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

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FROM THE PEN OF THE EDITOR

A.K. SAXENA
Director

The year 2003 is moving towards an end. The 'end' does not mean the end of everything. Every end ushers in a new beginning. There may be different sort of ends for different persons but the beginning of a new era is always joyful for everyone. Forget the past if not memorable and look at the future which is always bright. So, on behalf of JOTI Journal we wish a very warm, happy and joyful 'New Year' to all the judicial officers.

During the year 2003, several new feathers have been added to the wings of Judicial Officers' Training & Research Institute. Our Institute is gaining new heights day by day only because of valuable guidance and blessings of Hon'ble the Chief Justice and Hon'ble Judges of our High Court. The Institute cannot achieve any target without their blessings. During this year the training of largest ever batch of 118 newly recruited Civil Judges Class II had undergone the first phase of intensive training. Hon'ble Shri Justice Bhawani Singh ji, the then Chief Justice of our High Court blessed the trainees on the occasion of inauguration of first phase of training programme and Hon'ble Shri Justice Kumar Rajaratnam ji, Chief Justice and Patron, JOTRI, Hon'ble Shri Justice Rajeev Gupta ji, Administrative Judge and Chairman, High Court Training Committee and Hon'ble Shri Justice Dipak Misra ji, Member, High Court Training Committee graced the occasion of valedictory session on the eve of conclusion of first phase of training programme. The trainee Judicial Officers were fortunate enough to have guidance and blessings of such high dignitories. Indeed, it was the rare opportunity for these judicial officers. The Institute will remain extremely obliged for their valuable guidance. I also extend my sincere thanks to Hon'ble Former Judges of our High Court and other members of guest faculty for their valuable support during training programme.

The Institute has adopted a new training scheme for different cadre of judicial officers which includes training programme, refresher courses and workshops with a view to provide better opportunities to them so that they may serve the society in an effective manner and dispose of the cases as early as possible. We are trying to impart extensive training to judicial officers so that they may have in-depth knowledge of legal and other fields and may not feel any difficulty while discharging the noble duty of dispensation of justice. It would be great injustice towards the trainee judicial officers if I fail to state that they were serious, sincere and enthusiastic during the training programme. They were having a zeal to learn something new from the Institute, which was very much apparent from their faces and behaviour. Their active participation in the discussion sessions on various topics was another encouraging feature for us. Apart from that, almost all the newly recruited Civil Judges Class II handed over their articles on different topics of their choice on my single request during the training and some of their articles are being published in JOTI Journal. This shows the worthiness of training institute meant for judicial officers. I am sure that our efforts shall reap

the sweet fruits in future. The bright future of district judiciary in Madhya Pradesh is quite visible.

The new scheme of training has also inducted the programme of physical exercise and yoga in its curriculum. The importance of yoga and exercise is unquestionable one. The largest batch of newly recruited Civil Judges Class II had undergone the yoga classes during their training schedule and their experience showed that they have been benefitted immensely by the 'Yoga' and 'Dhyana' as it has taught them physical morality.

In my earlier editorial, I had informed about the bi-monthly training programme at district level. The Institute commenced this bi-monthly training programme in the month of August 2003 for the first time. Forty districts were divided into five groups and one legal problem was sent to all the districts of that group and likewise other legal problems were allotted to other groups of districts. In this manner five legal issues were raised for the discussion in the month of August 2003. Barring few districts, almost all the judicial officers of various districts took this training programme seriously. This exercise helped the judicial officers to study the different aspects of legal problem. As I said in my earlier editorial that the success of this programme will depend upon the sincerity of District Judges and I am happy to inform that most of the District Judges are serious about the bi-monthly training programme. I admire their efforts. Out of all the articles received in the Institute, some of the articles are being published in this part of JOTI Journal for the benefit of all the judicial officers and will be published regularly in future having regard to the quality. Our JOTI Journal is prestigious one and publication of articles in it, is a matter of pride and, therefore, I congratulate those District Judges and their associate judicial officers whose articles are being publised in this issue and I hope the judicial officers of other districts will not sit on the back benches.

Earlier, our training Institute was situated in the premises of High Court building. Hon'ble the Chief Justice has been pleased to allot the first floor of erstwhile SAT building exclusively for JOTRI. We have already shifted to new premises. This will help us to provide better facilities to trainee judicial officers in future. It cannot be denied that better facilities at working place raise the standard of work. We are progressing repidly towards that direction. It is expected that our judicial officers will take this opportunity to develop their personality of a true judge.

I have mentioned some of the features of progressive working of our training institute which had taken place during the year 2003 and several steps are being taken and will be taken by us to provide better facilities and best training to judicial officers. We should always be optimistic in our life. Our motto should be : "remain always satisfied in every moment of life and should not get disturbed in adverse conditions". This will place you at the peak for which you are entitled. I hope the 'New Year' will bring lot of pleasure and happiness to all of you. With this ambition, I on behalf of Judicial Officers' Training & Research Institute again extend my best wishes to all of you for the coming 'New Year'.

Rest in next issue.

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PART - I

ARTICLE 21 OF THE CONSTITUTION OF INDIA- THE EXPANDING HORIZONS

A.K. SAXENA
Director

The Constitution of India provides Fundamental Rights under Chapter III. These rights are guaranteed by the Constitution. One of these rights is provided under Article 21 which reads as follows :-

"21. PROTECTION OF LIFE AND PERSONAL LIBERTY : No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 21 of the Constitution deals with the prevention of encroachment upon personal liberty or deprivation of life of a person. Though the phraseology of Article 21 starts with negative word but the word 'No' has been used in relation to the word 'deprived'. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law. It clearly means that this fundamental right has been provided against the State only. If an act of private individual amounts to encroachment upon the personal liberty or deprivation of life of other person, such violation would not fall under the parameters set for the Article 21. In such a case the remedy for aggrieved person would be either under Article 226 of the Constitution or under the General law. But, where an act of private individual supported by the State infringes the personal liberty or life of another person, the act will certainly come under the ambit of Article 21.

The State cannot be defined in a restricted sense. It includes Government Departments, Legislature, Administration, Local Authorities, other authorities exercising statutory powers and so on so forth, but it does not include non-statutory or private bodies having no statutory powers. For example : company, autonomous body and others. Therefore, the fundamental right guaranteed under Article 21 relates only to the acts of State or acts under the authority of the State which are not according to procedure established by law. The main object of Article 21 is that before a person is deprived of his life or personal liberty by the State, the procedure established by law must be strictly followed.

'Right to Life' means the right to lead meaningful, complete and dignified life. It does not have restricted meaning. It is something more than surviving or animal existence. The meaning of the word life cannot be narrowed down and it will be available not only to every citizen of the country, but also to a person who may not be citizen of the country *(Chairman Rly. Board and others v. Chandrima Das and others, AIR 2000 SC 988).* As far as *'Personal Liberty'* is concerned, it means freedom from physical restraint of the person by personal incarceration or otherwise and it includes all the varieties of rights other than those provided under Article 19 of the Constitution. *'Procedure established by Law'* means the law enacted by the State. *'Deprived'* has also wide range of meaning under the

Constitution. These ingredients are the soul of this provision. The fundamental right under Article 21 is one of the most important rights provided under the Constitution which has been described as heart of fundamental rights by the Apex Court.

The scope of Article 21 was a bit narrow till 50s as it was held by the Apex Court in Gopalan's case *(Gopalan Vs. State of Madras, AIR 1950 SC 37 = (1950) SCR 88)* that the Contents and subject-matter of Article 21 and 19 (1) (d) are not identical and they proceed on total different principles. In this case the word 'deprivation' was construed in a narrow sense and it was held that the 'deprivation' does not restrict upon the right to move freely which came under Article 19 (1) (d). At that time Gopalan's case was the leading case in respect of Article 21 along with some other Articles of the Constitution, but post Gopalan case the scenario in respect of scope of Article 21 has been expanded or modified gradually through different decisions of the Apex Court and it was held that interference with the freedom of a person at home or restriction imposed on a person while in jail would require authority of law. Whether the reasonableness of a penal law can be examined with reference to Article 19, was the point in issue after Gopalan's case and finally in the case of *Maneka Gandhi Vs. Union of India, 1978 SC 597,* the Apex Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the State where it prescribed a procedure for depriving a person of his life or personal liberty. This view has been further relied upon in the case of *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi and others, AIR 1981 SC 746* as follows :

> "Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only of Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just."

In another case of *Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180* it was further observed : "Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it."

As stated earlier, the protection of Article 21 is wide enough and it was further widened in the case of *Bandhua Mukti Morcha vs. Union of India and others, AIR 1984 SC 802* in respect of bonded labour and weaker sections of society. It lays down as follows :

> "Article 21 assures the right to live with human dignity, free from exploitation. The State is under a constitutional obligation to see that

there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the state Government are therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy."

The meaning of the word 'life' includes the right to live in fair and reasonable conditions, right of rehabilitation after release, right to livelihood by legal means and decent environment. The expanded scope of Article 21 has been explained by the Apex Court in the case of *Unni Krishnan vs. State of A.P., (1993) 1 SCC 645* and the Apex Court itself provided the list of some of the rights covered under Article 21 on the basis of earlier pronouncements and some of them are listed below:

(i) The right to go abroad.
(ii) The right to privacy.
(iii) The right against solitary confinement.
(iv) The right against hand cuffing.
(v) The right against delayed execution.
(vi) The right against custodial violence.
(vii) The right against public hanging.
(viii) Doctor's assistance.

It was observed in *Unni Krishnan's case* that Article 21 is the heart of Fundamental Rights and it has extended meaning from time to time. This case has further expanded the scope of Article 21 by observing that the life includes the education as well, as the right to education flows from the right to life.

As a result of expansion of the scope of Article 21, the Public Interest Litigations in respect of children in jail being entitled to special protection, health hazards due to pollution and harmful drugs, housing for beggars, immediate medical aid to injured persons, starvation deaths, the right to know, the right to open-trial, inhuman conditions in after-care home have found place under it. Through various judgments the Apex Court also included many of the non-justiciable Directive Principles embodied under Part IV of the Constitution and some of the examples are as under :-

(a) Right to pollution-free water and air. (1998 AIR SCW 2813, AIR 2000 SC 1997 and AIR 2002 SC 40)
(b) Protection of under -trial. (AIR 2000 SC 2083)
(c) Right of every child to a full development. [(1990) 2 SCC 318]
(d) Protection of cultural heritage. (AIR 1989 SC 549)

Maintenance and improvement of public health, improvement of means of communication, providing human conditions in prisons, maintaining hygenic condition in slaughter houses have also been included in the expanded scope of Article 21. This scope has further been extended even to innocent hostages detained by militants in shrine who are beyond the control of the State *(State of J & K vs. H.C. Bar Association, 1994 Supp (3) SCC 708).*

The view taken by Delhi High Court was affirmed by the Apex Court in the case of *S.S. Ahluwalia vs. Union of India and others, AIR 2001 SC 1309* and held that in the expanded meaning attributed to Article 21 of the Constitution, it is the duty of the State to creat a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardised or endangered. If in any circumstance the State is not able to do so, then it cannot escape the liability to pay compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution.

While dealing with the provision of Article 21 in respect of personal liberty, Hon'ble the Supreme Court put some restrictions in a case of *Javed and others vs. State of Haryana, AIR 2003 SC 3057* as follows :

> "At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justive- economic, social and political- cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners."

The Apex Court laid a great importance on the reasonableness and rationality of the provision and it is pointed out that in the name of undue stress on Fundamental Rights and individual liberty, the ideals of social and economic justice cannot be given a go-by.

Thus it is clear that the provision of Article 21 was construed narrowly at the initial stage but the law in respect of 'life' and 'personal liberty' of a person was developed gradually and a liberal interpretation was given to these words. New dimensions have been added to the scope of Article 21 from time to time. It imposed a limitation upon a procedure which prescribed for depriving a person of life and personal liberty by saying that the procedure must be reasonable, fair and such law should not be arbitrary, whimsical and fanciful. The interpretation which has been given to the words 'life' and 'personal liberty' in various decisions of the Apex Court, it can be said that the protection of life and personal liberty has got multi-dimensional meaning and any arbitrary, whimsical and fanciful act of the State which deprived the life or personal liberty of a person would be against the provision of Article 21 of the constitution.

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BAIL - THE DISCRETIONARY DOMAIN

VED PRAKASH
Addl. Director

The concept of personal liberty, though an essential feature of our constitutional scheme, is neither absolute nor isolated and if found necessary personal liberty may be curtailed under a procedure established by Law (Art. 21). For an ideal social set-up a fine balance has to be struck between liberty of an individual and interest of the society because both are complimentary to each other. In this respect it has aptly been remarked by the Supreme Court in the famous case of *Indira Nehru Gandhi Vs. Raj Narain, AIR 1975 SC 2299* that 'the major problem of society is to combine that degree of liberty without which law is a tyranny with that degree of law without which liberty becomes license'. The discretionary jurisdiction of Courts, regarding grant or refusal of bail to persons arrested in connection with commission of various offences, ultimately aims at attaining this very objective.

Almost 25 years back the Apex Court in *State of Rajasthan Vs Balchand, AIR 1977 SC 2447* proclaimed that the basic rule might tersely be put as bail not jail. Taking this principle a step ahead and putting its seal of approval to the philosophy of balancing interests of individual and society, the Apex Court in *Ram Govind Upadhyaya Vs Sudarshan Singh & Others 2002 (2) ANJ SC 596* observed that while liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals, but this protection can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stands qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs protection from these elements since the later are having the capability of spreading a reign of terror so as to disrupt the life and tranquility of the people in the society. In *Mansab Ali Vs Irsan and another (2003) (1) SCC 632,* the Apex Court again stressed that the discretionary jurisdiction of bail should be exercised by balancing valuable right of liberty of an individual and the interest of society in general.

STATUTORY PROVISIONS :

Section 436 to Section 439, which find place in chapter XXXIII of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') provide in respect of regulation of bail in different types of cases. Section 436 enacts the invariable rule for grant of bail in bailable cases, subject to the sole exception contained in Sub-section (2) of Section 436, under which a Court may refuse to release a person on bail, even in a bailable case, where such person has failed to comply with the conditions of the bail bond. Section 437, which deals with the power of the Court other than the High Court or Court of Session, clothes the Courts with a discretion to release a person accused of a non-bailable offence

on bail, subject to following two main limitations as provided in Sub-section (1) thereof:-

(i) Such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions for a non-bailable and cognizable offence.

Section 438 deals with what is conventionally referred to as anticipatory bail and provides that subject to the conditions and limitations provided therein a person apprehending arrest for an accusation on a non-bailable offence may on being arrested be directed to be released on bail by the High Court or the Court of Session. Section 439 confers special powers upon High Court and Court of Session to grant bail to any person in custody and accused of an offence.

The Apex Court in *Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179* examined the scope of Sections 437 and 439. The Court held that Section 437 Cr.P.C. is concerned only with the Court of Magistrate and it expressly excludes the High Court and the Court of Session. As regards Section 439, the Court observed that this Section confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under Section 439(1) Cr.P.C. against granting of bail to persons accused of an offence punishable with death or imprisonment for life. The Court further observed that, however, it is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life.

THE DISCRETION - EXERCISE OF :

The benedictory jurisdiction of bail lies exclusively within the discretion of the Court usually referred to as judicial discretion. It means sound discretion guided by law, and governed by rule, not humor. It must not be arbitrary, vague and fanciful, but legal and regular. The basic concept of judicial discretion may be put in a capsulated form in the following classical exposition given by Benjamin Cardozo. J.

> "The judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity

of order in the social life. Wide enough in all conscience is the field of discretion that remains."

The Apex Court from time to time in its various pronouncements has outlined and stated the various considerations which should be kept in mind while exercising the judicial discretion regarding grant or refusal of bail. In *State of Maharashtra Vs. Anand Chintaman Dighe JT 1990 (1) SC 28* it has been observed that there are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court. Where the offence is of serious nature the Court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused a reasonable possibility of presence of the accused not being secured at the trial , the reasonable apprehension of witness being tampered with and the larger interest of the public and such similar other considerations.

In *Ram Govind Upadhyaya (Supra),* which is a recent case, the Apex Court ordained that while placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail, more heinous is a crime, the greater is the chance of rejection of the bail though, however, dependent on the factual matrix of the matter. The Court laid down following considerations which should be kept in mind while dealing with the matter of bail, which are, as the Court clarified, only illustrative:-

(a) While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant .

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall has to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of event, the accused is entitled to an order of bail.

Past criminal background of the person seeking bail also has close bearing in the matter of bail. It is found explained by the Apex Court in *Ram Pratap Yadav Vs Mitra Sen Yadav & another (2003) 1 SCC 15,* that -

"It cannot be denied that previous conviction of an accused for a heinous

offence punishable with imprisonment for life, his involvement in other crimes and the quantum of punishment for the offences in which the applicant is seeking bail are all relevant factors to which the court should consciously advert to while taking a decision in the matter of enlargement on bail".

BAIL ORDER, SHAPE OF :

Sub-section 4 of Sec. 437 of the Code mandates that a Court releasing a person on bail under Sub-section (1) or Sub-section (2) is required to record reasons. Under Sec. 438 the Court 'if it thinks fit' may grant anticipatory bail. The use of phrase 'if it thinks fit' in Sec. 438 (1) gives an indication that the order granting anticipatory bail must show why the Court thinks it fit to do so, which means and implies that the order must be reasoned one. Though, the condition of giving reasons for granting bail, as found in Sec. 437 (4) or the use of phrase 'if it thinks fit' as used in Sec. 438 is not there in Sec. 439 of the Code, however, as laid down by the Apex Court in *Mansab Ali Vs Irsan and another (2003) (1) SCC 632.* in granting or refusing bail, the Courts are required to indicate, may be very briefly, the reasons for grant or refusal of bail and the jurisdiction is not to be exercised in a casual and cavalier fashion. Though, recording of reasons for being satisfied about a prima facie case is desirable but detailed examination of evidence and elaborate documentation of the merits should be avoided because no party should have the impression that his case has been prejudged (refer: *Niranjan Singh and another Vs. Prabhakar Raja Ram Kharote and others, AIR 1980 SC 785.* Elaborating this the Apex Court in *Kashi Nath Roy Vs. State of Bihar, AIR 1996 SC 3240* observed that the Courts exercising bail jurisdiction normally do and should refrain from indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail. For, in that manner, the principle of "presumption of innocence of an accused" gets jeopardized; and the structural principle of "not guilty till proved guilty" gets destroyed, even though all same elements have always understood that such views are tentative and not final, so as to affect the merit of the matter".

ARREST - CUSTODY - SURRENDER:

The concept of bail as incorporated under Section 437 pre-supposes that there is a person in custody of the Court desirous of being set at liberty. The custody may be either due to the arrest of a person in a non-bailable offence by a police officer without warrant of arrest or arrest in compliance of a warrant of arrest issued by a Court or surrender of a person accused or suspected of being involved in a non-bailable offence before the Court of competent jurisdiction. This is particularly, apparent from the language of Section 437, which says about a person arrested or detained or person appearing or brought before the Court. However, Section 439 of the Code provides in respect of a person accused of an offence and in custody. Apparently, their appears to be wide difference between these two provisions but as explained in *Niranjan Singh (Supra).* term 'Custody' as used in Section 439 is of elastic semantics but its core meaning is that the law has taken control of the person and, therefore, the physical control or at least

physical presence of an accused in Court coupled with submission to the jurisdiction and orders of the Court amounts to custody of such person. A person can be said to be in judicial custody when he surrenders before the Court and submits to its directions. A person under protective umbrella of anticipatory bail is also deemed to be in 'custody' for the purpose of bail u/s 439 of the Code (See: *Vinod Kumar Vs. State of M.P., 1999 Cr.LJ 4364*). However, appearing through Counsel cannot be treated as custody. (See : *State Vs Dallu Punja Madhya Pradesha State AIR 1954, Madhya Bharat 113, Full Bench*).

MISCELLANEOUS ASPECTS :

Very often a question is posed whether a Magistrate in exercise of its jurisdiction under Section 437 of the Code may release a person on bail who has been arrested in connection with an offence exclusively triable by the Court of Session. A clear cut answer to this question is found in *Prahlad Singh Bhati Vs N.C.T. Delhi and another JT 2001 (4) SC 116*, wherein the Apex Court has held that even though, there is no legal bar for a Magistrate to consider an application for grant of bail to a person who has been arrested for an offence exclusively triable by a Court of Sessions yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purpose of getting the relief of bail.

In the aforesaid case, the Apex Court also pointed out that with the *change of the nature of the offence,* the accused becomes disentitled to the liberty granted to him in relation to a minor offence if the offence is altered for an aggrieved crime. Though, the aforesaid proposition was made in the background of the fact that initially the accused was granted anticipatory bail for lesser offence which was subsequently converted in to a graver offence, but then the aforesaid principle may well be applied where regular bail initially was granted for a lesser offence and subsequently, the offence has been altered to an aggravated one.

Again a question which very often crops up before trial Courts is that in a situation where bail has been granted by the superior Court and the accused person fails to comply with the conditions of bail regarding regular appearance before the Court during trial and remains absent then whether on his subsequent appearance such accused person, as of right, can claim to be released on bail under initial bail order given by the superior Court. In such a situation it is argued that the trial Court has to abide by the bail order of the superior Court and cannot refuse bail. The issue was considered in detail by our own High Court in *Veer Singh v. State of M.P. (Misc. Cr. C. No. 6160 of 96, Order dated 17/11/1997, Jabalpur).* Hon'ble Depak Mishra J. speaking for the Court, after referring to Section 436 (2), 437 (5), 439 (2), 446 and 446-A of the Code, as well as the relevant case law, including the case of *Johny Wilson v. State of Rajasthan, 1986 Cr. LJ 1235,* rejected the plea that the Trial Magistrate is bound to enlarge such an accused on bail because there has been no cancellation of bail by the superior Court. From the aforesaid pronouncement, following principles can well be deduced :-

a) Once the accused does not appear in a Court and is produced in custody pursuant to a warrant of arrrest having been issued by competent Court, or surrenders voluntarily being aware of issue of such warrant, all other provisions of the Chapter XXXIII will come into play and the Magistrate can refuse to release the accused and he would have no right in law to contend that he is entitled to be enlarged on bail, as the order by which he was enlarged has not been concelled.

b) Even if there is no condition at the time of grant of bail, as a consequence of non-appearance of the accused before the trial Judge or trying Magistrate, the said Court would have complete liberty to deal with him in accordance with law.

c) If the trial Court is satisfied that there are cogent and sufficient reasons for non-appearance of the accused he may exonerate and release him on fresh bail bonds with the same conditions or more onerous conditions with regard to the surety and the sum. He is also at liberty, depending upon the facts and circumstances of the case, to refuse him to enlarge on bail.

In some Courts the prevalent practice is that after enlargement on bail at investigation stage, accused is required to attend the Court till a charge sheet is submitted against him. This practice has been disapproved by the Apex Court in *Free Legal Aid Committee, Jamshedpur Vs. State of Bihar, AIR 1982, SC 163.* and it has been held that after release on bail, the accused need not be required to appear before the Court until charge sheet is filed and process is issued against such person by the Court.

SUCCESSIVE BAIL PETITIONS :

Successive bail petitions by a person in custody are no doubt maintainable. However, the application must contain details of previous applications and their result. The person providing such details should also be named in the application (See: *State of M.P. Vs. R.P. Gupta , 2000 (1) MPJR 185 HC*) .Again subsequent application should be decided by the same judge who rejected the previous ones except when case has been transferred by S.J to A.S.J., in which situation the A.S.J. shall have jurisdiction to decide such application (See: *Narian Prasad Vs. State of M.P. 1993 MPLJ 1 F.B.*) The object of placing subsequent application before the same Judge is that the process of the Court is not abused and such an impression is not created that the litigant has either successfully avoided one Judge or selected another to secure a favourable order and unless there is substantial charge in the fact situation and circumstances of the case, the subsequent application should not be allowed (See: *State of Maharashtra Vs. Captain Buddhi Kota Subba Rao AIR 1985 SC 2292*).

ANTICIPATORY BAIL -BASIC ISSUES :

The jurisdiction in respect of anticipatory bail is altogether different than that of regular bail. Considerations, which should weigh with the Court while dealing with the request for anticipatory bail, are also different. in *State Vs. Anil*

Kumar JT 1997 (7) SC 651, the Apex Court found merit in the plea that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well protected with a favorable order under Section 438 of the Code. In serious cases effective interrogation of suspected person is of tremendous advantage and success in such interrogation would elude if the suspected person knows that he is well insulated by a pre-arrest bail order.

The scope of Section 438 was scanned and outlined by a five Judges bench of the Apex Court in *Gurubaksh Singh Vs State of Punjab, AIR 1980 SC 1632.* It was laid down therein that an anticipatory bail is neither a passport to the Commission of Crimes nor a shield against any and all kind of accusations, rather it is a device to secure individual liberty. The person seeking anticipatory bail should have reason to believe that he may be arrested for non-bailable offence. Mere 'fear' is not 'belief'. Therefore, jurisdiction u/s 438 cannot be invoked on the basis of vague and general allegations, as to arm oneself in perpetuity against a possible arrest. The Apex Court made it clear that the power conferred by Sec. 438 is of extra-ordinary character in the sense that it is not ordinarily resorted to like the power conferred by Sec. 437 and 439, and should be exercised with due care and circumspection. If the proposed accusation appears to stem not from motive of furthering the ends of justice but from ulterior motive to injure and humiliate the person by arresting him then direction to release such person on anticipatory bail may be made.

DURATION OF THE ORDER :

The initial view of the Supreme Court as expressed in *Gurubaksh Singh (Supra)* was that the normal rule should be not to limit the operation of the order of anticipatory bail in relation to a period of time, but for reasons the Court may limit its operation to a short period. However, with the pronouncement of the Apex Court in *Salauddin Vs. the State of Maharashtra ,AIR 1996 SC 1042* it is now well settled that anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. It is essential that the duration of such order should be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court, which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.

TERRITORIAL JURISDICTION :

As regards the question of territorial jurisdiction in the matter of anticipatory bail, our own High Court in *Pradeep Kumar Soni Vs State of M.P. 1990 JLJ 573* clearly laid down that the application should be submitted before the Court within whose jurisdiction the offence has been committed. However, in *Kailashpati Vs State of M.P. 1996 Criminal Law Journal 363* a contrary view has been expressed. The aforesaid situation may be resolved with the help of the view taken by the Apex Court in *State of Assam and another Vs. R.K. Krishna Kumar and another*

AIR 1998 SC 144. In this case, the alleged offence was committed in Assam. Application for anticipatory bail was moved before the Bombay High Court, which was granted. The Supreme Court observed that the question of granting anticipatory bail to any person who is allegedly connected with the offence in question must for all practical purposes be considered by the High Court of Guwahati within whose territorial jurisdiction such activities should have been perpetrated. This view lands support to the view taken by our own High Court In *Pradeep Kumar Soni (Supra).*

ARREST WARRANT BY COURT :

Though, the jurisdiction under Section 438 of the Code can be invoked by a person against whom a warrant of arrest has been issued by a Court while taking cognizance against him in respect of an alleged offence, (See: *Nirbhay Singh Vs. State of M.P., 1996 (1) Crimes 238 M.P., FB*), however, it has been held in *Yogendra Singh Vs. State of M.P. (M.Cr.C. No. 592/99, Order dated 6/09/1999 at Main Bench, Jabalpur)* that where warrant of arrest has been issued by a Court against an accused person who has failed to appear before the Court despite being already on bail then such an application is not maintainable.

CANCELLATION OF BAIL :

The Apex Court in *Aslam Babalal Desai Vs. State of Maharashtra, 1992 Cr.LJ, 3712* considered the various aspects regarding cancellation of bail and observed that considerations for rejection of bail and cancellation of bail are different. It is easier to reject a bail application than to cancel a bail granted by the Court because it involves review of all the circumstances of the case. The Court enumerated following situations where bail may be cancelled -

(i) The accused misuses his liberty by indulging in similar criminal activity,

(ii) Interferes with the course of investigation,

(iii) Attempts to tamper with evidence of witnesses,

(iv) Threatens witnesses or indulges in similar activities which would hamper smooth investigation,

(v) There is likelihood of his fleeing to another country,

(vi) Attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,

(vii) Attempts to place himself beyond the reach of his surety.

BAIL ORDER - WHETHER REVISABLE:

The view of our own High Court on this point is settled one because it has been laid down in *State of M.P. Vs Nansingh Rakosingh Bhilala, 1980 MPLJ 603* that granting of bail is an interlocutory order and a revision petition under Section 397 of the Code should not be entertained as sub-section (2) of that section provides that no revision petition will lie under that provision against an interlocutory order.

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EXTENSION OF TIME LIMIT FOR FILING OF WRITTEN STATEMENT

A.K. SAXENA
Director

As we know, the Code of Civil Procedure, 1908 was amended by the Code of Civil Procedure (Amendment) Act, 1999 and it was further amended by the Amendment Act, 2002 with a view to cut short the delays at various levels. Accordingly, different provisions in the Code of Civil Procedure (hereinafter referred to as "the Code") have been added or amended by these two Amendment Acts. Thereafter, several questions have been raised from various corners in respect of applicability of various amended provisions and one of those questions is whether the Court is empowered to extend time limit of ninety days for filing of written statement as contained in Order 8 Rule 1 of the Code? Order 8 Rule 1 of the Code provides as follows :

> **"1. Written Statement.-** The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:
>
> Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

The above provision clearly provides that the party must file written statement within thirty days from the date of service of summons on him, but the Court has ample power to extend the time limit for filing of written statement after recording reasons in writing for doing so but this period shall not be later than ninety days from the date of service of summons.

It has to be seen whether this provision of prescribing time limit for filing written statement is directory or mandatory in nature. We have to borne in mind several points before arriving at any conclusion regarding directory or mandatory nature of any provision and the guidelines laid down by the Apex Court in the case of *Topline Shoes Ltd. Vs. Corporation Bank, (2002) 6 SCC 33.* This case relates to the provision contained in Section 13 (2) (a) of the Consumer Protection Act, 1986, which reads thus:

> "(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

It was held by the Apex Court in this case that to answer a question whether the provision prescribing limit for filing reply is mandatory or directory in nature, it is to be find out that what was the Statement of Objects and Reasons of the said Act; and what provisions have been made regarding consequences of non-

compliance. It would be profitable to reproduce relevant paragraphs of the judgment with a view to bring to the notice of the readers various legal aspects as discussed by the Supreme Court, which are as follows :

> "8. The Statement of Objects and Reasons of the Consumer Protection Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of consumers and to provide them speedy and simple redressal of their grievances. Hence, quasi-judicial machinery has been set up for the purpose, at different levels. These quasi-judicial bodies have to observe the principles of natural justice as per clause 4 of the Statement of Objects and Reasons which reads as under :
>
> > "4. To provide *speedy* and *simple redressal* to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will *observe the principles of natural justice* and have been empowered to give reliefs of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi- judicial bodies have also been provided."
>
> (emphasis supplied)
>
> Thus the intention to provide a time-frame to file reply, is really meant to expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply. The provision, however, as framed, does not indicate that it is mandatory in nature. In case the extended time exceeds 15 days, no penal consequence are prescribed therefor. The period of extension of time "not exceeding 15 days", does not prescribe any kind of period of limitation. The provision appears to be directory in nature, which the consumer forums are ordinarily supposed to apply in the proceedings before them..... The provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is an expression of "desirability" in strong terms. But it falls short of creating any kind of substantive right in favour of the complainant by reason of which the respondent may be debarred from placing his version in defence in any circumstances whatsoever. It is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing time-frame to file reply, as a guideline, and then to exercise its discretion as best as it may serve the ends of justice and achieve the object of speedy disposal of such cases keeping in mind the principles of natural justice as well. The Forum may refuse to extend time beyond 15 days, in view of Section 13 (2) (a) of the Act but exceeding the period of 15 days of extension, would not cause any fatal illegality in the order.

