CHARGE : WHETHER IT IS A TRIAL OR INQUIRY :-

What we have seen before is trial commences when inquiry is completed. The question is whether in a complaint filed under Section 190 Cr.P.C. r/w/s 200 Cr.P.C., evidence before charge is a part of trial or not ? The simple answer would be it is not so. Trial commences when accused and the prosecution are being heard for consideration of framing of charge. For that we have to refer to Sections 33 and 138 of the Evidence Act. A party has right to cross examine the opposite party's witnesses. Thus in a criminal case the accused has a right to cross examine the prosecution witnesses. There is a practice that when evidence before charge begins, the accused party is given a chance to cross examine the prosecution witnesses.

The question is whether giving a chance to them amounts to obligation and a duty cast upon the accused to avail it, and if he does not avail it, whether he loses the right of further cross-examination or if that witness could not be re-examined for whatsoever reason whether that evidence is read against the accused. From Section 244 to Section 247 of the Cr.P.C. trial of warrant cases instituted otherwise than on police report is being provided. Section 244 Cr.P.C. says that when in any warrant case instituted otherwise than on police report the accused appears or is brought before a Magistrate, the Magistrate shall proceed to **hear the prosecution** and take all such evidence as may be produced in support of the prosecution. The words "hear the prosecution" have been substituted for the words "hear the complainant". On bare persual of this provision, it is clear that it is for the Court to hear the prosecution and to take evidence as may be produced in support of the prosecution. No obligation is cast upon the accused person to cross-examine the witnesses before charge is framed. This will be very much clear from the provision of Section 246 Cr.P.C. On appearance of the accused evidence before charge is being recorded. It is the choice of the accused to cross-examine the witnesses. He may forego that right or he may avail that right. But even if he avails that right he does not loses the right to recall those witnesses who have been already examined and cross examined also before the stage of charge because of the provisions of S. 246 (4) (5) and (6) of the Cr.P.C. It is his right to further cross examine those witnesses and therefore even if he does not cross-examine the witnesses for prosecution (complainant) before charge, it cannot be said that the examination-in-chief has gone without cross-examining the witnesses and other evidence can be read against the accused person. In ***Prithvi Nath Vs. R.C. Kaul, 1975 Cr.L.J. 216 (J & K) (FB)*** explains the meaning of the word "examination" and "hear".

Part of the para 5 of the judgment runs as under :-

"Whether in S. 200 the legislature has deliberately used the words 'examine the complainant' in S. 252, (old) the word used is 'hear' and not 'Examine'. It would thus appear that a clear distinction is sought to be made between the connotation of the words 'examine' and 'hear'. Furthermore, in S. 252 (old) 244 (new) when the legislature refers to production of evidence, it says so specifically by using the words "take all such evidence as may be produced". Thus S. 252 itself makes a distinction be-

tween taking of evidence produced and hearing the complainant. In these circumstances the word 'hear' has been used in S. 252 not in the wider sense of the examination of the complainant on oath, but only in a limited sense that the court shall have to give **a right of audience to the complainant** regarding the nature and character of the evidence that he wants to produce.

Again in para 10 of the judgment, the words "as may be produced" have been explained. Part of paragraph 10 of the judgment is reproduced :-

"S. 252 itself clearly lays down that the Magistrate shall take all such evidence as may be produced in support of the prosecution. The words 'as may be produced' clearly connote that the liberty of determining the order of evidence or production of the same or the choice of the witnesses is entirely that of the prosecutor. **AIR 1923 Cal 579 : (1944) 45 Cr. LJ 172 (Pat)** relied on. **1965 (1) Cr. LJ 350 (SC)** followed. **AIR 1961 Andh Pra 420** were distinguished."

We can refer to another citation ***Gandharva lal Vs. State of H.P., 1980 Cr.L.J. 1189 (H.P.)*** in which the words "When trial commence" is being explained.

Part of paragraph 9 of the judgment is reproduced :-

"The language employed in Section 244 would thus go to suggest that the trial of a warrant cases instituted otherwise than on a police report would commence only after the accused appears or is brought before a Magistrate and the Magistrate proceeds to hear the prosecution and takes evidence as may be produced in support of the prosecution. There are ofcourse proceedings conducted by the Magistrate in respect of warrant cases instituted otherwise than on a police report before the stage of Section 244 is reached but such proceedings would not constitute a part of the trial either of the accused or of the case. Complaints to the Magistrates are filed under Chapter XV of the Code which is under the heading 'Complaints to Magistrates.' Initial proceedings on these complaints like issue of process and supply of documents etc. are conducted under Chapter XVI of the Code which is under the heading 'commencement of proceedings before Magistrates.' Next comes Chapter XIX which is under the heading 'trial of warrant cases by Magistrates'. These three separate headings allotted to the three different chapters, namely, Chapter XV, XVI and XIX would further strengthen the conclusion that the trial of warrant cases instituted otherwise than on police report would commence only when the case reaches the stage enabling the Magistrate to comply with the provisions of Section 244 of the Code. It thus follows that the trial of a warrant case instituted otherwise than on a police report cannot be said to have commenced till the accused appears or is brought before a Magistrate and the Magistrate proceeds to hear the prosecution and takes all such evidence as may be produced in support of the prosecution."

One more citation ***Nandram Vs. State of M.P., 1995 MPLJ 83*** which explains this concept in such manner that one will be able to understand the principle behind it. In this case the Food Inspector filed a complaint under Section 190 r/w/s 200 Cr.P.C. Evidence before charge of Food Inspector was recorded but after framing of charge when the accused exercised his discretion under Section 246 (4) to resummoned the Food Inspector for cross Examination, it was reported that he was dead. It was suggested that examination-in-chief which was done prior to framing of charge should be read as evidence, as the

accused did not avail the opportunity to cross-examine the witness who is now dead.

Part of the judgment runs as under :-

The expression "judicial proceedings" includes any proceedings in the course of which evidence is or may be legally taken on oath. It is necessary that the judge or Magistrate concerned must be actually recording evidence in order to amount to judicial proceeding. In fact occasion to record evidence may not actually arise and still the proceeding may amount to judicial proceeding. The test is whether in the course of these proceedings evidence may be legally taken on oath or not. Presenting of Challan is the first slip in the proceeding wherein occasion may subsequently arise to record evidence on oath. On receiving challan the Magistrate has to decide judicially whether to take cognizance of the offence thereon or not.

However, the case of ***Gurddin Vs. Emperor, AIR 1935 Nag 8*** does not match in so many words with the view expressed in the article. In this judgment it is said that :

> "The accused has a right to cross-examine a prosecution witness before the charge is framed against him and if he has failed to do so not only had he the oppurtunity but he had the right of cross-examining the witness, and the action of the Court in treating the evidence of any such witness under S. 33 is justified when it is found impossible to produce him for further cross-examination under the provisions of S. 256 Cr.P.C."

Let us see the provisions of Section 33 Evidence Act. This second proviso to Section 33 says that, "the adverse party in the first proceeding had the **"right and opportunity"** to cross-examine. The right and opportunity has been explained in so many words by different High Courts. A reference is made to **AIR 1934 Mad 100** in which it is said that "where the adverse party had the **opportunity but not the right or had right but not the opportunity, or had neither the opportunity nor the right to cross-examine the witness in the first proceeding,** the deposition of the witness for the first proceeing will not be admissible in subsequent proceeding." In **AIR 1934 Patna 413, AIR 1953 Assam 176** and in **AIR 1940 Orissa 100.** it is said that. "it is if the adverse party had the opportunity to cross examine on the occasion. Where an opportunity for cross examination was offered but the party did not avail himself of the right and opportunity the deposition would be admissible under this section (S. 33)". It is said in **AIR 1950 Cal 435, AIR 1959 Cal 667, AIR 1931 All 71** that in a warrant case until the stage provided for in section 250 Cr.P.C. is reached, (old Act) i.e. after charge, the accused had no right to cross-examine. The fact that he was allowed to cross examine a witness before the framing of the charge does not make his evidence admissible under S. 33. But different view has been taken by Madras High Court, Nagpur High Court and previously by Allahabad High Court also. In these cases it was held that if the accused is given permission to cross examine witnesses examined under Section 252 Cr.P.C. (old). he become vested with the right and if he exercises the right so, Section 33 is fully applicable can evidence can be brought on record.

What **AIR 1916 Bom 218** says is the person against whom proceedings have been instituted under Section 476 Cr.P.C. (old), had no right to cross examine the witnesses during that inquiry and the evidence of the witnesses in that inquiry who is not forth coming on the trial start on the result of the inquiry is not recorded under S. 33. But this view has not been accepted by some other Courts. ***Mulak Raj Vs. Sikka, AIR 1974 SC 1723***

says that right and opportunity to cross examine the witnesses is implied in proceedings before an officer authorised to take the evidence. ***Dahya Bai Vs. State of Gujarat, AIR 1964 SC 1563*** says that the examination of a witness means as laid down in section 137, his examination-in-chief, his cross-examination and his re-examination. It follows that the provisions that a witness shall be examined means not only that he shall be examined in chief but also that he should be permitted to be cross examined and re-examined. But the distinction should be made regarding evidence before charge, i.e. inquiry, and evidence after charge under Section 246 Cr.P.C. Thus the provisions of section 246 will have to be considered before coming to the conclusion that as to whether the evidence before charge can be read against the accused person.

This citation relates to old Cr.P.C. and that has reference to Section 207-A(5) which runs as under :

> "207-A (5) - The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them."

Thus a specific provision was made in reference to cross-examination by the accused persons but after amendment the Magistrate has to commit the case to the Sessions without recording any evidence before him. Therefore, in that case also accused would have no opportunity to cross examine any witness as there would be no examination-in-chief also before committing Magistrate. This phraseology has not been used in Section 244 (of 1974 Amendment). It is a settled view that the committal proceedings are inquiry and not trial.

Again in section 208 of the Cr.P.C. (old) relating to proceedings instituted otherwise than on police report, there was given a right to cross examine the witnesses. The provision of section 208 (2) of Old Cr.P.C. runs as under :

> "The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them."

Therefore, the citation of **AIR 1974 SC 1723** is not applicable. Part of paragraph numbers 20 to 24 are reproduced :-

> "Where in a Sessions trial, the witness whose deposition recorded by the committing Magistrate was sought to be brought on record, could not be found in spite of all reasonable steps taken, including the one taken by High Court during the hearing of appeal, and further although the accused had a right to cross-examine that witness in the committing Court, his counsel had preferred not to cross-examine at that stage and had reserved it for the Sessions Court, both the conditions of Section 33 were satisfied and the evidence of such witness recorded in committing Court was admissible in Sessions trial."

Under Section 252 (Old Cr.P.C.) there was no provision alike S. 207 A (5) and 208 (2) of old Cr.P.C. which could provide **right and opportunity** to the accused to cross examine the witnesses produced by the complainant. Therefore, the conclusion may be in cases otherwise than on police report till inquiry is completed and complainant and accused being heard for consideration of charge trial does not begin and the accused has no **right and opportunity** as such to cross examine the complainant and his witnesses. It is a matter of right and opportunity and not of concession given by the court.

On persual of above rulings one can safely say that since the trial begins after framing of charge, the stage before framing of charge is inquiry and during that period of inquiry if the prosecution has produced evidence, this does not mean that the accused had right and opportunity to cross examine. It is his pure discretion which he may exercise or he may not exercise and in any event the evidence of the complainant and his witnesses recorded under S. 244 will not be read against him for any purposes and after charge he will have a right and opportunity both to cross-examine. Therefore, at this stage the provisions of Section 246 (4) and (5) cannot be overlooked. That provision has a bearing on S. 244 Cr.P.C. This is because the words employed in S. 244 (4) are".....whether he (accused) wishes to cross examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. Sub-clause (5) of S. 246 runs as under 'If he says he does so wish, the witnesses named by him **shall be recalled** and after cross examination and re-examination (if any), they shall be discharged."

On persual of cases like **Ramchandra Modak's case, AIR 1926 Patna 214, Chintaram's case, AIR 1931 Lahore 196,** we can say that the right to cross examine cannot be deemed to be waived by a statement by the accused or his pleader before the charge that he would not require any witnesses to be recalled for further cross-examination after the charge is framed. The **right** to cross-examination is not lost even though before the charge, the accused professed to take no part in the trial and refused to cross examine the witnesses.

DISTINCTION -

The words "inquiry" and "investigation" are also been distinguished and they are also distinguished from 'trial'. Firstly, the word 'research' has been explained. As research is a remote search, an investigation is a minute inquiry; a scrutiny is a strict examination. Learned men of inquisitive tempers make their researches into antiquity : magistrates investigate doubtful & mysterious affairs; police investigate crimes; physicians investigate the cause of diseases; men scrutinize the actions of those whom they hold in suspicion.

DIFFERENCE BETWEEN THESE TERMINOLOGICAL WORDS :-

A . INQUIRY AND INVESTIGATION :- Inquiry is by a Magistrate only as investigation is being conducted by police officer or any person other than the Magistrate or Court. However, a person may be authorised by a Magistrate in this behalf.

The object of inquiry is determination of truth or falsehood of certain allegation in order to further the action. The object of investigation is collection of evidence in particular case/matter for which police or person is authorised to investigate the act or offence as the case may be.

B. INQUIRY AND TRIAL :- Trial and Inquiry are distinct proceedings may be in one case.

Inquiry is something different from trial when the former stops the latter begins. Hence all proceedings before a Magistrate, prior to the framing of a charge (in case of warrant trial) or the statement of particulars of the offence (in case of summons trial) alleged, which do not result in conviction or acquittal.

Inquiry may start on vague rumours with shadow beginning but trial commences only when the Magistrate or Court after considering the case before it forms opinion that

there is a ground for presuming that the accused has committed an offence and frames charge or formulates particulars of offence.

The term 'inquiry' is wider than the term 'trial' because while trial presupposes the idea of an offence, inquiry relates not only to offences but also to matters which are not offences such as proceedings for committing the case, maintenance, security proceedings etc. Thus it also relates to matters which are not offences. A trial may be in respect of an offence only. It is a judicial proceeding which ends in conviction or acquittal.

C. **JUDICIAL PROCEEDINGS :-** In **Shrichand Vs. State of M.P., 1993 Cr.L.J. 498 = 1992 MPLJ 383,** the meaning of the words 'Judicial Proceedings' has been explained. It says that :

Every judicial proceeding whatever, has for its proper ascertainment of some right or liability. If the proceeding is criminal the object is to ascertain the liability of the person accused. If the proceeding is civil, the object is to ascertain some right of property or some status or the right of one party and the liability of the other to some form of relief.

Judicial proceeding is a proceeding in which evidence is or may be taken on oath or in which any judgment, sentence or final order is passed or recorded evidence-***Gholana v. Ismail, 1 All.***

For determining the question whether an enquiry is a judicial proceeding or not one must look to :-

(i) the object of the enquiry,

(ii) the nature of the enquiry, and

(iii) the powers that the person holding the enquiry has in relation thereto -See **AIR 1951 MB 44.**

To constitute a judicial proceeding, evidence need not have necessarily been taken. It is sufficient if evidence is contemplated to be taken on oath, when a Magistrate acts judicially, it becomes a judicial proceeding.-E. ***Peddiasubba Reddy v. State,*** **1993 Cr.L.J. 495 (MP).**

An investigation would be excluded unless it is ordered as a part of the trial, for example, an investigation made by a Magistrate as directed by the Magistrate who has taken cognizance of a complaint under **Section 202.-*Veni v. Wajid,* AIR 1937 all 90.**

Acts of Court passed judicially and effecting rights of parties are included in the definition of "judicial proceeding".-***Subramaniam v. Commissioner of Police,*** **AIR 1964 Mad 185 : 1964(1) Cr.L.J. 519.**

There are judicial proceedings as well as proceedings other than judicial proceedings. For instance recording of statement by a Magistrate u/s 164 Cr.P.C. is non-judicial proceeding. It is what is said in ***Purushottam Vs. Emperor, (1921) 45 Bombay 834.***

What are inquiries, Judicial proceedings and proceedings other than Judicial proceedings, one may refer to standard books on Cr.P.C. by A.I.R., Sohani, Basu and more others.

TO CONCLUDE :- Hope this article may help to solve the problems (if any) relating to the said subject to some extent. One may say that there is nothing to know about this subject but it is always there to look to the subject from others point of view also. This may result in bringing about new aspects in relation to the subject before us. One can buck one's ideas up.

Table showing type of proceedings under the Code

Proceeding	By whom	Object and Nature	Oath
Investigation	By police or other authorised person (other than a Magistratate).	Collection of evidence for the purposes of any inquiry or trial	Oath cannot be administered to the persons examined or interrogated.
Inquest	(a) By police u/s. 174.	(a) Ascertainment of the cause of death in cases of suicide, unnatural death, death cased in commission of crime etc. Police is required to get the post-mortem examination done in cases of bride-burning or bride- suicides and in other cases where there is doubt regarding the cause of death.	(a) Police cannot administer oath to person summoned for inquest.
	(b) By Magistrate u/s. 176.	(b) Inquest by Magistrate is mandatory in cases of (i) death of a person while in police custody; (ii) death in case of bride-burning or bride- suicide. Inquiry into the cases of deaths as mentioned in (a) above is at the discretion of the Magistrate.	(b) Magistrate may administer oath to persons to be examined by him.
Inquiry	By a Magistrate or court.	Judicial determination of any question (other than one relatiing to the guilt or innocence of any person in respect of any offence alleged against him) under the Code.	Oath can be administered to the persons to be examined.
Trial	-do-	Judicial determination as to the guilt or innocence of any person accused of any offence.	-do-

NOTE :- Extract - Courtesy "Lectures on Cr.P.C. by R.V. Kelkar, 1990 Edition.

CONTRACT FOR SALE AND PART PERFORMANCE EPITOMISED

P.V.NAMJOSHI

The extract from Section 54, Transfer of Property Act relating to contract for sale and Section 53-A relating to part performance is reproduced for ready reference :

SECTION 53A, PART PERFORMANCE :-

Where any person contracts to transfer for **consideration** any immovable property by **writing** signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a trasferee for cosideration who has no notice of the contract or of the part performance thereof.

SECTION 54- CONTRACT FOR SALE :-

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Comparative study relating to **'Part Performance'** would be limited only with reference to **'Contract for sale'**.

DOCTRINE - INDIAN AND ENGLISH

Basically there is difference between Indian and English Law relating to the doctrine of Contract for sale. As a general rule, in England a contract for sale on property makes one the owner- the owner in equity of the estate. But in India the distinction between the legal and equitable estates, is not recognised. Under the English law the purchaser by virtue of contract for sale becomes in equity, the owner of the property from the date of the contract. Reference can be made to a case ***Walsh Vs. Lonsdale, (1882) 2 Chd. 9.*** The reference is from **Chitty on Contracts General Principles, Chapter 13, Item No. 020 at page 631, 1994 Edition.**

But there is a foot note on that page which says about sufficient act of part

performance. The commentary runs as under :-

"A license coupled with the grant of an interest in land cannot be revoked so as to defeat the grant, to which it is appurtenant." (***Thomas Vs. Sorrell, (1673) Vaughan, 330 : Jones Vs. Earl of Tank Ville (1909) 2 Chd. 440***).

