TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice A.K. Patnaik**	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

Shailendra Shukla — Addl. Director

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

Esteemed Readers,

Year 2005, which is gradually sinking into the vast ocean of the past, has a special significance in the annals of judicial history of India. On being declared by Hon'ble Shri Justice R.C. Lahoti, the then Chief Justice of India, as "Year of Excellence in Judiciary", the judicial fraternity throughout the country worked with devotion and dedication to make it a real success. Year 2005 is also significant because the High Court of Madhya Pradesh, which started functioning from 1st November, 1956, entered into the golden jubilee year of its establishment. This also happens to be the case with the State of Madhya Pradesh which came into existence on 1st November, 1956 and is commemorating its golden jubilee year. A glimpse over the period of past fifty years will at once reveal that Madhya Pradesh judiciary has been able to deliver the goods and may legitimately feel proud of its performance. But it should not lead us to a sense of complacency rather it must guide us to take the challenges, which are presently before the system of administration of justice, including mounting arrears of cases and inordinate delay in dispensation of justice. The prevailing situation calls for a concerted and dedicated approach to the cause of justice so that the beneficiaries of the system may continue to have faith in its efficacy.

We know that with globalization and the advancements made in the field of Information and Communication Technology things have started changing at a fast pace. Equally perceptible is the pace of corresponding deterioration in social, moral and ethical values in all walks of life. This situation is bound to increase the pressure of work on the system of administration of justice because still the Judiciary happens to be the ultimate hope of the people. This commends us to cautiously tread over the path of excellence through continued introspection and improvisation.

By the time this issue reaches your hands, we all shall be celebrating the advent of New Year - Year 2006. This indeed is an occasion to garner new hopes, develop new ideas and plan new strategies to serve 'the millions in quest of justice' to the best of our ability. We, in the Institute, plan to enhance the utility of this Journal by including a new column in Part I of the Journal exclusively devoted to discussion on legal problems in question-answer form in which we shall be dealing with 5 to 10 problems in each issue. Apart that, we also plan to

publish a series of articles focusing on examination of witness, witness protection and marshalling/appreciation of evidence.

Distant training through bi-monthly discussion on various legal issues of contemporary importance has no doubt captured the attention of judicial officers, but it has yet to pick up the momentum and reach its zenith. Once again, through this column, I make a fervent request to the brethren judicial officers to make this exercise a grand success by ensuring active involvement of all the officers of the district in discussion on the given issue.

Part I of this issue is full of fragrance of the inaugural function of the Golden Jubilee Celebrations of the High Court of Madhya Pradesh held on 22nd October, 2005 at the Main Seat of High Court at Jabalpur. Apart that, two articles relating to Wild Life (Protection) Act, 1972 and PC and PNDT Act, 1994, respectively, also find place in Part I. Training Calendar of first half of Year, 2006 is also being included in Part I. Part II as usual abounds with various judicial pronouncements, including one by the Apex Court ascertaining and outlining the extent of tortuous liability of surgeon in case of failure of sterilization operation (Note No. 335). A Notification issued by the Government of Madhya Pradesh enhancing the rate of daily allowance payable to a witness attending Court finds place in Part III. In Part IV we are including remaining portion of the Code of Criminal procedure (Amendment) Act, 2005.

AT THE END, I, ON MY OWN BEHALF, AS WELL AS ON BEHALF OF THE INSTITUTE WISH TO ALL OUR READERS 'A HEALTHY, HAPPY & PROSPEROUS NEW YEAR' WITH THE FOLLOWING STANZA FROM A POEM OF *Lord Tennyson:*

"Ring out the old, ring in the new,
Ring happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true."

A. K. Patnaik
Chief Justice

191, South Civil Lines,
Jabalpur - 482 001
Tel. (O) 2626443
(R) 2678844
2678855
2626746 (Net)
Fax 0761-2678833

Dated : .....

MESSAGE

I am happy to learn that JOTI Journal, a bi-monthly Published by the Judicial Officers Training & Research Institute, is releasing its December, 2005 issue shortly.

JOTI Journal contains articles and information which will keep a Judge in the State of M.P. well informed and up to date on the development of law.

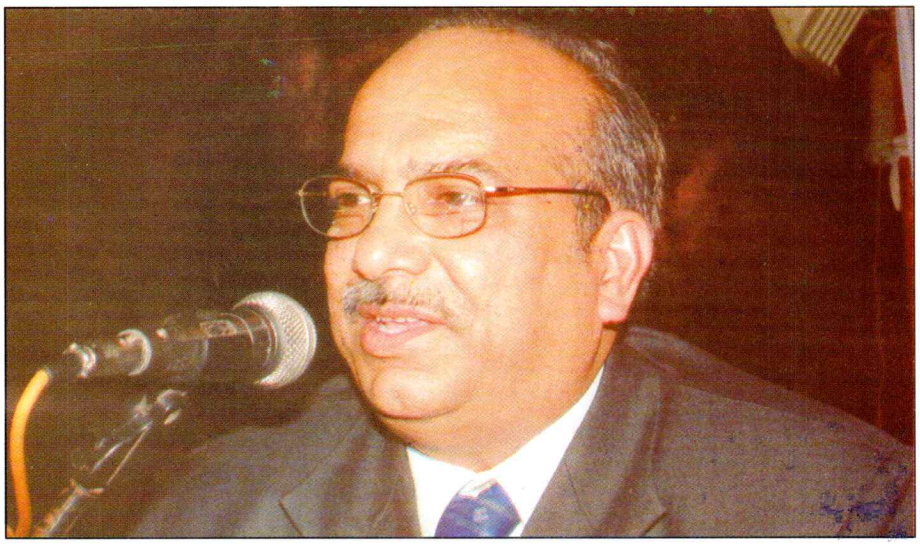
Every Judicial Officer in the State of M.P. should religiously go through the articles and information published in the JOTI Journal to keep himself informed about the development of law. Unless a Judge keeps himself informed about the latest development of law, he cannot dispense effective justice.

(A.K. PATNAIK)
Chief Justice

GLIMPSES OF INAUGURAL FUNCTION OF THE GOLDEN JUBILEE CELEBRATIONS OF THE HIGH COURT OF MADHYA PRADESH HELD AT PRINCIPAL SEAT, JABALPUR ON 22.10.2005

HON'BLE SHRI JUSTICE R.C. LAHOTI, THE THEN CHIEF JUSTICE OF INDIA, DELIVERING INAUGURAL ADDRESS

HON'BLE SHRI JUSTICE Y.K. SABHARWAL, CHIEF JUSTICE OF INDIA ADDRESSING THE AUDIENCE



HON'BLE SHRI JUSTICE A.K. PATNAIK, CHIEF JUSTICE OF THE HIGH COURT OF MADHYA PRADESH DELIVERING WELCOME ADDRESS

HON'BLE SHRI JUSTICE R.C. LAHOTI RELEASING THE SOUVENIR COMMEMORATING THE OCCASION

GLIMPSES OF JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HON'BLE THE CHIEF JUSTICE OF MADHYA PRADESH AND HON'BLE THE CHAIRMAN OF THE HIGH COURT TRAINING COMMITTEE TAKING A ROUND OF THE LIBRARY ROOM WHICH BECAME FUNCTIONAL RECENTLY

HON'BLE SHRI JUSTICE A.K. PATNAIK, CHIEF JUSTICE OF MADHYA PRADESH DELIVERING INAUGURAL ADDRESS ON 05.12.2005 TO ADJs PARTICIPATING IN REFRESHER COURSE

APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

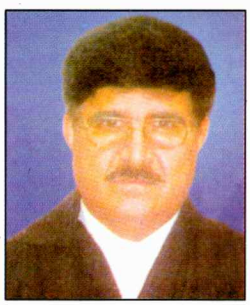
Hon'ble Shri Justice Anang Kumar Patnaik, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Ram Kishore Gupta, Hon'ble Shri Justice Ravi Shankar Jha, Hon'ble Smt. Justice Manjusha P. Namjoshi, Hon'ble Shri Justice Shyam Sunder Dwivedi, Hon'ble Shri Jusitce Syed Ali Naqvi and Hon'ble Shri Justice Subhash Chandra Vyas on 18th October, 2005 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Shri Justice Ram Kishore Gupta has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 1st January, 1949. Passed his LL.B examination from University Teaching Department of Rani Durgawati Vishwavidyalaya, Jabalpur. Practiced in High Court of Madhya Pradesh at Jabalpur for over 33 years. Was senior standing counsel for Indian Railways, Food Corporation of India, Steel Authority of India, Hindustan Coppers Limited Balaghat and Chhattisgarh Infrastructure Development Corporation. He was designated as Senior Counsel on 20.06.2003. Took oath as Additional Judge of High Court of Madhya Pradesh on 18th October, 2005.

Hon'ble Shri Justice Ravi Shankar Jha was appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 14th October, 1961. Obtained his LL.B. degree in 1986 from University Teaching Department of Rani Durgawati Vishwavidyalaya, Jabalpur. Initiated his practice as junior to Hon'ble Shri Justic P.P. Naolekar, Judge, Supreme Court of India. Was appointed as Government Advocate in the year 1994 and worked in this capacity till 1996. Was appointed as Deputy Advocate General in the year 1996. Was also standing counsel for the High Court of Madhya Pradesh, Bhilai Steel Plant and Food Corporation of India. Was designated as Senior Counsel on 26.04.2003. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005.

Hon'ble Smt. Justice Manjusha P. Namjoshi has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 21st August, 1947. Obtained her LL.B. degree in the year 1969. Joined Judicial Service as Civil Judge Class II on 04.06.1970, was promoted as Additional District Judge on 15.04.1987. Worked as President of District Consumer Forum from 17.05.1996 to May, 2001 and as Additional Director, J.O.T.R.I., High Court of Madhya Pradesh from May, 2001 to May, 2002. Was District and Sessions Judge, Ratlam prior to her elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005.