9.... The election law is a technical law which also provides consequences of non-compliance with certain provisions but in the present case we find that no consequence is provided in case the time granted to file reply exceeds the total period of 45 days. It may at best be said to be an irregular way of exercise of discretion. Normally the Forum or Commission would act in accordance with the provision relating to procedural matters and while considering the question whether any further time may or may not be granted, it would be relevant to take into account the limit placed for extension of time in accordance with the provisions of the Act. In the absence of any penal consequences to follow, it will not be open for the appellant to contend that the reply filed by the respondent within the time granted though beyond 45 days, is liable to be rejected. The appellant therefore cannot derive any help from the decision referred to above.....

11. We have already noticed that the provision as contained under clause (a) of sub-section (2) of Section 13 is procedural in nature. It is also clear that with a view to achieve the object of the enactment, that there may be speedy disposal of such cases, that it has been provided that reply is to be filed within 30 days and the extension of time may not exceed 15 days. This provision envisages that proceedings may not be prolonged for a very long time without the opposite party having filed his reply. No penal consequences have however been provided in case extension of time exceeds 15 days. Therefore, it could not be said that any substantive right accrued in favour of the appellant or there was any kind of bar of limitation in filing of the reply within extended time though beyond 45 days in all. The reply is not necessarily to be rejected. All facts and circumstances of the case must be taken into account. The Statement of Objects and Reasons of the Act also provides that the principles of natural justice have also to be kept in mind."

In the present context, first of all, the Statement of Objects and Reasons of both the Amendment Acts should be looked into. The Amendment Act, 1999 was enacted with a view to cutting short the delays at various levels of procedure, but before action could be initiated for its enforcement, various representations were sent to the Government to show that certain provisions could cause hardship to the litigants. The provisions of Amendment Act, 1999 were reconsidered and the Amendment Act, 2002 was enacted but the Statement of Objects and Reasons of these amendments remained the same.

The Code was amended with a view to cut short the delay which causes unnecessary hindrances in the progress of the cases. The provision of Order 8 Rule 1 of the Code has been amended to cut short the delay in filing of the written statement. It does not prescribe any kind of period of limitation. The nature of the provision is procedural one. All this show that the provision under Order 8 Rule 1 is directory in nature.

Next comes the point of consequences of non-compliance. The consequences of non-compliance of the provision of Order 8 Rule 1 has been provided under Order 8 Rule 10 which reads as under :

> **"10. Procedure when party fails to present written statement called for by Court.-** Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up."

According to Order 8 Rule 1, the consequence of not filing written statement would be : the Court can pronounce judgment against the defaulting party; or make such order in relation to the suit as it thinks fit. This is not the penal provision against the defendant because if the Court pronounces the judgment immediately, the matter ends and the question of filing of written statement does not arise and on the other hand if the Court does not think it proper to pronounce the judgment, a wide discretion has been given to the Court to make proper orders in relation to the suit. There can be a wide scope to pass an order of rejection of plaint even in absence of written statement. It is nowhere provided in Rule 10 of Order 8 of the Code that where a party fails to file written statement within stipulated time, the same shall not be taken no record or it shall be rejected. This shows that the Court has wide discretionary powers to accept the written statement which has been filed after the period of ninety days.

The important aspect of natural justice should always be considered while dealing with the provision of Order 8 Rule 1 of the Code. Since Order 8 Rule 1 provides the procedural law, the principle of natural justice should not be ignored. When it appears from the circumstances prevailing in a particular case that natural justice is in favour of defaulting party, the Court has discretionary powers to pass an order in favour of that party, but of course on certain terms. It would be desirable for the Courts to pass such an order so that undue delay may not be caused.

The matter in question has been considered by our Hon'ble High Court of Madhya Pradesh in cases of *Asarfilal Vs. Smt. Vimla Devi and others, 2003 (3) MPHT 14 (NOC), Mithumal and others Vs. Ku. Kavita, 2003 (3) MPHT 206 and S.K. Muddin Vs. S.K. Nafeez, 2003 (4) MPHT 93.* Now, it is a settled position of law on the basis of these pronouncements that the provision made under Order 8 Rule 1 of the Code is directory and not mandatory in nature and the Court has full power to accept the written statement which has been filed after expiry of ninety days from the date of service of summons. It has been laid down in the case of *Mithumal (supra)* as follows :

> "The procedural provision inserted in Order 8 Rule 1 of CPC intends to expedite the trial. In case written statement is not filed within time limit of 90 days prescribed in Order 8 Rule 1 of CPC, Court

may be justified in closing the right to file written statement. However it does not mean that if written statement is filed in the Court explaining the reasons for delay in exceptional cases, Court cannot take written statement on record subject to payment of cost if case has not progressed substantially after closing of the right to file written statement. Court can take written statement on record to do complete justice between parties at the same time case is not to be delayed."

It is clear from the above mentioned citations that the provision under Order 8 Rule 1 is directory and not mandatory in nature but while exercising the discretionary powers, it should be borne in mind that the defaulting party may not make mockery of discretionary powers of the Courts. It is duty of the Court to look into the mater and if the Court finds in exceptional cases that there are sufficient grounds for the delay and undue delay would not occur in early disposal of the case, the Court can pass an order of taking written statement on record filed beyond ninety days with certain conditions.

Now the question arises at this juncture as to under which provision the Court is empowered to extent the time. Section 148 of the Code provides the enlargement of time by the Courts. It is clear from the provision of this section that the Court can fix or grant time for the doing of any act prescribed or allowed by the Code from time to time but such period cannot be enlarged beyond thirty days in total. Section 148 applies only where any time has been fixed by the Court for the doing of any act prescribed or allowed by the Code. It does not provide extension of time limit where the limitation has been fixed by the law for doing certain act. It simply says where the act prescribed or allowed by the Code is to be done, the Court may fix or grant any period for doing that act, such enlargement of time cannot exceed thirty days in total. It has been laid down in *Mohan Lal Vs. Hari Prasad Yadav and others, (1994) 4 SCC 177* as under :

> "We are thus left with the question whether Section 148 of the Code would be applicable to the present case or not. Again Section 148 of the Code would not be applicable to the present case for the simple reason that the time for making an application under Rule 89 of Order 21 of the Code is not fixed by the Court."

In the case of *S.K. Muddin (supra)* it has been laid down that the written statement can be taken after ninety days of service of summons on filing of application under Section 151 of the Code or the Court may invoke the inherent jurisdiction suo motu in appropriate cases. Thus, it can be said that the jurisidiction for extension of time for filing of written statement beyond ninety days can be invoked under Section 151 of the Code.

It is the settled legal position at present that the provision under Order 8 Rule 1 are directory in nature and the Court can use its discretion by taking written statement after the prescribed period of ninety days but these discretionary powers can only be used in appropriate cases. While doing so, the Courts must borne in mind the principles laid down in the above mentioned case laws.

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BI-MONTHLY TRAINING PROGRAMME

In all five topics were sent by this Institute for discussion in the bi-monthly training meeting of August, 2003 to be held at district head quarters. The Institute has received articles on these topics from various districts. One article on each topic is being included in this issue of JOTI Journal. The Institute is also publishing some relevant additional material on the topic 'Inherent powers of criminal Couts' for the benefit of judicial officers.The topics are as under :

1. Whether criminal Courts have inherent powers? If yes, what should be the nature and extent of such powers ?
   क्या दांडिक न्यायालयों को अन्तर्निहित शक्तियां प्राप्त हैं ? यदि हां, तो उनका स्वरूप एवं विस्तार क्या होना चाहिए ?

2. What is the scope of applicability of the provisions regarding alternative dispute resolution as contained in Section 89 and order X Rule 1-A to 1-C Code of Civil Procedure ?
   व्यवहार प्रक्रिया संहिता की धारा 89 एवं आदेश X नियम 1-ए से 1-सी के अन्तर्गत वैकल्पिक विवाद निराकरण हेतु निर्धारित प्रक्रिया की प्रायोजयता का स्वरूप क्या होना चाहिए ?

3. Whether the provisions of Order 18 rule 4 and Order 18 Rule 5 C.P.C. are self-contradictory? What may be the harmonious mode of their applicability?
   क्या व्यवहार प्रक्रिया संहिता के आदेश 18 नियम 4 तथा आदेश 18 नियम 5 के प्राविधान विरोधाभास पूर्ण हैं ? इन प्राविधानों की प्रायोज्यता का सामंजस्यपूर्ण तरीका क्या हो सकता है ?

4. Whether Magistrate has jurisdiction under section 451 Cr.P.C. to grant interim custody of articles seized under Forest Act, 1927, M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam,1969, Wild Life (Protection) Act, 1972 and M.P. Excise Act, 1915? If yes, what is the extent and scope of such powers?
   क्या मजिस्ट्रेट को दंड प्रकिया संहिता, 1973 की धारा 451 के अन्तर्गत उन वस्तुओं को अंतरिम सुपुर्दगी पर देने की अधिकारिता है, जो वन अधिनियम, 1927, म.प्र. वन उपज (व्यापार विनियमन) अधिनियम, 1969, वन्य प्राणी (संरक्षण) अधिनियम, 1972 तथा म.प्र. आबकारी अधिनियम, 1915 के अन्तर्गत अभिग्रहीत की गई है ? यदि हां, तो ऐसी अधिकारिता का स्वरूप एवं विस्तार क्या है ?

5. Whether the recovery of fine from a person sentenced to life imprisonment and fine and further imprisonment in default of payment of fine shall remain suspended till the sentence of life imprisonment is over? Explain legal position in this respect.
   आजन्म कारावास के साथ-साथ अर्थदंड तथा उसके संदाय में व्यतिक्रम की दशा में अतिरिक्त कारावास से दंडित व्यक्ति से अर्थदंड की वसूली क्या आजन्म कारावास की सजा पूर्ण होने तक स्थगित रहेगी ? इस बारे में विधिक स्थिति स्पष्ट करें ?

दांडिक न्यायालय की अन्तर्निहित शक्तियाँ

न्यायिक अधिकारीगण
जिला छिंदवाड़ा

अन्तर्निहित शक्ति के अधिकार का सिद्धान्त एक लैटिन उक्ति *"Quado lex aliquid alicui concedit concodere videtur id sine quo ipsa non potest"* पर आधारित है, जिसका अर्थ है कि जब विधि किसी को कोई अधिकार देती है, तो उसे ऐसे अधिकार भी देती है, जिनके बिना उक्त अधिकार का अस्तित्व संभव रह पाना मुमकिन न हो।

किसी भी संहिता के द्वारा निर्धारित प्रक्रिया के अनुरूप आपराधिक न्याय प्रशासन में निश्चित रूप से कमियाँ आना स्वाभाविक है और ऐसे मामले एवं परिस्थितियाँ हो सकती हैं, जो संहिता के स्पष्ट एवं प्रकट प्रावधानों के अंतर्गत न हो। इसका कारण यह है कि विधायिका केवल अत्यधिक प्राकृतिक एवं सामान्य घटनाओं का पूर्वानुमान का सकती है। ऐसी कोई प्रक्रियात्मक विधि निर्मित नहीं की जा सकती, जो सदैव, सभी कालों में, सभी परिस्थितियों के अनुरूप हो, क्योंकि मामले की सभी परिस्थितियों का पूर्वानुमान नहीं किया जा सकता। ये परिस्थितियाँ समय एवं आवश्यकता के अनुसार परिवर्तनीय है। जहां संहिता में प्रक्रिया संबंधी कोई स्पष्ट प्रावधान न हो, वहाँ न्यायालय को न्यायोचित प्रशासन के लिए अन्तर्निहित शक्तियों की आवश्यकता होती है, ताकि स्पष्ट प्रक्रिया के अभाव में न्याय विफल न हो सके, क्योंकि न्याय ही प्रमुख आवश्यकता है, जिसकी नींव पर न्याय मंदिर की स्थापना होती है।

संहिता द्वारा निर्धारित प्रक्रिया अथवा नियमों के कभी-कभी दुरूपयोग होने की संभावना भी रहती है अथवा निर्धारित की गई प्रक्रिया का दुरुपयोग इस प्रकार किया जा सकता है, जिससे न्याय प्रशासन में बाधा या रुकावट हो। अतः प्रक्रिया का दुरुपयोग रोकने के लिए न्यायालय को अन्तर्निहित शक्तियों का प्रयोग करने की आवश्यकता होती है। फलस्वरूप उपरोक्त परिस्थितियों में न्याय प्रशासन में किसी भी बाधा को समाप्त करने के लिए अथवा संहिता द्वारा निर्धारित प्रक्रिया का दुरुपयोग रोकने के लिए या अन्याय का प्रतिकार करने के लिए अथवा किसी त्रुटि को सुधार करने के लिए यह नहीं कहा जा सकता कि न्यायालय को अन्तर्निहित शक्तियाँ प्राप्त नहीं हैं, क्योंकि संहिता में इसका उपबन्ध नहीं है। फलस्वरूप प्रत्येक न्यायालय को, चाहे वह व्यवहार अथवा आपराधिक न्यायालय क्यों न हो, संहिता में स्पष्ट प्रावधानों के अभाव में भी न्याय प्रशासन हेतु अपने ही स्वयं के निर्माण से अन्तर्निहित स्वरूप की ऐसी सभी शक्तियाँ जो न्याय प्रशासन के संव्यवहार में न्याय करने के लिए अथवा किसी त्रुटि को समाप्त करने के लिए आवश्यक हो, प्राप्त होती है।

दंड प्रक्रिया संहिता की धारा 482 में यह उपबंधित है कि उच्च न्यायालय उपरोक्त अन्तर्निहित शक्ति का प्रयोग कर सकते हैं। माननीय उच्च न्यायालय से निम्न दांडिक न्यायालयों को उपरोक्त अन्तर्निहित शक्ति का प्रयोग करने का स्पष्ट उपबन्ध संहिता में नहीं है। परिणामस्वरूप ऐसी स्थिति में प्रश्न यह उत्पन्न होता है कि क्या दांडिक न्यायालयों को भी उचित न्याय प्रशासन हेतु अथवा प्रक्रिया के दुरुपयोग को रोकने के लिए अन्तर्निहित शक्ति प्राप्त है ?

प्रत्येक दांडिक न्यायालय को उसके गठन से ही अन्तर्निहित शक्ति प्राप्त होती है। यह अलग बात है कि न्यायालय की अन्तर्निहित शक्ति सीमित कर दी जाये। यह विधायिका के कौशल एवं दूरदृष्टि पर निर्भर करता है कि इस तरह का विधायन बनाया जाये, जिसमें प्रक्रिया संबंधी सभी आवश्यकताओं, संभावनाओं का समावेश हो, ताकि न्यायालय द्वारा प्रयोग की जाने वाली शक्ति को स्पष्ट रूप से परिभाषित किया जा सके। न्यायालय द्वारा प्रयोग किए जाने वाले क्षेत्राधिकार सुस्पष्ट हों, न्यायालय को न्याय प्रशासन में कोई असुविधा न हो और उसे अपनी अन्तर्निहित शक्ति का प्रयोग करने की आवश्यकता यथासंभव न्यूनतम पड़े।

दंड प्रक्रिया संहिता, 1973 इस संबंध में एक श्रेष्ठ विधायन है, जिसमें न्याय प्रशासन से संबंधित सभी आवश्यक परिस्थितियों के अनुरूप प्रक्रिया तथा अधिकारों का वर्णन किया गया है। अपवाद स्वरूप मामले को छोड़कर, दांडिक न्यायालयों को अन्तर्निहित शक्ति का प्रयोग करने का कोई अवसर नहीं है। संभवतः इसीलिए दांडिक न्यायालय को दंड प्रक्रिया संहिता की धारा 482 के अन्तर्गत अन्तर्निहित शक्ति का प्रयोग करने का अधिकार स्पष्टतः नहीं दिया है।

यह सही है कि दंड प्रक्रिया संहिता, 1973 की धारा 482 उच्च न्यायालय की अन्तर्निहित शक्तियों का उपबन्ध करती है तथा अधीनस्थ न्यायालयों की अन्तर्निहित शक्तियों के बारे में कोई स्पष्ट विधान नहीं करती। परन्तु इसका यह अर्थ कदापि नहीं है कि दंड प्रक्रिया संहिता, अधीनस्थ न्यायालयों की अन्तर्निहित शक्तियों को स्पष्टतः निषेधित करती है। इस संदर्भ में न्यायदृष्टांत ''हरीराम बनाम राज्य'' (ए.आई.आर. 1956 एम.बी. 17) के अन्तर्गत प्रतिपादित सिद्धान्त अवलोकनीय है, जिसमें यह कहा गया है कि यदि विपरीततः कोई स्पष्ट प्रावधान न हो, तो प्रत्येक न्यायालय के बारे में यह माना जायेगा कि उसके गठन से ही उसे इस प्रकार की अन्तर्निहित शक्तियाँ प्राप्त हैं, जो न्याय प्रशासन के लिए आवश्यक हो।

साथ ही माननीय मध्यप्रदेश उच्च न्यायालय ने न्याय दृष्टांत ''समी बाई बनाम नाथू'' (ए.आई.आर. 1961 एम.पी. 25) में यह सिद्धान्त प्रतिपादित किया है कि न्यायालय की प्रक्रिया के दुरुपयोग को रोकने एवं न्याय के उद्देश्यों की प्राप्ति हेतु विधि के स्पष्ट प्रावधान के अभाव के बावजूद अधीनस्थ न्यायालयों को भी अन्तर्निहित शक्तियाँ प्राप्त हैं।

इसके अतिरिक्त माननीय मध्यप्रदेश उच्च न्यायालय ने न्यायदृष्टांत प्रशासक, नगरपालिक निगम भोपाल बनाम रफीक अहमद (1975 जे.एल.जे. 708) में यह सिद्धान्त प्रतिपादित किया है कि धारा 561-अ (नवीन धारा 482) दंड प्रक्रिया संहिता केवल उच्च न्यायालय की अन्तर्निहित शक्तियों को सुरक्षित करती है एवं अधीनस्थ न्यायालयों के इस प्रकार की किसी शक्ति के बारे में मौन है, परन्तु इसका यह अर्थ कदापि नहीं है कि आवश्यकता पड़ने पर, अधीनस्थ न्यायालय किसी अन्तर्निहित शक्ति का प्रयोग करने से वंचित है, क्योंकि विधि का यह भी सुस्थापित सिद्धान्त है कि न्यायालय को विधि के द्वारा जो अधिकार निहित किये गये हैं, उनके अस्तित्व एवं उनके विधिक कर्तव्य के निर्वहन के लिए उन्हें अन्तर्निहित शक्तियाँ भी प्रदाय की गई हैं और इसी क्रम में सभी दांडिक न्यायालय को भी इस प्रकार की अन्तर्निहित शक्तियाँ प्राप्त हैं, जो न्यायिक उद्देश्यों की पूर्ति हेतु आवश्यक हों। परन्तु तदर्थ आवश्यक है कि इस प्रकार की अन्तर्निहित शक्ति का मनमाना प्रयोग अथवा दुरुपयोग न हो।

इस क्रम में अधीनस्थ दांडिक न्यायालय के दैनंदिन कार्य में अन्तर्निहित शक्तियों के प्रयोग के संदर्भ में निम्न उदाहरणों द्वारा विषय को समझा जा सकता है :-

अधीनस्थ दांडिक न्यायालय पूरक चालान को अपनी अन्तर्निहित शक्ति का प्रयोग करते हुए ग्रहण करते हैं, क्योंकि संहिता में कोई स्पष्ट प्रावधान नहीं है।

यदि पुलिस चालान में किसी व्यक्ति का नाम त्रुटिवश अभियुक्त के रूप में लिख दिया गया है और मजिस्ट्रेट आदेशिका जारी करते हुए अपराध का संज्ञान लेता है, तो भी अभियोजन के निवेदन पर अपनी अन्तर्निहित शक्ति का प्रयोग करते हुए मजिस्ट्रेट उक्त त्रुटि को दूर कर सकते हैं। इस संदर्भ में 1972 सी आर. एल.जे. 1148 अवलोकनीय है।

ए.आई.आर. 1963 इलाहाबाद 148 (श्रीमती कनीज़ फातिमा बीबी वि. उत्तरप्रदेश राज्य एवं अन्य) में माननीय न्यायालय ने यह अभिनिर्धारित किया है कि लोक विश्लेषक की रिपोर्ट, खाद्य अपमिश्रण निवारण अधिनियम की धारा 13 के अन्तर्गत लोक विश्लेषक को साक्षी के रूप में आहूत किए बिना साक्ष्य में ग्राह्य है, किन्तु न्यायालय अपनी अन्तर्निहित शक्ति के अंतर्गत उसकी परीक्षा हेतु उसे आहूत कर सकता है।

भारतीय दंड विधान की धारा 452 के अपराध के विचारण के दौरान पुलिस ने अभियुक्त को आधिपत्यहीन कर दिया। अभियुक्त के दोषमुक्त किए जाने पर न्यायालय अपनी अन्तर्निहित शक्ति के अंतर्गत उसे आधिपत्य पुनः प्रदान कर सकता है। इस संदर्भ में ए.आई.आर. 1961 मणीपुर 34 अवलोकनीय है।

न्यायालय साक्ष्य सूची से भिन्न किसी भी साक्षी को प्रकरण के न्यायोचित निराकरण के लिए अपनी अन्तर्निहित शक्ति का प्रयोग करते हुए साक्ष्य हेतु बुला सकता है।

शिवचरण बनाम राज्य तथा अन्य, (1990)3) क्राईम्स 597 पैरा 11 के मामले में पुलिस द्वारा जप्त की गई भैंस आवेदक के सुपुर्दनामा पर प्रदान कर दी गई, क्योंकि पुलिस ने दो बार अवसर दिए जाने के बावजूद भी, न्यायालय में प्रतिवेदन प्रस्तुत नहीं किया। बाद में मुख्य न्यायिक दंडाधिकारी ने अपने पूर्व के सुपुर्दनामा आदेश को इस आधार पर निरस्त कर दिया कि जप्त की गई संपत्ति की सूचना, दंड प्रक्रिया संहिता की धारा 457 के अन्तर्गत पुलिस ने मजिस्ट्रेट को नहीं दी थी। इलाहाबाद उच्च न्यायालय ने इन परिस्थितियों में यह माना कि न्यायालय अपने ऐसे किसी आदेश को जो क्षेत्राधिकार के अभाव में पारित किया गया है, वापस लेने के लिए स्वतंत्र है, क्योंकि क्षेत्राधिकार के बिना पारित किया गया आदेश विधि की दृष्टि से शून्य है। अतः यह कहा जा सकता है कि क्षेत्राधिकार विहीन आदेश को वापस लेने की दांडिक न्यायालय को सीमित अन्तर्निहित शक्ति प्राप्त है।

शंभूलाल गोपे तथा अन्य बनाम बिहार राज्य, ए.आई.आर. 1971 पटना 151 पैरा-4 के मामले में पटना उच्च न्यायालय ने यह अभिनिर्धारित किया है कि दं.प्र.सं. में अधीनस्थ दांडिक न्यायालय को व्य.प्र.सं. की धारा 151 के सदृश्य अन्तर्निहित शक्ति प्रदान नहीं की गई है किन्तु अधीनस्थ दांडिक न्यायालय अन्तर्निहित शक्ति का प्रयोग इस शर्त के साथ कर सकता है कि ऐसी शक्ति का प्रयोग संहिता के प्रत्यक्ष अथवा अप्रत्यक्ष प्रावधानों के विपरीत न हो। उदाहणार्थ-प्रतिभू के स्थान पर नकद राशि जमा कराये जाने की शक्ति, न्यायालय उठने तक से दंडित करने की शक्ति।

यदि अभियोजन अथवा बचाव पक्ष समुचित एवं पर्याप्त अवसर देने के उपरांत भी साक्ष्य प्रस्तुत करने में असमर्थ रहते हैं और न्यायालय यह पाती है कि जानबूझकर विलम्ब कारित किया जाकर न्याय प्रक्रिया का दुरुपयोग किया जा रहा है तो न्यायालय अपनी अन्तर्निहित शक्ति का प्रयोग करते हुए किसी भी पक्ष को साक्ष्य प्रस्तुत करने का अवसर समाप्त कर सकता है। इसी प्रकार विचारण की कार्यवाही के दौरान यदि किसी स्टेज की चूक हो जाती है, उदाहरण के लिए आरोप की रचना बिना प्रकरण साक्ष्य हेतु नियत हो जाता है अथवा जहाँ एक से अधिक अभियुक्त हों, वहाँ किसी एक अभियुक्त पर आरोप विरचित नहीं हो पाता है और प्रकरण यदि साक्ष्य हेतु नियत हो जाता है अथवा बिना अभियुक्त परीक्षण के प्रकरण बचाव साक्ष्य हेतु नियत हो जाता है, आदि ऐसे अनेक उदाहरण हो सकते हैं, जिसकी प्रक्रियात्मक त्रुटि को दूर करने की अन्तर्निहित शक्ति न्यायालय को प्राप्त है।

फलस्वरूप उपरोक्त विवेचन से यह स्पष्ट है कि यद्यपि दं.प्र.सं. की धारा 482 के प्रावधानों के अंतर्गत प्रत्यक्षतः अधीनस्थ दांडिक न्यायालयों को अन्तर्निहित शक्ति प्रयोग करने का अधिकार नहीं दिया गया है, लेकिन इस धारा के अन्तर्गत स्पष्टतः दांडिक न्यायालय द्वारा अन्तर्निहित शक्ति के प्रयोग पर प्रतिबंध भी नहीं लगाया गया है। अन्तर्निहित शक्ति के बिना किसी भी न्यायालय के अस्तित्व की कल्पना नहीं की जा सकती। अतः सभी दांडिक न्यायालयों को अन्तर्निहित शक्ति प्राप्त है, भले ही वे अत्यधिक सीमित ही क्यों न हो।

इस प्रकार विधि के स्पष्ट प्रावधान के अभाव के बावजूद अधीनस्थ दांडिक न्यायालयों को भी न्यायालय की प्रक्रिया के दुरुपयोग को रोकने एवं न्याय के उद्देश्यों के प्राप्ति हेतु अन्तर्निहित शक्तियाँ प्राप्त हैं, परन्तु इस संबंध में यह ध्यान रखा जाना अत्यावश्यक है कि इस प्रकार की अन्तर्निहित शक्ति का प्रयोग विधि के स्पष्ट प्रावधान के विपरीत या उल्लंघन में नहीं किया जा सकता है।

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दांडिक न्यायालयों की अन्तर्निहित शक्तियां (सांस्थानिक पूरक आलेख)

दांडिक न्यायालयों में अन्तर्निहित शक्तियां वैष्ठित होने के विषय में प्रश्न उद्भूत होने का आधारभूत कारण यह है कि सिविल प्रक्रिया संहिता की धारा 151 के समरूप, जो सिविल न्यायालयों की अन्तर्निहित शक्तियों के विषय में प्राविधित करती है, दांडिक न्यायालयों की अन्तर्निहित शक्तियों के विषय में कोई प्राविधान दंड प्रक्रिया संहिता, 1973 में नहीं है, तथापि धारा 482 उच्च न्यायालय की अन्तर्निहित शक्तियों के विषय में प्राविधित करती है।

यद्यपि विधिक क्षेत्रों में यह सामान्य अवधारणा विद्यमान रही है कि न्यायालय की अन्तर्निहित शक्तियां, संहिता के किसी प्राविधान विशेष से उद्भूत न होकर न्यायालय के अस्तित्व मात्र से न्यायालय में निहित होती है ताकि न्यायालय न्यायिक प्रक्रिया के दुरुपयोग की स्थिति में उसका प्रतिकार करने हेतु किसी विर्निदिष्ट प्रक्रियागत प्राविधान के अभाव में ऐसी शक्तियों के अन्तर्गत न्यायदान की प्रक्रिया को सार्थकता प्रदान कर सके, लेकिन कतिपय न्याय दृष्टांतों की पृष्ठभूमि में यह विषय किचिंत जटिल स्वरूप प्राप्त कर चुका है।

जय बरहाम विरूद्ध केदारनाथ, ए.आई.आर. 1922 पी.सी. 269 के मामले में प्रीव्ही. काउंसिल द्वारा किया गया यह विनिश्चय इस विषय में एक मील का पत्थर है कि प्रत्येक न्यायालय का यह सर्वोच्च कर्तव्य

है कि वह न्यायालीन कृत्य से वादकारी को क्षति कारित न होने दे। वस्तुतः विधि का उद्देश्य अभियुक्त को नैसर्गिक न्याय के सिद्धान्तों के अनुरूप ऋजु विचारण उपलब्ध कराना है।

रघुवीर सिंह विरुद्ध बिहार राज्य, ए.आई.आर. 1964 एस.सी. 1 में सर्वोच्च न्यायालय की तीन सदस्यीय की पीठ द्वारा किया गया यह विनिश्चय इस क्रम में स्थिति को और अधिक स्पष्ट कर देता है कि उच्च न्यायालय सहित सभी न्यायालय न्यायदान के लिए उन सभी शक्तियों के साथ-साथ जो विधि द्वारा प्रदान की गई हैं, ऐसी अन्तर्निहित शक्तियों का उपयोग कर सकते हैं जो विनिर्दिष्टतः संरक्षित की गई है अथवा अधिनियम के द्वारा नहीं छीनी गई है।

उक्त प्रतिपादन अपने आप में सुस्पष्ट रूप से दांडिक न्यायालयों में अन्तर्निहित शक्तियों के वेष्टित होने की स्थिति की ओर इंगित करता है, लेकिन इसके बाद सर्वोच्च न्यायालय द्वारा विन्देश्वरी प्रसाद विरुद्ध काली सिंह, ए.आई.आर. 1977 एस.सी. 2432 में किए गए इस प्रतिपादन से स्थिति किंचित अस्पष्ट हो जाती है कि दंड प्रक्रिया संहिता (धारा 561 ए पूर्व संहिता की) यद्यपि उच्च न्यायालय को अन्तर्निहित शक्तियां प्रदान करती हैं लेकिन संहिता में धारा 151 व्यवहार प्रक्रिया संहिता के समरूप प्राविधान न होने के कारण अधीनस्थ दांडिक न्यायालयों को अन्तर्निहित शक्तियां प्राप्त नहीं है। यह न्याय निर्णय द्विसदस्यीय पीठ का था तथा इस मामले में न्यायालय के विचारार्थ मूल प्रश्न यह था कि क्या मजिस्ट्रेट को अपने ही आदेश को बदलने की अधिकारिता प्राप्त है। सर्वोच्च न्यायालय ने इस विषय में दिल्ली उच्च न्यायालय के निर्णय को पलटते हुए यद्यपि उक्त अभिमत अवश्य दिया है लेकिन इस निर्णय में सर्वोच्च न्यायालय की त्रिसदस्यीय पीठ द्वारा विनिश्चित रघुवीर सिंह (पूर्वोक्त) के मामले का कोई संदर्भ नहीं है। अतः स्वाभाविक रूप से यह प्रश्न उठता है कि इसी बिन्दु पर वहतर् पीठ के सुस्पष्ट विनिश्चय के अस्तित्वाधीन रहते हुए क्या लघुतर पीठ के द्वारा किया गया उक्त विनिश्चिय आबद्धकारी पूर्व निर्णय का प्रभाव रखेगा ?