Thus it is a question of part performance coupled with contract for sale, i.e. what we are going to discuss here.

Under English Law the buyer is the equitable owner of the property from the date of the contract. Hence he is liable to pay consideration, money etc., although before the execution of the conveyance the property is actually destroyed. In India contract for sale does not of itself create any interest in or charge on such property, and the title in the property passes only upon the delivery of possession or registration of the document. The result is that in case of accidental loss of the property the buyer is not affected.

Doctrine of part performance under sec. 53A and equitable doctrine of part performance followed in English courts-distinction.-Sec. 53A primarily imports the equitable doctrine of part performance propounded by the courts of England. However, there is an essential difference between the English doctrine and the provisions of sec. 53A. While in England the contract to which the doctrine of part performance applies may be oral, sec. 53A expressly requires that the contract must be in 'writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. It does not recognise or admit an oral contract. It has to be signed by the person contracting the transfer or immovable property - ***Ude Ram V State AIR 1994 P&H 175.***

In England a tenancy-at-will is implied when a person enters into possession under a valid lease. But part performance in India does not confer an equity as in England but to a statutory right which is comparatively a restricted right in that it is available only as a defence. Sec. 53A is only a partial importation into the statute law of India the English doctrine of part performance - ***Technician Studio Pvt. Ltd. V. Lila Ghosh*** **AIR 1977 SC 2425;** ***Maneklal Mansukbhai v. Hormusji Jamshedji*** **AIR 1950 SC 1 : 1950 SCR 75.**

The concept of two classes of ownership, i.e. legal and equitable is alien to Indian law which recognises only one owner. However, many of the English Equitable principles have been taken statutory form in India. From the ultimate paragraph of section 54 and section 40 (which relates to burden of obligation) annexed to ownership but not amounting to interest or easement) it is clear that a contract for sale of immovable property though does not, of itself create an interest in or charge on such property, creates an obligation annexed to the ownership of the immovable property, not amount to an interest in the property but an obligation which may be enforced against a transeree with notice or a gratuitous transferee. The principle was laid in ***Bai Dosa Bai Vs. Mathura Das Govind Das, AIR 1980 SC 1334.***

A contract for sale is therefore, merely a document creating a right to obtain another document and does not require registration. Again there is a distinction between a contract to sale and contract of sale. The contract to sale is an executory

contract while the later is an executed contract. The sale creates a Jus in rem while contract to sale is jus ad rem. The postponement of the passing of title in a contract of sale does not convert it into a contract to sell. This was how held in ***Sahadeo Vs. Kuber AIR 1950 All 632 and Sujan Vs. Mohkam, AIR 1983 Punj 180.*** Thus in a contract for sale (contract of sale) where the property agreed to be sold is compulsorily acquired, the purchaser suing for specific performance of the contract cannot claim compensation money lying with the collector under this section or under Sec. 73(2) of the Transfer of Property Act, which says about the right to proceeds of Revenue sale or compensation on acquisition.

EQUITIES OF PERSONS CONTRACTING TO BUY :-

If the transaction is still in the stage of contract, the buyer, even if he has paid the price or part of the price and even if he has taken possession, is not the owner and the property is still in the seller. But these circumstances may give rise to equities in favour of the buyer. A buyer who has paid the price or part of the price in anticipaion of a conveyance is entitled under section 55(6)(b) to a charge on the property for the amount paid. If the contract is still capable of specific performance, the buyer may file a suit for specific perfomance and complete his title. If the buyer is in possession in pursuance of the contract, he is protected from dispossession by the right enacted in section 53A. But if section 53A does not apply "an averment of the existence of a contract of sale, whether with or without possession following upon the contract is not a defence to an action for ejectment in India". **(1934) 61 I.A. 388)**

CONTRACT FOR SALE OF IMMOVABLE PROPERTY AND CONTRACT FOR SALE OF GOODS :-

A contract for sale of immovable property differs from the contract for sale of goods. In that the Court will grant specific performance of it unless special reasons to the contrary are shown. It is not within the competence of the guardian of the minor to bind the minor by a contract for the purchase of land. And as there is **want of mutuality** the minor on attaining majority cannot obtain specific performance of the contract. Otherwise a contract for the sale of land is subject to the general rules applicable to all contracts; and this and other sections of Act are taken as part of the Contract Act as shown in section 4 of Contract Act. A contract of sale by minor is void, but a contract for sale to a minor is valid.

An unregistered contract of sale is an agreement to sell and so gives rise to a right to enforce specific performance not only against the vendor but also against a transferee from the vendor with notice of the contract as held in ***Jayanarayan Vs. Balwant, AIR 1939 Nag 35.*** Although the contract of sale can be enforced against a subsequent transferee with notice and perhaps against an attachment the title relates back. Please see ***Gandmal Vs. Laxman, AIR 1945 Nag 86.***

The simple rule would be when the title to the goods passes under the contract, it is a sale and when the title does not pass the contract is an agreement to sell. Please refer to ***State Vs. Gannon, AIR 1958 SC 550 and State Vs. Motilal, AIR 1981 HP 8.***

CONTRACT FOR SALE - TIME AND ITS ESSENCE :-

In transaction with sale of immovable properties formal time is not the essence of contract. Please also see section 55 of the Contract Act, when the time is essence of contract. Whether or not time was of the essence of the contract would have to be judged in the context and the circumstances of the case as held in ***Indira Kaur Vs. Sheolal, AIR 1988 SC 1074.*** Please also refer to ***Govind Prasad Vs. Hari Dutt (1977) 2 SCC 539.***

If one takes it as a general rule that time is of the essence of a contract, then the original claim may be defeated easily by going away at the material time giving no opportunity to the vendee to enforce his claim. It may be that where receprocal compromise is made by way of concession. The compliance with the receprocal obligation can be secured strictly within the stipulated time. ***(Indira Kaur Vs. Sheolal, AIR 1988 SC 1074).***

OBJECT OF SECTION 53-A (PART PERFORMANCE) :-

This section gives right to the defendant to protect his possession as against the transferor. It is equally available against persons who claim under him, such as his heirs assignees and legal representatives.

WATCH OVER PRINCIPLE :-

The watch guards which have been engrafted in Section 53-A to prevent fraud on the part of the defendant himself are :

(1) that the defendant must have in part-performance, that is to say, in pursuance of the unregistered contract, taken possession of the property; (2) that he must continue in possession in such part-performance of the contract at the time of the dispute; and (3) if these conditions are satisfied, he can resist a suit for recovery of possession from him either by the tranferor or by any person claiming under him, provided only that such latter person would not be affected by the defence of part performance if he was a person who had acquired the property for consideration without notice of the contract to the defendant or of the part-performance thereof.

DOCTRINE OF PART-PERFORMANCE WHEN CAN BE SUCCESSFULLY INVOKED

The equitable doctrine underlying Section 53-A when successfully invoked necessarily requires that the party seeking its benefit must establish that he is entitled to ask for the assistance of rules of equity.

The Mysore High Court explained in ***K. Jamil Ahmed Saheb Vs. Mahabub B, 1964 Mys. L.R. (Supp) 619,*** All that is necessary in order to sustain an appeal to the doctrine of part-performance is the demonstration of the fact that the matter advanced beyond the stage of contract and resulted in part performance. Although one of the requirements of Section 53-A as explained in that case was that there should be such taking of possession by the transferee in part-performance of the contract before he could contend that there was a part-performance, it was also explained that it is not always necessary that the agreement should incorporate a recital that there was a transformation of possession as mortgagee, into possession as purchaser or transferee. The Mysore High Court observed that it was enough if there was some indication of such transformation.

PART PERFORMANCE - INGREDIENTS :-

Following are the essential ingredients relating to the part performance :

1) This refers to immovable properties.

2) There must be a consideration.

3) The contract should be in writing, signed by the parties and the terms should be ascertainable.

4) The transferee should in part performance of the contract take possession and should continue in possession and do some act in furtherance of contract and the other terms are routine terms like willingness to perform contract.

5) The last ingredient of the section is such type of contract does not bind a person who has paid consideration and who has under notice of the contract and part performance thereof. (See also ***AIR 1970 SC 546, Nathulal Vs. Phool Chand***)

The main ingredients are, there should be written document and the possession of some portion of the property is transferred under the written agreement to the intending purchaser.

DISTINCTION BETWEEN PART PERFORMANCE AND CONTRACT FOR SALE :-

The main distinction between contract for sale and part performance is :-

(1) a contract for sale may be oral where as part performance under Section 53-A of the Transfer of Property Act must be in writing.

(2) In contract for sale, possession may not be transferred to the intending purchaser but in case of part performance transferee has to take possession or if he is already in possession of the whole or part of the property, his possession should be under the agreement.

(3) In case of part performance the transferee has a right to protect his possession where as in case of contract for sale, if there is no possession, then it is a bare contract for sale and therefore the transferee has no interest in and charge over such property and cannot claim any right in property. What he can do is he may file a suit for specific performance of the contract.

(4) In case of part performance, the person in possession of property may protect his possession and may get an injunction against the transferor where as in case of contract for sale the intending purchaser cannot restrain the transfereor from selling the property to other person. He cannot file a suit simplicitor for injunction only. He has to seek the relief of specific performance, i.e. a consequential relief and only then he can seek injunction against the transferor. Please refer to ***1971 MPLJ S.N. 29, Babulal Vs. Jitendra Singh.***

For further studies please go through section 42 of Specific Relief Act, 1877 repealed and section 34 Specific Relief Act.

PRINCIPLE RELATING TO SWORD AND SHIELD :-

Again we shall refer to the case of ***Walsh Vs. Lonsdale. (1882) 2 Ch.D. 9.*** Under English law as equity treats that has done which ought to have been done. Even an

oral application is sufficient to attract the doctrine. This rule is known as equity in ***Walsh Vs. Lonsdale;*** but in India, it is specifically provided that the agreement must be contained in a written document. Under English Law, the doctrine can be used both by the plaintiff and the defendant. If a person has dispossessed of the property in question, he can base his action on the strength of the doctrine. But here in India,if a person has dispossessed of the property in question,he can base his action on the strength of the doctrine. If a person is dispossessed having no title he may also file a suit for possession over the property. Under section 6 of the Specific Relief Act.

It is said that in India it is only the defendant who can plead the provisions of Section 53-A of the T.P. Act. It is said that the equity of part performance in India is a negative equity, but not a positive equity. It can be used as a shield, but not as a sword because the nature is negative. It gives only a right to protect the possession, which has already been obtained. It does not give any other right, e.g. to sue the other party. By virtue of section 53-A the defendant, if already in possession, may hold on to the possession. The purpose of enacting section 53-A was in a limited part and introduced in a limited form, the English doctrine of equity of part performance. Please refer to ***Chaliaqualla Ramchandrayya Vs. Bapanna Satyanarayana, AIR 1964 SC 877.*** Please also refer to ***Biswabani Vs. Santosh, AIR 1980 SC 226.*** In a Gujarat decision in ***Savarkanda Nagarpalika Vs. Moninagar Niva, AIR 1981 Guj 243,*** it was held that part performance is not merely 'a sword' and injunction was granted in favour of the plaintiff who sought for protection under section 53-A as a shield and not as a sword. Again in ***Madan Mohan Vs. Gourishankar, AIR 1988 MP 152*** the same view was taken. The crux of the provision contained in section 53A is that **mutural covenant's are operative** though title is not transferred as a result the transferee., though he cannot seek to enforce his title, can resist the attack on his rights under the contract, which would include the right to retain possession. As such section 53-A can also be used as a sword so as to injunct the transferor from disturbing the transferee's possession.

In Gujarat case the plaintiff society in possession of suit land leased out to it by Municipality. A suit was filed against municipality seeking protection to its possession under section 53-A. It was held that the society must be protected from unjust invasion by municipality over its legitimate rights. In **1988 M.P. 152** it was held that the unregistered document was treated by plaintiff as agreement to sell and the document was found to be complete sale, the plaintiff would be entitled to permanent injunction. In case of ***Mukesh Vs. Dev Narayan,*** **AIR 1987 MP 85 at para 26** it is said that the trial court has refused to grant injunction on the ground that the plaintiff was not in possession of the suit land. In the present case the plaintiff came before the court with a case for specific performance of the contract based on an agreement. Here we shall refer a case of ***Keshavlal Vs. Narsingh Bhai Kalidas Patel, AIR 1976 Guj 154.*** The facts of the case are reproduced here for ready reference :

'A' agreed to sell certain property to 'B' and subsequently got the property mutated in the name of 'C' on the alleged partition which was found to be untrue. On the allegation that 'A' and 'C' were attempting to sell the properties to third

persons, 'B' filed a suit for a declaration of his right under the Contract and for an injunction against 'A' and 'C' from alienating the properties in favour of third persons.

It was held that in the case of an agreement to sell, the parties to the agreement are not entitled to legal character nor can it be said that a person, who has agreed to purchase has got 'any right to any property' for the simple reason that a mere agreement to sell, does not create any interest or any right in the property agreed to be purchased. Under these circumstances, it is not a case in which the plaintiff can obtain any declaratory decree under section 34 of the Act.

But B will be entitled to the relief of perpetual injunction claimed. A person who has agreed to sell his immovable property is more or less in the position of a trustee for the person to whom he has agreed to sell the property. ***F.A. 181 of 1964 decided on 14-7-1971 (Guj)*** relied on.

Even a person who has agreed to sell an immovable property stands in a sort of fiduciary relationship with the person who has agreed to purchase and, therefore, the former cannot commit any breach of his obligation and if he attempts to do so, he can be prevented from doing so by a suitable injunction under section 38 of the **"Specific Relief Act."**

It will be much better to refer to **Pollock and Mulla on Indian Contract and Specific Relief Act by Tripathi, 1986 Edition page 1073,** in which this citation has been discussed and what is said is, "it is submitted that an agreement to sale creates no interest in the property under section 54 of the T.P. Act except to sue for specific performance and the case referred to in **1976 Guj 154** is distinguished."

DOCTRINE OF PART PERFORMANCE AND EQUITABLE DOCTRINE UNDER ENGLISH AND INDIAN CODES : DISTINCTION :-

Section 53A primarily imports the equitable doctrine of part performance propounded by the courts of England. However, there is an essential difference between the English doctrine and the provisions of section 53-A. While in England the contract to which the doctrine of part performance applies may be oral, Section 53A expressly requires that the contract must be in writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. It does not recognise or admit an oral contract. It has to be signed by person contracting the transfer of immovable property. ***Ude Ram Vs. State, AIR 1994 P&H 175.*** In England a tenancy-at-will is implied when a person enters into possession under a void lease. But part performance in India does not confer an equity as in England but to a statutory right which is comparatively a restricted right in that it is available only as a defence. Section 53-A is only a partial importation into the statute law of India the English doctrine of part performance. ***Technician Studio Pvt. Ltd. Vs. Lila Ghosh, AIR 1977 SC 2425; Maneklal Mansukbhai Vs. Hormusji Jamshedji, AIR 1950 SC 1.***

Please also refer to ***Patel Navratlal Roop ji Vs. Kondh Group Kheti Vishayak and another, (1996) 7 SCC 690,*** in which the Supreme Court held that the agreement of sale cannot be used as a title for the declaration in a suit. Equity does not create

interest in the property. It merely gives a right to enforce it specifically as an equitable relief in a court of law. Therefore, transferee taking possession of land in part performance thereof does not acquire any title in the land under S-53-A. The provision creates a bar on the transfer or to assert his title and can be invoked by the transferee only as defence.

INVOCATION OF DOCTRINE OF PART PERFORMANCE BY PLAINTIFF :-

No doubt it is settled law that Section 53-A is available by way of defence only. It is not, however, correct to say that Section 53 T.P. Act can be invoked only by a defendant. It can also be invoked by a plaintiff so long he uses it as a shield. So, a plaintiff may sue for injunction for restraining the defendant on the plea of part performance provided, however, the requisite conditions for calling in aid of the section are fulfilled. Please refer to ***Akram Mea Vs. Secunderabad, Municipal Corporation, AIR 1957 AP 859*** and ***Chaitan Das Vs. Murali Dalai, AIR 1971 Ori 41.***

LIMITATION :-

The Report of the Select Committee reads as under :-

"We, therefore, think that, in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part performance of the contract and subject to the other conditions which we have proposed. In **46 Mad 919** and **23 CWN 284,** the courts took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation."

It has been held under this section, i.e. under section 53-A that Art. 113 of the Limitation Act (old) Now Art. 54 of the Limitation act (New) does not apply. Limitation does not generally apply to a plea in defence. See ***Sri Kishan Lal Vs. Mt Kashmiro 20 CWN 957 (PC).*** It confers only a passive right on a defendant to protect his possession. But in order to have the protection of Sec. 53A, possession must be taken in part performance of the contract before the enforcement of the contract is barred by time.

ADVERSE POSSESSION :-

In ***Thepali Vs. Daddi, 1999 M.P. RN 407 (HC),*** it was said that long possession under unregistered sale can still be relied on for purpose of delivery of possession to seller and possessee's names named in the record of Registrar of Records, such possession cannot be disturbed by the courts.

In ***Roop Singh Vs. Ram Singh, 2000 (3) M.P.H.T. 18 (SC),*** the Supreme Court held that defendant getting possession of suit land as lesse or under a batai agreement, it is for him to establish by cogent and convincing evidence, hostile animus and possession adverse to the knowledge of real owner. Mere possession for long time does not result in converting permissive possession into adverse possession. ***Thakur Kailash Singh Vs. Arvind Kumar, 1995 SC 73 and Mohanlal Vs. Mirza Abdul Gaffar and another (1996) 1 SCC 639*** referred to.

Plea retaining possession by the defendant under Section 53-A of Transfer of Property Act and plea of adverse possession are inconsistent with each other. Plea of adverse possession would not be available to the defendant unless hostile animus

or retaining possession as an owner after getting in possession of the land, has been asserted or pointed out.

SUBSEQUENT PURCHASER WITHOUT NOTICE : EFFECT OF :-

In ***Ramlal Vs. Mangal Singh, 2000 M.P. RN 30 (HC),*** it was held that subsequent purchaser without notice has right to possession. Sale deed undated, unregistered and without recitals of handing over possession do not give any title. Registered sale deed containing recital of handing over possession to vendee by co-owners/sellers. Another agreement to sell containing no such recital cannot be given any weight.

