JOTI JOURNAL

Vol. X
DECEMBER 2004 (Bi-Monthly)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice R. V. Raveendran**	Chief Justice & Patron
2.	**Hon'ble Shri Justice Dipak Misra**	Chairman
3.	**Hon'ble Shri Justice S. K. Kulshrestha**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
5.	**Hon'ble Shri Justice K. K. Lahoti**	Member
6.	**Hon'ble Shri Justice Sugandhi Lal Jain**	Member

● ● ●

EDITOR

Ved Prakash Sharma — Director

SUB-EDITOR

Rajeev Kumar Shrivastava — Addl. Director

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

It is indeed a matter of distinctive privilege for me to have the opportunity of sharing my views with the esteemed readers of this bi-monthly Journal through this column. I am also conscious of the onerous responsibility that has been put on my shoulders in this respect. At the very outset let me assure with all the humility at my command that this Institute would continue to strive hard to carry forward the task of keeping the flame of legal knowledge (JOTI) bright and vibrant; the task which was started by my illustrious and dedicated predecessors and which for its accomplishment requires active and meaningful co-operation of its esteemed readers. I shall always be soliciting the co-operation in the form of illuminating articles relating to legal issues, views and suggestions.

We are well aware of the sense of disillusionment writ large on the faces of those who come to the temples of justice with high hopes for justice and then get entangled in the web of adjournments for this or that reason thus rendering their dreams of getting justice a mirage and then driven to desperation. We must seriously ponder over this problem of gradual degeneration of faith of the common man in the system and make earnest efforts to find out ways and means for its redressal. The role of this Journal in this connection assumes importance because it aspires to become a beacon in the hands of judicial officers at the grass-root level so that they may continue their journey of excellence towards the goal of imparting justice in a firm, fearless, upright and expeditious manner. Justice which is real and quick, so that the seekers of justice may develop the deepest faith in the system of administration of justice without being afraid of taking recourse to legal process for redressal of their grievances.

With the given constraints, which are there in the system of administration of justice at district level, the task of imparting quick and qualitative justice is no doubt difficult but not impossible. A step in this direction is bound to raise the new rays of hope in the eyes of those who are waiting for justice since long.

Recently, Hon'ble the Chief Justice of India, as head of our Institution, has given a nationwide call to all having a role in the system of administration of justice to observe year 2005 as year of excellence for judiciary. We, in particular, at the level of district judiciary should respond to this call in a positive manner so as to make it a grand success. This requires a strategic approach on our part so that we can channalise all the available resources at our command to attain the goal. For this, we must right now start with a dispassionate introspection setting out our short-term and long-term targets. We should explore our hidden skills and sharpen them so that we can use them to an optimum level. The tools of legal knowledge, moral uprightness, commitment and management if applied skillfully are bound to generate desired results. The response so made to the

call may well reflect in quick and qualitative justice and liquidation of old pending cases in a time bound manner.

The response to the scheme of bi-monthly training programme at district level through discussion among judicial officers on legal issues of recurring importance is yet to attain the momentum which is expected in this direction. It is apposite to state in this respect that out of the articles received by this Institute related with bi-monthly meetings held during the months of January to August, 2004 the Institute could not find five articles relating to five topics for being published in the JOTI Journal of any of the bi-monthly meeting. Therefore, some more effort is required in this direction so that the scheme may attain its purpose.

With this sixth and final issue of the current year, 400 notes on various illuminating and enlightening judgments of Hon'ble the Apex Court and our own High Court have been included in Part II of the Journal. These notes reflect the developing trend of law which if taken into consideration is bound to help the judicial officers in shaping a sound legal methodology which may be helpful in delivering effective and expeditious justice. The Institute is in the process of preparing a legal database of 1000 such notes on judgments published since August 2002 in JOTI Journal.

Year 2004 is going to become part of the history. The melody of ringing bells of the New Year can well be heard conveying the message to carry on the journey towards eternity and excellence while keeping ourselves abreast of developments which are taking place at a fast pace around us. Let the New Year be a new experience of achievements to all of us as well as to all those who have immense hope from the system of administration of justice.

A HAPPY NEWYEAR.

●

The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible.

-Mr Justice Frankfurter in Bridges v. California

APPOINTMENT OF JUDGES AND ADDITIONAL JUDGE IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice R.V. Raveendran, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Rakesh Saksena, Hon'ble Shri Justice Nishith Kumar Modi, Hon'ble Shri Justice Umesh Chandra Maheshwari, Hon'ble Shri Justice Surendra Kumar Gangele, Hon'ble Shri Justice Pankaj Kumar Jaiswal and Hon'ble Mrs. Justice Shubhada R. Waghmare as Judges of the High Court of Madhya Pradesh and Hon'ble Miss Justice Sheela Khanna as Additional Judge of the High Court of Madhya Pradesh on October 11, 2004 in a Swearing-in-Ceremony held in the Conference Hall, South Block, High Court of Madhya Pradesh, Jabalpur.

Hon'ble Shri Justice Rakesh Saksena has been appointed as Judge of the High Court of Madhya Pradesh. Born in the family of Shri B.N. Saksena (Retired District & Sessions Judge) on 8.9.51. Obtained LL.B. degree from Vikram University, Ujjain. Joined Bar at Gwalior in the year 1973 and started practice under the able guidance of Hon'ble Shri Justice S. K. Dubey, (Former Judge of the High Court of M.P.) and later on under Shri J. P. Gupta, a renowned Criminal Lawyer. Was Vice President, Bar Association, Gwalior during the years 1977 to 79. Was also the Secretary, High Court Bar Association, Gwalior in the year 1994. Took oath as Judge of the High Court of Madhya Pradesh on October 11,2004.

Hon'ble Shri Justice Nishith Kumar Modi has been appointed as Judge of the High Court of Madhya Pradesh. Born on 6.12.1951. Obtained LL.B. degree and then Joined Bar in the year 1973 at Gwalior. Was Member of High Court Bar Association, Gwalior. Acted as Government Advocate for State of Madhya Pradesh. Was Standing Counsel for Union Bank of India, State Bank of India, M.P. Electricity Board and Board of Secondary Education, Madhya Pradesh. Was also Additional Advocate General, High Court of Madhya Pradesh, Gwalior Bench up to his elevation as Judge. Took oath as Judge of the High Court of Madhya Pradesh on October 11,2004.

Hon'ble Shri Justice Umesh Chandra Maheshwari has been appointed as Judge of the High Court of Madhya Pradesh. Born on 2.11.1955 at Mhow (Indore). Obtained LL.B. degree from Gujrati College, Indore. Was enrolled as an Advocate in the year 1977 and joined Bar in the same year. Was Honorary Lecturer in R. C. Jall Law College, Mhow since 1.1.1987. Was President, District Court Bar Association, Mhow for the years 1989 to 1991 and Secretary, High Court Bar Association, Indore for the year 2001-2002. Took oath as Judge of the High Court of Madhya Pradesh on October 11,2004.

Hon'ble Shri Justice Surendra Kumar Gangele has been appointed as Judge of the High Court of Madhya Pradesh. Born on 26.07.1956. Obtained LL.B. degree from Motilal Nehru Law College, Chhatarpur. Was enrolled as an Advocate in the year 1980 and joined Bar at District Court, Chhattarpur. Later on joined the Chamber of Late Shri Y.S. Dharmadhikari in the year 1984 at Jabalpur. Was Additional Standing Counsel for Union of India, Standing Counsel for New India Assurance Company, Oriental Insurance Company and Hind Mazdoor Sabha. Took oath as Judge of the High Court of Madhya Pradesh on October 11, 2004

Hon'ble Shri Justice Pankaj Kumar Jaiswal has been appointed as Judge of the High Court of Madhya Pradesh. Born on 24.9.1958, obtained LL.B. degree from N.E.S. College, Jabalpur. Joined Bar in the year 1981 and started practice in the High Court of Madhya Pradesh at Jabalpur under his father, Shri M.L. Jaiswal, Senior Advocate of the High Court. Was Standing Counsel for many Corporations and Public Undertakings. Took oath as Judge of the High Court of Madhya Pradesh on October 11, 2004

Hon'ble Mrs. Justice Shubhada Ravi Waghmare has been appointed as Judge of the High Court of Madhya Pradesh. Born on 5.11.1954, obtained Law Degree in Hons. from Bombay University in 1978. Joined Bar in the year 1981 and started practice in the High Court of Madhya Pradesh, Indore Bench. Was Deputy Govt. Advocate during 1989-91. Was Standing Counsel for M.P. Pollution Control Board for the last 10 years. Was appointed as Senior Counsel for Government of India in the Central Administrative Tribunal in December, 2000. Was the Member of Human Rights Core Group for the year 2001-02, Secretary of the High Court Bar Association, Indore from 1996 to 1998 and Vice-President for the year 2000-2001. Took oath as Judge of the High Court of Madhya Pradesh on October 11,2004.

Hon'ble Miss Justice Sheela Khanna has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 7.10.1946. After obtaining LL.B. degree joined Madhya Pradesh Judicial Service as Civil Judge Class II on 3.4.1970. Did LL.M. from Sagar University. Was promoted as Civil Judge Class I in the year 1984, and as Additional District & Sessions Judge in the year 1987. Was District & Sessions Judge at Narsinghpur, Gwalior & Indore. Visited Colombo, Bangkok, Hongkong, Tokyo, Singapore and Nepal to study working of Parliamentary Affairs. Also participated in SAARC Conference in 1993 at New Delhi. Took oath as Additional Judge of the High Court of Madhya Pradesh on October 11, 2004.

●

HON'BLE SHRI JUSTICE VISHNUDEO NARAYAN ASSUMES CHARGE

Hon'ble Shri Justice Vishnudeo Narayan on His Lordship's transfer from Jharkhand High Court to High Court of Madhya Pradesh was administered oath of office on dated 07-12-2004 by Hon'ble the Chief Justice R.V. Raveendran in a brief ceremony held in the Conference Hall of South Block of High Court of Madhya Pradesh, Jabalpur.

Born on 13-08-1943. His Lordship joined Higher Judicial Service in the State of Bihar. Was Additional District Judge at Saran and Nalanda. Worked as Additional Judicial Commissioner, Ranchi and there after as Principal Judge, Family Court, Patna. Also worked as District Judge Deogarh and thereafter Registrar General of the Jharkhand High Court. Was appointed as Permanent Judge of the Jharkhand High Court on 28-01-2002. Was transferred to the High Court of Madhya Pradesh and took oath of office on dated 07-12-2004.

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

●

HON'BLE SHRI JUSTICE S.P. KHARE DEMITS OFFICE

Hon'ble Shri Justice S.P. Khare demitted office on 15.10.2004 on His Lordship's appointment as Chairman of the Madhya Pradesh Industrial Tribunal, Indore. Born on 23.6.1943 in Kakori District Lucknow (U.P.), His Lordship after completing LL.B. from Lucknow university in year 1963 joined Madhya Pradesh Judicial Service as Civil Judge Class II in December 1964. Took LL.M degree from Lucknow University. Was promoted as Civil Judge Class I and Chief Judicial Magistrate. Was promoted as Additional District and Sessions Judge in 1982. Worked in the capacity of District and Sessions Judge Rewa, Bhopal and Jabalpur. His Lordship also held the office of Principal Secretary law in law and legislative affairs Department of Govt. of M.P. Was elevated as Additional Judge of the High Court of Madhya Pradesh on March 17, 1997. Was appointed permanent Judge on 22.1.1999.

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

●

PART - I

LEGAL ASPECTS RELATING TO OFFENCES UNDER SECTIONS 304-B, 306 AND 498-A, I.P.C.

VED PRAKASH
Director

The social evil of dowry which is deeply rooted in the Indian social system has been the primary cause for growing incidents of cruelty and harassment against married women. Dowry Prohibition Act, 1961 attempted to curb this evil by rendering acts of giving, taking or demanding dowry as offences. Despite this enactment, incidents of cruelty and harassment against married women continued to increase. Therefore by Amending Act No. 46 of 1983 Section 498-A and 113-A were inserted, respectively in I.P.C. and Evidence Act. Section 498-A aims at curbing the acts of cruelty while Section 113-A provides a presumptive base for imposing penal liability for husband and his relatives for abatement of suicide in cases where married women committed suicide because of cruelty within seven years of marriage. To further strengthen the law in this respect Section 304-B I.P.C. and Section 113-B were, respectively inserted in I.P.C. and Evidence Act by Amending Act No. 46 of 1986. Section 304-B created the offence of dowry death while Section 113-B provided presumptive base for this offence.

The aforesaid legislative measures have not proved effective as reflected from the fact that there has been a gradual increase in the offences relating to dowry deaths. The number of such cases reported during 1995 was 4648 which rose to 5513 in 1996 and 6006 in 1997. Similarly, the number of cases registered under Section 498-A I.P.C. also showed an upward trend. The conviction rate in relation to cases under Section 498-A has also been very low, being less than 3% for the years 1998-99. This statistics calls for a close scrutiny and introspection on the part of various agencies having a role in the system of administration of justice including the Courts of law which have a greater responsibility to ensure that the legislative measures may have the desired effect on the social set-up. Impressing about this aspect, the Apex Court observed in *Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia , (1989) 1 SCC 715* that the criminal justice system must respond to the needs and notions of the society. The investigating agency must display a live concern and sharpen their wits. They must penetrate into every dark corner and collect all the evidence. The Courts must also display greater sensitivity to criminality and avoid on all counts "soft justice".

Pointing out about the role of Courts, the Apex Court observed in *Kunula Bala Subramanayan Vs. State, 1993 Cr.L.J. 1635 (SC)* that the Courts are required to deal with such cases in a more realistic manner and not allow criminals to escape on account of procedural technicalities or insignificant lacuna in the evidence as otherwise the criminals would receive encouragement and the victim of crime would be totally discouraged by the crime going unpunished. The Courts are

expected to be sensitive in cases involving crime against women. Emphasising about the duty of the Courts in such cases, the Apex Court observed in *State of Karnataka Vs. M.V. Manjunathegowda, AIR 2003 SC 809* that every court must be sensitized to the enactment of the law and the purpose for which it is made by the legislature. It must be given a meaningful interpretation so as to advance the cause of interest of the society as a whole. No leniency is warranted to the perpetrator of a crime against the society.

No doubt the issue requires a careful approach and a higher decree of sensitivity on the part of law Courts but at the same time the Courts should not be oblivious of the fact, as pointed out by the Apex Court in *Arun Vyas Vs. Anita Vyas, AIR 1999 SC 207* that a tendency has developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused. The Courts are also required to keep in mind, as pointed out in *Ramesh Kumar Vs. State of Chhattisgarh, (2001) 9 SCC 618* that if it transpires that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide is found guilty.

In order to implement the relevant provisions of law in an effective manner, it is but necessary to have a proper perspective of their various aspects. Therefore, these provisions are being examined here in the light of various legal pronouncements.

DOWRY:

Section 2 of the Dowry Prohibition Act, 1961 defines "dowry" as under:-

> "Section 2. Definition of 'dowry' - In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly -
>
> (a) by one party to a marriage to the other party to the marriage; or
>
> (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mehr in the case of persons to whom the Muslim personal law (Shariat) applies.
>
> **Explanation II**- The expression 'valuable security' has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860)."

From the aforesaid definition, it is clear that there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are *"in connection with the marriage of the said parties"*. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of "dowry". Hence the dowry mentioned in Section 304-B should be any property or valuable security given or agreed to be given in connection with the marriage. [See - *Satvir Singh and Ors. V. State of Punjab and another, 2001 ANJ (SC) 68*]

Again, as held in *Reema Aggarwal Vs. Anupam and others, (2004) 3 SCC 199* the definition of expression "dowry" cannot be confined merely to the demand of money, property or valuable security made at or after the performance of marriage. 'Marriage' in this context would include a **proposed marriage** also more particularly where the non-fulfillment of dowry leads to the ugly consequences of marriage not taking place at all.

CRUELTY:

Section 498-A, which provides in respect of offence relating to cruelty against married woman, is set-out herein below:-

> **"498-A. Husband or relative of husband of a woman subjecting her to cruelty.-** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> **Explanation** - For the purpose of this section, "cruelty" means -
>
> (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her *to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."*
>
> (Emphasis added)

The basic purport of the aforesaid provision is to avoid 'cruelty' both physical and mental. Therefore, two dimensions - physical and mental have been taken note of in order to ascribe a broader meaning to the word 'cruelty'.

Explanation (a) involves three specific situations, viz., (i) to drive the woman to commit suicide (ii) to cause grave injury (iii) to cause danger to life, limb or health, both mental and physical, thus involving a physical torture or atrocity. In explanation (b) there is absence of physical injury which indicates that the legislature thought it fit to include coercive harassment also in the category of cruelty, which is equally heinous to match the physical injury: whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of Section 498-A. Thus, "Cruelty" for the purpose of constituting the offence under the aforesaid Section need not be physical. Even mental torture, abnormal behaviour may amount to Cruelty and harassment in the given case. [See - *Gananath Pattnaik Vs. State of Orissa, 2002 (1) ANJ (SC) 506.]* Acts of cruelty whether mental or physical are required to be established in order to bring home the application of Section 498-A IPC.

ABETMENT TO COMMIT SUICIDE (SECTION 306 IPC AND SECTION 113-A INDIAN EVIDENCE ACT) :

The offence relating to abetment to commit suicide by a married woman within seven years of marriage is covered by Section 306 IPC read with Section 113-A of Indian Evidence Act.

A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that:-

(i) the woman has committed suicide,

(ii) such suicide has been committed within a period of seven years from the date of her marriage,

(iii) the husband or his relatives, who are charged has subjected her to cruelty.

Interpreting Section 113-A and outlining the ambit and scope of Section 113-A, a Three-Judge Bench of the Apex Court in the case of *Ramesh Kumar Vs. State of Chhattisgarh, (2001) 9 SCC 618* ordained that on existence and availability of the above said circumstances, the court may presume that such suicide has been abetted by her husband or by such relatives of her husband. The Court pointed out that:

Firstly, the presumption is not mandatory, it is only permissive as the employment of expression "may presume" suggests.

Secondly, the existence and availability of the above said three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or abstain from drawing the presumption.

Thirdly, the expression - "the other circumstances of the case" used in Section 113-A, suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption.

Lastly, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption.

From the above, it is clear that for drawing presumption u/s 113-A, certain conditions precedent by way of proved facts should be brought on record by the prosecution which will require collection of specific evidence relating to these issues by the investigating agency.

DOWRY DEATH:

Section 304-B IPC, was mainly introduced having regard to the increasing menace of dowry deaths by burns and bodily injury or otherwise than under normal circumstances and insufficiency of the existing provisions of law to combat them effectively.

Section 304-B, IPC provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry , such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death. The offence is punishable with imprisonment for a term, which shall not be less than seven years but which may extend up to imprisonment for life. For the purpose of Section 304-B "dowry" shall have same meaning as in Section 2 of the Dowry Prohibition Act, 1961. In order to attract application of Section 304-B IPC, the essential ingredients are as follows:

(i) The death of a woman should have been caused by burns or bodily injury or otherwise than under normal circumstances.

(ii) Such death should have occurred within seven years of her marriage.

(iii) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

(v) Such cruelty or harassment is shown to have been meted out to the woman *soon before* her death.

PRESUMPTION REGARDING DOWRY DEATH (SECTION 113-B EVIDENCE ACT):

Keeping in view the impediment in the pre-existing laws in securing evidence to prove dowry related deaths, legislature thought it fit to insert a provision relating to presumption of dowry death on proof of certain essentials. It is

in this background presumptive Section 113-B in the Evidence Act has been inserted which provide that "when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

As per the definition of 'dowry death' in Section 304-B IPC and the wording in the presumptive Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been *"soon before her death"* subjected to cruelty or harassment *"for or in connection with the demand of dowry"*. Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory for the Court to raise a presumption that the accused caused the dowry death.*[See-K. Prema S. Rao and another Vs. Yadia Srinivasa Rao, 2002 ACT(S.C.)1853]*

A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment for or in connection with demand of dowry. Therefore, the evidence tendered in this regard should be scanned and appreciated by the Court with due care and caution. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the *'death occurring otherwise than in normal circumstances'.*

"SOON BEFORE":

The expression "soon before" is very relevant in cases where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. The words "soon before" found in Section 304-B IPC have come up for consideration before the Apex Court in large number of cases and it has consistently been held that it is neither possible nor desirable to lay down any straitjacket formula to determine what would constitute "soon before" in the context of Section 304-B IPC. It all depends on the facts and circumstances of the case. Interpreting this phrase in *Kans Raj Vs. State of Punjab and Ors., (2000) 5 SCC 207* the Apex Court observed as under:

> Term *"soon before"* is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114 Illustration (a) of the Evidence Act. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course

of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death."

Section 304-B would be attracted not only when the death is 'caused' by someone, but also when the death 'occurs' unnaturally. If occurrence of death is preceded by cruelty or harassment of in-laws for or in connection with dowry demand and if the connection between the two is established, mere occurrence of death is enough though death may not have been 'caused' by the in-laws. It can, therefore, be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned in the section are satisfied. [See - *Hem Chand Vs. State of Haryana, (1994) 6 SCC 727*]

SECTIONS 304-B & 498-A:

Under Section 304-B as already noted, it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in Section 498-A and the husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage. Further it must also be borne in mind that a person charged and acquitted under Section 304-B can be convicted under Section 498-A . If the case is established, a person can be convicted under both the Sections but no separate sentence need be awarded under Section 498-A in view of the substantive sentence being awarded for the major offence under Section 304-B. [See - *Smt. Shanti & Anr. Vs. State of Haryana (1991) 1 SCC 371*]

"HUSBAND":

For the purposes of Section 304-B and 498-A, the expression "husband" will also cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty. The absence of a definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as "husband" is no ground to exclude them from the purview of Section 304-B or 498-A IPC. [See - *Reema Aggarwal Vs. Anupam and others, (2004) 3 SCC 199*]

NATURE OF EVIDENCE :

Regarding the nature of evidence which can be adduced in cases relating to cruelty against married women, abetment to suicide and dowry death, the Apex Court observed in *State of West Bengal Vs. Orilal Jaiswal, 1994 Cr.L.J. 2104 (SC)* that generally it is not expected that husband or his relatives will inflict cruelty against married woman in such a way as to bring it to the notice of neighbours and tenants residing nearby because that will put them to disrespect and contempt in the eyes of neighbours. Therefore, it may not be practical to demand independent evidence of neighbours and tenants in such case. Naturally, the evidence of relatives of deceased like father, mother, sister may

be available in such cases in the shape of statements made by the deceased to them regarding ill-treatment. As laid down in *Sharad Vs. State of Maharashtra, AIR 1994SC 1622* such statements made by the deceased to her relatives are no doubt relevant under Section 32 (1) Indian Evidence Act as dying declaration if they relate to the cause of death or to the circumstances leading to her death.

In cases of dowry deaths, generally the evidence will be that of -

(a) the parents of the deceased, or

(b) the close relations of the deceased, or

(c) the friends of the deceased.

Not only the events that are known to the persons acquainted with the deceased, but the statements alleged to have been made by the deceased about the harassment or ill-treatment or cruelty will also assume importance. Letters, if any, that have been written by the deceased to her relations or friends, touching the harassment or cruelty, also have got a material bearing.

In each and every case, the courts are also required to consider the status of the parties, the conduct of the parties, the strained relations, and the events that took place from the date of the marriage till the date of the death so as to arrive at a conclusion regarding alleged ill treatment and demand of dowry. Therefore, evidence on these points should also be examined carefully.

It must be remembered that since such crimes are generally committed in the privacy and secrecy, independent and direct evidence may not be ordinarily available. That is why the legislature has by introducing sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage.

If we view the provisions of Section 498-A, 306 and 304-B cumulatively, the picture which emerges will be that if a married woman is subjected to cruelty or harassment by her husband or his family members Section 498-A, I.P.C would be attracted. If such cruelty or harassment was inflicted by the husband or his relative *for or in connection with any demand for dowry* soon before the death of the married women by burns or bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B I.P.C for dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302 I.P.C. Then there may be the situation where the husband or his relative by his willful conduct creates a situation which drives the woman to commit suicide and she actually does so within seven years of her marriage, the case would squarely fall within the ambit of Section 306 I.P.C. because in such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desparate situation of no return which would compel her to put an end to her miseries by committing suicide. [See - *The State of Punjab Vs. Iqbal Singh & Ors. JT1991 (2) SC 495].*

●

COGNIZANCE IN COMPLAINT CASES - A PANORAMIC VIEW

SANJEEV KALGAONKAR
Civil Judge Class-I

The expression "taking cognizance of an offence" has not been defined in the Code of Criminal Procedure, 1973. The ways in which cognizance can be taken are set out in Clauses (a) (b) and (c) of Sec. 190 of the Code which is captioned as "Cognizance of Offences by Magistrates".

Sec. 190 of Cr.P.C. talks of *'cognizance of offences'* by Magistrate. The expression cognizance of offences in its broad and literal sense means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of the offence or taking steps to see whether there is any basis for initiating judicial proceedings for other purposes. Term 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceeding rather than it is the condition precedent for the initiation of proceedings by the Magistrate or the Judge. *(See - State of West Bengal vs. Mohd. Khalid, AIR 1995 SC 785)*

It is well settled by a catena of decisions that when Magistrate takes notice of the accusation and applies his mind to the allegations made in the complaint or police report and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender, he is said to have taken cognizance unless the Magistrate does so for proceeding under Sec. 200 or 204 Cr.P.C. *(See - Kishun Singh Vs. State of Bihar, (1993) 2 SCC 16)*

In case of *Devrapalli Lakshminarayana Reddy & Others Vs. Narayana Reddy and Others, AIR 1976 SC 1672* it was held by the Supreme Court that when on receiving a complaint the Magistrate applies his mind for the purpose of proceeding under Sec. 200 and the succeeding sections in Chapter XV of Cr.P.C., he is said to have taken cognizance of the offence within the meaning of Sec. 190(1)(a). If instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation or ordering investigation by the police under search warrant for the purpose of investigation or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.

Section 204 of the Code provides for issuance of process when the Magistrate opines that there is sufficient ground for proceeding. But in order to arrive at such an opinion, the Magistrate may either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit.

Section 201(2) of the Code provides that no such direction for investigation shall be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session. Sub-section (2) explains that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. For example, when a complaint case alleging commission of an offence punishable under Section 307 IPC comes before the Magistrate and the Magistrate 'TAKES COGNIZANCE' of the complaint, then he cannot direct for investigation, unless the complainant and all the witnesses of the complainant are examined on oath.