इस क्रम में पूर्व निर्णय के आबद्धकारी प्रभाव के विषय में सर्वोच्च न्यायालय के द्वारा हाल ही में प्रदीप चंद पारिजात विरूद्ध प्रमोद चन्द्र पटनायक, (2002) 1 एससीसी 1 में किया गया यह विनिश्चियन हमारा ध्यान आकृष्ट करता है कि यदि दो न्यायाधीशों की पीठ तीन न्यायाधीशों की पीठ द्वारा किए गए विनिश्चय से असहमत है तो उस दिशा में एकमात्र अनुज्ञेय मार्ग यह है कि मामला तीन न्यायाधीशों की दूसरी पीठ के समक्ष रखा जाए तथा यदि तीन न्यायाधीशों की ऐसी पीठ तीन न्यायाधीशों की पूर्व पीठ के विनिश्चय को त्रुटिपूर्ण पाती है, तो उस दशा में मामला पांच न्यायाधीशों की पीठ के समक्ष रखा जाए। शीर्षस्थ न्यायालय के इस विनिश्चय के प्रकाश एवं पूर्वोक्त पृष्ठभूमि के परिप्रेक्ष्य में रघुवीर सिंह (पूर्वोक्त) में त्रिसदस्यीय पीठ के इस विनिश्चय को प्रभावी एवं आबद्धकरी माना जाना चाहिए कि प्रत्येक न्यायालय को अन्तर्निहित शक्तियां प्राप्त हैं, भले ही संहिता में इस हेतु विनिर्दिष्ट प्रावधान न किया गया हो।

सर्वोच्च न्यायालय ने मेजर जनरल ए.एस.गौराया विरुद्ध एस.एन. ठाकुर, ए.आई.आर. 1986 एस.सी. 1440 (द्विसदस्यीय पीठ) के मामले में विन्देश्वरी प्रसाद (पूर्वोक्त) के मामले को अवलंबित करते हुए पुनः यह प्रस्थापना दी है कि दंड प्रक्रिया संहिता, 1973 में सिविल प्रक्रिया संहिता की धारा 151 के समरूप प्राविधान के अभाव में अधीनस्थ दंड न्यायालयों को अन्तर्निहित शक्तियां प्राप्त नहीं हैं। न्यायिक विनिश्चयों के आबद्ध कर स्वरूप के विषय में प्रदीपचन्द पारिजात (पूर्वोक्त) में किए गए प्रतिपादन की पृष्ठभूमि में इस मामले में किए विनिश्चय को भी आबद्धकर प्रभाव का निरूपित करना न्यायिक दृष्टिकोण के अनुरूप नहीं होगा। इस विश्लेषण के क्रम में तथा अंतिम निष्कर्ष पर पहुंचने के पूर्व सर्वोच्च न्यायालय के ही दो अन्य

विनिश्चयों का संदर्भ यहां समीचीन होगा। सावित्री विरुद्ध गोविन्द सिंह, रावत ए आई आर 1986 एस.सी. 984 का प्रथम मामला दंड प्रक्रिया संहिता, 1973 की धारा 125 के प्राविधानों से संबंधित है, जो पत्नी, संतान तथा माता पिता को निर्वाह भत्ता दिलाए जाने के विषय में है। संहिता के अध्याय 11 में विद्यमान धारा 125-128 में अन्तरिम भरण-पोषण राशि दिलाए जाने विषयक कोई प्राविधान न होने के बावजूद सर्वोच्च न्यायालय द्वारा इस मामले में यह विनिश्चित किया गया है कि स्पष्ट प्रतिशिद्धकारी प्राविधान के अभाव में न्यायालय को उक्त प्राविधानों के अन्तर्गत आवेदक को अन्तरिम निर्वाह भत्ता दिलाने की अधिकारिता है। निश्चिय ही ऐसी अधिकारिता किसी विनिर्दिष्ट प्राविधान के अभाव में न्यायालय की अन्तर्निहित शक्तियों से ही प्रवाहित हो सकती है।

के.एम. मैथ्यू विरूद्ध केरल राज्य, ए.आई.आर. 1992 एस.सी. 2206 का मामला किंचित अधिक महत्वपूर्ण एवं सुसंगत है। इस मामले में न्यायालय के समक्ष केन्द्रीय प्रश्न यह था कि क्या धारा 204 दंड प्रक्रिया संहिता के अन्तर्गत आव्हान पत्र जारी किए जाने के पश्चात् मजिस्ट्रेट आहूत अभियुक्त के उपस्थित होने तथा निवेदन करने पर परिवाद पर पुनर्विचार कर ऐसी संतुष्टि होने पर कि कोई मामला नहीं बनता है, परिवाद कार्यवाही समाप्त करने का आदेश दे सकता है। इस विषय में सकारात्मक निष्कर्ष देते हुए सर्वोच्च न्यायालय ने यह मताभिव्यक्ति की है कि मजिस्ट्रेट को यह न्यायिक विवेकाधिकार प्राप्त है कि संहिता में विनिर्दिष्ट प्राविधान के अभाव के बावजूद वह ऐसी संतुष्टि होने पर, कि अभियुक्त के विरुद्ध मामला नहीं बनता है, परिवाद की कार्यवाही के समाप्त कर दे तथा आदेशिका वापस बुला ले। कदाचित, ऐसी अधिकारिता अन्तर्निहित शक्तियों के अन्तर्गत ही मजिस्ट्रेट को प्राप्त हो सकती हैं अन्यथा नहीं।

पूर्वोक्त विश्लेषण के आधार पर यही विधिक स्थिति उभर कर सामने आती है कि अधीनस्थ दांडिक न्यायालयों की अन्तर्निहित शक्तियों के बारे में दंड प्रक्रिया संहिता, 1973 में विनिर्दिष्ट प्राविधान न होने की स्थिति में भी दांडिक न्यायालयों को अन्तर्निहित शक्तियां प्राप्त हैं।

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To be fully effective, speed must be coupled with accuracy. Speed means nothing if the service rendered is not accurate. Furthermore, accuracy must be present at all points.

- Nielander, William A.

SECTION 89 AND ORDER X RULE 1-A, 1-B & 1-C OF C.P.C. SCOPE AND APPLICABILITY

JUDICIAL OFFICERS
District Ratlam

(1) After amendment of C.P.C. w.e.f. 1.7.2002 new section 89 has been reenacted to introduce settlement of dispute outside the court.

The new provisions as mentioned above are meant to quicken the judicial procedure which otherwise takes much time to dispose of the suit.

Amendment now imposes an obligation upon the court to refer the disputes for settlement after issues being framed. Section 89 reads as follows :-

89. Settlement of disputes outside the Court - *(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the courts shall formulate the terms of settlement & give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for-*

(a) arbitration;

(b) Conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that act;

(b) to Lok Adalat, the Court shall refer the same to Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall affect a compromise between the parties and shall follow such procedure as may be prescribed.

(2) Section 89 C.P.C. is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of cases in the Courts and cost of litigation. Hence the forum discribed in section 89 C.P.C. has to be lookedup to with all earnestness so that the litigant public may have faith in seeking process of resolving their disputes by this process. This is a new provision, hence certainly a paradixical situation should be avoided. Technicalities should also be avoided. Apex court rendered the judgment in *N.K. Shah Engineer and Contractors Vs. State of M.P. (1999) S.C.C. 594 ;* that arbitration award is not vitiated merely because the arbitrator had not given an itemwise award and has chosen to give a lumpsum award. A lumpsum award is not a bad award. An award need not formerly express the decision of the Arbitration on each matter of dofferance. nor it is necessary for the award to be a speaking one. It will be presumed that the award disposes of finally all the matters in difference.

(3) The provisions under section 89 C.P.C. are optional and not binding on the parties concerned, hence court can only suggest the matter in which parties may resolve their differences.

Before referring the matter to the Arbitration, it should be keep in mind that the recovery of any disputed amount should not be barred by the period of three years prescribed under article 137 of the Limitation Act, 1963, because under section 3 of the Limitation Act, the claim must be sought only period prescribed in the Limitation Act. Hence only the case in which the legally recoverable amount is under question, may be referred to the arbitration.

(4) There is no bar for the parties to a dispute to refer the dispute for settlement to the Lok Adalat at any time instead in normal course has become not only expensive but also continues for years together, hence if any formal forum is chosen by the parties for expeditious decisions for their disputes, it would not be safe for a court of law to come to conclusion that such decision has been taken for any extraneous consideration without any supporting materials in that regard. It should also be keep in mind that under section 89 of the C.P.C. only such disputes or matters can be referred to a forum chosen by the parties, to only such Forum which is competent or empowered to decide, can be referred to such Forum. The Court can dismiss the application seeking reference of their case, if the matter is pertaining to unlawful agreement.

(5) In case where proceedings have commenced before the coming into force the new section 89 C.P.C. and case is pending before the Court, it is open to the Court or to the parties that the new provisions may be applicable to such pending proceedings. There is nothing in the language of section 89 C.P.C. which barred the parties or Courts from so doing.

In the Indian atmosphere Panchayat Courts, Nyaya Panchayat, Panchayat Adalat and Gram Kacheri etc., resolving the disputes between the parties through conciliation. Litigation in Civil Courts is costly, time consuming, unproductive and

full of complications. It is nearly always a drains on wealth and depresses economically as well as emptionally. The net result is virtually in general a loss. By draining energy, funds, the litigation weakens both parties to a loss sit-vis-a-vis the open market place. Litigation thus destroys both the parties in the terms of money, time, energy and good relations, whereas if parties redress their dispute through conciliation, their disputers resolves for ever and even in the happy atmosphere. Hence, Courts must try to encourage alternative dispute resolution.

(6) The essential ingredients of the special provisions under section 89 C.P.C. are as follows :-

1. There should be any possibility of a settlement;

2. Such settlement appears to be acceptable to the parties.

Where it appears to the Courts that above elements are exist, then the Court shall formulate the terms of settlement and give them to the parties for their observations and if parties willing to settle their disputes by way of compromise, then the Court may reformulate the terms of a possible settlement keeping in view the observations received from the parties.

(7) It is clear that why section 89 has been inserted. It is not necessary that all the suits filed in the court be decided by the court itself. A limited number of judges are available still over burdened with work. It has been required that a alternative dispute resolution mechanism be evolved for speedy disposal of pending suits. All that means is that effort has to be made to bring about an amicable settlement between the parties but if it is not possible through these methods, the case will go to trial. The procedure to be followed for these methods is given in sub-sections.

(8) The Supreme Court of India has also emphasized the value of these amendments in *A.I.R. 2003 SC 189* as follows-

> 9. It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as on contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89 (2) (d) provides that the parties shall follow the procedure as may be prescribed. Section 89 (2) (d), therefore, contemplates appropriate rules being framed with regard to mediation.

10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the case are settled out of court there is a requirement that the parties to the suit must indicate the form of ADR which there would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act. 1996 will apply and that case will go outside the stream of the Court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso fact take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or meditation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the Courts. It does appear to us that modulates have to be formulated for the manner in which Section 89 and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constituted so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

(9) The rules 1-A 1-B, and 1-C have been added to Order 10 of C.P.C. that the court after recording the admission or denial, shall direct the parties to the suit to opt for either mode for the settlement out side the court as given in Section 89. On the option of the parties the court shall fix the date of appearance of the parties before such forum. If parties fail to appear before that forum the matter come back to the court. The consent of the parties is requited before the matter be referred for arbitration.

(10) These special provisions have been made to help the litigants as well as the court to resolve disputes by adopting ADR (Alternative Dispute Resolution).

A penal of arbitrators should be framed from advocates. However they are required to work on norminal fee/token fee.

The system given above if adopted will certainly result in to speedy disposal of cases pending since last so many years.

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व्यवहार प्रक्रिया संहिता के आदेश 18 नि. 4 एवं 5 की प्रायोज्यता

न्यायिक अधिकारीगण
जिला इन्दौर

"Justice delayed is justice denied" अर्थात देर से न्याय का मिलना, न्याय के न मिलने जैसा है। व्यवहार न्यायालयों में व्यवहार वादों के विलम्ब से निराकृत होने एवं दीर्घ अवधि तक वादों के लंबित रहने की जटिल प्रक्रिया में सुधार के लिए समय-समय पर विचार किया जाता रहा है। उक्त प्रक्रिया को सुगम व सरल बनाने एवं प्रकरणों के शीघ्र निराकरण के उद्देश्य से ही समय-समय पर व्यवहार प्रक्रिया संहिता में संशोधन किये जाते रहे हैं। मालीमत कमेटी की सिफारिश के आधार पर व्यवहार प्रक्रिया संहिता में संशोधन अधिनियम 1999 एवं संशोधन अधिनियम 2002 के द्वारा संशोधन किये गये हैं। उक्त संशोधन दिनांक 1.7 .2002 से प्रभावशील हो चुके हैं। यहां हम व्यवहार प्रक्रिया संहिता में संशोधन द्वारा जोड़े गये प्रावधान आदेश 18 नियम 4 एवं 5 के बारे में ही चर्चा कर रहे हैं।

आदेश 18 नियम 4 व्य.प्र.सं. के अधीन प्रत्येक मामले में शपथ पत्र पर साक्षय लिये जाने का प्रावधान नवीन निर्मित किया गया है। प्रत्येक प्रावधान को जोड़े जाने के पीछे एक उद्देश्य होता है। उक्त प्रावधान को संशोधन द्वारा जोड़े जाने का मुख्य उद्देश्य मालीमात कमेटी की सिफारिश के अनुसार न्यायालयों में साक्ष्य अंकित किये जाने में अधिक समय व्यतीत होने को कम करना है, जिससे कि न्यायालय उक्त समय का उपयोग प्रकरणों के अंतिम निराकरण के लिये कर सके।

सर्वप्रथम इस प्रश्न पर विचार करना होगा कि क्या आदेश 18 नियम 4 व्य.प्र.सं. एवं आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधानों में कोई विसंगति है? इस प्रश्न पर विचार करने के लिये हमें आदेश 18 नियम 4 व आदेश 18 नियम 5 व्य.प्र.सं. एवं आदेश 18 नियम 13 व्य.प्र.सं. के प्रावधानों को देखना होगा। आदेश 18 नियम 4 व्य.प्र.सं. में संशोधन द्वारा जो नवीन प्रावधान जोड़े गये हैं, उनमें प्रत्येक मामले में साक्ष्य शपथ पत्र पर लिये जा सकने का प्रावधान किया गया है जबकि आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधान का शीर्षक पढ़ने से यह स्पष्ट होता है कि उक्त प्रावधान उन मामलों के संबंध में है, जिनके निर्णयों के विरुद्ध अपील हो सकती है तथा आदेश 18 नियम 13 व्य.प्र.सं. का शीर्षक पढ़ने से यह स्पष्ट होता है कि उक्त प्रावधान उन मामलों के संबंध है, में जिनमें निर्णयों के विरुद्ध अपील की व्यवस्था नहीं है। जहां तक आदेश 18 नियम 13 व्य.प्र.सं. के प्रावधान का प्रश्न है, उस प्रावधान के अस्तित्व में रहते हुए आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान के अंतर्गत साक्ष्य लिये जाने में कोई कठिनाई या विसंगतिपूर्ण स्थिति नहीं है। मुख्य विवाद का विषय आदेश 18 नियम 4 एवं आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधान के संबंध में ही है तथा यह कहा जा रहा है कि यह दोनों प्रावधान एक दूसरे के विरोधाभासी है। यदि इन दोनों प्रावधानों को सतही तौर पर पढ़ा जाये तो यह अवश्य स्पष्ट होता है कि दोनों प्रावधान में कुछ विसंगति दिखाई देती है क्योंकि एक तरफ आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान में समस्त मामलों में साक्षी का मुख्य परीक्षण शपथपत्र पर लिये जाने का प्रावधान किया गया है, दूसरी तरफ आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधान में अपीलीय मामलों

में साक्ष्य अंकित किये जाने की जो व्यवस्था पूर्व से है, उस अनुसार न्यायाधीश की उपस्थिति में उसके निर्देशन पर या उसके स्वयं के समक्ष टाईपराइटर पर प्रत्यक्ष रूप में साक्ष्य न्यायालय की भाषा में अंकित किया जाना है। इस आधार पर यह तर्क किया जा सकता है कि जिन मामलों में अपील हो सकने के प्रावधान हैं, उनमें साक्ष्य न्यायाधीश की उपस्थिति में ही उसके निर्देशन पर अंकित की जानी चाहिये तथा आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधान को देखते हुए आदेश 18 नियम व्य.प्र.सं. के अधीन शपथपत्र पर साक्ष्य लिये जाने का जो प्रावधान संशोधन द्वारा जोड़ा गया है, उसके अधीन अपीलीय मामलों में साक्ष्य नहीं ली जा सकेगी।

माननीय उच्चतम न्यायालय ने "सलेम बार एसोसियेशन तमिलनाडू विरुद्ध भारत शासन, ए.आई.आर. 2003 उच्चतम न्यायालय पृष्ठ 189" के न्याय दृष्टांत में आदेश 18 नियम 4 के प्रावधान की वैधानिकता पर विचार करते हुए उक्त न्याय दृष्टांत के पद क्रमांक 18 में यह स्पष्ट किया है कि सभी मामलों में आदेश 18 नियम 4 व्य.प्र.सं. के अधीन साक्ष्य शपथपत्र पर ली जा सकती है। माननीय उच्चतम न्यायालय उक्त निर्णय में यह भी स्पष्ट किया है कि जहां साक्षी को पक्षकार द्वारा स्वयं उपस्थित किया जाये, उस स्थिति में न्यायालय ऐसे साक्षी को शपथ पत्र पर साक्ष्य पेश करने का आदेश दे सकेगा। यदि साक्षी आदेश 16 नियम 1 के अधीन आहूत करने पर न्यायालय में उपस्थित हुआ है, तो उस स्थिति में न्यायालय उक्त साक्षी का मुख्य परीक्षण स्वयं अंकित कर सकता है या फिर परिस्थितियों के अनुसार यदि न्यायालय चाहे तो उसे शपथपत्र पर कथन देने के लिये भी आदेश दे सकता है। इस प्रकार आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान को माननीय उच्चतम न्यायालय द्वारा वैधानिक ठहराया जा चुका है। यह सही है कि माननीय उच्चतम न्यायालय के उक्त न्याय दृष्टांत में आदेश 18 नियम 4 एवं आदेश 18 नियम 5 व्य.प्र.सं. के संबंध में कोई विचार इस रूप में नहीं हुआ है कि उक्त दोनों प्रावधानों में कोई विसंगति है या नहीं। इसलिये माननीय उच्चतम न्यायालय के उक्त न्याय दृष्टांत से आदेश 18 नियम 4 व आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधानों के विसंगतिपूर्ण होने या न होने के संबंध में कोई निष्कर्ष नहीं निकाला जा सकता है। लेकिन इस प्रश्न पर माननीय म.प्र. उच्च न्यायालय की खंडपीठ ने रोशन जनरल स्टोर विरुद्ध विवेक गुप्ता, 2003 (II) एम.पी.जे.आर. पृष्ठ 310 के न्याय दृष्टांत में विचार करते हुए निर्णय के पद क्र. 18 लगायत 24 में दोनों प्रावधानों की व्याख्या करते हुए यह ठहराया है कि आदेश 18 नियम 4 व आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधानों में कोई विसंगति पूर्ण स्थिति नहीं है तथा आदेश 18 नियम 4 व्य.प्र.सं. के अधीन साक्षी के मुख्य परीक्षण की साक्ष्य अपीलीय मामलों में शपथपत्र पर ली जा सकेगी। इस प्रकार उक्त न्याय दृष्टांत के आधार पर यह कहा जा सकता है कि आदेश 18 नियम 4 व्य.प्र.सं. के द्वारा प्रत्येक मामलों में शपथ पत्र पर मुख्य परीक्षण की साक्ष्य लिये जाने के संबंध में जो प्रावधान संशोधन द्वारा जोड़े गये हैं, उनमें व आदेश 18 नियम 5 व्य.प्र.सं. के पूर्व प्रावधानों में कोई विरोधाभास नहीं है, बल्कि आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधान नवीन संशोधन द्वारा जोड़े गये प्रावधान आदेश 18 नियम 4 व्य.प्र.सं. के पूरक स्वरूप के ही कहे जा सकते हैं। यद्यपि "लक्ष्मणदास विरुद्ध देवजी माल व अन्य, ए.आई.आर. 2003 राजस्थान पृष्ठ 74 के न्याय दृष्टांत में आदेश 18 नियम 4 एवं आदेश 18 नियम 5 व्य.प्र.सं. के प्रावधानों को विसंगतिपूर्ण कहा गया है लेकिन

माननीय म.प्र. उच्च न्यायालय की खंडपीठ ने राजस्थान उच्च न्यायालय के उक्त न्याय दृष्टांत को विभेदित किया है। इसके अलावा राजस्थान उच्च न्यायालय का उक्त न्याय दृष्टांत उस परिस्थिति में रहा है, जब तक माननीय उच्चतम न्यायालय ने पूर्व उल्लेखित "सलेम बार एसोसियेशन तमिलनाडू" के न्याय दृष्टांत में आदेश 18 नियम 4 व्य.प्र.सं. की वैधानिकता के संबंध में कोई निर्णय नहीं दिया था। इसलिये राजस्थान उच्च न्यायालय का निर्णय अब कोई प्रभाव नहीं रखता है। इसके अलावा मधुर इंडस्ट्रीज लिमिटेड विरुद्ध एम.व्ही. ओरियंट कामर्स एंड अदर्स (ए.आई.आर. 2003 मुम्बई पृष्ठ 330) के न्याय दृष्टांत में माननीय मुम्बई उच्च न्यायालय ने भी यह ठहराया है कि अपील योग्य मामलों में आदेश 18 नियम 4 व्य.प्र.स. के अधीन शपथ पत्र पर साक्ष्य ली जा सकती है। ऐसा ही सिद्धान्त कर्नाटक उच्च न्यायालय ने "अब्राहीम फारूख मिया कार्जगी विरुद्ध कासीम खान, आई.एल.डी. 2003 (8) पृष्ठ 594 के न्याय दृष्टांत में प्रतिपादित किया है। इस तरह म.प्र. उच्च न्यायालय की खंडपीठ के अलावा देश के अन्य विभिन्न उच्च न्यायालयों ने भी आदेश 18 नियम 4 व्य.प्र.सं. के अधीन शपथपत्र पर मुख्य परीक्षण की साक्ष्य सभी प्रकार के मामलों में लिये जा सकने के बारे में मत व्यक्त किये हैं। इसलिये अब इस प्रश्न पर कोई विवाद नहीं रह जाता है कि आदेश 18 नियम 4 व्य.प्र.सं. के अधीन सभी प्रकार के मामलों में (जिनमें अपील योग्य मामले भी शामिल हैं) शपथपत्र पर साक्ष्य ली जा सकती है।

अब विचार के लिये यह प्रश्न उत्पन्न होता है कि क्या शपथपत्र पर ली जाने वाली साक्ष्य व्यवहार वादों के शीघ्र निराकरण के लिये प्रासंगिक हो सकती है। शपथपत्र पर ली जाने वाली साक्ष्य के संबंध में यह कहा जा सकता है कि उक्त साक्ष्य वास्तव में पक्षकार की साक्ष्य न होकर अधिवक्ता द्वारा तैयार की गई साक्ष्य है और इससे साक्षी के कथन की सत्यता की परख नहीं हो सकती है जिसके अभाव में मामले में वास्तविक न्याय नहीं हो सकेगा क्योंकि साक्ष्य अंकित किये जाने का मूल उद्देश्य न्यायालय के समक्ष प्रस्तुत होने वाली साक्ष्य की सत्यता को कसौटी पर परख करने के बाद निर्णय देना होता है, तभी मामले में वास्तविक रूप में न्याय हो सकता है। इसके अलावा शपथ पत्र पर पेश होने वाली साक्ष्य में कुछ व्यवहारिक कठिनाईयां यह भी हो सकती हैं कि दी जाने वाली साक्ष्य अभिवचनों के अनुरूप न होते हुए भी उसके बाहर व नवीन साक्ष्य दी जा सकती है। शपथपत्र के साथ ऐसे दस्तावेजों को भी साक्ष्य में प्रदर्शित कर पेश कर दिया जा सकता है जो पूर्व से ही अभिलेख पर नहीं है तथा ऐसे दस्तावेज भी साक्ष्य में प्रदर्शित कर पेश किये जा सकते हैं जो कि विधिक रूप में साक्ष्य में ग्राह्य योग्य ही न हो, जैसे कि फोटो कापी के रूप में प्रस्तुत दस्तावेज जिसके बाबद् द्वितीय साक्ष्य की अनुमति नहीं ली गई है। लेकिन इन आधारों पर ही शपथपत्र पर पेश की जाने वाली साक्ष्य को अप्रासंगिक होना कहा जाने से सहमत नहीं हुआ जा सकता, क्योंकि यह सर्वविदित है कि न्यायालय में साक्षियों के कथन होने पर न्यायालय बहुत कुछ समय साक्ष्य को अंकित किये जाने में व्यतीत करता है। यदि उक्त समय को बचाया जाये तो निश्चित ही न्यायाधीश उक्त समय में और भी महत्वपूर्ण कार्य करते हुए प्रकरणों का शीघ्र निराकरण कर सकता है क्योंकि वह उक्त समय का उपयोग निर्णय, आदेश लेखन व अन्य महत्वपूर्ण कार्यों में कर सकता है। व्यवहारिक तौर पर यदि शपथपत्र पर पेश की जाने वाली साक्ष्य का मूल्यांकन किया जाये तो इस तथ्य को नकारा नहीं जा सकता कि शपथपत्र पर पेश

होने वाली साक्ष्य बहुधा वास्तविक रूप में पक्षकार एवं साक्षियों के उनके कथन न होकर पक्ष समर्थन करने वाले अधिवक्ता की मदद से तैयार किये जाने वाले कथन हो सकते हैं, लेकिन इससे मामले के गुणदोष पर अधिक प्रभाव नहीं पड़ेगा, क्योंकि प्रभावी कूट परीक्षण से साक्षी की सत्यता अभिलेख पर लाई जा सकती है और उस स्थिति में भले ही मुख्य परीक्षण की साक्ष्य अधिवक्ता के सहयोग से तैयार की भी गई हो तो ऐसे साक्षी की वास्तविकता कूट परीक्षण से स्पष्ट हो सकती है। इसलिये केवल इस आधार पर कि शपथपत्र पर पेश किये जाने वाला कथन साक्षी का वास्तविक कथन नहीं होगा , आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान को अप्रासंगिक कहा जाना उचित नहीं होगा।

यह सही है कि शपथपत्र पर पेश की जाने वाली साक्ष्य के साथ वह व्यवहारिक कठिनाई हो सकती है (जैसा कि पूर्व में उल्लेखित किया गया है) अर्थात शपथपत्र के साथ ही उन दस्तावेजों को पेश किया जा सकता है, जो पूर्व से अभिलेख पर नहीं है तथा ऐसे दस्तावेज भी साक्ष्य में प्रदर्शित कर पेश हो सकते हैं, जो साक्ष्य में विधिक रूप से ग्राह्य योग्य नहीं हैं, लेकिन इसके लिये आदेश 18 नियम 4 व्य.प्र.सं. में ही यह प्रावधान किये गये हैं कि शपथ पर जो भी साक्ष्य पेश की जायेगी, उनमें दस्तावेजों की ग्राह्यता न्यायालय के आदेश के अधीन ही रहेगी। इससे यह स्पष्ट होता है कि जब भी शपथ पत्र कोई साक्ष्य पेश की जाती है और उसके साथ दस्तावेज प्रदर्शित किये जाते हैं तो उस स्थिति में न्यायालय विपक्षी पक्ष को इस बाबद् अवसर दे सकता है कि वह दस्तावेजों की ग्राह्यता के संबंध में कोई आपत्ति करना चाहता है तो कर सकता है तथा उस समय अभिवचनों से हटकर पेश की गई साक्ष्य के संबंध में भी विचार किया जा सकता है। इसी तरह जो दस्तावेज पूर्व से अभिलेख पर नहीं हैं, बिना न्यायालय की अनुमति के अधीन ही पेश किये हैं, तो उनके संबंध में भी उन्हें अभिलेख पर न पढ़े जाने के संबंध में भी परिस्थितियों के अनुसार आदेश दिया जा सकता है। यदि पक्षकार द्वारा आदेश 7 नियम 14 (3) व्य.प्र.सं. (वादी पक्ष) या आदेश 8 नियम 1 (3) व्य.प्र.सं. (प्रतिवादी पक्ष) के अंतर्गत ऐसे दस्तावेजों को जो पूर्व से अभिलेख पर नहीं है, को अभिलेख पर लिये जाने की प्रार्थना की जाती है तो इस बाबत भी न्यायालय परिस्थितियों के अनुरूप विचार करते हुए आदेश दे सकता है। इस प्रकार शपथपत्र पर पेश की जाने वाली साक्ष्य से ऐसी कोई समस्या नहीं है, जिसका कि निराकरण नहीं हो सकता है। अभिवचनों के बाहर पेश की जाने वाली साक्ष्य को अभिलेख से हटाया जा सकता है और उसे न पढ़े जाने के बारे में आदेश दे सकते हैं। इसी तरह जो दस्तावेज साक्ष्य में ग्राह्य नहीं हैं, उनकी ग्राह्यता को भी कूट परीक्षण प्रारंभ होने से पूर्व निराकरण किया जा सकता है। इसलिये शपथ पर पेश होने वाली साक्ष्य में जो व्यवहारिक कठिनाई उत्पन्न होना संभावित है, उनका निराकरण भी व्यवहार प्रक्रिया संहिता के प्रावधानों के अधीन किया जा सकता है। इस तरह आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान निराकरणों के शीघ्र निराकरण में सहायक हो सकते हैं।

कोई भी प्रावधान स्वमेव में परिपूर्ण नहीं होता है। उसमें कुछ कमियां, कुछ अच्छाईयां व बुराईयां हो सकती है, लेकिन यदि किसी विधि या प्रावधान के प्रकरणों का शीघ्र निराकरण करने में मदद मिलती है तो उसे अपनाये जाने में कोई बुराई नहीं हो सकती है, क्योंकि न्यायालय का मूल उद्देश्य पक्षकारों के प्रकरणों का शीघ्र निराकरण करने का है। प्रक्रियात्मक विधि उस उद्देश्य के लिये एक साधन है, इसलिये हमें साधनों

का उपयोग उस रीति में करना होगा, कि जिससे हम अपने उद्देश्य तक पहुंचने में सफल हो सकें। कानून के ऐसे प्रावधान, जो परस्पर प्रथम दृष्टया विसंगतिपूर्ण प्रदर्शित होते हो और यदि उनका अधिनियम के प्रावधानों के उद्देश्य को ध्यान में रखते हुए सामंजस्यपूर्ण अर्थान्वयन कर प्रभावी किया जाना संभव हो, तब सौहार्द्पूर्ण अर्थान्वयन के कानूनी निर्वचन के सिद्धान्त के आधार पर दोनों प्रावधानों को प्रभावी बनाया जा सकने योग्य अर्थान्वयन को स्वीकार करना चाहिए, जब तक कि कोई अन्य चारा न हो। ऐसा करने पर ही अधिनियम के प्रावधानों के उद्देश्य को विफल होने से रोका जा सकता है। इस संबंध में म.प्र. उच्च न्यायालय के भूतपूर्व मुख्य न्यायाधिपति माननीय जी.पी. सिंह साहब द्वारा लिखित प्रिंसीपल ऑफ स्टेच्युटरी इंटरप्रिटेशन (आठवां एडीशन) के पृष्ठ 123 का यह भाग उल्लेखनीय है :-

(b) Inconsistency and repugnancy to be avoided; harmonious construction.