Hon'ble Shri Justice Shyam Sunder Dwivedi has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 31st August, 1948. Obtained Law Degree in 1969 and enrolled as Advocate in the same year and started his practice with his father at Mandsaur. Joined Judicial Service as Civil Judge Class II on 08.04.1970, was promoted as Additional District Judge on 20.04.1987. Worked as Additional Registrar, High Court of Madhya Pradesh, Jabalpur from October, 1992 to May 1994, as District Judge (Vigilance), Indore from August, 2000 to February, 2002 and as Registrar (Vigilance), High Court of Madhya Pradesh, Jabalpur from April, 2004 to March 2005. Was District and Sessions Judge, Indore prior to elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005.



Hon'ble Shri Justice Syed Ali Naqvi has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 24th December, 1947. Obtained his Law Degree from Law College, Shajapur. Joined Judicial Service as Civil Judge Class II on 09.09.1970, was promoted as Additional District Judge on 15.06.1987. Worked as Additional Registrar, High Court of Madhya Pradesh, Gwalior from February 1995

to May 1996. Worked as District Judge at Sidhi, Chhindwara and Jabalpur. Was posted as Director, Prosecution, Bhopal prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005.

Hon'ble Shri Justice Subhash Chandra Vyas has been appointed as Additional Judge of High Court of Madhya Pradesh. Was born on 18.04.1946. Obtained Law Degree from Madhav College, Ujjain. Joined Judicial Service as Civil Judge, Class II on 16.07.1970, was promoted as Additional District Judge on 19.10.1987. Worked as Registrar, High Court of Madhya Pradesh, Indore Bench from May, 1997 to September, 2003. Was District & Sessions Judge, Gwalior prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005.

●

Hon'ble Shri Justice Deepak Verma, Administrative Judge High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Jitendra Kumar Maheshwari, Hon'ble Shri Justice Brij Mohan Gupta and Hon'ble Shri Justice Anil Prakash Shrivastava on 25th October, 2005 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Shri Justice Jitendra Kumar Maheshwari has been appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 19.06.1961. Practiced in High Court of Madhya Pradesh at Gwalior for over 19 years. Dealt with Civil, Constitutional, taxation, labour, company, service and criminal matters. Was a member of State Bar Council and Member of Advisory Committee, Mahatma Gandhi College of Law, Gwalior. Was standing counsel for M.P. State Mining Corporation, M.P. Housing Board, State Bank of India and National Seeds Corporation. Took oath as Additional Judge of High Court of Madhya Pradesh on 25th October, 2005.

Hon'ble Shri Justice Brij Mohan Gupta has been appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 20.08.1947. Joined Judicial Service as Civil Judge, Class II on 14.06.1972, was promoted to the post of Additional District Judge on 30.07.1988. Was District & Sessions Judge, Datia from October, 1997 to April, 1999. Worked as Registrar (Judicial), Supreme Court of India from April, 1999 to June, 2004. Was Court Administrator-cum-Registrar General, Supreme Court of India prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 25th October, 2005.

Hon'ble Shri Justice Anil Prakash Shrivastava has been appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 26.11.1947. Joined Judicial Service as Civil Judge, Class II on 17.07.1972, was promoted to the post of Additional District Judge on 18.07.1988. Worked as Additional Secretary, Law and Legislative Affairs Department, Government of Madhya Pradesh, Bhopal from February, 1996 to May, 1997, was District & Sessions Judge, Raigarh from March, 1998 to February 2001. Was Registrar, Office of the Welfare Commissioner, Bhopal Gas Victims, Bhopal prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 25th October, 2005.

●

मध्यप्रदेश उच्च न्यायालय की स्वर्ण जयंती (1956–2006)

के शुभारंभ समारोह के अवसर पर

न्यायमूर्ति रमेश चन्द्र लाहोटी

[भारतवर्ष के मुख्य न्यायाधीश (तत्कालीन)]

का उद्‌बोधन

(जबलपुर, दिनांक 22.10.2005)

मध्यप्रदेश उच्च न्यायालय की स्वर्ण जयंती समारोह के शुभारंभ के अवसर पर मध्यप्रदेश उच्च न्यायालय के मुख्य न्यायाधिपति श्री ए.के. पटनायक, न्यायाधीशों, अभिभाषक महानुभावों, मध्यप्रदेश शासन और इस प्रदेश के नागरिकों और जन–जन को मेरी हार्दिक शुभकामनाएँ। मैं आभारी हूँ कि आपने इस अवसर पर मुझे अपने बीच आने का अवसर दिया ताकि मैं आपको अपनी शुभकामनाएँ भेंट कर सकूँ और अपने कुछ समयोचित विचार आपके समक्ष प्रस्तुत कर सकूँ। मध्यप्रदेश उच्च न्यायालय के पूर्व मुख्य न्यायाधिपति और वर्तमान में मेरे सहयोगी न्यायमूर्ति श्री रवीन्द्रन के इस पुनीत कार्य के संपादन हेतु आज का दिन चुनने के लिए, हम सभी कृतज्ञ रहेंगे।

यह स्वर्णिम दिवस

उपानिषद् में प्रार्थना[1] है–

असतोमासद्‌गमय:
तमसो मा ज्योतिर्गमय:
मृत्योर्मा अमृतगमय:

(Lead me from falsehood to truth;
from darkness to light and from death to immortality)

कुछ दिवस पूर्व हमने विजयादशमी का त्यौहार मनाया, जो असत्य पर सत्य की विजय का प्रतीक है। हम सभी दीपावली का त्यौहार मनाने की तैयारी में व्यस्त हैं, जो अंधकार पर प्रकाश की विजय का प्रतीक है। और, इन दो त्यौहारों के बीच, हम इस संस्था की स्वर्ण जयंती का शुभारंभ कर रहे हैं जो भारतीय संविधान के निर्माताओं के अनुसार भारत की उस न्याय व्यवस्था का प्रतीक है जिसमें भारत के जन–जन की यह आस्था समाहित है कि इस स्वतंत्र संवैधानिक गणराज्य में मृत्यु से अमृत की ओर यात्रा का पथ प्रदर्शन और आरोहण यदि कोई कर सकता है तो वह भारत की न्याय व्यवस्था है। यात्रा तेज हो या धीमी, पर होती तो है। और, मंजिल दूर हो या पास, मिलती तो है। भारत का संतोषी धैर्यवान नागरिक इस उम्मीद के सहारे अपने दिन काटता है कि एक दिन न्याय मिलेगा, और अवश्य मिलेगा–

मंजिल मिले, मिले न मिले, इसका मुझे गम नहीं
मंजिल की जुस्तजू में मेरा कारवाँ तो है।

---

1. (वृहदकारण्यकोपनिषद् 1.3.28)

यह संयोग है कि भारतवर्ष के मुख्य न्यायाधीश के पदभार से मेरे मुक्त होने के लिए सुनिश्चित दिन, जिस दिन कबीर की तरह मैं भी कह सकूँगा "कि दास कबीर जतन से ओढ़ी, ज्यों की त्यों धर दीन्हीं-चदरिया", वह दिन और स्वर्ण जयंती वर्ष के प्रारंभ होने का दिन एक ही है – एक नवम्बर। और, उसी दिन इस देश की न्याय व्यवस्था की बागडोर उन हाथों में होगी जो हाथ मेरे से अधिक सुडौल, सक्षम और सशक्त हैं। और, जिस दिन यह सारी घटनाएँ घटेंगी उस दिन इस देश में दीपावली होगी। यह शुभ संकेत है। संस्था और व्यवस्था में व्यक्ति गौण होता है, निरन्तरता, गति और प्रगति का महत्व होता है। आने वाले वर्ष में संगठित होकर सक्रिय रूप से इस देश की न्याय व्यवस्था को और अधिक मजबूत, त्वरित और प्रभावी बनाने के लिए हमारे देश के मुख्य न्यायमूर्ति के हाथ मजबूत, करने का संकल्प आज के दिन हमें लेना चाहिए।

जब कोई सुखद घटना अथवा पवित्र कार्य का सम्पादन होना होता है तो सभी परिस्थितियाँ अनुकूल हो जाती हैं और शुभ संकेत मिलने लगते हैं। रामचरित मानस का एक प्रसंग बहुत समीचीन है। जब भगवान राम के सीता से विवाह की तैयारियां चल रही थीं उस अवसर पर वर्णन करते हुए गोस्वामी तुलसीदासजी ने लिखा है:–

"चढ़ि चढ़ि रथ बाहेर नगर लागी जुरन बरात।
होत सगुन सुंदर सबहिं जो जेहि कारज जात ।299।।

मंगलमय कल्यानमय अभिमत फल दातार ।
जनु सब साचे होन हित भए सगुन एक बार ।।303 ।।

आप कहेंगे कि उच्च न्यायालय के स्वर्ण जयंती समारोह और विवाह के प्रसंग में लिखे गए दोहे का क्या सम्बन्ध? मुझे भी जिज्ञासा थी। उत्तर आज मिल गया। जबलपुर पहुँचते ही आज प्रातः काल के समाचार पत्रों में पढ़ा कि इस समारोह की तैयारी में उच्च न्यायालय भवन दुल्हिन की तरह सजाया गया है ! और यह समाचार भी मिला कि इस समारोह में भाग लेने के लिए, इस न्यायालय के 66 पूर्व न्यायाधीश शहर में आए हुए हैं। अर्थात् बाराती भी बड़ी संख्या में मौजूद हैं!!