The proviso incorporated in Sub-sec. 2 of the Sec. 202 Cr.P.C. does not merely confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. But the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course, if the complainant requires the help of the Court to summon such witnesses, it is open to the Magistrate to issue such summons. Even if the Magistrate omits to comply with the above requirement that would not by itself vitiate the proceedings. This dictate of law was laid down by the Supreme Court in case of *Rosy And Another Vs. State Of Kerala, AIR 2000 SC 637*

When Magistrate receives a complaint, he is not bound to take cognizance even if the facts alleged in the complaint disclose the commission of an offence. This is clear from the use of words "may take cognizance" which in the context in which they occur cannot be equated with "must take cognizance". The word 'may' gives discretion to the Magistrate in the matter.

In *Gopal Das Sindhi Vs. State Of Assam, A.I.R. 1961 SC 968* it was observed by the Supreme Court that - "If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word, 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156 (3) to the police for investigation".

The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202 (1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage when the Magistrate is in seisin of the case. That is to say in case of a complaint regarding the commission of a cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a) Cr.P.C. But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to

switch back to the pre-cognizance stage and avail of Sec. 156 (3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a pre-emptor reminder or intimation to the police to exercise their plenary powers of investigation under Section 156 (1). Such an investigation embraces the entire continuation of process which begins with the collection of evidence under Section 156 and ends with a report or chargesheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him. *(See- Devarapalli Lakshminarayana Reddy And others Vs. Narayana Reddy And Others, AIR 1976 S.C. 1672)*

Provision contained in sec. 202 (2) Cr.P.C. does not mean that a complaint, in which offence complained of is triable exclusively by the Court of Session , cannot be sent to police for investigation even while exercising powers under Section 156 (3) of the Code. In this respect reference is made to the decision in *Suresh Chand Jain Vs. State of Madhya Pradesh, AIR 2001 SC 573* wherein it has been held that the investigation referred to in Sec. 156 (3) Cr.P.C. is the same investigation, the various steps to be adopted for which have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of the Police Station, of the substance of the information relating to the commission of a cognizable offence. The investigation contemplated in that Chapter can be commenced by the police even without the order of a Magistrate. But the significant point to be noticed is, when a magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

The provisions of the Code do not in any way stand in the way of a Magistrate to direct the police to register at the police station and then investigate the same. When an order for investigation under Section 156(3) of the Code is to be made, the proper direction to police would be to register a case at the police station treating the complaint as the First Information Report and investigate into the same. *(See - Madhu Bala Vs. Suresh Kumar And Others, AIR 1997 SC 3104)*

What is contained in sub-section (3) of Section 156 is the power to order the investigation referred to in sub-section (1) because the words "order such an investigation as above mentioned" in sub-section (3) are unmistakably clear as referring to the other sub-section. The power is to order an "officer-in-charge of a police station" to conduct investigation. Therefore, when a Magistrate orders investigation under Sec. 156 (3) Cr.P.C., he can only direct an officer-in-charge of a police station to conduct such investigation and not to any superior police

officer. Thus, Magistrate cannot order an investigation under Sec. 156 (3) Cr.P.C. by the CBI or any officer other than an officer-in-charge of a police station. *(See -C.B.I. Through S.P., Jaipur Vs. State of Rajasthan, AIR 2001 SC 666)*

But still another important question arises as to how discretion is to be exercised by the Magistrate in taking cognizance of the offence or in sending the complaint under Section 156 (3) of the Code to the police for investigation?

Rules 113 & 114 of M.P. Rules & Orders (Criminal) must be kept in mind before exercising jurisdiction provided by Section 156 (3) of the Code of Criminal Procedure. The power under Section 156 (3) of the Code has to be exercised judiciously on proper grounds and not in a mechanical manner. In the cases where allegations are not very serious and the complainant himself is in possession of evidence to prove the allegations levelled in the complaint, there is no need to pass order under Section 156 (3), of the Code. But where the Magistrate is of the view that nature of the allegations is such that the complainant himself may not be in a position to collect and produce evidence before the Court and interest of justice demands that the police should step-in to help the complainant, the Magistrate should exercise this discretion after proper application of mind.

Custodial Interrogation is one of the grounds where the Magistrate should exercise this discretion in directing, investigation under Section 156 (3) where it appears to be necessary for some recovery of article or discovery of fact. When bona fides of the police are impugned, it is undesirable to send complaint to police.

PROCEDURE - DISMISSAL OF COMPLAINT OR ISSUANCE OF PROCESS :-

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceedings, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for doing so. The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a Revisional Court. Being kept in ignorance of the reasons clearly prejudices his right to move the Revisional Court and where he takes the matter to the Revisional Court renders his task before that Court difficult. *(See- Kishore Kumar Gyanchandani, Vs. G.D. Mehrotra And Another, AIR 2002 S.C. 483)*

There is no legal requirement for trial Court to pass a detailed Order while issuing process under Sec. 204 Cr.P.C. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. *(See- Dy. Chief Controller of Imports & Exports Vs. Roshanlal Agarwal, AIR 2003 SC 1904)*

Rule 112 of M.P. Rules and Orders (Criminal) provides in precise words that many Magistrates, whether from laziness, timidity or misplaced conscientiousness, make insufficient use of the provisions of section 203 of the Code, and issue

process indiscriminately after the most cursory examination of the complainant and without applying their minds judicially to the facts brought out. Such procedure can be too strongly condemned.

On proper use of the provisions of section 203 of the Code depends the protection of the general public from the harassment and expense of appearing in the Court to answer false or trivial complaints, and Magistrates who fail in this respect fail in an important part of their duties. The proper use of the provisions of section 203 is a matter to which inspecting officers should invariably devote attention.

Judicial process should not be an instrument of oppression and needless harassment. There lies a responsibility and duty on the Magistrate to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfaction that the law casts liability or creates offence against the juristic person or the person impleded then only process would be issued at that stage. Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration for issuing process lest it would be an instrument in the hands of private complainant to harass other persons needlessly. *(See- Punjab National Bank Vs. Surendra Sinha, AIR 1992 SC 1815)*

REMEDIES AVAILABLE TO THE ACCUSED AT THE STAGE OF ENQUIRY:-

The scope of inquiry under Section 202 of the Code is very limited and that is to find out whether there are sufficient grounds for proceeding against the accused who has no right to participate therein much less a right to cross-examine any witness examined by the prosecution, but he may remain present only with a view to be informed of what is going on. This question is no longer *res integra* having been specifically answered by a 4-Judge Bench decision of the Supreme Court in the case of *Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose & Anr., AIR 1963 SC 1430,* wherein the Supreme Court categorically laid down that an accused during the course of inquiry under Section 202 of the Codeof Criminal Procedure, 1898, has no right at all to cross-examine any witness on behalf of the prosecution because it is clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on.

CONCLUSION- PROCEDURE IN NUTSHELL :-

(i) After a complaint being filed Magistrate has two alternatives - either to examine the complainant and to proceed under Chapter XV or to direct the police to investigate without himself taking cognizance and to resort to Section 156 (3) of Chapter XII.

(ii) Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused, but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) He can postpone the issue of the process and direct an enquiry by any other person or an investigation by the police.

(iii) A Magistrate can order investigation under Section 156 (3) only at the pre-cognizance stage, that is to say before taking cognizance under Sections 190, 200 and 204, Cr.P.C. and where a Magistrate decides to take cognizance under the provisions of Chapter XV, he is not entitled in law to order any investigation under Section 156 (3) though in cases not falling within the proviso to Section 202 Cr.P.C. i.e. cases triable exclusively by the Court of Sessions, he can order an investigation by the police which would be in the nature of an enquiry as contemplated in Section 202 of the Code.

(iv) In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

(v) Where a Magistrate orders investigation by the police before taking cognizance under Section 156 (3) of the Code and receives report thereon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 Cr. P.C. *(See - Tula Ram Vs. Kishor Singh, AIR 1977 SC 2401)*

It is well settled that when police after investigation files a final report under Section 173 of the Code the Magistrate may disagree with the conclusion arrived at by the police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final report submitted by the police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the Code and takes cognizance if the materials produced by the complainant make out an offence. This question has been raised and answered by the Supreme Court in the case of *Gopal Vijay Vs. Bhuneshwar Prasad Sinha and others, (1982) 2 SCC 510.* The Supreme Court in no uncertain terms in the aforesaid case has indicated that acceptance of final report does not debar the Magistrate from taking cognizance on the basis of the materials produced in a complaint proceeding. *(See -Kishore Kumar Gyanchandani vs. G.D. Mehrotra And Another, AIR 2002 SC 483)*

●

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute to the districts for discussion in the bi-monthly training meeting of August, 2004. The Institute has received articles relating to these topics from most of the districts. Out of these articles, the articles relating to topic nos. 2, 4 and 5 have not been found of requisite standard. The Institute is publishing its own article on topic no. 5. Topic Nos. 2 and 4 will be allotted to other districts in future. The articles on rest of the topics are being included in this issue of JOTI Journal.

Q. 1 What is the legal position regarding limitation for a suit which is reinstituted after its return under Order 7 Rule 10 C.P.C.

आदेश 7 नियम 10 व्यवहार प्रक्रिया संहिता के अन्तर्गत लौटाये गये वाद के पुनः संस्थित किये जाने हेतु परिसीमा की विधिक स्थिति क्या है?

Q. 2 Lelgal position regarding interim custody of property which has been seized in an offence under Wild Life Protection Act, 1972.

वन्य जीव संरक्षण अधिनियम, 1972 के प्रावधानों के अन्तर्गत अभिगहीत सम्पत्ति को अंतरिम अभिरक्षा पर दिये जाने के विषय में विधिक स्थिति क्या है?

Q. 3 Whether a decree passed in terms of compromise under Order 23 Rule 3 C.P.C. amounts to Res Judicata under Section 11 C.P.C.

क्या आदेश 23 नियम 3 व्यवहार प्रक्रिया संहिता के अन्तर्गत पारित समझौता आधारित आज्ञप्ति धारा 11 व्यवहार प्रक्रिया संहिता के अन्तर्गत पूर्व न्याय का प्रभाव रखती है?

Q. 4 Procedure to be adopted by a Magistrate when a person proposes to surrender before the Court alleging that he is being accused of committing a non-bailable offence.

किसी व्यक्ति द्वारा स्वयं के बारे में अजमानतीय अपराध का मामला होने का अभिकथन करते हुए न्यायालय के समक्ष समर्पण की दशा में मजिस्ट्रेट द्वारा अपनायी जाने वाली प्रक्रिया का स्वरूप क्या होगा?

Q. 5 Whether a Court can permit a surety to deposit cash u/s 445 Cr.P.C.?

क्या न्यायालय धारा 445 द.प्र.सं. के अन्तर्गत जमानतदार को नगद राशि निक्षिप्त करने के लिये अनुज्ञात कर सकता है?

●

आदेश–7 नियम–10 व्य.प्र.सं. के अन्तर्गत लौटाए गए वादों को पुनः संस्थित किए जाने हेतु परिसीमा की विधिक स्थिति

न्यायाधीशगण
जिला छिंदवाड़ा

आदेश–7 नियम–10 व्य.प्र.सं. में यह प्रावधान किया गया है कि :–

1. नियम 10–क के उपबंध के अधीन रहते हुए, वाद–पत्र, वाद के किसी भी प्रक्रम में उस न्यायालय में उपस्थित किए जाने के लिए लौटा दिया जाएगा, जिसमें वाद संस्थित किया जाना चाहिए था ।

   स्पष्टीकरण ....

2. न्यायाधीश वाद–पत्र के लौटाने पर उस पर उसके उपस्थित किए जाने की और लौटाए जाने की तारीख, उपस्थित करने वाले पक्षकार का नाम और उसके लौटाए जाने के कारणों का संक्षिप्त कथन पृष्ठांकित करेगा ।

इस प्रकार आदेश–7 नियम–10 व्य.प्र.सं. दिग्दर्शित करती है कि जब न्यायालय के समक्ष उस प्रकरण के विचारण के संबंध में क्षेत्राधिकार का अभाव हो, चाहे क्षेत्राधिकार का ऐसा अभाव क्षेत्रिक, आर्थिक या अन्यथा किसी कारणवश हो, तब न्यायालय द्वारा दावे को लौटाए जाने का आदेश पारित किया जाना ही विधिक दृष्टि से समीचीन होता है, जैसा कि माननीय सर्वोच्च न्यायालय के द्वारा न्याय दृष्टांत आत्मानाथस्वामी तथा देवास्थानम विरूद्ध के. गोपालास्वामी आयंगर, ए.आई.आर. 1965 एस.सी. 338 एवं आर.एस.डी.बी. फायनेंस कंपनी प्रायवेट लिमि. विरूद्ध श्री वल्लभ ग्लास वर्क्स लिमिटेड, ए.आई.आर. 1993 एस.सी. 2094 के अंतर्गत सिद्धान्त प्रतिपादित किया गया है। अतः स्पष्ट है कि आदेश–7 नियम– 10 व्य.प्र.सं. में केवल वाद–पत्र को वापिस लौटाए जाने एवं उसके पुनः संस्थित किए जाने की प्रक्रिया का वर्णन किया गया है, परन्तु ऐसे वाद को पुनः संस्थित किए जाने के संबंध में परिसीमा का उल्लेख नहीं किया गया है, ऐसे वाद को पुनः संस्थित करने के संबंध में परिसीमा अधिनियम की धारा–14 के प्रावधान सुसंगत हैं । परिसीमा की धारा–14(2) के अनुसार:–

> किसी वाद के लिए परिसीमा की संगणना में जहां पर सद्भावनापूर्वक कोई वादी, प्रतिवादी के विरूद्ध प्रथम बार के न्यायालय में चाहे कोई अपील, निगरानी या कोई दूसरी व्यवहार कार्यवाही सम्यक् उद्यम से चलाता आ रहा है, जो कि अधिकारिता की त्रुटि से अथवा तद्रूप अन्य प्रकार के कारण से उक्त न्यायालय उसे ग्रहण करने के अयोग्य है, वहां यदि वह कार्यवाही उसी वाद पदग्रस्त मामले से संबंधित है, वहां पर परिसीमा काल की संगणना में से वह समय अपवर्जित कर दिया जाएगा, जो ऐसी त्रुटि के कारण हुआ हो ।

उपरोक्त प्रावधान के विश्लेषण से स्पष्ट है कि यदि निम्न शर्तो की पूर्ति होती है तो परिसीमा काल की संगणना में से वह समय अपवर्जित कर दिया जाएगा जो क्षेत्राधिकार की त्रुटि के कारण गलत न्यायालय में वाद चलाने में व्यतीत हुआ हो :–

(i) पूर्व की कार्यवाही और पश्चात्वर्ती कार्यवाही, दोनों में पक्षकार एक होने चाहिए अथवा उन्हीं पक्षकारों के हित प्रतिनिधि होने चाहिए।

(ii) पूर्व एवं पश्चात् व्यवहार कार्यवाही एक ही वाद–पदग्रस्त मामले से संबंधित होनी चाहिए।

(iii) पूर्व की व्यवहार कार्यवाही सम्यक् उद्यम से चलाई गई हो।

(iv) पूर्व का न्यायालय क्षेत्राधिकार की त्रुटि से अथवा तदरूप अन्य प्रकार के कारण से उसे ग्रहण करने के अयोग्य हो।

धारा–14 परिसीमा अधिनियम के अनुसार पूर्ववर्ती कार्यवाही को सम्यक् उद्यम से चलाया जाना आवश्यक है। सम्यक् उद्यम से तात्पर्य सम्यक् सतर्कता एवं सावधानी बरतने से है। साथ ही कार्यवाही सद्भावनापूर्ण होनी आवश्यक है। सद्भावना की परिभाषा परिसीमा अधिनियम की धारा–2 (एच) में दी गई है, जिसके अनुसार कोई बात सद्भावनापूर्वक की गई समझी जाएगी जो सम्यक् सावधानी या ध्यान के बिना न की गई हो। यह परिभाषा जनरल क्लाउजेज एक्ट की धारा–3 (22) में दी गई परिभाषा से भिन्न है। जनरल क्लाउजेज एक्ट में दी गई परिभाषा के अनुसार केवल ईमानदारी से की गई बात सद्भावनापूर्वक मानी जाएगी, भले ही उसमें लापरवाही क्यों न हो। चूंकि परिसीमा अधिनियम में विशिष्ट रूप से सद्भावना को परिभाषित किया गया है, अतः धारा–14 के संबंध में भी सद्भावना के लिए यही परिभाषा लागू मानी जाएगी। माननीय उच्चतम न्यायालय द्वारा माधवराव नारायणराव पटवर्धन विरूद्ध रामकृष्ण गोविंद भानू एवं अन्य, ए.आई.आर.1948 एस.सी. 767 के प्रकरण में यह अभिनिर्धारित किया गया है कि:–

> In considering the question whether in instituting the previous suit and carrying on the proceedings in the wrong court the plaintiff had acted in good faith, it is wrong to apply the definition of good faith contained in general clauses Act. Since the Limitation Act itself contains its own definition the question should be examined in the light of that definition, that is to say whether the plaintiff acted with due care and attention.
>
> The real question material for the purpose of S.14 was not whether the plaintiff was dishonest or that his acts or omission in this connection were malafied, on the other hand the question was whether plaintiff acted with due care and attention. The burden of bringing his case within the section lay on the plaintiff. When he did not satisfy the initial burden which lay upon him the burden did not shift to the defendant to show the contrary.

अतः स्पष्ट है कि यह प्रमाणित करने का प्रमाण भार वादी के ऊपर है कि उसके द्वारा पूर्व की कार्यवाही सम्यक् उद्यम से सद्भावनापूर्वक तथा उचित सतर्कता एवं सावधानी बरतते हुए चलाई गई थी, यह प्रमाणित करने के पश्चात् ही वादी धारा–14 परिसीमा अधिनियम के अंतर्गत छूट प्राप्त करने का अधिकारी होगा। इस धारा की छूट प्राप्त करने के लिए वादी को आवेदन प्रस्तुत करना चाहिए एवं अभिवचन भी करना चाहिए, परन्तु माननीय म.प्र. उच्च न्यायालय द्वारा विट्ठल भाई विरूद्ध राजाराम, 1981 (2) म.प्र. वीकली नोट–144 के प्रकरण में यह अभिनिर्धारित किया गया है कि यदि प्रतिवादी के द्वारा परिसीमा की आपत्ति की गई है तथा उसके उत्तर में वादी के द्वारा परिसीमा की छूट की प्रार्थना की गई है तो वादी के उत्तर को आवेदन मानकर विलम्ब को क्षमा किया जा सकता है।

जहां तक अपवर्जित अवधि की गणना का संबंध है तो इस संबंध में परिसीमा अधिनियम की धारा–14 की व्याख्या (क) के अनुसार :–

'जिस समय के भीतर पूर्ववर्ती व्यवहार कार्यवाही लंबित थी, उस का अपवर्जन करने में वह दिन, जिसकी कार्यवाही संस्थित की गई थी तथा वह दिन जिसको खत्म हुई, दोनों गिने जाएंगे।'

अतः इस व्याख्या से स्पष्ट है कि जिस दिन वाद पत्र वापिस किया गया, वह समस्त अवधि अपवर्जित की जाएगी, भले ही न्यायालय के द्वारा वाद वापिस करने का आदेश पूर्व में दिया गया हो। माननीय उच्चतम न्यायालय द्वारा रामउजारे विरूद्ध यूनियन, 1999 (1) एस.सी.सी., 685 के प्रकरण में यह अभिनिर्धारित किया गया है कि :-

"Limitation runs from the date the plaint is returned and not from the date of order by which, the plaint is directed to be returned under O.7 R. 10 and 10-A C.P.C."

इसी प्रकार माननीय म.प्र. उच्च न्यायालय द्वारा बृजमोहनदास गोकुलचन्द विरूद्ध नरसिम्हादास मनोहरीलाल, ए.आई.आर., 1971 एम.पी. 243 के प्रकरण में यह अभिनिर्धारित किया गया है कि:-

"The plaintiff was entitled to exclude all the period from dt. 28.09.54 the date of the Institution of suit till 22.4.1963 the date on which the plaint was returned, after due endorsement and that suit was thus not barred by limitation.

In this case the suit was filed on 28.09.1954 and on 18.03.63 the court said that it had no territorial jurisdiction and directed the plaint to be returned to the plaintiff, on 22.04.63 the plaintiff applied to the Court for plaint being returned and the same was returned on that very day after the necessary endorsement was made thereon. The argument of the counsel for appellant / plaintiff was that there is no rule making incumbent on the plaintiff to apply the court for making the necessary endorsement and the plaintiff can not be held to be guilty of laches if he does not move the application to the Court immediately for that purpose.

परन्तु उस समय स्थिति भिन्न होगी, जब न्यायालय द्वारा वादी को आवश्यक पृष्ठांकन के पश्चात् वाद-पत्र वापिस किया गया, परन्तु वादी के द्वारा वाद-पत्र लेने से इंकार कर दिया गया, ऐसी स्थिति में वादी इंकार के पश्चात् की अवधि को अपवर्जित कराने का अधिकार नहीं होगा।

परन्तु यदि वादी वाद-पत्र वापिस लेने की बजाए न्यायालय के आदेश के विरूद्ध अपील करता है तथा अपीलीय न्यायालय द्वारा आदेश की पुष्टि की जाती है तो धारा-14 परिसीमा अधिनियम के अंतर्गत अपीलीय न्यायालय में व्यतीत हुआ समय भी अपवर्जित किया जाएगा तथा परिसीमा का समय अपीलीय न्यायालय के आदेश के पश्चात् प्रारंभ होगा।

यदि वादी के द्वारा गलत न्यायालय में वाद परिसीमा काल के अंतिम दिन प्रस्तुत किया गया हो तथा परिसीमा अधिनियम की धारा-14 की शर्तो की पूर्ति होती हो तो ऐसी अवस्था में वाद-पत्र वापिस करने वाले

न्यायालय द्वारा वादी को सक्षम न्यायालय में वाद प्रस्तुत करने के लिए युक्तियुक्त समय प्रदान किया जाएगा, भले ही परिसीमा वाद वापिस करने की तिथि को ही समाप्त हो रही हो। युक्तियुक्त समय क्या होगा, यह प्रत्येक मामले के तथ्य एवं परिस्थितियों पर तथा न्यायालय के विवेक पर निर्भर करेगा। यद्यपि परिसीमा अधिनियम में ऐसी स्थिति के लिए परिसीमा से छूट का कोई प्रावधान नहीं किया गया है, परन्तु कोई स्पष्ट प्रावधान न होने कारण न्यायालय के द्वारा व्यवहार प्रक्रिया संहिता की धारा–151 के अंतर्गत न्यायालय को प्रदत्त अंतर्निहित शक्तियों के अंतर्गत युक्तियुक्त समय प्रदान किया जा सकता है, ताकि वादी के साथ अन्याय कारित न हो।

●

आदेश 23 नियम 3 व्य.प्र.सं के अन्तर्गत पारित समझौता आज्ञप्ति की पूर्व न्याय के रूप में प्रभावशीलता?