It has already been seen that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid "a head on clash" between two sections of the same Act and, "whenever it is possible to do so to conture provision which appear to conflict so that they hormonise" It should not be lightly assumed that "Parliment had given with one hand what it took away with the other". The provision of one section of a statute cannot be used to defeat those of another "unless it is impossible to effect reconciliation between them". The same rule applied in regard to sub-sections of a section. In the words of GAJENDRA GADKAR, J. "The sub-section must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repuganancy". As stated by VENKATARAMA AIYAR, J. "The rule of construction is well setteld that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as the rule of harmonious construction". That effect should be given to both, is the very essence of the rule.

आज हम प्रक्रियात्मक विधि की जटिलता में ही इतने उलझे हैं कि कई बार निर्णय तक पहुंचने में न्याय का उद्देश्य विफल हो जाता है अर्थात 'Justice delayed is justice denied' जैसी स्थिति निर्मित हो गई है। इसलिये आदेश 18 नियम 4 व्य.प्र.सं. के प्रावधान पूर्णतः प्रासंगिक है और उन्हें सभी प्रकार के व्यवहार वादों में अपनाये जाने में कोई कठिनाई नहीं होनी चाहिये।

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भारतीय वन अधिनियम 1927
म.प्र. वनोपज (व्यापार विनियमन) अधिनियम
वन्य प्राणी (संरक्षण) अधिनियम 1972
एवं
म.प्र. आबकारी अधिनियम 1915
के अधीन अपराधों में जप्त वस्तुओं के बारे में
धारा 451 दंड प्रक्रिया संहिता 1993 के अधीन
सुपुर्दगी संबंधी मजिस्ट्रेट की अधिकारिता एवं विस्तार

न्यायिक अधिकारीगण
जिला दमोह

1. दंड प्रक्रिया संहिता, 1973 आपराधिक मामलों के विचारण हेतु एक सामान्य प्रक्रियात्मक विधि है। इस संहिता की धारा 451 आपराधिक मामलों में जांच या विचारण के दौरान न्यायालय के समक्ष लाई गई संपत्ति की अंतरिम अभिरक्षा/ व्ययन के बारे में न्यायालय द्वारा समुचित आदेश करने का प्रावधान करती है। इसके साथ ही यह सुस्थापित विधि है कि विशेष अधिनियम के प्रावधान, सामान्य अधिनियम पर अध्यारोही प्रभाव करते हैं। जहां कोई विशेष अधिनियम किसी विषय में किसी विशिष्ट प्रक्रिया और फोरम (Forum) का प्रावधान करता हो, वहां तत्संबंधी कार्यवाही उसी विहित विशिष्ट प्रक्रिया से विशिष्ट फोरम में की जानी चाहिए। वर्तमान विषय से संबंधित चारों अधिनियम, विशेष अधिनियम है। अतः दंड प्रक्रिया संहिता की धारा 451 के साथ-साथ इन चारों अधिनियमों में किसी अपराध में जप्त वस्तुओं के व्ययन संबंधी प्रावधानों का तुलनात्मक अवलोकन आवश्यक है।

2. भारतीय वन अधिनियम, 1927 (इसे संक्षेप में वन अधिनियम लिखा जावेगा) की धारा 52, 52-ए 52-बी, 52-सी, 53 एवं 54 तथा मध्यप्रदेश वनोपज (व्यापार विनियमन) अधिनियम, 1969 (इसं संक्षेप में वनोपज अधिनियम लिखा जावेगा) की धारा 15, 15-ए, 15-बी, 5-सी, एवं 15-डी तथा मध्यप्रदेश आबकारी अधिनियम, 1915 (इसे संक्षेप में आबकारी अधिनियम लिखा जावेगा) की धारा 47, 47-ए, 47-बी, 47-सी, 47-डी, इन अधिनियमों के आधीन किसी अपराध में जप्त वस्तुओं के बारे में विधि प्रतिपादित करती है। इन तीनों अधिनियमों के इन प्रावधानों को देखने से यह स्पष्ट है कि तीनों अधिनियमों के प्रावधान समरूपी है। इनकी भाषा और आत्मा समान है। महत्वपूर्ण रूप से उल्लेख करने योग्य तथ्य सिर्फ यह है कि आबकारी अधिनियम की धारा 47 से 47-डी तक के प्रावधान तब लागू होते हैं, जब जप्त शराब की मात्रा 50 बल्क लीटर से अधिक हो।

3. वन अधिनियम, वनोपज अधिनियम एवं आबकारी अधिनियम के उपरोक्त प्रावधानों को

देखने से यह भी स्पष्ट है कि इन अधिनियमों के यह प्रावधान इन्हीं अधिनियमों के अधीन किसी अपराध में जप्त वस्तुओं को राजसात करने के बारे में एक निश्चित प्रक्रिया एवं फोरम का गठन करते हैं। वन अधिनियम की धारा-55, वनोपज अधिनियम की धारा 15-सी एवं आबकारी अधिनियम की धारा 47-डी कतिपय दशाओं में न्यायालय की अधिकारिता के वर्जन का उपबंध करती है। सार रूप में प्रावधान यह है कि "उस अपराध (जिसके कारण वस्तु जप्त हुई है) का विचारण करने की अधिकारिता रखने वाले मजिस्ट्रेट को (यथा स्थिति वन अधिनियम की धारा 52 (4), वनोपज अधिनियम की धारा-15 (5) अथवा आबकारी अधिनियम की धारा-47-ए (3) के अधीन जब जप्तशुदा वस्तुओं को राजसात करने की कार्यवाही प्रारंभ करने की सूचना यथास्थिति प्राधिकृत अधिकारी/कलेक्टर से विहित प्रारूप में प्राप्त हो जाती है, तब वह मजिस्ट्रेट उस संपत्ति के कब्जे, व्ययन, परिदान, वितरण आदि के बारे में कोई आदेश नहीं करेगा।

4. इन अधिनियमों के अधीन अपराध में जप्त बस्तुओं के राजसात किये जाने संबंधी विधि पर दृष्टि डालने से यह भी स्पष्ट है कि यथास्थिति प्राधिकृत अधिकारी या कलेक्टर द्वारा किसी वस्तु को राजसात करने का आदेश तब तक नहीं दिया जा सकता है जब तक वह ऐसी वस्तु को राजसात करने की कार्यवाही प्रारंभ करने की सूचना, अपराध का विचारण करने की अधिकारिता वाले मजिस्ट्रेट को विहित प्रारूप में नहीं दे देता है, और उस व्यक्ति, जिससे संपत्ति जप्त हुई तथा उस वस्तु से हितबद्ध प्रतीत होने वाले अन्य व्यक्ति/व्यक्तियों को समुचित सूचना देकर उन्हें व जप्ती करने वाले अधिकारी को सुन नहीं लेता है।

5. जप्तशुदा वस्तुओं को राजसात करने संबंधी उपरोक्त विधि तथा कतिपय दशाओं में न्यायालय की अधिकारिता के वर्जन संबंधी प्रावधानों को देखने से यह बिल्कुल साफ है कि मजिस्ट्रेट की अधिकारिता का वर्जन केवल तभी होता है, जब यथास्थिति प्राधिकृत अधिकारी/कलेक्टर द्वारा वस्तुओं को राजसात करने संबंधी कार्यवाही प्रारंभ कर ऐसी कार्यवाही प्रारंभ करने की सूचना उस अपराध का विचारण करने की अधिकारिता वाले मजिस्ट्रेट को दे दी जाती है। इसके विपरीत यदि मजिस्ट्रेट को ऐसी सूचना नहीं दी जाती है, तो जप्तसंपत्ति के अंतरिम व्ययन के बारे में मजिस्ट्रेट की अधिकारिता वर्जित नहीं होगी।

6. वन अपराधों के संबंध में जप्त वस्तुओं के बारे में वन अधिनियम की धारा 53 एवं 54 को देखने से यह भी स्पष्ट है कि ऐसी जप्त वस्तुयें जिनके राजसात करने की कार्यवाही प्रारंभ नहीं की गई है, रेंजर से अनिम्न पंक्ति के अधिकारी द्वारा उन वस्तुओं के स्वामी को उसके द्वारा बंधपत्र निष्पादित करने पर अंतरिम अभिरक्षा में दी जा सकती हैं तथा धारा 54 के अधीन मजिस्ट्रेट जप्त शुदा वस्तुओं के व्ययन की समुचित व्यवस्था कर सकता है। साबिर अली विरुद्ध मध्यप्रदेश राज्य, 1987 मध्यप्रदेश राज्य लॉ जनरल 57 के न्यायिक दृष्टांत में यह विधि प्रतिपादित की गई है कि- "वन अधिनियम की धारा 54 के अधीन व्ययन संबंधी प्रावधान के अंतर्गत अंतरिम सुपुर्दगी भी शामिल है।" इससे यह स्थिति भी साफ हो जाती है कि वन अधिनियम के अधीन अपराध में जप्त वस्तुओं, जिनके राजसात करने की कार्यवाही प्रारंभ न की गई हो, के अंतरिम व्ययन का अधिकार वन अधिनियम की धारा 54 के आधीन मजिस्ट्रेट को है।

7. अहमद जी विरुद्ध स्टेट, ए.आई.आर. 1986 मध्यप्रदेश पृष्ठ 1 में विधि को स्पष्ट करते हुए पैरा 4 में कहा गया है कि- "वन अधिनियम की धारा 52 (3) के अधीन प्राधिकृत वन अधिकारी वन उपज एवं अपराध कारित करने के लिए प्रयुक्त वाहन को राजसात कर सकता है। वन अधिनियम की धारा 52-

ए के अधीन प्राधिकृत अधिकारी के आदेश के विरुद्ध वन संरक्षक को अपील की जा सकती है और वन संरक्षक के ऐसे आदेश के विरुद्ध धारा 52-बी के अधीन सत्र-न्यायालय के समक्ष पुनरीक्षण किया जा सकता है। वन अधिनियम की धारा 52-सी के अधीन वर्जन यह है कि जप्त वनोपज या अपराध में प्रयुक्त वाहन को राजसात करने की कार्यवाही प्रारंभ हो जाने की सूचना जब वन मंडल अधिकारी द्वारा मजिस्ट्रेट को दे दी जाती है तब मजिस्ट्रेट को वनोपज या अपराध करने में प्रयुक्त वाहन के व्ययन के बारे में आदेश करने के क्षेत्राधिकार वर्जित हो जाता है। मजिस्ट्रेट केवल वन अधिनियम की धारा 54 के अधीन संपत्ति के व्ययन का आदेश कर सकता है, जबकि संपत्ति को राजसात करने की कार्यवाही प्रारंभ न की जावे।"

8. कैलाशचन्द्र विरुद्ध स्टेट, ए.आई.आर. 1995 मध्यप्रदेश पृष्ठ 1 के न्यायदृष्टांत में वन अधिनियम के विभिन्न प्रावधानों पर विचार कर माननीय खंड पीठ द्वारा पैरा क्र. 31 एवं 33 में विनिश्चित किया गया है कि जप्त वस्तुओं को राजसात करने संबंधी कार्यवाही के अभाव की दशा में मजिस्ट्रेट दंड प्रक्रिया संहिता के प्रावधानों के अधीन आदेश कर सकता है, और इस प्रकार वन अधिनियम की धारा 52-सी में न्यायालय के क्षेत्राधिकार पर आरोपित वर्जन केवल आंशिक वर्जन है, पूर्ण नहीं। "

9. इसी तरह मध्यप्रदेश आबकारी अधिनियम के प्रावधानों की व्याख्या करते हुए सुरेश विरुद्ध मध्यप्रदेश राज्य, 2003 (1) एम.पी.एल.जे. 638 के न्यायिक दृष्टांत में यह प्रतिपादित किया गया है कि- "जब जप्त वस्तुओं को राजसात करने संबंधी कार्यवाही प्रारंभ करने की सूचना अपराध का विचारण करने की अधिकारिता वाले मजिस्ट्रेट को नहीं भेजी जाती तो मजिस्ट्रेट को जप्त शुदा वाहन अंतरिम अभिरक्षा में दिये जाने का अधिकार है। दंड न्यायालय को अधिकारिता केवल तभी नहीं होती है, जब अधिनियम की धारा 47-ए (3) के अधीन समुचित सूचना मजिस्ट्रेट को भेज दी गई हो।

10. इस तरह भारतीय वन अधिनियम, मध्यप्रदेश वनोपज (व्यापार विनियमन) अधिनियम एवं मध्यप्रदेश आबकारी अधिनियम के अधीन अपराधों में जप्त वस्तुओं के व्ययन संबंधी इन अधिनियमों के प्रावधानों एवं माननीय उच्च न्यायालय द्वारा प्रतिपादित विधि से विधिक स्थिति स्पष्ट हो जाती है कि वन अधिनियम की धारा 52-सी, वनोपज अधिनियम की धारा 15-सी एवं मध्यप्रदेश आबकारी अधिनियम की धारा 47-सी से दंड न्यायालय की अधिकारिता में आरोपित वर्जन केवल आंशिक वर्जन है। यह वर्जन तभी लागू होता है, जब इन अधिनियमों के अधीन अपराध में जप्त वस्तुओं को राजसात करने की कार्यवाही प्रारंभ हो जाने की सूचना अपराध का विचारण करने की अधिकारिता वाले मजिस्ट्रेट को विहित प्रारूप में मिल जाती है और अन्यथा स्थिति में दंड प्रक्रिया संहिता की धारा 451 के अधीन मजिस्ट्रेट की यह अधिकार है कि वह प्रत्येक प्रकरण की परिस्थितियों के अनुसार और उचित आधारों पर प्रकरण मे जप्तशुदा वस्तुओं के अंतरिम व्ययन या अंतरिम अभिरक्षा के बारे में समुचित आदेश करे।

11. वन्य प्राणी (संरक्षण) अधिनियम, 1972 के प्रावधान उपरोक्त अधिनियमों के प्रावधानों से भिन्न है। वन्य प्राणी (संरक्षण) अधिनियम की धारा 50 (3) यह प्राविधित करती है कि इस धारा में वर्णित स्तर का वन अधिकारी किसी व्यक्ति को समुचित बंधपत्र निष्पादित करने पर जप्त वस्तुओं को अंतरिम अभिरक्षा में इस आधार पर दे सकता है कि अपेक्षा की जाने पर वह व्यक्ति उन वस्तुओं को मजिस्ट्रेट के समक्ष पेश कर दे। इसी अधिनियम की धारा 50 (4) यह प्राविधित करती है कि जप्त की गई वस्तु को विधि

अनुसार कार्यवाही करने के लिए मजिस्ट्रेट के समक्ष तुरंत लाया जायेगा। इस अधिनियम की धारा 50 (6) पशु, पशुवस्तु, ट्राफी को वन अधिकारी द्वारा विक्रय करने का प्राविधान करती है। इसी अधिनियम की धारा 50 की उप-धारा 3 तथा 4 को देखने से यह प्रकट है कि जप्तशुदा वस्तुओं के व्ययन के संबंध में आदेश करने की मजिस्ट्रेट की पूरी अधिकारिता है, इसलिये यह प्रावधान किया गया है कि जप्त वस्तुओं को विधि अनुसार कार्यवाही किये जाने के लिए मजिस्ट्रेट के समक्ष लाया जावेगा।

12. वन्य प्राणी संरक्षण अधिनियम में मजिस्ट्रेट अथवा दंड न्यायालय की अधिकारिता का वर्जन करने वाला कोई भी अभिव्यक्त उपबंध नहीं है। विवाद की विषयवस्तु इस अधिनियम की धारा 39 से प्रारंभ होती है। इस अधिनियम की धारा 39 (1) (ए) एवं (बी) यह घोषित करती है कि इस अधिनियम के प्रावधानों या उसके अंतर्गत बने नियमों के उल्लंघन में बंदी रखे गये या बंदी अवस्था में जन्मे पशु या शिकार किये गये पशु, पशु वस्तु, ट्राफी या असंशोधित ट्राफी या पशु मांस शासन की संपत्ति होगी। धारा 39 (1) (डी) यह घोषित करती है कि अपराध करने में प्रयुक्त यान, जलयान आयुध, फंदा औजार (जिनका उपयोग अपराध करने में किया गया है और जिन्हें इस अधिनियम के अधीन अपराध में जप्त किया गया है) शासन की संपत्ति होगे। प्रश्न यह उठता है कि, क्या ऐसी वस्तु जिसके बारे में धारा 39 ने शासन की संपत्ति होना घोषित कर दिया गया है, अंतरिम अभिरक्षा में दी जानी चाहिए अथवा क्या अंतरिम अभिरक्षा में किसी व्यक्ति को ऐसी संपत्ति दी जा सकती है ?

13. इस संबंध में मधुकर राव विरुद्ध मध्यप्रदेश राज्य, 2000 (1) मध्यप्रदेश लॉ जनरल 289 में माननीय उच्च न्यायालय की पूर्ण पीठ द्वारा यह व्यवस्था दी गई है कि- "कोई वस्तु जिसमें वाहन भी शामिल है, जो कि इस अधिनियम के अधीन अपराध में या अपराध के संदेह में जप्त की गई है, उसे समुचित आधारों और परिस्थितियों पर विचारण के दौरान इस अधिनियम की धारा 50- (4) सहपठित धारा 451 दंड प्रक्रिया संहिता के अधीन मजिस्ट्रेट द्वारा अंतरिम सुपुर्दगी में दिया जा सकता है। माननीय उच्च न्यायालय द्वारा यह भी व्यवस्था की गई है कि वाहन सहित किसी भी वस्तु की इस अधिनियम के अधीन अपराध या अपराध के संदेह में जप्ती मात्र अधिनियम की धारा 39 (1) (डी) के अधीन उसे राज्य सरकार की संपत्ति नहीं बना देती है। जप्त वस्तुओं को राज्य की संपत्ति निरूपित किये जाने के लिए सक्षम न्यायालय का यह निष्कर्ष आवश्यक है कि ऐसे यान या वस्तु का उपयोग अपराध कारित करने में किया गया है।

14. इसी तरह दीवान अर्जुनसिंग विरुद्ध मध्यप्रदेश राज्य, 2003 (1) एम.पी.जे.आर. 377 के न्यायदृष्टांत में यह कहा गया है कि दंड प्रक्रिया संहिता की धारा 451 सहपठित धारा 50 (4) वन्य प्राणी संरक्षण अधिनियम के अधीन जप्तशुदा वाहन को अंतरिम सुपुर्दगी पर देने का अधिकार मजिस्ट्रेट को है।

15. इस तरह वन्यप्राणी (संरक्षण) अधिनियम, 1972 के अधीन अपराध में जप्त वस्तुओं के बारे में यह विधि स्पष्ट है कि इस अधिनियम की धारा- 50 (ब) सहपठित धारा 451 दंड प्रक्रिया संहिता के अधीन मजिस्ट्रेट को यह अधिकार है कि वह प्रत्येक प्रकरण की परिस्थितियों को देखते हुए समुचित आधारों पर अपराध के विचारण के दौरान जप्तशुदा संपत्ति के अंतरिम व्ययन/सुपुर्दगी के बारे में समुचित आदेश कर सकता है।

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RECOVERY OF FINE

JUDICIAL OFFICERS
District Ujjain

Mode of punishments are prescribed u/s 53 of Indian Penal Code. Section 53 is as follows :-

"The Punishments to which offenders are liable under provisions of this Code are-

First	—	Death;
Secondly	—	Imprisonment for life;
Thirdly	—	(Repealed by Act 17 of 1949)
Fourthly	—	Imprisonment, which is of two descriptions, namely: (1) Rigorous, that is with hard labour (2) Simple;
Fifthly	—	Forfeiture of property;
Sixthly	—	Fine.

Accordingly second mode of punishment is imprisonment for life. 'Life' is defined u/s 45 of IPC as- "The word life denotes the life of a human being, unless the contrary appears from the context". Offences under various sections of Indian Penal Code are punishable with life imprisonment as well as fine. Life imprisonment means imprisonment for the remaining whole period of convict's life. Hon'ble Supreme Court explained the meaning of life imprisonment in different judgments.

In *Gopal Vinayak Godse Vs. State of Maharastra and others, AIR 1961 SC 600 at page 604 para 8* it is held thus :

> "As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death".

In *State of M.P. Vs. Ratansingh, AIR 1976 SC 1552* it is held that-

> "The sentence for life would enure till the life time of the accused. It is not possible to fix a particular period of the prisoner's death."

In *Kartar Singh and others Vs. State of Harayana, AIR 1982 SC 1439* it is held that -

> "A perusal of several sections of the Indian Penal Code as well as Criminal Procedure Code will show that both the Codes make and maintain a clear distinction between imprisonment for life and imprisonment for a term, in fact, the two expressions "imprisonment for life" and "imprisonment for a term" have been used in contradistinction with each other in one and the same section, where the former must

mean imprisonment for the remainder of the natural life of the convict (vide : definition of "life" in S. 45 IPC) and the latter must mean imprisonment for a definite or fixed period".

In *Ashok Kumar Vs. Union of India, AIR 1991 SC 1792 at page 1800* it is held as follows :-

> "The expression 'imprisonment for life' must be read in the context of Section 45 IPC. Under that provision the word 'life' denotes the life of a human being unless the contrary appears from the context. We have seen that the punishments are set out in Section 53, imprisonment for life being one of them. Read in the light of Section 45 it would ordinarily mean imprisonment for the full or complete span of life."

In *Laxman Naskar Vs. Union of India and others, AIR 2000 SC 986 at page 987,* para 3, it is held that-

> "It is settled position of law that life sentence is nothing less than lifelong imprisonment and by earning remissions a life convict does not acquire a right to be released prematurely."

Similarly in *Laxman Naskar Vs. State of West Bengal and others, AIR 2000 SC 2762* at para 4 it is held as under :-

> "Sentence for 'imprisonment for life' ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life".

In *Subhash Chandra Vs. Krishnlal and others, AIR 2001 SC 1903* in *para 21* it is held that-

> "The sentence for imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government choses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure".

Accordingly the settled position of law is that the life imprisonment means the whole remaining period of convict's natural life that is till death. No doubt u/s 433 Cr.P.C. and section 55 of IPC the appropriate Government may commute the sentence without the consent of the offender for imprisonment of either description for a term not exceeding 14 years. As held by Hon'ble Supreme court in *State of Punjab Vs. Keshar singh, AIR 1996 SC 2512,* but here we are least concerned with the commutation of sentence.

Section 63 of IPC in reference to Sec. 53 IPC provides :

> "Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive."

In *Adamji Umar Dalal Vs. The State of Bombay, AIR (39) 1952 SC 14* it is held that-

> "Where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases."

In *Palaniappa Gounder Vs. State of Tamilnadu, AIR 1977 SC 1323* in para 9 and 12 it is held that-

> "Though for the offence of murder courts have the power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. Before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case."
>
> "It cannot, however, be overlooked that since by S. 357 (1) (c) of the new Code and its precursor S. 545 (1) (bb) of the old Code, compensation can only come out of fine, it is always necessary to consider in the first instance whether the sentence of fine is at all called for, particularly when the offender is sentenced to death or life imprisonment. If so, the fine must not be excessive, having regard to all the circumstances of the case like motivation of the offence the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine."

Accordingly it is lawful for a Court to award both sentences i.e. life imprisonment as well as fine.

Section 64 IPC provides sentence of imprisonment for not payment of fine, it runs as follows :

In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

Words "it shall be competent" show that it is not imperative or obligatory on the Court to award a term of imprisonment in default of payment of fine. In this regard the law enunciated in *State Vs. Krishna Pillai Madhvan Pillai, 1953 Cr.L.J. 1265* (Travan Kaur Kochin High Court) is relevant, which states as follows:

> "The Jurisdiction of the Trial Court to impose a sentence of imprisonment in default of payment of fine is merely permissive it is not imperative to award a term of imprisonment in default of payment of a fine".

Though it is not imperative to award imprisonment in default of payment of fine, but in practice such imprisonment may be awarded u/s 30 of Cr.P.C. to give a sanctioning force to sentence.

Now it is to see that whether the imprisonment awarded in default of payment of fine is the part of the sentence of imprisonment or a distinct sentence. Section 31 of the Cr.P.C. would show that the normal rule is that the sentences should be consecutive unless the Court directs the same to run concurrently. It is clear from the wordings of the section 31 Cr.P.C. that the imprisonment referred to in the said section is substantive sentence of imprisonment. There is no provision in the Code for directing imprisonment in default of payment of fine to run concurrently with the substantive sentence of imprisonment awarded for any other offences in the same case or at different trials. In this context Sec. 429 (2) Cr.P.C. is also relevant which is as under :-

> "When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences."

Section 429 (2) Cr.P.C. accordingly enjoins that effect shall not be given to the award of imprisonment in default of payment of fine until the person has undergone the further sentence or sentences. In this regard the Judgment of Kerala High Court in *Sukumaran Vs. State, 1993 Cr.L.J. 3228* is relevant.

Here not only section 31 and 429 (2) Cr.P.C. but also the provision of Sec. 428 Cr.P.C. are to be looked into. Section 428 Cr.P.C. deals with the set off against sentence of imprisonment, but under this provision only sentence of substantive imprisonment that is sentence to imprisonment for a term shall be set off not being imprisonment in default of payment of fine. This provision describes the distinct identity of imprisonment in default of payment of fine.

In *Sukumaran Vs. State, 1993 Cr.L.J. 3228 the Kerala High Court* held that substantive sentence and sentence in default of payment of fine are two distinct sentences. Its finding is as follows :

> "Yet another section to be noticed in this connection is S. 53 IPC, where fine is dealt with as a distinct punishment. S. 64 of the IPC in this context is of importance. The same deals with sentence of imprisonment for non-payment of fine and it states that the default of sentence shall be in excess of any other imprisonment to which the offender may have been sentenced or to which he may be liable under the commutation of the sentence. Thus when S. 64 IPC itself enjoins that, default sentence should be in excess of the sentence awarded to him or to which he is liable under the commutation or sentence, it is clear without doing violence to the said provision default sentence cannot be directed to run concurrently with substantive sentence. It is

thus demonstrably clear from a reading of Ss. 53 and 64 IPC that, substantive sentence and sentence in default of fine are two distinct sentences, and hence they cannot be made concurrent.

In *Babulal Ambaram Vs. State of M.P., 1987 MPLJ 480* it was held that-

"There is no provision in law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with sentence of imprisonment passed either at the same trail or at different trials".

In *State of M.P. Vs. Sidhiya, 1964 MPLJ Note 215* it is held that-

> "The provisions of section 64, Indian Penal Code make it clear that any sentence of imprisonment in default of payment of fine has to be in excess of and not concurrent with any other sentence of imprisonment to which the accused may have been sentenced. The terms of imprisonment inflicted in default of payment of fine has to run consecutively and not concurrently".

In *Mrityunjoy Rose Vs. State of Bihar and another, AIR 1967 Patna 286* it was held that-

> "The power in the Court to direct the concurrent running of punishments is confined to cases where the punishments consist of imprisonment. In terms it does not cover cases of sentences of imprisonment imposed in default of payment of fine".

Above discussion shows that sentence of "imprisonment" and "sentence of imprisonment in default of fine" are two distinct sentences. Imprisonment in default of fine is awarded in excess of and not in concurrent with any other sentence of imprisonment to which the accused may have been sentenced. In view of Sec. 429 (2) Cr.PC. and Section 53 and 64 IPC, it is clear that the imprisonment in default of payment of fine shall not be executed until all substantive sentences of imprisonment have been executed.

Section 70 IPC prescribes a limitation for recovery of fine which is as follows :-

> "The fine or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of the period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts."

In *Meer Ahmed Vs. Collector Peshwar District, AIR (30) 1943* Peshawar 56 it is held that-

> "Provisions of Sec. 70 Penal Code, which prohibits the levy of a fine at any time beyond six years of the date of the sentence or where the offender is liable under the sentence to a greater term of imprisonment than six years, than at any time previous to the expiry of that period.

In above citation it was also held that- "But under S. 70 it is the period of imprisonment to which the offender is liable under the sentence which is to count, not the period to which he might have been liable had the sentence been correctly imposed".

In *State Vs. Krishna Pillai Madhvan Pillai, 1953 Cr.L.J. 1265 (Travan Cochin High Court)* it is held that-

> "The fine would remain alive for collection for six years after the passing of the sentence. Assuming the accused counter-petitioner has no means now to pay the same, it can be recovered from any property acquired by him within the period specified . Even his death will not discharge from the liability any property which would, after his death be legally liable for his debts."

In *Palak Dhari Singh and others Vs. State of Uttar Pradesh and others, AIR 1962 SC 1145* Hon'ble Supreme Court held in para-6 as follows :-

> "The language of S. 70 prescribes the terminus quo to be the date of "passing of the sentence" by Court which passes such order. The filing of appeal or revision does not, unless specifically ordered arrest the operation of the order of passing of the sentence of conviction. Hence the limitation starts from the date of conviction by the trial Court and not from the date of dismissal of Revision by the High Court."

In *Mehtab Singh Vs. State of U.P., AIR 1979 SC 1263* it is held in para-5 as follows:

> "The proposition is impeccable that in the ordinary course, absence, stay or suspension of the sentence by any higher Court, the expiry of the period six years will bar the levy of the fine."
>
> **Para-8**
>
> "Section 70 says that the State shall levy fine within six years from the date of the sentence: To levy is to realise or to collect. It is clear that what is meant is that within six years the State must commence proceedings for realisation, not complete it."

As provided above it is clear that recovery proceeding for fine should be started from the date of sentence within six years or during imprisonment. That is the law itself says that when the person is in imprisonment the proceeding to recover fine should be started.

The AIR Manual 5th Edition 1989 Vol. 37 at page 190 at note 5 (1) it is mentioned that-

> "If the offence is punishable with imprisonment for a period of 10 years but the offender is actually sentenced only to a term of 7 years, imprisonment and fine, the fine can be recovered only within the period of 7 years from the date of the sentence and not 10 years."