प्रकृति भी हम पर कृपालु है। ऐसा सुहावना मौसम, जब न गर्मी है न सर्दी है, भारतवर्ष के "हृदय प्रदेश" मध्यप्रदेश के उच्च न्यायालय के स्वर्ण जयंती समारोह का शुभारंभ उस नगर में हो रहा है जो इस प्रदेश की "संस्कारधानी" है। जबलपुर राजनैतिक राजधानी तो नहीं बन सकी, किन्तु यह इस प्रदेश की संस्कृति और संस्कारों की राजधानी बन सकी, और है भी।

हमारे गौरव

स्वर्ण जयंती के अवसर पर हम सभी सात्विक गर्व की अनुभूति कर सकते हैं । इसलिए कि मध्य प्रदेश उच्च न्यायालय की गौरवशाली परम्पराएँ रही हैं और वे आज भी जीवन्त हैं । मध्य प्रदेश ने देश की शीर्षस्थ न्यायपालिका को 8 न्यायाधीश दिये हैं – न्यायमूर्ति श्री एंम. हिदायतुल्ला, श्री ए.पी. सेन, श्री गोवर्धनलाल ओझा, श्री जगदीश शरण वर्मा, श्री फैजानुदीन, श्री देवदत्त धर्माधिकारी और श्री प्रकाश नावलेकर । परमेश्वर की कृपा, माता–पिता और गुरुजन के आशीष और आप सरीखे हितैषी तथा मित्रों की शुभकामनाओं के परिणाम स्वरूप मेरा नाम भी इस पंक्ति में जुड़ा है । इन 8 में से तीन भारत के मुख्य न्यायाधीश हुए हैं । न्यायमूर्ति श्री हिदायतुल्ला और न्यायमूर्ति श्री जगदीश शरण वर्मा, ऐसे मुख्य न्यायाधिपति हुए हैं जिनके कारण मध्य प्रदेश उच्च न्यायालय और भारतवर्ष के उच्चतम न्यायालय को केवल देश में ही नहीं बल्कि देश के बाहर भी

अंतर्राष्ट्रीय ख्याति और सम्मान मिला है । उन्होंने वे आदर्श स्थापित किए हैं जिनका अनुकरण सहज संभाव्य नहीं है । विधिशास्त्र में उनके द्वारा निरूपित सिद्धान्त संपूर्ण न्याय जगत में सम्मान के साथ पढ़े जाते है और पढ़े जाते रहेंगे। इसी श्रृंखला में वे सब विलक्षण प्रतिभा और प्रत्युत्पनमति से संपन्न विद्वान न्यायाधीश और अभिभाषक महानुभाव हैं जो ईश्वर की कृपा से स्वस्थ सदेह हमारे बीच उपस्थित हैं और वे भी हैं जो अपना कर्तव्य संपादित करने के उपरांत अपनी दैहिक यात्रा समाप्त कर विधि जगत के आकाश में दैदीप्यमान नक्षत्रों की भांति सदा–सदा के लिए सुशोभित हो गए हैं । न्यायमूर्ति श्री एन.डी. ओझा, श्री अशोक माथुर और श्री रवीन्द्रन, मध्य प्रदेश के रास्ते चलकर उच्चतम न्यायालय पहुँचे हैं । मध्य प्रदेश वासियों से ये सभी कहते हैं, डॉ. शिवमंगल सिंह 'सुमन' के शब्दों में –

'मैं नहीं आया तुम्हारे द्वार, पथ ही मुड़ गया था।'

न्यायमूर्ति श्री जी.पी. सिंह, एक व्यक्ति नहीं संस्था हैं, उनके नाम से मध्य प्रदेश उच्च न्यायालय जाना जाता है। हमारे कुछ न्यायाधीश स्थानांतरित होकर बाहर के उच्च न्यायालयों में गए। उनमें से कुछ जैसे न्यायमूर्ति श्री बी.सी. वर्मा पंजाब एवं हरियाणा उच्च न्यायालय के और न्यायमूर्ति श्री गुलाब गुप्ता हिमाचल प्रदेश उच्च न्यायालय के मुख्य न्यायाधीश रहे हैं । मुझे यह कहते हुए प्रसन्नता होती है कि मध्य प्रदेश के न्यायाधीश बाहर के प्रदेशों में किसी भी हैसियत से गए हों उन्होंने मध्य प्रदेश की आदर्श परम्पराओं का प्रचार प्रसार किया है और उन प्रदेशों में मध्य प्रदेश का झण्डा ऊँचा उठाए रखा है । मध्य प्रदेश उच्च न्यायालय के न्याय दृष्टांत संपूर्ण भारतवर्ष में ससम्मान पठनीय और अनुकरणीय माने जाते हैं।

स्वर्ण जयंती : स्वर्णिम भविष्य की शुरुआत

इस स्वर्ण जयंती का शुभारंभ 'न्यायिक उत्कृष्टता के वर्ष' (Year of Excellence in Judiciary) में हो रहा है। भारत वर्ष की न्याय व्यवस्था के शीर्षस्थ पद पर आसीन होने के उपरांत इस बात को दृष्टिगत रखते हुये कि मेरा कार्यकाल बहुत लम्बा नहीं है, मैंने केवल तीन दूरगामी प्रभाव रखने वाली योजनाओं की परिपूर्ति का संकल्प लिया था। मुझे आपको यह जानकारी देते हुये बहुत प्रसन्नता हो रही है कि राष्ट्रीय न्यायिक अकादमी, जिसका आसन मध्य प्रदेश के ही भोपाल नगर में है, संपूर्ण रूप से क्रियाशील हो गई है। मेरे कार्यभार ग्रहण करने के उपरांत जुलाई 2004 से जून 2005 के वर्ष में 17 पाठ्य कार्यक्रम संपादित हुए जिनसे लगभग 700 न्यायाधीश लाभान्वित हुए हैं। जुलाई 2005 से प्रारंभ होने वाले वर्ष में 24 पाठ्य सत्र आयोजित करने की रूपरेखा बनकर प्रसारित हो चुकी है। लगभग 1000 न्यायाधीश इन कार्यक्रमों से लाभान्वित होंगे। वर्ष का शुभारंभ उच्चतम न्यायालय के न्यायाधीशों के लिए आयोजित 'समर रिट्रीट' से प्रारंभ हुआ जिसमें 11 न्यायाधीशों ने भाग लेकर इस देश के न्यायाधीशों के समक्ष अनुकरणीय आदर्श प्रस्तुत किया है।

हमें विदेशों की न्यायपालिकाओं के प्रस्ताव प्राप्त हो रहे हैं। वे इस राष्ट्रीय अकादमी का लाभ उठाना चाहते हैं किन्तु मेरा लक्ष्य अपने ही देश की न्यायपालिका को प्राथमिकता देने का रहा है।

दूसरी उपलब्धि हुई है – न्यायिक प्रक्रिया में सूचना एवं प्रसारण प्रौद्योगिकी (इन्फॉरमेशन एण्ड कम्यूनिकेशन टेक्नोलॉजी) के सम्मिश्रण के लिये पंचवर्षीय योजना तैयार होकर उसका अवतरण–एक राष्ट्रीय योजना के रूप में, भारत वर्ष के प्रधानमंत्री डॉ. मनमोहन सिंह जी द्वारा किया जाना । इन दोनों उपलब्धियों के लाभ आने वाले वर्षों में दृष्टिगोचर होंगे। न केवल न्यायदान की गुणवत्ता में सुधार होगा बल्कि न्यायदान की प्रक्रिया को गति भी

मिलेगी । पाँच वर्ष समाप्त होने पर हम 'कागज रहित न्यायालय' की परिकल्पना को साकार होता हुआ देख सकेंगे । परिवादीगण किसी सूचना केन्द्र या तदर्थ गुमटी में बैठकर अथवा मोबाइल फोन पर एस.एम.एस. के माध्यम से अपने प्रकरण में निर्धारित तिथि और सुनवाई की स्थिति के संबंध में जानकारी ले सकेंगे।

'वीडियो कान्फ्रेंसिंग' सुविधा उपलब्ध होने के उपरान्त किसी अभियुक्त को न्यायालय तक ले जाया जाना आवश्यक नहीं रहेगा। सुरक्षा और आवागमन पर होने वाला बहुत खर्च बचेगा। जबलपुर, ग्वालियर और इंदौर के न्यायाधीश अपने–अपने स्थान पर रहते हुये हुए 'फुल कोर्ट' की मीटिंग कर सकेंगे।

आत्मानुशीलन का अवसर

स्वर्ण जयंती का अवसर प्रसन्नता और आह्लाद का अवसर तो है किन्तु आत्मानुशीलन का अवसर भी है। अपने गौरवशाली अतीत का स्मरण करते हुए, अपने अनुभवों का उपयोग भविष्य की परियोजनाओं का निरूपण और संकल्पों का सृजन करने के लिए होना चाहिए और अतीत की उपलब्धियों पर आधारित आत्म–विश्वास का प्रयोग भविष्य के सार्थक निर्माण के लिए करना चाहिए।