न्यायाधीशगण
जिला सीहोर

पूर्व न्याय का सिद्धांत सभ्य न्यायिक समाज में एक लब्ध प्रतिष्ठित विधि सिद्धांत के रूप में प्रचलित रहा है। विधि का यह मूलभूत सिद्धांत है कि किसी वाद का एक बार परीक्षण होने के उपरांत निर्णय पारित हो जाने के पश्चात् उसी वाद विषय को लेकर पुनः उन्हीं पक्षकारों के मध्य न्यायालय में मामला संस्थित नहीं किया जाना चाहिए। पूर्व न्याय का सिद्धांत, जिसका आधार न्याय की समानता एवं सद्भाव है, प्राकृतिक न्याय के सिद्धांतों के अनुकूल है। एक वाक्य मे इस सिद्धान्त को इस प्रकार अभिव्यक्त कर सकते हैं कि किसी एक विवाद के लिये एक वाद एवं एक निर्णय पर्याप्त है।

पूर्व न्याय के संबंध में सिविल प्रक्रिया संहिता की धारा 11 में प्रावधान किये गये हैं तथा समझौता अथवा सहमति के आधार पर आज्ञप्ति पारित करने हेतु प्रावधान सिविल प्रक्रिया संहिता के आदेश 23 नियम 3 एवं 23 नियम 3 (ए) में दिये गये हैं।

सिविल प्रक्रिया संहिता में 1976 के संशोधन के पश्चात् अब समझौते के आधार पर आज्ञप्ति पारित करने के लिए यह आवश्यक शर्त है कि समझौता लिखित रूप से प्रस्तुत किया जाये। वह पक्षकारों द्वारा हस्ताक्षरित किया जाये तथा समझौता भारतीय संविदा अधिनियम, 1872 के अधीन शून्य या शून्यीकरण ना हो।

समझौते के आधार पर पारित आज्ञप्ति पर 'पूर्व न्याय सिद्धांत' लागू होता है या नहीं इस संबंध में मुख्य रूप से दो अभिमत है पहला अभिमत यह है कि समझौते के आधार पर पारित आज्ञप्ति पश्चात्वर्ती वाद में 'पूर्व न्याय सिद्धांत' का प्रभाव नहीं रखती लेकिन उस वाद के पक्षकार पश्चात्वर्ती वाद में उसी विवाद को उठाने के लिए विबंधित रहते हैं।

माननीय सर्वोच्च न्यायालय की 5 सदस्यीय खण्डपीठ ने राजा श्री शैलेन्द्र नारायण भंजदेव विरूद्ध उड़ीसा राज्य, 1956 एस.सी. 346 में यह सिद्धांत प्रतिपादित किया है कि समझौते या सहमति के आधार पर पारित आज्ञप्ति पश्चात्वर्ती वाद में विबंधन का प्रभाव रखती है लेकिन साथ ही माननीय सर्वोच्च न्यायालय ने इस न्याय दृष्टांत में यह सिद्धांत भी प्रतिपादित किया है कि समझौता अथवा सहमति के आधार पर पारित निर्णय एवं आज्ञप्ति उसी प्रकार का प्रभाव रखती है मानो न्यायालय ने विवादित वाद में अपना विवेक उपयोग करते हुए निर्णय दिया हो। इस न्याय दृष्टांत में कंडिका–8 में जस्टिस लार्ड हर्सल को उद्धरित किया गया है। इसी प्रकार प्रीवी काउंसिल के न्याय दृष्टांत किंच विरूद्ध वालकाट एवं अन्य, एल.आर. 1929 ए.सी. 482 को उद्धरित करते हुए यह प्रतिपादित किया गया है कि जहां पर दोनों पक्षों की सहमति से कोई आज्ञप्ति पारित

की जाती है वह उसी प्रकार प्रभावशील होती है, जिस प्रकार की दोनों पक्षों में विवाद के अंतिम निपटारे के बाद न्यायालय द्वारा निष्कर्ष अंकित किए जाते है।

माननीय सर्वोच्च न्यायालय की 3 सदस्यीय खण्डपीठ ने सुन्दर बाई देशपांडे विरूद्ध देवजी शंकर देशपांडे, ए.आई.आर. 1954 एस.सी. 82 में यह प्रतिपादित किया है कि यद्यपि उभयपक्षों के अधीन उसी स्थिति में पश्चात्वर्ती वाद प्रस्तुत किया गया है जो स्थिति उनके पश्चात्वर्ती वाद में है फिर भी यह प्रांगन्याय के सिद्धांत के अधीन प्रतिबंधित नहीं होगी लेकिन पक्षकार समझौते के आधार पर जो आज्ञप्ति पारित की गयी है उसके व्यवहार से विबंधित होंगे।

माननीय सर्वोच्च न्यायालय ने उपरोक्त न्याय दृष्टांत में विबंधन और पूर्व न्याय के सिद्धांत में विभेद करते हुए यह उल्लेख किया है कि विबंधन का सिद्धांत साक्ष्य अधिनियम की धारा 115 के अधीन पक्षकारों के द्वारा किये गये पूववर्ती आचरण के आधार पर निर्धारित है जबकि 'पूर्व न्याय का सिद्धांत' पक्षकारों के बीच में पूर्ववर्ती विवाद के विनिश्चयन के अभिलेख पर आधारित है। इसी न्याय दृष्टांत की कंडिका–12 में माननीय सर्वोच्च न्यायालय ने दिनशा मुल्ला के सिविल प्रक्रिया संहिता के पृष्ठ 84 पर उद्धरित सिद्धांत की पुष्टि करते हुए यह कहा है कि समझौते के आधार पर जो आज्ञप्ति पारित की जाती है उस पर विबंधन का सिद्धांत लागू होता है लेकिन उसका प्रभाव पूर्व न्याय के समान ही होता है जो कि ऐसी डिक्री को 'इनविटियम' कहा जाता है और जिसका प्रभाव यह है कि पक्षकार उसी बिन्दु को जिस पर समझौते के आधार पर आज्ञप्ति पारित की जा चुकी है पुनः पश्चात्वर्ती वाद में उठाने के लिए विबंधित है।

माननीय सर्वोच्च न्यायालय की 3 सदस्यीय खण्डपीठ ने पल्लवर्ती वेकटसुब्बाराव विरूद्ध बैलूरी जगन्नाधाराव, ए.आई.आर. 1967 एस.सी. 591 में यह उल्लेखित किया है कि समझौते की आज्ञप्ति पर न्यायालय के निर्णय को पूर्व न्याय के सिद्धांत पर नहीं रखा जा सकता क्योंकि न्यायालय ने इस समझौते के आज्ञप्ति में अपने विवेक का उपयोग नहीं किया है इसलिए यह साक्ष्य अधिनियम की धारा 115 के अधीन विवंधन का प्रभाव रखेगा।

उपरोक्त प्रतिपादित सिद्धांतों के विपरीत कई न्याय दृष्टांतों में समझोते के आधार पर पारित आज्ञप्ति पर पूर्व न्याय के सिद्धांत को लागू माना गया है।

माननीय सर्वोच्च न्यायालय ने शंकर सीताराम सोनटक्के विरूद्ध बालकृष्ण सीताराम सोनटक्के, ए.आई.आर. 1954 एस.सी. 352 में यह सिद्धांत प्रतिपादित किया है कि जब पक्षकारों में राजीनामा के पश्चात् संयुक्त संपत्ति के संबंध में विवाद का अंतिम रूप से निपटारा हो गया और उस आधार पर आज्ञप्ति पारित की गई उस आज्ञप्ति को पश्चात्वर्ती वाद में चुनौती नहीं दी जा सकती क्योंकि पश्चात्वर्ती वाद में पूर्व पारित आज्ञप्ति पूर्व न्याय के सिद्धांत का प्रभाव रखती है। यद्यपि इस न्याय दृष्टांत में भी माननीय सर्वोच्च न्यायालय ने ऐसी डिक्री को 'इनविटियम' की संज्ञा दी है।

माननीय सर्वोच्च न्यायालय की दो सदस्यीय खण्डपीठ ने बायराम पेस्टनजी जरीवाला विरूद्ध यूनियन बैंक ऑफ इंडिया, ए.आई.आर. 1991 एस.सी 2234 में यह सिद्धांत प्रतिपादित किया है कि समझौते की आज्ञप्ति पक्षकारों पर बंधनकारी प्रभाव रखेगी और पश्चात्वर्ती वाद में यह पूर्व न्याय के सिद्धांत का प्रभाव रखेगी तथा पक्षकारों पर ऐसी आज्ञप्ति बाध्यकर होगी।

माननीय सर्वोच्च न्यायालय की दो सदस्यीय खण्डपीठ ने निर्मलजीत सिंह आदि विरूद्ध हरनाम सिंह आदि, ए.आई.आर. 1996 एस.सी 2252 में यह सिद्धांत प्रतिपादित किया है कि जहाँ पर पक्षकारों के बीच में सम्पत्ति के बंटवारे के बाद में राजीनामा या समझौते के आधार पर आज्ञप्ति पारित की गई है वहाँ पर

पश्चात्वर्ती वाद में ऐसी आज्ञप्ति पूर्व न्याय के सिद्धांत का प्रभाव रखेगी और वे पक्षकार या उनके प्रतिनिधि ऐसी आज्ञप्ति के निर्णयों से पश्चात्वर्ती वाद में बाधित होंगे।

उपरोक्त न्याय दृष्टांतों के साथ ही विभिन्न उच्च न्यायालयों द्वारा भी समझौते या सहमति के आधार पर पारित आज्ञप्ति में पश्चात्वर्ती वाद में उस आज्ञप्ति को पूर्व न्याय का प्रभाव रखने वाला माना है।

माननीय नागपुर उच्च न्यायालय ने रामलाल, श्यामलाल आदि विरूद्ध दत्तदयाल विशनदयाल, ए.आई.आर.(35) 1948 नागपुर 304 में यह सिद्धांत प्रतिपादित किया है कि सहमति के आधार पर पारित आज्ञप्ति चाहे वह सहमति के आधार पर हो या पूर्व विवाद निष्कर्षों के पश्चात् ऐसी आज्ञप्ति का पालन किया जाना चाहिए जब तक कि ऐसी आज्ञप्ति निरस्त ना की जाये, भले ही यह आज्ञप्ति अवयस्क के प्रति क्यों न हो। माननीय उच्च न्यायालय ने यह भी निर्धारित किया है कि ऐसी आज्ञप्ति सभी पक्षकारों पर बंधनकारक होगी और पश्चात्वर्ती वाद में भी पूर्व न्याय का प्रभाव रखेगी।

माननीय उच्च न्यायालय ने यह सिद्धांत प्रीवी काउंसिल द्वारा ए.आई.आर. 1929, पी.सी. 289 तथा सर दीनशामुल्ला के सिविल प्रक्रिया संहिता के ग्यारहवें प्रकाशन में दिये गये विभिन्न न्यायिक उद्धरणों का अनुसरण करते हुए किया है।

माननीय मद्रास उच्च न्यायालय ने चेत्तीयगरू विरूद्ध मक्का चित्तावदु, ए.आई.आर. 1934 मद्रास 454 में यह निर्धारित किया है कि प्रत्येक प्रकरण के तथ्य और परिस्थितियों के आधार पर न्यायालय को यह निर्धारित करना पड़ेगा कि समझौते या सहमति पर आधारित आज्ञप्ति अगले वाद में पूर्व न्याय का प्रभाव रखती है या नहीं। विशेषकर यह देखना होगा कि सहमति या समझौते के आधार पर जो आज्ञप्ति पारित की गई उस आज्ञप्ति में उस बिन्दु का निराकरण हुआ है या नहीं जिसको पश्चात्वर्ती वाद में उठाया जा रहा है।

माननीय पटना उच्च न्यायालय ने चांदीचरण बंधोपाध्याय विरूद्ध नाबागोपाल व अन्य सारवेल, ए.आई. आर. 1957 पटना 365 में यह सिद्धांत प्रतिपादित किया है कि सहमति या समझौता के आधार पर पारित आज्ञप्ति का वह भाग जो कि वैधानिक रूप से स्वीकार है और उसको अवैधानिक वाद से यदि पृथक किया जाता है तो पश्चात्वर्ती वाद में ऐसा वैधानिक रूप से स्वीकार भाग पूर्व न्याय का प्रभाव रखेगा। इसी न्याय दृष्टांत में माननीय उच्च न्यायालय ने विबंध एवं पूर्व न्याय का विभेद करते हुए यह स्पष्ट किया है कि जहाँ विबंध में साक्ष्य अधिनियम की धारा 115 के अधीन पक्षकारों के व्यवहार और आचरण के आधार पर उन्हें उसी बिन्दु पर पश्चात्वर्ती पक्रम में आपत्ति करने से विबंधित किया जाता है वहीं पर पूर्व न्याय में पक्षकारों के बीच में पूर्व में हुए अभिलेख के आधार पर निर्णय बंधनकारी का प्रभाव रखते हैं।

स्पेंसर बोवर तथा टर्नर की पूर्व न्याय विषयक पुस्तक के द्वितीय संस्करण में पृष्ठ 37 पर उल्लिखित किया गया है कि "कोई निर्णय अथवा आदेश जिस रूप में पूर्व न्याय वर्णन के अनुकूल है पूर्व न्याय से बाधित रहेगा। इसको इस आधार पर कि यह निर्णय पक्षकारों की सहमति पर आधारित है, पूर्व न्याय से बाह्य नहीं किया जा सकता। यह सही है कि ऐसे मामलों में न्यायालय को तथ्यों का अन्वेषण करने के कर्तव्य की जरूरत नहीं रहती है तथा न्यायालय को इस प्रकार के विवादित विषयों पर न्यायिक मताभिव्यक्ति करने की आवश्यकता नहीं रहती है लेकिन इसके साथ–साथ यह भी सही है कि पक्षकारों की संयुक्त प्रार्थना पर न्यायालय पक्षकारों के मध्य तयशुदा विषय वस्तु पर न्यायिक स्वीकृति तथा बाध्यकारी प्राधिकरण प्रदान करता है। इस प्रकार पक्षकारों के मध्य सम्पादित एक समझौता जो लिखित विधिक उपबंधों के अधीन है, एक सहमति के रूप में प्रदर्शित होता है प्रतिबंध के रूप में नहीं, जिस प्रकार कि पूर्व न्याय में विवाद आधारित होता है। इस प्रकार निर्णय, आदेश तथा

अधिनिर्णय जो सहमति पर आधारित होते हैं, सदैव दूसरे निर्णय, आदेश एवं अधिनिर्णय की तुलना में कम प्रभावकारी नहीं होते हैं ।

सरदीन शॉमुल्ला द्वारा सिविल प्रक्रिया संहिता पर लिखित कमेन्ट्री के ग्यारहवें संस्करण के पृष्ठ 184 पर सहमति, आज्ञप्ति तथा विबंधन शीर्षकान्तर्गत उल्लिखित किया गया है– "वर्तमान धारा शब्दशः सहमति पर आधारित आज्ञप्तियों पर लागू नहीं होती है क्योंकि ऐसे मामलों में यह नहीं कहा जा सकता कि पक्षकारों के मध्य विवादित विषय–वस्तु के संबंध में पक्षकारों को पूर्णरूपेण सुना जाकर और अंतिमरूपेण उसका निराकरण किया गया है परन्तु सहमति पर आधारित एक आज्ञप्ति पूर्व न्याय की भाँति प्रभाव रखती है।"

उपरोक्त न्यायिक दृष्टांतों में उद्धरित एवं प्रतिपादित सिद्धान्तों के आधार पर यह कहा जा सकता है कि पूर्ववर्ती वाद में किया गया समझौता और उसके आधार पर पारित आज्ञप्ति यदि पक्षकारों के बीच में विवादों का, जिस विवाद के आधार पर वाद प्रस्तुत किया गया था संपूर्ण रूप से निराकरण करता है तो ऐसी आज्ञप्ति पश्चातवर्ती वाद में उन्हीं पक्षकारों के बीच में उसी संपत्ति के संबंध में या उसी विवाद के संबंध में जिनका निराकरण समझौते के आधार पर पूर्व में हो चुका है प्रांगन्याय का प्रभाव रखेगी उदाहरण के लिए जहाँ अविभाजित संपत्ति बँटवारे के लिए वाद लाया जाता है और वाद में सभी पक्षकारों की सहमति से विवादित संपत्ति का बंटवारा किया जाता है और उस बंटवारे के आधार पर आज्ञप्ति पारित की जाती है तो पश्चातवर्ती वाद में उसी संपत्ति के संबंध में हित रखने वाले पक्षकार दुबारा वाद नहीं ला सकते और ना ही पूर्व वाद के पक्षकारों के उत्तराधिकारी वाद ला सकते हैं तथा ऐसे वाद में रेसज्यूडिकेटा का प्रभाव होगा। जैसा कि ऊपर उद्यरित माननीय सर्वोच्च न्यायालय के न्याय दृष्टांतों में प्रतिपादित किया गया है।

अन्य प्रकार के प्रकरणों में जहाँ पर कि समझौते के आधार पर पक्षकारों ने किसी विषय वस्तु के संबंध में सहमति दी है और उस सहमति के आधार पर आज्ञप्ति पारित की गई है तो पश्चातवर्ती वाद में उसी बिन्दु को पुनः उठाने के लिए विबंधित रहेंगे उदाहरण के लिए यदि किसी महिला ने पहले यह विवाद उठाया था कि उसने एक पुत्र को गोद लिया था और उसे गोद लेने का अधिकार था और इसी वाद में पक्षकारों के समझौता के पश्चात् आज्ञप्ति पारित की जाती है तथा महिला पुत्र के लेने का अधिकार त्यागते हुए उसके बदले में कोई धनराशि या कोई संपत्ति प्राप्त करती है तो पश्चातवर्ती वाद में उसी महिला का तथाकथित दत्तक पुत्र यह विवाद नहीं उठा सकता कि वह महिला का दत्तक पुत्र होने के कारण संपत्ति में उत्तराधिकार प्राप्त करने का अधिकारी है क्योंकि महिला ने अपने आचरण और व्यवहार से पारित आज्ञप्ति का अनुसरण करते हुए क्षतिपूर्ति की राशि प्राप्त कर ली है इसलिए तथा कथित दत्तक पुत्र पर विबंधन का सिद्धान्त लागू होगा।

अंतिम रूप से यही कहा जा सकता है कि समझौते या सहमति के आधार पर पारित आज्ञप्ति पश्चातवर्ती वाद में पूर्व न्याय का प्रभाव रखेगी या विबंधन का प्रभाव रखेगी यह उस प्रकरण के तथ्य और परिस्थिति तथा पूर्व वाद में पारित की गई आज्ञप्ति और पूर्व वाद के तथ्य और परिस्थितियों के आधार पर निर्धारित किया जा सकता है एक सर्वमान्य सिद्धान्त इस संबंध में प्रतिपादित करना संभव नहीं है कि समझौते के आधार पर पारित आज्ञप्ति हर हाल में पश्चातवर्ती वाद में पूर्व न्याय का प्रभाव रखेगी ही। यद्यपि समझौते पर आधारित आज्ञप्ति शब्दशः सिविल प्रक्रिया संहिता के अन्तर्गत उल्लिखित धारा 11 की परिधिन्तर्गत नहीं आती है, परन्तु पूर्व न्याय के सामान्य सिद्धान्तों के आधार पर नवीन वाद की प्रचलनशीलता को बाधित करती है। समझौते पर आधारित केवल वे आज्ञप्तियों जो कपट, दुर्व्यपदेशन आदि पर आधारित नहीं है वाद के पक्षकारों को आगे मुकदमेबाजी से, नवीन वाद संस्थित किये जाने से रोकती है।

●

APPLICABILITY OF SECTION 445 CR.P.C. TO SURETY

Chapter 33 of the Code of Criminal Procedure, 1973, hereinafter referred to as the Code, enacts provisions as to bails and bonds. A person accused of an offence on being arrested may be released on bail under Sections 436, 437 and 439 of the Code . Section 441 of the Code which has a bearing on the point, in no uncertain terms provides in this respect that before a person is released on bail, he is required to execute personal bond with or without surety bond as the case may be for his regular appearance before the Court. Thus the whole purpose for demanding bail is to ensure that the accused person is regularly attending the Court during trial. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. *[*See - *In the matter of Babu Surja Narain Mukhtear, A.I.R. 1935 Patna 195 (Special Bench)*].

Section 445 of the Code, which is an enabling provision, confers a discretionary power upon the Court or the officer which has called upon a person to execute a personal bond with or without sureties to permit him to deposit a sum of money or Government promissory notes in such amount as such Court or officer may fix in lieu of executing such bond. Section 445 is a reproduction of Section 513 of the Code of Criminal Procedure, 1898 (since repealed). Outlining the scheme of Section 513, it was observed *in The matter of Surja Narain (Supra)* that when a Court orders an accused to be released on bail on his offering surety or sureties, the question of the forfeiture of the amount of surety, in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. Section 445 of the Code which is relevant for our present discussion reads as under :

> ***"445. Deposit instead of recognizance.***-When any person is required by any court or officer to execute a bond with or without sureties, such court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the court or officer may fix in lieu of executing such bond".

The aforesaid provisions do indicate that the person who can be permitted (not directed or ordered) u/s 445 to deposit a sum of money/promissory notes in lieu of bond is the person who has been required to execute bond with or without sureties and not the surety. However, there has been some divergence of opinion as to whether these provisions are applicable only to the person who has been asked to execute the bond with or without sureties or are applicable to the principal and surety both.

In *Laxman Lal vs. Mulashankar, ILR 32 Bombay 449,* which is the earliest decision available on the point, it has been expressed by the Bombay High

Court that the deposit allowed under Section 513 has been allowed in substitution of the bond which the principal himself is required to execute and not in substitution of any bond which his sureties are required to execute.

After referring to the aforesaid view, a contrary view, however, was expressed in *Abdul Sattar & others Vs. Emperor, AIR 1938 Oudh 199.* The relevant observations made therein are as under :

> "It has been held in 32 Bom 449 that the deposit allowed under S. 513 is allowed in substitution only of the bond which the principal himself, would otherwise execute, not in substitution of any bond which his surety executes. With all due respect to the learned Judges who decided that case I am unable to hold the same view and I may say that this view was only expressed as an obiter dictum."

The applicability and scope of Section 513 was also considered in *Edmund N. Sohuster Vs. Assistant Collector of Customs, New Delhi, AIR 1967 Punjab 189* wherein Punjab High Court was of the view that the provisions of Section 513 empower the Court to permit an accused person to deposit a sum of money or Government promissory notes in lieu of executing such bond as the Court may fix. The Court clearly expressed that such concession has not been extended by such provisions to the sureties.

Examining the scheme and applicability of the provisions of Section 445 of the Code in *Ganesh Babu Gupta vs. State of Uttar Pradesh, 1990 Cr.L.J 912* the Allahabad High Court observed as under :-

> "The provisions under the Criminal Procedure Code do not stipulate of any such conditions such as calling upon the accused person to furnish Bank Security in lieu of his release on bail. The relevant provision in this context is given under *S. 445 of Cr.P.C. which too speaks of only to the extent of permitting the accused to deposit sum of money or Government promissory note in lieu of executing surety bonds".*
>
> (emphasis added)

From the discussion made hereinabove it is clear that except for the view taken in *Abdul Sattar (Supra)* all the other authorities clearly subscribe to the view that the words 'any person' as used in Section 445 in conjunction with the words 'permit him' refer to the person who is required to execute the bond and not the surety. Again it is also quite manifest from the phraseology of Section 445 that the words 'such bond' used in the end of Section 445 co-relate to words 'a bond' used in the opening part of the Section, being a bond which a person is required to execute with or without sureties and this Section has nothing to do with the person who has been required to execute the surety bond. Thus the view expressed to that effect by the authorities referred to hereinabove appears to reflect the correct legal position because any other interpretation will cause violence to the language as well as the scheme of Section 445 of the Code.

●

APPLICABILITY OF SECTION 445 CR.P.C. TO SURETY

Chapter 33 of the Code of Criminal Procedure, 1973, hereinafter referred to as the Code, enacts provisions as to bails and bonds. A person accused of an offence on being arrested may be released on bail under Sections 436, 437 and 439 of the Code . Section 441 of the Code which has a bearing on the point, in no uncertain terms provides in this respect that before a person is released on bail, he is required to execute personal bond with or without surety bond as the case may be for his regular appearance before the Court. Thus the whole purpose for demanding bail is to ensure that the accused person is regularly attending the Court during trial. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. *[See - In the matter of Babu Surja Narain Mukhtear, A.I.R. 1935 Patna 195 (Special Bench)]*.

Section 445 of the Code, which is an enabling provision, confers a discretionary power upon the Court or the officer which has called upon a person to execute a personal bond with or without sureties to permit him to deposit a sum of money or Government promissory notes in such amount as such Court or officer may fix in lieu of executing such bond. Section 445 is a reproduction of Section 513 of the Code of Criminal Procedure, 1898 (since repealed). Outlining the scheme of Section 513, it was observed *in The matter of Surja Narain (Supra)* that when a Court orders an accused to be released on bail on his offering surety or sureties, the question of the forfeiture of the amount of surety, in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. Section 445 of the Code which is relevant for our present discussion reads as under :

> ***"445. Deposit instead of recognizance.***-When any person is required by any court or officer to execute a bond with or without sureties, such court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the court or officer may fix in lieu of executing such bond".

The aforesaid provisions do indicate that the person who can be permitted (not directed or ordered) u/s 445 to deposit a sum of money/promissory notes in lieu of bond is the person who has been required to execute bond with or without sureties and not the surety. However, there has been some divergence of opinion as to whether these provisions are applicable only to the person who has been asked to execute the bond with or without sureties or are applicable to the principal and surety both.

In *Laxman Lal vs. Mulashankar, ILR 32 Bombay 449,* which is the earliest decision available on the point, it has been expressed by the Bombay High

Court that the deposit allowed under Section 513 has been allowed in substitution of the bond which the principal himself is required to execute and not in substitution of any bond which his sureties are required to execute.

After referring to the aforesaid view, a contrary view, however, was expressed in *Abdul Sattar & others Vs. Emperor, AIR 1938 Oudh 199.* The relevant observations made therein are as under :

> "It has been held in 32 Bom 449 that the deposit allowed under S. 513 is allowed in substitution only of the bond which the principal himself, would otherwise execute, not in substitution of any bond which his surety executes. With all due respect to the learned Judges who decided that case I am unable to hold the same view and I may say that this view was only expressed as an obiter dictum."

The applicability and scope of Section 513 was also considered in *Edmund N. Sohuster Vs. Assistant Collector of Customs, New Delhi, AIR 1967 Punjab 189* wherein Punjab High Court was of the view that the provisions of Section 513 empower the Court to permit an accused person to deposit a sum of money or Government promissory notes in lieu of executing such bond as the Court may fix. The Court clearly expressed that such concession has not been extended by such provisions to the sureties.

Examining the scheme and applicability of the provisions of Section 445 of the Code in *Ganesh Babu Gupta vs. State of Uttar Pradesh, 1990 Cr.L.J 912* the Allahabad High Court observed as under :-

> "The provisions under the Criminal Procedure Code do not stipulate of any such conditions such as calling upon the accused person to furnish Bank Security in lieu of his release on bail. The relevant provision in this context is given under *S. 445 of Cr.P.C. which too speaks of only to the extent of permitting the accused to deposit sum of money or Government promissory note in lieu of executing surety bonds".*
>
> (emphasis added)

From the discussion made hereinabove it is clear that except for the view taken in *Abdul Sattar (Supra)* all the other authorities clearly subscribe to the view that the words 'any person' as used in Section 445 in conjunction with the words 'permit him' refer to the person who is required to execute the bond and not the surety. Again it is also quite manifest from the phraseology of Section 445 that the words 'such bond' used in the end of Section 445 co-relate to words 'a bond' used in the opening part of the Section, being a bond which a person is required to execute with or without sureties and this Section has nothing to do with the person who has been required to execute the surety bond. Thus the view expressed to that effect by the authorities referred to hereinabove appears to reflect the correct legal position because any other interpretation will cause violence to the language as well as the scheme of Section 445 of the Code.

●

PART - II

NOTES ON IMPORTANT JUDGMENTS

320. SERVICE LAW :

M.P. CIVIL SERVICES (PENSION) RULES, 1976 - Rules 57 to 61

Pension, payment of to a retired employee - Concerned authorities should insure timely payment - Interest awarded for delayed payment.

Shiv Kumari Dubey (Smt.) Vs. State of M.P.

Reported in 2004 (II) MPWN 34

Held :

..... Learned Counsel for the petitioner has brought to the notice of this Court Rule 57 of the M.P.Civil Services (Pension) Rules, 1976. The said rule reads as under:

> *"57 Preparation of pension papers.* (1) Every Head of Office shall undertake the work of preparing pension papers in Form 6 two years before the date on which a Government servant is due to retire on superannuation, or on the date on which he proceeds on leave preparatory to retirement whichever is earlier."

Submission of Mr. Patel is that the same being the command of the Rules any deviance shown by the respondents can only be compared with the cruel and recalcitrant attitude of the authorities who for no rhyme or reason, pave the path of procrastination. Mr. Rahul Jain, learned Counsel for the State could only submit that the fault lies with the petitioner but he can not combat the situation that everything moved when the Tribunal passed the interim order. The whole action, if I am permitted to say, definitely *frescoes* a picture creating a cyclorama to project that sitting over the matter is neither legally incorrect or unsound or morally improper or ethically unwarranted. This kind of propensity on the part of the authorities deserves to be condemned and accordingly it is deprecated. This Court hopes the authorities would act as per the Rules and the cases of the retired employees shall be dealt with in total adherence to the Rules. Rules are made to be followed and not to be thrown in the Bay of Bengal.A retired employee may have some kind of patience but certainly it cannot be expected that he would have the Himalayan patience, tranquillity of the pacific ocean and job's fortitude. Turbulence has to end at one point of time. Sooner the authorities realise and act in accordance with the Rules and take prompt steps it would be a welcome step in a welfare State. Let new paradigm be written to be followed by the officers who have felt that these kind of cases are to be dealt with in a relaxed manner. Relaxation in this regard, as I have stated above, does not commend appreciation. As there is no factual dispute in regard to the controversy but there is delay, which is clear as day, on the part of

the respondents I am inclined to direct that the petitioner shall be entitled to interest at the rate of 9% from 1.7.1994 till the date of final payment.