Meaning thereby that if the person is imprisoned for the whole life the proceeding to recover fine can only be initiated before the completion of the

term of imprisonment that is before the death of the convict. If convict dies during imprisonment no recovery of fine is possible. It means that recovery of fine cannot be suspended during the imprisonment for life.

The offender who has been sentenced to fine must be considered as a debtor, and as a debtor not entitled to any peculiar lenity. Even execution of imprisonment in default of payment of fine does not discharge liability of fine. The Court has every power to realise the fine, even death does not discharge this liability.

Under Section 421 of Cr.P.C. the Court may take action for the recovery of fine either by issuing a warrant of attachment and sale of any movable property belonging to the offender or issuing a warrant to the Collector of the District authorising him to realise the amount as an arrears of land revenue. Proviso of Sec. 421 Cr.P.C. provides that if accused has been served whole of sentence of imprisonment in default of payment then no Court shall issue such levy warrant unless special reasons to be recorded in writing, if considers it necessary so to do or unless it has made an order for the payment of expenses or compensation out of the fine u/s 357 Cr.P.C.

Therefore, it is clear that proviso to Section 421 (1) of Cr.P.C. empowers the Judge to recover fine even in a case in which accused has undergone sentence of imprisonment in default of payment of fine. If fine can not be recovered on the ground that the accused is in jail and he is undergoing life imprisonment then the complainant shall not be able to get the compensation as awarded by Court and Court's order would become a futile exercise.

In brief, combined study of Sections 53, 63, 64, 70 of IPC, Sections 30, 31, 421 (1), 429 (2) Cr.P.C. and law laid down by Hon'ble the Supreme Courts and High Courts, it is clear that the sentence of life imprisonment and sentence of fine are independent sentences.

No proceeding to recover fine is possible after completion of life imprisonment because life imprisonment will continue till last breath of accused. The fine can be recovered only during the term of life imprisonment and not afterwards.

Hence the fine should be recovered during the life imprisonment and its recovery shall not be suspended till life imprisonment is over unless stayed by the appellate Court. This fine amount is liable to be levied by distress and sale of offender's property. For recovery proceedings resort of Sec. 421 Cr.P.C. may be taken and warrant for levy of fine should be issued for attachment and sale of any movable or immovable property belonging to the offender. Warrant may also be issued u/s 421 (b) Cr.P.C. to the Collector of the District authorising him to realise the amount as arrears of land revenue.

Accordingly it is concluded that the recovery of fine from a person sentenced to life imprisonment and fine and further imprisonment in default of payment of fine shall not remain suspended till the sentence of life imprisonment is over.

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APPLICATION OF INFORMATION TECHNOLOGY IN JUDICIARY - LEARN IT YOURSELF

(CONTINUED FROM PREVIOUS ISSUE)

It is time now to get down to business. The information technology will be the foundation of the Court system in near future and now is the time to prepare yourself so that you are in a position to reap benefits of technological advances. The idea is to use the information technology in justice delivery system, so as to make it more responsive, transparent and service oriented to the seekers of justice, as well as to avoid delays at various levels by upgrading the system. As such, there is a crying need to make justice delivery system information technology oriented so that it may keep pace with changing times.

There are many specific areas where the information technology can help the courts in organizing their daily work. Computerized filing of cases, updating inquiry mechanism, caveat matching, dissemination of Court related information on web sites of the court, cataloguing of books in the library and grant of remand using video conferencing facility are only some of the instances where information technology can help the judiciary in managing its work efficiently.

The vital question, however is, can the information technology help a judge in his task of dispensation of justice? The answer is an emphatic yes. We would hasten to add though, that no technology could convert a bad judge into a good one and a good judge would still be a good judge without a computer but a computer with right kind of software can increase the efficiency of a judge.

Now let us briefly discuss specific areas wherein information technology can help. At present, most judgments are being typed on manual typewriters. A hard copy of judgment, once prepared, cannot be altered without leaving visible signs of interpolation. There is virtually no scope for second thoughts or improvements, once a judgment is typed. On the other hand and electronic copy of a judgment prepared on a computer can be altered in any manner you like. With the help of software like Iyrix, WordStar or MS Word you can change the location of words, sentences or even entire paragraphs. You can insert words or sentences at the desired places. You can change the construction of a sentence or even replace it entirely. You can embellish your judgments by using bold letters, or italics or you can select fonts of your choice. When finally you are satisfied with your effort you can take out a print, again with click of a mouse.

Some of us might ask what would I do, if I cannot type? In such a situation speech recognition software comes to your help. This type of software enables you to dictate judgments to your computer, just as you dictate them to your stenographer. The software convert your speech files into electronic files. These electronic files may than be converted into print files with the help of a printer. However, you'll have to train your computer to recognize your voice, so as to enable it to familiarize itself with the quality of your voice, peculiarity of accent, style of dictation and pronunciation. Though it is not a very difficult task, accu-

racy continues to be a problem. Dragon Naturally Speaking, by far the most popular software of this kind, claims that people can attain an accuracy level of as high as 98 percent. In our opinion though, 90 to 95 percent accuracy can realistically be hoped for. The quality of the software is bound to improve in future. Dragon Naturally Speaking software has already come up with and updated version incorporating legal terminology. There is little doubt that speech recognition software can reduce your dependence on your stenographer to a great extent. With this kind of technology you can say goodbye to frustrating mornings when your stenographer fails to turn up at the appointed hour.

Every member of judicial fraternity, worth his salt, religiously maintains a dog-eared register wherein he or she painstakingly jots down head notes of the judgments of higher courts reported in law journals so that they can be cited in judgments as and when required. A computer can make this task of maintaining a register extremely easy. Software of the computer enables a user to store precedents subject wise. For example you can create separate directories subdirectories for precedents related to subject like Indian Penal Code, Criminal Procedure Code, Indian Evidence Act, Civil Procedure Code, Civil Practice, Food Adulteration Act, Law of Precedents and so on. Any of the precedents so stored may later be recalled instantaneously with the click of a mouse whenever required.

All of us know that volumes of AIR Supreme Court from the year 1950 to 2000 occupy entire wall full of bookshelves therefore it is not practicable for a judicial officer to carry these volumes along with him on every transfer. Here the technology comes to your help. All the volumes of AIR Supreme Court are now available on three CDs ROM. You can, not only carry around these CDs Rom on every transfer but also carry them in your briefcase to the court everyday. There is one catch however. This set off three CDs ROM costs a whopping Rs 28,000. We doubt that any of us will be able to afford or willing to invest such a sum in these volumes. We hope that the prices would come down eventually.

There are myriad Indian and international law related sites available on World Wide Web. Three of the most useful of these sites are allindiareporter.com, scconline. com and supremecourtofindia.nic.in. Once you're connected to World Wide Web through Internet, sky is the limit, literally and figuratively.

So, a computer can increase the efficiency and the output of a judge tremendously. There can be little doubt on that score. What else can it do for you, your wife or your child? Plenty. You can plan your engagements, draft documents, write letters, send and receive massages through e-mail, connect to the cyber world and keep in touch with the latest events in the fields that interest you, shop on internet, download encyclopedias and dictionaries of every hue which are available on internet, free of charge and even buy or sale stocks online.

BUYING A COMPUTER

We hope that by now we have made you sufficiently interested in computers to consider buying one for your family but in the process if we sounded like

sales persons of a computer vendor, it is purely unintentional. If you have allowed yourself to be persuaded that you need a PC and if you ask around, people would caution you immediately. They would tell you that PCs are getting faster, more efficient, user friendlier and cheaper by the day. They are right. So, what should you do? Should you wait for that better and cheaper version to arrive in the market? You certainly can. At your own cost. Because no matter what you buy eventually, it will be outdated in six months and obsolete in two years. So, if someone asks us, which is the best time to buy a PC? We would answer unhesitatingly, 'now' because even if a faster computer arrives in the market tomorrow, it will not diminish the capabilities of my computer bought yesterday.

There is no way to determine how much should you spend on a PC because you have a budget that is unique to you. However, whatever your budget is you would want to buy the best PC available in the market for that amount. When you start considering buying a computer you will be called upon to make a series of small decisions. The first question to encounter you would be whether you should go in for a branded computer or settle for an assembled one? A branded computer is a complete set of mutually compatible components like monitor, systems unit, keyboard, mouse, speakers etc., with registered preloaded software, marketed by an established reputed manufacturer. It is covered by a guaranty/ warranty running for a period of six months to 3 years and is usually supported by a network of service centers to provide after- sales service. No wonder the branded computers are considerably more expensive than their assembled brethren. An assembled computer on the other hand consists of components like monitor, mother board, CPU, media drives, hard disc, modem mouse etc., manufactured by different specialized manufacturers. Compatibility of different components is something you have to take care of. It is often loaded with pirated software with attendant problems. Your computer, as a unit, will not be covered by any warranty, though individual components may carry warranty of sorts. You can acquire a high-powered assembled computer for as little as Rs. 20000/-, a branded computer on the other hand will set you back by at least Rs. 30000/-. No doubt you save money if settle for an assembled computer but you save headaches if you opt for a branded one. All of us can presume that we would be transferred from one place to another sooner or later. So a backup network that can provide technical assistance or after-sales service is absolutely indispensable. In such a scenario unless you are very techno savvy we would not advise you to go in for an assembled computer.

Having decided in favour of a branded computer, the next question to ponder over is, what you should look for, a multinational brand or an Indian one? In this context some of the brand names that readily come to mind are Compaq, HP, IBM, Acer, Dale, HCL, Wipro, Zenith etc. Compaq, HP, Acer, IBM and Dale are multinational corporations whereas HCL, Wipro, Zenith etc. are Indian brands. Compaq India and HP India merged a couple of years ago so quality wise there is nothing to choose between the two. HCL and Wipro are two of the most reputable Indian brands.

Once you decide, which brand name to buy, you will have to zero in on the precise model that suits your needs and the pocket. Here, a little understanding of technical terms will help in making sense of advertisements and brochures. Speed of a computer is measured in MHz. As we have already seen 1000 MHz constitute one gigahertz. Standard computers available in the market nowadays have clock speeds ranging from 1.8 gigahertz to 2.6 gigahertz, though computers with 3.2 gigahertz have also arrived in the market. Even a speed of 1.8 gigahertz is more than enough as the difference would in any case be in Nanoseconds. Your computer should have a random access memory of at least 128 MB. Most computers available in the market carry that much memory. The advanced ones may have a random access memory of 256 MB. Next into look for is the capacity of hard disc. As we have already discussed, songs, movies and graphics consume much greater storage space than text. So if you intend to work a lot with graphics, you should go in for computer with a hard disc that can accommodate about 40 gigabytes of data. For those who would work mostly with text, even 20 GB is enough. A 17 inch monitor will be preferable to a 15 inch one. However, if you go for a branded computer everything will be neatly packaged along with original software. So, you will not have to worry about anything except the price. Those, who decide in favour of assembled PC, would do well to procure assistance of experts.

No matter whether you buy a branded PC or an assembled one, you will have two buy uninterruptible power supply (U.P.S.), separately. It would not be advisable to penny pinch here. Like a TV set, your computer cannot be shut down instantaneously. First, you are required to shut different programmes you have opened. If programmes are not properly shared and power is tripped suddenly, you stand the risk of corrupting your files. U.P.S. is a battery-powered device that supplies you with about 15-20 minutes of power in case of a power breakdown, so that you get sufficient time to step-by-step close down programmes that were running at that point of time. So, you will be required to spend an additional amount of Rs 2000 to 4000 for a UPS. A PC is the most renowned of all brands in this sphere.

That leaves you with only one peripheral to look for. That is a printer. As we know there are mainly three types of printers did that available. While a dot matrix printer may be useless for graphics, a laser printer may be too expensive for most of us. That leaves us with inkjet printers. These printers are not only light on pocket but are also most suitable for light-duty printing, including graphics. HP, Epson and Canon are some of the branded inkjet printers you can choose from and unless you are heavily into graphics, any inkjet printer will serve your purpose. For most part of the year, manufacturers run schemes that offer free low-end printers. Otherwise you may have to shell out anything between Rs 2500 to Rs 5000 for an inkjet printer.

So friends, take the plunge. Happy clicking.

(Concluded)

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PART - II

NOTES ON IMPORTANT JUDGMENTS

331. ACCOMMODATION CONTROL ACT, 1961 (M.P.)- Section 12 (1) (f) Bonafide need for non-residential accommodation- Alternative accommodation- Residential accommodation which can be converted into non-residential accommodation not to be considered.
Sitaram Patel Vs. Bipin Chand Jain
Reported in 2003 (2) MPHT 499

Held :

Looking to the aforesaid provision, if the plaintiff is having other reasonable suitable non-residential accommodation of his own in his possession in the city, it will be treated as an alternative accommodation. Merely such residential accommodation of the plaintiff, could be used as non-residential accommodation, that will not be considered as an alternative accommodation for ascertaining the need of plaintiff under Section 12 (1) (f) of the Act. Statutory provision is specific that the landlord has no other reasonably suitable non-residential accommodation of his own in his occupation in the city. The plaintiff cannot be compelled to convert his any residential accommodation into a non-residential accommodation nor the defendant-tenant can say that any residential accommodation in the possession of the plaintiff be converted into as non-residential accommodation just to negative the need of the plaintiff.

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332. ACCOMMODATION CONTROL ACT, 1961 (M.P.)- Section 13 Filing of an application for condonation of delay- Necessity of.
Sayeda Akhtar Vs. Abdul Ahad
Judgment dt. 18.7.2003 passed by the Supreme Court in Civil Appeal No. 5010 of 2003, reported in 2003 LT (SC) 91= (2003) 7 SCC 52

Held :

Section 13 of the M.P. Accommodation Control Act, 1961 reads as under :

"13. (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court to pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

* * *

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

A bare perusal of the aforementioned provision would clearly go to show that although the court has the jurisdiction to extend the time for depositing the rent both for the period during which the tenant had defaulted as well as the period subsequent thereto but an application is to be made therefor. The provision requiring an application to be made is indisputably necessary for the purpose of showing sufficient cause as to why such deposit could not be made within the time granted by the Court. The court does not extend time or condone the delay on mere sympathy. It will exercise its discretion judicially and on a finding of existence of sufficient cause.

In *Nasiruddin v. Sita Ram Agarwal, (2003) 2 SCC 577* this Court noticed the said provision as well as the decision in *Shyamcharan Sharma v. Dharamdas, (1980) 2 SCC 151* and observed that the court has been conferred the power to extend the time for deposit of rent but on an application made to it.

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333. ACCOMMODATION CONTROL ACT, 1961 (M.P.)- Section 23-A and 23-J Nationalised Bank- Bank falls within category of a Company for purpose of Section 23-J (ii)
Fazal Abbas and others Vs. Shiv Ram Sharma.
Reported in 2003 (3) MPLJ 403

Held :

A Division Bench of this Court in the case of *Ranjit Narayan Haksar vs. Surendra Verma reported in 1995 MPLJ 21= 1994 JLJ 740* has made it clear that the expression 'Company' has a specific and restricted meaning as contained in the provisions of the Companies Act 1956 as also a general meaning in the legal sense as in a association, collection of individuals or as the company incorporated by a Special Act of the legislature. 'Company' in the general legal sense can include what is known as statutory corporation, which is also regarded as a statutory company. There is nothing in the language or context of section 23-J (ii) indicating any intention to give a restricted meaning to the expression 'company'. The legislature did not refer to the Companies Act in section 23-J (ii) and did not specifically exclude statutory corporation. The expression 'company' has been used in its general legal sense and takes in Government owned or controlled statutory Corporations. The aforesaid Division Bench decision of this Court has been confirmed by the Hon'ble Supreme Court in the case of *Surindra Verma vs. Ranjeet Narayan Haksar, reported in 1995 MPLJ 560=1995 JLJ 460.*

It is not disputed that respondent is retired employee of the State Bank of Indore. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, provides for acquisition and transfer of the undertakings and certain banking companies and section 9 of this Act provides that the Central Government may after consultation with the Reserve Bank, make a scheme for carrying out the provisions of this Act. For the aforesaid reason bank falls within the category

of a company controlled by the Central Government. The provisions of section 23-J (ii), therefore is applicable to the case of the respondent.

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334. ARBITRATION AND CONCILIATION ACT, 1996- Section 8
Arbitration clause in agreement-Court required to refer dispute to arbitrator-Arbitration clause applicable to facts of the case or not, may be decided by the Arbitrator.
Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums Judgment dt. 23.7.2003 by the Supreme Court in Civil Appeal No. 5156 of 2003, reported in (2003) 6 SCC 503

Held :

This Court in the case of *P. Anand Gajapathi Raju v. P.V.G. Raju, (2002) 4 SCC 539* has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, if is mandatory for the civil court to refer the dispute to an arbitrator.

The question then would arise: what would be the role of the civil court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388* with reference to the power of the arbitrator under Section 16 has laid down thus : (SCC p. 405, para 21)

> "21. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. *It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction.* There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had

nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." (emphasis supplied)

It is clear from the language of the section, as interpreted by the Constitution Bench judgment in Konkan Rly. that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned.

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335. ARBITRATION AND CONCILIATION ACT, 1996 - Section 85 (2) (a) Arbitral proceedings pending when Act of 1996 came into force-Unless otherwise agreed by parties old Act applicable.
N.S. Nayak & Sons Vs. State of Goa
Judgment dt. 8.5.2003 by the Supreme Court in Civil Appeal No. 97 of 2002, reported in (2003) 6 SCC 56

Held :

Section 85 (2) (a) specifically provides that : (1) the provisions of the old Act shall apply in relation to arbitral proceedings which commenced on or before the new Act came into force, unless otherwise agreed by the parties; and (2) it also provides that the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force.

Further, the complete answer to the contention of the learned counsel for the appellant is in the following paragraph (para 32) of *Thyssen Stahlunion GMBII V. Steel Authority of India Ltd., (1999) 9 SCC 334* wherein the Court has specifically held that once the arbitral proceedings commenced under the old Act, it would be the old Act which would apply in the arbitral proceedings and also for enforcing the award : (SCC pp. 374-75).

"32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue legal proceedings must be pending when the new Act comes into force. *To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act.* Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody i.e. the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of

the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. *We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998.* Any other construction on Section 85 (2) (a) would only lead to confusion and hardship. This construction put by us is consistent with the wording of Section 85 (2) (a) using the terms 'provision' and *'in relation to arbitral proceedings' which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well."*

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336. CIVIL PROCEDURE CODE, 1908- Section 9
Plea of bar of jurisdiction- Burden to prove such plea is on the party who alleged it.
Dwarka Prasad Agarwal (D) by L. Rs. and another Vs. Ramesh Chandra Agarwala and others
Reported in AIR 2003 SC 2696

Held :

The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil Courts to determine all disputes of civil nature unless the same is barred under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil Court is not to be readily inferred. A provision seeking to bar jurisdiction of civil Court requires strict interpretation. The Court, it is well-settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil Court. The burden of proof in this behalf shall be on the party who asserts that the civil Court's jurisdiction is ousted. (See Sahebgouda (dead) by LRs. and others v. Ogeppa and others, (2003 (3) Supreme 13). Even otherwise, the civil Court's jurisdiction is not completely ousted under the Companies Act, 1956.

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337. CIVIL PROCEDURE CODE, 1908- Section 113
Applicability of Section 113-Law explained.
Central Bank of India Vs. Vrajlal Kapurchand Gandhi and another
Judgment dt. 16.7.2003 by the Supreme Court in Civil Appeal No. 4634 of 2003, reported in (2003) 6 SCC 573

Held :

Great emphasis was laid on Section 113 CPC, by Mr. Nariman to contend that had the stand been taken before the courts below, in case of necessity, the provision could have been resorted to.

The said provision reads as follows:

"113. *Reference to High Court.*- Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

Provided that where the court is satisfied that a case pending before it involves a question as to the validity of any Act, ordinance or regulation or of any provision contend in an Act, ordinance or regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, ordinance, regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation.- In this section, 'regulation' means any regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State."

The proviso is relevant for our purpose. It operates in the following circumstances:

(a) The court is satisfied that a case pending before it involves a question as to the validity of any Act, ordinance or regulation, or of any provision contained therein.

(b) Determination of the aforesaid question is necessary for disposal of the case.

(c) The court is of the opinion that such Act, ordinance or regulation or a provision contained in an Act, ordinance or regulation is inoperative.

(d) But the Act, ordinance or regulation or provision concerned has not been declared invalid or inoperative by the High Court to which the court where the case is pending is subordinate or by the Supreme Court.

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338. CIVIL PROCEDURE CODE, 1908- Section 115
Interim order- Revision not maintainable if it does not finally decide the lis.
Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and others
Judgment dt. 17.4.2003 by the Supreme Court in Civil Appeal No. 3488 of 2003, reported in (2003) 6 SCC 659

Held :

A plain reading of Section 115 as it stands makes it clear that the stress is

on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115. There is marked distinction in the language of Section 97 (3) of the Old Amendment Act and Section 32 (2) (i) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32 (2) (i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.

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339. CIVIL PROCEDURE CODE, 1908- Section 115
CONSTITUTION OF INDIA- Articles 226 and 227
Section 115 as amended by Act of 1999- Impact on the jurisdiction of High Court under Articles 226 and 227.
Surya Dev Rai Vs. Ram Chander Rai and others
Judgment dt. 7.8.2003 by the Supreme Court in Civil Appeal No. 6110 of 2003, reported in (2003) 6 SCC 675

Held :

This appeal raises a question of frequent occurrence before the High Courts as to what is the impact of the amendment in Section 115 CPC brought in by Act 46 of 1999 w.e.f. 1-7-2002, on the power and jurisdiction of the High Court to entertain petitions seeking a writ of certiorari under Article 226 of the Constitution or invoking the power of superintendence under Article 227 of the Constitution as against similar orders, acts or proceedings of the courts subordinate to the High Courts, against which earlier the remedy of filing civil revision under Section 115 CPC was available to the person aggrieved.

Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder.

(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction- by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction- by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot to be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will

not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed inereafter or afresh, the High Court may in appropriate cases itself make an order in suppression or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

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340. CIVIL PROCEDURE CODE, 1908- Section 151 and O.8 R.1
Time limit of 90 days to file w.s. as prescribed by O.8 R.1- Court may invoke inherent powers to accept w.s. after the period of 90 days.
S.K. Muddin Vs. S.K. Nafees
Reported in 2003 (4) MPHT 93

Held :

With reference to decision of this Court in *Asarfi Lal Vs. Smt. Vimla Devi* and others, *2003 (3) MPHT 14 (NOC)* and *Smt. Kusum Bai* and another *Vs. Ghasiram* and others, *2003 (3) MPHT 15 (NOC)*, learned Counsel for the applicant states that the proviso to Order 8 Rule 1 is directory and not mandatory.

Where the reason for not filing the written statement within 90 days time was explained, the Court ought not to have declined to accept the written statement. Even otherwise, the Court is not seized of the jurisdiction to accept the written statement on filing of application under Section 151, CPC stating the delay if any. Even under Section 151, CPC, where the circumstances explaining the delay are demonstrated in the case itself, the Court below suo-motu may invoke the inherent jurisdiction in accepting the written statement filed beyond the period of 90 days as stipulated under Order 8 Rule 1, CPC.

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341. CIVIL PROCEDURE CODE, 1908- O.3 R.2 and Section 151
POWER OF ATTORNEY ACT, 1882- Section 2 (21)

(i) Witness- Power of attorney holder is a competent witness.
(ii) Inherent powers- Powers to recall an order- Law explained.
Smt. Shanti Devi Agarwal Vs. V.H. Lulla
Reported in 2003 (II) MPJR 175

Held :

To clarify the position further it would be appropriate to reproduce the definition of words 'Power of Attorney' and 'Evidence'. (The) Power of Attorney Act 1882 (amended by Act No. 55 of 1982) under section 1 A defines the word 'power of attorney' as :

> "Power of attorney includes any instrument empowering a specified person to act for and in the name of the person executing it."

Similarly (The Indian) Stamp Act 1899 defines 'Power of Attorney' as :

> "2 (21) "Power of Attorney" includes any instrument (not chargeable with a fee under the law relating to court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it."

That apart the Nagpur High Court in a judgment reported in AIR 1937 Nagpur, 65 (66) has explained the term "power of attorney" as :

> "Power of attorney is an authority whereby one is set in turn, stead or place of another to act for him."

Now coming to the expression 'evidence', section 3 of the Indian Evidence Act defines it as:

> **"Evidence"-** "Evidence" means and includes-
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
>
> (2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

Thus a power of attorney holder, who virtually steps into shoes of a party can place materials in terms of the definition of 'evidence' as above, on behalf of that party, before a Court under the provisions of Order 3 Rule 2 of the Code and also under Section 118 of the Evidence Act unless he stands disqualified for the reasons given in that section itself and further, admissibility of his evidence would be subject to rigorous procedure contained in Chapter X thereof.

In the case of *Indian Bank Vs. Satyam Fires (India) Pvt. Ltd. (AIR 1996 SC 2592)*, Hon'ble the Apex Court while interpreting the powers of the Commission under Section 13 (iv) of the Consumer Protection Act, 1986 held that statutory tribunals created under the Act have inherent powers to recall its order passed under a mistake or fraud. Similarly, in the case of *Budhia Swain Vs. Gopinath Deb (AIR 1999 SC 2089)*, Hon'ble the Apex Court has summed up the legal position with regard to power to recall an order under Section 151 of the Code as under :-

> Civil Procedure Code, 1908 Section 151- Power to recall an order scope of- Grounds- Legal position summed up.
>
> **HELD : A tribunal or a court may recall an order earlier made by it if (i) the proceedings culminating into an order suffer from the inherent lack**

of jurisdiction and such lack of jurisdiction is patent, (ii) there exists fraud or collusion in obtaining the judgment, (iii) there has been a mistake of the court prejudicing a party or (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation."

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342. CIVIL PROCEDURE CODE, 1908-O.5 R.17 and 19
Service of summons- Court should make a judicial order while accepting service effected under Rule 17.
Shakuntala Singh Vs. Basant Kumar Thakur and others
Reported in 2003 (3) MPLJ 414

Held :

Apart from this when the service was seriously disputed by the appellant in the trial Court it was obligatory on the part of respondent to examine process server who has affected the service. In absence of such, service cannot be held to be valid, it is contrary to the provisions of Rules, 17, 19 of Order 5, Civil Procedure Code. This Court in the case of *Baijnath vs. Harishankar reported in 2001 (2) MPLJ 142* has considered this question and held :

"19. In *Kunja vs. Lalaram and others, 1987 MPLJ 746,* it has been laid down that the provisions of Rule 19 of Order 5 of the Code are mandatory and cast a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5 of the Code. It has further been observed that non-compliance of Order 5, Rule 19 will cause serious injustice to the defendant. *Bombay High Court in Baburao Soma Bhoi vs. Abdul Raheman Abdul Rajjak Khatik, 2000 (1) Mh. L.J. 481 = (1999) All India High Court Cases 3725,* has observed that the return of summons should be accompanied by the affidavit of the process server, which is in Form 11 of the First Schedule of the Appendix "B" of the Code. If the return report of the process server is without an affidavit, the Court has to record the

statement of process server and after making further enquiry, the Court should hold that the summons has been duly served or not.

20. In the instant case as noticed above, the trial Court without examining the process server, directed that the appellant/defendant No. 1 be proceeded against ex-parte; even though report of the process server was not accompanied with his affidavit. Obviously such a course was not permissible.

24. In the instant case, since the trial Court has not made any enquiry regarding the service of summons on the appellant as also regarding the refusal of summons reported by serving officer, the mandatory requirements of Order 5, Rule 19 of the Code have not been duly complied with. The approach of the trial Court during trial as also while holding the enquiry on the application of the appellant under Order 9, Rule 13, Civil Procedure Code, for setting aside exparte judgment and decree passed against him, appears to be rather casual and negligent, as has been pointed out above. Moreover, the cause of delay shown by the appellant is belated filing of the said application under Order 9, Rule 13 read with section 151 of the Code also deserves acceptance."

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343. CIVIL PROCEDURE CODE, 1908- O.6 R.17
Amendment of pleadings-Granting or refusing of amendment- Law explained.
Punjab National Bank Vs. Indian Bank and another
Judgment dt. 22.4.2003 by the Supreme Court in Civil Appeal No. 7072 of 2001, reported in (2003) 6 SCC 79

Held :

In *Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala, AIR 1964 SC 11* it has been held that amendment can be refused when the effect of it would be to take away from a party a legal right which had accrued to him by lapse of time. It may be so when fresh allegations are added or fresh reliefs are sought by way of amendment. But where the amendment merely clarifies an existing pleading and does not in substance add to or alter it, there is no good reason not to allow the same nor would even the bar of limitation come in the way. No fresh allegations of facts have been introduced and/or added nor is any fresh cause of action or new relief sought to be added. A matter already contained in the original pleading can always be clarified and such an amendment should ordinarily be allowed and in such a case the question of bar of limitation would not be attracted.

The position that emerges from the decisions referred to earlier is that an amendment would generally not be disallowed except where a time-barred claim is sought to be introduced, there too it would be one of the factors for consideration or where it changes the nature of the suit itself or it is male fide or the other

party cannot be placed in the same position had the plaint been originally filed correctly, that is to say, the other side has lost right of a valid defence by subsequent amendment.

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344. CIVIL PROCEDURE CODE, 1908- O.8 R.3 and 5
Pleadings- Unless specifically denied amounts to admission.
Mohd. Syed & Anr. Vs. M/s Hindustan Petroleum & 3 Ors.
Reported in 2003 (II) MPJR 117

Held :

The Apex Court in the case of *Jahuri Sah and others vs. Dwarika Prasad Jhunjhunwala and others AIR 1967 SC 109* has held that to say that defendant has no knowledge of fact pleaded by the plaintiff is not tantamount to a denial of existence of fact, not even as implied denial. The said verdict to the Supreme Court was followed by the Division Bench of this Court in the case of Dhanabai Vs. State of M.P. and others, 1987 JLJ 879 wherein it has been held that if the allegation in the plaint is not denied specifically or only no knowledge is pleaded it amounts to an admission under Order 8 Rule 3 and 5 of the code of Civil Procedure.

Needless to say that it is the bounden duty of a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which would go a long way to discredit the truth of his case. It is apposite to refer the decision of the Division Bench of this Court in the case of *Kasturchand v. Kapurchand, 1975 JLJ 333 (para 20).*

More than seven decades back, the law was settled by the privy council in *Sarder Gurbakhsh Singh Vs. Gurdial Singh and another AIR 1927* Privy Council 230 wherein it has been categorically held that the practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his, (the other party's) own witness is a bad and degrading practice. The true object to be achieved Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicion attaching to it. The story can then be subjected in all its particulars to cross-examination.