NATURE OF SUIT FOR GRANTING OF INJUNCTION :-

Where there is a written agreement and the plaintiff is in possession by virtue of part performance he has right to protect his possession and he can also file a suit for specific performance. If the plaintiff (transferee) feels that the transferor may dispossess him from his possession, he can file a suit for injunction, for protecting his possession on the suit property because he has entered into the possession by virtue of an agreement and his possession is legal possession and therefore, the transferor cannot dispossess him without due process of law. In addition to that he can also file a suit for specific performance and can take formal relief also. But if there is a contract for sale under last para of section 54 of the T.P. Act., and if he is not in possession of suit property by virtue of such agreement, then he has no right to file a suit for injunction, where injunction simplicitor is sought against transferor for restraining him from selling the property to someone else, because such suit is not maintainable for declaration or injunction simplicitor, which was also made clear in **1971 MPLJ S.N. 29** (***Babulal Vs. Jitendra Singh***) Again the possession must be under part performance. For example if a tenant who is in possesion of suit property enters into an agreement under last clause of Section 54 T.P. Act for contract of sale and even if there is a written agreement, the tenant, the intending purchaser is in possession of the suit property by virtue not under part performance because by that agreement tenancy has not seized and it subsists and therefore his possession is that of a tenant only. Please also refer to Mankunwar Vs. Bhodiram 1957 J.L.J. 879, Chandmal Vs. Chouturam 1963 JLJ 290 (SN) and 1962 M.P.L.J. 135 (SN) Chandrika Prasad Vs. Dani Prasad. Please also go through other citations u/s 42 (Old Act) and S. 34 (New Act) for further studies.

CONCLUSION :-

Thus Section 53-A of the T.P. Act is made applicable only when there is a contract in writing signed by the party sought to be charged (transferor) and the transferee should have taken possession of at least some portion of the said property under the agreement, where as in case of contract of sale the parties to contract may also orally agree for sale and purchase of the property. In case of part performance the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof are not adversely affected. In case of part performance, a transferee has a right to protect the possession of the property taken in possession under the contract. However, under a contract for sale, no interest or charge on such property is created in favour of intending purchaser.

BETTER KNOW IT

SCOPE OF SESSIONS JUDGES IN REVISION BY A PRIVATE PARTY

A seminar was held on 12-8-2001 at Indore. The seminar was conducted by the J.O.T.I. in which Judges from District Court, Indore participated.

One of the Additional District Judges put a question about the scope of Sessions Court in revision, (by a private party) against an order of acquittal or about the quantum of sentence passed by a trial court. Whether the Sessions Court can consider the question of quantum of sentence as to whether it is on lower side or on higher side? **Mind that the revision is not meant for enhancement of sentence but for questioning the correctness of the quantum of the sentence or acquittal.**

The question was answered suitably but the discussion went on for a long period. It was also told that Judges can refer to 'Joti Journal' where on several occasions such type of question was answered by the High Court and the Supreme Court. Presently, I will refer few citations. **1999 Joti Journal February pt. Titbit No. 37 page 47, *Prem Shankar Vs. Kaushal Prasad (1998 (2) Vibha 116).*** in which case several rulings were referred to by the High Court and in foot-notes further guidance was given to the Judges to refer to ***Durgadas Vs. State, 1990 (2) MPWN 158 and Shridhar Vs. Prakash Vati, 1990 (2) MPWN 185.*** Again in **1999 Joti Journal April part at page 113 Tit bit No. 17** ***Vimal Singh Vs. Khuman Singh (1998 (2) Vibha 299)*** which laid down the principle about the same subject matter. Again in **2000 Joti Journal August part at page 485 Tit bit No. 33,** there is another citation relating to ***Ashok Vs. Ram Sewak, 2000 (2) M.P.H.T. 393.*** The leading case is ***K. Chinnaswamy Vs. State of A.P., AIR 1962 SC 1788.*** It is also requested to go through **1999 Joti Journal April part at page 142 Tit bit No. 55,** ***Kishan Swaroop Vs. Govt. of NCT of Delhi, (1998) 8 SCC 451*** and also please refer to **(1993) 3 SCC 690.** Judges are requested to go through the provisions of Sections 397, 398, 399 and 401 Cr.P.C. In **Vinod Kumar Vs. Mohravati, 1990 Cr.L.J., 2068** (All. Bench) it was held that the Section 399 deals with the powers of the Sessions Judge while hearing a case of which record has been called for by himself. The said powers are the same as that of the High Court under Section 401. In ***Niranjan Kumar Vs. Randhir Roy, 1990 Cr.L.J. 683 (Cal)*** it was held that when there was acquittal of the accused who was charged on the police report and the state did not file an appeal against it, the informant, since he had no right of appeal he was held to be competent to apply for a revision. Even a third party has a right to file a revision. This is how stated ***Bishweshwar Prasad's case, (1933) 56 All. 158 (FB).***

Kindly go through these judgments first, so that the subject will be clear and before going through these citations please go through the text of Sections 397, 398, 399 and 401 Cr.P.C.

Please refer to ***1990(ii) M.P.W.N. S.No.185 Shridhar Vs. Prakashwati*** in which it is said that sessions court and High Court both have concurrent jurisdiction of revision. Sessions court should be approached first. Order of revision may be set aside on revision petition filed by private party. If acquittal is not challenged by State in appeal the private party may challenge the same in revision.

REVISION BY AGGRIEVED PRIVATE PARTY IN CASE OF ACQUITTAL IN TRIAL COURT : SCOPE :-

During the course of seminar at Indore, one Judge put a question regarding the scope of revision by an aggrieved private party against a judgment of acquittal passed by the trial Court.

The answer is as under :

The scope is limited and instead of explaining the matter in my own words, I will refer to different issues of **JOTI JOURNAL. 1999(1) JOTI at page 47 Tit Bit No. 37, 1999 (4) JOTI at page 308, Tit Bit No. 62, 1999 (2) JOTI at page 142, Tit Bit No. 55** and **2000 (4) JOTI at page 485 Tit Bit 33 :**

The subject is very clear. The scope of the revisional court is quite limited. Following are the extracts from the tit bits cited above :-

REVISION BY PRIVATE PARTY AGAINST THE ACQUITTAL OF THE ACCUSED : JURISDICTION OF THE SESSIONS COURT : SECTION 397/401 CR.P.C. :-
1998 (2) V.B. 116 : (1999) 1 JOTI PAGE 47 T.B. NO. 37
PREM SHANKAR Vs. KAUSHAL PRASAD

Revision by private party against acquittal was challenged. No evidence left for consideration. No inadmissible evidence was considered. The case was based on appreciation of evidence. No interference is permissible. Revision under Section 397/401 of the Cr.P.C. against the order of the acquittal by a private party. Acquittal by ignoring probative value of FIR and without considering material evidence on record. Interference by the High Court is possible.

CASE LAW REFERRED :-

1. Chinna Swamy Reddy Vs. State of A.P., 1962 SC 1788
2. Ayodhya Dubey Vs. Ram Sunder, AIR 1961 SC 1415
3. Bansi Lal and others Vs. Laxman Singh, AIR 1986 SC 1721 were followed.

Judicial Officers are requested to go through the judgment in whole. They are also requested to go through the following judgments also regarding the jurisdiction of the sessions court in cases of revision by private party against the acquittal of accused. ***Durga Das Vs. State, 1990 (2) MPWN 158*** and ***Shridhar Vs. Prakash Vati, 1990 (2) MPWN 185.***

2) CR.P.C., SS. 378 (1)(4) AND 401
1999 (1) MPWN 25 (SC) : 1999(4) JOTI; PAGE 308; T.B. NO. 62
JASBIR Vs. STATE OF PUNJAB

Accused acquitted in case instituted on police report. Appeal by complainant not maintainable. Such appeal may be converted into revision.

3) CR.P.C., SECTIONS 401, 378 AND 210 :-
(1998) 8 SCC 451 : 1999(2) JOTI; PAGE 142, T.B. NO. 55
KISHAN SWAROOP Vs. GOVT. OF NCT OF DELHI

ORDER

1. Leave granted. Heard the learned counsel for the parties.

2. On a report lodged by the appellant with the Sadar Bazar Police Station, Delhi a case was registered against three persons. After police submitted charge-sheet (challan) against them they stood their trial for offences punishable under sections 381 and 411 of the Indian Penal Code. The trial ultimately ended in their acquittal and aggrieved thereby the appellant filed a revision petition in the Delhi High Court. At the time of hearing of the petition the High Court posed the question whether the appellant was required to obtain permission from the Public Prosecutor to file such a petition and relying upon the judgment of this Court in ***K. Chinnaswamy Reddy v. State of A.P. AIR 1962 S.C. 1788*** and some judgments of the High Courts, it answered the same in the affirmative and dismissed the revision petition without prejudice to the appellants right to approach it afresh after obtaining the requisite permission. The above order is under challenge in this appeal.

3. From the impugned judgment we find that the High Court has referred to the provisions of Sections 378 and 210 of the Code of Criminal Procedure to conclude that it was the primary responsibility of the State to file appeal/revision and therefore no criminal revision in respect of an order which is appealable at the instance of the State could/should be entertained without the requisite permission of the Public Prosecutor. In drawing the above inference the High Court failed to notice that if the Code of Criminal Procedure did not empower a private party to file a revision petition against an order of acquittal passed in a case instituted on a police report a formal permission of the Public Prosecutor would not entitle him to do so. To put it differently, a Public Prosecutor cannot vest a private party with a right which it has not got under the Code.

4. In dealing with the revision powers of the High Court vis-a-vis the right of a private party to move in revision against an order of acquittal passed in a case instituted upon a police report this Court observed in Chennaswamy Reddy (on which judgment the High Court relied) as under.

   It is true that it is open to a High Court in revision to set aside an order at acquittal even at the instance of private parties, though the state may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

5. In view of the earlier discussion of ours and the above quoted observations of this Court we unhesitatingly quash the impugned order and allow this appeal.

NOTE : Please refer to **(1993) 3 SCC 690 (1973) 2 SCC 583, (1975) 4 SCC 477.**

4. CR.P.C., SECTIONS 401 AND 401(3) : CRIMINAL REVISION AGAINST ACQUITTAL : LOCUS STANDI OF PARTY NOT PARTY TO THE PROCEEDINGS
2001 (2) M.P.H.T. 393 : 2000 (4) JOTI; PAGE 485 T.B. NO. 33
ASHOK Vs. RAMSEWAK

The petitioners filed criminal revision against the impugned order of acquittal of non petitioners passed by the trial Court. The preliminary objection of non-petitioners regarding petitioners' locus standi. Hence question of maintainablilty of this criminal revision was raised as to whether the petitioners who are private parties have locus standi to move this court by filing this criminal revision because the aggrieved party was the State, who has not preferred appeal against the order of acquittal. It was held that there is no bar as such for the private parties to prefer a revision petition. It can be entertained in exceptional cases, where there has been miscarriage of justice on account of manifest error on a point of law. ***K. Chinna Swamy Vs. State of A.P., AIR 1962 SC 1788*** followed.

NOTE :- Please see Joti Journal, 1999 February at page 47 and Joti Journal, 1999 April at pages 142 and 113. Also see 1998 (2) V.B. 116, AIR 1961 SC 1415, AIR 1986 SC 1721, 1990(2) MPWN 158, 1990 (2) MPWN 185, (1998) 8 SCC 41, (1993) 3 SCC 690, (1973) 2 SCC 583, (1975) 4 SCC 477, AIR 1961 SC 1415 and AIR 1986 SC 1721.

BETTER KNOW IT

THE EXTENT OF POWER TO REVERSE OR MODIFY DECREE - EXPLAINED

One learned reader wanted to know with reference to the Article **"The extent of power to reverse or modify decree"** appeared in **2001 (5) Joti Journal pages 325-328.** He drew my attention to second paragraph of the sub heading "Non-deciding application" (page 326) regarding the conclusion on the subject.

My conclusion runs like this :

"To conclude this subject, it can be safely said that in view of Section 99 CPC, unless manifest injustice is shown, the judgment and decree of the trial Court cannot be interfered with merely for one of territorial jurisdiction or other jurisdictional error or other errors described in the section."

I will draw attention to Section 21-A and 21 of the CPC with reference to this conclusion. It will make the conclusion more clear. It is further requested that Judges may go through **1999 JOTI April Part Tit Bit No. 11 at page 45** and **Tit Bit No. 12 at page 46.**

Section 21-A of the C.P.C. is reproduced for ready reference :-

"21-A : BARE ON SUIT TO SET ASIDE DECREE ON OBJECTION AS TO PLACE OF SUING :- No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

EXPLANATION :- The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned."

21. OBJECTIONS TO JURISDICTION -

(1) No objection to the place of suing shall be allowed by any Appellate or Revisional

Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earnest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

विचार जो साकार करना है

मित्रों

आने वाले फरवरी 2002 के साथ सन 2001 का इंडेक्स प्रदान करने का पूर्ण प्रयत्न है। दिसम्बर 2001 का मात्र इंडेक्सिंग शेष है। जो अब प्रकाशित हो रही है।

माननीय मुख्य न्यायाधिपति महोदय ने अतिकृपावंत होकर पत्रिका के पृष्ठ, आवश्यकतानुसार 100 पृष्ठ तक प्रकाशित करने की अनुमति दी है। संस्था की ओर से श्रीमान को साधुवाद। इसी कारण यह अंक शतकीय पृष्ठों का है।

टिट बिट्स अत्याधिक मात्रा में प्रकाशित करना शेष है। लगभग 500 टिट बिटस् अग्रिम रूप से तैयार भी है व रोजाना ही यह काम द्रुतगति से चलता रहता है। यथा सम्भव यह कार्य आने वाली पत्रिकाओं में उन्हें प्रकाशित कर के पूर्ण कर लेंगे। कुछ महानुभवों के लेख भी प्रकाशित करना शेष है।

कम्प्यूटर की राह देख रहे हैं। वह आने के पश्चात कार्य में सुपरसॉनिक गति आ जाएगी।

प्रयत्न यह रहेगा कि तत्पश्चात पिछले सात वर्षों में पत्रिका में प्रकाशित विभिन्न महत्वपूर्ण लेखों का, व परिपत्रों का व अन्य दैनंदिन सामग्री का प्रकाशन भी एक पुस्तक प्रकीर्णक विविध संग्रह (Miscellany) तैयार करने का विचार है जो प्रत्येक न्यायाधीश के लिए अत्यंत उपयोगी एवं समय का साथी (Boon Companion) सिद्ध हो सकता है। वर्तमान में यह एक विचार कल्पना है उसे वास्तविकता में परिणित करने में समय लग सकता है।

संपादक

PRINCIPLE (RATIO) OF A CASE

The rules for finding the principle of a case can, therefore, be summarized as follows :

(1) The principle of a case is not found in the reasons given in the opinion.

(2) The principle is not found in the rule of law set forth in the opinion.

(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case, and the judge's decision.

(4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.

(5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion.

The rules for finding what facts are material and what facts are immaterial as seen by the judge are as follows;

(1) All facts of person, time, place, kind and amount are immaterial unless stated to be material.

(2) If there is no opinion, or the opinion gives no facts, then all other facts in the record must be treated as material.

(3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record.

(4) If the opinion omits a fact which appears in the record this may be due either to (a) oversight, or (b) an implied finding that the fact is immaterial. The second will be assumed to be the case in the absence of other evidence.

(5) All facts which the judge specifically states are immaterial must be considered immaterial.

(6) All facts which the judge impliedly treats as immaterial must be considered immaterial.

(7) All facts which the judge specifically states to be material must be considered material.

(8) If the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material.

(9) If in a case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of all the facts held material by the various judges.

(10) A conclusion based on a hypothetical fact is a dictum. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.

-**GOODHART**, Arthur I., Essays in Jurisprudence (Cambridge : 1931),

CORRIGENDA

Let us correct the last paragraph by substituting the following portion at page 324 after "Thus in pending....and grant the fresh order of bail."

TO BE AMENDED :-

But in case where accused has been released on bail u/s 389 of the Cr.P.C. has been extended with a facility that instead of attending the High Court/Superior Court he may approach the Chief Judicial Magistrate for periodical attendance causing there by least harassment, inconvenience and expenditure for attendance. De facto he is reporting his presence before the concerned C.J.M./ Magistrate but De Jure he is appearing before the Superior Court/High Court through that Magistrate. Therefore, he is obliged to attend the Magistrial Court as and when directed. The accused is not at liberty to control the proceedings at his own sweet will in the Magistrial Court as envisaged by **Hon'ble Shri Justice Dipak Misra** in his celebrated order an bail in the case of ***Veer Singh Vs. State*** as referred to above.

If an accused whose sentence only is suspend subject to the decision of the appeal/ revision is not permitted to commit the breach of the terms and conditions of the bail order. And if so commits the concerned Magistrate has jurisdiction and liberty to deal with the accused. He may condone the absence or take suitable action u/s 89-446 and 446A of the Code of Criminal Procedure and send him to jail. This cannot be interpreted as transgressing the powers by the Magistrate. The directions given by the Superior Court / High Court are to be complied with by the accused and the concerned Magistrate. The Magistrate has inherent powers to take suitable action by cancellation of bail order, forfeiture of bail bonds, recovery thereof and send him to jail till he is able to produce fresh order of bail from the Superior Court/High Court.

TO SUMMARISE IT :

(a) Magistrate has power to arrest the accused u/s 89 of the Cr.P.C.

(b) He is under obligation to intimate the circumstance which lead him to take action u/s 89 of the Cr.P.C. or other suitable action as the case may be;

(c) He has jurisdiction to proceed u/s 446 and 446A of the Code;

(d) Attention is also drawn to the last few lines of **Chintamani's case** refered to above.

दोष निवारण

माह अक्टूबर 2001 के ज्योति में अक्षर संयोजन एवं विन्यास में जो त्रुटियां त्वरित दृष्टिगोचर हो सकी हैं वे इस प्रकार हैं। कृपया संशोधन कर लें। असुविधा हेतु क्षमस्व।

1. पृष्ठ 313 – शीर्षक में **न्यायधीश** के स्थान पर **न्यायाधीश** पढ़ें।
2. पृष्ठ 326 शीर्षक **Non- Deciding application** के अंतर्गत दूसरे चरण में अंत में "Sec. S. 21A CPC" जोड़ा जावे।
3. पृष्ठ 324 पर अनुक्रमांक 5 के पश्चात Part IV 1997 August Part पश्चात Page 29 लिखा जावे।
4. पृष्ठ 337 पर शीर्षक में **तैय्यारी** के स्थान पर **तैयारी** पढ़ें।
5. पृष्ठ 363 पर टिट बिट क्र. 18 में **ऑर्डर 23** के स्थान पर **33** पढ़ें।

FLASH

AMENDMENT IN CR.P.C.
THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2001
NO. 50 OF 2001

Received the assent of the President on the 24th September, 2001 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 24-9-2001 Pages 1-2 (S. No. 58)

An Act further to amend the code of Criminal Procedure, 1973.

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows :-

1- **Short Title -** This Act may be called the code of Criminal Procedure (Amendment) Act, 2001.

2- **Amendment of section 125. -**In the Code of Criminal Procedure, 1973 (2 of 1974) (hereinafter referred to as the principle Act), in section 125.-

(i) in sub-section (1)-

(a) the word "not exceeding five hundred rupees in the whole," shall be omitted;

(b) after the proviso and before the Explanations, the following provisos shall be inserted, namely :-

"Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct :

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceedings under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.";

(ii) for sub-section (2), the following sub-section shall be substituted, namely :-

"(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";

(iii) in sub-sections (3) and (4), for the word "allowance", wherever it occurs, the words "allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be "shall be substituted.