●

321. SERVICE LAW :

Temporary government servant, termination of - Unless services terminated on the ground of unsatisfactory conduct or unsuitability or for like reason, discretion has to be exercised with reason and fair play - Constitutional protection under Article 311 available to such person also.

Praveen Kumar Karel Vs. High Court of M.P.

Reported in 2004 (ii) MPWN 37

Held :

A three-Judge Bench of the Supreme Court in The *Manager, Government Branch Press v. D.B. Belliappa, (1979) 1 SCC 477= AIR 1979 SC 429* has laid down the law that if the services of a temporary government servant are terminated in accordance with the conditions of service on the ground of unsatisfactory conduct or his unsuitability for the job and/or for his work being unsatisfactory, or for a like reason which marks him off as a class apart from other temporary servants who have been retained in service; there is no question of the application of Article 16. But if the services of a temporary government servant are terminated arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of employment. Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of termination of service, it is the duty of the authority to dispel that charge by disclosing to the Court the reason or motive which impelled it to take the impugned action. Excepting in cases analogous to those under Article 311 (2), proviso (c), the authority cannot withhold such information from Court and plead that the order was purely administrative passed in the exercise of administrative discretion, and not judicial. Fairness, founded on reason is the essence of Articles 14 and 16(1). Article 16 (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The expression 'matters relating to employment' is not confined to initial matters prior to the act of employment; it comprehends all matters such as salary, increments, leave, gratuity, pension, age of superannuation, promotion and termination of employment. "Appointment" in Article 16 (1) will include termination of or removal from service. The protection of Articles 14 and 16 (1) is available to such a temporary government servant if he has been arbitrarily discriminated against and singled out for harsh treatment. The appellant has discretion under the conditions of service, but such discretion has to be exercised in accordance

with reason and fair play and not capriciously. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal opportunity and offend the equality clause in Articles 14 and 16 (1). The argument based on pure master and servant relationship is misconceived. It is to bring that relationship in tune with the vastly changed and changing socio-economic conditions and mores that this antiquated and unjust doctrine has been eroded by judicial decisions and legislation, and in its application to persons in public employment particularly, the Constitutional protection of Articles 14, 15, 16 and 311 is available.

●

322. CRIMINAL PROCEDURE CODE, 1973 - Section 125 (3)

Recovery of amount due beyond period of one year from the date of the application cannot be enforced - Acquiescence of defaulting party not to extend the period.

Mamta (Mst.) Vs. Budhmal Rajak

Reported in 2004 (II) MPWN 49

Held :

It is a well settled principle of law that no warrant shall be issued for the recovery of any amount due under section 125 (3) of the Code of Criminal Procedure, 1973 unless an application is made to the Court to levy such amount within a period of one year from the date on which it became due and that Court cannot enforce areas of more than one year and that the acquiescence of defaulting party does not empower the Court to extend the period. Thus, the Courts below rightly refused to enforce arrears of more than one year.

●

323. INDIAN PENAL CODE, 1860 - Section 182

Offence under Section 182 - Cognizance can be taken only on a complaint filed by the public servant to whom false information was given.

Sajjan Vs. State of M.P.

Reported in 2004 (II) MPWN 52

Held :

Learned counsel for the appellant next contended that complaint under section 182 IPC could have been filed only by the public servant to whom false information was given. I find force in this contention of the learned counsel for the appellant. The FIR was lodged at police station, therefore, only the public servant to whom FIR was made could have filed the complaint. Absence of making the complaint as prescribed by section 195 CrPC is a fatal defect and cannot be cured under section 465 CrPC, therefore conviction under section 182 IPC cannot be allowed to stand.

●

324. EVIDENCE ACT, 1872 - Section 113 - A

Presumption under Section 113 - A - Presumption does not arise merely on proof of circumstances enumerated under Section 113 - A - Court has to exercise its discretion regarding raising such presumption on the basis of facts and circumstances of the given case - Difference between Sections 113-A and 113-B, Evidence Act - Law explained.

Hans Raj Vs. State of Haryana

Reported in 2004 (2) ANJ (SC) 151

Held :

Unlike Section 113-B of the Indian Evidence Act, a statutory presumption does not arise by operation of law merely on proof of the circumstances enumerated in Section 113-A of the Indian Evidence Act. Under Section 113-A of the Indian Evidence Act the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband (in this case) had subjected her to cruelty. Even if these facts are established the Court is not bound to presume that the suicide had been abetted by her husband. Section 113-A gives a discretion to the Court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of word cruelty in Section 498-A.I.P.C. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The Court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life,limb or health of the woman. The law has been succinctly stated in *Rameshkumar vs. State of Chhattisgarh, (2001) 9 SCC 618* wherein this Court observed:

"this provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet a social demand to resolve difficulty of proof where helpless married woman were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still is cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the

abovesaid circumstances, the Court *may presume* that such suicide had been abetted by her husband. Parliament has chosen to sound a not of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the Court shall have to have regard to "all the other circumstance of the case." A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression- "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause- and- effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says- "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

●

325. CRIMINAL TRIAL :

Circumstantial evidence, conviction on the basis of - Principles to be kept in mind - Law stated.

State of Madhya Pradesh Vs. Sanjay Rai

Reported in 2004 (2) ANJ (SC) 180

Held :

There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

In *Hanumant Govind Nargundkar and Anr vs. State of Madhya Pradesh, (AIR 1952 SC 343),* where in it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

A reference may be made to a later decision in *Sharad Birdhichand Sarda vs. State of Maharashtra, (AIR 1984 SC 1622).* Therein, while dealing with cir-

cumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot merely be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be prove; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

●

326. MOTOR VEHICLES ACT, 1988 - Section 147

Insurer's liability regarding theft of Vehicle - Vehicle comprehensively insured - In case of theft of vehicle, breach of insurance policy not germane.

J.P. Gupta Vs. National Insurance Company Limited

Reported in 2004 (3) MPHT 344 (DB)

Held :

Since the vehicle was stolen, therefore, in the case of theft of vehicle, breach of condition is not germane. Insurance Company is liable to indemnify the owner of the vehicle. Therefore, the finding of the Trial Court that the defendant/insurance company is not liable to indemnify the plaintiff is set aside and it is held that in the case of theft of vehicle when the insured has obtained comprehensive policy, the insurance company is liable to indemnify the loss caused to the insured. We therefore, hold that the insurance company is liable to indemnify the insured.

●

327. CRIMINAL PROCEDURE CODE, 1973 - Section 197

Cognizance of offence punishable under Prevention of Corruption Act, 1988 against public servant after his retirement - No sanction required u/s 197 - Law explained.

Dinanath Vimal Vs. State of M.P.

Reported in 2004 (3) MPHT 393

Held :

The only point for determination in this revision is whether sanction under Section 197 of Code was required on the day of taking cognizance? Shri Kutumble, learned Senior Advocate drawing support from the decision of Supreme Court in *R. Balakrishnan (supra)* argued and submitted that in view of phraseology of Section 197 of the Code, sanction would be necessary even after the retirement of applicant from Government service and in absence of sanction, prosecution and trial would be void.

After hearing learned Counsel for both sides, and considering the material available on record, in the considered opinion of this Court, this petition has no force and substance, consequently it must fail. This very contention came up for consideration before Supreme Court in *Kalicharan Mahapatra Vs. State of Orissa, (1998) 6 SCC 411.* In that case, question for consideration before the Supreme Court was whether cognizance of offence punishable under provision of Prevention of Corruption Act, 1988 could be taken against a public servant (IPS Officer) without sanction under Section 197 of Code after he ceased to be public servant? Supreme Court after noticing the earlier judgment *R. Balakrishna Pillai, AIR 1996 SC 901,* and various provision of the Act, answered the question in emphatic no, holding that no sanction is required and a public servant who committed an offence mentioned in the Act, while he was a public servant can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the Court takes cognizance of the offence. But if he ceases to be a public servant by that time, the Court can take cognizance of the offence without any such sanction. In other words, the public servant who committed the offence while he was a public servant is liable to be prosecuted whether he continues in office or not at the time of trial or during the pendency of the prosecution. While considering the ambit and scope of Section 197 of the Code, it was held in Para 13 as under :-

> "13. It must be remembered that in spite of bringing such a significant change to Section 197 of the code in 1973, Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant "who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" whereas the offences contemplated in the PC Act are those which can not be treated as acts either directly or even purportedly done in the discharge of his official duties. *Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code.*
>
> (Emphasis is added)

The decision was also referred to and relied upon is subsequent decisions in *State of Kerala Vs. V. Padmanabhan Nair, reported in (1999) 5 SCC 690; State of J.K. Vs. Charan Das Puri, reported in (1999) 5 SCC 738* and *State of Kerala Vs. M.M. Manikantan Nair, AIR 2001 SC 2145.*

Thus, it is clear that for committing an offence punishable under the provisions of the Act, accused must be a public servant on the date of commission of offence and if he ceases to be public servant of the date when cognizance is taken then no sanction is required otherwise it would lead to absurd result as observed by the Supreme Court in Para 7 Kalicharan Mahapatra (supra) as under :-

"7. There is no indication anywhere in the above provisions that an offence committed by a public servant under the Act would vanish off from penal liablity at the moment he demits his office as public servant. His being a public servant is necessary when he commits the offence in order to make him liable under the Act. He can not commit any such offence after he demits his office. If the interpretation now sought to be placed by the appellant is accepted, it would lead to the absurd position that any public servant could commit the offences under the Act soon before retiring or demitting his office and thus avert any prosecution for it or that when a public servant is prosecuted for an offence under the Act, he can secure an escape by protracting the trial till the date of superannuation."

●

328. INTERPRETATION OF STATUTES :

Heading or title prefixed to section, use of in interpretation - Heading can be used only when enacting words are ambiguous - Law explained.

Raichurmatham Prabhakar and another Vs. Rawatmal Dugar

Reported in 2004 AIR SCW 3591

Held :

The view is now settled that the Headings or Titles prefixed to sections or group of sections can be referred to in construing an Act of the Legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the Headings or Titles. According to one view, the Headings might be treated as preambles to the provisions following them so as to be regarded as giving the key to opening the mind of the draftsman of the clauses arranged thereunder. According to the other view, resort to Heading can only be taken when the enacting words are ambiguous. They cannot control the meaning of plain words but they may explain ambiguities. (See : *Principles of Statutory Interpretation by Justice G. P. Singh, Ninth Edition 2004, pp. 152, 155*). In our opinion, it is permissible to assign the heading or Title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject- matter dealt with thereunder. The Heading or Title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject-matter dealt with by the enactment underneath; though the name would always be brief

having its own limitations. In case of conflict between the plain language of the provision and the meaning of the Heading or Title, the Heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.

●

329. CRIMINAL TRIAL :

Appreciation of evidence - Reaction of witnesses to the incident- Human behaviour varies from person to person- Evidence of a witness not to be discarded because he did not react in any particular manner- Law explained.

State of Uttar Pradesh Vs. Devendra Singh

Reported in 2004 AIR SCW 3656

Held :

Prosecution examined primarily three witnesses to substantiate its accusations. They are PWs 2 and 3 who claimed to have been the accused in the company of the deceased just prior to the occurrence and PW-4 who claimed to be an eye-witness. He stated to have seen the accused throttling the deceased. The High Court found that the evidence of PW-4 did not inspire confidence. His conduct was unnatural. It was accepted that he had not disclosed about his having seen the occurrence for about three days. The High Court also noticed that the said witness at one place had admitted that he had not seen the occurrence but during his examination later on the next day again stated that he had seen the occurrence. In this background the witness was held to be unreliable.

Human behaviour varies from person to person. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start willing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. (See *Rana Partap and others v. State of Haryana, 1983 (3) SCC 327*).

As rightly noted by the trial Court, the witness was a young lad and according to his testimony the accused was a hardened criminal with records of violence. It is his evidence that the he was threatened by the accused there fore, his silence in not telling others for the some time cannot, in the circumstances of the case, he held to be suspicious and unnatural.

●

330. CONSUMER PROTECTION ACT, 1986- Sections 21 and 22 (1)
Jurisdictional competence of various Forums under the Act - Capricious or arbitrary or negligent exercise or non-exercise of power by public authorities - Resulting in physical, mental or emotional suffering, insult, injury or loss - Commission/Forum may award compensation against concerned public authorities fixing personal liability.
Ghaziabad Development Authority Vs. Balbir Singh
Judgment dt. 17.03.2004 by the Supreme Court in Civil Appeal No. 7173 of 2002, reported in (2004) 5 SCC 65

Held :

Thus the law is that the Consumer Protection Act has a wide reach and the Commission has jurisdiction even in cases of service rendered by statutory and public authorities. Such authorities become liable to compensate for misfeasance in public office i.e. an act which is oppressive or capricious or arbitrary or negligent provided loss or injury is suffered by a citizen. The word compensation is of a very wide connotation. It may constitute actual loss or expected loss and may extend to compensation for physical, mental or even emotional suffering, insult or injury or loss. The provisions of the Consumer Protection Act enable a consumer to claim and empower the Commission to redress any injustice done. The Commission or the Forum is entitled to award not only value of goods or services but also to compensate a consumer for injustice suffered by him. The Commission/Forum must determine that such sufferance is due to mala fide or capricious or oppressive act. It can then determine amount for which the authority is liable to compensate the consumer for his sufferance due to misfeasance in public office by the officers. Such compensation is for vindicating the strength of law. It acts as a check on arbitrary and capricious exercise of power. It helps in curing social evil. It will hopefully result in improving the work culture and in changing the outlook of the officer/ public servant. No authority can arrogate to itself the power to act in a manner which is arbitrary. Matters which require immediate attention should not be allowed to linger on. The consumer must not be made to run from pillar to post. Where there has been capricious or arbitrary or negligent exercise or non-exercise of power by an officer of the authority, the Commission/Forum has a statutory obligation to award compensation. If the Commission/Forum is satisfied that a complainant is entitled to compensation for loss or injury or for harassment or mental agony or oppression, then after recording a finding it must direct the authority to pay compensation and then also direct recovery from those found responsible for such unpardonable behaviour.

●

331. TRANSFER OF PROPERTY ACT, 1882-Section 53-A
Part-performance- Benefit of part-performance cannot be denied-Merely because suit for specific performance has become time barred.
Mahadeva and others Vs. Tanabai

Judgment dt. 20.04.2004 by the Supreme Court in Civil Appeal No. 5993 of 1998, reported in (2004) 5 (SCC) 88

Held :

The singular reason assigned by the High Court for denying the benefit of Section 53-A of the TP Act is not a sound reason by itself in view of the decision of this Court in *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi, (2002) 3 SCC 676.* This Court has held that merely because the suit for specific performance at the instance of the vendee has become barred by limitation that by itself is not enough to deny the benefit of the plea of part-performance of agreement of sale to the person in possession.

●

332. INDIAN PENAL CODE, 1860- Section 361

Kidnapping of a minor girl - 'Enticement', meaning of - Persuading or soliciting the minor to abandon the legal guardianship amounts to enticement - Law explained.

Moniram Hazarika Vs. State of Assam

Judgment dt. 13.04.2004 by the Supreme Court in Criminal Appeal No. 48 of 1998, reported in (2004) 5 SCC 120

Held :

As stated above, the learned counsel for the appellant placed strong reliance on the judgment of this Court in *Varadarajan case, AIR 1965 SC 942.* The facts of that case show that the minor in that case left the house of the legal guardian as per her own choice and not on the basis of any enticement or persuasion on the part of the accused. This is clear from the following observations of this Court in that case : (AIR p. 944, para 7)

> "There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that the did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that."

It is on the basis of the said finding that the minor in that case walked out of the house of her guardian without any inducement from the accused; this Court came to the conclusion that the accused in that case was not guilty of the offence. It is also worthwhile to notice what this Court said about the act of the

accused in such cases which amounts to enticement which is found in para 10 of the said judgment and which reads thus: (AIR p. 945)

> "10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, *he had at some earlier stage solicited or persuaded the minor to do so.*"
>
> (emphasis supplied)

It is clear from the above observations of this Court that if the accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping.

●

333. N.D.P.S. ACT. 1985- Section 50

Search before either Gazetted Officer or Magistrate, choice of- Choice lies with the police officer and not the accused- Law explained.

T.T. Heneefa Vs. State of Kerala

Judgment dt. 21.04.2004 by the Supreme Court in Criminal Appeal No. 1336 of 2002, reported in (2004) 5 SCC 128

Held :

The counsel for the appellant submits that under Section 50 of the NDPS Act, the accused should have been told that he has got a right to be searched in the presence of a gazetted officer or a Magistrate and this option was not given to the appellant and it was argued that in the instant case, the appellant was asked only whether he would like the presence of a Magistrate and in that way there was violation of Section 50 of the NDPS Act. We are unable to agree with the plea raised by the appellant. Ext. P-1, mahazar shows that before the search the appellant was asked whether he would like the presence of a Magistrate, he declined to avail that privilege and thereafter the search was conducted and drug was recovered from his possession.

The plain reading of Section 50 of the NDPS Act does not show that the accused has got a right of option of either a gazetted officer or the Magistrate, rather the option is for the officer who conducts the search. Section 50 of the NDPS Act, relevant portion whereof reads as follows :

> "50... any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate."

If the accused says that search shall be in the presence of a gazetted officer or a Magistrate, the officer can choose any one of them depending upon the availability of gazetted officer or the Magistrate.

●

334. INDIAN PENAL CODE, 1860- Section 149

Expression "common object", meaning and connotation of- Definite roles need not be ascribed to fasten liability under Section 149- Law explained.

Chanda and others Vs. State of U.P. and another

Judgment dt. 29.04.2004 by the Supreme Court in Criminal Appeal No. 241 of 1998, reported in (2004) 5 SCC 141

Held :

The pivotal question is applicability of Section 149 IPC. The said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

●

335. N.D.P.S. ACT, 1985- Section 21

Possession of contraband must be conscious- Contraband found in bundle carried by father - Role of accused was only to take his father on his scooter - No material to show conscious possession by son-Son cannot be held liable.

Narcotics Control Bureau, Jodhpur Vs. Murlidhar Soni and others Judgment dt. 29.04.2004 by the Supreme Court in Criminal Appeal No. 1048 of 1997, reported in (2004) 5 SCC 151

Held :

It is also to be noted that even according to the prosecution case so far as this respondent is concerned, his only role in regard to the contraband was to take his father on his scooter to the place where they were allegedly arrested. The bundle in question which contained the contraband was carried by Murlidhar Soni and there is no material whatsoever to show that the present respondent had the knowledge that the bundle contained any contraband. In our opinion since the prosecution has not placed any material to show the conscious possession of the contraband by the respondent herein and since Murlidhar Soni is dead, we think the contention advanced on behalf of the respondent as to the possession of the contraband by the respondent has to be accepted.

●

336. WORDS AND PHRASES :

Expressions "tax" and "fee", meaning of and difference between. State of Gujarat and others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and others

Judgment dt. 8.04.2004 by the Supreme Court in Civil Appeal No. 6462 of 2001, reported in (2004) 5 SCC 155

Held :

A tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not payment "for services rendered". This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual there is no element of "quid pro quo" between the taxpayer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. But the traditional view that there must be actual quid pro quo has undergone a sea change with the passage of time. Co-relationship between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered. It is increasingly realised that the element of quid pro quo in the strict sense is not a sine qua non for a fee.

●

337. N.D.P.S. ACT, 1985- Sections 42 and 43
Applicability of - Search of public conveyance at public place- Section 43 applicable and not Section 42.
State of Haryana Vs. Jarnail Singh and others
Judgment dt. 29.04.2004 by the Supreme Court in Criminal Appeal No. 918 of 1998, reported in (2004) 5 SCC 188

Held :

The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no application to the facts of this case. Section 42 authorises an officer of the Departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance, etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender.

Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public

conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.

In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in *M. Prabhulal v. Asstt. Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449* that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.

●

338. CRIMINAL PROCEDURE CODE, 1973- Sections 125 and 126
Place of initiating action by the parents - Sub-clause (a) of Section 126 (1) is applicable.
Vijay Kumar Prasad Vs. State of Bihar and others
Judgment dt. 7.04.2004 by the Supreme Court in Criminal Appeal No. 431 of 2004, reported in (2004) 5 SCC 196

Held :

Section 125 deals with various categories of persons who can claim maintenance. Sections 125 and 126 of the Code appear in Chapter IX which carries the heading "Order for maintenance of wives, children and parents".

Section 125 (1) (d) relates to the father or the mother, unable to maintain himself or herself.

Section 126 (1) which is relevant for the purpose of this case reads as follows :

> "126. (1) Proceedings under Section 125 may be taken against any person in any district -
>
> (a) where he is, or
>
> (b) where he or his wife resides, or
>
> (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child".

The position of law relating to proper jurisdiction was highlighted by this Court in *Jagir Kaur v. Jaswant Singh, AIR 1963 SC 1521* as follows : (AIR pp. 1523-24, para 5)

> "The crucial words of sub-section (8) are, 'resides', 'is' and 'where he last resided with his wife'. Under the Code of 1882 the Magistrate of the district where the husband or father, as the case may be, resided

only had jurisdiction. Now the jurisdiction is wider. It gives three alternative forums. This in our view, has been designedly done by the legislature to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of the three forums convenient to them. The proceedings under this section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy, as we have pointed out, is ordinarily a helpless person. So the words should be liberally construed without doing any violence to the language."

As noted in the abovesaid judgment, the crucial expression for the purpose of jurisdiction in respect of a petition which is filed by a father is not where "parties reside" and "is".

It is to be noted that clauses (b) and (c) of sub-section (1) of Section 126 relate to the wife and the children under Section 125 of the Code. The benefit given to the wife and the children to initiate proceeding at the place where they reside is not given to the parents. A bare reading of the section makes it clear that the parents cannot be placed on the same pedestal as that of the wife or the children for the purpose of Section 126 of the Code.

●

339. CRIMINAL PROCEDURE CODE, 1973- Sections 154 and 156
Investigation by police officer recording FIR- No statutory bar against investigation by an officer who lodges the FIR- Law explained.
State Represented by Inspector of Police, Vigilance & Anti-corruption, Tiruchirapalli, T.N. Vs. V. Jayapaul
Judgment dt. 22.03.2004 by the Supreme Court in Criminal Appeal No. 359 of 2004, reported in (2004) 5 SCC 223

Held :

There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant (Inspector of Police, Vigilance) from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not, in our view, disqualify him from taking up the investigation of the cognisable offence. A suo motu move on the part of the police officer to investigate a cognisable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code. The scheme of Sections 154, 156 and 157 was clarified thus by Subba Rao, J. speaking for the Court in *State of U.P. v. Bhagwant Kishore Joshi, AIR 1964 SC 221* (AIR p. 223, para 8)

> "Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognisable offence. Section 156 thereof authorises such an officer to investigate any cognisable offence prescribed therein. Though ordinarily investigation is under-

taken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise".

In fact, neither the High Court found nor was any argument addressed to the effect that there is a statutory bar against the police officer who registered the FIR on the basis of the information received taking up the investigation.

Though there is no such statutory bar the premise on which, the High Court quashed the proceedings was that the investigation by the same officer who "lodged" the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstance; of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on has own, the investigation would necessarily be unfair or biased.

●

340. CRIMINAL PROCEDURE CODE, 1973- Section 156

Investigation by police officer who lodged/recorded FIR himself- No rule that such police officer cannot investigate the case- Law explained.

S. Jeevanantham Vs. State Through Inspector of Police, T.N.

Judgment dt. 21.04.2004 by the Supreme Court in Criminal Appeal No. 28 of 2003, reported in (2004) 5 SCC 230

Held :

We heard the learned counsel for the appellants. The counsel for the appellants contended that PW 8, the Inspector after conducting search prepared the FIR and it was on the basis of the statement of PW 8 the case was registered against the appellants and it is argued that PW 8 was the complainant and he himself conducted the investigation of the case and this is illegal and the entire investigation of the case is vitiated. Reliance was placed on the decision in *Megha Singh v. State of Haryana, (1996) 11 SCC 709* wherein this Court observed that the constable, who was the de facto complainant had himself investigated the case and this affects impartial investigation. This Court said that the Head Constable who arrested the accused, conducted the search, recovered the pistol and on his complaint FIR was lodged and the case was initiated and later he himself recorded the statement of the witnesses under Sec-

tion 161 Cr.PC as part of the investigation and such practice may not be resorted to as it may affect fair and impartial investigation. This decision was later referred to by this Court in *State v. V. Jayapaul, (2004) 5 SCC 223* wherein it was observed that: (SCC p. 227, para 6)

> "We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done..."

In the instant case, PW 8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellants was narcotic drug and the counsel for the appellants could not point out any circumstances by which the investigation caused prejudice or was biased against the appellants. PW 8 in his official capacity gave the information, registered the case and as part of his official duty later investigated the case and filed a charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation.

●

341. TRADE MARKS ACT, 1999- Section 27 (b)

Intellectual property- Descriptive trade mark, passing off of- Descriptive trade- mark also entitled to protection under law- Law explained. Godfrey Philips Indian Ltd. Vs. Girnar Food & Beverages (P) Ltd. Judgment dt. 20.4.2004 by the Supreme Court in Civil Appeal No. 5611 of 2001, reported in (2004) 5 SCC 257

Held :

The appellant filed an application in the suit for an interim injunction. This was allowed by the learned Single Judge. The respondent appealed before the Division Bench. The Division Bench allowed the appeal. It upheld the learned Single Judge's view that the appellant's products had displayed the mark "SUPER CUP" prominently and "Tea City" did not occupy a prominent position and rejected the respondent's submission that the trade mark of the appellant was a composite one of "Tea City SUPER CUP". The Division Bench also upheld the Single Judge's opinion that the appellant's trade mark was "SUPER CUP". However, the Division Bench held that the words "SUPER" referred to the character or quality of the tea and was merely a laudatory word and the word "CUP" referred to a cup of tea. Accordingly, the conclusion of the Division Bench was that the phrase "SUPER CUP" was descriptive and laudatory of the goods of the appellant and, therefore, the appellant was not entitled to any order of injunction.

Without going into the question whether the conclusion arrived at by the Division Bench that the trade mark is descriptive is correct or not, it appears to us, and as is conceded by both parties before us, that the enunciation of the principle of law with regard to the protection available even in respect of the descriptive trade mark was wrong. A descriptive trade mark may be entitled to protection if it has assumed a secondary meaning which identifies it with a particular product or as being from a particular source.

●

342. CONSTITUTION OF INDIA- Article 311

Applicability of Article 311- It applies only to persons holding civil posts- "Civil Post", meaning and connotation of - Law explained.