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345. CIVIL PROCEDURE CODE, 1908- O.21 R.97, 101 and 103
Execution proceedings- Resistance to delivery of possession- All disputes should be decided by Executing Court and not by separate suit.
Gajendra Nath Vs. Shakil Ahmad Khan alias Ajaj Mohd. Khan and another
Reported in 2003 (2) MPHT 506

Held :

The Scheme of the provisions in Order 21 Rules 97 to 101 is altogether different after the Amendment in the year 1976 than which prevailed earlier. That

has been explained in several decisions of the Supreme Court. In *Shreenath Vs. Rajesh, AIR 1998 SC 1827,* it has been made crystal clear that Order 21 Rule 97 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through the judgment-debtor or claiming independent right of his own including a tenant not party to the suit or even a stranger. A decree- holder in such a case, may make an application to the Executing Court complaining such resistance for delivery of possession of the property. Rule 97 (2) after 1976 substitution empowers the Executing Courts when such claim is made to proceed to adjudicate upon the applicant's claim in accordance with the provisions contained thereinafter. This refers to Order 21 Rule 101 (as Amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21 Rule 97 or Rule 99 should be determined by the Court and not by a separate suit. By the amendment, one has not to go for a fresh suit but all matters pertaining to that property including any obstruction by a stranger are adjudicated in the executing proceedings. The expression "any person" in Rule 97 (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21 Rule 97.

Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger. So, under Order 21Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the Executive Court. A party is not thrown out to relegate itself to the long-drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings.

Again in *Silverline Forum Pvt. Ltd. Vs. Rajiv Trust, (1998) 3 SCC 723,* it has been observed that the adjudication mentioned in Order 21 Rule 97 (2) need not necessarily involve a detailed enquiry or collection of evidence. The Court can make the adjudication on admitted facts or even on the averments made by the resister. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary.

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346. CIVIL PROCEDURE CODE, 1908- O.22 R.3
Pujari, office of, is heritable- Legal heirs may continue the suit on death of Pujari.
Shri Prakash Tank Vs. State of M.P. & Ors.
Reported in 2003 (II) MPJR SN 64

Held :

So far as the first contention of the application that the office of pujari is not heritable and right to sue does not survive cannot be accepted. This question has been considered by this Court in Civil Revision No. 694/1995 decided on 26.7.1995 (1995 (II) MPWN 158)

In view of the aforesaid, the settled position of law is that office of Pujari is heritable and right to sue survives on the legal heirs of deceased Pujari.

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347. CONSTITUTION OF INDIA- Arts. 72 and 161
Terms pardon, reprieve, respite, remission- Meaning and connotation of- Exercise of power by the Governor or by the President- Power can be exercised on the advice of Counsel of Ministers.
State (Govt. of NCT of Delhi) Vs Prem Raj
Judgement dated 5.08.2003 by the Supreme Court in Criminal Appeal No. 948 of 2003, reported in (2003) 7 SCC 121

Held :

Article 72 of the Constitution of India, 1950 (in short the Constitution) confers upon the President power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. The power so conferred is without prejudice to the similar power conferred on the Court Martial or the Governor of a State. Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as, Sections 432,433 or 433 -A of the Code or by any prison rules. But the President or the Governor, as the case may be, must act on the advice of the Council of Ministers.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the court otherwise directs. Pardon is to be distinguished from "amnesty" which is defined as "general pardon of political prisoners; an act of oblivion". As understood in common parlance, the word "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

Reprieve means a stay of execution of sentence, a postponement of capital sentence. Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction. It is something like a release on probation for good conduct under Section 360 of the Code. Remission is reduction of the amount of a sentence without changing its character. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the court, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. Commutation is change of a sentence to a lighter sentence of a different kind (Section 432-A empowers the appropriate Government to suspend or remit sentences).

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348. CONSTITUTION OF INDIA- Article 141

Precedent- No blind reliance should be placed on a previous decision- Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

Ashwani Kumar Singh Vs. U.P. Public Service Commission and others Reported in AIR 2003 SC 2661

Held :

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret Judgments. They interpret words of statutes; their words are not to be interpreted as statues. In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

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349. CONSTITUTION OF INDIA- Article 226

Writ jurisdiction under Article 226- No jurisdiction to determine issues on private dispute over a property or right under partnership- No jurisdiction to direct compromise in civil suits.

Dwaraka Prasad Agarwal (D) by LRs. and another Vs. B.D. Agarwal and others

Judgment dt. 7.7.2003 by the Supreme Court in Civil Appeal No. 4782 of 1996, reported in (2003) 6 SCC 230

Held :

The High Court derives its jurisdiction in terms of Article 226 of the Constitution of India, if an occasion arises therefor, to make judicial review of the order passed by a statutory authority. It is beyond any cavil that no writ can be issued if the disputes involve private law character. The writ court has also no jurisdiction to determine an issue on private dispute over a property or right under a partnership. While purporting to record a compromise, the writ court cannot enlarge its jurisdiction by directing that the suits pending in different courts filed

or different causes of action would also stand compromised. By reason thereof the writ court would be entrenching upon the jurisdiction of the civil court indirectly which it could not do directly. For the purpose of granting permission even for withdrawal of suit in terms of Order 23 Rule 1 of the Code of Civil Procedure, the civil courts themselves were required to apply their mind as to whether having regard to the dispute between the parties, a case therefor has been made out or not. The civil court is required to act on its own and not on the basis of any direction of any other court determining a totally foreign issue.

Furthermore, a writ court can pass an effective order provided it has jurisdiction in relation thereto. With the enlargement of the power of the court recording compromise in view of the Code of Civil Procedure (Amendment) Act, 1976, the responsibility and duty of the court also has increased. By reason of Order 23 Rule 3 of the Code of Civil Procedure, a party can challenge the legality of the compromise only before the same court and in that view of the matter the court was enjoined with a solemn duty to decide such controversy in a lawful manner. A question as to whether a compromise is void or voidable under the Indian Contract Act or any other law for the time being in force, would have, thus, to be determined by the court itself. Once it is held that the agreement or the compromise was fraudulent, the same per se would be unlawful and the court is required to declare the same as such.

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350. CONSUMER PROTECTION ACT, 1986- Section 21, 22

Jurisdiction of different forums constituted under the Act- Jurisdiction is in addition to the jurisdiction of conventional Courts- Complicated questions capable of being determined by summary inquiry are within jurisdiction of such forums.

CCI Chambers Coop. Hsg. Society Ltd Vs. Development Credit Bank Ltd.

Judgment dated 29.08.2003 by the Supreme Court in Civil Appeal No. 7228 of 2001, reported in (2003) 7 SCC 233

Held :

It cannot be denied that fora at the national level, the State level and at the district level have been constituted under the Act with the avowed object of providing summary and speedy remedy in conformity with the principles of natural justice, taking care of such grievances as are amenable to the jurisdiction of the fora established under the Act. These fora have been established and conferred with the jurisdiction in addition to the conventional courts. The principal object sought to be achieved by establishing such fora is to relieve the conventional courts of their burden which is ever-increasing with the mounting arrears and whereat the disposal is delayed because of the complicated and detailed procedure which at times is accompanied by technicalities. Merely because recording of evidence is required, or some questions of fact and law arise which would need to be investigated and determined, cannot be a ground for shutting the doors of any forum under the Act to the person aggrieved.

In *Indian Medical Assn. case (1995) 6 SCC 651* this Court noticed the powers conferred on the several fora under the Act, the procedure applicable (including the exercise of some powers of the civil court under the Code of Civil Procedure having been made available to the fora under the Act) and held that the nature of averments made in the complaint is not by itself enough to arrive at a conclusion that the complaint raises such complicated questions as cannot be determined by NCDRC. It is only when the dispute arising for adjudication is such as would require recording of lengthy evidence not permissible within the scope of a summary enquiry that a forum under the Act may ask the complainant to approach the civil court. The fora made available under the Act are in addition to, and not in derogation of the provisions of any other law for the time being in force and the jurisdiction of the conventional courts over such matters as are now cognizable under the Act has not been taken away. A three-Judge Bench of this Court recently in *Dr. J.J. Merchant case (2002) 6 SCC 635* specifically dealt with the issue as to the guidelines which would determine the matter being appropriately dealt with by a forum under the Act or being left to be heard and decided by a civil court. This Court noticed that the fora under the Act are specifically empowered to follow such procedure which may not require more time or delay the proceedings. A forum under the Act is entitled, and would be justified, in evolving a procedure of its own and also by effectively controlling the proceedings so as to do away with the need of a detailed and complicated trial and arrive at a just decision of the case by resorting to the principles of natural justice and following the procedure consistent with the priciples thereof, also making use of such of the powers of the civil court as are conferred on it. The decisive test is not the complicated nature of the questions of fact and law arising for decision. The anvil on which entertainability of a complaint by a forum under the Act is to be determined is whether the questions, though complicated they may be, are capable of being determined by summary enquiry i.e. by doing away with the need of a detailed and complicated method of recording evidence.

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351. CONTEMPT OF COURTS ACT, 1971- Section 2 (c) (ii)
Incorrectness of pleading- Verification of incorrect pleadings- When person pleading, liable for perjury and contempt of Court- Law explained.
S.R. Ramaraj Vs. Special Court, Bombay.
Judgment dated 19.08.2003 by the Supreme Court in Criminal Appeal No. 1491 of 1995, reported in (2003) 7 SCC 175

Held :

Where a verification is specific and deliberately false, there is nothing in law to prevent a person from being proceeded for contempt. But it must be remembered that the very essence of crimes of this kind is not how such statements may injure this or that party to litigation but how they may deceive and mislead the courts and thus produce mischievous consequences to the administration of civil and criminal justice. A person is under a legal obligation to verify

the allegations of fact made in the pleadings and if he verifies falsely, he comes under the clutches of law. In order to expose a person to the liability of a prosecution for making false statement there must be a false statement of fact and not a mere pleading made on the basis of facts which are themselves not false. Merely because an action or defence can be an abuse of process of the court, those responsible for its formulation cannot be regarded as committing contempt, but an attempt to deceive the court by disguising the nature of a claim is contempt. If the facts leading to a claim or defence are set out, but an inference is drawn thereby stating that the stand of the plaintiff or defendant is one way or the other it will not amount to contempt unless it be that the facts as pleaded themselves are false.

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352. CRIMINAL PROCEDURE CODE, 1973- Section 2 (h) and 156
'Investigation', meaning of- Whether a Magistrate can interfere with investigation- Held, no- Error or illegality in investigation, effect of- Power of the Court to take cognizance not affected.
Union of India Vs. Prakash P. Hinduja and another
Judgment dt. 7.7.2003 by the Supreme Court in Criminal Appeal No. 666 of 2002, reported in (2003) 6 SCC 195

Held :

The principal question which, therefore, requires consideration is whether the court can go into the validity or otherwise of the investigation done by the authorities charged with the duty of investigation under the relevant statutes and whether any error or illegality committed during the course of investigation would so vitiate the charge-sheet so as to render the cognizance taken thereon bad and invalid.

We will first examine the statutory provisions made in that regard. Section 2 (h) CrPC defines "investigation" and it includes all the proceedings under the 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. It ends with the 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 filing of a charge-sheet under Section 173.

The provisions referred to above occurring in Chapter XII of the Code show that detailed and elaborate provisions have been made for securing that an investigation takes place regarding an offence of which information has been given and the same is done in accordance with the provisions of the Code. The manner and the method of conducting the investigation are left entirely to the officer in charge of the police station or a subordinate officer deputed by him. A Magistrate has no power to interfere with the same. The formation of the opinion whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the case to a Magistrate or not as contemplated by Sections 169 and 170 is to be that of the office in charge of the police station and a Magistrate has absolutely no role to play at this stage. Similarly, after completion of the investi-

gation while making a report to the Magistrate under Section 173, the requisite details have to be submitted by the officer in charge of the police station without any kind of interference or direction of a Magistrate and this will include a report regarding the fact whether any offence appears to have been committed and if so, by whom, as provided by clause (d) of sub-section (2) (i) of this section. These provisions will also be applicable in cases under the Prevention of Corruption Act, 1947 by virtue of Section 7-A thereof and the Prevention of Corruption Act, 1988 by virtue of Section 22 thereof.

The Magistrate is no doubt not bound to accept the final report (sometimes called as closer report) submitted by the police and if he feels that the evidence and material collected during investigation justify prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by Section 190 CrPC. The statutory provisions are, therefore, absolutely clear that the court cannot interfere with the investigation.

An incidental question as to what will be the result of any error or illegality in investigation on the trial of the accused before the court may also be examined. Section 5-A of the Prevention of Corruption Act, 1947 provided that no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable under Section 161, Section 165 and Section 165-A IPC or under Section 5 of the said Act without the order of a Magistrate of the First Class. In H.N. Rishbud, AIR 1955 SC 196 the investigation was entirely completed by an officer of the rank lower than the Deputy Superintendent of Police and after permission was accorded a little or no further investigation was made. The Special Judge quashed the proceedings on the ground that the investigation on the basis of which the accused were being prosecuted was in contravention of the provisions of the Act, but the said order was set aside by the High Court. The appeal preferred by the accused to this Court assailing the judgment of the High Court was dismissed and the following principle was laid down : (AIR pp. 203-04, para 9)

> "9. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that in invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.
>
> A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cogni-

zance or trial. No doubt a police report which results from an investigation is provided in Section 190 of the Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading 'Conditions requisite for initiation of proceedings'. The language of this section is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 of 199.

These latter sections regulate the competence of the court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of Section 190 (1) (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial."

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353. CRIMINAL PROCEDURE CODE, 1973- Section 154
First information report- Contents of- Not an encyclopaedia of case- Need not contain all facts- Law explained.
Superintendent of police, CBI and others Vs. Tapan Kumar Singh Judgement dt. 10.4.2003 by the Supreme Court in Criminal Appeal No. 938 of 1995, reported in (2003) 6 SCC 175

Held :

It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even

if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

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354. CRIMINAL PROCEDURE CODE, 1973- Section 197
Sanction under Section 197 Cr.P.C. not taken- Objection raised after filing of charge-sheet and at the time of taking cognizance, should be considered.
Beena Yadu (Dr. Smt.) Vs. State of M.P.
Reported in 2003 (1) Vidhi Bhasvar 243

Held :

As regards point of sanction under section 197, CrPC, the applicant took objection after filing of charge-sheet and at the time of taking cognizance thereof. Thus, in view of a judgment of Hon'ble Apex Court reported as (2000) 8 SCC 498 *Birendra K. Singh v. State of Bihar,* plea of the applicant for sanction under section 197 of CrPC ought to have been considered. The applicant was said to be on duty as an emergency Medical Officer on call and thus, the allegation being connected with acts of discharge of official duties of the applicant, could not have been taken cognizance of, without a previous sanction in terms of section 197 of CrPC and more so in view of the judgment of Hon'ble Apex Court reported as 1996 SCC (Cri) 128 *[R. Balakrishna Pillai v. State of Kerala and another].*

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355. CRIMINAL PROCEDURE CODE, 1973- Section 198 (1) (c) and 320 (2) r/w section 494 IPC.
Provisions of Section 198 (1) and 320 (2) are not inter-se anomalous.
Sunil Pillai Vs. Union of India
Reported in 2003 (2) MPHT 459 (DB)

Held :

It is also relevant to refer to Section 320 of the Code. Section 320 deals with

the offences punishable under the sections of the Indian Penal Code, specified in the first two columns of the Table attached to the said sections that may be compounded by the persons mentioned in the third column of that table. The column pertaining to Section 494 stipulates that the offence may be compounded by the husband or wife or the person so marrying. It is appropriate to state here that Section 494 occurs in the table which has been framed under sub-section (2) of Section 320. As far as this offence is concerned the permission of the Court is necessary. True it is, Section 198 (1) (c) has widened the range of persons who can lodge a complaint by describing him as the person aggrieved. As far as Section 494 is concerned the parents and the other relatives, namely, brothers, sister, son or daughter and even grand father and also maternal uncle and such relatives have been included. Taking the social requisite collective harmony and prevalent tradition bound sociocultural norms into consideration such a latitude has been given in the statute for launching of prosecution. They remain in the realm of persons authorised to launch prosecution but as for as compounding is concerned the statute confers such authority exclusively on the husband or the wife. There is also a safeguard attached to it inasmuch as prior permission of the Court is necessary. It is not under the table framed under Section 320 (1) where permission of the Court is not necessary. The grant of leave to file a complaint and to compound the offence are in two different spheres or realms.

In our considered opinion, the facets under Section 198 (1) (c) and the sphere under Section 320 (2) qua Section 494, IPC are in two different realms. The question of any kind of anomaly which as has been submitted by Mr. Singh relying on the decision rendered in the case of G.C. Mandawar (supra) is not attracted.

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356. CRIMINAL PROCEDURE CODE, 1973 - Sections 200, 202, 190, 156 (3) Power of Magistrate on receipt of complaint case- Three different procedures laid down.
Raghuveer Singh Vs. Phoolmal
Reported in 2003 (II) MPWN 47

Held :

The main conention raised by learned counsel for the applicant is that the Magistrate has acted illegally and without jurisdiction in issuing the process without recording the statement of the complainant under section 200 or any witnesses under section 202 CrPC and, therefore, the entire proceedings deserves to be quashed. In support of his arguments the learned counsel for the applicant relied upon the judgment of Apex Court in the case of *Rajindra Nath Mahato v. T. Ganguly, AIR 1972 CAR 84 (SC),* judgment of this Court in the case of *Suresh Chand Jain v. Shri Mahendra Kumar Bhadkaria, 1997 (2) MPWN 234,* and in the case of Ku. Shashi Mitra and another v. Smt. Bhawana and another in MCrC 252/02 vide order dated 29.7.2002. As regards the judgment of Apex Court in the case of Rajindra Nath Mahato (supra) the question involved before the Court was whether the Magistrate to whom the case was transferred could have issue

process under section 202 CrPC before examining the complainant. In that case, the cognizance of the offence was taken by one Magistrate and the process was issued by another Magistrate to whom the case was transferred. In that case the Apex Court has observed that before issuing process the magistrate has to examine the complainant but the facts of the case are quite distinguishable. In that case the cognizance of the case was taken by the Magistrate, Shri S.K. Ganguly and the process was issued by another Magistrate Shri Sarkar to whom the case was transferred and has not taken the cognizance of offence. In para 8 of the judgment the Apex Court has held that the Magistrate who has to take cognizance and transferred the case to another Magistrate the complainant was required to be examined under section 200 CrPC. The Apex Court has further observed that "there are certain exceptions with which we are not concerned in the present appeal". Thus, in that case the Court was not dealing with the question involved in the present case. The question involved in the present case is that whether recording of statement of complainant Is mandatory in each and every case and this question was not present before the Apex Court.

The other judgments referred by the applicant were in the case of *Sureshchand Jain and Ku. Shashi Mitra (supra).* In both these cases this Court has taken a view that in every case examining the complainant is mandatory before issuing summons. However after perusing the said judgments I find that this Court has taken the said view without noticing the judgment of Apex Court in the case of *H.S. Bains v. The State (Union Territory of Chandigarh) AIR 1980 SC 1883.* The facts of the said case are identical to the present case. In that case also, Magistrate directed the investigation under section 156 and called for the police report before issuing the process and the question which was raised was whether examining the complainant was necessary before issuing the process by the Court and whether the Magistrate has power to issue the summons without examining the complainant. Apex Court after referring to the various provisions of the Criminal Procedure Code in para 6 has held as under."

> "It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under section 200. Thereafter, if in his opinion, there is no sufficient ground for proceeding he may dismiss the complaint under section 203. If in his opinion, there is sufficient ground for proceeding he may issue process under section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an

investigation under section 156 (3). The police will then investigate and submit a report under section 173 (1). On receiving the police report, the Magistrate may take cognizance of the offence under section 190 (1) (b) and straightway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceedings further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take congizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under section 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process".

From the plane reading of the aforesaid portion of para 6 it is clear that the Magistrate on receipt of complaint can do one of the three things, first he may decide that there is no sufficient ground for proceedings further or he may take cognizance of the offence under section 190 (1) (b) on the basis of police report and issue process. This he may do without being bound in any manner by the conclusion arrived at by the police in their report or he may take cognizance of the offence under section 190 (1) (a) on the basis of original complaint and proceed to examine upon oath the complainant and his witnesses under section 200 and if he adopts the third alternative he may hold or direct an inquiry under section 202 if he thinks fit. Thereafter, he may dismiss the complaint or issue the process as the case may be.

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357. CRIMINAL PROCEDURE CODE, 1973- Section 235 (2)
Hearing of the case for sentencing- After conviction no adjournment necessary for such hearing.
Gurudev Singh and another Vs. State of Punjab
Judgment dated 1.08.2003 by the Supreme Court in Criminal Appeal No. 392 of 2002, reported in (2003) 7 SCC 258

Held :

It is contended on behalf of the appellants that the trial court had pronounced the sentence on the same day on which the conviction was passed. Hence, relying upon certain observations in the judgments of this Court in *Muniappan v. State of T.N., (1981)3 SCC 11* and *Allauddin Main v. State of Bihar, (1989) 3 SCC 5* it was urged that the obligation of the trial court under Section 235 (2) of the Code of Criminal Procedure, 1973, was not properly discharged as the trial court did not adjourn the hearing of the case for sentencing after the order of conviction was pronounced.

In our view, the contention is entirely misplaced. As pointed out in *Ramdeo Chauhan v. State of Assam, (2001) 5 SCC 714* both the aforesaid judgments were delivered prior to the addition of the third proviso to Section 309 (2) of the Code of Criminal Procedure, 1973 by amending Act 45 of 1978 which reads thus:

> "Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him".

It was held that the mandate of the legislature is clear that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. Nonetheless, the court can in appropriate cases grant adjournment for the aforesaid purpose, if the proposed sentence is a sentence of death. From the material on record, it does not appear that any request was made to the learned Sessions Judge for adjournment. In the circumstances, we see no substance in the contention that the sentence imposed was vitiated for non-compliance with Section 235 (2) of the Code of Criminal Procedure, 1973.

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358. CRIMINAL PROCEDURE CODE, 1973- Section 391
Additional evidence, production of during appeal- Retrial not necessary, if found necessary- Appellate Court may direct recording or additional evidence.
Om Prakash Vs. State of M.P.
Reported in 2003 (II) MPJR 219

Held :

But, the present case in not a case of retrial and it is found explained by Hon'ble the Supreme Court in *Ukha Kolhe v. State of Maharashtra, AIR 1963 SC 1531* that in a case where in the interest of justice, and for just and proper decision of the case, the recording of additional evidence is found to be necessary, then instead of retrial, the procedure prescribed for permitting recording of additional evidence, should be resorted to. Then, it is found explained by P.C. Sarkar, in 7th Edition of his commentry on Code of Criminal Procedure at page 1158 under Section 391 of the Code of Criminal Procedure, which relates to a direction by appellate Court for taking an additional evidence, that the Court can act under this section if the documents admitted, had not been legally proved.

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359. CRIMINAL PROCEDURE CODE, 1973 - Section 439
Bail- Order granting bail- Strong expression of opinion be avoided but brief reasons should be given.
Ghanchi Rubina Salimbhai Vs. Metubha Diwansingh Solanki and others Judgment dated 24.07.2003 by the Supreme Court in Criminal Appeal Nos. 885-87 of 2003, reported in (2003) 7 SCC 183

Held :

Be that as it may, we do not want to go into this controversy whether a

concession was made by the parties in regard to the necessity to give a reasoned order. We think since the trial court has assigned reasons for refusing bail which includes availability of material to establish prima facie case against the respondent-accused, and looking to the gravity of the offence as also the apprehension of the complainant as to the possibility of interference by the accused with the investigation and threat to the prosecution witnesses in the event of they being enlarged on bail, we think it would have been more appropriate if the High Court could have at least briefly indicated the reasons which it thought entitled the respondent-accused to bail. While saying so, we are not unaware of the fact that any strong expression of opinion in the nature of a finding in a bail application though not binding on the trial court, could influence the mind of the trial court since such observation comes from the High Court, still we think it appropriate that some indication of the grounds on which the High Court rejected the findings recorded by the trial court, should have been reflected in the order by which the High Court reversed such findings. It is all the more necessary for the reason that there is always a possibility of the order of the High Court being challenged in appeal before this Court in which event this Court is entitled to know the basis of the impugned order.

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360. CRIMINAL TRIAL :

(i) Appreciation of evidence- Conflict between ocular testimony and medical evidence-Inferences that may be drawn.

(ii) Motive, proof of- Law explained.

Thaman Kumar Vs. State of Union Territory of Chandigarh
Judgment dt. 6.5.2003 by the Supreme Court in Criminal Appeal No. 425 of 1996, reported in (2003) 6 SCC 380

Held :

The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and

many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.

The width of the ligature mark would very much depend upon the type of the cloth, how tightly and strongly it was rolled over and was converted into a rope and how soon it was removed. In *Punjab Singh v. State of Haryana, 1984 Supp. SCC 233* it was held that if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence. Again in *Anil Rai v. State of Bihar, (2001) 7 SCC 318* it was held that if medical evidence when properly read shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statements of the eyewitnesses has to be accepted. We are in respectful agreement with the view taken in the above cases.

There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworty and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. In *State of H.P. v. Jeet Singh, (1999) 4 SCC 370* it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it, as it is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended . In *Nathuni Yadav v. State of Bihar, (1998) 9 SCC 238* it was held that motive for doing a criminal act is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause need not necessarily be proportionately grave to do grave crimes. It was further held that many a murder have been committed without any known or prominent motive and is quite possible that the aforesaid impelling factor would remain undiscoverable.

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361. CRIMINAL TRIAL :

Hostile witness- Evidence, appreciation of- Court should normally look for corroboration.

State of Rajasthan Vs. Bhawani and another

Judgment dated 31.07.2003 by the Supreme Court in Criminal Appeal No. 421 of 1996, reported in (2003) 7 SCC, 291

Held :

The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness, no doubt furnishes no justification for rejecting en bloc the evidence of the witness. But the court has at least to be aware that prima facie, a witness who makes different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight

should be attached to the same. The court should be slow to act on the testimoney of such a witness and, normally, it should look for corroboration to his evidence.

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362. CRIMINAL TRIAL :

Identification at night - Persons accustomed to live without light- Accused known persons- May be identified from voice.
Shivraj Bapuray Jadhav and others Vs. State of Karnataka
Judgment dt. 15.7.2003 by the Supreme Court in Criminal Appeal No. 805 of 2002, reported in (2003) 6 SCC 392

Held :

The submission that the occurrence was two days prior to the new moon day and, therefore, the ocular witnesses could not have witnessed the occurrene as they claimed to have, does not appeal to us for the reason that not only, as noticed by the High Court, the parties are used to living in the midst of nature and accustomed to live without light, the parties could have been idenfitied easily not only from the voices but from the fact that they are known persons and close relatives and living in the neighbouring huts.

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363. CRIMINAL TRIAL :

Last seen together, evidence of- Husband and deceased wife colseted in bedroom- Death of wife- Husband (accused) alone to explain how his wife died.
Babu Vs. Babu
Judgment dated 11.08.2003 by the Supreme Court in Criminal Appeal No. 270 of 1996, reported in (2003) 7 SCC 37

Held :

The second important circumstantial evidence against the accused is that the accused and the deceased were last seen together. To put it tersely, both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW 3 and PW 6 that they had dined together and the accused and the deceased were closeted in a room at about 8.30 p.m. Therefore, on the fateful day the accused and the deceased were closeted in a bedroom at about 8.30 p.m. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.

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364. CRIMINAL TRIAL :

Medical evidence- Variance between ocular testimony and medical evidence - Course to be adopted.
Rajalal & Ors. Vs. State of M.P.
Reported in 2003 (I) MPJR 522

Held :

It is also argued on basis P*urushottam Vs. State of M.P. (AIR 1980 SC 1873)* that in case of inconsistency between the statements of eye-witnesses and the medical evidence, evidence of medical expert is to be preferred. However, it is to be remembered that evidence of doctor has to be appreciated like evidence of any other witness and there is no irrebutable presumption that a doctor is always a witness of truth. *Mayur Panabhai Shah Vs. State of Gujarat (AIR 1983 SC 66).* Anyhow, medical evidence is mainly opinion evidence. Its value is only corroborative. It proves that injuries could have been caused in the manner alleged and nothing more.

Apex Court in Mohan Singh v. State of M.P. : (1999) 2 SCC 428 has pronounced:

> "11. The question is how to test the veracity of the prosecution story especially when it is with some variance with the medical evidence. Mere variance of the prosecution story with the medical evidence, in all cases, should not lead to the conclusion, inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which Courts are created. To search it out, the Courts have been removing the chaff from the grain. It has to disperse to suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the Court, within permissible limit, to find out the truth. It means on one hand, no innocent man should be punished but on the other hand, to see no person committing an offence should get scotfree. If in spite of such effort, suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this, one has to comprehend the totality of the facts and circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eyewitnesses including the medical evidence, of course, after excluding those parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution of a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans (sic), clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt."

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365. CRIMINAL TRIAL :

Proof beyond reasonable doubt- Meaning and connotation of. Krishnan and another Vs. State represented by Inspector of Police. Judgment dated 28.07.2003 by the Supreme Court in Criminal Appeal No. 1149 of 2002, reported in (2003) 7 SCC 56

Held :

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case.

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P. v. Krishna Gopal, (1988) 4 SCC 302.*

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366. CRIMINAL TRIAL :

EVIDENCE ACT, 1872- Section 134

(i) Witnesses- Name not mentioned in FIR as eyewitness- Not ipso facto become suspect.

(ii) Evidence- What matters is quality and not quantity- Plurality of witnesses not to be insisted upon.

Chhitar Lal Vs. State of Rajasthan

Judgment dt. 21.7.2003 by the Supreme Court in Criminal Appeal No. 845 of 2002, reported in (2003) 6 SCC 397

Held :

Evidence of the person whose name did not figure in the FIR as witness

does not perforce become suspect. There can be no hard-and-fast rule that the names of all witnesses, more particularly eyewitnesses should be indicated in the FIR. As was observed by this Court in *Shri Bhagwan v. State of Rajasthan, (2001) 6 SCC 296* mere non-mention of the name of an eyewitness does not render the prosecution version fragile. The information was not lodged by an eyewitness. Mental condition of a person whose father has lost his life inevitably gets disturbed. Explanation offered by witnesses for non-mention of PW 3's name is plausible. Additionally, it is to be noted that in the present case the statement of PW3 was recorded on the same day of incident, immediately after the investigation process was set into motion. Therefore, the plea that PW 3's testimony is doubtful lacks substance.....The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). Admiristration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent, cases where the testimony of a single witness only could be avaliable, in number of crimes the offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability. If the testiomony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. This position has been settled by a series of decisions. The first decision which has become locus classicus is Mohd. Sugal Esa Mamasan Rer Alalah v. R., AIR 1946 PC 3. The Privy Council focused on the difference between English law where a number of statutes make conviction impermissible for certain categories of offences on the testimony of a single witness and Section 134 of the Evidence Act. The view has been echoed In *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614, Guli Chand v. State of Rajasthan, (1974) 3 SCC 698, Vahula Bhushan v. State of T.N., AIR 1989 SC 236, Jagdish Prasad v. State of M.P., AIR 1994 SC 1251 and Kartik Malhar v. State of Bihar, (1996) 1 SCC 614.*

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367. EVIDENCE ACT, 1872- Section 3
Evidence of related/interested witness, if trustworty and inspires confidence- Reliance can be placed.
Harijana Narayana and others Vs. State of Andhra Pradesh
Reported in AIR 2003 SC 2851

Held :

We have carefully considered the submissions of the learned Senior Counsel on behalf of the appellants. Our attention has been drawn extensively to the evidence on record in support of the plea raised on behalf of the appellants. The evidence, in each case, has to be considered from the point of trustworthiness

and from the angle as to whether it inspires confidence in the mind of the Court to accept and that the question of credibility and reliability of a witness has to be decided with reference to the way he fared in cross-examination and the nature of impression created in the mind of the Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties on either side. In such cases if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and very careful too in weighing such evidence.