आदरणीय और मेरे मित्र न्यायाधीशगण और अभिभाषक महानुभावों ! इस देश के कोटि–कोटि जन की आशाएँ और अपेक्षाएँ इस देश की न्यायपालिका पर और हम पर टिकी हैं। संविधान के निर्माताओं ने, जिस भारत का नक्शा खींचा है वह सम्पूर्ण प्रभुत्व सम्पन्न, समाजवादी, पंथनिरपेक्ष, लोकतंत्रात्मक गणराज्य का नक्शा है जिसमें समस्त नागरिकों को सामाजिक, आर्थिक और राजनैतिक न्याय की आश्वस्ति होगी। स्वतंत्रता, समता, गरिमा, एकता और बंधुत्व की प्राप्ति और निरंतर अभिवृद्धि होगी। तदर्थ उत्तरदायित्वों का निर्वाहन करने के लिये भारत के संविधान में अनूठा यंत्र रचा गया है जिसे सामान्य शब्दों में कहा जा सकता है: प्रभु सत्ता का विधायिका, कार्यपालिका और न्यायपालिका के बीच विभाजन और परस्पर संतुलन और नियंत्रण बनाये रखने की ऐसी आंतरिक पद्धति की संरचना कि कोई अपनी मर्यादा का उल्लंघन न कर सके। किंतु संविधान निर्माताओं ने जो शब्दों में नहीं लिखा है, जिसे रेखाओं के बीच पढ़ना होगा, वह है न्यायपालिका को सौंपी गई एक न्यासी और संवैधानिक मूल्यों के रक्षक की जिम्मेदारी । न्यायपालिका को सम्पूर्ण स्वतंत्रता दी गई और यह अपेक्षा की गई कि वह अपने उत्तरदायित्व का निर्वाह श्रेष्ठतम करेगी। न्यायपालिका एक संस्था है; उसके घटक और उसकी जीवनदायिनी शक्ति हैं – न्यायाधीश । संविधान निर्माताओं ने यह आधारभूत संदेश दिया है कि प्रत्येक न्यायाधीश का आचरण और कर्त्तव्य–सम्पादन इतना उत्कृष्ट हो कि कभी किसी को उंगली उठाने का अवसर ही न मिले। संविधान की इस आत्मा की अनुभूति हमें करने की आवश्यकता है। हमें अपनी स्वर्णिम परम्पराओं को न केवल जीवंत बनाये रखना है बल्कि उनका संवर्द्धन और सम्पुष्टिकरण भी करना है । वैश्वीकरण एवं उदारीकरण के युग में हमें अपना दृष्टिकोण बदलकर आधुनिकीकरण के साथ कदम मिलाने होंगे। मानवाधिकार, महिलाओं के समानाधिकार, समाज के पिछड़े वर्ग विशेषकर कमजोर वर्ग – जैसे बच्चे, मजदूर, विकलांग, प्राकृतिक आपदाओं से पीड़ित जन समूह – इनके सामाजिक अधिकारों को उपलब्ध कराना न्यायपालिका का चिंतन होना चाहिए। हम सब सामूहिक रूप से इन सब आदर्शों को प्राप्त कर सकते हैं यदि हम में से प्रत्येक के वैयक्तिक जीवन में आदर्शों की उत्कृष्टता हो।

मध्य प्रदेश की न्यायपालिका की उच्च आदर्श परम्पराओं को आत्मसात करते हुए दिनांक 3 मई, 1988 को प्रारंभ हुई मेरी यात्रा अब अंतिम पड़ाव पर पहुँच रही है। जिनसे मैंने सीखा है उन्हें सिखाना मेरा

उद्देश्य नहीं है और न ही मैं इस भ्रांति से पीड़ित हूं कि मैं उन्हें कोई सीख दे सकता हूँ। न्यायाधीशों की चर्चा नारद संहिता से एक श्लोक[2] उद्धत करते हुए समाप्त करता हूँ। न्यायाधीश में क्या गुण होने चाहिए:

राजा तु धार्मिकान् सभ्यान् नियुन्ज्यात् सुपरोक्षितान्
व्यवहार धुर वोढ़ ये शक्ताः सद्भवा इव
धर्मशास्त्रार्थ कुशलाः कुलीनाः सत्यवादिनः
समाः शत्रो च मित्रे च नृपते स्युः सभासद

(Let the king appoint, as members of the courts of Justice, honourable men of proven integrity, who are able to bear the burden of administration of Justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends or foes.)

मुझे आशा है कि मेरे मित्र और मुझसे कम आयु के न्यायाधीश उक्त सूत्र का सार शब्दशः अपने जीवन में अनूदित करेंगे और उनके सानिध्य और नेतृत्व में इस संस्था की हीरक जयंती मनेगी।

स्वर्ण जयंती के अवसर पर मेरे मित्र अभिभाषकों से कुछ अनुरोध करना चाहता हूँ। विधि का व्यवसाय समाज की सेवा के लिए प्राप्त दुर्लभ अवसर है। यह व्यवसाय नीति और धर्म के आधारभूत सिद्धांतों का मूर्त रूप है। उसमें वे सब गुण समाहित हैं जो किसी भी अच्छे व्यवसाय में होने चाहिये। विधि का व्यवसाय बुद्धिमत्ता प्रत्युत्पनमति, साहस और संघर्ष का अक्षय कोष है। न्यायमूर्ति श्री कृष्णा अय्यर के शब्दों में, अभिभाषकों द्वारा उनके अपेक्षित उत्तरदायित्व का निर्वाह इस पर आश्रित है कि वे कितने सत्यनिष्ठ हैं और उनकी व्यावसायिक जीवन पद्धति कैसी है। इस व्यवसाय की केंद्रीय विषय वस्तु न्यायदान में संपूर्ण सहयोग करना है। न्यायालय के समक्ष पैरवी करने का अभिभाषकों को मिला एकाधिकार इन तीन मान्यताओं पर आधारित है : (क) अभिभाषक के कार्य की सामाजिक उपादेयता है; (ख) अपने व्यावसायिक उत्तरदायित्व का श्रेष्ठ निर्वहन करते हुए अभिभाषकों को यह प्रमाणित करना चाहिए कि वे उस एकाधिकार के अधिकारी पात्र हैं; और (ग) वे अपने कर्त्तव्य का संपादन उचित रीति से कर रहे हैं अथवा नहीं इसे उनके पक्षकार, न्यायाधीशगण और सर्वोपरि उनके अपने व्यावसायिक साथी निरंतर देखते परखते रहते हैं। यदि अभिभाषक अपने कर्त्तव्यों और उत्तरदायित्वों के प्रति जागरुक होकर सक्रिय नहीं रहेंगे तो वे समाज में आदरणीय कहलाने के पात्र नहीं रहेंगे। स्मरण रहे कि अभिभाषण व्यवसाय कोई व्यापार नहीं है और फाइलें कोई बिकने वाली वस्तु नहीं है।

संग्रहालय और प्रदर्शनी

यह जानकर मुझे प्रसन्नता है कि स्वर्ण जयंती के अवसर पर मध्य प्रदेश उच्च न्यायालय में संग्रहालय और प्रदर्शनी का आयोजन किया गया है। इस आयोजन की शैक्षणिक महत्ता है। हम सभी को और जन साधारण को मध्य प्रदेश के न्यायिक इतिहास की परम्पराओं और दर्शनीय वस्तुओं की जानकारी मिलेगी जो ज्ञानवर्धक और प्रेरणास्पद भी होगी।

स्वर्ण जयंती स्मारिका

मध्य प्रदेश उच्च न्यायालय की स्वर्ण जयंती के अवसर पर प्रकाशित स्मारिका का विमोचन करने का सौभाग्य मुझे मिला है। इस स्मारिका के प्रकाशन में जिन्होंने योगदान और मार्गदर्शन दिया है, चाहे अपने लेखों के माध्यम से, चाहे संयोजन के माध्यम से, वे सभी साधुवाद के पात्र हैं। मुख पृष्ठ पर प्रस्तुत उच्च न्यायालय

2. नारद 36–4–5 (धर्मकोश–43)

भवन का विहंगम दृश्य, मुख पृष्ठ का रंग संयोजन विशेषकर कागज का स्वर्णिम रंग, प्रथम दृष्टि में प्रेम (लव एट फर्स्ट साइट) का आमंत्रण देते हैं। प्रकाशित चुनिन्दा लेख चिंतन की गहराई, अभिव्यक्ति की श्रेष्ठता और विचारोद्वेलन की क्षमता से परिपूर्ण हैं। कुल मिलाकर यह स्मारिका स्वर्ण जयंती जैसे समारोह के लिए समीचीन है। इसमें स्वर्ण की आभा भी है और स्वर्ण का स्थायित्व भी। मुझे विश्वास है कि यह स्मारिका मध्य प्रदेश उच्च न्यायालय से सम्बद्ध प्रत्येक न्यायाधीश, अभिभाषक और अन्य किसी के लिए भी एक बेशकीमती दुर्लभ संग्रहणीय दस्तावेज प्रमाणित होगी। न्यायमूर्ति श्री दीपक मिश्रा यद्यपि इस स्मारिका के परदे के पीछे छिपे व्यक्ति हैं, किंतु उनकी सृजनशीलता, परिकल्पना और नियोजित परिश्रम की झलक इस स्मारिका में आद्योपांत परिलक्षित होती है। जब यह स्मारिका छप रही थी तब दिल्ली में एक–दो बार वे मुझे मिले थे। मैंने उनके चेहरे पर चिंता की लकीरें देखी हैं। किंतु जब यह स्मारिका परिपूर्ण होकर उनके हाथों में दिखी तब मैंने उनके हाथों की लकीरों को देखा और तब मुझे लगा कि उनके हाथों की लकीरों और इस स्मारिका में कोई सम्बन्ध है। याद आया 'नूर लखनवी' का शेर[3] –

तुम्हारे हाथों की लकीरों के इजाफे हैं गवाह;
तुमने पत्थर की तरह इसको तराशा है बहुत
जो भी मिलता है मुकद्दर का गिला करता है
और मुझको, तुम्हारे हाथों पे भरोसा है बहुत

उपसंहार

हमारा भविष्य उज्जवल है। मध्य प्रदेश उच्च न्यायालय, यहाँ के न्यायाधीश यहाँ के अभिभाषक – इन सबने मिल जुलकर जो इतिहास रचा है, जिन श्रेष्ठ और आदर्श परम्पराओं को शनैः शनैः गढ़ा है उनके आधार पर हम एक सुंदर विकसित और समर्थ समाज की आधारशिला रख सकते हैं।

स्वर्ण जयंती के प्रसन्नतायुक्त वातावरण में भी हम यह नहीं भूल सकते कि चाहे न्यायाधीश हो चाहे अभिभाषक, उनके समक्ष आने वाला प्रत्येक प्रकरण दुःख, दर्द और अन्याय की एक कहानी होता है। हमारे पास आने वाला प्रत्येक व्यक्ति न्याय की आस में भटकता हुआ व्यक्ति है। उसे चाहिए सहानुभूति, आश्वासन के दो शब्द, हम सबका मिला जुला निश्छल प्रयास और एक दिन न्याय की प्राप्ति।