3. **Amendment of section 127.-** In section 127 of the principal Act,-

(i) for sub-section (1); the following sub-section shall be substituted, namely :-

"(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the mainte-

nance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.";

(ii) in sub-section (3), in clause (c), for the word "maintenance", the words "maintenance or interim maintenance, as the case may be," shall be substituted;

(iii) in sub-section (4),-

(a) for the words "monthly allowance has been ordered", the words "monthly allowance for the maintenance and interim maintenance or any of them has been ordered" shall be substituted;

(b) for the words "as monthly allowance in pursuance of", the words "as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of" shall be substituted.

4. **Amendment of section 128.-** In section 128 of the principal Act,-

(i) for the word "maintenance", the words "maintenance or interim maintenance and expenses of proceeding, as the case may be", shall be substituted;

(ii) for the words "whom the allowance", the words "whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be," shall be substituted;

(iii) for the words "allowance due", the words "allowance, or as the case may be, expenses, due" shall be substituted.

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WHAT IS NATURAL IN NATURAL JUSTICE?

Judges and writers have criticised the use of the phrase natural justice to describe the essential requirements of a fair hearing. Lord Shaw thought the expression "harmless," "high-sounding," and, in some contexts, "vacuous". ***L.G.B.v. Arlidge*** **(1915) A.C. 120, 138. Black J.** thought "Natural Justice means no more than justice without any epithet"; ***Green v. Blake*** **(1948) I.R. 242, 268. Maugham J.** in a comment reflecting both insularity and cynicism said,

> "The phrase (natural justice) is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Amongst most savages there is no such thing as justice in the modern sense. The phrase 'the principles of natural justice' can only mean, in this connection, the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imparts that the accused should be given his chance of defence and explanation" (***Maclean v. The Workers Union*** (1929) 1 Ch. 602, 624).

Ormrod L.J. has complained that

> "the phrase 'the requirements of natural justice' seems to be mesmerising people at the moment. This must, I think, be due to the apposition of the words 'natural' and 'justice'. It has been pointed out many times that the word 'natural' adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen" (***Norwest Holst Ltd. v. Department of Trade*** (1978) Ch. 201, 227).

Courtesy - Natural Justice by Paul Jackson & Publishers Law Publishing company "Universal".

●

TIT-BITS

1. ADMINISTRATIVE LAW : VIOLATION OF STATUTORY PROVISIONS : EFFECT OF :-

(2000) 8 SCC 262

NETAI BAG Vs. STATE OF W. B.

Mere violation would not render state's action arbitrary in all cases. Distribution of state largesse tender or public action though desirable but when such procedure not followed arbitrariness cannot be presumed in all cases.

LAND ACQUISITION ACT. SECTIONS 16 AND 17 :-

Land required for a public purpose. Mode of sale of unutilised surplus part of such land. The test to determine the validity of land, the test of burden of land explained. In the absence of any specified statutory procedure, it was held the test is to examine whether the impugned mode of sale was against public interest or was actuated by extraneous considerations or opposed to fair play or conferred undue benefit upon an undeserving pary. However, the court can examine only the fairness of the decision-making process and cannot interfere with the ultimate policy decision merely because, in its opinion, another decision would have been better. Moreover, notwithstanding the State's liability show its actions to be fair, reasonable and in accordance with law, the initial burden of showing prima facie evidence of unconstitutionality of the impugned action, held lies upon the petitioner. In the peculiar facts and circumstances of the case, leasing out the land to a private company without floating tenders or holding public auction, held, was not illegal, arbitrary or mala fide.

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2. ARBITRATION ACT, SECTION 8 : CHALLENGE OF APPOINTMENT OF ARBITRATOR :-

2001 (1) M.P.W.N. NOTE 105 (SC)

NATIONAL HEAVY ENGINEERING CO-OPERATIVE LTD. Vs. KING BUILDERS

Trial Court appointing arbitrator as per direction of the High Court. Appointment cannot be challenged on the ground of arbitration clause more so when appointed arbitrator is more qualified and experienced.

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3. ARBITRATION AND CONCILIATION ACT : SECTION 11 : WHETHER THE ORDER OF C.J. OR HIS NOMINEE UNDER S. 11 IS A JUDICIAL ORDER? (RES-INTEGRA)

(2000) 8 SCC 159

KONKAN RAILWAY CORPN. LTD. Vs. RANI CONSTRUCTIONS PVT. LTD.

Whether order of C.J. or his nominee under S. 11 is a judicial order and thus appealable under Art. 136. Question referred to larger Bench in view of contention by appellant corporation that judgment in ***Konkan Rly. Corpn. Ltd. Vs. Mehul Construction Co., (2000) 7 SCC 201*** requires reconsideration on grounds that (i) 1996 Act did not take away power of court to decide preliminary issues, notwithstanding arbitrator's "competance" to decide such issues, including whether particular matters were "excepted matters" or whether an arbitration agreement existed or whether there was a "dispute" in terms of the agreement; (ii) in other countries where Uncitral Model was being followed, court could decide such issues judicially and need not mechanically appoint an arbitrator; (iii) there were situa-

tions where preliminary issues would have to be decided by court rather than arbitrator; (iv) if order of C.J. or his nominee were to be treated as an administrative one it could be challenged before a Single Judge of High Court, then before a Division Bench and then Supreme Court under Art. 136; result would be further delay in arbitration proceedings, and (vi) an order under S. 11 does not relate to administrative functions of C.J. or C.J.I.

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4. CONSTITUTION OF INDIA : SOVEREIGN FUNCTION : DOCTRINE OF PITH AND SUBSTANCE : EXPLAINED :-
(2000) 8 SCC 61
AGRICULTURAL PRODUCE MARKET COMMITTEE Vs. ASHOK HARIKUNI

With the courtesy of Easten Book Company, SCC publishers following portion is reproduced :

Statutory corporation, functionaries where of, were creatures of the statute and some of them performed sovereign functions of the Government whether covered. Test to determine. In answer, the Supreme Court held that it is to be ascertained from the object for which they worked. In interpreting the statute for this purpose, the pith and substance thereof should be found out. On facts, it was held, none of the functions of the Market Committee estalished under Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 are sovereign or inalienable functions of the State. Hence, such a Market Committee, is an "industry". That it was not constituted for making any profits was inconsequential. Therefore, its temporary employees who had not become government servants under the provisions of the Karnataka Act were "workmen" under the Industrial Disputes Act, 1947. Under constitutional law what are the sovereign functions explained. Functions that could be undertaken by private persons, held cannot be sovereign functions.

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5. CONTRACT ACT : SECTION 171 AND WORDS AND PHRASES "LIEN" AND "CLAIM" EXPLAINED :-
(2000) 8 SCC 278
M.V. AL QUAMAR Vs. TSA VLIRIS SAL VAGE (INTERNATIONAL) LTD.

Whereas claim cannot but be termed to be a genus, lien is a particular species arising out of the genus and the two terms namely, claim and lien cannot be identified with each other so as to accord same meaning.

Paragraph 32 of the judgment is reproduced :-

Mr. Ashok H. Desai for Respondent 1 and being the decree-holder, however, in no uncertain terms contended that as a matter of fact it is of no significance at all if the judgment be termed to be the judgment in rem or judgment in personam especially in the facts of the matter under consideration having due regard to the domestic law and in particular Section 44-A of the Code of Civil Procedure. Before, however, dealing with the same a passage from Encyclopaedia Britannica (Transportation Law) may be of some significance. Learned authors thereof while referring the components of maritime law had the following to state pertaining the maritime liens; a word of caution at this juncture ought to be introduced by reason of the confusion in populas (sic populus) between a maritime claim and maritime lien whereas claim cannot but be termed to be genus lien is a particular species arising out of the genus and the two terms namely, claim and lien cannot be

identified with each other so as to accord same meaning. Let us, however, address ourselves on maritime lien as is available in the encyclopaedia and the same reads as below:

"Maritime liens; although admiralty actions are frequently brought in personam, against individual or coporate defendants only, the most distinctive feature of admiralty practice is the proceeding in rem, against maritime property, that is, a vessel, a cargo, or 'freight', which in shipping means the compensation to which a carrier is entitled for the carriage of cargo.

Under American maritime law, the ship is personified to the extent that is may sometimes be held responsible under no liability. The classic example of personification is the 'compulsory pilotage' case. Some state statutes impose a penalty on a shipowner whose vessel fails to take a pilot when entering or leaving the waters of the state. Since the pilotage is thus compulsory, the pilot's negligence is not imputed to the shipowner. Nevertheless, the vessel itself is charged with the pilot's fault and is immediately impressed with an inchoate maritime lien that is enforceable in Court.

Maritime liens can arise not only when the personified ship is charged with a maritime tort, such as a negligent collision or personal injury, but also for salvage services, for general average contributions and for breach of certain maritime contracts."

PRACTICE AND PROCEDURE : "FLEXIBLE APPROACH OF COURTS" :-

The court has to approach the modern problem with some amount flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce.

(Note : How law change with time-mind it- please read the following paragraph)

Paragraph 43 of the judgment is reproduced :

The two decisions noted above in our view deal with the situation amply after having considered more or less the entire gamut of judicial precedents. **Baker, J's** judgement in the **New Zealand's Case, (1980) 1NZLR 104 (NZSC)** very lucidly sets out that the court has to approach the modern problem with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Roscoe Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce. The observations of Barker, J. and the findings thereon in the New Zealand's case with the longish narrations as above, depicts our inclination to concur with the same, but since issue is slightly different in the matter under consideration, we, however, leave the issue open, though the two decision as above cannot be doubted in any way whatsoever and we feel it expedient to record that there exists sufficient reasons and justification in the submission of Mr. Desai as regards the invocation of jurisdiction under section 44-A of the Code upon reliance on the two decisions of the New Zealand and Australian Courts.

6. **1) C.P.C., S. 11, O. 7 R. 11 : RESJUDICATA : SUCCESSION CERTIFICATE :-**
2) INDIAN SUCCESSION ACT, SECTIONS 373, 383 (E), PART X AND 387 :-
(2000) 8 SCC 143
JOGINDER PAL Vs. INDIAN RED CROSS SOCIETY

A decision under Part X upon any question of rights between parties does not operate as res judicata, even where issues were raised and/or evidence was led. In later suit issues have to be decided afresh uninfluence by findings made in proceedings for grant of succession certificate. Trial Court allowing evidence to be led and then dismissed respondent Society's application for certificate and awarding certificate in favour of appellant on basis of second will executed by deceased. Respondent Society filing suit for declaration that it was the lawful owner of property of deceased on the basis of first will. The trial Court rejected the plaint under O.7 R.11. The provisions of Expln. 8 to Section 11 not applicable to finding made in course of proceedings for grant of succession certificates.

It was held by the Supreme Court that Sections 373, 383(e) and 387 of the succession Act, 1925 make it clear that the proceedings for grant of succession certificates are summary in nature and that no rights are finally decided in such proceedings. Section 387 puts the matter beyond any doubt. It categorically provides that no decision under Part X upon any question of right between the parties shall be held to bar the trial of the same question in any suit or any other proceeding between the same parties. Thus section 387 permits the filing of a suit or other proceedings even though a succession certificate might have been granted.

Merely because issues were raised and/or evidence was led, in respect of an application for succession certificate it does not mean that the findings given thereunder are final and operate as res judicata. Even in summary proceedings issues can be raised and/or evidence can be led. The proceedings remain summary even though the court may, in its discretion, permit leading of evidence and raising of issues. So in a subsequent suit the crucial issues must be decided afresh, untrammelled or uninfluenced by any finding made in the proceedings for grant of succession certificate.

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7. C.P.C., O. 41 R. 27 : SCOPE OF :-
2001 (1) CGWN 27 (SC)
MAHAVIR SINGH Vs. NARESH CHANDRA

Scope of O. 41 R. 27 is limited. Application dismissed by appellate Court. Order cannot be reversed in revision as no full case is before High Court in revision.

Powers of appellate Court to take additional evidence are within the limitation prescribed under O. 41 R. 27. Court has to act in accordance with this provision and not outside of it.

Words used under O. 41 R. 27 "or for any other substantial cause" must be read with word "requires".

Ability to pronounce the judgment to be understood as the ability to pronounce a judgment satisfactorily. It is only a lacuna in evidence which empowers to exercise powers under.

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8. C.P.C., O. 22 R. 4 : SERVICE OF L.RS.
2001 (1) MPWN 102
SURESH CHANDRA SHARMA Vs. SURENDRANATH

Service of LRs. application refused. Main case cannot be proceeded ex-parte.

The whole judgment is reproduced to understand the principle underlying the rule.

Feeling aggrieved by the judgment and decree dt. 21.1.1997, passed in Civil Appeal No. 15/A 96 of Vth Addl. Judge, to Distt. Judge, Morena, thereby, confirming judgment and decree dtd. 19.11.1992 passed in Civil Suit No. 106A/88 of1st Civil Judge, Class I, Morena, appellant/defendant has filed this second appeal praying for setting aside the judgment and decree of both the Courts below.

Plaintiff/respondent No.1 to 4 had instituted the suit for eviction and arrears or rent against Shiv Singh Sharma and respondent No. 5, 6, and 7. During pendency of suit, defendant No. 1 Shiv Singh Sharma expired and application to bring his legal representative on record, was moved. The appellant as his legal representative, was found served on the basis of refusal of service. The learned trial Court after substituting LRs. on record proceeded ***ex-parte*** against appellant on the assumption of his service on the application for substitution as LRs. and decided the case on merits. Against the judgment and decree of the trial Court, appeal was also dismissed and the judgment and decree of trial Court was confirmed.

This second appeal has been admitted on the following substantial question of law :

"Whether, the Court can proceed ***ex-parte*** on a date when the case is not fixed for hearing."

It is an admitted position that on 8.9.1988, the case was fixed for consideration of application under Order 22 Rule 4 of CPC when the case was made ***ex-parte*** against appellant for non-appearance in pursuant to notice, which was refused by him. This was issued to him on an application under Order 22 Rule 4 of CPC and was not meant for regular hearing of the case. However, after substituting LRs. on record, the learned trial Court, further proceeded ex-parte against appellant for deciding the case on merits.

The learned counsel for the appellant has submitted that the learned trial Judge ought to have permitted plaintiff to amend the plaint and issued summons alongwith the copy of plaint to appellant for hearing the suit on merits as laid down in a decision of this Court in the case of ***Jaina Bai V. Kubhra Bai*** reported in **1980 (2) MPWN 40,** however, the learned appellate Court has distinguished this case on the ground that appellant had separately filed an application to set-aside the ***ex-parte*** order against him which was rejected by the trial Court, I am of the considered opinion that this controversy now has been finally settled by a Full Bench Decision of this Court, in the case of ***Archana Kumar v. Purendu Prakash*** reported in **2000(2) JLJ 84,** wherein, it has been observed that order of rejection of an application under Order 9 Rule 13 of CPC can also be assailed in appeal on merits. In the circumstances, decision of the case on merits without proper notice to appellant is a nullity.

For the reasons stated hereinabove, this appeal is allowed and the judgment and decree passed by both the Courts below are hereby set-aside. It is directed that the parties shall appear before the trial Court on 5th February, 2001 and the case be decided according to law from the stage, it was heard ex-parte, against appellant.

NOTE :- Judicial Officers are requested to go through a brief note written under the head **'Better know it' in 2001 Joti Journal April issue at page 136.** Judicial Officers are further requested to go through ***2001 (1) CGWN 16 (SC) Jagdish Sawhney Vs. Harbans***

Singh in which it is said that applicant not party in the trial court. Decree passed on 31-8-1995. Knowledge of decree gained on 2-2-1996, simply beacuse he appeared in contempt proceedings, no inference can be drawn about the knowledge of the decree. Delay rightly condoned.

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9. C.P.C. O. 1 Rr. 9 AND 10 : NECESSARY AND PROPER PARTIES WHAT IS :-
2001 (1) MPWN NOTE 107
NANDU BAI (SMT) Vs. CHIEF MUNICIPAL OFFICER

Presence of party not necessary in deciding an issue in either way. Such party is not necessary party.

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10. C.P.C., O. 39 RR. 1 AND 2 AND O. 38 R. 5 : SUIT FOR RECOVERY OF BANK LOAN :-
2001 (1) MPWN NOTE 92
PREMIER ENTERPRISES Vs. CANARA BANK

Suit for recovery of loan by respondent Canara Bank against appellants Premier Enterprises. Trial Court granted injunction to attach the account of defendant with another Bank. The High Court set aside the order as the account in another Bank was not the subject matter of the property. However, High Court Permitted that such action can be taken under O. 38 R. 5 CPC.

The judgment being of general importance, it is reproduced as it is for further studies:-

The appellant/defendants have directed this appeal against the order dated 1.9.1998 passed by V. ADJ Indore in CS No. 58/97 thereby allowing the application of respondent No. 1/plaintiff Bank under O. 39 R. 1, 2 CPC restraining the appellant/defendants from withdrawal of the amount lying deposited in their saving bank A/c with the State Bank of Indore, Rajmohalla Branch, Indore.

Briefly stated the facts of the case are that respondent No. 1 Canara Bank filed a suit against the appellant and other respondents in the trial Court for the recovery of the amount due against the appellant and respondents. In the said suit, the plaintiff/Bank also filed an application under O. 39 R. 1, 2 CPC for grant of temporary injunction against the appellant restraining withdrawal of the amount lying deposited in their saving bank a/c with the State Bank of Indore, Br. Rajmohalla, Indore. Initially, ***ex parte*** order of injunction was issued against the appellant by the trial Court. On service of notice to the appellant, the appellant opposed the prayer of injuction and prayed for vacation of order of injunction, passed ***ex parte.*** The trial Court, on hearing the parties, confirmed the order of ex parte injunction and issued temporary injunction against the appellant as indicated above. Aggrieved, the appellants have filed this appeal against the impugned order of the trial Court.

With the consent, this appeal is heard on merits at the stage of motion hearing.

The counsel for the appellants contended that the trial Court has committed an error in passing the impugned order of injunction without properly appreciating the provisions of Order 39 Rule 1, 2 CPC. The counsel submitted that the order of temporary injunction can be granted only with respect to the property disputed in the suit. The Saving Bank A/c with the State Bank of Indore in the name of the appellant is not at all disputed property

in the present suit. As such the impugned order of temporary injunction is illegal and inoperative and not in conformity with the law with regard to grant of temporary injunction. He also contended that the plaintiffs' suit for the recovery of the alleged amount of loan, as per the plaintiffs' case, was sufficiently secured by the document of hypothecation executed by defendant/debtor. As such no order of temporary injunction restraining the appellants for transacting their business with the saving bank A/c in some other bank be granted under the Provisions of Order 39 Rule 1, 2 CPC and the impugned order of injunction deserves to be vacated. The counsel relied on the decision in ***Darshan Singh v. Central Bank of India and others (1999 (I) MPLJ 644).***

As against this, councel for the respondent No. 1 supported the impugned order and submitted that in the facts and circumstances of the case, the said order was necessary for securing due performance of the decree likely to be passed against the appellants and the other respondents.