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368. EVIDENCE ACT, 1872- Section 9
CRIMINAL TRIAL :

(i) Identification of accused- Identification in T.I. Parade or in Court not a sine qua non in every case , if the guilt is otherwise established.

(ii) Rape cases- Appreciation of evidence in rape cases- Approach required to be adopted by Courts.

Visveswaran Vs. State Rep. by S.D.M.
Judgment dt. 28.4.2003 by the Supreme Court in Criminal Appeals Nos. 929-30 of 2002, reported in (2003) 6 SCC 73

Held :

It is unfortunate that despite the aforesaid facts, the test identification parade was not held. An important aspect of the case is that the appellant had beard and moustaches when PW 1 and PW 2 were examined as witnesses for the prosecution. It was not so at the time of the occurrence. PW 1 and PW 2, therefore, it is evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not mean that the acquittal is to follow as a natural corroboratory (sic) from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Cout is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.

Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are

not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.

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369. EVIDENCE ACT, 1872 - Section 32

Dying declaration- Legal maxim "nemo moriturus praesumitur mentiri" applies- Can be sole basis for conviction- Principles governing admissibility of dying declaration- percentage of burns not determinative to affect credibility of dying declaration.

P.V. Radhakrishna Vs. State of Karnataka

Reported in AIR 2003 SC 2859 = (2003) 6 SCC 443

Held :

The principle on which dying declaration is admittied in evidence is indicated in legal maxim "nemo moriturus praesumitur mentiri-a man will not meet his Maker with a Lie in his mouth".

Though a dying declaration is entiltled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817) :*

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja and another v. *State of Madhya Pradesh (1976) 2 SCR 764);*

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of Uttar Pradesh v.*

Ram Sagar Yadav and others (AIR 1985 SC 416) and *Ramavati Devi v. State of Bihar, AIR 1983 SC 164);*

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy and another v. Public Prosecutor (AIR 1976 SC 1994);*

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

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kaka Singh v. State of M.P. (AIR 1982 SC 1021);*

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

(vii) Merely because a dying declaration does contain the details as to the occurence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617);*

(viii) Equally, merely because it is a brief statement it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Oza and others v. State of Bihar (AIR 1979 SC 1505);*

(ix) Normaly the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanahau Ram and another v. State of Madhya Pradesh (AIR 1988 SC 912);*

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan and others (AIR 1989 SC 1519);*

(xi) Where here are more than one statement in the nature of dying declaration one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839).*

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370. EVIDENCE ACT 1872- Section 34
Account Books, entry in- Though relevant but alone not sufficient to charge with liability.
Mahavir Prasad Vs. Vasudeo Prasad & Anr.
Reported in 2003 (II) MPJR 307

Held :

Section 34 of the Evidence Act states that a decree can be passed on the basis of entries in the accounts books, which are kept in regular course of business, but the said statement would not alone be sufficient evidence to charge with any person with the liability.

The Supreme Court in the case of *Dadarao v. The State of Maharashtra (AIR 1974 SC 388)*, has laid down that the plaintiff in his oral evidence must show that the account books were kept in regular coruse of business as required by Section 34 of the Evidence Act. In absence of oral evidence to that effect or any other evidence to prove that the account books were kept in regular course of business, no decree can be passed.

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371. EVIDENCE ACT, 1872- Sections 91 and 92
Applicability and scope of Sections 91 and 92- Law explained.
Roop Kumar Vs. Mohan Thedani
Judgment dt. 2.4.2003 by the Supreme Court in Civil Appeal No. 2631 of 2003, reported in (2003) 6 SCC 595

Held :

Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known sometimes as the "best-evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it.

In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be

inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only bilateral documents. (See : *Bai Hira Devi v. Official Assignee of Bombay, AIR 1958 SC 448.)* Both these provisions are based on "best-evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law." It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.

The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliverately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

This Court in *Gangabai v. Chhabubai, (1982) 1 SCC 4 and Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434* with reference to Section 92 (1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

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372. HINDU MARRIAGE ACT, 1955- Section 13 (1) (i-a)
Cruelty-Whether averments of character assassination made in writtin statement amount to mental cruelty- Yes- To constitute cruelty under Section 13(1) (i-a) no particular duration required.
Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate
Judgment dt. 16.4.2003 by the Supreme Court in Civil Appeals Nos. 7200-01 of 2001, reported in (2003) 6 SCC 334

Held :

The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13 (1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that levelling disgusting accusations of

unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court.

To satisfy the requirement of clause (i-a) of sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitutes the required mental cruelty for purposes of the said provision, in our view, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the courts perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer. A conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only.

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373. HINDU SUCCESSION ACT, 1956- Section 15 (2)

Applicability and scope of Section 15 (2) - Law explained.

V. Dandapani Chettiar Vs. Balasubramanian Chettiar (Dead) by L.Rs. and others

Judgment dt. 8.8.2003 by the Supreme Court in Civil Appeal No. 6626 of 1995, reported in (2003) 6 SCC 633

Held :

Sub-section (2) of Section 15 carves out an exception in case of a female dying intestate without leaving son, daughter or children of a predeceased son or daughter. In such a case, the rule prescribed is to find out the source from which she has inherited the property. If it is inherited from her father or mother, it would devolve as prescribed under Section 15 (2) (a). If it is inherited by her from her husband or father-in-law, it would devolve upon the heirs of her husband under Section 15 (2) (b). The clause enacts that in a case where the property is inherited by a female from her father or mother, it would devolve not upon the other heirs, but upon the heirs of her father. This would mean that if there is no

son or daughter including the children of any predeceased son or daughter then the property would devolve upon the heirs of her father. Result would be- if the property is inherited by a female from her father or her mother, neither her husband nor his heirs would get such property, but it would revert back to the heirs of her father.

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374. INDIAN PENAL CODE, 1860- Section 149

Common object, determination of- Factors to be seen- Difference between common object and common intention.

Amzad Ali alias Amzad Kha and others Vs. State of Assam

Judgment dt. 22.7.2003 by the Supreme Court in Criminal Appeals Nos. 993-94 of 2002, reported in (2003) 6 SCC 270

Held :

It is incorrect to claim that prior formation of an unlawful assembly with a common object is a must and should have been found as a condition precedent before roping the accused within the fold of Section 149 IPC. No doubt the offence committed must be shown to be immediately connected with the common object, but whether they had the common object to cause the murder in a given case would depend and can rightly be decided on the basis of any proved rivalry between two factions, the nature of weapons used, the manner of attack as well as all surrounding circumstances. Common object has been always considered to be different from common intention and that it does not require prior concert and common meeting of minds before the attack. Common object could develop *eo instanti* and being a question of fact it can always be inferred and deduced from the facts and circumstances of a case projected and proved in a given case.

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375. INDIAN PENAL CODE, 1860- Section 304-A

Sentence- Degree of callousness-Sentence of fine of Rs. 500/- for an offence u/s 304-A is disproportionately light- Practice depricated.

State of M.P. Vs. Bhagirath

Reported in 2003 (2) MPHT 520

Held :

After hearing learned Counsel for the parties and after carefully perusing the record of the Lower Court, I find that the unfortunate accident was the direct result of reckless and negligent driving by the respondent in utter disregard of the safety of persons on the road, therefore, the sentence of mere fine is grossly inadequate. It is true that the respondent admitted his guilt but the practice of imposing disproportionately light sentences merely because the conviction was on a plea of guilt, is injudicious and is, therefore, to be depricated. I am aware that prejudice in case of an offence under Section 304-A of IPC is bound more or less to reflect on the question of culpability of the accused and give rise to false issues which tend to cloud judicial vision but the task of keeping out the prejudice has got to be performed. To decide the question as to whether the sentence

passed on accused should be enhanced, one has to consider whether the rash and negligent act of the accused which occasioned the death showed callousness on the part of the respondent as regards the risk which he was exposing. In this case, an innocent woman who was standing by the side of the road died due to the callousness on the part of the respondent. Looking to the degree of callousness which was present in the conduct of the accused, the respondent does not deserve leniency. In *Rattan Singh Vs. State of Punjab (AIR 1980 SC 84)* where the rash and negligent driving of a truck driver resulted in a fatal accident, the Supreme Court declined to reduce the sentence of two years.

It is true that since the commission of offence a considerable period has collapsed but it is not sufficient ground to take a lenient view. Normally, in such cases the maximum sentence of two years imprisonment should be awarded but looking to the lapse of considerable period of time since the commission of offence and looking to the fact that the accused also suffered some injuries when his dumber hit not only the deceased but also the truck standing by the side of the road, a sentence of R.I. for a period of one year will be adequate.

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376. INTERPRETATION OF STATUTES :

Interpretation of statutes, wills and all written instruments, golden rule for.

Union of India Vs. Rajiv Kumar

Judgment dt. 18.7.2003 by the Supreme Court in Civil Appeals Nos. 5007-08 of 2003, reported in (2003) 6 SCC 516

Held :

The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." (See *Grey v. Person, (1857) 6 HL Cas 61)*

The latter part of this "golden rule" must, however, be applied with much caution. "If", remarked Jervis, C.J.,

> "the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though they do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning". [See *Abley v. Dale, 138 E R 519 (ER p. 525)].*

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377. LAND ACQUISITION ACT, 1894- Sections 23 (2) and 28
Award of interest - Award passed on 5-4-1994 after coming into force of Amendment Act of 1894- Claimant entitled to solatium at the rate of 30% on enhanced compensation and interest.
Ramdas Vs. State of M.P.
Reported in 2003 (3) MPLJ 428

Held :

We will first proceed to deliberate on entitlement of interest under section 23 (1-A) of the Act. It is not disputed at the Bar that notification under section 4 read with section 17 (1) of the Act was brought into existence in the mid of 1975. Land Acquisition Officer passed the award on 17.8.1977. The Reference Court passed the award on 5-4-1994. In this factual chronology the question that falls for adjudication is whether the claimant is entitled to the interest at the rate of 12% per annum at market value of the land from the date of the publication of the notification. The possession has been taken over on 21.1.1976. The Constitution Bench of the Apex Court in the case of *K.S. Paripoornan vs. State of Kerala, 1995 AIR SCW, 1004* scanned the transitory provision contained in the amending Act and expressed the view as under :

"54. If sub-section (1-A) of section 23 is construed in the light of the provisions contained in sub-section (1) of section 30 of the amending Act there is no escape from the conclusion that section 23 (1-A), by itself, has no application to proceedings which had commenced prior to the enactment of the amending Act and the applicability of the said provision to pending proceedings is governed exclusively by sub-section (1) of section 30 of the amending Act. A perusal of sub-section (1) of section 30 of the amending Act shows that it divides the proceedings for acquisition of land which had commenced prior to the date of the commencement of the amending Act into two categories, proceedings which had commenced prior to April 30, 1982 and proceedings which had commenced after April 30, 1982. While clause (a) of section 30 (1) deals with proceedings which had commenced prior to April 30, 1982, clause (b) deals with proceedings which commenced after 30, 1982. By virtue of clause (a) of section 23 (1-A) has been made applicable to proceedings which had commenced prior to April 30, 1982 if no award had been made by the Collector in those proceedings before April 30, 1982. It covers (a) proceedings which were pending before the Collector on April 30, 1982 wherein award was made after April 30, 1982 but before the date of the commencement of the amending Act, and (b) such proceedings wherein award was made by the Collector after the date of the commencement of the amending Act. Similarly section 30 (1) (b) covers (a) proceeding which had commenced after April 30, 1982 wherein award was made prior to the commencement of the amending Act, and (b) such proceedings wherein award was made after the commencement of the amending Act. It would thus appear that both the clauses [(a) and (b)] of sub-section (1) of section 30 cover proceedings for acquisition which were pending on the date of the commencement of the amending Act and to which the provisions of section 23 (1-A) have been made

applicable by virtue of section 30 (1). If section 23 (1-A) independently of section 30 (1) is applicable to all proceedings which were pending on the date of the commencement of the amending Act clauses (a) and (b) of section 30 (1) would have been confined to proceedings which had commenced prior to the commencement of the amending Act and had concluded before such commencement because by virtue of section 15 the provisions of section 23 (1-A) would have been applicable to proceedings pending before the Collector on the date of commencement to the amending Act. There was no need to so phrase section 30 (1) as to apply the provisions of section 23 (1-A) to proceedings which were pending before the Collector on the date of the commencement of the amending Act. This only indicates that but for the provisions contained in section 30 (1). Section 23 (1-A) would not have been applicable to proceedings pending before the Collector on the date of commencement of the amending Act.

55. Merely because sub-section (1) of section 30 only refers to award made by the Collector while sub-section (2) of section 30 also refers to an award made by the court as well as the order passed by the High Court or the Supreme Court in appeal against such award does not mean that section 23 (1-A) was intended to have application to all proceedings which were pending before the Civil Court on the date of the commencement of the amending Act. The difference in the phraseology in sub-sections (1) and (2) of section 30 only indicates the limited nature of the retrospectivity that has been given to provisions contained in section 23 (1-A) under section 30 (1) as compared to that given to the provisions of sections 23 (2) and 28 under section 30 (2). The limited scope of the retrospectivity that has been conferred in respect of section 23 (1-A) under sub-section (1) of section 30 does not lend support to the contention that the scope of such retrospectivity should be enlarged by reading such further retrospectivity into the provisions of section 23 (1-A). For the reasons aforementioned we are of the view that in relation to proceedings which were initiated prior to the date of the commencement of the amending Act section 23 (1-A) would be applicable only to those which fall within the ambit of clauses (a) and (b) of sub-section (1) of section 30 of the amending Act.

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378. LAND REVENUE CODE, 1959 (M.P.)- Section 109 and 110
Mutation entry in revenue records- Such entries are for fiscal purposes and do not confer any title.
Manik Lal and others Vs. Rajaram and another
Reported in 2003 (3) MPHT 29

Held :

The Apex Court in *State of U.P. Vs. Amar Singh and others [(1997) 1 SCC 734]* has also considered the question whether by mutation the party will get right or not, and held :-

> "It is settled law that mutation entries are only for the purpose of enabling the State to collect the land revenue from the person in possession but it does not confer any title to the land. The title would be de-

rived from an instrument executed by the owner in favour of an alinee as per the Stamp Act and registered under the Registration Act."

The Apex Court in *Durga Das Vs. Collector and others [(1996) 5 SCC 618]* considered that the entries in the revenue record do not confer any title to the property, wherein it was held that :-

> "Mutation entries do not confer any title to the property. It is only an entry for collection of the land revenue from the person in possession. The title to the property should be on the basis of the title they acquired to the land and not by mutation entries."]

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379. LAND REVENUE CODE, 1959 (M.P.) Section 170-B
Transfer of land by a person of a Scheduled Tribe to a person of Scheduled Tribe-Transaction is convered by Section 170-B.
Bhaiji Vs. Sub Divisional Officer & Ors.
Reported in 2003 (II) MPJR 1

Held :

An affluent shrewd tribal may indulge into exploiting his fellow beings. Possibility cannot be ruled out where a non-tribal may manage to have land transferred apparently but not in reality in the name of a tribal and taking advantage of his status affluence or any other means, conferring him with capacity to exploit, may till the land to his own advantage depriving the aboriginal tribal from the benefits of the land settled by the State with him. All such cases are taken care of by Section 170-B. The purpose of enacting Section 170-B of the Code is very wide. The object sought to be achieved, as its drafting indicates, is to gather and make available all statistics with the State officials so as to find out how much land belonging to aboriginal tribals is in possession of any one of whom it does not belong as on the cut off date. The information having been collected the enquiry under sub-Section (3) shall be directed towards finding out the nature of transaction resulting into transfer of land-whether such transaction of transfer has resulted in the aboriginal tribal having been defrauded of his legitimate right in the land ? Sub-Sections (1), (2) and (3) and enacted in 1980 have to be read as part of one whole scheme. If the submission of Shri Gambhir is correct then the object of enquiry under sub-Section (3) would have been to find out if such transaction of transfer has resulted in an aboriginal tribal having been defrauded of his legitimate right by person not belonging to aboriginal tribe. But that is not so. Nowhere in the entire scheme of sub-Sections (1), (2) and (3) of Section 170-B as enacted in 1980, there is the least indication of confining the applicability of the provision to such transactions of transfer as were entered into by a member of oboriginal tribe in favour of a member not belonging to aboriginal tribe. No exception has been enacted by the Legislature so as to exclude from the proview of Section 170-B transactions of transfer between two persons both of whom are members of aboriginal tribes. Had it been so, the Legislature would have specifically said so. The language of the Section as drafted in 1980 is clear and unambiguous and does not admit of any doubt so far as this aspect is concerned.

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380. LIMITATION ACT, 1963- Generally

Limitation- Computation of the period of limitation- guiding principles- Expression 'sixty days from the date of the order' as used in Section 48-AA of Advocates Act, 1961- Meaning of in relation to computation of period of limitation.

D. Saibaba Vs. Bar Council of India and another

Judgment dt. 6-5-2003 by the Supreme Court in W.P. (C) No. 528 of 2002, reported in (2003) 6 SCC 186

Held :

So far as the commencement of the period of limitation for filing the review petition is concerned we are clearly of the opinion that the expression "the date of that order" as occurring in Section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. True, the process of interpretation cannot be utilized for implanting a heart into a dead provision : however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart.

In *Raj Kumar Dey v. Tarapada Dey, (1987) 4 SCC 398* this Court pressed into service two legal maxims guiding and assisting the court while resolving an issue as to calculation of the period of limitation prescribed, namely, (i) the law does not compel a man to do that which he could not possibly perform, and (ii) an act of the court shall prejudice no man. These principles support the view taken by us hereinabove. Any view to the contrary would lead to an absurdity and anomaly. An order may be passed without the knowledge of anyone except its author, may be kept in the file and consigned to the record room or the file may lie unattended, unwittingly or by carelessness. In either case, the remedy against the order would be lost by limitation though the person aggrieved or affected does not even know what order has been passed. Such an interpretation cannot be countenanced.

How can a person concerned or a person aggrieved be expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words "the date of that order", therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed.

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381. MOTOR VEHICLES ACT, 1939- Sections 110-A and 110-B

Negligence (contributory) on the part of driver (deceased)- Whether employer can be held vicariously liable in torts for damages under M.V. Act- Held, No.

Tamil Nadu State Transport Corporation, Tanjore Rep. by its MD Vs. Natrajan and others

Judgment dt. 6.5.2003 by the Supreme Court in Civil Appeal No. 3991 of 2003, reported in (2003) 6 SCC 137

Held :

From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of the Madras High Court in its impugned order imposing liability to the extent of 50% on the appellant Corporation. The Division Bench of the High Court completely overlooked that the claimant himself was the driver of the corporation bus and was found negligent to the extent of 50% for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the corporation bus, the Corporation as an employer cannot be held to be vicariously liable for the negligence of the claimant himself. The claim petition did not make the Corporation a party to the claim obviously because the claimant exercised option of approaching the Claims Tribunal under the Motor Vehicles Act against the owner and insurer of the private bus. He did not file any claim under the Workmen's Compensation Act against the employer. Since the Corporation was not at fault and the accident was caused because of the contributory negligence of the drivers of both the buses, the Corporation could not be held liable under the provisions of the Motor Vehicles Act.

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382. MOTOR VEHICLES ACT, 1988- Section 147

Third party risk- Comprehensive Insurance Policy only covers person or classes of persons specified in policy.

Ramashray Singh Vs. New India Assurance Co. Ltd. and others

Reported in AIR 2003 SC 2877

Held :

The appellant's final submission was that as the policy was a comprehensive one, it would cover all risks including the death of the Khalasi. The submission is unacceptable. An insurance policy only covers the person or classes of persons specified in the policy. A comprehensive policy merely means that the loss sustained by such person/persons will be payable up to the insured amount irrespective of the actual loss suffered. (See *New India Insurance Co. Ltd. v. J.M. Jaya 2002 (2) SCC 278;* Colinvaux's Law of Insurance (7th Edition) pp. 93-94).

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383. MOTOR VEHICLES ACT, 1988- Section 149 (2) (a) (ii)

Damage to vehicle due to accidental fire- Driver not holding valid driving licence- Accident not due to fault of driver- Held, Insurance Company cannot repudiate its liability for damages.

Jitendra Kumar Vs. Oriental Insurance Co. Ltd. and another

Judgment dt. 17.7.2003 by the Supreme Court in Civil Appeal No. 4647 of 2003, reported in (2003) 6 SCC 420

Held :

The question then is : can the Insurance Company repudiate a claim made by the owner of the vehicle which is duly insured with the Company, solely on the ground that the driver of the vehicle who had nothing to do with the accident did not hold a valid licence? The answer to this question, in our opinion, should be in the negative. Section 149 of the Motor Vehicles Act, 1988 on which reliance was placed by the State Commission, in our opinion, does not come to the aid of the Insurance Company in repudiating a claim where the driver of the vehicle had not contributed in any manner to the accident. Section 149 (2) (a) (ii) of the Motor Vehicles Act empowers the Insurance Company to repudiate a claim wherein the vehicle in question is damaged due to an accident to which driver of the vehicle who does not hold a valid driving licence is responsible in any manner. It does not empower the Insurance Company to repudiate a claim for damages which has occurred due to acts to which the driver has not, in any manner, contributed i.e. damages incurred due to reasons other than the act of the driver.

We notice that in the impugned order the National Commission has placed reliance on the judgment of this Court in the case of *New India Assurance Co. Vs. Kamla, (2001) 4 SCC 342* which, in our opinion, has no bearing on this aspect of the case in hand. This Court in the said case held that the take driving licence when renewed genuinely, does not acquire the validity of a genuine licence. There can be no dispute on this proposition of law. But then the judgment of this Court in the case of New India Assurance Co. does not go to the extent of laying does a law which empowers the Insurance Company to repudiate any and every claim of the insured (appellant) merely because he had engaged a driver who did not have a valid licence. In the instant case, it is the case of the parties that the fire in question which caused damage to the vehicle occurred due to mechanical failure and not due to any fault or act, or omission of the driver. Therefore, in our considered opinion the Insurance Company could not have repudiated the claim of the appellant.

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384. MOTOR VEHICLES ACT, 1988- Section 166

"Compensation"- Meaning and connotation of- Just compensation, what amounts to- Law explained.

Divisional Controller, KSRTC Vs. Mahadeva Shetty and another

Judgment dated 31.07.2003, by the Supreme Court in Civil Appeal No. 5453 of 2003, reported in (2003) 7 SCC 197

Held :

The term "compensation" as stated in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. "Damages" on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. Pecuniary damages are to be valued on the basis of "full compensa-

tion". That concept was first stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co (1980) 5AC 25.*

It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which to it appears to be "just". It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrariness. If it is not so, it cannot be just. (See *Helen C. Rebello v. Maharashtra SRTC, (1999) 1 SCC 90.*

This Court in *R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551* laying the principles posited : (SCC p. 556, para 9)

> "9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages

to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

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385. MOTOR VEHICLES ACT, 1988- Section 170 (b)
Insurance Company's right to contest claim on all or any of the grounds- Owner and driver not filingWS and failing to contest- Sufficient to grant permission u/s 170 (b).
United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and others
Judgment dated 11.08.2003 by the Supreme Court in Civil Appeal No. 6295 of 2003, reported in (2003) 7 SCC 212

Held :

In view of the aforesaid decisions on the point and on a consideration of the relevant provisions under the Motor Vehicles Act, it is plain and clear that the insurance company can contest the claim preferred before the Tribunal only on the statutory grounds prescribed under Section 149 (2) of the Act, but, if there is a collusion between the person making the claim and the person resisting the claim or if the person against whom the claim is made has failed to contest the claim, the insurance company can step in and seek permission of the Tribunal and make a prayer for getting itself impeded as a party to the proceeding and the insurer so impleaded can then contest the proceeding on grounds other than the grounds enumerated in sub-section (2) of Section 149 of the Act. This is an enabling provision in the event of a collusion between the claimant and the insured or the tortfeasor.

In the instant case, the Insurance Company was impleaded as the third respondent. The driver and owner of the vehicle, though appeared before the Tribunal, did not contest the proceedings. They did not file the written statement nor did they choose to give evidence before the Tribunal. Admittedly, the appellant filed an application under Section 170 of the Act seeking permission of the Tribunal to contest the proceedings giving the necessary details. The award passed by the Tribunal also evidently shows that pursuant to this permission, the counsel for the appellant Insurance Company cross-examined the witnesses produced by the claimant to prove the negligence of the offending vehicle. Unfortunately, however, the Tribunal, while passing its orders on the petition filed under Section 170 of the Act only stated that the prayer was granted, though the mandate of Section 170 (b) of the Motor Vehicles Act states that the Tribunal while passing an order shall record its reasons. This Court in Shankarayya case had emphasised this aspect. But it is very much evident in this case that the driver and the owner of the motor vehicle did not file the written statement and failed to contest the proceedings. The Tribunal could have merely recorded that fact while

allowing the application. In a situation contemplated by clause (b) of Section 170, nothing more was required than recording that indisputable fact.

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386. M.P. CO-OPERATIVE SOCIETIES ACT, 1961- Section 85
Order passed by Registrar, Co-operative Societies is deemed to be a decree of Civil Court-Civil Court can execute such order on a certificate issued by the Registrar.
M.D. Bopche and another Vs. Darshan Agarwal
Reported in 2003 (3) MPHT 91

Held :

It is contended on behalf of the petitioners that the order of the Registrar cannot be executed by a Civil Court as that order is only deemed to be a decree of the Civil Court and is to be executed in the same manner as a decree of such Court but there no specific provision that such order shall be executable by the Civil Court. Reliance is placed on the decision reported in *Khayaliram Vs. Ved Prakash 1987 (I) MPWN 143.* The full facts of this decision are not given in the Note. It is found that in that case the application for execution was directly filed before the Civil Court without the certificate of the Registrar and then it was held that the Civil Court cannot *suo motu* assume jurisdiction on the basis of an application for execution filed to it directly by a decree-holder. In the present case, the execution proceedings before the Civil Court have commenced on the basis of the certificate issued by the Registrar. Therefore, it shall be executed in the same manner as a decree of such Court. Section 85 (a) of the Act clearly states that the order is to be deemed to be a decree of a Civil Court and shall be executed in the same manner as "a decree of such Court" Therefore, for all intents and purposes certificate of the Registrar is to be treated as a decree of the Civil Court and it is to be executed as such. In this view of the matter Civil Court has the jurisdiction to execute the decree. That is clarified in Section 55 (2) of the Rules. According to this rule the decree-holder shall state whether he desires "to execute the award by a Civil Court under clause (a) of Section 85". This rule clearly gives a clue to the meaning of Section 85 (a) of the Act. The Executing Court has rightly held that it has jurisdiction to execute the order of the Registrar on a certificate granted by him as a decree of the Civil Court. The Executing Court has relied upon order dated 7-9-1988 in Misc. Petition No. 1928 of 1988 in which it has been held that the Civil Court has jurisdiction to execute all awards passed under the Act as the decree of the Civil Court. This is an order of the Division Bench of this Court and therefore, it is entitled to carry more weight than the decision referred above.

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387. MUNICIPAL CORPORATION ACT, 1956 (M.P.)- Section 132
Property Tax- Imposition of- Scheme of the Act-Law explained.
M.P. Co-operative Housing Society & Anr. Vs. State & Ors.
Reported in 2003 (II) MPJR 82

Held :

Sub section 1 of Section 132 of the Act, 1956 provides that Corporation shall, subject to any general or special order which the State Government may make in this behalf, impose in the whole or in any part of the Municipal Area, property tax subject to provisions of Section 135, 136 and 138 of the Act. Section 133 of the Act provides imposition of taxes and fees. The Corporation is empowered to impose tax & fees by a resolution, at the time of final adoption of the budget estimates for the next financial year, subject to the provisions of this Act and subject to such limitations and conditions as may be prescribed by the State Government in this behalf. Section 134 deals with recovery of taxes. Section 135 deals with imposition of property tax. The property tax shall be charged and levied at the rate not less than six percent and not more than ten percent of the Annual Letting Value, as may be determined by the Corporation for each financial year. Section 136 deals with the exemptions from the payment of property tax. Section 138 has been substituted by M.P. Act 18 of 1997 w.e.f. 21.4.1997 and entirely new provisions have been made. Section 138 deals with determination of Annual Letting Value of land or building. The annual letting value of any building or land, whether revenue paying or not, shall be determined as per the resolution of the Corporation adopted in this behalf, on the basis of per square foot of the built up area of a building or per square foot of land, as the case may be, taking into consideration the area in which the building or land is situate, its location, situation purpose for which it is used, its capacity for profitable user, quality of construction of the building and other relevant factors and subject to such rules, as may be made by the State Government in this behalf. The State Government has framed the Rules under Section 37 and 73 read with Section 433 of the Act of 1956 called M.P. Municipalities (The Conduct of Business of the Mayor in Council/President in Council and the Powers and Functions of the Authorities) Rules, 1998.

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388. N.D.P.S. ACT, 1985-Sec. 53 (2)

(i) Excise Sub- Inspector is not a Police Officer for purpose of the Act- Confession recorded by such Inspector admissible in evidence.

(ii) Word 'Possession'- Meaning and connotation of.

Prakash Pawar Vs. State of M.P.

Reported in 2003 (II) MPJR 247

Held :

The confessional statements of accused Prakash are Ex. P-14 and Ex. P-19 and the statement of accused Ashok is Ex.P-18 These have been proved by Ajay Shankar Tiwari (P.W.11), Excise Sub-Inspector, who had recorded these statements. He is authorized to investigate the case as per Section 53 (2) of the Act. It has been held by the Supreme Court in *Raj Kumar Karwal Vs. Union of India, AIR 1991 SC 45* that Section 25 of the Evidence Act which engrafts a whole-

some protection must not be construed in a narrow or technical sense but must be understood in broad and popular sense. But at the same time it cannot be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred. The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under S. 173 of the Code. Unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under S. 173, he cannot be described to be a 'Police Officer' under S. 25, Evidence Act. The officer, other than a police officer, invested under S. 53 of the N.D.P.S. Act, 1985 with powers of an officer-in-charge of a police station is not entitled to exercise 'all' the powers under Chapter XII of the Criminal P.C. including the power to submit a report or charge-sheet under S. 173 of the Criminal P.C. that being so, such officer is not a 'police officer' within the meaning of S. 25 of Evidence Act.

The *'ganja'* after its arrival at Jabalpur was in the custody of Parcel Office of the Railways as its carrier in its capacity as bailee. The accused persons came to the Parcel Office to take the delivery on the basis of the Railway Receipt Ex.-P-29 endorsed in favour of accused Prakash. The accused persons were thus having the dominion or control over ganja. They had right to claim its delivery and therefore in legal paralance they were in constructive possession of the ganja. The Parcel Office had its "custody" or "detention" or "detentio" as it was called under Roman Law. Savigny said that possession consisted of two ingredients, 'corpus possessionis', effective control, and 'animus domini', the intention to hold as owner. The persons having right to immediate possession is frequently referred to in English law as being the possessor. Salmond also says corporeal possession is "the continuing excise of a claim to the exclusive use of it". That is corpus and animus. 'Possession' has also been described as "to have and to hold". It embraces the conception of right as well as that of physical control. It is used in the sense to "own" or "entitled to". It means "the state of owning of having in one's hands of power". This is also called 'possession in law'. It can be 'constructive'. Possession is a polymorphous term which may have different meaning in different contexts.