Dr. Gurjeewan Garewal (Mrs) Vs. Dr. Sumitra Dash (Mrs) and others

Judgment dt. 12.04.2004 by the Supreme Court in Criminal Appeal No. 2303 of 2004, reported in (2004) 5 SCC 263

Held :

At the outset it is to be mentioned that Article 311 cannot be automatically invoked in all the instances where a person is not given an opportunity of hearing. Article 311 confers certain safeguards upon persons employed in civil capacities under the Union of India or a State. Only persons who are holding *"civil posts"* can claim the protection provided under Article 311. The 1st respondent could claim the protection of Article 311 only if she holds a "civil post". A Constitution Bench of this Court in *State of Assam v. Kanak Chandra Dutta, AIR 1967 SC 884* has explained the meaning of "civil post". Here it was held that :

> "There is no formal definition of 'post' and 'civil post'. The sense in which they are used in the services chapter of Part XIV of the Constitution is indicated by their context and setting... a civil post means a post not connected with defence outside the regular services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State.... There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and *it is a question of fact in each case whether there is a relation between the State and the alleged holder of a post."* (AIR p. 886, para 9) (emphasis supplied)

●

343. CIVIL PROCEDURE CODE, 1908 - O.41 Rr. 4 and 33

Several defendants filing separate appeals against the decree on grounds common to all - Dismissal of one appeal, effect of- Remaining appeals do not become infructuous on this ground - Law explained

Bajranglal Shivcharai Ruia Vs. Shashikant N. Ruia and others

Judgment dated 23.3.2004 by the Supreme Court in Civil Appeal No. 5293 of 1993, reported in (2004) 5 SCC 272

Held :

The respondents then contend that, even if the appeal is not liable to be dismissed on the principle of res judicata, even otherwise the appeal should be dismissed as it may result in conflicting decrees. Upon dismissal for default of Civil Appeal No. 7490 of 1993, the decree made by the High Court became final as against Shyamsunder. If the present appeal is allowed, resulting in setting aside the decree or making any modification thereof, it would result in the anomalous situation of there being conflicting decrees between the same parties, arising out of the same cause of action, is the contention.

In our view, this contention has no merit. Where there are several defendants, who are equally aggrieved by a decree on a ground common to all of them, and only one of them challenges the decree by an appeal in his own right, the fact that the other defendants do not choose to challenge the decree or they have lost their right to challenge the decree, cannot render the appeal of the appealing defendant infructuous on this ground. In fact, Rule 4 and Rule 33 of Order 41 CPC are enacted to deal with such a situation.

●

344. CIVIL PROCEDURE CODE, 1908 - O. 20 R. 12

Mesne profits and rent proceeds, difference between - Law explained.

Union of India Vs. Banwari Lal & Sons (P) Ltd.

Judgement dated 12.4.2004 by the Supreme Court in Civil Appeal No. 1531 of 1999, reported in (2004) 5 SCC 304

Held :

In *Rao, Kameshwara: Law of Damages & Compensation (5th Edn., Vol. I, p. 528),* the learned author states that right to mesne profits presupposes a wrong whereas a right to rent proceeds on the basis that there is a contract. But there is an intermediate class of cases in which the possession though not wrongful in the beginning assumes a wrongful character when it is unauthorisedly retained and in such cases, the owner is not entitled to claim mesne profits but only the fair rent. In the present case, in view of the permission granted by this Court enabling the appellant to use and occupy the property up to 31.3.1993, it cannot be said that the possession of the appellant was illegal and wrongful and in the nature of trespass. In the circumstances, damages were claimable not on the basis of mesne profits but on the basis of fair rent.

●

345. CRIMINAL PROCEDURE CODE, 1973 - Section 464

Power of Appellate or revisional Courts to convict where a particular charge was not framed - Law explained.

Dalbir Singh Vs. State of U.P.

Judgment dated 8.4.2004 by the Supreme Court in Criminal Appeal No. 479 of 1999, reported in (2004) 5 SCC 334

Held :

There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 CrPC, it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that *Sangaraboina Sreenu, (1997) 5 SCC 348* was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.

●

346. CRIMINAL PROCEDURE CODE, 1973 - Section 173 (8)

Further investigation - Section 173 (8) contemplates further investigation even after court has taken cognisance in the matter - Delay in conclusion of trial - No hindrance in carrying out further investigation - Law explained

Hasanbhai Valibhai Qureshi Vs. State of Gujarat & ors

Judgment dated 5.4.2004 by the Supreme Court in Criminal Appeal No. 421 of 2004, reported in (2004) 5 SCC 347

Held :

Coming to the question whether a further investigation is warranted, the hands of the investigating agency or the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at the truth.

Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted.

In *Ram Lal Narang v. State (Delhi Admn.), (1979) 2 SCC 322* it was observed by this Court that further investigation is not altogether ruled out merely

because cognisance has been taken by the Court. When defective investigation comes to light during course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

●

347. MOTOR VEHICLES ACT, 1988 - Sections 163 (A) and 166

Ambit and scope of Section 163 (A) - Claimant can pursue his remedy either under S. 163 (A) or under S.166 - S.163 (A) contemplates strict liability in respect of persons whose annual income is upto Rs. 40,000/- - Law explained.

Deepal Girishbhai Soni and others Vs. United India Insurance Co. Ltd., Baroda

Judgement dated 18.3.2004 by the Supreme Court in Civil Appeals No. 3126 of 2002, reported in (2004) 5 S.C.C. 385 (3 Judge Bench)

Held :

Section 163-A was, thus, enacted for grant of immediate relief to a section of the people whose annual income is not more than Rs 40,000 having regard to the fact that in terms of Section 163-A of the Act read with the Second Schedule appended thereto, compensation is to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors relevant therefor. An award made thereunder, therefore, shall be in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature. The note appended to column 1 which deals with fatal accidents makes the position furthermore clear stating that from the total amount of compensation one-third thereof is to be reduced in consideration of the expenses which the victim would have incurred towards maintaining himself had he been alive. This together with the other heads of compensation as contained in columns 2 to 6 thereof leaves no manner of doubt that Parliament intended to lay a comprehensive scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicle or any other fault arising out of use of a motor vehicle.

Apart from the fact that compensation is to be paid by applying multiplier method under the Second Schedule other relevant factors, namely, reduction of one-third in consideration of the expenses which the victim would have incurred towards maintaining himself, general damages in case of death as also in the case of injuries and disabilities as also disability in non-fatal accidents, a notional income for compensation to those who had no income prior to accident are provided for, are required to be considered which is also a clear pointer to the fact that thereby Parliament intended to provide for a final amount of compensation and not an interim one.

The scheme envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set-off against a higher compensation unlike Section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs 40,000 or less is covered thereunder whereas Sections 140 and 166 cater to all sections of society.

It may be true that Section 163-B provides for an option to a claimant to either go for a claim under Section 140 or Section 163-A of the Act, as the case may be, but the same was inserted *ex abundanti cautela* so as to remove any misconception in the minds of the parties to the lis having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that Section 166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims both under Section 163-A and Section 166 does not arise. If the submission of the learned counsel is accepted the same would lead to an incongruity.

We, therefore are of the opinion that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both.

In *Kodala, (2001) 5 SCC 175* the contention of the claimant that the right to get compensation is in addition to the no-fault liability was, thus, rightly rejected. In agreement with Kodala we are also of the opinion that unlike Sections 140 and 141 of the Act Parliament did not want to provide additional compensation in terms of Section 163-A of the Act.

In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that Parliament intended to insert a non obstante clause of wide nature which would mean that the provisions of Section 163-A would apply

despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.

Conclusion

We, therefore, are of the opinion that Kodala has correctly been decided. However, we do not agree with the findings in Kodala that if a person invokes provisions of Section 163-A, the annual income of Rs 40,000 per annum shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs 40,000 can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.

●

348. CRIMINAL PROCEDURE CODE, 1973 - Sections 391 and 311
Additional evidence - Witness stating to depose differently than his earlier statement - Appellate Court may grant such prayer considering genuineness of such prayer - Power to be exercised in exceptional or extraordinary situation and not in routine manner - Law explained.
Anil Sharma and others vs. State of Jharkhand
Judgment dated 30.4.2004 by the Supreme Court in Criminal Appeal No. 622 of 2003, reported in (2004) 5 SCC 679

Held :

It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine or cavalier manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court ultimately can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

●

349. WORDS AND PHRASES :

"Abandonment" and "waiver" - Meaning of and distinction between.
Dr Karan Singh Vs. State of J&K and another
Judgment dated 13.4.2004 by the Supreme Court in Civil Appeal No. 5943 of 1997, reported in (2004) 5 SCC 698

Held :

In *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd., AIR 1953 SC 98* this Court stated : (AIR p. 101, para 12)

> "Two things are thus clear, namely, (1) that abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself, and (2) that mere waiver, acquiescence or laches which is short of abandonment of right or estoppel does not disentitle the holder of shares who has a vested interest in the shares from challenging the validity of the purported forfeiture of those shares."

In the same decision the Supreme Court also made it clear that: (AIR p. 105, para 21)

> "A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by 'mere' laches, or 'mere' standing by or even by saying that he has abandoned his right, unless there is something more, namely, inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is so say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver 'as such' which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed."

Waiver

In *Municipal Corpn. of Greater Bombay v. Dr. Kakimwadi Tenants Assn., 1988 Supp. SCC 55* it was held : (SCC p. 65, para 14)

> "In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case."

●

350. M.P. ACCOMMODATION CONTROL ACT, 1961- Section 12 (1)
Eviction on the ground of bonafide need of landlord- Death of landlord during appeal- The need of landlord should be seen on the date of filing of the suit- It need not continue till decree is passed by final Court- Law explained.
Shakuntala Bai and others vs. Narayan Das and others
Judgement dated 5.5.2004 by the Supreme Court in Civil Appeal Nos. 4496-97 of 1998, reported in (2004) 5 SCC 772

Held :

Sub-section (1) of Section 12 of the Act says "no suit shall be filed in any civil court against a tenant for his eviction...". The language employed does not say "no decree shall be passed...". So the bar created is against filing of the suit except on one of the grounds enumerated in clauses (a) to (p) of the sub-section. Therefore what is to be seen is whether the suit was validly filed i.e. whether on the date of filing of the suit one of the grounds was made out. A suit validly filed cannot be scuttled or held no longer maintainable in absence of any specific provision to that effect. Therefore the principle that "the need of the landlord must exist till the decree for eviction is passed by the last court and attains finality" can even otherwise have no application here in view of the express language used in the section.

As the preamble shows, the Madya Pradesh Accommodation Control Act, 1961 has been enacted for expeditious trial of eviction cases on the ground of bona fide requirement of landlords and generally to regulate and control eviction of tenants. If the subsequent event like the death of the landlord is to be taken note of at every stage till the decree attains finality, there will be no end to litigation. By the time a second appeal gets decided by the High Court, generally a long period elapses and on such a principle if during this period the landlord who instituted the proceedings dies, the suit will have to be dismissed without going into merits. The same thing may happen in a fresh suit filed by the heirs and it may become an unending process. Taking into consideration the subsequent events may, at times, lead to rendering the whole proceedings taken infructuous and colossal waste of public time. There is no warrant for interpreting a rent control legislation in such a manner, the basic object of which is to save harassment of tenants from unscrupulous landlords. The object is not to deprive the owners of their properties for all times to come.

●

351. CIVIL PROCEDURE CODE, 1908- Order 6 Rule 2
Nomenclature of an application- Duty of counsel to indicate correct provision of law-Law stated.
Jeet Mohinder Singh Vs. Harminder Singh and another
Judgment dated 26.7.2004 by the Supreme Court in Civil Appeal No. 4437 of 2004, reported in (2004) 6 SCC 26

Held :

Though the nomenclature of an application is really not material and the substance is to be seen, yet it cannot be said that a party shall be permitted to indicate any provision and thereafter contend that the nomenclature should be ignored. Duty is cast on the parties to properly frame their applications and indicate the provisions of law applicable for making the application. Nomenclature may not be normally material. But there is a purpose in indicating the nomenclature in a clear and precise manner. Though it is the substance and not the form which is material but as indicated above, that cannot be a reason to quote an inappropriate provision of law and then say: "Don't look at the nomenclature". The care and caution which is required to be taken cannot be diluted to absurd limits.

●

352. CONSTITUTION OF INDIA-Article 254

State Act and Central Act on the same subject- Question of repugnancy- State Act would prevail where assent of the President has been received to it.

Engineering Kamgar Union Vs. Electro Steels Castings Ltd. and another

Judgment dated 16.4.2004 by the Supreme Court in Civil Appeal No. 86 of 2000, reported in (2004) 6 SCC 36

Held :

In a case, thus, where both the State Act and the Central Act have been enacted in terms of List III of the Seventh Schedule of the Constitution of India, the question of repugnancy as envisaged under Article 254 would arise. In that type of cases, it is well settled that in absence or Presidential assent, the parliamentary Act would prevail and where the assent has been received, the State Act would. *[See* also *M.P. All Permit Owners Assn. v. State of M.P., (2004) 1 SCC 320].*

●

353. CONSTITUTION OF INDIA- Articles 226, 227

Jurisdiction of High Court under Articles 226 and 227 regarding interlocutory orders- Effect of Amendment of Section 115 C.P.C. by Act number 46 of 99- Law explained.

Yeshwant Sakhalkar and another Vs. Hirabat Kamat Mhamai and another

Judgment dated 30.04.2004 by the Supreme Court in Civil Appeal No. 2962 of 2004, reported in (2004) 6 SCC 71

Held :

The question as to whether the application of Article 227 of the Constitution of India could be maintainable or not has been answered by this Court in *Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675* wherein it was held : (SCC pp. 694-96, para 38)

"38. 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 be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory juisdiction 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 above said 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 thereafter 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."

●

354. WORDS AND PHRASES :

Expression 'Compensation', meaning of.

Pohla Singh Alias Pohla Ram (D) By LRs. and others Vs. State of Punjab and others

Judgment dated 05.05.2004 by the Supreme Court in Civil Appeal No. 6741 of 1999, reported in (2004) 6 SCC 126

Held :

The dictionary meaning of the word "compensation" is as under: *Black's Law Dictionary*

"money given to compensate loss or injury".

Webster's Third New *International Dictionary*

"the act or action of making up, making good or counterbalancing: rendering equal:"

P. Ramanatha Aiyar: *Law Lexicon*

"something given or obtained as an equivalent; ... an equivalent given for property taken or for any injury done to another:"

●

355. ADVERSE POSSESSION :

Possession of mortgagee, nature of- Such possession remains permissive unless shown that it became adverse.
Virendra Nath Vs. Mohd. Jamil and others
Judgment dated 14.07.2004 by the Supreme Court in Civil Appeal No. 4007 of 1999, reported in (2004) 6 SCC 140

Held :

In case of a mortgage, the mortgagor has no right in law to eject a mortgagee until the mortgage is redeemed. Even though the mortgage was not by any registered instrument, it is not disputed that the possession of the land was taken by Jan Mohammed as a mortgagee. If his entry on the land was as mortgagee, the nature of his possession would continue to be as a mortgagee unless there is evidence to show that, at any point of time, he asserted his adverse title, by repudiating his possession as mortgagee and continued in adverse possession for the prescribed period of more than 12 years to the knowledge of the mortgagor.

●

356. TRADEMARKS ACT, 1999- Section 2 (1) (m)

Intellectual property- Trademarks and domain name, distinction between- Infringement of domain name- Applicability of law of trademark and passing off- Law explained.
Satyam Infoway Ltd. Vs. Sifynet Solutions (P) Ltd.
Judgment dated 06.05.2004 by the Supreme Court in Civil Appeal No. 3028 of 2004, reported in (2004) 6 SCC 145

Held :

A "trade mark" has been defined in Section 2(1) (zb) of the Trade Marks Act, 1999 (hereafter referred to as "the Act") as meaning:

> "2. (1) (zb) 'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours:"

Therefore a distinctive mark in respect of goods or services is a "trade mark".

A "mark" has been defined in Section 2(1) (m) as including "a device, brand, heading, label, ticket, *name*, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof" (em-

phasis supplied) and a "name" includes any abbreviation of a name [Section 2(1)(k)].

"Goods" have been defined in Section 2(1) (j) as meaning "anything" which is the subject of trade or manufacture, and "services" has been defined in Section 2(1)(z) as meaning:

> "2. (1)(z)... service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising."

Analysing and cumulatively paraphrasing the relevant parts of the aforesaid definitions, the question which is apposite is whether a domain name can be said to be a word or name which is capable of distinguishing the subject of trade or service made available to potential users of the internet.

The original role of a domain name was no doubt to provide an address for computers on the internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the commercial field, each domain-name owner provides information/services which are associated with such domain name. Thus a domain name may pertain to provision of services within the meaning of Section 2 (1) (z). A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding on-line internet location (Ryder, Rowdney D. ; Intellectual Property and the Internet, pp. 96-97). Consequently a domain name as an address must, of necessity, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identify becomes critical.

> "As more and more commercial enterprises trade or advertise their presence on the web, domain names have become more and more valuable and the potential for dispute is high. Whereas a large number of trade marks containing the same name can comfortably coexist because they are associated with different products, belong to business in different jurisdictions, etc., the distinctive nature of the domain name providing global exclusivity is much sought after. The fact that many consumers searching for a particular site are likely, in the

first place, to try and guess its domain name has further enhanced this value.(See- Rowland, Diane and Macdonald Elizabeth; Information Technology Law, 2nd edn. P. 521)

The answer to the question posed in the preceding paragraph is therefore in the affirmative.

The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing-off action. It would depend upon the volume of sales and extent of advertisement.

The second element that must be established by a plaintiff in a passing-off action is misrepresentation by the defendant to the public. The word misrepresentation does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff. What has to be established is the likelihood of confusion in the minds of the public (the word "public" being understood to mean actual or potential customers or users) that the goods or services offered by the defendent are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the "imperfect recollection of a person of ordinary memory".

The third element of a passing-off action is loss or the likelihood of it.

The use of the same or similar domain name may lead to a diversion of users which could result from such users mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/ users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar website which offers no such services. Such users could well conclude that the first domain-name owner had misrepresented its goods or services through its promotional activities and the first domain-owner would thereby lose its custom. It is appar-

ent, therefore, that a domain name may have all the characteristics of a trade mark and could found an action for passing off.

However, there is a distinction between a trade mark and a domain name which is not relevant to the nature of the right of an owner in connection with the domain name, but is material to the scope of the protection available to the right. The distinction lies in the manner in which the two operate. A trade mark is protected by the laws of a country where such trade mark may be registered. Consequently, a trade mark may have multiple registration in many countries throughout the world. On the other hand, since the internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require worldwide exclusivity but also that national laws might be inadequate to effectively protect a domain name. The lacuna necessitated international regulation of the domain name system (DNS). This international regulation was effected through WIPO and ICANN. India is one of the 171 States of the world which are members of WIPO. WIPO was established as a vehicle for promoting the protection, dissemination and use of intellectual property throughout the world. Services provided by WIPO to its member States include the provision of a forum for the development and implementation of intellectual property policies internationally through treaties and other policy instruments.

●

357. CRIMINAL TRIAL :

Circumstantial evidence - Conviction solely on the basis of circumstantial evidence permissible - Law explained.

Vilas Pandurang Patil Vs. State of Maharashtra

Judgment dated 06.05.2004 by the Supreme Court in Criminal Appeal No. 367 of 1999, reported in (2004) 6 SCC 158

Held :

Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue, which taken together form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See-*Hukam*

Singh v. State of Rajasthan, (1977) 2 SCC 99. Eradu v. State of Hyderabad, AIR 1956 SC 316, Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330, State of U.P. v. Sukhbasi, 1985 Supp. SCC 79, Balwinder Singh v. State of Punjab, (1987) 1 SCC 1 and *Ashok Kumar Chatterjee v. State of M.P, 1989 Supp. (1) SCC 560)* The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab, AIR 1954 SC 621* it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P., (1996) 10 SCC 193* wherein it has been observed thus: (SCC pp. 206-07, para 21)

> "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

●

358. RENT AND EVICTION :

Change of user- Accommodation let out for commercial purposes- Lease deed specifying use for particular commercial purpose- Change to another purpose, effect of- Law stated.

Goa Urban Cooperative Bank Ltd. Vs. Noor Mohd. Sheikh Mussa and another

Judgment dated 05.7.2004 by the Supreme Court in Civil Appeal No. 4577 of 1999, reported in (2004) 6 SCC 166

Held :

Letting out the premises for commercial purpose can have different colours and hues depending upon the purpose for which they are let out. For example, a non-residential premises can be let out for commercial purpose for running a shop, office, restaurant, hotel, cinema and godown for storing of the goods, etc. If it is specified in the lease deed that the premises be used for a particular commercial purpose then the change of use of the premises falling in another category of purpose would amount to change of user of the building falling within the four corners of Section 22 (2) (b) (ii) of the Act (Goa Rent Act, 1968....) and the landlord would be entitled to seek eviction of the tenant for having changed the use of the suit premises for a purpose other than for which it was let out. When the use of the building is identified in the lease deed as an "office", it would be taken that the parties had used the expression "office" in

the sense in which the "office" is understood in common parlance or as indicated by its dictionary meaning.

●

359. CRIMINAL PROCEDURE CODE, 1973- Section 389
Suspension of execution of sentence and bail, difference between- Requirement of recording reasons for suspension- Order not be passed in routine manner.
State of Haryana Vs. Hasmat
Judgment dated 26.07.2004 by the Supreme Court in Criminal Appeal No. 715 of 2004, reported in (2004) 6 SCC 175

Held :

Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

The appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the period the accused-respondent was granted parole.

The learned Sessions Judge, Gurgaon by a judgment dated 24-10-2001 had found the accused- respondent guilty. Criminal Appeal No. 100-DB of 2002 was filed by the respondent. The fact that during the pendency of the appeal the accused-respondent was on parole goes to show that initially the accused-respondent was not given the benefit of suspension of execution of sentence. The mere fact that during the period of parole the accused has not misused the liberties does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court was whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view.

In *Vijay Kumar v. Narendra, (2002) 9 SCC 364 and Ramji Prasad v. Rattan Kumar Jaiswal, (2002) 9 SCC 366* it was held by this Court that in cases involving conviction under section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. The impugned order of the High Court does not meet the requirement. In Vijay Kumar case it was held that in considering the prayer for bail in a case involving a serious offence like murder

punishable under Section 302 IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder. These aspects have not been considered by the High Court, while passing the impugned order.

●

360. TRANSFER OF PROPERTY ACT, 1882- Section 41

Transfer by ostensible owner- Transferee, when protected.

Kashmir Singh and others Vs. Panchayat Samiti, Ferozpur and others Judgment dated 13.04.2004 by the Supreme Court in Civil Appeal No. 510 of 1999, reported in (2004) 6 SCC 207

Held :

Faced with this situation as a last resort, learned counsel for the appellant contended that the appellant was a bona fide purchaser for consideration without notice and, therefore, the protection provided under Section 41 of the Transfer of Property Act was available to him. We do not find any force in this submission. Section 41 of the Transfer of Property Act reads:

> "41. *Transfer by ostensible owner.*— Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it.
>
> Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

●

361. CONSTITUTION OF INDIA- Article 226

Compensation- When compensation can be granted in exercise of jurisdiction under Article 226- Law explained.

Hindustan Paper Corpn. Ltd. Vs. Ananta Bhattacharjee and others Judgment dated 28.04.2004 by the Supreme Court in Civil Appeal No. 3512 of 1998, reported in (2004) 6 SCC 213

Held :

The Division Bench of the High Court had directed payment of interest by way of compensation.

The question which arises for consideration is as to whether in exercise of its jurisdiction under Article 226 of the Constitution of India such a direction was permissible in law. We are of the opinion that it was not. Public law remedy for the purpose of grant of compensation can be resorted to only when the fundamental right of a citizen under Article 21 of the Constitution is violated and not otherwise. It is not every violation of the provisions of the Constitution or a

statute which would enable the court to direct grant of compensation. The power of the court of judicial review to grant compensation in public law remedy is limited. The instant case is not one which would attract invocation of the said rule. It is not the case of the respondents herein that by reason of acts of commission and omission on the part of the appellant herein the fundamental right of the respondents under Article 21 of the Constitution has been violated.

●

362. CONSUMER PROTECTION ACT, 1986- Section 14 (1)
Grant of relief under the Act not dependent upon whether consumer made alternative arrangements to reduce loss- Provisions of the Act to be interpreted broadly, positively and purposefully.
H.N. Shankara Shastry Vs. Asstt. Director of Agriculture, Karnataka
Judgment dated 06.05.2004 by the Supreme Court in Civil Appeal No. 2253 of 1999, reported in (2004) 6 SCC 230

Held :

Under Section 14(1) of the Consumer Protection Act, 1986 (for short "the Act"), if the District Forum is satisfied that the goods complained against suffer from any defect, it could grant reliefs which include return of the price of the paddy and also compensation to the consumer for any loss suffered. Granting of relief to the consumer does not depend upon whether he should have made alternative arrangement. In the present case, it was enough for the appellant to establish that the paddy seeds supplied by the respondent were defective.

In this regard, the District Forum and the State Commission have recorded concurrent findings of fact. The State Commission also has not kept in mind the very object of the Act which was enacted to better protect the interest of the consumers. The Act is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation. The provisions of the Act ought to be interpreted in a rational manner for achieving the objective set forth in the Act. The approach of the Forums has to be rational consistent with the purpose of the Act rather than technical. In *Secy. Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha (2004) 1 SCC 305* this Court has expressed that : (SCC p. 312, para 12)

> "Having due regard to the scheme of the Act and purpose sought to be achieved to protect the interest of the consumers better, the provisions are to be interpreted broadly, positively and purposefully...."

●

363. CIVIL PROCEDURE CODE, 1908- Section 20
CONSTITUTION OF INDIA- Article 226
Cause of action, meaning of - It implies a right to sue- Every action must be based upon a course of action.
Kusum Ingots & Alloys Ltd. Vs. Union of India and another
Judgment dated 28.04.2004 by the Supreme Court in Civil Appeal No. 9159 of 2003, reported in (2004) 6 SCC 254.

Held :

Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitute the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. For every action, there has to be a cause of action, if not, the plaint or the writ petition, as the case may be, shall be rejected summarily.

●

364. ADMINISTRATIVE LAW :

Natural justice, principles of- Principles not to be stretched too far- Party remaining absent after proper notice cannot complain that opportunity of hearing was not given.

N.K. Prasada Vs. Government of India and others

Judgment dated 12.04.2004 by the Supreme Court in Civil Appeal No. 3137 of 1999, reported in (2004) 6 SCC 299.