I have considered rival submissions of the counsel for the parties and also persued the impugned order and copies of the documents available on record of the appeal. In view of the facts of the case as also provisions of O. 39 R. 1 CPC, the impugned order of injunction cannot be sustained in view of the fact that the alleged saving bank a/c in the name of the appellant No. 2 with the State Bank of Indore, Rajmohalla Br. is not property in dispute in the suit filed by the respondent/plaintiff. The question of irreparable injury also does not arise in favour of the plaintiff/Bank as the suit filed by the Bank is only a money suit filed for the recovery of the loan extended to the defendant/principal debtor. The law is well settled on the point that the injury cannot be considered to be irreparable injury which can be compensated in terms of money. Submissions of the counsel for the appellants also deserve to be accepted that the suit-loan extended to the defendant/debtors was sufficiently secured by the documents of hypothecation executed in favour of the plaintiff/Bank. As such there was no occasion for grant of temporary injunction restraining the appellants from transacting with their saving bank a/c lying with other Bank at Indore.

While considering the question of grant of temporary injunction in a money suit based on documents of hypothecation, this Court in case of **Darshansingh** (supra) has held that in case of loan sufficiently secured by the documents of hypothecation, no temporary injunction restraining the defendants (debtors) from transacting with their Bank A/c with other Bank can be issued under provisions of Order 39 Rule, 1, 2 CPC.

In the light of the facts and circumstances of the case on (at) hand, as also the law applicable, the impugned order of temporary injunction issued against the appellant is illegal and contrary to the settled principles of law and cannot be allowed to sustain and deserves to be demolished.

In my considered opinion, in such cases, appropriate remedy for the plaintiff-Bank is to ask for the relief of attachment before judgment as contemplated under Order 38 Rule 5 CPC.

Consequently, this appeal succeeds and is accordingly allowed. The impugned order of temporary injunction issued against the appellants is set aside and vacated. However, in view of the facts and circumstances of the case on hand, respondent/Bank shall be at liberty to file appropriate application for grant of relief of attachment before judgment permissible under the law, and if such application is filed by the plaintiff/Bank in the trial

Court, the trial Court shall consider and dispose of the same in accordance with law.

With the aforesaid order, this appeal stands disposed of but without any orders as to costs.

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11. C.P.C., O. 9 R. 13 : GROUNDS FOR SETTING ASIDE EX PARTE DECREE :-
2001 (1) MPWN NOTE 95
ASSISTANT COLLECTOR Vs. RAIPUR WIRE AND STEEL LTD.

No written statement filed for 10 years. Defendant represented by their counsel. Such attitude cannot be condemned by setting aside ex-parte decree.

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12. C.P.C., O. 17 R. 1 AND PROVISO (D) : ADJOURNMENTS : PREVIOUS ADJOURNMENTS HOW FAR RELEVANT :-
(2000) 8 SCC 532
STATE BANK OF INDIA Vs. CHANDRA GOVINDJI

To ascertain whether sufficient cause existed to permit adjournment and whether the party seeking adjournment had a reasonable opportunity to present his case, which he had not availed of, the past need not be re-examined as long as a reasonable ground existed on the date adjournment is next sought.

In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. The earlier adjournment if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on flimsy grounds the same would have been rejected.

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13. C.P.C., O. 21 RR. 54. 66 (2), 66 (2)(A), 67 AND 90 :-
2001 (1) JLJ 167
SALMA AGA (SMT.) Vs. SEWAK SHARAN GUPTA

Mandatory requirements not compled with. Judgment debtor not given opportunity before setting the terms of auction. Auction is bad, in law. The terms of proclamation of sale not settled applying judicial mind. No proper publication made under R. 67, time of sale not mentioned though date of sale was mentioned. Time of sale should be mentioned, place should be mentioned and as there was no compliance with mandatory requirements, the auction was set aside and it was directed to the decree holder to return the money with interest received as consideration for the sale.

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14. C.P.C., O. 22 R. 10 :-
2001 (1) JLJ 184
SITARAM DUA Vs. SARASWATI DEVI SAINY

Provision under O. 22 R. 10 not depend upon death of any party. Assignee during pendency of suit may continue the suit with leave of Court.

LIMITATION :- No limitation is prescribed to come and contest. Suit may be dis-

missed as the assigner does not have cause of action after assignment. Assignee may be brought on record before suit is dismissed.

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15. C.P.C., O. 22 R. 10 R/W/O, 1 Rr. 10 AND 9
2) TRANSFER OF PROPERTY ACT, SECTION 52
2001 (1) JLJ 202
URMILA PATEL Vs. SMT. LAXMIBAI

Transferee during pendency of appeal coming with due deligence to be impleaded as party should be allowed to join the lis. Transferee pendents lite will be bound by the proceedings in the suit. He is representative of his seller.

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16. C.P.C., O. 5 R. 19-A : ADDITIONAL MEASURE AND NOT AN ALTERNATIVE MODE
2) M.P. ACCOMMODATION CONTROL ACT, SECTIONS 13(1) AND 13 (6) : DUTY OF THE TENANT :-
2001 (2) M.P.H.T. 43
BASANT SINGH Vs. ROMAN CATHOLIC MISSION

Statutory liability on the tenant under Section 13(1) of the Act. Failed to comply with the requirements envisaged under Section 13(1) of the Act. Striking out the defence. Provisions contained in Section 13(6) of the Act vest the Appellate Court or the Revisional Court with a discretionary jurisdiction. The discretion has be exercised not in an arbitrary manner but on sound judicial principles. M.P. Accommodation Control Act is a beneficent peice of legislation.

Paragraphs 65 and 66 of the judgment are reproduced :-

In fact, it is the suit which is to be taken as pending in the shape of the appeal filed under section 96 of the Code of Civil Procedure. Even a revision is the continuation of the proceedings. The legislative intent underlying the provisions contained in Section 13(1) of the M.P. Accommodation Control Act as it stood amended w.e.f. 16-8-1983 is very much clear. The aforesaid provision casts a statutory liability on the tenant, who is a respondent in such an appeal to comply with the conditions stipulated in Section 13(1) of the Act within one month of service of the notice of the appeal. The failure to comply with the requirements envisaged under Section 13(1) of the Act in the event of a pending appeal or revision entails serious consequences vesting the Court of appeal or revision with ample jurisdiction to strike out the defence put in by the tenant against his eviction and proceed with the hearing of the appeal or revision.

I must hasten to add that the provisions contained in Section 13(6) of the Act vest the Appellate Court or the Revisional Court with a discretionary jurisdiction. In case, sufficient ground has been made out for condoning any default in making the deposits as envisaged under Section 13(1) of the Act, the Appellate Court or the Revisional Could refuse to stike out the defence against eviction and proceed to hear the appeal or revision on merits of the defence put in against eviction. The discretion of course has to be exercised not in an arbitrary manner but on sound judicial principles keeping in mind that though M.P. Accommidation Control Act is a beneficient piece of legislation to protect the interest of the tenant sufficient case has been taken under the provisions of the Act to protect the interest of the landlord as well.

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17. C.P.C., O. 22 RULE 4 AND SECTION 115 : BRINGING L. RS. ON RECORD :-
2001 (2) M.P.H.T. 9 (CG)
PHAGURAM SAHU Vs. PYARIBAI

Ignorance about the death or the date of death. Good and sufficient ground for condonation of delay and setting aside abatement. But there must be some pleadings or some application to that effect.

When the plaintiff/applicant was projecting the prayer on the foundation of the ignorance, he was duly bound to inform the Court that he did not know about the date of death or in any case he made proper enquiries between 21-8-96 to 18-10-96. The ignorance about the death or the date of death may provide a good and sufficient ground for condonation of delay and setting aside the abatement but there must be some pleadings or some application to that effect. In absence of any pleading relating to the ignorance about the death or the date of death it would not be possible to condone the delay and set aside the abatement.

NOTE :- Please refer to ***Gangadhar Vs. Rajkumar, AIR 1983 SC 1202.*** Please also refer to O. 22 R. 10-A CPC and the Commentary there on by Mulla on CPC.

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18. Cr.P.C., SECTIONS 228 AND 240 : FRAMING OF CHARGE AND QUASHING OF : HIGH COURT'S POWER TO QUASH THE CHARGE : MANNER OF EXERCISE : EXPLAINED :-
(2000) 8 SCC 239
STATE OF DELHI Vs. GYAN DEVI

With the courtesy of Eastern Book Company, SCC publishers following portion is reproduced :-

It is well settled that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. At this stage of charge the court is to examine the materials only with a view to be satisfied that a prima facie case of commission of offence alleged has been made out against the accused persons.It is also well settled that when the petition is filed by the accused under Section 482 CrPC seeking for the quashing of charge framed against them the court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the court the charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. Moreover, once the trial court has framed a charge against an accused the trial must proceed wihout unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases.

The High Court has erred in its approach to the case as if it was evaluating the medical evidence for the purpose of determining the question whether the charge under Sections 304/34 IPC framed against the accused-Respondents 1 and 2 was likely to succeed or not. This question was to be considered by the trial Judge after recording the entire evidence in the case. It was not for the High Court to pre-judge the case at the stage

when only a few witnesses (doctors) had been examined by the prosecution and that too under the direction of the High Court in the revision petition filed by the accused. The High Court has not observed that the prosecution had closed the evidence from its side. There is also no discussion or observation in the impugned order that the facts and circumstances of the case had made it an exceptional case in which immediate interference of the High Court by invoking its inherent jurisdiction under Section 482 CrPC was warranted in the interest of justice. Therefore, the impugned order of the High Court is set aside and the trial court is directed to proceed with the hearing of the case.

NOTE :- Judicial Officers are requested that while entertaining revision against the framing of charge, this point should also be kept in mind for deciding the revision.

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19. Cr.P.C., SECTIONS 209 AND 183 : POWERS OF THE MAGISTRATE TO CONSIDER AND EVALUATE EVIDENCE IN CASE TRIABLE BY SESSIONS COURT :- 2001 (1) MPWN NOTE 101
HAZARI Vs. STATE OF M.P.

Once the case is committed to Sessions Court under S. 209, bar of section 193 is lifted. Sessions Court gets complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of offence. The Magistrate has no power to consider the veracity of the allegations as the case is exclusively triable by the Court of Sessions. The Magistrate is also not required to balance and weigh the evidence as a trial Court. If material and facts are available on record and the case diary remains unrebutted the accused persons should be committed to Sessions Court. He is not required to hold enquiry to satisfy whether a prima facie case is disclosed.

NOTE :- Judicial Officers are requested to go through ***1993 Suppl. (2) SCC 121, Rizwan Vs. Waqar Ahmed*** published in 1996 'Joti Journal' June part at page 17 which is reproduced for ready reference :

"The police filed a charge-sheet under Sec. 307 IPC against the respondents/accused. The Magistrate, however, having regard to the nature of injuries instead of committing the case converted it into a warrant case and proceed to try the respondents accused under Sec. 323 and 324 IPC. Questioning the same, a revision was filed before the sessions Judge who directed the Magistrate to commit the case to the Court of Sessions holding that the Magistrate had no option except to commit. As against that a revision was filed by the accused before the High Court. The High Court allowed the revision and confirmed the order of the Magistrate. But it appears that certificate granting leave to appeal was granted by the High Court taking the view that a question of law namely regarding the scope of section 209 Cr.P.C. was involved.

Having gone through the judgments of both the courts below we are unable to persuade ourselves to hold that the High Court has committed any error in allowing the revision. Section 209 of the Cr.P.C. lays down that if it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions then it has to commit. No doubt in the instant case, there are number of injuries on the complainant but the Doctor found almost all of them to be simple. In that view of the matter the Magistrate thought that it was not a fit case it commit. Therefore, it cannot be said that the High Court has erred in allowing the revision. The appeal is dismissed accordingly."

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20. Cr.P.C., SECTIONS 360 AND 361 :-
2) PROBATION OF OFFENDERS ACT, SECTIONS 3, 4 R/W/S/6 :-
2001 (1) MPWN NOTE 112
CHHOTE Vs. STATE OF M.P.

The provisions under are mandatory. Offence under S. 324/34 IPC. Accused above 21 years of age considerable period elapsed. 3 months spent in jail. Benefit extended.

NOTE :- In M.P. the provisions of Probation of Offenders Act are applicable. Therefore, the provisions of Section 360 Cr.P.C. will not be made applicable. Please refer to **1998 Joti Journal August Issue Titbit No. 47** ***Davalu Das Vs. State, 1998 (1) Vidhi Bhasvar 297*** and ***State of Kerala Vs. Gelappan George, 1983 Cr.L.J. 178*** reported in **August 1998 Joti Journal.** Please also refer to **2000 Joti Journal, December issue at page 757 Titbit No. 84** ***2000 (2) JLJ 52, Manoj Vs. State*** and **2001 February Joti Journal Tit bit No. 82 at page 102-104, 1999 (2) JLJ 93** and **Star Firmament No. 2** (unreported case) ***State Vs. Tinkeshwar Pd.*** reported in February Joti Journal at page 129 for ready reference.

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21. Cr.P.C., SECTION 125 : MAINTENANCE :-
2001 (1) MPWN NOTE 116
USHA BAI Vs. NIHAL SINGH

Maintenance amount is payable from the date of the order if no other time is fixed. If there is a second marriage by the husband wife is entitled to live separately and claim maintenance.

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22. Cr.P.C., SECTION 311 : RAPE : RECALLING OF WITNESSES : GROUNDS :-
2001 (1) MPWN NOTE 96
MANISH Vs. STATE OF M.P.

The provisions of section 311 of Cr.P.C. cannot be availed for filing lacuna left by prosecution or defence.

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23. Cr.P.C., SECTIONS 202, 154 AND 156 (3) :-
JT 2001 (2) SC 81
SURESH CHAND JAIN Vs. STATE OF M.P.

With the courtesy of JT publishers the whole judgment is reproduced :-

JT 2001 (2) SC 81

SURESH CHAND JAIN VS. STATE OF MADHYA PRADESH & ANOTHER

Criminal Appeal No. 43 of 2001

(Arising out of S.L.P. (Cri.) No. 2225 of 2000) Decided on 10-01-2001

[From the Judgment and Order dated 1.5.2000 of the Madhya Pradesh High Court in M. Cri. C. No. 1409 of 2000]

K.T. THOMAS & R.P. SETHI, JJ.
DT. 10.1.2001

APPEARANCES

Mr. R.K. Jain,Senior Advocate, Mr. Ajay Jain, Mr. Jitendra and Mr. Sushil Kumar Jain, Advocates with him for the Appellant.

Mr. Ashok Kumar Singh and Mr. Uma Nath Singh, Advocates for the Respondents.

CRIMINAL LAW

CRIMINAL PROCEDURE CODE, 1973

a) Sections 156(3), 202-Powers of Magistrate to direct investigation by police officer-Phrase used in both provisions-Kind of investigations thereunder. Held that investigation envisaged by Section 202 is different from investigation contemplated by Section 156(3). **Suresh Kumar's case** not approved. [Para 7]

b) Sections 156(3), 202, 154-Power of Magistrate to direct investigation-Direction to register FIR and investigate-Justification-Differentiation in directing investigation under Section 156(3) and under Section 202, Held that under Section 156(3), Magistrate has not taken cognizance whereas under Section 202, he takes cognizance. Investigation under Section 202 is of limited nature. ***Gopal Das Sindhi v. State of Assam*** **[AIR 1961 SC 986]** followed.

HELD

In Chapter XII of the Code, investigation would start with making the entry in a book to be kept by the officer-in-charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation contemplated in that Chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence. [Para 8]

But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. The investigation referred to therein is of a limited nature. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him. [Para 9]

For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR.There is nothing illegal in doing so. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer-in-charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint. [Para 10]

CASES REFERRED :

1. ***Suresh Kumar v. State of Haryana*** [1996 (3) Recent Criminal Reports 137] (para 5)
2. ***Ram Narain v. Lokuram*** [1986 (37) Rajasthan Law Weekly 143] (Para 5]
3. ***Tula Ram and Ors. v. Kishore Singh*** (AIR 1977 SC 2401) (Para 11)

4. ***Gopal Das Sindhi and Ors. v. State of Assam and Anr.*** (AIR 1961 SC 986) (Para 11)

THOMAS, J.

1. Leave granted.

2. A complaint was forwarded by a Magistrate to the police for registering an FIR and for conducting investigation. One of the persons arrayed in the complaint as accused questioned the legality of the above order first in revision before the Sessions Court and then by invoking the inherent powers of the High Court. Both did not succeed. This appeal is by the same person contending that the order of the Magistrate should have been upset in the interest of justice.

3. The complaint was filed by the second respondent (Mahesh Patidar) before the Chief Judicial Magistrate, Neemuch (M.P.) on 12.8.1999 alleging that the appellant and his wife, Geeta Devi have committed offence under Secion 3 of the Prized Chits and Money Circulation Scheme (Prohibition) Act and under Section 420 of the Indian Penal Code. The Chief Judicial Magistrate passed an order on 18.8.1999 which is extracted below :

   "The complaint submitted by the complainant has been persued. This complaint has been submitted by the complainant for initiating action against the accused under Section 3 of the Prizes, Chits and Money Circulation Scheme (Prohibition) Act and Section 420 of the IPC. Both the offences are serious, therefore, the case is required to be investigated by the Police Station, Neemuch Cantt. under Section 156(3) Cr.P.C., therefore, the complaint submitted by the complainant be sent to the in charge, Police Station, Neemuch Cantt. with the direction to register F.I.R. and initiate investigation. The copy of the F.I.R. be sent to this court immediately."

4. Appellant challenged the said order in a revision before the Sessions Court and when the revision was dismissed he moved the High Court under Section 482 of the Code of Criminal Procedure (for short 'the Code'). Learned Single Judge of the High Court of Madhya Pradesh took the view that "in a private complaint case under Section 156(3) of the code the Magistrate is empowered to order investigation; the allegation made in the complaint needs to be investigated in public interest."

5. Shri R.K.Jain, learned senior Counsel contended first that a Magistrate on receipt of a complaint should have examined the complaint on oath before proceeding to any other step. Learned senior Counsel adopted the alternative contention that the Magistrate has no power to direct the police to register an FIR. In support of the said contention learned Counsel cited two decisions. One is ***Ram Narain v. Lokuram*** **[1986 (37) Rajasthan Law Weekly 143]** and the other was rendered by the Punjab and Haryana High Court in ***Suresh Kumar v. State of Haryana*** **[1996 (3) Recent Criminal Reports 137].**

6. The former decision of the Rajasthan High Court need not vex our mind as the consideration focused therein was on the scope of Section 202(1) of the Code and the learned Single Judge observed therein that a Magistrate cannot make any order regarding police investigation without examining the complainant on oath. If the facts in that case remained one under Section 202(1) of the Code then the observation cannot be faulted with. That apart, as the point involved in this case is different we do

not think it necessary to examine the said decision. But the other decision rendered by a Single Judge of the Punjab and Haryana High Court (***Suresh Kumar v. State of Haryana***) has gone a step further as he held that "the Magistrate has no power within the contemplation of Section 156(3) of the Code to ask for registration of the case, but could only refer the complaint to the police for investigation at the pre-cognizance stage to make the enquiry in the matter enabling the Magistrate to apply his mind with regard to the correctness of the complaint." In that decision learned Single Judge, at the end of the judgment, made a direction as follows.