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389. PARTNERSHIP ACT, 1932- Section 32 (3) and 72
Partnership, nature of- Liability of a retiring partner vis-a-vis creditors- Law explained.
Syndicate Bank Vs. R.S.R. Engineering Works and others
Judgment dt. 9.5.2003 by the Supeme Court in Civil Appeal No. 1337 of 1997, reported in (2003) 6 SCC 265

Held :

There is no a *priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into an agreement to discharge him from liability. An adoption by the creditor of the new firm as his debtor does not by any

means necessarily deprive him of his rights against the old firm especially when the creditor is not a party to the arrangement and then there is not fresh agreement between the creditor and the newly constituted firm. After the creditor has taken a new security for a debt from a continuing partner, it may be a strong evidence of an intention to look at only the continuing partner for the payment due from the firm.

It is also important to note that it has long been recognised that partnership is not a species of joint tenancy and that, in the absence of some contrary agreement, there is no survivorship as between partners, at least so far as it concerns their beneficial interests in the partnership assets.

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390. PREVENTION OF FOOD ADULTERATION ACT, 1954- Section 7 (i), 16 (1) (a) and 20
The words "Local Authority" deleted from Section 20 by Amending Act No. 34 of 1976- Effect- Food Inspector's power to file complaint not affected.
Viman Singh Vs. State of M.P. and another
Reported in 2003 (3) MPHT 3 (NOC)

Held :

Now the applicant has mainly challenged the competence of Food Inspector *Shri G.K. Verma (P.W.1)* on the strength of a judgment of this Court, Municipal Council, *Balaghat Vs. Bhaduram, reported as 1996 (1)* Prevention of Food Adulteration Cases 318, which says that after amendment of Section 20 of the Act (By Act No. 34 of 1976), with effect from 1.4.1976, the word 'Local Authority' was deleted and therefore, the Municipal Council had no authority to file a complaint.

However, it appears that an earlier decision of this Court, Kishanlal Vs. Municipal Corporation, Jabalpur, reported as 1980 (II) Prevention of Food Adulteration Cases Page 36, was not brought to the notice of the Court. This judgment, on the other hand, says that it is not a Municipal Corporation but a Food Inspector who files a complaint under the powers directly derived from the State Govt. The judgment also says that "Food Inspector Shri Pathak even assuming that he had no authority, which in fact he had, could institute the prosecution in his capacity as a private purchaser, as has been rightly held by the Trial Court...."

Thus as per ratio of this judgment, Amendment Act No. 34/76 makes no dent on the Food Inspector's power which is derived directly from the State Govt. under a notification issued by it.

In the instant case also, Food Inspector G.P. Verma (P.W.1) in Para 1 of his statement has deposed to have been appointed as per notification (Ex. P-1) by the State Govt. and had been given the territorial jurisdiction of Municipal Corporation, Bhopal. Thus, there is no ambiguity in respect of his competence to file complaint against the applicant.

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391. SERVICE LAW :

Compulsory retirement with retrospective date- It is against service jurisprudence- Law explained.
Raja Ram Singh Vs. State of M.P. and others
Reported in 2003 (3) MPLJ 501

Held :

Upon hearing learned counsel for the parties, it is unmistakably clear that the order Annexure P-1 passed by the Director, Treasury & Accounts and the consequential order Annexure P-2 passed by the Treasury Officer imposing penalty of compulsory retirement by giving retrospective effect from 19-12-1986 is arbitrary and is contrary to the service jurisprudence. The Supreme Court in the case of *R. Jeevaratnam vs. State of Madras AIR 1966 SC 951* has held that an order of dismissal with retrospective effect is in substance an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively from an anterior date. The impugned order is palpably illegal and is product of exercise of power without jurisdiction. The order has been issued on 8-9-2000. It can not take effect retrospectively.

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392. SERVICE LAW :

Date of birth, correction of- Law explained.
State of U.P. and others Vs. Gulaichi (Smt)
Judgment dt. 25.7.2003 by the Supreme Court in Civil Appeal No. 5207 of 2003, reported in (2003) 6 SCC 483

Held :

Normally, in public service, with entering into the service, even the date of exit, which is said as the date of superannuation or retirement, is also fixed. That is why the date of birth is recorded in the relevant register or service-book, relating to the individual concerned. This is the practice prevalent in all services, because every service has fixed the age of retirement, it is necessary to maintain the date of birth in the service records. But, of late a trend can be noticed, that many public servants, on the eve of their retirement raise a dispute about their records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution of India or by filing applications before the Administrative Tribunals concerned, or even filing suits for adjudication as to whether the dates of birth recorded were correct or not.

An application for correction of the date of birth should not be dealt with by the courts, Tribunals or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in

seniority waiting for their promotion, may lose the promotion forever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of the date of birth has been made in accordance with the procedure preseribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service-book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service-books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the Tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior.

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393. SERVICE LAW :

Departmental Enquiry- Findings of fact recorded by enquiry officer- Scope of interference by Court.

Sanjay Kumar Gupta Vs. General Manager, New India Assurance Company Limited

Reported in 2003 (3) MPLJ 543

Held :

It is well settled that the Court cannot interfere with the findings of fact recorded by the enquiry officer if these are not perverse. It cannot be said that the findings in the present case are based on "no evidence" or no reasonable person could have reached these findings. In *Syed Rahimuddin vs. Director General, C.S.I.R., AIR 2001 SC 2418* it has been held by the Supreme Court that the conclusion or findings of fact arrived at in a departmental inquiry can be interfered

with by the Court only when there was no materials for conclusion or when on the materials the conclusion could not be that of a reasonable man. It has been reiterated in *Lalit Popli Vs. Canara Bank, (2003) 3 SCC 583* that if there is some evidence to reasonably support the conclusion of the inquiring authority, it is not the function of the Court to review the evidence and to arrive at its own independent finding. The inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings.

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394. SERVICE LAW :

M.P. Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960- Rule 3

Applicability- Advantage available, if conditions in Clause (i) and Clause (ii) of Rule 3 satisfied.

Ashok Kumar Vishwakarma vs. State of M.P. and others

Reported in 2003 (3) MPLJ 498

Held :

The learned counsel for both the sides have been heard. Rule 3 of the M.P. Government Servants (Temporary and Quasi-Permanent Service) rules, 1960 (hereinafter to referred to as the Rules) is as under :-

"Rule 3 : A Government servant shall be deemed to be in quasi-permanent service;

(i) if he has been in temporary service in the same service or post continuously for more than three years; and

(ii) if the appointing authority being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordance with such instructions as the Governor issue from time to time."

In the present case the petitioner has no doubt completed three years temporary service but no declaration as to his suitability for that post has been issued as envisaged in clause (ii) of rule 3 of the Rules. The petitioner can advantage of this rule if both conditions in clauses (i) and (ii) of rule 3 of the Rules were satisfied. He does not satisfy the requirement of clause (ii) of rule of the Rules. Rule 3A Rules is not attracted in the present case as of the petitioner has not completed five years of temporary service. In view of this factual scenario the petitioner could not be treated to be in quasi-permanent service.

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395. SERVICE LAW :

Residence- Residence within a district/rural areas not a valid basis for classification for the purpose of public employment.

Savitri Singh Vs. State of M.P. & Ors.

Reported in 2003 (II) MPJR 233

Held :

After hearing the learned counsel for both the sides, this Court is of the opinion that the view taken by the Commissioner, Rewa, on the basis of the circular of the State Government, is illegal. Recently in *Kailash Chand Sharma Vs. State of Rajasthan, AIR 2002 SC 2877* it has been held by the Supreme Court that residence within a District or rural areas of that District could not be a valid basis for classification for the purpose of public employment. The argument in favour of such reservation which has the overtones of parochialism is liable to be rejected on the plain terms of Art. 16 (2) and in the light of Art. 16 (3). An argument of this nature files in the face of the peremptory language of Art. 16 (2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Residence by itself- be it be within a State, region. District or lesser area within a District-cannot be a ground to accord preferential teratment or reservation save as provided in Art. 16 (3). It is not possible to compartmentalise the State into districts with a view to offer employment to the residents of that District on a preferential basis.

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396. SERVICE LAW :

Strikes- Right to strike not a fundamental right-There is no legal, statutory, equitable or moral right to go on strike.

T.K. Rangarajan Vs. Government of T.N. and others

Judgment dt. 6.8.2003 by the Supreme Court in Civil Appeal No. 5556 of 2003, reported in (2003) 6 SCC 581

Held :

Law on this subject is well settled and it has been repeatedly held by this Court that the employees have no fundamental right to resort to strike. In *Kameshwar Prasad v. State of Bihar, AIR 1962 SC 1166* this Court (Constitution Bench) held that the rule insofar as it prohibited strikes was valid *since there is no fundamental right to resort to strike.*

There is no statutory provision empowering the employees to go on strike.

Apart from statutory rights, government employees cannot claim that they can take the society at ransom by going on strike. Even if there is injustice to some extent, as presumed by such employees, in a democratic welfare State, they have to resort to the machinery provided under different statutory provisions for redressal of their grievances. Strike as a weapon is mostly misused which results in chaos and total maladministration. Strike affects the society as a whole and particularly when two lakh employees go on strike en masse, the entire administration comes to a grinding halt. In the case of strike by a teacher, the entire educational system suffers; many students are prevented from appearing in their exams which ultimately affects their whole career. In case of strike by doctors, innocent patients suffer; in case of strike by employees of transport services, entire movement of the society comes to a standstill; business is adversely affected and number of persons find it difficult to attend to their work,

to move from one place to another or one city to another. On occasions, public properties are destroyed or damaged and finally this creates bitterness among the public against those who are on strike.

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397. SUCCESSION ACT, 1925 - Section 74

Wills, interpretation of- Essential principles- Law explained.

Arun kumar and another Vs. Shriniwas and others

Judgment dt. 8.4.2003 by the Supreme Court in Civil Appeals Nos. 9961-62 of 1995, reported in (2003) 6 SCC 98

Held :

The essential principles which should guide the courts in interpretation of wills, in contrast to the other class or category of documents, have been set out, on a review of the entire case-law on the subject, succinctly in the decision of this Court in *Navneet Lal v. Gokul, (1976) 1 SCC 630 as hereunder: (SCC pp. 633-34, para 8)*

(i) The fundamental rule is to ascertain the intention of the testator from the words used, the surrounding circumstances for the purpose of finding out the intended meaning of the words which have been employed;

(ii) The court, in doing so is entitled to put itself into the armchair of the testator and is bound to bear in mind also other matters than merely the words used and the probability that the testator had/would have used the words in a particular sense, in order to arrive at a right construction of the will and ascertain the meaning of the language used;

(iii) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole, with all its provisions and ignoring none of them, as redundant or contradictory, giving such construction as would give to every expression some effect rather than that which would render any of the expressions inpoperative.

(iv) Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator;

(v) It is one of the cardinal principles of constructions of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will, unless the law prevents effect being given to it, if even there appear to be two repugnant provisions conferring successive interests and the first interest created is valid the subsequent interest cannot take effect, the court will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible, to every testamentary intention contained the will.

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398. SUCCESSION ACT, 1925- Section 118

Section 118- Held unconstitutional and therefore struck down.

John Vallamattom and another Vs. Union of India

Judgment dt. 21.7.2003 by the Supreme Court in Writ Petition (C) No. 242 of 1997, reported in (2003) 6 SCC 611

Held :

In my opinion, whether in an enactment religious bequests by a Christian are discriminatory and violative of Articles 14 and 15 of the Constitution must be determined as per the rule of procedure laid down by Section 118 of the Act, which comes within the purview of Articles 14 and 15 of the Constitution, and it is, therefore, necessary that all testators who are similarly situated should be subjected to the same rule of procedure. There cannot be any unusual burden on Christian testators alone when all other testators making similar bequests for similar charities and similar religious purposes are not subjected to such procedure. Therefore, in my opinion, Section 118 of the Act is anomalous, discriminatory and violative of Articles 14, 15, 25 and 26 of the Constitution and should be struck down.

The Indian Succession Act came into effect on 30.9.1925. As per Section 4, Para II of the Act shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina. Section 20 of Part III of the Act is not applicable to any marriage contracted before the first day of January, 1866; and is not applicable and is deemed never to have applied to any marriage, one or both of the parties to which professed at the time of marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion. As per Section 23 of Part IV of the Act, that part shall not apply to any Will made or intestacy occurring before the first day of January, 1866 or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi. Likewise, as per Section 29 of Part V of the Act, that Part shall not apply to any intestacy occurring before the first day of January, 1866 or to the property to any Hindu, Muhammadan, Buddhist, Sikh or Jaina. By Act 51 of 1991, Parsis were also excluded from the application of Section 118 of the Act. Thus, it is seen that the procedure prescribed has been made applicable to Christians alone. There is also no acceptable answer from the respondent as to why it regulates only religious and charitable bequests and that too, bequests of Christians alone. The whole case, in my view, is based upon undue, harsh and special burden on Christian testators alone. A substantive restriction is imposed based on uncertain events over which the testator has no control. I, therefore, have no hesitation to hold that Section 118 of the Act regarding religious and charitable bequests of all testators who are similar should be subjected to the same procedure. As the law stands today, a Christain cannot make a bequest for religious or charitable purposes without satisfying the conditions and procedures prescribed by Section 118 of the Act. Such a burden, procedural burden and substantive law burden is not falling upon Hindu, Muhammadan, Jaina or Parsi testators.

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399. SUCCESSION ACT, 1925- Sections 371 and 372
Territorial jurisdiction of Court- Term "ordinarily resided" used in Section 371 of the Act- Meaning of.
Somwati Tiwari and others Vs. People in General.
Reported in 2003 (3) MPLJ 512

Held :

Section 371 of the Act provides that the District Judge within whose jurisdiction the deceased "ordinarily resided" at the time of his death may grant a succession certificate. In the application under section 372 (1) of the Act "ordinary residence" of the deceased at the time of his death is to be stated. In the present case it was specifically stated in the letter referred above that deceased Motilal Tiwari was permanent resident of village Marhi, District Satna. There was no rebuttal of this fact as the application for grant of succession certificate was not opposed by anyone. It has been held by this Court in *Shiv Kumar vs. Bhanu Pratap, 1962 MPLJ Note 113* that the territorial jurisdiction for the purpose of grant of succession certificate is determined by the place where a person ordinarily resided. The term "reside" is not defined in the Act. But in the Oxford Dictionary it is stated to mean "dwelling permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."

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400. TRANSFER OF PROPERTY ACT, 1882- Section 53-A
Transferee in possession- Nature of right u/s 53-A- Transferee may exercise the right either as plaintiff or as defendant - Right available even after expiry of limitation to bring suit for specific performance.
M/s Chetak Constructions Ltd. Vs. Om Prakash & Ors.
Reported in 2003. (II) MPJR 95

Held :

Section 53-A of the Transfer of Property Act relevant for the present purpose provides that where any person "contracts to transfer for consideration" any immovable property by writing signed by him and the "transferee" has in part performance of the contract 'taken possession' of the property 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, the transferor "shall be debarred from enforcing against the transferee" any right in respect of the property of which the transferee has taken possession other than the right expressly provided by the terms of the contract. A plain reading of the Section shows that a statutory right has been conferred on the "transferee-in possession" to protect his possession if he satisfies all the conditions of the Section. It imposes a statutory bar on the transferor, but confers no title on the transferee. The right conferred on the transferee can be used "as a shield and not as a sword", it is a "weapon of defence and not of attack", it is a "defensive or passive equity and not an active one". To this extent the law is well settled. In *Ranchhoddas vs. Devaji AIR 1977 SC 1517* it has been observed by the

Supreme Court that the doctrine of part performance is a defence. It is a shield and not a sword. It is a right to protect his possession against any challenge to it by the transferor contrary to the terms of the contract. In *State of U.P. vs. District Judge AIR 1997 SC 53* it is said that Section 53-A provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell the lands to the transferee if the proposed transferee satisfies other conditions of Section 53-A. That protection is available as a shield only against the transferor, the proposed vendor, and would disentitle him from distrubing the possession of the proposed transferees who are put in possession pursuant to such agreement. Again in *Hamzabi vs. Syed Kamruddin (2001) 1 SCC 414* it is reiterated that Section 53-A protects the possession of persons who may have acted on a contract of sale but in whose favour no legally valid sale-deed may have been executed or registered.

The divergence of opinion is on the point whether the transferee is protected when he is in the Court as a defendant or he can also knock at the doors of the Court as a plaintiff and seek the intervention of the Court for protection of his possession. On a dispassionate consideration this Court is of the opinion that he can come to the Court as a plaintiff also for recognition and protection of his right which has been given to him by the statute. The Court cannot tell him if he comes as plaintiff; "go back, use your physical strength and muscle power to resist and repel the attack the transferor and drive him to come to the Court as a plaintiff and then if you arrayed as defendant the Court will protect you". This will be against the basic concept of the rule of law. The transferee-in possession satisfying all the conditions of the section must be protected by the court whether he comes as a plaintiff or a defendant. He cannot be permitted to assert his title but he can legitimately claim through the Court the right which has been given to him by the law. If he has a good case he must get the assistance of the Court. If he has a genuine grievance that must be redressed whether he is in the shoes of the plaintiff or of the defendant.

It has also been argued that the plaintiff has not filed any suit for specific performance of contract and therefore it cannot claim injunction invoking the benefit of Section 53-A T.P. Act. Recently in *S.S. Survayanshi Vs. P.B. Suryavanshi 2002 AIR SCW 659* it has been held that the Special Committee's report which is reflected in the aims and objects of amending Act, 1929 shows that one of the purpose of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. In that view of the matter, Section 53-A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in amending Act, 1929 of the Act and specially when S. 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under S.53-A even if the period of limitation to bring a suit for specific performance has expired.

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PART - III

CIRCULARS / NOTIFICATIONS

मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
:: मंत्रालय ::

क्र. सी-2/1/03/3/एफ भोपाल, दिनांक 15.9.2003

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, म.प्र. ग्वालियर,
समस्त विभागाध्यक्ष,
समस्त संभागायुक्त,
समस्त जिलाध्यक्ष,
समस्त मुख्य कार्यपालन अधिकारी, जिला पंचायत,
मध्यप्रदेश।

विषयः वाहन भत्ते की स्वीकृति।

सन्दर्भः इस विभाग का परिपत्र क्रमांक सी-2/1/2003/3/1, दि. 26.2.03 एवं क्र. सी-2/2/03/3/एक, दिनांक 26.02.2003.

इस विभाग के संदर्भित परिपत्रों द्वारा भोपाल, नगर निगम की सीमा में रहने वाले तथा नगर निगम की सीमा में स्थित शासकीय कार्यालयों में कार्यरत समस्त तृतीय एवं चतुर्थ वर्ग के कर्मचारियों तथा कार्यभारित तथा आकस्मिकता निधि से वेतन पाने वाले कर्मचारियों को संदर्भित पत्रों द्वारा उल्लिखित निर्धारित शर्तें पूर्ण करने पर दि. 1.3.03 से दि. 29.2.04 तक रुपये 15.00 (पन्द्रह रु.) प्रतिमाह की दर से वाहन भत्ता स्वीकृत करने संबंधी निर्देश जारी किये गये थे।

2. ब्रम्हस्वरूप समिति द्वारा की गई अनुशंसा पर विचार करते हुए शासन द्वारा निर्णय लिया गया है कि, बी-1 (भोपाल, इंदौर) तथा बी-2 (ग्वालियर, जबलपुर) श्रेणी के नगरों में पदस्थ वर्कचार्ज एवं आकस्मिक निधि से वेतन पाने वाले कर्मचारियों को सम्मिलित करते हुए सभी तृतीय एवं चतुर्थ श्रेणी के ऐसे शासकीय सेवाएं जो नगर निगम/नगर पालिका की सीमा में रहते हों, को 50 रु. (पचास रुपये) प्रतिमाह की दर से वाहन भत्ता निम्नलिखित शर्तों पर स्वीकृत किया जाये :-

(1) आकस्मिक अवकाश को छोड़कर अन्य समस्त प्रकार के अवकाशों की अवधि में वाहन भत्ता देय नहीं होगा।

(2) वाहन भत्ता स्वीकृत के लिए स्वयं वाहन रखने की शर्त का प्रतिबंध नहीं होगा।

(3) ऐसे प्रत्येक शासकीय सेवक, जिसे वाहन भत्ता स्वीकृत किया गया है, के वेतन देयक में समस्त आहरण एवं संवितरण अधिकारियों द्वारा निम्नलिखित प्रमाणीकरण अभिलिखित किया जाना चाहिए :-

प्रमाणित किया जाता है कि उन समस्त कर्मचारियों द्वारा सामान्य प्रशासन विभाग के आदेश क्र. सी-2/1/03/3/ एक, दि. 15.09.03 में निर्धारित सभी शर्तें पूरी की गई हैं, जिनका वाहन भत्ता इस देयक में आहरित किया गया है।

(4) यह आदेश दिनांक 1.8.03 से प्रभावशील होंगे।

(5) यह आदेश वित्त विभाग से उनके यू.ओ.क्र. 1693/03/ नि-चार, दिनांक 11.09.2003 द्वारा सहमति प्राप्त कर जारी किये गये हैं।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार
सही/-
(एम.एल. नरवरिया)
अवर सचिव
म.प्र. शासन, सामान्य प्रशासन विभाग

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HIGH COURT OF MADHYA PRADESH

REGISTRAR GENERAL JABALPUR

D.O.No. 772/11-15-38/75 Dated 19 November, 2003.

Subject : Use of Amber light and also the plate showing designation on the private vehicle by Judicial Officers.

Dear District Judge,

It has been observed that the Judicial Officers of the State are using Amber light on their private vehicles inspite of the fact that they are not authorised to do so. Similarly, it has also been noticed that some Judicial Officers display the plates indicating their designation on private vehicles.

Hon. the Chief Justice is pleased to issue following instructions :-

1. That except the District Judge and Chief Judicial Magistrate of the district, all the other Judicial Officers are directed to ensure that Amber light be not used on their private vehicles.
2. Judicial Officers are further directed not to display the designation plate on their private vehicles to maintain the decency.

You are, therefore directed to circulate the above instructions amongst Judicial Officers working under your control and also make sure the strict compliance of the same.

With regards,

Yours sincerely,
(A.K. SELOT)

Ministry of Finance and Company Affairs (Department of Revenue) Notification No. G.S.R. 115 (E) dated the 21st February, 2003. **Published in the Gazette of India (Extraordinary) Pari II Section 3 (i) dated 21-2-2003 page 2.**

In exercise of the power conferred by Section 9, read with Section 76 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Rules, 1985 namely :-

1. (1) These rules may be called the Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2003.

   (2) They shall come into force on the date of their publication in the official Gazette.

2. In the Narcotic Drugs and Psychotroipc Substances Rules, 1985,-

   (i) in Schedule I, under sub-heading II, "Psychotropic Substances", Sl. No. 28 and the entries relating thereto shall be omitted;

   (ii) in schedule III, after Sl. No. 2, the following shall be inserted, namely :—

1	2	3	4
3	Phentermine		ĒĒ Dimethylphen-ethylamine

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Ministry of Finance and Company Affairs (Department of Revenue) Notification No. G.S.R. 129 (E) dated the 26th February, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3(i) dated 26-2-2003 Page 1.

In exercise of the powers conferred by Section 9, read with Section 76 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Rules, 1985, namely :—

1. (1) These rules may be called the Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2003.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Narcotic Drugs and Psychotropic Substances Rules, 1985 in Schedule II, serial number 1 Alprazolam and the entries relating thereto shall be omitted.

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Ministry of Health and Family Welfare (Department of Health) Notification No. G.S.R. 554 (E) dated the 18th July, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 18-7-2003 Page 2.

In exercise of the powers conferred by Section 23 of the Prevention of Food Adulteration Act, 1954 (37 of 1954), the Central Government, after consultation with the Central Committee for Food Standards, hereby makes the following rules further to amend the Prevention of Food Adulteration Rules, 1955, namely ,—

1. (1) These rules may be called the Prevention of Food Adulteration (1st Amendment) Rules, 2003.

(2) They shall come into force on the 1st day of January, 2004.

2. In the Prevention of Food Adulteration Rules, 1955, in Appendix B, in item A.33 relating to Packaged drinking water (other than Mineral Water), in the table, for serial number 40 and entries relating thereto, the following shall be substituted, namely ,—

"40.	(i)	Pesticide residues considered individually	— Not more than 0.0001 mg/litre (The analysis shall be conducted by using Internationally estab lished test methods meeting the residue limits specified herein).
	(ii)	Total pesticide residues	— Not more than 0.0005 mg/litre (The analysis shall be conducted by using Internationally established test methods meeting the residue limits specified herein).

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Notification No. F-10-9-2003- L-2 dated the 8th, July, 2003.— In exercise of the powers conferred by sub-section (1) of Section 8-B of the Dowry Prohibition Act, 1961 (No. 28 of 1961), and in supersession of this Department Notifications Nos. 866-Legal- 89, dated the 19th April 1989, published in "Madhya Pradesh Gazette" dated the 5th May 1989 and F-10-14- 98- L-2, dated the 22nd July 1999, the State Government hereby appoints all the Executive Officers of Janpad Panchayats as Dowry Prohibition Officers within their respective areas for the purpose of the said Act.

[Published in M.P. Rajpatra (Asadharan) dated 8-7-2003 Page 760]

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH LOKAYUKT EVAM UP-LOKAYUKT (SANSHODHAN) ADHINIYAM, 2003

No. 24 of 2003

[Received the assent of the Governor on the 14th May, 2003; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 20th May, 2003.]

An Act further to amend the Madhya Pradesh Lokayukt Evam Up-Lokayukt Adhiniyam, 1981.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fourth Year of the Republic of India as follows :-

1. Short title. — This Act may be called the Madhya Pradesh Lokayukt Evam Up- Lokayukt (Sanshodhan) Adhiniyam, 2003.

2. Amendment of Section 3.— In sub-section (2) of Section 3 of the Madhya Pradesh Lokayukt Evam Up-Lokayukt Adhiniyam, 1981 (No. 37 of 1981) (hereinafter referred to as the Principal Act), —

(i) in clause (a), for the words "or Chief Justice of any High Court in India." the words "or Chief Justice or Judge of any High Court in India." shall be substituted;

(ii) in clause (b), for the words "which is not less than that of a secretary to Government of India" the words "which is not less than that of an Additional Secretary to Government of India" shall be substituted.

3. Amendment of Section 11. — In sub-section (1) of Section 11 of the Principal Act, after the existing proviso, the following proviso shall be inserted, namely :—

"Provided further that where it is necessary to summon any Government servant in his official capacity, his statement on affidavit shall be deemed to be sufficient as evidence".

4. Amendment of Section 13.— In clause (i) of sub-section (3) of Section 13 of the Principal Act for the Words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted.

5. Amendment of Section 13-A.— In Section 13-A of the Principal Act—

(i) in the heading for the he words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted;

(ii) in sub-section (1) for the words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted, and for the words "each District" the words "each Division" shall be substituted;

(iii) in sub-section (3) for the words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted;

(iv) in sub-section (4) for the words "District Vigilance Committee" the words "Divisional Vigilance Committee" and for the words "another District" the words "another Division" shall be substituted;

(v) in sub-section (5) for the words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted.

6. Amendment of Section 17.— In sub-section (2) of Section 17 of the Principal Act, for the words "District Vigilance Committee" the words "Divisional Vigilance Committee" shall be substituted.

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THE ESSENTIAL COMMODITIES (AMENDMENT) ACT, 2003

No. 37 of 2003*

[1st June, 2003]

An Act further to amend the Essential Commodities Act, 1955.

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

1. Short title.— This Act may be called the Essential Commodities (Amendment) Act, 2003.

2. Amendment of section 3 of Act 10 of 1955.— In section 3 of the Essential Commodities Act, 1955, after sub-section (3C), the following shall be and shall be deemed to have been inserted, on and from the 14th day of June, 1999, namely:—

'(3D) The Central Government may direct that no producer, importer or exporter shall sell or otherwise dispose of or deliver any kind of sugar or remove any kind of sugar from the bonded godowns of the factory in which it is produced, whether such godowns are situated within the premises of the factory or outside or from the warehouses of the importers or exporters, as the case may be, except under and in accordance with the direction issued by the Government :

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* Received the assent of the President on the 1st June, 2003 and Act published in the Gazette of India (Extraordinary) Part II, Section 1 dated 2-6-2003 pages 1-2 (S.No. 40).

Provided that this sub-section shall not affect the pledging of such sugar by any producer or importer in favour of any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934 (2 of 1934) or any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), so, however, that no such bank shall sell the sugar pledged to it except under and in accordance with a direction issued by the Central Government.

(3E) The Central Government may, from time to time, by general or special order, direct any producer or importer or exporter or recognised dealer or any class of producers or recognised dealers, to take action regarding production, maintenance of stocks, storage, sale, grading, packing marking, weighment, disposal, delivery and distribution of any kind of sugar in the manner specified in the direction.

Explanation.— For the purposes of sub-section (3D) and this sub-section,—

(a) "producer" means a person carrying on the business of manufacturing sugar;

(b) "recognised dealer" means a person carrying on the business of purchasing, selling or distributing sugar;

(c) "sugar" includes plantation white sugar, raw sugar and refined sugar, whether indigenously produced or imported.'.

3. Validation of action taken under clauses 4 and 5 of the Sugar (Control) Order, 1966.— (1) Notwithstanding anything contained in any judgment, decree or order of any court or other authority or any agreement, any action taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under any direction or order issued by the Central Government under clause 4 or clause 5 of the Sugar (Control) Order, 1966, made under section 3 of the Essential Commodities Act, 1955 (10 of 1955), at any time during the period commencing on and from the 14th day of June, 1999 till the day on which the Essential Commodities (Amendment) Bill, 2003 receives the assent of the President, shall be deemed to be, and deemed always to have been, for all purposes, as validly and effectively taken or done or omitted to be done under sub-section (3D) or Sub-section (3E), as the case may be, of section 3 of the Essential Commodities Act, 1955, as if the said sub-sections had been in force at all material times.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would have not been so punishable if this Act had not come into force.

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SHIFTING OF JOTRI TO NEW BUILDING

This is to inform all the judicial officers that with the kind blessings of Hon'ble the Chief Justice, the Institute which was hitherto run in the building of main seat of the High Court at Jabalpur, has been shifted to the 1st floor of the erstwhile SAT building. In future, all correspondence with the Institute, may be made at its following address :-

Judicial Officers' Training & Research Institute
Tehsil Chowk
Beoharbagh, Ghamapur Road,
Jabalpur (M.P.)
Pin- 482001

We are thankful to publishers of MPJR, SCC, AIR, MPLJ, MPHT, MPLT MPWN, VIDHI BHASVAR for using some of their material in this Journal.

- Editor