जबलपुर की मिट्टी और यहाँ के उच्च न्यायालय भवन की नींव नर्मदा के पवित्र जल से सिंचित है। यह स्थान और यह भवन अभिनंदन के पात्र हैं। यह एक तीर्थ स्थान है, और आज का आयोजन एक आराधना। परम्परागत पूजा के लिए गंगाजल जैसा ही पवित्र नर्मदा का जल चाहिए, तुलसी चाहिए, भाव चाहिए और अर्पण करने के लिए तन और मन चाहिए। कैसी हो एक न्यायाधीश और एक अभिभाषक की मनःस्थिति । चार पंक्तियों में इसे व्यक्त करूंगा और आपकी अनुमति लूँगा। इसके पूर्व आप सब को पुनः हार्दिक बधाई, आपका आभार। और, अब ये चार पंक्तियाँ[4] –

पर पीड़ा में छलक उठे मन, यह छलकन ही गंगाजल है।
दुःख हरने को पुलक उठे मन, यह पुलकन ही तुलसीदल है ।।
जो अभाव में भाव भर सके, वाणी से रसधार झर सके।
जनहिताय अर्पित जो जीवन, यह अर्पण ही आराधन है।।

●

3. (कृष्ण बिहारी नूर से क्षमा याचना सहित) समन्दर मेरी तलाश में, पृष्ठ 10
4. डॉ. गोपीनाथ केशरवाणी, कल्याण, अंक 8 वर्ष 2002

ADDRESS BY

HON'BLE SHRI JUSTICE Y.K. SABHARWAL 'CHIEF JUSTICE OF INDIA' AT THE INAUGURAL CEREMONY OF THE GOLDEN JUBILEE CELEBRATIONS OF THE HIGH COURT OF MADHYA PRADESH AT JABALPUR ON 22.10.2005

INTRODUCTION

It is with great pleasure that I participate in the Golden Jubilee Celebrations of the High Court of Madhya Pradesh. This occasion celebrates fifty years over which the Court has played an invaluable role as caretaker of the Constitution and a temple of justice. I must offer my felicitations to both the bar and the bench of this State of Madhya Pradesh, both past and present, for having come together in giving us half a century of legal and constitutional history at this High Court.

ESTABLISHMENT OF THE HIGH COURT AND ITS BENCHES

This is a celebration that crosses local boundaries and that we all share in. The High Court of Madhya Pradesh has a rich heritage. It was not created afresh at the time of re-organization of states, which was when the State of Madhya Pradesh was born. The act of re-organization merely changed the seat of the existent High Court of Nagpur to Jabalpur, which became the High Court of Madhya Pradesh from 1st November, 1956. This also resulted in the abolition of the High Court of Judicature of Madhya Bharat at Indore and Gwalior, the Judicial Commissioner's Court, Vindhya Pradesh and the Judicial Commissioner's Court at Bhopal. The Nagpur High Court was itself established in early 1936, under the Letters Patent issued by the then Emperor of India. This Letters Patent under which the Nagpur High Court was constituted and invested with jurisdiction continues in force after the adoption of the Constitution of India, subject to Articles 225 and 372 of the Constitution. It is also significant to note that the benches of the High Court are not later additions or afterthoughts. They have as much of a history as the High Court itself. The temporary benches of the High Court were also directed to sit at Indore and Gwalior on the very same day of 1st November, 1956. This was confirmed by the President of India in 1968. The inauguration of the High Court in 1956 took place under the able guidance of Chief Justice Hidayatullah, who headed the High Court of Nagpur since 1954.

EARLIEST JUDGES WHO CONTRIBUTED TO THE DEVELOPMENT OF THE COURT

The present High Court therefore owes its origin to the highest Court in the old province of C.P. and Berar, and has been gifted with some exemplary Chief Justices, each of whom has left an indelible mark on the administration of justice. We can look all the way back to pre-independence days, when the Berar Court was presided over by Chief Justice Gilbert Stone, who was a Scholar and wrote an excellent book on pleadings. He was followed by Sir Fredrick Grille an I.C.S, and Shri B.P. Sinha who brought with him the heritage of both the Patna

and Calcutta High Courts. Shri Justice Vivian Bose followed. Not only was he known for justice and fair play, in protection of human, firstly in a time when there was no statutory recognition of fundamental rights, but, also for the excellent command he had over the English language. The judgments of the Nagpur High Court came to be so well appreciated that other High Courts and the Privy Council would quote passages verbatim thereform. Justice Vivian Bose came from an illustrious family of lawyers who had close links with the Court. In fact, his grandfather Sir B.K. Bose was on the Bar of the Court of Judicial Commissioner predecessor to even the Nagpur High Court and established in 1862. Pausing for a moment, we must note that, even though the physical form of the High Court of Madhya Pradesh is in itself only fifty years old, if we look back to the spirit and tradition it embodies, we recognize a lagacy of almost a hundred and fifty years. This legacy has been nurtured by the more recent chief justices.

CONTRIBUTION OF JUDGES TO THE SUPREME COURT

Situated as it is in the heart of the Country, the High Court of Madhya Pradesh has contributed several distinguished judges to the Supreme Court of India. This list includes *Justice Madholkar*, *Justice A.P. Sen, Justice G.L. Oza, Justice Faizanuddin* and *Justice D.M. Dharmadhikari,* who recently retired. This tradition is continued by currently serving justices such as Justice Naolekar. It is also a matter of pride that two past Chief Justices of India *Justice Hidayatullah* and *Justice J.S. Verma,* and the present Chief Justice of India, *Justice R.C. Lahoti,* all come from the High Court of Madhya Pradesh.

A special place is occupied in the history of this Court by Justice Hidayatullah. Justice Hidayatullah studied at Nagpur and Cambridge University, following which he moved to Lioncon's Inn. He started his practice at Nagpur, where he became the Chief Justice of the Nagpur High Court. From there he moved on to become the Chief Justice of India on the 25th of February, 1968, after which he served as the Vice-President of India from 1977 to 1982. His contribution to the establishment of the High Court was immense in both physical and spiritual terms. On 20th March, 1969, the members of the Bar assembled in the Chief Justice's Court room to felicitate Shri Justice Bhishambar Dayal as the new Chief Justice of M.P. By this time, Justice Hidayatullah was Chief Justice of India. Shri Chitaley, Advocate General of M.P. in his welcome stated:

"[Justice Hidayatullah] was in every sense the architect of this High Court. Even the Conrtroom, in which your Lordship will preside, was designed by the Chief Justice M. Hidayatullah and it has and will serve as a perennial source of inspiration to the Bench and to the Bar."

Justice Verma served this Court for over a decade as a Judge and thereafter as Chief Justice. Later he was appointed as Chief Justice of Rajasthan High Court and then as a Judge of the Supreme Court, where he served with distinction for number of years, ending his tenure as Chief Justice of India. Finally, when we speak of Chief Justice Lahoti hailing from the High Court of Madhya Pradesh, it is also important to note that his ties go all the way back to his graduation in Law from Holkar College, Indore. He was even awarded a gold medal for securing first position in the University. After serving this Court as a

Judge with distinction for number of years, Justice Lahoti was appointed as a Judge of Delhi High Court in 1994. It was not only good luck for Delhi or Delhi Judiciary but for me personally too. Time constraint does not permit me to narrate in this golden jubilee celebration innumerable golden qualities Justice Lahoti has. But let me only say that in fact he is pure gem from every angle. Apart from this, many have been elevated as Chief Justices of various other High Courts across the country. All these learned judges have made good use of the legal acumen they nurtured and developed while at the High Court of Madhya Pradesh. It was the strong sense of foundations and traditions that allowed them to serve with distinction in the pursuit of law and justice.

EMINENT LAWYERS BEFORE THE HIGH COURT

It is also a matter of pride for the High Court to have had the privilege of nurturing a galaxy of eminent lawyers. This includes several stalwarts from the past, such as the late Dr. Hari Singh Gour, Shri Diwan Bahadur Pandit Sitacharan Dubey, Shri R.S. Dabir, Shri R.P. Verma, Shri Y.S. Dharmadhikari, all of whom practised before the principal seat at Jabalpur; Shri K.A. Chitaley and Shri Surajmal Garg who practiced before the bench at Indore, and Dr. Harihar Niwas Dwivedi who practiced before the bench at Gwalior. All of these eminent practitioners contributed in their own unique way to the enrichment of the High Court of Madhya Pradesh. Their tradition is continued by the likes of Shri Rajendra Singh, Shri S.C. Datt, Shri P.S. Nair, Shri N.S. Kale, Shri Rajendra Tiwari, Shri G.M. Chaphekar, Shri A.M. Mathur, Shri J.P. Gupta and Shri R.A. Roman. They all deserve our respect and appreciation, as do the many other successful lawyers who have made significant contributions not just in the law but in the larger sphere of public life.

It is our hope of tomorrow that the junior members of the Bar will never feel that the shoes they are stepping into are too big, for, in their turn, one day they will rise to the occasion and emulate their seniors in stature and erudition. One must never forget that the first duty of a lawyer is to the Court; and it only in this way that the nobility of the profession can remain sacrosanct.

QUESTIONS REQUIRING INTROSPECTION

On the 18th of March, 1960, at the inauguration of the High Court Bench at Indore, Chief Justice P.V. Dixit stated that:

"The Supreme Court and the High Court are bulwarks of the Constitution. As bulwarks, they have to face heavy weather and storms, to secure that the cause of justice does not become a tempest-tossed barge in mid-ocean. They are no doubt stout vessles which will weather the storm."