"Before parting with the judgment, it is observed that often it is found that the Judicial Magistrates working under the control of this Court many a time upon the complaints preferred before them, allegedly showing that a cognizable offence has been committed by the accused, direct the police to register and conduct the investigation in such cases under Section 156(3) of the Cr.P.C. After the reports are received from the police the Magistrate deal with those cases as police challans and conduct the proceedings in the matters against the provisions of law as discussed above. Hence the Registry is directed to send a copy of this judgment to all the Judicial Magistrates in the States of Punjab, Haryana and Union Territory, Chandigarh, for information and guidance."

7. In our opinion, the aforesaid direction given by the learned Single Judge of the Punjab and Haryana High Court in ***Suresh Kumar v. State of Haryana*** **(supra) is contrary to law and cannot be approved.** Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code. Section 156 of the Code reads thus :

"156. Police officer's power to investigate cognizable cases:-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having juridiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

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

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

8. The investigation referred to therein, is the same investigation and the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of

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

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. "or direct an investigation to be made by a police officer or by such other persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding". This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

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

11. Though the learned Single Judge of the Punjab and Haryana High Court in ***Suresh Kumar v. State of Haryana*** (supra) made reference to two decisions rendered by this Court [***Gopal Das Sindhi and Ors. v. State of Assam and Anr.*** (AIR 1961 SC 986) and ***Tula Ram and Ors. v. Kishore Singh*** (AIR 1977 SC 2401) learned Single Judge fell into error in formulating a legal position which is quite contrary to the dictum laid down by this Court in the aforecited decisions. In Gopal Das Sindhi v. State of Assam (supra) a three Judge Bench of this Court considered the validity of the course adopted by a Judicial Magistrate of the 1st class in ordering the police "to register a case, investigate and if warranted, submit chargesheet". Learned Judges repelled the contention that the Magistrate ought to have examined the complainant on oath under Section 200 of the Code. Dealing with the said contention their Lordships stated thus :

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence."

12. In ***Tula Ram v. Kishore Singh*** (supra) a two Judge Bench of this Court, after referring to the earlier decisions, reiterated the same legal position. It is unfortunate that when this Court laid down the legal position so explicity in the above two decisions which reached the notice of the learned Judge of the Punjab and Haryana High Court, he had formulated a position contrary to it by stating that "the Magistrate has no power within the comtemplation of Section 156(3) of the Code, to ask for registration of the case". It appears that the judicial officers under Punjab and Haryana High Court who were, till then, following the correct position, were asked by the learned Judge to follow the erroneous position formulated by him in the aforesaid judgment.

13. In the present case the High Court of Madhya Pradesh had rightly upheld the course adopted by the Magistrate. Hence we dismiss this appeal.

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24. CR.P.C., SECTIONS 202, 203 AND 482 :- PRIVATE COMPLAINT MAINTAINABILITY OF CIVIL CLAIM :-
2001 (1) APARADH NIRNAY JOURNAL 136 (SC)
SMT. LALMUNI DEVI Vs. STATE OF BIHAR

Quashing of criminal complaint on the ground that it spelled out civil wrong and continuance of criminal prosecution would be an abuse of process of the Court. No ground to quash criminal complaint. It was held that merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. Maintainability of civil and criminal proceedings is one thing and an act of being civil nature is totally different thing. The whole judgment is reproduced to understand the subject matter.

JUDGEMENT

S.N. Variava, J.-Leave granted.

2. This Appeal is against an Order dated 10th November, 1999 by which, in an Application under Section 482 of the Code of Criminal Procedure, a criminal complaint has been quashed on the ground that the complaint spelled out civil wrong and continuance of the criminal prosecution would be an abuse of process of the court.

3. The complaint was that Respondents 2 to 10 had fraudulently got the father of the Complainant to execute a gift deed. On the basis of this complaint the Magistrate held an enquiry under Section 202 of the Code of Criminal Procedure and dismissed the complaint under Section 203 of the Code of Criminal Procedure. As against the

Order of dismissal the Appellant went in Revision. The learned Sessions Judge set aside the Order of dismissal and remanded the case back to the Magistrate.

4. On such remand the Magistrate issued process against Respondents 2 to 10 to face trial under Sections 419, 420, 467 and 120-B of the Indian Penal Code.

5. Respondents 2 to 10 then filed a Petition under Section 482 of the Code of Criminal procedure for quashing the complaint. By the impugned Order the complaint has been quashed on the ground, as set out above, that the complaint spelled out a civil wrong and, therefore continuance of the criminal prosecution would be an abuse of process of the court.

6. Mr. Sinha submitted that the impugned order was unsustainable. He submitted that acts make out a civil wrong as well as a criminal liability. He submitted that merely because civil action can be taken does not mean that a criminal complaint is not sustainable. In support of his submission he relied upon the case of ***Trisuns Chemical Industry v. Rajesh Agarwal and Ors. [JT 1999(6) SC 618].*** In this case, the agreement between the parties contained an Arbitration clause. This Court held that merely because the dispute could be referred to arbitration it was not an effective substitute for a criminal prosecution when the act also made out an offence.

7. On the other hand, Mr. Singh submitted that the alleged acts have made out no case for taking cognizance. He submitted that at the highest the remedy would lie in a Civil Court only. He relied upon the case of ***State of Haryana v. Bhajan Lal [1992(1) Supp. SCC 335] and Mr. K. Ramakrishna & Ors. v. State of Bihar & Anr. [JT 2000 (Supp.1) SC 53].*** In these cases it is held that inherent powers can be exercised to quash proceedings to prevent abuse of the process of law and to secure ends of justice. It has been held that where the allegations in the FIR do not constitute the alleged offence of where the offence is not disclosed in the complaint or the FIR the frivolous criminal litigation could be quashed.

8. There could be no dispute to the proposition that if the complaint does not make out an offence it can be quashed. However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. In this case, on the facts, it cannot be stated, at this prima facie stage, that this is a frivolous complaint. The High Court does not state that on facts no offence is made out. If that be so, than merely on the ground that it was a civil wrong the criminal prosecution could not have been quashed.

9. In our view, the Order of the High Court cannot be maintained and is accordingly set aside. The trial Court to proceed with the Complaint in accordance with law. The Appeal is allowed. There will, however, be no Order as to costs.

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25. Cr.P.C., SECTIONS 177, 178 :- 2) I.P.C., SECTION 498A : CRUELTY :-
2001 (1) JLJ 225
S. FAISAL NABI Vs. STATE OF M.P.

Offence under Section 498A IPC is a continuing offence. Letters demanding car from the father of wife was sent to wife at Bhopal. Court at Bhopal has also territorial jurisdiction to try case.

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26. Cr.P.C., SECTION 144 : RESTRICTIONS UNDER SECTION 144, SCOPE AND POWER OF :-

2001 (2) M.P.H.T. 24

HARISH ARORA Vs. DISTRICT MAGISTRATE SHAHDOL.

It is well settled in law that an order under Section 144 is passed to meet a situation of emergency and it cannot be passed in repeated manner to avoid happening of a particular apprehended situation. It cannot be passed to earn to the status of permanent or semi-permanent in character. The impugned orders are quashed being semi-permanent in nature.

Paragraphs 3 and part of paragraphs 4 and 5 are reproduced :-

I have heard Mr. P.N. Pathak, learned counsel for the petitioner, and Mr. Ashok Agrawal learned Panel Lawyer for the State. It is submitted by Mr. Pathak that the orders passed vide Annexures B-13 to P-17 do clearly exposit that the same are passed in stereotyped manner without applying his mind. It is further submitted that provision enshrined under Section 144 of Cr.P.C. is not to be taken recourse to in a factual matrix of this nature. In support of his contention he has placed reliance on the decision rendered in the case of ***Acharya Jagdishwaranand Avadhuta etc. Vs. Commissioner of Police, Calcutta and another, AIR 1984 SC 51.***

Resisting the aforesaid submission Mr. Ashok Agrawal, learned Panel Lawyer, has submitted that as the theft in coal and law and order situation required to be controlled the District Magistrate has no option but to issue orders which have been issued. It is also urged by him that unless the order of the present nature is passed there will be chaos in the area.

On an objective reading of the aforesaid provision it becomes quite clear that the order passed by a Magistrate can remain in force for a period of two months but the same can be extended at the instance of the State Government if circumstances so warrant upto a period of six months. It is well settled in law that an order under Section 144 is passed to meet a situation of emergency and it cannot be passed in repeated manner to avoid happening of a particular apprehended situation.

From the aforesaid enunciation of law it is graphically clear that an order under Section 144 of the Code cannot be passed to earn the status of permanent or semi-permanent in character. On a proper scrutiny of the orders passed by the District Magistrate it is graphically clear that the orders are semi-permanent in nature. If orders are scrutinised on the anvil of **Acharya** Jagadishwaranand Avadhuta's case the same do not withstand close scrutiny.

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27. Cr.P.C., SECTIONS 451 AND 457 :-

2) WILD LIFE (PROTECTION) ACT, 1972 : RETURN OF PROPERTY - JURISDICTION OF :-

2001 (1) M.P.L.J. SN 8

STATE Vs. RAJENDRA KUMAR

Court can relase property used for commission of offence under the Act under Section 451 and 457 of Cr.P.C.

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28. Cr.P.C., SECTION 125 : MAINTENANCE :-
2001 (1) M.P.L.J. 382
MAYA DEVI Vs. SHANKARLAL

Section 125 of the Code is a "Special Law" within the meaning of section 29(2) of Limitation Act, 1963. Maintenance awarded to minor under Section 125 Cr.P.C., limitation of one year is provided under Section 125(3) First Proviso not applicable in such case.

Paragraphs 9 and 10 are reproduced :-

From the aforesaid decisions, on parity of reasoning, an inference can be drawn that section 125 of the Code is a "Special Law" within the meaning of section 29(2) of the Indian Limitation Act, 1963. It provides for protection against vagrancy and is supplemental the right to obtain maintenance under the general civil law. It has been held to be a speedy remedy to be given to persons named in that section who are not being provided with maintenance. The 1st proviso to sub-section (3) of the Code is special law for the reason it provides limitation for claiming maintenance to the extent of one year from the date it became due.

Once this conclusion is reached, section 6 of the Limitation Act are attracted as it is made applicable by section 29(2) of the Limitation Act, 1963. Section 6 of the Limitation Act confers a legal disability to a minor to institute a suit or make an application. For this reason, the applicants Nos. 2 and 3 could not have filed an application for execution of the order as per section 125(3) of the Code. This Court, consequently, agrees with the decision rendered by Hon. Mr. Justice B. Subhashan Reddy in the matter of ***Laxmi and others Vs. Nakka Narayan Goud and another, 1994 Cri.L.J. 565*** and holds that as long as applicants No. 2 and 3 do not attain majority, the time given under 1st proviso to section 125(3) of the Code would not run. Accordingly the Order dated 24-11-1995 is hereby set aside and the case is sent back for determination of maintenance amount due so far applicant Nos. 2 and 3 are concerned. It is made clear that 1st proviso to section 125(3) of the Code shall remain in operation so far as applicant No. 1 Mayadevi is concerned.

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29. CRIMINAL TRIAL AND PRACTICE : SENTENCE :-
20001 (1) CGWN NOTE 17
KALYANDAS Vs. STATE OF M.P.

Sentences are executed in accordance with direction issued by the Courts. They are not executed on the basis of what a party says.

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30. CRIMINAL TRIAL : SECTIONS 149 AND 34 IPC :-
2001 (1) A.N.J. (SC) 155
PIPAL SINGH Vs. STATE OF PUNJAB

Even where some out of several accused are acquitted it is open to the court to consider whether remaining accused were guilty of an offence by involving section 34 IPC. With a view to determine the common intention, the nature of injuries, background of the incident and the nature of weapon used to cause the injuries needed to be considered.

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31. DEED INTERPRETATION OF : AGREEMENTS : MERGER OF :-
2001 (1) MPWN NOTE 117
IMRATLAL KUSHWAHA Vs. JANKIBAI

Two agreements of one subject matter. Previous one merges into subsequent agreement.

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32. DEBIT LAWS : STATE FINANCIAL CORPORATIONS ACT, 1951, SECTIONS 29(4) AND 25 :-
(2000) 8 SCC 528
H.P. STATE FINANCIAL CORPORATION, SHIMLA Vs. PREMNATH

The State Financial Corporation sold the properties of the lonee. The price received by the Corporation executed the lonee's liability.The excess amount was kept in the current account of the Financial Corporation.The lonee challenged the sale by Writ Petition and thereby preventing the corporation from disbursing the extra amount to him. The Writ Petition culminated in a direction for refund of excess amount to the lonee. In such circumstances, in the absence of any agreement or statutory provision or circumstances warranting an equitable relief, the said loanee is not entitled to any interest on the refundable amount.

In the impugned order the High Court has not referred to any ground justifying the payment of interest to the respondents. The respondent have also not referred to any circumstance warranting the exercise of powers of equity in their favour. In the absence of an agreement and the statutory provision, interest could not be claimed by the respondents as a right.

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33. EVIDENCE ACT, SECTION 133 : ACCOMPLICE'S EVIDENCE S. 120-A, 120-B CRIMINAL CONSIRASY
(2000) 8 SCC 203
STATE OF KERALA Vs. P. SUGANTHAN

Section 133 says that if the evidence of the accomplice is corroborated in material particulars, can constitute the basis for conviction. Accomplice becoming approver having been validly granted pardon under Section 306 Cr.P.C. and withstanding cross-examination in committal as well as sessions Court. His testimony regarding causing death of the deceased by the accused P. suganthan referred to as A-1 corroborated in material particulars by other evidence. Circumstantial evidence sufficient to connect A-1 with commission of the crime. It was held that Court below rightly acquitted P. Suganthan under Section 302, 120-A, 120-B.

Criminal conspiracy can be established on the basis of circumstantial evidence. The circumstances should give raise to a conclusive inference of an agreement between 2 or more persons to commit an offence. The circumstances should be prior in time than actual commission of offence. Conspiracy is a continuing offence and act committed by any of the conspirators during substinence of conspiracy would attract section 120-B.

NOTE :- Judicial Officers are requested to go through Section 114 Illustration B which runs as under :-

"That an accomplish is unworthy of credit, unless he is corroborated in material particulars."

Please also go through Section 133 which runs as under :

"An accomplish shall be a competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplished."

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34. EVIDENCE ACT, SECTION 60 HEARSAY EVIDENCE:-
2001 (1) BLJ 30
LODHARI RAM Vs. STATE OF M.P.

Person giving information not examined. Witness deposing as basis of information. It is only hearsay evidence.

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35. EVIDENCE ACT, SECTION 3 : DOCUMENT - PARTLY PROVED : EFFECT OF :-
2001 (2) M.P.H.T. 1
RAJASTHAN STATE ROAD TRANSPORT CORPORATION Vs. LOKMAN SINGH

Where part of documents not proved by evidence it does not mean that the entire claim is false for baseless.

Part of paragraph 6 is reproduced :-

In so far as the quantum of compensation is concerned, the learned counsel for the appellant has invited attention to certain observations of the Tribunal made in Para 13 of the award, wherein it has been mentioned that claimant has filed certain receipts Exs. P-12 to P-20, which are false or false in order to obtain false claim. I am not of the opinion that this observation has only been made on the ground that such receipts are not proved by any evidence. So where part of documents not found proved by evidence, it does not mean that the entire claim is false or baseless. However, the learned Tribunal has disallowed that part of compensation or the documents which are not proved by evidence.

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36. EVIDENCE ACT, SECTIONS 3 AND 8 :
2) CRIMINAL TRIAL : MOTIVE - CIRCUMSTANTIAL EVIDENCE :-
3) EVIDENCE ACT, SECTION 9 : IDENTFICATION BY WIVES :-
2001 (2) M.P.H.T. 69 (DB)
STATE Vs. VEDRI

In case of circumstantial evidence, motive is one of the circumstances which assumes importance but it cannot be said that in the absence of motive other proved circumstances although complete the chain, would be of no consequence.

It is well settled that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue then the same offers an additional link in the chain of circumstances to complete the chain.

Identification by voice can be relied upon if the person who is to be identified is intimately known to the person who identifies him. It depends on the degree of intimacy between two. In this case, Raja Beti is not only residing in neighbourhood of the accuse, but is also closely related to him as the deceased was her cousin sister. In that

circumstatces, Raja Beti being hostile, if states that she had no occasion to talk to accused face in face or had seen him talking with others, does not mean that she was not familiar with the voice of the accused.

CRIMINAL TRIAL : APPRECIATION OF EVIDENCE : HOSTILE WITNESS : DOCTRINE OF BENEFIT OF DOUBT :-

It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base the conviction upon his testimony if corroborated by other reliable evidence. **JT 1999(9) SC 133** followed.

The expression reasonable doubt, is incapable of definition but the pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accuse. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertain doubt regarding the guilt of the accused. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A Criminal Court could be convinced of the guilt only beyond the range of a reasonable doubt. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.

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37. HINDU MARRIAGE ACT, SECTIONS 13B AND 28 : WHEN CAN BE PASSED :-
2001 (1) MPWN NOTE 114
NAYAN KUMAR Vs. SMT. KARUNA

Decree of divorce by consent may be passed when there is no chance of reconcilliation.

●

38. HINDU MARRIAGE ACT, SECTIONS 13(1)(i-A) AND 27 :-
2001 (1) M.P.L.J. 412
VIJAY KUMAR JAIN Vs. SUNITA VIJAY KUMAR JAIN

Petition by husband for divorce on ground of cruelty by wife. Plea of condonation of cruelty by husband. Not entertainable when abuses, harassment and maltreatment by respondent/wife continued and culminated in assault on husband by family members of wife in her presence.

It was held by the High Court that in a case a ground under section 13(1) (ia) of the Act, is made out, the party establishing the same deserves a decree for divorce. A direction of payment of amount awarded under section 27 of the Act could not be made a condition precedent for the decree of divorce becoming effective, as had been done by trial Court. To that extent the trial Court's decree was erroneous and deserved modification by setting aside the said condition.

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39. I.P.C., SECTIONS 338 AND 279 : SENTENCE :- ONE SENTENCE TO BE PASSED
2001 (1) C.G.W.N. 20
ROOPCHAND Vs. STATE OF CHHATTISGARH

Offence under Section 279 merges in offence under S. 338. Accused can be convicted under both the provisions but no separate sentence can be passed for both the offences.