Held :

The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in *Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492* of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties, wherein upon noticing a large number of decisions it was held: (SCC p. 506, para 29)

> "29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby".

The principles of natural justice, it is well settled, must not be stretched too far.

●

365. CRIMINAL PROCEDURE CODE, 1973- Sections 345 and 346

Intentional insult or interruption to Court sitting in judicial proceedings- Ambit, scope and applicability of Section 345- Law explained.

Bar Council of India Vs. High Court of Kerala

Judgment dated 27.04.2004 by the Supreme Court in Writ Petition No. 52 of 2002, reported in (2004) 6 SCC 311

Held :

Section 345 of the Code of Criminal Procedure provides for when an offence as is described under Sections 175, 178, 179 and 180 or 228 of the Indian Penal Code is committed in the view or in the presence of any civil, criminal or revenue court, before rising of the court, the court may detain the offender in custody and take cognisance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished, with a fine of Rs. 200 or imprisonment in default for one month.

Section 346 provides for the procedure where the court is of the opinion that the offender should be imprisoned otherwise than in default of payment of fine or that a fine exceeding two hundred rupees should be imposed on him or such court is for any reason of the opinion that the case should not be disposed of under Section 345, such court after recording the facts constituting the offence and the statement of the accused may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such person before such Magistrate or if sufficient security is not given, shall forward such person in custody to such Magistrate.

Section 345 of the Code of Criminal Procedure deals with five classes of contempt, namely: (i) intentional omission to produce a document by a person legally bound to do so; (ii) refusal to take oath when duly required to take one; (iii) refusal to answer questions by one legally bound to state the truth (iv) refusal to sign a statement made to a public servant when legally required to do so; and (v) intentional insult or interruption to a public servant at any stage of a judicial proceeding.

An advocate practising in the court can also be punished under the aforementioned provisions.

●

366. CIVIL PROCEDURE CODE, 1908- Section 100
Second appeal- Judgment cannot be reversed unless substantial question of law has been framed- Law explained.
Chadat Singh Vs. Bahadur Ram and others
Judgment dated 03.08.2004 by the Supreme Court in Civil Appeal No. 4903 of 2004, reported in (2004) 6 SCC 359

Held :

In *Ishwar Das Jain v. Sohan Lal, (2000) 1 SCC 434* this Court in para 10 has stated thus: (SCC p. 441)

> "10. Now under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

Yet again in *Roop Singh v. Ram Singh, (2000) 3 SCC 708* this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads : (SCC p. 713)

"7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact-finding courts after appreciating the evidence held that the defendant entered into the possession of the premises as a *batai*, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a *batai* agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession [*Thakur Kishan Singh v. Arvind Kumar, (1994) 6 SCC 591*]. Hence the High Court ought not to have interfered with the findings of fact recorded by both the courts below".

●

367. PRACTICE AND PROCEDURE:
Restoration of suit, effect of an ancillary/incidental/ interlocutory orders passed before dismissal- Held, such Orders Would Stand Revived on Restoration Unless Court directs otherwise- Law explained.
Vareed Jacob Vs. Sosamma Geevarghese and others
Judgment dated 21.04.2004 by the Supreme Court in Civil Appeal No. 2634 of 2004, reported in (2004) 6 SCC 378

Held :

17. In the case of *Shivaraya v. Sharnappa, AIR 1968 Mys. 283* it has been held that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders. This was a case under Order 39.

18. In the case of *Saranatha Ayyangar v. Muthiah Moopanar, AIR 1934 Mad. 49* it has been held that on restoration of the suit dismissed for default all

interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall stand revived unless during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.

19. A similar view has been taken by the Patna High Court in the case of *Bankim Chandra v. Chandi Prasad, AIR 1956 Pat. 271* in which it has been held that orders of stay pending disposal of the suit are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit and, therefore, when the suit, dismissed for default, is restored by the order of the court all ancillary orders passed in the suit shall revive, unless there is any other factor on record or in the order of dismissal to show to the contrary. This was also a matter under Order 39.

20. In the case of *Nandipati Rami Reddi v. Nandipati Padma Reddy, AIR 1978 AP 30* it has been held by the Division Bench of the Andhra Pradesh High Court that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.

●

368. CIVIL PROCEDURE CODE, 1908- Order 6 Rule 17
Amendment of pleadings- Amendment sought to plead time barred relief- Discretion of the Court in granting such amendment- Discretion not totally taken away-Law explained.
Pankaja and another Vs. Yellappa (Dead) and others
Judgment dated 05.08.2004 by the Supreme Court in Civil Appeal No. 4983 of 2004, reported in (2004) 6 SCC 415

Held :

So far as the court's jurisdiction to allow an amendment of pleadings is concerned, there can be no two opinions that the same is wide enough to permit amendments even in cases where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held that the dominant purpose of allowing the amendment is to minimise the litigation, therefore, if the facts of the case so permit it is always open to the court to allow applications inspite of the delay and laches in moving such amendment application.

But the question for our consideration is whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limita-

tion prescribed in law, can the court in the exercise of its discretion take away the right accrued to another party by allowing such belated amendments.

The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.

This Court in the case *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co., AIR 1957 SC 357* has held : (AIR p. 362, para 16)

> "16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

This view of this Court has, since, been followed by a three-Judge Bench of this Court in the case of *T.N. Alloy Foundry Co. Ltd. v. T.N. Electricity Board, (2004) 3 SCC 392.* Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing such amendment in the interest of justice.

Factually in this case, in regard to the stand of the defendants that the declaration sought by the appellants is barred by limitation, there is dispute and it is not an admitted fact. While the learned counsel for the defendant- respondents pleaded that under Entry 58 of the Schedule to the Limitation Act, the declaration sought for by the appellants in this case ought to have been done within 3 years when the right to sue first accrued, the appellant-plaintiff contends that the same does not fall under the said entry but falls under Entry 64 or 65 of the said Schedule of the Limitation Act which provides for a limitation of 12 years, therefore, according to them the prayer for declaration of title is not barred by limitation, therefore, both the courts below have seriously erred in not considering this question before rejecting the prayer for amendment. In such a situation where there is a dispute as to the bar of limitation this Court in the case of *Ragu Thilak D. John v. S. Rayappan, (2001) 2 SCC 472 has held: (SCC p. 472)*

> "The amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The

plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case. The plea of limitation being disputed could be made a subject- matter of the issue after allowing the amendment prayed for."

●

369. INDIAN PENAL CODE, 1860- Section 300-A

Medical negligence of doctor- Fixing of criminal liability for such negligence- Standard of negligence required to be proved is that of gross negligence or recklessness- Law explained.

Dr. Suresh Gupta Vs. Govt. of NCT of Delhi and another

Judgment dated 04.08.2004 by the Supreme Court in Criminal Appeal No. 778 of 2004, reported in (2004) 6 SCC 422

Held :

For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in *R. v. Adomaho, (1994) 3 All ER 79 (HL)* relied upon on behalf of the doctor elucidates the said legal position and contains the following observations:

> "Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."

Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to the risk of landing themselves in prison for alleged criminal negligence.

For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors

would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

No doubt, in the present case, the patient was a young man with no history of any heart ailment. the operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so *reckless or grossly negligent* as to make him criminally liable.

Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of *recklessness and deliberate wrongdoing i.e. a higher degree of morally blameworthy conduct.*

To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against the doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

●

370. INDIAN PENAL CODE, 1860- Section 307

Attempt to murder, offence of- Intent coupled with some overt act in execution thereof sufficient- Infliction of bodily injury capable of causing death not essential- Law explained.

Bappa alias Bapu Vs. State of Maharashtra and another

Judgment dated 05.08.2004 by the Supreme Court in Criminal Appeal No. 798 of 2004, reported in (2004) 6 SCC 485

Held :

Section 307 makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in section 307. Thus, it is sufficient to justify a conviction under Section 307 if there

is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. In the instant case, the accused-appellant has been rightly convicted under Section 307 IPC.

Section 307 IPC reads :

> "307 *Attempt to murder*- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned".

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

In *Sarju Prasad v. State of Bihar, AIR 1965 SC 483* it was observed that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not itself sufficient to take the act out of the purview of Section 307 IPC.

The above position was highlighted in *State of Maharashtra v. Balram Bama Patil, (1983) 2 SCC 28, Girija Shankar v. State of U.P., (2004) 3 SCC 793 and Vasant Vithu Jadhav v. State of Maharashtra, (2004) 9 SCC 31.*

●

371. CRIMINAL TRIAL :

Sentence - Undue sympathy to impose inadequate sentence, effect of - It undermines confidence of public in efficacy of Law- Law explained.

Surjit Singh Vs. Nahara Ram and another

Judgment dated 05.08.2004 by the Supreme Court in Criminal Appeal No. 799 of 2004, reported in (2004) 6 SCC 513

Held :

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross- cultural conflict where living law must find answer to new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that, "State of criminal law continues to be- as it should be- a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

●

372. CRIMINAL PROCEDURE CODE, 1973- Section 228

Framing of charge, essentials for- Charge can be framed if there is material showing possibility about commission of the crime as against certainty.

State of A.P. Vs. Golconda Linga Swamy and another

Judgment dated 27.07.2004 by the Supreme Court in Criminal Appeal No. 1180 of 2003, reported in (2004) 6 SCC 522

Held :

At the time of framing the charge it can be decided whether prima facie case has been made out showing commission of an offence and involvement of the charged persons. At that stage also evidence cannot be gone into meticulously. It is immaterial whether the case is based on direct or circumstantial evidence. Charge can be framed, if there are materials showing possibility about the commission of the crime as against certainty.

●

373. SPECIFIC RELIEF ACT, 1963-Section 20

Specific performance of contract- Inadequacy of consideration, effect of- Mere inadequacy of consideration not an unfair advantage within the meaning of Sub-Section 2 of Section 20- Law explained.

P. Dsouza Vs. Shondrilo Naidu

Judgment dated 28.7.2004 by the Supreme Court in Civil Appeal No. 5333 of 1999, reported in (2004) 6 SCC 649

Held :

Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

The decision of this Court in *Nirmala Anand, (2002) 5 SCC 481* may be considered in the aforementioned context.

Raju, J. in the facts and circumstances of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question, preserved all along by Respondents 1 and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held: (SCC p. 501, para 23)

> "23... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapes which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case."

The Court for arriving at the said finding gave opportunities to the parties to settle the matter and Respondents 1 and 2 were prepared to pay up to Rs. 60 lakhs as against the demand of the appellant to the tune of rupees one-and-a-half crores which was subsequently reduced up to Rs. 120 lakhs. In view of the respective stands taken by the parties, the Court inter alia directed Respondents 1 and 2 to pay a sum of Rs. 40 lakhs in addition to the sum already paid by them.

Bhan, J., however, while expressing his dissension in part observed: (SCC pp. 506 & 507, paras 38 & 40)

> "38. It is well settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.
>
> "40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific perform-

ance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

●

374. WORDS AND PHRASES :

Expression 'astrology', meaning of- It is a study of science to some extent.

P.M. Bhargava and others Vs. University Grants Commission and another

Judgment dated 05.05.2004 by the Supreme Court in Civil Appeal No. 5886 of 2002, reported in (2004) 6 SCC 661.

Held :

Before dealing with the contentions raised it will be useful to understand the meaning of the word "astrology" as given in various dictionaries:

> "The science or doctrine of stars, and formerly often used as equivalent to astronomy, but now restricted in meaning to the pseudo-science which claims to foretell the future by studying the supposed influence of the relative positions of the moon, sun and stars on human affairs. (*Webster's New International Dictionary*)
>
> Either a science or a pseudo-science, astrology- the forecasting of earthly and human events by means of observing and interpreting the fixed stars, the sun, the moon and the planets- has exerted a sometimes extensive and a sometimes peripheral influence in many civilizations, both ancient and modern. As a science, astrology has been utilized to predict or affect the destinies in individuals, groups or nations by means of what is believed to be a correct understanding of the influence of the planets and stars on earthly affairs. As a pseudo-science, astrology is considered to be diametrically opposed to the findings and theories of modern Western science. [*Encyclopaedia Britannica* (2nd Edn.)]"

According to the abovementioned standard books, Astrology is a science which claims to foretell the future or make predictions by studying the supposed influence of the relative positions of the moon, sun, planets and other stars on human affairs. It, therefore, requires study of celestial bodies, of their positions, magnitudes, motions and distances, etc. Astronomy is a pure science. It was studied as a subject in ancient India and India has produced great astronomers, long before anyone in the Western world studied it as a subject. Since Astrology is partly based upon study of movement of sun, earth, planets and other celestial bodies, it is a study of science at least to some extent.

●

375. SERVICE LAW :

Re-evaluation, judicial direction for- Direction for re-evaluation should not be given unless rules provide therefore- Law explained.

Pramod Kumar Shrivastava Vs. Chairman, Bihar Public Service Commission, Patna and others

Judgment dated 06.08.2004 by the Supreme Court in Civil Appeal No. 5046 of 2004, reported in (2004) 6 SCC 714

Held :

In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks. This question was examined in considerable detail in *Maharashtra State Board of Secondary* and *Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27.* In this case, the relevant rules provided for verification (scrutiny of marks) on an application made to that effect by a candidate. Some of the students filed writ petitions praying that they may be allowed to inspect the answer-books and the Board be directed to conduct re-evaluation of such of the answer-books as the petitioners may demand after inspection. The High Court held that the rule providing for verification of marks gave an implied power to the examinees to demand a disclosure and inspection and also to seek re-evaluation of the answer-books. The judgment of the High Court was set aside and it was held that in absence of a specific provision conferring a right upon an examinee to have his answer-books re-evaluated, no such direction can be issued.

●

376. CRIMINAL PROCEDURE CODE, 1973- Sections 200, 202 and 203

Power of Magistrate to recall process issued by it under Section 204- Magistrate has no such power- The only remedy lies in invoking Section 482 of the Code- Contra opinion expressed in K.M. Mathew's case [(1992) 1 SCC 217] expressly overruled.

Adalat Prasad Vs. Rooplal Jindal and others

Reported in 2004 (4) MPLJ 1

Held :

Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present if any. If on such examination of the complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint under section 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses has not made out sufficient ground for proceeding. Per contra if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage has materials to proceed, he can proceed to issue process under Section 204 of the Code.

Section 202 contemplates postponement of issue of process: It provides that if the Magistrate on receipt of a complaint if he thinks fit, to postpone the

issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks it fit he may even take evidence of witnesses on oath, and after such investigation, inquiry and the report of the Police if sought for by the Magistrate and if he finds no sufficient ground for proceedings he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 of the Code.

But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *K.M. Mathew Vs. State of Kerala and anr., (1992) 1 SCC 217* before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the Court and making an application for dismissal of the complaint under Section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in involving section 482 of Code.

Therefore, in our opinion the observation of this Court in the case of *Mathew* (supra) that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in *Mathew's*

case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.

●

377. CRIMINAL PROCEDURE CODE, 1973- Section 202 (2)

Inquiry by Magistrate in complaint case exclusively triable by Court of session- Magistrate is required to examine only those witnesses which complainant considers material to prove his case- Law explained.

Rampyare and others Vs. Rampyari

Reported in 2004 (4) MPLJ 54

Held :

Learned counsel next contended that as the offence is triable exclusively by the Court of Session, it was obligatory for the complainant to examine all the witnesses cited in the complaint and if the same was not done, complaint could not have been registered. Non-examination of witnesses vitiates further proceedings.

A perusal of proviso to Sub-Section (2) of Section 202, Criminal Procedure Code reveals that Magistrate is required to call upon the complainant to produce his witnesses and examine them on oath. The duty of Magistrate in complaints about offences triable by Sessions Judge becomes onerous. The legislative intent behind the said proviso must be carried to its logical end. A person facing trial of a serious offence should not be taken by surprise.

But where complainant is satisfied with examination of only certain witnesses before committal of case it is not incumbent on committing Magistrate to record evidence of remaining witnesses. It is evident from the language of the proviso that it does not require all the prosecution witnesses to be examined. Only witnesses of the choice of complainant can be examined. The words "all his witnesses" under proviso to Section 202 (2) do not refer literally to all prosecution witnesses in number rather to all complainant's witnesses to whom he considers material to prove his case.

●

378. HINDU LAW :

Presumption of joint property of joint family- No presumption that business standing in the name of member of the joint family is joint property.

Mohan Vs. Madanlal

Reported in 2004 (4) MPLJ 60

Held :

The Apex Court in *G. Narayan Raju vs. Chamaraju, AIR 1968 SC 1276* has held that :-

> "It is well established that there is no presumption under Hindu Law that business standing in the name of member of the joint family is a

joint family business even if that member is the manager of the joint family. Unless it could be shown that the businesses in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate."

The plaintiff has not adduced any reliable evidence to prove the fact that the business run by the defendant was started from joint family funds. It cannot be disputed that there is a presumption of jointness regarding members of the family, but there is no such presumption of joint property of joint family. Therefore, the plaintiff would have to prove the existence of joint family business and also that the disputed properties were purchased from the income of such business.

●

379. M.P. MONEY LENDERS ACT, 1934-Section 2 (v)

Expression "in the regular course of business" as used in Section 2 (v), meaning of- A person does not become money lender by advancing one or two loans.

Banshilal Kharakwar Vs. Narbada Prasad Chourasia

Reported in 2004 (4) MPLJ 77

Held :

There is no material on record to prove that the plaintiff is a moneylender. There is no evidence that the plaintiff in the regular course of business advances loan. Although the defendant in his examination-in-chief has said that the plaintiff is a moneylender but in the cross examination he admitted that on the basis of hearsay information he has stated that plaintiff is a moneylender. The plaintiff has denied that he is a moneylender. If only an insolated act of advancing money is shown to the Court, it cannot be stated that the same constitutes a regular course of business. The words "in the regular course of business" signify certain degree of system and continuity of transaction. By advancing one or two loans, a person does not become a moneylender. The burden of proving that the plaintiff was a moneylender was on the defendant but the defendant could not give an iota of evidence to prove that the plaintiff was a "moneylender" as defined in M.P. Money Lenders Act.

●

380. MOTOR VEHICLES ACT, 1988- Section 166 (3) before Amendment of 1994

Limitation for filing claim- Accident taking place before coming into effect of the Amendment of 1994 - Claim petition pending on the date when amendment came into effect- Amended provisions applicable

Bhadu Vs. Satish and another

Reported in 2004 (4) MPLJ 81

Held :

At the relevant time the limitation for filing the application seeking compensation under section 166 was as per sub-clause (3) of section 166, which reads as under :

> "(3) No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident :
>
> Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months but not later than twelve months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time".

In case of *Dhannalal Vs. D.P. Vijay Vargiya, 1997 (1) MPLJ 195* the Supreme Court has observed as under : "Section 110-A (3) of the Motor Vehicles Act of 1939 prescribed a period of 6 months for filing an application for compensation from the date of the accident and vested power in the Tribunal to entertain such application even after the expiry of the said period of 6 months. The Motor Vehicles Act, 1988 repealed the earlier provision and prescribed 6 months' period of limitation in sub-section (3) of section 166. The proviso to section 166(3) allowed the Tribunal to entertain the application after the expiry of the said period of 6 months but not later than 12 months from the date of accident. However, the aforesaid sub-section (3) of section 166 was omitted by section 53 of the Motor Vehicles (Amendment) Act, 1994, which came into force with effect from 14-11-1994. The effect of the said amendment is that there is no limitation for filing claim petition before the Tribunal in respect of any accident. It does not appear that the omission of sub-section (3) of section 166 of the Act of 1988 has been done retrospectively. But at the same time, there is nothing in the Amending Act to indicate that benefit of omission/deletion of section 166 (3) is not to be extended to pending cases where a plea of limitation has been raised. In this background the deletion of sub-section (3) from section 166 should be given full effect so that the object of deletion of sub-section by the Parliament is not defeated. If a victim of the accident or heirs of the deceased victim can prefer claim for compensation although not being preferred earlier because of the expiry of the period of limitation prescribed, the victim or the heirs of the deceased shall be in a worse position if the question of condensation of delay in filing the claim petition is pending either before the Tribunal, High Court or the Supreme Court. The matter will be different if any claimant having filed a petition for claim beyond time which has been rejected by the Tribunal or the High Court, the claimant does not challenge the same and allows the said judicial order to become final. The aforesaid Amending Act shall be of no help to such claimant, the reason being that a judicial order saying that such petition of claimants was barred by limitation has

attained finality. But that principle will not govern cases where the dispute as to whether petition for claim having been filed beyond the period of twelve months from the date of the accident is pending consideration either before the Tribunal, High Court or Supreme Court. In such cases, the benefit of amendment of sub-section (3) of section 166 should be extended."

In case of *New India Assurance Company Ltd. vs. C. Padma and another [(2003) 7 SCC 713]* the Supreme Court has followed its earlier view taken in case of Dhannalal (supra).

The ratio of the aforesaid judgments is fully applicable to the facts of the present case. In the present case the claim petition was filed on 11.2.1993 and was pending when the Motor Vehicles (Amendment) Act, 1994 came into force with effect from 14.11.1994 and, therefore, their case was to be treated in accordance with Amended Act in which there is no limitation for filing claim petition. The impugned order dismissing the claim petition is clearly against the mandate of the law and, therefore, deserves to be set aside.

●

381. CIVIL PROCEDURE CODE, 1908- Order 9 Rule 13
'Sufficient cause'- Decree passed against LRs of the deceased defendent without bringing them on record- Application to set aside the ex parte decree by LRs.- Sufficient cause made out.
Thakurdeen Bani and others Vs. Bhailal Gupta
Reported in 2004 (4) MPLJ 84

Held :

The ex parte decree was passed on 9-1-1997. The suit was instituted by present applicants against Ghurau, who is the father of the present respondent. On going through the impugned order it is gathered that defendant Ghurau died in the year 1990 and this fact was known to applicant No. 2., Jamuna Prasad, who was one of the plaintiffs and was examined as non-applicant witness No. 2 in the Court below. The Court below after marshalling the evidence came to hold that since this fact has been admitted by Jamuna Prasad that defendant Ghurau died and present respondent Bhailal is his heir, therefore, according to the Court below, since the present respondent was not arrayed as defendant, though original defendant Ghurau died, the present application for setting aside the ex-parte decree by respondent Bhailal is maintainable and this would amount to "sufficient cause" for his non-appearance. According to me, this finding of the trial Court cannot be said to be an incorrect approach of the law. When the defendant Ghurau died, it was for the plaintiffs to file appropriate application for substitution of his legal representatives, having not done so, the respondent can, under all the corners of law, file an application for setting aside the ex-parte decree. There is a clear finding of the Court below that respondent is a resident of village- Dhumma and his father, who was the defendant in the suit, was residing in village Sonbarsa and, therefore, it cannot be said that respondent was aware of the pendency of the suit.

●

382. SERVICE LAW :

Departmental inquiry- Chargsheet can be issued by an officer below the rank of the appointing authority- Law explained.

M.C. Mittal Vs. State of M.P. and another

Reported in 2004 (4) MPLJ 87

Held :

The legal position is well settled that it is not necessary for the disciplinary authority to issue the charge-sheet under his signature. The charge-sheet can always be issued by an officer below the rank of the appointing authority. The order of removal or termination of the services should not be passed by an officer below the rank of the appointing authority as provided in Article 311 (1) of the Constitution of India. Recently in *State of U.P. vs. Chandrapal Singh, (2003)4 SCC 670* it has been held that the authority competent to dismiss or remove an official need not itself initiate or conduct the enquiry proceedings.

●

383. CRIMINAL PROCEDURE CODE, 1973- Section 164

Statement recorded under Section 164, use of- Such statement is not a substantive piece of evidence- It can be used either for contradiction or for corroboration.

State of M.P. Vs. Ramesh Kumar

Reported in 2004 (4) MPLJ 102

Held :

So far as statement of abovesaid witness under Section 164 (Ex.D/6) is concerned, suffice it to say that the statement recorded under section 164 Criminal Procedure Code is not a substantive piece of evidence. It be can be used either for contradiction or for corroboration. From the very fact that the statement of Rath Kumar was recorded under Section 164 Criminal Procedure Code, it is evident that at one stage of investigation prosecution doubted the veracity and credibility of this witness and, therefore, this witness cannot be relied. In this context, we may profitably rely the Division Bench decision of this Court in the case of *Lallu Singh vs. State of M.P., 1996 MPLJ 452= 1996 (1) Vidhi Bhasvar 269* and another Division Bench decision in the case of *Chhagan vs. State of M.P., 1995 (2) MPWN 150.* A Single Bench decision of this Court in the case of *Shambhu Singh and others vs. State of M.P., 1991 JLJ 53* is also quite relevant to the point.

●

384. CRIMINAL PROCEDURE CODE, 1973- Sections 273 and 299

Proceedings initiated against co-accused in the same case after judgment against other accused persons earlier- Evidence recorded against earlier accused persons cannot be used in the subsequent case- Witnesses should be examined again.

Jagdish Prasad Vs. Bhajan Singh and others

Reported in 2004 (4) MPLJ 152

Held :

Co-accused Chandan, Ramkali and Nathuram were separately tried earlier by the Additional Sessions Judge, Seonda in Sessions Trial No. 4/2001. In the sessions trial against these accused persons, statements of witnesses i.e. PW-1 Munnalal, PW-2 Raghuraj Singh, PW-3 Head Constable Kamta Prasad, PW-4 Pushpa were recorded. PW-5 Arju and PW-6 Govind Das were the eye witnesses to the said incident. The other witnesses, who were examined were PW-7 Siya, PW-8 Malkhan Singh, PW-9 Dr. D.P. Dandatiya PW-10 Dr. G.L. Varma and PW-11 Dharmveer Singh. The Sessions Judge after appreciating the evidence acquitted the co-accused Chandan, Ramkali and Nathuram by the judgment dated 25-3-2004. The State did not prefer any appeal against the said judgment and hence the said judgment attended finality between the parties. Thereafter, the present petition was filed by the present applicants stating that as the Sessions Court has acquitted three co-accused persons in the earlier sessions trial no useful purpose will be achieved by prosecuting the applicants on the basis of statements of the same witnesses, as there is no chance of their conviction. Hence, the sessions trial against the present accused should be quashed.

For this purpose, learned counsel for the applicants has relied on the judgment of the Apex court in case of *Prem Lata and others vs. State of Punjab, AIR 1991 SC 69,* in which the apex Court has held that in case where there are no chances of conviction the criminal proceedings should be quashed in exercise of inherent power under section 482 Criminal Procedure Code, because the Criminal Courts are already overburden and no purpose is achieved by continuing the criminal cases, in which there are no chances of success. The another decision relied on by the learned counsel for the applicants is the judgment of this Court passed in the case of *Smt. Akhilesh vs. State of M.P. MCRC No. 690/2003,* in which this Court has relied on the judgment of Apex Court in the case of *Premlata* (supra) and has quashed in similar situation.