The golden jubilee is not merely an occasion of exchanging pleasantries and talking of platitudes, it is also a time for introspection and heart - searching. We must examine the past and see whether the stormy years have been kind to us. The destiny of each one of us in the world of law, of the practising lawyers and of those on the Bench, is linked with our judicial system. Twenty seven years ago, Justice H.R. Khanna made a speech at the Golden Jubilee of the Mathura Bar Association. The questions he asked on that day of celebration are

even today the questions we must ask ourselves as we celebrate fifty years of the High Court of Madhya Pradesh:

- Does our judicial system satisfy the demand for justice?
- Does it fulfil the expectations of the people? Are Courts of law looked upon as temples of justice, where it is administered without fear, or favour, oblivious of the personalities of the litigants and without regard to their long purse or high status?
- Does the common man have an abiding and unshakeable faith in the process of justice as administered by the courts?

It is upon the answer to these questions that our judicial system would ultimately be judged. The image of the Courts in the ultimate analysis depends essentially upon the way the cases are handled, the extent of confidence the court inspires in the parties to the cases before them, the promptness or absence of delay in the disposal of cases.

PENDENCY OF CASES AND ARREARS

In order to fully address the needs of the new India that we live in, it is crucial that the judicial system has a public image of modernity, efficiency and accessibility. This is not possible as long as the judicial option remain associated with interminably long and frighteningly expensive litigation. There is an urgent need to tackle pendency of cases. The vast numbers of cases that we are dealing with mandates a combined endeavour in which both the bar and the bench come together to address this malaise. There are about 3 crore cases pending across the country in various subordinate courts. It is striking to see that almost two-thirds of all these cases are criminal in nature. In this year declared as the "year of excellence" by Chief Justice Lahoti, the High Court of Madhya Pradesh took steps to expedite the disposal of cases. A special drive was launched to clear the backlog of civil appeals, old civil suits and summary cases. Applications under Section 321 of the CrPC for withdrawal of cases by the State Government were also speedily considered. This program was driven by an incentive scheme for judicial officers and special measures taken. The figures are quite encouraging. While in early 2002, there were almost 11 lakh cases pending before the subordinate courts in the state of Madhya Pradesh, this was reduced to nine and a half lakh cases by March this year. This has not been because of reduction in the rate of institution of fresh matters, but because the rate of disposal has been ahead of the institution.

It is clear today that High Court across the country are heavily burdened, with over 33 lakh cases pending at the beginning of this year, over 80% of which are civil matters. Recent reports show that there remain almost two lakh cases still pending before the three benches of the High Court of Madhya Pradesh. The experience of the subordinate courts must be replicated with the High Court as well. One of the bright spots has been the Family Courts in this state, to which more and more people have resorted over the recent years. Despite the increased load, the pendency has been steadily declining. While there were over 7000 cases pending in mid-2002, the number has gone down to a little over 6000 in March this year. This shows that the disposal rate of these courts

has been improving despite steady increases in the institution of new cases. We are also happy to note that the disposal of cases by Lok Adalats has gone up almost tenfold over the last five years.

JUDICIAL DISCIPLINE AND EFFICIENCY

There are three elements to an efficient judicial system - physical, structural and philosophical. The physical aspect involves infrastructural support in terms of libraries, legal resources, computerization and the availability of physically and geographically accessible and approachable courts. The structural element involves systemic modifications, such as the best possible distribution of admission and regular matters between judges, prompt filling of vacancies, appointment of some judges only for petty offences in the subordinate courts, limitations on the time period for a trial and oral proceedings and, most of all, limited adjournments. However, neither of these can succeed without the philosophical element.

Efficiency stems from a mindset. Judicial discipline in intertwined with the effective functioning of the Courts. The greatest judges of the High Court are remembered not only for the decisions they render, but more for their work ethics and conduct. The importance of streamling and accelerating the dispensation of justice cannot be overemphasized. It is only when the judicial process works well that people will reject extrajudicial avenues. This is increasingly important in the current scenario when the judicial system is tested not just domestically, but also internationally. Foreign investment and international trade and commerce necessarily occur on an implicit foundation of the rule of law. We have with us the advantages of the common law, respected and easily related to by most countries. There is a need for clarity in judgments and consistency in the line taken by various courts across the country, especially in matters relating to commerce, trade and contractual relations, domestic as well as international. Litigants must ultimately be secure in the belief that, irrespective of the overflowing dockets, they are assured of justice. It is only with a strong, swift and effective judicial system that our inherent advantages can be fully utilized.

INFRASTRUCTURE

A necessary concomitant to streamlining justice delivery in India is the provision of necessary and adequate infrastructure. Libraries must be up to date and adequate facilities must be available with all subordinate courts as well. Computerization of the courts has been an ongoing endeavour, one which Chief Justice Lahoti has especially followed and promoted. The High Court of Madhya Pradesh introduced computers over a decade ago, and there is an action plan in place to upgrade facilities. Ultimately, any infrastructural improvements would require and rely on the support of the executive. We are confident of securing the full cooperation of the executive in our national program for the computerization of the judiciary.

INDEPENDENCE OF THE JUDICIARY

The Court must remain, in the words of Chief Justice Kania half a century ago, "quite untouchable by the legislature or the executive authority in the performance of its duties." In the memorable words of Chief Justice Patanjali Shastry,

the Courts function as "the sentinels on the *qui vive*", a reference to sentinels guarding French castles in days of yore. The duty of the higher judiciary is to operate as a watchdog through judicial review over both the acts and the omissions of the legislature and the executive. Through its decisions, the Court has strived to give meaning to Fundamental Rights and to protect the exploited and the oppressed.

FINAL REMARK - ROLE OF THE COURT

Some of the greatest judges on the Court have been those who had the vision and conviction to discover new *avatars* of the right to life. They have diluted hurdles of *locus standi* and recognized through years of consistent strands of judicial pronouncements a golden triangle running through some of the most powerful Articles of the Indian Constitution - Articles 14, 19 and 21.

Finally, it must be remembered that an effective guard must be both independent and upright. Judges must maintain the highest standards so as to set an example for all those whose behaviour and actions it is their lot to regulate. Justice Khanna said in 1977 that we need persons on the Bench who can weigh things in the balance with supreme impartiality, who are undaunted by any consideration except that of justice, justice absolute, justice pure and unalloyed, whom nothing can sway, neither mob frenzy nor the views of the powers that be, persons with resolute hearts, persons whose allegiance is to justice and to nothing else. Timidity of mind ill goes together with the office of a Judge. Weak characters cannot be good Judges.

At the opening ceremony of the Nagpur High Court building in 1940, Sir Gilbert Stone, the then Chief Justice, referred to the maxim, "Let justice be done though the heavens fall". But whether they do fall or remain eternally as they are, in this temple of justice there shall always be vindication of law and innocence and the triumph of truth and justice.

We must remember that in the final analysis, the strength and failure of our judicial system, its utility and credibility as a necessary organ of the State in a civilized society, the respect it would evoke and the confidence it would inspire would depend upon the way it satisfies the hopes and aspirations of the people, of the common man in the quest for justice, in keeping the scales even in any legal combat between the rich and the poor, between the mighty and the weak, between the State and the citizen, without fear or favour. I hope that the State which is the biggest litigant would act with more responsibility by not asking for repeated adjournments. I have no doubt that if Government, Judges, advocates and litigants all cooperate, delay in disposal of cases can be considerably reduced.

I will end by expressing my full confidence on both the Bar and the Bench who would take advantage of the experience of last half a century to appropriately address and tackle the problem of providing inexpensive and speedy justice to the teeming millions to maintain the faith of common man in the judiciary.

With this optimism, I wish you all the best.

Thank you,

●

WELCOME ADDRESS BY

HON'BLE SHRI JUSTICE A.K. PATNAIK, CHIEF JUSTICE, HIGH COURT OF MADHYA PRADESH IN THE INAUGURAL FUNCTION OF THE GOLDEN JUBILEE CELEBRATIONS OF THE HIGH COURT OF MADHYA PRADESH ON 22.10.2005

It gives me immense pleasure to welcome you all to this august inaugural function of the Golden Jubilee Celebrations of the High Court of Madhya Pradesh. On 1st of November 1956, the State of Madhya Pradesh was constituted and the High Court of Madhya Pradesh with its Principal Seat at Jabalpur was established by the States Reorganization Act, 1956. By an order dated 1st November, 1956 of the then Chief Justice of Madhya Pradesh High Court, temporary Benches of the High Court were also constituted at Indore and Gwalior, which subsequently became permanent Benches of the High Court. The High Court of Madhya Pradesh with its Principal Seat at Jabalpur and its Benches at Indore and Gwalior will be completing 50 years on 31.10.2006. We are, therefore, celebrating the Golden Jubilee of the High Court during 2005-2006. An exhibition of old articles and papers relating to the High Court has already been inaugurated today and this is the inaugural function of the Golden Jubilee Celebrations. A function is proposed at Indore and another at Gwalior during this Golden Jubilee Year. 18 Law lectures by eminent jurists, 6 each at Jabalpur, Indore and Gwalior have also been planned during 2005-2006. A Commemorative Book and a special postal cover are also being released as part of the Golden Jubilee Celebrations.

In these 50 years, since 1st November, 1956, the High Court of Madhya Pradesh has grown to become an institution of great repute because of the high standards maintained and the landmark judgments delivered by its Judges. We have, therefore, invited all our former Chief Justices and Judges with a view to honour them for their rich contribution to the growth of this institution. 33 of former Judges have taken the trouble to travel long distances besides the former judges residing at Jabalpur have come to attend this inaugural function. Due to paucity of time, I am unable to mention their individual names, but I welcome them all with all humility to this inaugural function of the Golden Jubilee Celebrations.

The Advocates of the Madhya Pradesh High Court at Jabalpur, Indore & Gwalior have made immense contributions to the reputation of this High Court. Without their able assistance, many of the landmark judgments delivered by this Court may not have been possible. Senior Advocates of the High Court have provided a very constructive leadership to the younger members of the Bar because of which the Bar of this High Court is known all over the country as one with high traditions and values. I welcome all the members of the Bar to this inaugural function.