NOTE :- Judicial Officers are requested to go through **AIR 1969 Guj 62, AIR 1956 MB 141 and 1989 Cc.R.R. NOC No. 57, 2001 (1) MPHT 22 (CG).** Judicial Officers are also requested to study the provisions of Section 71 of IPC and S. 320 of Cr.P.C. to understand this principle.

●

40. I.P.C., SECTIONS 376/511 : ATTEMPT TO RAPE :-
2001 (1) CGWN NOTE 24
RAMDIL Vs. STATE OF M.P.

Minimum sentence for rape is 7 years. Therefore, for attempt it should be 3-1/2 years only.

●

41. I.P.C., SECTIONS 306 AND 107 : ABATEMENT OF SUICIDE :-
2001 (1) MPWN NOTE 93
ASHOK KUMAR Vs. STATE OF M.P.

Deceased publicity beaten by accused persons cannot be deemed to have aided commission of suicide by deceased cannot be charged even if deceased had left a suicidal note of beating and public humiliation.

●

42. I.P.C., SECTIONS 300 AND 304 -A: ACCUSED CHARGED FOR ELECTROCUTING BOY AGED 11 YEARS : GRANT OF BALL - CONSIDERTAIONS : STAGE AT WHICH TO BE CONSIDERED :-
2001 CRI.L.J. 712 (SC)
RAM KUMAR LAHARIA Vs. STATE OF M.P.

With the courtesy of Cri.L.J. publishers the whole judgment from paragraph 2 to 10 is reproduced :

2. Heards parties.

3. This Appeal is against an order dated 29th March, 2000 by which an order framing charges under Ss. 302 and 304 of I.P.C. has been quashed. By the impugned Order the prosecution is directed to be proceeded only under S. 304-A of I.P.C. and S. 39 of the Indian Electricity Act.

4. Briefly stated the facts are as follows :

2nd Respondent was possessing a field by the side of Shankar river, 2nd Respondent used to take water from the river to his field for irrigation purposes. 2nd Respondent did not have electric connection. It is claimed by the prosecution that he was taking illegal electric connection.

5. On 2nd May, 1999 a boy, named Santosh, who was aged about 11 years, died due to electric shock by coming in contact with the live wire through which 2nd Respondent

was illegally taking electric connection. Some persons have given statements that the boy was swimming in the river and the wire accidentally broke and fell in the water resulting in the boy being electrocuted. On this basis, by the impugned Order prosecution is directed to be proceeded with only for offences under S. 304, I.P.C. and S. 39 of the Indian Electricity Act.

6. However, two eye witnesses, by names Haribal aged about 12 and Sandhya bal aged about 7, have given statement to the police that 2nd Respondent had called the deceased Santosh to him and had given shock to the deceased on his chest and other parts of the body with the help of other accused. The story given by the two eye witnesses is that thereafter 2nd Respondent and other Accused have thrown the body into the river along with the live wire. It must be mentioned at this stage that 5 burn injuries have been found on the dead body.

7. The trial Court after considering the facts and material framed charges under Ss. 302 and 304 of I.P.C. and S. 39 of the Indian Electricity Act.

8. The High Court, in Criminal Revision, by the impugned Order has proceeded to disbelieve the evidence of the eye witnesses. The High Court has noted that, at this stage, the evidence was not to be weighed by the Court. But the High Court holds that the Court could still assess the improbability or absurdity of the statement of the eye witnesses. The High Court holds that the statements of the two witnesses Sandhya bal and Hari bal were so absurd and and improbable that no prudent person could ever reach a just conclusion that there was sufficient ground for proceeding against the accused for offences under S. 302 or S. 304 of the I.P.C.

9. In our view, the High Court has committed a patent error. As noted by the High Court itself, at this stage, it was not open for the Court to weigh or asses the evidence. It was not possible for the Court, at this stage, to come to a conclusion that this evidence was absurd or inherently improbable. Prima facie at least the 5 burn injuries support the case that the boy was not just electrocuted by a live wire falling in the river in which he was swimming. They prima facie suggest direct contact with the live wire. In this view of the matter, we are of the view that the Order of the High Court cannot be sustained and it is set aside.

10. The Appeal is accordingly allowed. The trial Court is directed to proceed with the trial on the basis of charges framed by it.

●

43. I.P.C., SECTION 302 R/W/S 34 AND 149 :-
2001(1) A.N.J. (SC) 158
PYAREY Vs. STATE OF U.P.

Five assailants surrounded the deceased and the first three attacked him with axe-injuries sustained devastating resulting in instantareous death. Difficult to conclude about the next two assailants that they also shared the common object to murder since they did not use their weapons to inflict even one beating on the deceased, nor did they say anything at the spot. They did not prevent the deceased from running away nor did they step forward to stand in front of the deceased. Hence conviction and sentence on these two persons set aside.

●

44. LANDLORD AND TENANT : RAJASTHAN PREMISES (CONTROL OF RENT AND EVICTION) ACT, 1950, SECTION 13(1)(H) : BONAFIDE NEED OF LANDLORD APPRECIATION OF :-
(2000) 8 SCC 557
BABU LAL VS. VINOD KUMAR

Bona fide need of landlord, held on facts, there were no grounds for interference in the face of concurrent findings that respondents were members of a large joint family (having 27 members) and required more than the 13 rooms available to them. Fact that mother of respondents had constructed another house is another neighbourhood, held, did not mean that they did not require the disputed house. Issue of comparative hardship had also been decided in landlord's favour. High Court rightly dismissed second appeal of appellant tenants.

●

45. LIMITATION ACT, SECTION 5 : DELAY IN FILING REVISION : SUFFICIENT CAUSE TO BE EXPLAINED :-
2001 (1) MPWN NOTE 120
STATE OF M.P. Vs. ANAND HINDU ANATHASHARAM

Sanction of State sought after expirty of limitation. No satisfactory delay of 30 days explained. Delay cannot be conducted.

●

46. MOTOR VEHICLES ACT, 1988, S. 149(2) : GRATUITOUS PASSENGER :-
2001 (1) MPWN NOTE 108
BHIKAMCHAND GOLCHA Vs. ABDUL LATIF

Passengers travelling in goods vehicle as gratuitous passenger and for hire and reward. Insurer is liable to satisfy the award.

Being important one the whole judgment is reproduced :-

This group of nine cases is proposed to be decided by this common judgment since they arise out of the same accident and common award of Motor Accident Claims Tribunal, Durg dated 12.2.1999, Besides this will also dispose of the cross-objection filed in M.A. No. 1172 of 1999 (***National Insurance Company Limited Vs. Smt. Kachar Bai and another***).

Accident took place on 21-4-1993 when claimants were travelling in truck No. MIT 7555. The truck met with accident at Bafna Nala resulting in injuries to the occupants travelling in it. The vehicle was owned by Bhikamchand Golcha and insured with the National Insurance Company Limited. Claims Tribunal came to the conclusion that the vehicle was carrying passengers for hire and reward, therefore, Insurance Company was not liable to pay compensation. However, no direction for refund of amount of interim compensation of Rs. 25,000.00 deposited by Insurance Company has been made by the Tribunal, hence, the award has been assailed by the Insurance Company. The owner of the truck Bhikamchand has also challenged the award on the ground that Insurance Company should have been saddled with the liability to pay compensation since persons travelling in the vehicle were gratuitous passengers and the vehicle was not being used for hire and reward. There are no cross-objections by claimants for enhancement of the award though the owner of the Truck has not only filed appeal against the award but has also filed cross objection in M.A. No. 1172 of 1999 under Order 41 Rules 1 CPC 1908.

The Short question for examination and deremination in this case is whether Insuarance Company has been rightly exonerated by the Tribunal from the liability to pay compensation. We answer this question in the negative. There is no dispute that the vehicle was insured with National Insurance Company Ltd. at the time of accident. There is also no dispute that the claimants who suffered injuries in the accident involving the vehicle owned by Bhikam Chand were travelling in this truck. In Claim case No. 58 of 1993, Mst. Jetun Bai died in the accident. There is no evidence suggesting that the claimants were passengers for hire and reward in the vehicle in question. Therefore, they have to be taken as gratuitous passengers. Consequently, the case is covered by the decision of Apex Court report in **AIR 2000 SC 235** (***New India Assurance Company Ltd. v. Satpal***). Consequently, the Insurance Company is held liable to pay compensation in all the cases.

What emerges from the above discussion is that the appeals filed by the Insurance Company (M.A. No. 1171 of 1999, MA No. 1172 of 1999, M.A. No. 1173 of 1999, M.A. No. 1174 of 1999, M.A.No. 1175 of 1999, M.A. No. 1176 of 1999 and M.A. No. 1177 of 1999) are dismissed and the appeals and cross objection filed by owner of the truck Bhikam Chand (M.A. No. 756 of 1999 and M.A. No. 1539 of 1999) are allowed to the extent that the liability to pay compensation fixed by the Tribunal against the owner of truck is made joint and several with National Insurance Company Limited. There shall be no order as to costs.

●

47. MOTOR VEHICLES ACT 1988, SECTION 173 : JOIN APPEAL BY OWNER AND INSURER

2001 (1) MPWN NOTE 109

NEW INDIA ASSURANCE CO. LTD. Vs. SMT NEELABAI

Joint appeal of insurer and owner of vehicle not maintainable.

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48. MOTOR VEHICLES ACT, 1988, SECTION 168 :- COMPENSATION : EMPLOYMENT ON COMPASSIONATE GROUND :-

2001 (1) M.P.L.J. 407

UMABAI Vs. KHEMCHAND

Interest on the amount could not be disallowed on the ground that the employment had been granted to widow on compassionate ground. No substitute for compensation on death or person who was in service. Exgratia payment can be deducted from payment of compensation. Service benefits granted by employer to widow of deceased cannot be deducted from amount of compensation payable under Motor Vehicles Act.

●

49. MOTOR VEHICLES ACT, 1939, SECTION 174 :- EXTENT OF LIABILITY OF A INSURANCE COMPANY TOWARDS THIRD PARTY :-

2001 (1) A.N.J.(SC) 216

ORIENTAL INSURANCE CO. LTD. Vs. CHERUVAKKARU NAFEESSU

Contractual obligations contained in clauses relating to the liability of the third parties and avoidance clause, it was held that appellant company liable to pay the entire award amount to the claimants. Appellant can recover the excess amount from the insured.

Paragraphs 8, 9, 10 and 11 are reproduced :-

8. Relying upon the aforesaid judgment and referring to the avoidance clause, a three Judge Bench of this Court in ***Amrit Lal Sood and another v. Smt. Kaushalaya Devi Thapar & Ors. [AIR 1998 SC 1433]*** held

"In the policy in the present case also, there is a clause under the heading :

"AVOIDANCE OF CERTAIN TERMS AND RIGHTS OF RECOVERY-which reads thus : Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939. Section 95. But the Insured shall pay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions."

The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstances that the owner of the vehicle did not file an appeal against the judgment of single judge of the High Court under the Letters patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here".

9. The reliance of the learned counsel for the appellant on ***T. Shantharam v. State of Karnataka & Ors. [1995(2) SCC 539]*** and ***National Insurance Co. Ltd. New Delhi v. Judal Kishore & Ors. [1998(1) SCC 626]*** is of no help to him in as much as in those cases the effect of judgment in Amrit Lal Sood's case has not been considered in T. Shantharam's case the court was dealing with the effect of a comprehensive policy vis-a-vis the liability of the insurer in respect of third party risk on the basis of the estimated value of the vehicle and found that the limit of liability with regard to third party risk does not become unlimited or higher than the statutory liability only on account of entering into a comprehensive policy. It was pointed out that the comprehensive policy only entitles the owner to claim reimbursement of the entire amount of loss or damage suffered upto the estimated value of the vehicle which did not mean the limit of liability with regard to third party risk becoming unlimited or higher than the statutory liability. In the case of National Insurance co. ltd. v. Jugal Kishore & Ors. (supra) this Court observed that the liability under the policy could not exceed the statutory liability under section 95 of the Act only on the ground that the insured had undertaken Comprehensive insurance of the vehicle. The payment of higher premium on that score, however, did not mean that the limit of liability with regard to third party risk became unlimited or higher than the statutory liability fixed under subsection (2) of Section 95 of the Act.

10. In the facts and circumstances of this case we find that despite holding the liability under the policy limited to the extent of Rs. 50,000/-, the Claims Tribunal and the High Court were not unjustified in directing the appellant-company to pay the whole of the awarded amount to the claimants on the basis of the contractual obligations contained in clauses relating to the liability of the third parties and avoidance clause. However, the Claims Tribunal and the High Court were not justified in rejecting the

right of the appellant's company to recover from the insured the excess amount paid in execution and discharge of the award of the Tribunal.

11. The appeal is accordingly allowed holding that the appellant-company is liable to pay the entire award amount to the claimants. upon making such payment the appellant can recover the excess amount from the insured by executing amount from the insured by executing this award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988. No. costs.

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50. M.P. CINEMAS (EXHIBITION OF FILMS BY VIDEO CASSETTE RECORDER) LICENSING RULES, 1983, RULES 10 AND 13 :-
2) CONSTITUTION OF INDIA, ARTS, 226 AND 227 : WRIT OF CERTIORARI
2001 (2) M.P.H.T. 14
RAM KISHAN Vs. STATE OF M.P.

Screening of films through a VCR and projecting the films on a large screen by means of an electronic apparatus in Video Parlour. Exhibition of films by using the intel apparatus by the petitioner. District Magistrate issued two impugned orders indicating that exhibition of films on a large screen is not permissible in law as enunciated in the case of ***Anand Jaiswal Vs. District Magistrate, Shahdol.*** Against it this writ petition is filed. 'Intel System' means modern sophisticated apparatus. Writ Petition allowed with the direction that if the petitioners are utilising or using the apparatus of Intel, the impugned orders shall not be effective. ***Anand Jaiswal Vs. District Magistrate, Shahdol, M.P. No. 3673/87*** and ***Anand Jaiswal Vs. State, AIR 1987 MP 96*** discussed.

●

51. M.P. LAND REVENUE CODE, SECTIONS 57 (2) AND 182 (2) : JURISDICTION OF THE COURT :-
2001 RN 81 (HC)
RADHAKISHAN OZA Vs. STATE OF M.P.

Eviction order passed and upheld by all Courts on revenue side. Party can establish right/title in civil Courts. Civil Court has jurisdiction.

●

52. M.V. ACT, 1988 : SECTION 166 : CLAIM PETITION : COMPENSATION IN PERSONAL INJURY IS HIGHER AS COMPARED TO FATAL CASES :-
2001 (1) M.P.L.J. SN 11
BHURI BAI Vs. KARAMJEET

It is settled that in personal injury cases amount of compensation should normally be higher as compared to fatal cases, since in the former cases compensation is utilised by the victim as compared to other cases, where the same is utilised by the dependants.

●

53. N.D.P.S. ACT, SECTION 67 R/W/S/ 25 EVIDENCE ACT, 50 R/W/S/ 67
2) CONSTITUTION OF INDIA, ARTICLE 20 (3) :-
2001 (2) M.P.H.T. 56
SMT. JAHIDA BI Vs. CENTAL NARCOTICS BUREAU

Conviction was totally based on the statements recorded by the Investigating Officer during investigation under Section 67 of the Act of 1985. Hence, criminal appeal against

conviction was filed. It was held that statements recorded under sections 67 of the Act of 1985 cannot form the basis for convicting appellants in the absence of some corroborative evidence available on record. Such statement cannot be read against that person because of bar created by Art. 20(3) of the Constitution of India. Conviction set aside. ***K.I. Paunny Vs. Asst. Collector CE Cochin, (1977) 3 SCC 721*** and ***Shrishail Nageshi Pare Vs. State of Maharashtra, AIR 1985 SC 866*** followed. ***Prem Chand Vs. Central Investigation Bureau, 1997 (1) EFR374, State of Maharashtra Vs. Hasmukh Hargovind Shah, 1993 Cr. L. J. 1953, Ashok Hussain Allah Detah @ Siddique and another Vs. Asst. Collector of Customs, 1990 Cr.L.J. 2201, Kishansingh Vs. State of Rajasthan, 1995 Cr.L.J. (Raj.) 176*** and ***Kingsley and another Vs. State of Rajasthan, 1996 (3) Crimes 370,*** relied on.

Criminal appeal against conviction, it was held that besides statement recorded under Section 67, other evidence also available on record. Mandatory provisions of Section 50 also complied. It is also established that article seized from the bag carried by appellant was heroin. Hence conviction is well founded.

●

54. NEGOTIABLE INSTRUMENTS ACT, SECTIONS 138 AND 142 :-
2) CR.P.C., SECTIONS 4,5, 29(2), 325(1) AND 357 : POWERS OF THE MAGISTRATE TO SENTENCE :-
2001 (1) A.N.J. (SC) 172
PANKAJBHAI NAGJIBHAI Vs. STATE OF GUJARAT

Whether a Judicial Magistrate of First Class could have imposed a sentence of fine beyond Rs. 5,000/- in view of the limitation contained in section 28(2) of the Cr.P.C. Non application of the Code on any special jurisdiction or power conferred by any other law limited to the area where such special jurisdiction or power is conferred. Section 142 of the NI Act has not conferred any special jurisdiction or power on a judicial Magistrate of First Class. Fine portion deleted from the sentence and appellant directed to pay compensation of Rs. 83,000/- to the respondent complainant.

NOTE :- Judicial Officers are requested to go through the article 'Penalties in case of dishonour of a cheque' published in 'JOTI JOURNAL' October, 1997 at page 7. Same views were expressed in that article.

●

55. NEGOTIABLE INSTRUMENTS ACT, SECTIONS 138 AND 142 :- NOTICE : REPRESENTING THE DISHONOURED CHEQUE FOR ENCASHMENT AND IT WAS AGAIN DISHONOURED EFFECT OF :-
2001(1) A.N.J. (SC) 201
M/S DALMIA CEMENT (BHARAT) LTD. Vs. M/S GALAXY TRADER & AGENCIES LTD.

Respondent Firm purchased the cement and issued cheque. This cheque was dishonoured with remark "insufficient funds". Complainant issued legal notice u/s 138 of N.I. Act through Advocate, which was received on 15-6-1998 and on 20-6-98 Respondent firm send a letter to complainant that they had received an empty envelope please send contents, this letter was received by complainant on 30th June 98, which was the fifteenth day. Then appellant complainant again presented cheque to the Bank on 1.7.1998. Cheque was dishonoured on 2.7.1998. Then again statutory notice was issued to respondent on

2.7.1998 which was received on 27.7.1998 by respondent be cheque amount was not paid not and appellant filed complaint on 9.9.1998 admittedly within the statutory period from the second notice. Cognizance taken but High Court quashed the cognizance order and complaint on the ground that it was barred by limitation. Criminal appeal against it was filed and it was held by the Supreme Court that the respondent have not denied the issuance of their letter dated 20th June, 1998. Despite admitting its contents they opted to approach the High Court for quashing it proceeding merely upon assumption presumption and conjectures. The receipt of the second notice has concededly not been denied by the respondent. High Court fell in error by not referring the letter dated 20-6-1998. In these circumstances the appeal allowed. Order of High Court is set aside. The Trial Magistrate is directed to proceed against respondents in accordance with the provisions of law.