After perusing the said judgment, I find that the situation in the case of *Premlata* (supra) was quite different and not identical in the present case. Though, the Apex Court has laid down that the criminal proceedings should be quashed in case where there is no chances of success. While deciding the case of *Smt. Akhilesh* (supra), this Court has not taken into consideration the provisions of section 273, Criminal Procedure Code, which lays down as under :-

> "**Section 273.** *Evidence to be taken in presence of accused.*- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader."

The said section clearly lays down that any evidence taken in the course of trial or other proceeding shall be taken in the presence of the accused. The Rajasthan High Court in the case of *Balkishan vs. State of Rajasthan, 1998 Cr.L.J.*

2425 has laid down that the evidence recorded before appearance of the accused is not admissible in the evidence. Thus, the evidence recorded in earlier sessions trial against three co-accused Nathuram, Chandan and Ramkali is not admissible in the present case and therefore it cannot be read in the present case to give benefit to the present accused persons. Thus, the judgment of this Court in case of *Smt. Akhilesh* (supra) is per incuriam.

●

385. CIVIL PROCEDURE CODE, 1908- Section 115

Conversion of appeal into revision and vice versa- To meet ends of justice revision can be converted into appeal and vice versa if prescribed conditions are fulfilled.

Omprakash and others Vs. Dwarka Prasad and another

Reported in 2004 (4) MPLJ 168

Held :

It is true that scope of appeal and revision is different, but the Courts have been permitting conversion of appeal into revision and revision into appeal. Therefore, rigid view that appeal cannot be converted into revision or vice versa will not be in the interest of justice. A litigant cannot be penalised on account of technical error or mistake committed by the counsel. To meet the ends of justice, revision can be converted into appeal or appeal can be converted into revision while exercising the discretion and if the following norms are fulfilled, then normally order of conversion of revision into appeal or appeal into revision should be passed :

(i) When revision is converted into second appeal, then before passing the order of conversion, it is to be considered whether substantial question of law arises in the said case, if no substantial question of law arises in the case, revision cannot be converted into second appeal.

(ii) Revision can be converted into appeal if same is filed within time and there is no impediment of limitation. Limitation must be construed from the date of filing of the revision petition or appeal. If the revision or appeal so filed was within limitation, for conversion into appeal or revision, it is to be examined that the appeal or revision, as the case may be, so filed, on the date of institution, was within the limitation and if so, said permission can be granted.

(iii) There is no period of limitation for applying such conversion, but while exercising the powers of conversion, the Court would keep in mind whether appeal or revision, as the case may be, had been instituted within the period prescribed for such proceedings.

We are of the considered opinion that in the case of *Food Corporation of India and another Vs. Munnilal and another, 2003 (2) MPLJ 290* correct law has not been laid down. In this judgment, previous judgments on the point and settled position of law of this Court has not been considered. Ignoring the principle

of "stare decisis" settled practise has been unsettled without considering previous judgments. We have considered the earlier views of this Court and the judgments of other High Courts and that of the Apex Court and we hold that in this case, revision can be converted into miscellaneous appeal.

●

386. CRIMINAL TRIAL:

Appreciation of evidence- Police officer, evidence of- No rule of law or evidence that conviction cannot be recorded on the basis of uncorroborated testimony of a police official.
Manoj Kumar Shukla Vs. State of M.P.
Reported in 2004 (4) MPLJ 179

Held :

The inspector of police of or a constable cannot be considered absolutely as partisan witnesses. The evidence of Police Officials cannot be discredited merely because they are police officials. There is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of police officials even if found reliable unless corroborated by some independent evidence. After careful scrutiny of the evidence of police officials the trial Court found it to be trust worthy and reliable. After carefully perusing the evidence of police officials I also feel that the same inspires confidence and is trustworthy and reliable.

●

387. SERVICE LAW :

Transfer- Mere loss of chances of promotion on inter-divisional transfer no ground to interfere with transfer order- Law explained.
Kamal Singh Vs. State of M.P. and others
Reported in 2004 (4) MPLJ 182

Held:

The main contention of the petitioners are that their seniority is maintained divisionwise and therefore they cannot be transferred out of the division. The argument is per se unseasonable in view of the law laid down by the Division Bench of this Court in the *Dhaniram Ahirwar and another vs. State of Madhya Pradesh and another, 1995 MPLJ page 545,* in the aforesaid case petitioners who were working in the District Courts were transferred from one district to another, seniority of the employees were maintained districtwise and the argument advanced was that transfer from one district to another would adversely affect their chances of promotion. Considering the aforesaid argument it has been held by the Division Bench that transfer being a condition of service a employee is liable to transfer from one district to another and on such transfer the employee carries with his seniority in the previous district without any loss for the service rendered in the previous district. In the case of *Dhaniram Ahirwar* (supra) arguments as were advanced on behalf of the petitioners are indicated in para 3 of the judgment, submission No. (iii) was as under:

"(iii) The transfers adversely affect their seniority and chances of promotion and are, therefore, invalid."

While considering this submission it has been observed as under by the Division Bench after considering various judgments of the Supreme Court :-

"Relying on the decision in *Paresh Chandra Nanndi vs. Controller of Stores, N.E. Railway, Pandu and others, AIR 1971 SC 3359,* this Court held that transfer of a permanent employee and consequent transfer of his lien cannot be challenged when the post to which he is transferred does not carry less pay even if his transfer materially affects his chances of promotion".

"We are bound to follow decisions of the Supreme Court referred to above which draw the distinction between right to be considered for 'promotion' and 'chances of promotion'. *The contention that vacancy on higher post may arise sooner in the parent district and such vacancy may arise only much later in the district to which an employee is transferred, if at all, may affect the employee's chances of promotion but not his right to be considered for promotion, permanent transfer of seniority and transfer of lien.* When such is the case, it cannot be said that the transferred employee's right to be considered for promotion is adversely affected. We, therefore, hold that members of staff of establishments of the subordinate Courts in a particular district are liable to be transferred to another district, that the High Court has power to effect such transfer, the transfer does not affect his seniority or right to be considered for promotion and that the transfers cannot be impugned in the manner attempted by the petitioner. Points answered accordingly." (emphasis supplied).

●

388. ACCOMMODATION CONTROL ACT, 1961 (M.P.)- Section 20 (1) (c) Disclaimer of title- Unless there is attornment of tenancy or a notice of transfer of title in favour of successor rendered, plea of disclaimer cannot be maintained- Law explained.
Bajranglal Verma Vs. Gyaso Bai and others
Reported in 2004 (4) MPLJ 192

Held:

In the case of *C. Chandramohan vs. Sengottalyan and others,* reported in *2000 (1) SCC 451,* it was held by the Apex Court that unless there is a notice of transfer of title in favour of successor landlord or an attornment of tenancy, tenant's assertion that such landlord is merely a co-owner does not amount to denial of title. It has been observed by the Apex Court in that case that to constitute denial of title of the landlord, a tenant should renounce his character as tenant and set up title or right inconsistent with the relationship of landlord and tenant either in himself or in a third person. In that case the defendant had even paid rent to a successor of his previous landlord and in a suit instituted by

the plaintiff the defendant had asserted that though he had been paying rent, but plaintiff alone was not the absolute owner of the property because the original landlord from whom the plaintiff also claims, had left behind him a widow and three daughters also who were also his landlords. In the present case also the appellant has neither claimed title in himself nor has claimed title in any third person but has simply said that besides the sellers of the suit premises to the respondents, his original landlord i.e., Manorama Devi had left some other heirs also.

Again in the case of *Sheela and others vs. Firm Prahlad Rai Prem Prakash,* reported in *(2002) 3 SCC 375,* the Apex Court has observed as follows :-

> "In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of clause (c) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961. To amount to such denial or disclaimer, as would entail forfeiture of tenancy rights and incur the liability to be evicted, the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or in a third party."

●

389. CRIMINAL PROCEDURE CODE, 1973- Sections 398 and 399
Revisional powers of the Sessions Court- Powers under Sections 398 and 399 of the Code can be exercised by Sessions Court- Sections 398 and 399 should be read as one integral whole.
Hansraj Sharma @ Hansu Vs. Shivcharan Sharma
Reported in 2004 (3) MPLJ 485

Held :

By the enactment of the Code of Criminal Procedure, 1973, the Court of Sessions has been clothed with all or any of the powers which may be exercised by the High Court under section 401 (1). This power has been conferred on the Court of Sessions by virtue of section 399. A provision in pari materia with section 436 of the old Code has been retained in the shape of section 398 of the new Code which may, of course, cause over-lapping in the field of powers of the Court of Sessions under sections 398 and 399 of the Code, but Court of Sessions is now clothed with the revisional powers under both sections 398 and 399 of the new Code. It is well settled that the revisional powers are to be read and construed together and not in isolated water tight compartment. Therefore, sections 398 and 399 of the new Code would have to be read together as one integral whole. Therefore, when a Court of Sessions exercises its revisional jurisdiction, the power under both sections 398 and 399 of the Code could be exercised by it and it would be immaterial to investigate as to which specific provision has been actually invoked by it.

The revisional powers of the Court of Sessions by virtue of section 399 of the Code could be substantially equated with those of the High Court under section 401 (1) of the new Code of Criminal Procedure. The words "further enquiry" used in section 398 do not envisage within it the power to direct that person wrongly discharged be summoned or that a charge under any particular section or sections of Indian Penal Code or any other enactment be framed against him and he be put on trial. Therefore, such a direction could not be given under section 398 of the Code of Criminal Procedure. Nevertheless, direction of such nature could legally be given under section 399 read with section 401 (1) of the Code of Criminal Procedure which is repository of the larger powers vested in the Court of Sessions.

●

390. CONTEMPT OF COURTS ACT, 1971- Sections 11 and 15
Jurisdiction of Court trying contempt matter- Rightness or wrongness of order cannot be urged in contempt proceedings- Even if interim order ultimately is vacated or relief not granted finally, will not provide a ground for disobedience.
Prithawi Nath Ram Vs. State of Jharkhand and others
Judgment dt. 24.08.2004 by the Supreme Court in Civil Appeal No. 5024 of 2000, reported in (2004) 7 SCC 261

Held :

While dealing with an application for contempt, the court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision. A similar view was taken in *K.G. Derasari v. Union of India, (2001) 10 SCC 496.* The court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher court if according to him the same is not legally tenable. Such a question has necessarily to be agitated before the higher court. The court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the court passing the judgment or order. Though strong reliance was placed by learned counsel for the State of Bihar on a three-Judge Bench decision in *Niaz Mohd. v. State of Haryana, (1994) 6 SCC 332,* we find that the same has no application to the facts of the present case. In that case the question arose about the impossibility to obey the order. If that was the stand of the State, the least it could have done was to assail correctness of the judgment before the higher court. The State took diametrically opposite stands before this Court. One was that there was no specific direction to do anything in particular and, second was what was required to be done has been done. If what was to be done has been done, it cannot certainly be said

that there was impossibility to carry out the orders. In any event, the High Court has not recorded a finding that the direction given earlier was impossible to be carried out or that the direction given has been complied with.

On the question of impossibility to carry out the direction, the views expressed in *T.R. Dhananjaya v. J. Vasudevan, (1995) 5 SCC 619* need to be noted. It was held that when the claim inter se had been adjudicated and had attained finality, it is not open to the respondent to go behind the orders and truncate the effect thereof by hovering over the rules to get around the result, to legitimise legal alibi to circumvent the order passed by a court.

In *Mohd. Iqbal Khanday v. Abdul Majid Rather, (1994) 4 SCC 34* it was held that if a party is aggrieved by the order, he should take prompt steps to invoke appellate proceedings and cannot ignore the order and plead about the difficulties of implementation at the time contempt proceedings are initiated.

If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible.

In a given case, even if ultimately the interim order is vacated or relief in the main proceeding is not granted to a party, the other side cannot take that as a ground for disobedience of any interim order passed by the court.

●

391. EASEMENTS ACT, 1882- Section 60

Expression "construction relying on the license", meaning of- Constructions raised without permission of the licensor- License does not become irrevocable- Benefit of estoppel also not available- Law explained.

Ganpat Rao Vs. Ashok Rao and others

Reported in 2004 (3) MPLJ 571

Held :

By bare reading of section 60 of the Easement Act it is clear that by getting an irrevocable license it is necessary to plead and prove that the construction was carried out by the defendant in pursuance of the agreement. The words 'construction relying on the license' means that there must be a condition in the license itself that the licensee is permitted to raise 'pakka' construction. In ab-

sence of any such condition in the license, the license does not become irrevocable.

Shri R.D. Jain, learned counsel for the respondent has relied on the judgment of the Apex Court in the case of *Shankar Gopinath Apte Vs. Gangabai Hariharrao Patwardhan, AIR 1976 SC 2506, Chevalier I.I. Iyyappan and another vs. The Dharmodayam COL, Trichur, AIR 1966 SC 1017, Gujarat Ginning and Manufacturing Co., Ltd., Ahmedabad Vs. Motilal Hirabhai Spinning and Manufacturing Col. Ltd., Ahmedabad, AIR 1936 Privy Council 77.*

After perusing the said judgments it is clear that in absence of any condition in the license that the licensee is permitted to raise 'Pakka' construction the licence does not become irrevocable. For getting the benefit of section 60 it is for the licensee to plead and prove that there was a condition in the license to the effect that the land is given to the licensee to raise 'Pakka' construction. In the present case there is an oral license and the defendant has not laid any evidence to prove that there is any condition in the license relying on which he has made a construction.

As regards question of estoppel, the defendant was knowing the fact that the suit premises was given to him only for a temporary period till he constructs his own house. Thus, he was knowing that he is not the owner of the property and is permitted to reside in the suit property for a temporary period till he can manage to acquire any other suitable house for his residence. After knowing all these facts if he constructs a building on the land owned by the plaintiffs then he has to thank himself for it. The principle of estoppel will not help the defendant in the present case who was fully aware of the fact that license was given to him to reside in the suit premises till he manages to acquire other suitable house for him. Even though he is in possession of the land since 1925 he has not made any efforts to acquire the suitable house for him.

●

392. COPY RIGHT ACT, 1957- Section 45
Registration of the book with the Registrar of copyrights is a condition for acquiring Copyright- Law explained.
B.K. Dani Vs. State of M.P. and another
Reported in 2004 (3) MPLJ 580

Held :

Admittedly in respect of the publication of the Board, there had been no registration of copyright under Section 45 of the Copyright Act, 1957. A Division Bench of this Court in *M/s Mishra Bandhu Karyalaya vs. Shivratanlal Koshal 1970 MPLJ 475= AIR 1970 M.P. 261* held :

> "There was no provision for registration of copyright under the 1914 Act. A person had an inherent copyright in an original composition or compilation without registering it. *AIR 1927 Mad 1981.* Rel. on.
>
> Under the Act of 1957, the registration of the book with the Registrar of Copyrights is a condition for acquiring copyright with respect to it.

A copyright in a book now is secured only if it is an original compilation and has been duly registered according to provisions of 1957 Act. Once it is so registered the author is deemed to acquire property right in it. The right arising from the registration of the book can be the subject-matter of civil or criminal remedy, so that, without it the author can have no rights nor remedies though his work may be original one."

A Single Bench of this Court in *Shiv Lal Agarwals and Co., Publishers, Indore vs. State of M.P. in M. Cr.C. No. 4765/96* also held that registration of copyright is a condition acquiring copyright in a book. Therefore, in the absence of registration the respondent Board of Secondary Education, M.P., Bhopal never acquired copyright in respect of model question and answers said to have been published by it.

●

393. CIVIL PROCEDURE CODE, 1908- Order 33 Rules 1, 3, 7 and 8
Written statement, filing of- Stage of filing of written statement comes after application to sue as indigent has been allowed and registered as plaint.
Rakesh Kumar and others Vs. Bhagwati Bai
Reported in 2004 (3) MPLJ 586

Held :

Order 33, Rule 1, of the Code of Civil Procedure provides that any suit may be instituted by an indigent person. The aforesaid suit shall be presented along with an application for permission to file a suit as an indigent person. The aforesaid application shall be presented under Rule 3 of Order 33, which reads as under :

> **"R. 3.** *Presentation of application.*- Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.
>
> Provided that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs."

Rule 4 of Order 33 provides examination of the applicant and Rule 5 of Order 33 provides rejection of the application for permission to sue as an indigent person on certain grounds. Rule 7 of Order 33 provides procedure at hearing. For ready reference, Rule 7 reads as under :

> **"R.7** *Procedure at hearing.*- (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witness (if

any) produced by either party, and may examine the applicant or his agent, and shall make a full record of their evidence.

(1-A) The examination of the witnesses under sub-rule (1) shall be confined to the matters specified in clause (b), clause (c) and clause (e) of Rule 5 but the examination of the applicant or his agent may relate to any of the matters specified in Rule 5.

(2) The Court shall hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court under Rule 6, or under this rule the applicant is or is not subject to any of the prohibitions specified in R.5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as an indigent person."

In view of sub-rule (3) of Rule 7, the Court on enquiry may either allow or refuse to allow the applicant to sue as an indigent person and if applicant is permitted to sue as an indigent person the procedure is envisaged under Rule 8 of Order 33, which reads as under:

"**R.8** *Procedure if application admitted.*- Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee, or fees payable for service of process in respect of any petition, appointment of a pleader or other proceeding connected with the suit."

Rule 8 specifically provides that on allowing the application, it shall be numbered and registered and shall be deemed the plaint in the suit and shall proceed in all other respects as a suit instituted in ordinary manner and plaintiff shall not be liable to pay any Court-fee. Considering the Rule 8, it is apparent that the stage of filing of written-statement will arise only when the application shall be numbered as a plaint and registered. Until and unless the application is allowed and it is numbered and registered as a plaint, the stage of filing written-statement does not arise.

●

394. CIVIL PROCEDURE CODE, 1908- Order 6 Rule 17

Amendment of pleadings-Alternate/inconsistent plea sought to be added by Amendment- Court can refuse such prayer if it causes serious prejudice to the other side- Law explained.

Arvind Kumar Nitin Kumar Memorial Trust Vs. Nimad Vanita Wishwa Khandwa

Reported in 2004 (3) MPJR 176

Held :

So far as the contention of the petitioner that the application ought to have been allowed by the Court below on the basis of law laid down by the Apex

Court in *Jayanti Roy Vs. Dass Estate P. Limited, (2002) 5 SCC 175* is concerned, in the present case, there is material inconsistency between original pleadings and those proposed by the application. Though law of amendment is liberal, but it cannot be used to defeat right of other party. If the application is moved at proper stage, without any (undue) delay, normally amendment application is not rejected, but after more than 6 years, if such amendment is allowed, it will cause serious prejudice to the plaintiff. In these circumstances, the petitioner can not get any benefit of the case of *Jayanti Roy. In Sampath Kumar* Vs. Ayyakannu and another, 2003 (1) MPJR (SC) 91 the Apex Court considered pre-trial amendment based on cause of action arising during the pendency of the suit. In that case, the nature of relief sought to be changed, while basic structure of the suit remained unchanged. In those circumstances, the Apex Court found that merely on the ground of delay of 11 years in filing, an application for amendment cannot be rejected. But facts of this case are entirely different and petitioner cannot take any benefit of *Sampath Kumar.*

In the light of the law laid down by the Apex Court in *Arundhati Mishra (Smt) Vs. Sriram Charitra Pandey, (1994) 2 SCC 29* case, it is not in dispute that it was open to the petitioner to raise even inconsistent pleas in the written statement if he was claiming relief on the basis of alternative pleas but it is not case herein. In this case, there is no indication in plaint or in the written statement in respect of the relief which the petitioner is claiming at present. Though in the written statement, pleas may be alternatively or on additional ground to contest the suit, but at this stage, when the suit was filed in the year 1995, and the written statement on 8.3.1997 and after more than 6 and half years, if such inconsistent pleas are permitted in the written statement, the petitioner will be permitted to change his stand in the original pleas. His status as pleaded is of a licensee and except this nothing was pleaded in the written statement. The plea of licence and of tenancy are not consistent to each. In one, the party gets no right except to continue his possession during the licence period, but in other case, the party gets statutory rights in the property and his rights are to be decided in accordance with provision of Transfer of Property Act or relevant Accommodation Control Act. In one case, the possession is permissive while in other case, the possession is based on contractual obligations. In these circumstances, it will not be proper to permit such amendment which will cause serious prejudice to the other side.

●

395. MOTOR VEHICLES ACT, 1988- Section 149

Insurance company, liability of- Cover note issued by the company is adequate documentary proof to show that vehicle was duly insured- Law explained.

Sheikh Israj Vs. Smt. Rekha and others

Reported in 2004 (2) MP Vidhi Bhaswar 143

Held :

In case of *Yogendra Prasad v. Vinod Kumar and others [2002 ACJ 361]*, this Court has held that cover note is an adequate documentary proof to show that the offending vehicle was duly insured on the date of accident. In case of *Oriental Insurance Co. Ltd.v. White Rose [2002 ACJ 1061]*, Allahabad High Court has held that the insurance company cannot escape its liability to pay the amount once a cover note is issued. The insurance company is liable to pay compensation on the basis of cover note issued by its agent and negligence of error of agent does not affect the liability of the insurer.

In view of above legal position and also on the basis of the evidence available on record we hold that the offending truck was insured with the United India Insurance Company on the date of accident and therefore the insurance company is liable to pay the compensation.

●

396. NEGOTIABLE INSTRUMENTS ACT, 1881- Sections 138 and 141
Complaint under Section 138- It is not necessary to reproduce language of Section 141 verbatim in the complaint- Complaint should be read as a whole- Law explained.
Monaben Ketanbhai Shah and another Vs. State of Gujarat and others
Judgment dt. 10.08.2004 by the Supreme Court in Criminal Appeal No. 850 of 2004, reported in (2004) 7 SCC 15

Held :

It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking.

●

397. CIVIL PROCEDURE CODE, 1908- O.13 Rr. 1, 3 and 7
EVIDENCE ACT, 1872- Section 65
Admissibility and proof of the document- Objection should be taken when document is tendered in evidence- Law explained.
Dayamathi Bai (Smt.) Vs. K.M. Shaffi
Judgment dt. 04.08.2004 by the Supreme Court in Civil Appeal No. 2434 of 2000, reported in (2004) 7 SCC 107

Held :

Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (see Order 13 Rule 3 of the Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in *R.V.E. Venkatachala Gounder v. Aruimigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752* to which one of us, Bhan, J., was a party vide para 20: (SCC p. 764)

> "20. The learned counsel for the defendant- respondent has relied on *Roman Catholic Mission v. Stage of Madras, AIR 1966 SC 1457* in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal

because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party as not serious about the mode of proof. On the other hand, prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court". (emphasis in original)

●

398. N.D.P.S. ACT, 1944- Section 42 (1)
Applicability of Section 42 - Section not applicable where information is vague and not specific- Vague information cannot be equated to receipt of information under Section 42 (1).
Durgo Bai and another Vs. State of Punjab
Judgment dt. 10.08.2004 by the Supreme Court in Criminal Appeal No. 1143 of 2003, reported in (2004) 7 SCC 144

Held :

The learned counsel submits that the information about the commission of the offence which was received by the BSF Commandant and conveyed to PW 1 was not reduced to writing as required by Section 42 (1) of the Act. This argument overlooks the fact that there is nothing in the evidence on record to suggest that prior information as contemplated by Section 42 of the Act was received by the BSF commandant or the Police Inspectors concerned PW2 merely stated that "Commandant Sharma had not given the *naka* party the names of the accused. Information was that something is to be smuggled into India". Thus, check was organised not because the police or the BSF officials had specific information about the offence in question or even that the heroin will be carried or transported by someone from nearby villages. The general information about the smuggling into India which led the Commandant to organise a *nakabandi*, cannot be equated to the receipt of information within the contemplation of Section 42 (1)

●

399. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988- Section 2(a) Benami transactions- Test to determine- Where a particular sale is benami transaction- Burden to prove that a particular transaction is benami lies on person who alleges it to be benami- Law explained.
Valliammal (D) by LRs. Vs. Subramaniam and others
Judgment dt. 31.08.2004 by the Supreme Court in Civil Appeal No. 5142 of 1998, reported in (2004) 7 SCC 233

Held :

There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken *benami* in the name of another person for some reason, and the person whose name appears in the document is not the real owner, but only a *benami*. Heavy burden lies on the person who pleads that the recorded owner is a benami-holder.

This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is *benami* lies on the person who alleges the transaction to be a *benami*. The essence of a *benami* transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be *benami* of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Refer to *Jaydayal Poddar v. Bibi Hazra, (1974) 1 SCC 3, Krishnanand Agnihotri v. State of M.P., (1977) 1 SCC 816, Thakur Bhim Singh v. Thakur Kan Singh, (1980) 3 SCC 72, Pratap Singh v. Sarojini Devi, 1994 Supp (1) SCC 734* and *Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah, (1996) 4 SCC 490.* It has been held in the judgments referred to above that the question whether a particular sale is a *benami* or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transactions:

"(1) the source from which the purchase money came :

(2) the nature and possession of the property, after the purchase:

(3) motive, if any, for giving the transaction a benami colour:

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title deeds after the sale; and

(6) the conduct of the parties concerned in dealing with the property after the sale." (*Jaydayal Poddar v. Bibi Hazra. SCC p. 7, para 6*)

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase

money came and the motive why the property was purchased *benami* are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

●

400. CRIMINAL PROCEDURE CODE, 1973 - Sections 397 (2) and 160. CRIMINAL TRIAL :

(i) Expression "interlocutory order" as used under Section 397 (2)- Meaning of - Law explained.

(ii) Woman accused/witness interrogation of in police - Direction prohibiting interrogation of woman accused/witness in police station- Held, such direction iscontrary to Section 160 Cr.P.C.

(iii) Illegality in search, effect of - Evidence collected in such search of seizure not ispo-facto inadmissible - Law explained.

(iv) Remarks by Judges and Magistrates in judicial proceedings - While making remarks considerations of justice, fair play and restraint must be kept in mind - Law explained.

State represented by Inspector of Police and others vs. N.M.T. Joy Immaculate

Judgement dated 5.5.2004 by Supreme Court in Criminal Appeal No. 575 of 2004 (3 Judges Bench), reported in (2004) 5 SCC 729

Held :

(i) The first question which needs examination is whether the revision petition was maintainable. Sub-Section (2) of Section 397 CrPC lays down that the power of revision conferred by Sub-Section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, enquiry, trial or other proceedings. The expression "interlocutory order" has not been defined in the Code. It will, therefore, be useful to refer to its meaning as given in some of the dictionaries:

The New Lexicon Webster's Dictionary

"Pronounced and arising during legal procedure, not final".