The High Court of Madhya Pradesh today is one of the best administered High Courts in the country and the credit for this to a large extent goes to the Registry of this High Court. The superior Officers of the Registry are all present today and I welcome them all to this inaugural function. It has not been possible on account of limitation of space to accommodate the remaining staff of the High Court in today's inaugural function. We have organized a separate inaugural function with a cultural programme for them tomorrow.

Over the 50 years, however, new problems have come up in the High Court. The number of cases filed every day by the litigant public for redressal of their grievances has increased during the last few years. With the abolition of the State Administrative Tribunal, the cases pending before the Tribunal have been transferred to the High Court and new service cases are now being filed in the High Court. As a result, a large number of cases have accumulated and the litigant public are suffering due to the delays in disposal of the cases: Today, Madhya Pradesh High Court has as many as 37 Judges as against a sanctioned strength of 42. I am extremely proud of this large family of hard working, disciplined and sincere Judges and I am sure in years to come they will be able to cope up with the increasing litigation and will dispense justice to the people of Madhya Pradesh as speedily as possible. I welcome my brother Judges and their families to this function.

The pendency of cases in the Subordinate Courts in Madhya Pradesh is also huge. This problem will have to be tackled by filling up all the existing vacancies of Judges in the Subordinate Courts and by resorting to Alternative Dispute Resolution in cases where settlements are possible as provided in Section 89 of the Code of Civil Procedure. The District Judges and Judges of Family Courts of Madhya Pradesh and the Judicial Officers posted at Jabalpur are also present in this function. While welcoming them, I seek their cooperation in clearing the arrears of cases in the Subordinate Courts without in any way sacrificing the quality of justice.

My Lord the Chief Justice of India, Justice R.C. Lahoti, in an article titled "Quest for Judicial Excellence" published in the inaugural issue of the Journal of National Judicial Academy, has said :

> ".....We are living in the age of computers. Our methodologies are outdated and need a re-look with innovation."

His Lordship has set up a committee which is guiding the judiciary all over the country in computerisation of the Courts with funds provided by the Central Government. With such guidance and funds, we hope to make the best use of I.T. methodologies and make our judicial system more efficient, clean and speedy for the litigant public of Madhya Pradesh.

This inaugural function of the Golden Jubilee Celebrations of the High Court is an occasion to seek the blessings of our elders. His Excellency, the Governor of Madhya Pradesh Dr. Balram Jakhar has a long record of public service not only as a Governor, but also as Speaker of the Lok Sabha and as Minister in the Central Cabinet. I welcome His Excellency to this inaugural function of the Golden Jubilee Celebrations. My Lord, the Chief Justice of India, Justice R.C. Lahoti began his career in the legal profession in this State of Madhya Pradesh and has made lasting contributions to the Indian Judiciary in different capacities. We need his blessings on this august occasion. My Lord, Justice Y.K. Sabharwal will be our leader in the judiciary from 1.11.2005 and has a vision for making the Indian Judiciary more effective in future. We look forward to his guidance in shaping the future of this High Court. The Hon'ble Judges of the Supreme Court of India, who are present today, are known for their erudition and judgments and for their commitment to the cause of justice. Their Presence makes this function dignified. The presence of the Chief Justices, Acting Chief Justices and sitting Judges of other High Courts in today's inaugural function demonstrates that the Indian Judiciary though large and far flung is a well knit family. The ladies who have accompanied our guests today have added a lot of grace to this inaugural function.

I welcome you all on behalf of the High Court of Madhya Pradesh.

●

Keep away from people who try to belittle your ambitions. Small people always do that, but the really great make you feel that you, too, can become great.

MARK TWAIN

Every great and commanding moment in the annals of the world, is the triumph of some enthusiasm.

RALPH WALDO EMERSON

INVESTIGATION AND TRIAL OF OFFENCES UNDER WILD LIFE (PROTECTION) ACT, 1972

VED PRAKASH
Director

Wild Life (Protection) Act, 1972 (in short the Act) which received Presidential assent on 9.9.1972 and was notified in Central Gazette on 11.9.1972 came into force in Madhya Pradesh on 25th of January, 1973.

India once upon a time had the distinction of having richest and the most varied wild life. However, poaching and hunting with a feudalistic attitude resulted in rapid decline of invaluable wealth of India's wild life. This gave rise to a grave concern because it ultimately threatened the ecosystem and richness of the biodiversity, which is the pre-condition for the survival of life as well as human civilization. Considering all these aspects Wild Life (Protection) Act, 1972 was enacted by the Parliament, which provides for the protection of wild animals, birds and plants with a view to ensure ecological and environmental security and stability.

LEGISLATIVE DEVELOPMENTS

The Act, as enacted, aimed at regulating hunting of wild animals, laying down procedure for declaring areas as sanctuaries and national parks, regulating possession, acquisition, transfer of or trade in wild animals, animal articles, trophies and taxidermy thereof. It also provided penalties for the contravention of its various provisions. To make it more effective the Act, has so far been amended five times, i.e in 1982, 1986, 1991, 1993 and 2002 with following broad features:

- Act No. 23 of 1982, which came into force from 22.5.1982, basically provided for translocation of wild animals for scientific management and guidelines regarding licensing for hunting.
- Act No. 28 of 1986, which came into force on 25.11.1986, provided in respect of prohibition of trade in trophies, animal articles, etc. relating to 'scheduled animals', i.e. animals included in Sch. I and Part II of Sch. II of the Act.
- Act No. 44 of 1991, which came into force on 2.10.1991, provided for ban on hunting of wild animals included in Sch. I to Sch. IV of the Act except VERMIN as defined in Section 2 (34) and detailed in Sch. V of the Act. The only exception carved out was regarding hunting for protection of life, property, education, research, scientific management and captive breeding.

It also provided for immunization of live stock in buffer areas, i.e. areas around sanctuaries and national parks. Ban on transport of wild life without permission, setting of Central Zoo Authority, prohibition on collection/exploitation of threatened species of plants (as included in Sch. VI) and prohibition on

import/export of imported ivory with an object of protecting African Elephant were other important features of this amending Act. The Act also made various penalties more rigorous.

- Act No. 26 of 1993, which came into effect from 4.8.1992, provided for control of Central Zoo Authority over all zoos.
- Amending Act No. 16 of 2003, which came into force from 4.8.2003, provided for effective control over increased poaching and trade of wild life products. It provided a provision for buffers around national parks and sanctuaries.

Apart from that, it provided for development of conservation reserves/community reserves and highlighted the ecological and environmental aspects related with wild life protection. It also provided for enhancement of rewards as well as increase in composition fee from Rs. 2000/- to Rs. 25,000/-. The aforesaid legislative developments clearly indicate the anxiety on the part of the Parliament to ensure adequate protection of wild life by resorting to various methods for their preservation.

BRIEF OVERVIEW OF THE ACT

Originally, the Act had of 7 Chapters consisting of 66 Sections and 6 Schedules. By various Amending Acts Chapter III-A, Chapter IV-A, Chapter V-A and Chapter VI-A were added. Presently, the Act has 11 Chapters and six Schedules.

Chapter I contains definition clause (Section 2). Chapter II provides in respect of various Authorities under the Act. Chapter III deals with prohibition on hunting and permission of hunting in certain cases relating to human safety, scientific research, education, etc., that too under the grant of permit. Chapter III-A provides for protection of specified plants as defined in Section 2 (27) and detailed in Schedule VI of the Act. Chapter IV consisting of Sections 18 to 38 provides in respect of protected areas, meaning thereby sanctuaries defined in Section 2(26) and national parks defined in Section 2 (21), Conservation reserve defined in Section 36-A and Community reserve defined in Section 36 (c). Chapter IV-A gives statutory recognition to Central Zoo Authority which has power to control various zoos. Chapter V consisting of Sections 39 to 49 provides in respect of trade/commerce in wild animals, articles and trophies. Chapter V-A imposes prohibition on trade and commerce in respect of trophies and animal articles of scheduled animals i.e. animals included in Sch. I and Part II of Sch. II. Chapter VI, which is rather most important, being related with investigation and trial relating to various offences under the Act, consists of Sections 50 to 58 including Section 51-A, which was added by the Amendment Act of 2002, and provides for certain rigorous conditions regarding grant of bail in offences relating to hunting inside national park/sanctuary or altering boundary marks or an offence regarding scheduled animals if such person is previously convicted under the Act. Chapter VI-A precisely deals with forfeiture of property derived from illegal hunting and trade while Chapter VII consisting of Section 59

to 66 including Section 60-A and 60-B deals with miscellaneous aspects pertaining to reward, etc.