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56. 1) NOTICE - KNOWLEDGE - APPEARANCE IN SOME OTHER PROCEEDINGS : OFF SHOOTS OF :- 2) LIMITATION ACT, SECTION 5 : CONDONATION OF DELAY 2001 (1) CHHATTISGARH WEEKLY NOTES NOTE 16 (SC)
JAGDISH SAWHNEY VS. HARBANS SINGH

Applicant not a party in the trial Court. Decree passed on 31.8.1995. Knowledge of decree gained on 2.2.1996 simply because he appeared in contempt proceedings. No inference can be drawn about knowledge of passing the decree. Delay rightly condoned.

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57. PARTITION : PARTITION DEED HOW TO BE CONSIDERED : 2001 (1) MPWN NOTE 104
GANGARAM Vs. CHOUDHARY JAI KUMAR

Document not signed by all members of family cannot be termed as partition deed.

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58. PARTNERSHIP ACT, SECTIONS 48 (IV) AND 14 : RELEASE OF RIGHTS IN THE ASSETS OF THE FIRM FOR A LESSER VALUE : DIFFERENTIAL AMOUNT WOULD NOT COVER BY THE WORD "GIFT" : THERE WAS NO TRANSFER OF PROPERTY : WORDS "GIFT, TRANSACTION AND TRANSFER" INTERPRETATION OF (2000) 8 SCC 249

Release of rights in the assets of the firm for a lesser value. The aim and object of the Gift Tax Act are not similar to that of Estate Duty Act.

INTERPRETATION OF STATUTES : INTERNAL AIDS DEFINITION CLAUSE :-

This clause extending the meaning of a word does not take away its ordinary or popular meaning. The definition in other statutes can be a guide as judicially interpreted can be a guide to construction of the same words or expressions if both statutes are in pari materia.

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59. PROVINCIAL SMALL CAUSE COURTS ACT, 1887 : SECTION 23(1) : RETURN OF PLAINTS IN SUITS INVOLVING QUESTIONS OF TITLE :- (2000) 8 SCC 123
SHAMIM AKHTAR Vs. IQBAL AHMAD

The power vested under Section 23(1) is discretionary unless it is absolutely neces-

sary to determine finally the title to the suit property in the sense that relief cannot be granted without determination of the question of title, Small Cause Court may decide the suit. In the case of an eviction suit under Rent Control Act (U.P. in this case) question of title, held, **could be considered by such court as an incidental question and the final determination of title left to be decided by the competent court.**

NOTE : Please refer to ***Gulla Vs. Puranlal, 1958 MPLJ S.N. 123*** in which it was said that merely because the question of title was raised by the defence not between themselves and the plaintiff but between themselves and the third person who was not a party to suit, Section 23 cannot be invoked by them. Had it been between the defendant and the plaintiff, Section 23 could be invoked. Further please refer to ***Imtiaz-bi Vs. G.A. Naidu, 1963 JLJ S.N. 99*** in which it was held that when a contract of slae of immovable property falls through and the vendee sues to recover back the purchase money from the vendor, such a suit is of a small cause. **The question whether a suit is of a small cause nature is to be determined by the relief which the plaintiff claims and not by the nature of the defence.** It is not in the power of the defendant to oust the jurisdiction of the small cause Court merely by raising a plea involving a dispute about title to immovable property. It is for this reason that, where such a dispute is raised section 23 of the Act vests in the Small Cause Court a descretion either to determine that question of title or to return the plaint for presentation to the Court having jurisdiction to determine the question of title. **AIR 1926 Nagpur 65** followed.

Please also refer to ***1969 MPLJ S.N. 20, S.K. Rai Vs. Dhansi Ram.***

●

60. PREVENTION OF CORRUPTION ACT, SECTION 4(1) :- GRATIFICATION : MEANING OF AND PRESUMPTION :-
(2000) 8 SCC 571
MADHUKAR BHASKARRAO JOSHI Vs. STATE OF MAHARASHTRA

Once prosecution establishes that gratification was paid and accepted by public servant, presumption arises that it was paid and accepted as a motive or reward to do or forbear from doing any official act.

The word "gratification" is not defined in the Act of 1947. The context in which the word is used in Section 4(1) of the 1947 Act is important. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collacation of two expressions adjacent to each other like "gratification" or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it. It is not possible to accept the contention that the prosecution has further duty to prove beyond the fact that PW1 had paid the demanded money to the appellant for enabling it to lay the hand on the legal presumption employed in the Preven-

tion of Corruption Act. The defence did not even attempt to prove that the amount received by the appellant was not accepted as a reward or motive for the official act done by him, except the ipse dixit of the appellant, that too made at the fag end of the trial when he put in a written statement of his defence. Hence no exception can be taken to the conviction passed by the trial court which was concurred by the High Court in respect of the offence under Section 5(2) of the Act of 1947.

PREVENTION OF CORRUPTION ACT, 1947, SECTION 5(2) PROVISO : SENTENCE QUANTUM OF : SENTENCE BELOW THE PRESCRIBED LIMIT : SPECIAL REASONS :-

Object of fixing minimum sentence is of giving deterrent impact on other public servants. By protracting the proceedings accused public servant cannot succeed in getting the sentence reduced. Reducing the sentence to a nominal period and instead increasing the amount of fine would also defeat the purpose.

In this case the mere fact that this case was pending for such a long time cannot be considered as a "special case". That is a general feature in almost all convictions under the PC Act and it is not a speciality of this particular case. It is the defect of the system that longevity of the cases tried under the PC Act is too lengthy. If that is to be regarded as sufficient for reducing the minimum sentence mandated by Parliament the legislative exercise would stand defeated. There was absolutely no special reason in this case as for the appellant to entitle to get a sentence less than the minimum prescribed by law. Accordingly, the sentence passed by the trial court on the appellant for the offence under Section 5(2) of the Act of 1947 is restored.

CRIMINAL TRIAL : TRAP WITNESS : CORROBORATION OF :-

Gratification, mere fact that the currency notes reached the lands of the appellant is a sufficient corroboration of the trap witness.

●

61. PREVENTION OF CORRUPTION ACT : SECTION 5(2) PROVISO :- SPECIAL REASONS FOR IMPOSING MINIMUM SENTENCE :- SCOPE OF :-
(2000) 8 SCC 22
JAGJEEVAN PRASAD Vs. STATE OF M.P.

Superannuation of the accused is not such a reason. Hence the Supreme Court set aside the sentence of imprisonment till rising of the court awarded by High Court on that ground, enhanced by Supreme Court to one year. Special reasons explained.

(1) PREVENTION OF CORRUPTION ACT, SECTION 5(2) AND (2) CRIMINAL TRIAL : BURDEN OF PROOF :-

It is on the accused person to show that the amount received by him was not illegal gratification.

Paragraph 7 of the judgment is reproduced :

Learned counsel made an attempt to show that the appellant offered the said explanation even at the time when he was caught by the police. He failed to show any such conduct on the part of the appellant. On the contrary, the evidence shows that the appel-

lant made an apology to the police for having received the bribe amount. The appellant examined Ram Singh as DW 5. The High Court has rightly disbelieved his testimony. Anyone can come forward to help the accused to say that I sent that amount to (sic through) to the complainant. We are of the view that the High Court has rightly repelled the defence regarding payment of Rs. 500. The burden is on the public servant to show that the amount received by him was not illegal gratification and when he failed to discharge his burden the prosecution must be treated as having succeeded in proving that the appellant has committed the offence under Section 5 (2) of the PC Act, 1947.

●

62. RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993 SECTION 19(4) :-
2001 (1) M.P.L.J. 400
KISHORILAL Vs. DEBTS RECOVERY TRIBUNAL

Normal procedure to receive evidence is by affidavits. Section 19(4) does not contemplate oral evidence. Oral evidence/cross-examination may be resorted to only exceptional or special circumstances.

●

63. SERVICE LAW : AD HOC AND REGULAR SERVICES :-
(2000) 8 SCC 4
STATE OF HARYANA Vs. HARYANA VETERINARY & AHTS ASSOCIATION

Services rendered on the basis of adhoc appointment made dehors the recruitment rules, although without interruption followed by regular appointment on selection by Public Service Commission, held, not includible. The requisite period has to be computed from the date of regular appointment and not from any earlier date.

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64. SERVICE LAW : RIGHT OF PROBATIONER EXPLAINED :-
2001 (2) M.P.H.T. 85
R.L. VERMA Vs. DIRECTOR GENERAL, DR. BABASAHEB AMBEDKAR NATIONAL INSTITUTE OF SOCIAL SCIENCES AND OTHERS

It is true that a probationer has a right of being heard before an action is taken against him which would be prejudicial to his interest. That may be in the nature of pointing out the defaults committed by him and allowing him to mend his behaviour, to avoid such mistakes in future in his service. Even before blaming him, he need to be heard and needs to be given an opportunity of removing the blame put on him, leaving aside the charges, allegations.

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65. SERVICE LAW : INTERPRETATION OF STATUTES : SUBSIDIARY RULES : ANAMOLY, ABSURDITY, HARDSHIP, REDUNDENCY, REPUGNANCY-RULE AGAINST ANAMOLY APPLIED :-
(2000) 8 SCC 182
SANJAY DHAR Vs. J & K PUBLIC SERVICE COMMISSION

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Rule 9 of J&K Civil Service (Judicial) Recruitment Rules, 1967 must receive a purposive interpretation. Purposive interpretation enables ascertaining the purpose of enactment, the object sought to be achieved and the mischief sought to be taken care of or prevented. The object of the Rule is to exclude lawyers not in actual practice, and hence inexperienced, from entering judicial service. At the same time the Rule cannot be so constructed as to create an anomalous situation by asking the District Judge to certify the period of practice of a lawyer practising in High Court and not in District Courts, "based on his personal knowledge or official records of District Courts"-as J&K PSC wanted the appellant to do. A literal compliance, if insisted on, may defeat the object sought to be achieved by the Rule itself. If an advocate is practising exclusively in the High Court, the District Judge would not have any material available in his reocrds to verify the factum and the period of actual practice of any applicant. The Registrar of the High Court would be the best-suited person to issue a certificate in that regard and since the Rule contemplates the requisite certificate being issued by the District Judge, the underlying object sought to be achieved by the Rule would be fulfilled if the certificate issued by the Registrar is countersigned by the District Judge or the District Judge issues a certificate of his own based on the certificate issued by the Registrar. Therefore, the certificate filed by the appellant before the J&K PSC satisfied the requirement of Rule 9 and the J&K PSC was not justified in rejecting the application of the appellant holding him to be ineligible. As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured a position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their place in the order of appointments issued pursuant to the select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.

Moreover, the High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.

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66. SERVICE LAW : CIVIL SERVICES :-
2001 (1) MPWN NOTE 113
ASHOK KUMAR TIWARI Vs. STATE OF M.P.

Employee not joined at transferred place being no vacancy available. Transfer is absolutely illegal. Employee also entitled to exemplory cost of Rs. 10,000/- recoverable from erring officer, if so liked.

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67. SPECIFIC RELIEF ACT, SECTIONS 38 AND 39 : INJUNCTION AGAINST TENANT WHETHER DETERMINATION OF TENANCEY REQUIRED :-
2001 (1) MPWN NOTE 97
MUNNU KHAN Vs. NAGAR PALIKA PARISHAD, SANWER

Tenant erecting permanent structure without permission. Decree for preventive permanent injunction and mandatory injunction may be granted. There is no need first to determine his tenancy.

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68. TRADE AND MERCHANDISE MARKS ACT. 1958, SECTIONS 27(2), 28 AND 29 2) C.P.C., O. 39 RR. 1 AND 2 AND O. 43 R. 1(R) : GRANT OF INJUCTION CONSIDERATIONS :-
2001 (1) JLJ 192
LAXMI GUDAKHU FACTORY Vs. AVINASH GUDAKHU FACTORY

Plaintiff not only alleging infringement of its registered trade marks but also an action for passing off has to establish prior user. Proof of actual damages or fraud is not necessary. Gist of an action for infringement of trade mark is comparison of two trade marks. Approach should be from the point of view of an average intelligence. There was all the possibility of deception and a customer was likely to be misguided in purchasing the 'Gudakhu' manufactured by respondent No. 1 believing the same that of the plaintiff-appellant. It may be noted in the above connection that 'Gudakhu' is a product, which is normally used by illiterate persons.

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69. TRANSFER OF PROPERTY ACT, SECTIONS 53-A AND PROVISO TO SECTION 60 :- PART-PERFORMANCE AND RIGHT OF MORTGAGEE TO REDEEM :
2001 (1) M.P.L.J. 373 (SC)
HAMZABI Vs. SYED KARIMUDDIN

Mortgagor executing agreement of sale in favour of mortgagee in respect of the property mortgaged. Such an act would result in extinguishment of the mortgagor's right of redemption if the preconditions of section 53-A of the Act are fulfilled.

When a mortgagor/vendee agrees to sell the mortgaged property to the mortgagee/ putative vendee in possession, the mortgagee's status in subsumed or merged in his rights as a putative vendee under Section 53-A against the transferor, provided of course the preconditions for the application of secion 53-A are fulfilled.

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70. 1) TRANSFER OF PROPERTY ACT, SECTION 55 (2)M.P. LAND REVENUE CODE, SECTION 178 AND (3) C.P.C., SECTION 54
2001 RN 95 (HC)
BAHADUR SINGH Vs. SIDDANATH

Sale deed in respect of share in joint agricultural land. Purchaser may sue for partition of the portion purchased by him.

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71. 1) TRANSFER OF PROPERTY ACT, SECTION 53A AND (2) M.P. LAND REVENUE CODE, SECTION 64 (UNAMENDED) :-
2001 RN 113 (HC)
LAXMAN Vs. CHURAMAN

No agreement to sell in writing. Oral agreement of sale cannot be accepted on cryptic oral evidence when no time and terms have been specified.

Holder of agricultural lands dying in 1960. His holding vests in his widow and son. The partition of joint agricultural holdings admitted. The case that property was joint Hindu Family Property in negatived.

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72. TENANCY AND LAND LAWS : M.P. ZAMINDARI ABOLITION ACT, SAMVAT 2003 (1951), SECTIONS 2(A), 41 AND 38 :-
(2000) 8 SCC 542

Right of proprietor under S. 41 to be deemed a tenant of the Government in respect of his khudkasht of sir land, it was held that not affected by presence of trespasser in cultivatory possession of the land on the date of vesting of land in State Government. High Court erred in dismissing the second appeal of proprietor appellants and in confirming the findings of the lower appellate court that (i) respondent, an undisputed trespasser, had become a pucca tenant under S. 38 and (ii) that appellants had lost all rights in respect of the land.

The appellants were mortgages in respect of the suit land. They filed an application for restitution after the mortgagor's suit for redemption was ultimately dismissed as being barred by limitation.The application was rejected when **K** raised objections, contending that he was in possession of the land and that he had not been a party to the earlier proceedings. The appellants then filed the present suit for recovery of possession. The trial court decreed the suit, rejecting the contention of **K** that he had become a pucca tenant of the State Government under Section 38 of the M.B. Zamindari Abolition Act, as he was in possession on 2-10-1951 the date of its coming into force. **K's** appeal was, however, allowed and the decree set aside. The appellants' second appeal was dismissed by the High Court on the reasoning that even if **K** were a trespasser, the appellants could not claim a right to possession of the suit land because their rights had been lost after the vesting of the land in the State, as a consequence of the provisions of the Act.

Allowing the appeal, and decreeing the suit, the Supreme Court

HELD :

Under Section 41 of the M.B. Zamindari Abolition Act the proprietor in respect of holding of the khudkasht is deemed to be a tenant from the date of vesting. On the basis of this provision it is clear that the High Court is not justified in taking the view that the appellants had lost all rights in respect of the lands in question. The finding that the land was in possession of the respondents as trespassers could not be disputed at all.

The expression "personal cultivation" should be explained as not mere bodily cultivating the land but constructively also and also the right to possess against a trespasser.

Harischandra Behra v. Garbhoo Singh, 1961 JLJ 780 (CN 203), approved

If a wrongdoer takes possession, steps to exclude him can certainly be taken and cultivation by trespassers in such circumstance cannot clothe him with any right and his cultivation has to be deemed to be on behalf of the rightful owner. Thus the appellants are entitled to claim right to possess in respect of the land in question.

A distinction may be drawn between a suit brought by a proprietor in his character as

proprietor for possession of property and in his individual right to posses in respect of the said property against the trespasser.

Himmatrao v. Jaikisandas, AIR 1966 SC 1974 : (1966) 3 SCR 815, relied on

High Court lost sight of the provisions of Section 41 of the Act which enables even a proprietor holding land khudkasht or sir, to be deemed to be a tenant from the date of vesting. If the appellants were entitled to be put in possession of the land and the same had been deprived of by a trespasser that possession has to be recognised as that of the person who is entitled lawfully to cultivate the land in question.

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73. WORDS AND PHRASES : MEANING OF THE WORD "VESTING" EXPLAINED :- (2000) 8 SCC 99
RAJENDRA KUMAR Vs. KALYAN

There is some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To 'vest' generally means to give a property in."

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74. WORDS AND PHRASES : WORDS 'RESIGN', 'RESIGNATION', 'RESIONATIONEST JIRIS PROPII SPONTANEA REFUTATIA" (IS IN RELATION TO AN OFFICE WHICH CONVERTS THE ACT OF GIVING UP OR RELINGUISHING THE OFFICE) :- 2001 (1) BILASPUR LAW JOURNAL 1
B. N. BAJPAI Vs. RAMDAYAL UIKE

"Resignation" means an act of resigning and formal written notice of such an act. This is in relation to an office which converts the act of giving up or relinquishing the office.

CIVIL PRACTICE : ACCEPTANCE OF RESIGNATION :-

When the law requires acceptance of resignation only acceptance of notice makes the office vacant and not the submission of the resignation alone. Resignation virtually is a complete and effective act of resigning office.It serves the link of resignor with his office and terminates its tenure. The phrase 'by writing' under his hand is used to indicate that the resignation cannot be oral and it must be in writing and must be by hand, i.e. it must bear his signature. This cannot be considered that the person resigning should write in his own hand writing. If the letter is typed and signed by person concerned, then also there is no infirmity.

INTERPRETATION OF STATUTES : WORDS "OR" AND WORD "AND" :-

These words are normally disjunctive and conjunctive may be read as vice versa. It is to give effect to the manifest intention of Legislature as disclosed from the context. The word 'or' cannot be read as 'and' unless some other part of same statute or the clear intention which requires that to be done, is there. The positive conditions eparated by 'or' are read in alternative. Negative conditions connected by 'or' are constructed as cumulative and 'or' is read as 'nor' or 'and'.

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