Webster's Third New International Dictionary

"not final or definitive: made or done during the progress of an action".

Wharton's Law Lexicon

"An interlocutory order or judgment is one made or given during the progress of action, but which does not finally dispose of the rights of the parties e.g. an order appointing a receiver or granting an injunction, and a motion for such an order is termed an interlocutory motion."

Black's Law Dictionary

> "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy".

Ordinarily and generally, the expression "interlocutory order" has been understood and taken to mean as a converse of the term "final order". In *Vol. 26 of Halsbury's Laws of England (4th Edn.)* is has been stated as under in para 504 :

> "[A] judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. It is impossible to lay down principles about what is final and what is interlocutory. It is better to look at the nature of the application and not at the nature of the order eventually made. In general, orders in the nature of summary judgment where there has been no trial of the issues are interlocutory".

In para 505 it is said that in general a judgment or order which determines the principal matter in question is termed "final".

In para 506 it is states as under :

> "An order which does not deal with the final rights of the parties, but either (I) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals".

In *S. Kuppuswami Rao v. R., AIR 1949 FC 1* the following principle laid down in *Salaman v. Warner, (1891) 1 QB 734* was quoted with approval : (AIR p. 3, para 6)

> "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The test laid down therein was that if the objection of the accused succeeded, the proceeding could have ended but not vice versa. The order can be said to be a final order only if, in either event, the action will be determined.

However, in *Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551* such an interpretation and the universal application of the principle that what is not a

final order must be an interlocutory order was not accepted as this will render the revisional power conferred by Section 397 (1) nugatory. After taking into consideration the scheme of the Code of Criminal Procedure and the object of conferring a power of revision on the Court of Session and the High Court, it was observed as follows: (SCC p. 558, para 13)

> "In such a situation it appears to us that the real intention of the legislature was not to equate the expression 'interlocutory order' as invariably being converse of the words 'final order'. There may be an order passed during the course of a proceeding which may not be final in the sense noticed in *Kuppuswami case* but, yet it may not be an interlocutory order - pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders."

Same question has recently been considered in *K.K. Patel v. State of Gujarat, (2000) 6 SCC 195.* In this case a criminal complaint was filed against the Superintendent of Police and Deputy Superintendent of Police alleging commission of several offences under the Indian Penal Code and also under Section 147-G of the Bombay Police Act. The Metropolitan Magistrate took cognisance of the offence and issued process to the accused, who on appearance filed a petition for discharge on the ground that no sanction as contemplated by Section 197 CrPC had been obtained. The Metropolitan Magistrate dismissed the petition against which a revision was filed before the Sessions Judge, who allowed the same on the objection raised by the accused based upon Section 197 CrPC and also Section 161 (1) of the Bombay Police Act, which creates a bar of limitation of one year. The revision preferred by the complainant against the order of discharge was allowed by the High Court on the ground that the order passed by the Metropolitan Magistrate rejecting the prayer of the accused to discharge them was an interlocutory order. In the appeal preferred by the accused, this Court after referring to *Amar Nath v. State of Haryana, (1977) 4 SCC 137, Madhu Limaye v. State of Maharashtra (Supra)* and *V.C. Shukla v. State, 1980 Supp SCC 92* held that in deciding whether an order challenged is interlocutory or not, as for Section 397 (2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings. If so, any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397 (2) of the Code. It was further held that as in the facts of the case, if the objections raised by the accused were upheld, the entire prosecution proceedings would have been terminated, the order was not an interlocutory order and consequently it was revisable.

(ii) Further, the learned Judge has erred in directing the State Government to issue a circular to all the police stations instructing the police officials that the woman accused/witness should not be brought to the police station

and that they must be enquired only by women police or in the presence of women police at the places where they reside. The learned Judge has failed to note that the aforementioned findings are contrary to the statutory provisions contained in Section 160 CrPC. In fact, the learned Judge has erred in expanding the Scope of Section 160 CrPC to the accused as well, which might lead to hardship to an investigating agency. If the directions of the learned Single Judge are accepted, no purposeful investigation into any serious offence involving women accused could be conducted successfully.

(iii) The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure. Challenge to a search and seizure made under the Criminal Procedure Code on the ground of violation of fundamental rights under Article 20(3) of the Constitution was examined in *M.P. Sharma v. Satish Chandra, AIR 1954 SC 300* by a Branch of eight Judges of this Court. The challenge was repelled and it was held as under: (AIR pp. 306-07, para 18)

> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."

The law of evidence in our country is modelled on the rules of evidence which prevailed in English law. In *Kurma v. R., 1955 AC 1978* an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under: (All ER p. 239 B)

> The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is it is admissible and the court is not concerned with how it was obtained.

This question has been examined threadbare by a Constitution Bench in *Pooran Mal v. Director of Inspection (Investigation), (1974)1 SCC 345* and the principle enunciated therein is as under: (SCC pp. 363-64 & 366, pares 23 & 24)

> If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. So, neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search of seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.

(iv) It is a principle of cardinal importance in the administration of justice that the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody. At the same time, it is equally necessary that in expressing their opinions, Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve, as observed by this Court in State of U.P. v. Mohd. Naim, AIR 1964 SC 703. It is also very apt to quote para 13 of the judgment in *A.M. Mathur v. Pramod Kumar Gupta, (1990) 2 SCC 533 which reads thus:* (SCC pp. 538-39).

> "13. Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision-making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other coordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process".

●

PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADESH : JABALPUR

MEMORANDUM

No. B/2657 /
III-10-18/2002-II

Jabalpur, dt. 27/Sept., 2002.

To,

(1) The District & Sessions Judge,

(2) The Special Judge, (SC/ST)

Subject :- In the matter of claiming disposal units by Judicial Officers.

It has been noticed that there is a growing tendency amongst Judicial Officers to cope-up with the disposal norms. Such act of Judicial Officers cannot be deemed as ignorance because Rules and Orders (Civil) & (Criminal) are very clear in respect of type of cases to be registered under various heads and the units allowed to be claimed thereunder as per the directions issued by the High Court, from time to time.

Claiming of false units of disposal may be treated as an act of misconduct. Therefore, as directed, District and Sessions Judges are advised to see to it that the Judicial officers working under them do not claim false units either bonafidely or otherwise. Any lapse in this respect, shall be viewed seriously.

(A.K. SELOT)
REGISTRAR GENERAL

HIGH COURT OF MADHYA PRADESH : JABALPUR

ORDER

No. C/3230 /
III-1-5/57 Ch. 23A

Jabalpur, dt. 24th/ Sept., 04.

In exercise of powers conferred under Rule 505 of Madhya Pradesh Civil Court Rules 1961 the High Court is pleased to accord Special Sanction, enhancing the limit of amount in the hands of copyist as under :-

(1) Amount in the hand of Head Copyist at District Head Quarter- Rs. 2000/-

(2) Amount in the hands of copyist at out stations --- Rs. 500/-

BY ORDER OF HON'BLE HIGH COURT

(S.S. DWIVEDI)
REGISTRAR VIGILANCE

मध्यप्रदेश शासन, वित्त विभाग

क्रमांक /2085/642/नि–2/चार/89 भोपाल, दिनांक 5 जून 1989.

प्रति,

शासन के समस्त विभाग
अध्यक्ष, राजस्व मंडल, म.प्र. ग्वालियर,
समस्त संभागीय आयुक्त,
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,
मध्यप्रदेश ।

विषय :– भविष्य निधि खातों में निर्मित त्रुटियां दूर करने विषयक ।

संदर्भ :– वित्त विभाग का ज्ञापन क्रमांक 1430/आर–2/चार दिनांक 30.05.1978.

.....

वित्त विभाग के संदर्भित ज्ञापन द्वारा समस्त विभागों को निर्देशित किया गया था कि :–

(अ) भविष्य निधि खातों में निर्मित त्रुटियां दूर करने विषयक महालेखाकार को संबोधित समस्त आवेदन पत्र अनिवार्यतः कार्यालय प्रमुख के माध्यम से ही महालेखाकार को भेजे जावें। कोई भी आवेदनपत्र वाला/बाला महालेखाकार को नहीं भेजा जावेगा ।

(ब) भविष्य निधि खातों के संबंध में अपने मातहत कर्मचारियों के आवेदनपत्र महालेखाकार को भेजते समय कार्यालय प्रमुख अपनी विस्तृत टिप्पणी/विचार प्रस्तुत करेंगे और अंशदाता के भविष्य निधि खाते में सुधार हेतु निम्न जानकारी देंगे :–

(I) यदि आवेदनपत्र गुमशुदा राशियों (Missing Credits) के बाबत हो तो वसूली का विवरण जैसे बिल का व्हाउचर नम्बर तथा दिनांक जिसमें वसूली की गई हो, उस कोषालय का नाम जहां बिल encash हुआ है, बजट शीर्ष जिससे वेतन दिया जाता है। यदि भविष्य निधि की वसूली चालान से जमा की गई हो तो चालान नम्बर तथा दिनांक, बजट शीर्ष जिसमें रकम जमा की गई हो, कोषालय का नाम अंकित किया जावेगा।

(II) यदि खाते में निर्मित त्रुटियां किसी ऐसे समय से संबंधित हैं जिसमें अंशदाता किसी दूसरे विभाग में कार्यरत था तो उस आदान अधिकारी का पूरा पता तथा कार्यरत रहने की समयावधि अंकित करेंगे।

(III) यदि त्रुटियां एक से अधिक अकाउन्ट नम्बर आवंटित होने से संबंधित हैं तो महालेखाकार द्वारा जारी की गई लेखा पर्चियां आधार के लिये रखी जावें।

2. महालेखाकार मध्यप्रदेश ग्वालियर द्वारा राज्य शासन के ध्यान में लाया गया है कि उपरोक्त निर्देशों के बावजूद भी अंशदाताओं द्वारा सामान्य भविष्य निधि खातों में त्रुटियां, गुमशुदा रकमों के संबंध में शिकायत सीधे ही महालेखाकार तथा कम्पट्रोलर एवं ऑडीटर जनरल को की जाती है ।

3. अतः पुनः निर्देशित किया जाता है कि भविष्य में सामान्य भविष्य निधि खातों में निर्मित त्रुटियां दूर करने विषयक अभिदाताओं के आवेदन पत्र अग्रेषित करते समय उपरोक्त निर्देशों का कड़ाई से पालन किया जाय। साथ ही सेवानिवृत्त होने वाले तथा सेवा से त्याग पत्र देने वाले कर्मचारियों के सामान्य भविष्य निधि के अंतिम भुगतान आवेदनपत्र, आवश्यक दस्तावेजों के साथ भेजे जाय ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/–

(एस.आर. गुप्ता)

अपर सचिव, मध्यप्रदेश शासन, वित्त विभाग

●

उच्च न्यायालय मध्यप्रदेश : जबलपुर

ज्ञापन

क्रमांक बी/4362/(एक = 8=1/83)/ जबलपुर, दिनांक : 14/ अक्टूबर/ 2004

प्रति,

जिला एवं सत्र न्यायाधीश,

.....(म.प्र.)

विषय :– अधिवक्ता/शासकीय अधिवक्ताओं द्वारा फौजदारी एवं दीवानी प्रकरणों में उपस्थिति ज्ञापन/वकालतनामे प्रस्तुत करते समय अधिवक्ता कल्याण निधि के स्टाम्प चस्पा किये जाने बावत्।

.....

कृपया रजिस्ट्री के ज्ञापन क्रमांक ए./5274/एक=8=1/83 दि. 3 अगस्त 1996 एवं रजिस्ट्री पृष्ठांकन क्रमांक ए/130/एक=8=1/2003 दिनांक 8/2/04 का अवलोकन करने का कष्ट करें।

(2) मध्यप्रदेश राज्य अधिवक्ता परिषद की कार्यकारिणी समिति को यह दृष्टिगत हुआ है कि उच्च न्यायालय अथवा जिला न्यायालयों में जो अधिवक्ता/शासकीय अधिवक्ता न्यायालयों में उपस्थिति ज्ञापन/अथवा वकालतनामा प्रस्तुत करते समय अधिवक्ता कल्याण निधि के स्टाम्प बहुधा चस्पा नहीं करते हैं । मध्यप्रदेश

शासन द्वारा वर्ष 1982 में प्रदेश के अधिवक्ताओं के कल्याण के लिये प्रभावशील किये गये अधिवक्ता कल्याण निधि अधिनियम 1982 की धारा 19 (1) (2) (3) एवं धारा 22 के विविध प्रावधानों के अंतर्गत प्रत्येक अधिवक्ता को न्यायालयों में उपस्थिति ज्ञापन/वकालतनामा देते समय अधिवक्ता कल्याण निधि के स्टेम्प चस्पा किया जाना आवश्यक है । अतः आप अपने अधीनस्थ सभी न्यायाधीशों को निर्देशित करें कि वे न्यायालयों में उपस्थिति ज्ञापन/वकालतनामा तब तक स्वीकार नहीं करें जब तक कि उसमें अधिवक्ता कल्याण निधि का स्टाम्प चस्पा न किया गया हो। कृपया इन निर्देशों का कड़ाई से पालन करने हेतु कहा जावे।

(गौरीशंकर दुबे)
एडीशनल रजिस्ट्रार

●

NOTIFICATION REGARDING AMENDMENT IN THE MADHYA PRADESH JUDICIAL SERVICE REVISION OF PAY RULES, 2003

F. 3 (A) 19-2003-XXI-B (ONE). – In exercise of the powers conferred by the proviso to article 309 of the Constitution of India, the Governor of Madhya Pradesh hereby makes the following amendment in the Madhya Pradesh Judicial Service Revision of Pay rules, 2003, namely : —

AMENDMENT

In the said Rules, for rule 10, the following rule shall be substituted namely:-

"10. **Payment of Arrears of Pay.-** The actual arrears of Pay as a result of fixation of pay under these rules shall be payable in cash from 1st July, 2002 (i.e. pay for the month of July, 2002 Payable in August, 2002) after adjusting the monetary benefits enjoyed by the Judicial Officer under Madhya Pradesh Revision of pay Rules, 1998. The entire amount of difference of emoluments payable on the pay fixed on 1st July, 1996 or from the date of next increment or subsequent increments and the emoluments received in the existing pay from 1st July, 1996 to 30th June, 2002, shall be deposited in the respective provident fund account of the Judicial Officer after deducting the Income Tax as per rules :

Provided that in case of death/termination/retirement of Judicial Officer after 1st January, 1996 and before fixation of his pay under these Rules, the arrears will be paid in cash."

●

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH GOVANSH VADH PRATISHEDH ADHINIYAM, 2004

No. 6 of 2004

[Received the assent of the Governor on the 26th March, 2004; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 29th March, 2004]

An Act to provide, in the interest of the general public and to maintain communal harmony and peace, for prohibition of slaughter of cow progeny and for matters connected therewith.

Be it enacted by the Madhya Pradesh Legislalture in the fifty-fifth year of the Republic of India as follows :-

1. Short title, extent and commencement.— (1) This Act may be called the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004.

(2) It extends to the whole of the State of Madhya Pradesh.

(3) It shall come into force from the date of its publication in the "Madhya Pradesh Gazette".

2. Definitions. — In this Act, unless the context otherwise requires,—

(a) *"beef"* means flesh of cow progeny, whose slaughter is prohibited under this Act;

(b) *"cow progeny"* means cows, bulls, bullocks and calves of cows.

(c) *"Competent Authority"* means a person appointed by the State Government by notification to perform in any local area specified therein, the functions of a Competent Authority under this Act;

(d) *"institution"* means any charitable institution registered under any enactment for the time being in force, established for the purpose of keeping, breeding and maintaining cow progeny or for the purpose of reception, protection, care, management and treatment of infirm, aged and diseased cow progeny;

(e) *"slaughter"* means killing by any method whatsoever and includes maiming or inflicting of physical injury which in the ordinary course will cause death;

(f) *"Veterinary Officer"* means a person appointed as a Veterinary Officer under Section 3;

(g) *"vehicle"* means any mechanically or manually driven conveyance used on land, water or air.

3. Appointment of Veterinary Officer.— The Commissioner-cum -Director of Veterinary Services, Madhya Pradesh, may, by a general or special order, appoint for the purpose of this Act, any person, or class of persons, to be the Veterinary Officer for a local area specified in the order.

4. Prohibition of slaughter of cow progeny.— No person shall slaughter or cause to be slaughtered or offer or cause to be offered, for slaughter of any cow progeny.

5. Prohibition on possession of beef.— No person shall have in his possession beef of any cow progeny slaughtered in contravention of the provisions of this Act.

6. Prohibition on transport of cow progeny for slaughter.— No person shall transport or offer for transport or cause to be transported any cow progeny from any place within the State to any place outside the State, for the purpose of its slaughter in contravention of the provision of this Act or with the knowledge that it will be or is likely to be, so slaughtered.

7. Strengthening of institutions.— The State Government shall take necessary steps for strengthening of institutions which are engaged in welfare activities of cow progeny.

8. Levy of charges.— The person incharge of the institution may levy such charges as may be prescribed, for care and maintenance of infirm, aged and diseased cow progeny from their owners.

9. Penalties.— Whoever contravenes or attempts to contravene or abets the contravention of the provisions of Sections 4, 5 and 6 shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine which may extend to ten thousand rupees or with both.

10. Offences to be cognizable and non-bailable.— Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (No. 2 of 1974) all offences under this Act shall be cognizable and non-bailable.

11. Power of entry and inspection.— (1) For the purpose of enforcing the provisions of this Act the Competent Authority or the Veterinary Officer or any person authorised by the Competent Authority or the Veterinary Officer in writing in this behalf, shall have power to enter and inspect any premises within the local limits of his jurisdiction, where he has reason to believe that an offence under this Act has been, is being or is likely to be committed.

(2) Every person in occupation of any such premises as is specified in sub-section (1) shall allow the Competent Authority or the Verterinary Officer or any person authorised, by the Competent Authority in writing, such access to the premises as he may require for the aforesaid purpose and shall answer any question put to him by the Competent Authority, the Veterinary Officer or the person authorised, as the case may be, to the best of his knowledge and belief.

(3) The Competent Authority or the Veterinary Officer or any person authorised by the Competent Authority or the Veterinary Officer in writing, in this behalf, shall have power to stop and search any vehicle to ensure the compliance of Section 6 of this Act.

(4) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (No. 2 of 1974) relating to search and seizure shall, so far as may be, apply to searches and seizures under this section.

12. Rehabilitation.— The State Government shall, after coming into force of this Act, make rules for the economic rehabilitation of such person, if any, to be directly affected.

13. Protection of action taken in good faith.— No suit, prosecution or other legal proceedings shall be instituted against any person for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

14. Officers exercising powers under this Act deemed to be public servants.— All Competent Authorities, Veterinary Officers and other persons exercising powers under this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code, 1860 (45 of 1860).

15. Act to have overriding effect.— The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

16. Power to remove difficulty.— If any difficulty arises in giving effect to the provisions of this Act, the State Government may make such provisions or give such directions not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for removing the difficulty.

17. Power to make rules.— (1) The State Government may by notification, make rules for carrying out the provisions of this Act which shall have effect from the date of its publication or from such other date as may be specified in this behalf.

(2) The rules made under this Act shall as soon as possible after they are published be laid on the table of the Legislative Assembly.

18. Repeal and saving.— The Madhya Pradesh Govansh Vadh Pratishedh Adhyadesh, 2004 (No. 1 of 2004) is hereby repealed:

Provided that the repeal shall not effect—

(i) the previous operation of any law so repealed or anything done or suffered thereunder; or

(ii) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(iii) any investigation, legal proceeding or remedy in respect of any penalty, forfeiture or punishment as aforesaid; and

any such investigation, legal proceeding or remedy may be instituted, continue or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed.

●

MADHYA PRADESH
GOVANSH VADH PRATISHEDH RULES, 2004

In execise of the powers conferred by section 17 read with section 12 of the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (No. 6 of 2004), the State Government hereby makes the following rules, namely :—

1. *Short title and commencement.*— (1) These Rules may be called the Madhya Pradesh Govansh Vadh Pratishedh Rules, 2004.

(2) They shall come into force from the date of their publication in the "Madhya Pradesh Gazette".

2. *Definitions.*— In these rules, unless the context otherwise requires;—

(a) "Act" means the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (No. 6 of 2004);

(b) "Local officer" means the Joint Director/Deputy Director of Veterinary Services of the Government of Madhya Pradesh posted at district level;

(c) all other words and expression used herein and not defined shall have the meaning respectively assigned to them by the Act.

3. *Permit for transportation of cow progeny within the State.*— (1) Any person, who desires to transport cow progeny within the State by any vehicle shall apply for a permit in Form-1 to the Sub-Divisional Officer (Revenue) after depositing a fee of Rs. 25/- per trip.

(2) The provisions relating to the Prevention of Cruelty to Animal Act, 1960 (No. 59 of 1960) and other related Acts and rules shall be mentioned by the Sub-Divisional Officer on the back of the permit and compliance of the same shall be mandatory for the permit holder.

(3) The Sub-Divisional Officer (Revenue) may conduct such enquiry, as he may deem necessary for his satisfaction, for verification of details given in the application in Form-1. After conducting such enquiry, if the Sub-Divisional Officer is satisfied, he shall issue the permit in Form-2 to the applicant within a period of two weeks from the date of receiving the application or reject the application by passing an order stating the reasons thereof, and shall enter related informations in his official register under his own handwriting.

4. *Aid and grant to institutions.*— (1) Institutions having a minimum of one hundred of unproductive infirm, aged and diseased cow progeny, shall get aid under various schemes of State Goverment/Government of India.

(2) Institutions mentioned in Sub-rule (1) shall also get grant from marketing committee under clause (iv) of sub-section (3) of section 17 of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (No. 24 of 1973).

5. *Handing over of impounded cow progeny.*— Wandering cow progeny, which are captured by employees of cattle-pound and are not released or auctioned shall be handed over to the institution by the local authority.

6. *Levy of charges.*— (1) The institution may levy and recover charges for care and maintenance of cow progeny from their owners, which shall be equivalent to the charges levied by the cattle- pound of the local body.

(2) The cattle- pound, which are maintained by local bodies, may discharge the functions of institutions to the extent possible.

7. *Economic rehabilitation scheme.*— (1) The competent authority of the Municipal Corporation, Municipalities and Nagar Panchayats shall prepare a list in FORM-3 of persons, who are partially or fully affected by the provisions of the Act and display it on the notice board in their office for inviting objections. The objections, if any received, shall be disposed off by such competent authority, thereafter a final list of affected person's shall be perpared and the affected person shall be informed.

(2) The competent authority of local body shall send the final list to the Collector of the district.

(3) After receiving the final list from local body, the Collector of the district shall get it scrutinised and after certification in prescribed FORM-4, he shall recommend for various self employment schemes of concerned corporations and/or Boards of the State Government on the basis of affected person's demand, and a copy of that list shall be endorsed to the local officer for co-ordination.

(4) Such Corporations and Boards after completing necessary formalities shall make funds available to the affected persons either directly or through banks.

(5) Monthly monitoring of economic rehabilitation of the affected persons shall be done by the Collector, for which the local officer shall act as co-ordinator.

(6) The affected persons shall get benefit of this economic rehabilitation only once, after coming into force of the Act.

●

शैक्षिक संस्थानों के पास सिगरेट और अन्य तम्बाकू उत्पाद के विक्रय पर प्रतिषेध नियम, 2004

(सिगरेट और अन्य तम्बाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम, 2003 (2003 का 34) की धारा 6 के सह पठित धारा 31 द्वारा प्रदत्त शक्तियों के अन्तर्गत केन्द्रीय सरकार द्वारा विरचित– *स्वास्थ्य और परिवार कल्याण मंत्रालय (स्वास्थ्य विभाग) अधिसूचना क्र. सा. का. नि. 561 (अ) दिनांक 1 सितम्बर, 2004. भारत का राजपत्र (असाधारण). भाग 2 खण्ड 3 (i) दिनांक 1.9.2004 पृष्ठ 1 पर प्रकाशित।)*

1. संक्षिप्त नाम, विस्तार और प्रारंभ :–

1. इन नियमों का संक्षिप्त नाम शैक्षिक संस्थानों के पास सिगरेट और अन्य तम्बाकू उत्पाद के विक्रय पर प्रतिषेध, नियम, 2004 है ।

2. इनका विस्तार सम्पूर्ण भारत पर है ।

3. ये 1 दिसम्बर, 2004 को प्रवृत्त होंगे ।

2. परिभाषा :– इन नियमों में जब तक कि संदर्भ द्वारा अन्यथा अपेक्षित नहीं हो,–

क. 'अधिनियम' से सिगरेट और अन्य तम्बाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम, 2003 अभिप्रेत है;

ख. 'शैक्षिक संस्था' से ऐसा स्थान/केन्द्र अभिप्रेत है जहां विनिर्दिष्ट मानकों के अनुसरण में शैक्षिक अनुदेश दिए जाते हैं और जिसमें स्कूल, कालेज और उच्चतर प्रशिक्षण के स्थापित या किसी समुचित प्राधिकारी द्वारा मान्यता प्राप्त संस्थान अभिप्रेत है;

ग. 'धारा' से अधिनियम की कोई धारा अभिप्रेत है; और

घ. उन शब्दों और पदों के जो इसमें प्रयुक्त हैं और परिभाषित नहीं किए गए हैं किन्तु इस अधिनियम में परिभाषित हैं वही अर्थ होंगे, जो इस अधिनियम में दिए गए हैं।

3. शैक्षिक संस्थानों के पास सिगरेट और अन्य तम्बाकू के विक्रय पर निषेध:–

1. बोर्ड का प्रदर्शन– शैक्षिक संस्थान का स्वामी या प्रबंधक या मामलों का प्रभारी कोई व्यक्ति परिसर से बाहर किसी सहज दृश्य स्थान पर प्रमुख रूप से कथित एक बोर्ड प्रदर्शित करेगा कि शैक्षिक संस्थान के एक सौ गज की दूरी के घेरे के क्षेत्र में सिगरेट और अन्य तम्बाकू उत्पादों के विक्रय का सख्त प्रतिषेध है और कि यह अपराध जुर्माने से, जो दो सौ रुपये तक का हो सकेगा, दण्डनीय होगा ।

2. दूरी का माप– एक सौ गज की दूरी शैक्षिक संस्थान की, यथास्थिति, सीमा दीवार की बाहरी सीमा, बाड़ से नापी जायेगी।

●