NATURE OF OFFENCES

Various offences provided under the Act may be categorized as under on the basis of sentence prescribed for them:

Sl. No.	Offence under	Section	Penalty	Nature of offence	Mode of Trial
1	Contravention of any provision of the Act or Rule or Order except Ch. V-A & S. 38-J	51 (1)	Impri. - Upto 3 yrs or Fine - Upto Rs. 25000	Non bailable Cognizable	Warrant Trial cognizance on the basis of complaint
2	Subsequent offence of above	Proviso (2) of S. 51(1)	Impri - Upto 7Yrs. and fine **Impri - Min. 3 yrs. and Fine - Rs. 25,000/-**	Non bailable Cognizable	Warrant Trial cognizance by Court on the basis of complaint
3	Offence regarding animal specified in Sch. I or Part II of Sch. II or meat, trophy, uncured trophy, article of such animal or hunting in sanctuary /national park or altering boun- daries of the Sanctuary/ national park	Proviso (1)	Impri. - Upto 7Yrs.an and fine **Impri. - Min. 3 yrs. and Fine - Rs. 10,000/-**	Non bailable Cognizable	Warrant Trial cognizance by Court on the basis of complaint
4	Contravening any provision of Ch. V-A	S. 51 (1-A)	Impri. - Upto 7Yrs.an and fine **Impri. - Min. 3 yrs. and Fine - Rs. 10,000/-**	Non bailable Cognizable	Warrant Trial cognizance by Court on the basis of complaint
5	Teasing, molest-ing, injuring,feed- ing, disturbing any animal of zoo (u/s 38-J)	S. 51 (1-B)	Impri. - Upto 6 months or fine upto Rs. 2,000/- or both	Bailable Non-cognizable	Summons Trial cognizance by Court on the basis of complaint
6	Second offence of the above	Proviso to S. 51 (1-B)	Impri.- Upto 1 year or fine upto,Rs.5,000/-	Bailable Non-cognizable	-do-
7	Wrongful seizure etc.	53	Impri.- Upto 6 months Fine - Upto Rs. 500/- or both	Bailable Non-cognizable	Summons trial Cognizance by Court upon complaint

INVESTIGATION

Investigation, which involves collection of material to establish the commission of an offence, is the foundation on which depends the ultimate success or failure of the case. Regarding investigation part, we can examine the legal position from the following angles:

- Officers empowered to investigate
- Powers regarding entry, search and seizure
- Powers regarding arrest, detention and remand
- Powers regarding interrogation of persons and production of documents
- Other powers including power to record evidence

EMPOWERED OFFICERS:

Section 50 of the Act empowers following officers to make entry into any premises, land vehicle, vessel, including power to stop any vehicle or vessel in order to conduct search or inquiry on having reasonable grounds for believing that any person has committed any offence under the Act:

- Director of Wild Life Preservation
- Any officer authorized by the Director (W.L.P.)
- Chief Wild Life Warden
- Any officer authorized by the Chief Wild Life Warden (W.L.P.)
- Any Forest Officer
- Any Police Officer not below the rank of Sub-Inspector

SEARCH AND SEIZURE

Aforesaid officers u/s 50 of the Act on having reasonable grounds for believing commission of an offence under the Act by a person may seize from him:

- Captive animal
- Wild animal
- Meat
- Uncured trophy
- Specified plant
- Part or derivative of the above
- Animal Article
- Trophy
- Trap tools, vehicle, vessel, weapon - **used for commission of such offence**

ARREST, DETENTION AND REMAND

Section 50(1) (c) authorizes specified officers to arrest a person suspected of being involved in commission of an offence under the Act without warrant and to detain him. It is noteworthy that the aforesaid provision also leaves a discretion with the aforesaid officers not to arrest if they are satisfied that **such person will appear and answer any charge.**

The empowered officer also has the power to stop and detain any person to verify about any license or permit required under the Act and on his failure to do so and further failure to furnish his name and address to arrest such person without warrant.

In order to carry out the investigation, an officer not below the rank of **Assistant Director of Wild Life** or **Assistant Conservator of Forests** authorized by the State Government in this behalf may for purpose of investigation-

- Issue a search warrant, enforce the attendance of witnesses
- Compel the discovery and production of documents and material objects.

RECEIVING AND RECORDING EVIDENCE BY FOREST OFFICERS

The officers of the aforesaid category (Assistant Director/Assistant Conservator of Forests and officers of above rank) may receive and record evidence under Section 50 (8) (d). Sub-section 9 of Section 50 provides that such evidence is admissible in any subsequent trial before a Magistrate provided it has been taken in the presence of the accused person. With respect to similar provisions contained in Section 71 (d) and Section 72 (2) of Madhya Bharat Forest Act, it was authoritatively laid down by our own High Court in *Sajjan Singh v. State, 1960 JLJ S.N. 108* as under:

> "The statement made before a Forest Officer under clause (d) of section 71 of the Forest Act is admissible in any subsequent trial before a Magistrate, provided it has been taken in the presence of the accused person. Under section 72 (2) of the Act the statements recorded before the Forest Officer by themselves become a substantive piece of evidence when the conditions laid down in section 72 (2) are fulfilled. In the present case the statements before the Forest Officer were taken in the presence of the accused and he had cross-examined them. The statements could be relied upon in the trial."

From the above it is crystal clear that if the statement of person has been recorded in the presence of the accused and accused has been given the opportunity of cross-examination then in the event of the witness turning hostile the statement recorded by the Forest Officer can be used as substantive piece of evidence. Here it is noteworthy that this provision is seldom used by the Forest Officers and Courts and if used with care and caution may prove very helpful in establishing the guilt of the accused.

COGNIZANCE BY COURT

The provisions of Section 55 of the Act do clearly indicate that cognizance by a Court in respect of offences coming under the Act can be taken only on the complaint made by the following officers -

- Director of Wild Life Preservation.
- Any officer authorized by the Central Government
- Member Secretary Central Zoo Authority (for offences under Section VI-A
- Chief Wild Life Warden
- Any officer authorized by the State Government (vide notification dated 31.7.1974 the State Government has authorized Wild Life Warden u/s 55
- Officer in-charge of the Zoo (for offences u/s 38-J).
- Vide Notification dated 20.11.1976 issued by the M.P. Government Station **House Officers** are also empowered to file complaint under Section 55 of the Act.

Apart from the above, reference to Rule 55 of M.P. Wild Life (Conservation) Rules, 1974 is also relevant here under which following officers have been authorized to file complaint u/S 55 of the Act

- Chief Wild Life Warden
- Wild Life Warden
- Forest Range Officer

COMPLAINT BY PRIVATE PERSON

A peculiar provision in the shape of Section 55 (c) authorizes any person to make a complaint to the Court in respect of an offence under the Act provided such person has given notice of not less than 60 days in the manner prescribed about the alleged offence and his intention to make a complaint to the Central Government or the State Government or the officer authorized, meaning thereby the Court can take cognizance of any offence against an accused person on the complaint of a person who has given notice to the Central/State Government in the aforesaid manner.

From the aforesaid provisions, it is clear that the Court can take cognizance of an offence under the Act only on the basis of complaint. In *State of Bihar v. Murad Ali Khan, 1989 SC 1,* which was a case relating to killing of an elephant, police registered the case u/s 429 IPC. A complaint was also filed by the competent Forest Officer. It was argued that as police has registered a case in cognizable offence, therefore, Section 210 of the Cr.P.C. will apply and the Magistrate may not proceed with the complaint till the investigation is over. This

argument was rejected by the Apex Court and it was held that where the law provides a single mode of taking cognizance, then cognizance cannot be taken by any other mode and that Section 210 will not create any obstacle for taking cognizance. It was also observed in this case that the ingredients of offence under Section 429 IPC and offence under Section 9(1) read with Section 51 of Wild Life (Protection) Act are not substantially the same.

PRESUMPTIONS

Section 57 of the Act provides that in a prosecution for an offence under the Act, if it is established that a person was found in possession, custody or control of any captive animal, animal article, meat, trophy, uncured trophy, specified plant or part or derivative there of then it shall be presumed until the contrary is proved by the accused, that such accused person was in unlawful possession, custody or control of such animal, plant or article or part or derivative thereof. This provision must receive attention not only of the prosecution but also of the Courts particularly in the background of definitions of meat, trophy and uncured trophy, provided in Section 2 (20), 2(31) and 2(32), respectively, which are of the widest amplitude and include within their fold even the blood, bone, sinew, eggs, shell or carapace, fat, flesh with or without skin, raw or cooked.

COMPOSITION

Section 54 of the Act empowers Director of Wild Life Preservation, Asst. Director Wild Life Preservation, Chief Wild Life Warden and all officers of the rank of Deputy Conservator of Forests and above to compound the offences and to accept from any person against whom a reasonable suspicion exists that he has committed an offence under the Act payment of sum of money not exceeding Rs. 25,000/-.

However, it should be kept in mind that an offence, which is punishable with a minimum period of imprisonment (see table above) shall not be compounded. The effect of composition as provided in Section 54 (2) is that the suspected person, if in custody, shall stand discharge and no further proceedings in respect of offence shall be taken against such person. Again the officer compounding the offence may cancel any license or permit granted under the Act.

Here it is noteworthy that, the statement of object and reasons of Amendment Act 16 of 2002 in clause 15 provides that vehicle, weapon, tools, etc. used in committing compoundable offence are not to be returned to the offenders. No specific provision is there in Section 50 (4) to this effect. However, such a provision can be comprehended by a reading together Section 39 (1)(d) and Section 50 (4) of the Act.

DISPOSAL OF SEIZED ANIMAL, ARTICLE OR OTHER PROPERTY

The power to seize a captive animal, wild animal, animal article, trophy, uncured trophy, specified plant or part or derivative thereof, in respect of which a offence appears to have been committed and trap, tool, vehicle, vessel, which has been used for committing such an offence flows from Section 50 of the Act.

Section 39 (1) (d) provides that vehicle, vessel, trap or tool so seized shall be the property of the Government. The provisions of Sections 39 (1)9d) and 50 have created a lot of controversy about the mode of disposal of the seized vehicle, vessel, trap, tool. But if we examine the provisions of Section 50 a little carefully then following position emerges:-

1. **A captive or wild animal** that has been seized under section 51 (C) may be given on supurdagi by an officer not inferior to the rank of **Asst. Director of Wild Life Preservation or Asst. Conservator of Forest** to any person on execution by him of a bond for the production of such animal as and when required before the Magistrate having jurisdiction to try the offence.

Any meat, uncured trophy, specified plant or part or derivative thereof has to be disposed of by the Assistant Director of Wild Life Preservation or any officer of the Gazetted rank authorized by him in this behalf or by the Chief Wild Life Warden or the authorized officer as may be prescribed. The mode of disposal is provided in M.P. Wild Life (Protection) Rules, 1974, which is through public auction by an officer authorized by the Chief Wild Life Warden and the amount received by auction to be deposited in Government Treasury under Head 0-406. As per the latest position these items are to be disposed by burying them and not by way of auction.

The remaining articles, i.e. animal articles, trophy, trap, tool, vehicle, vessel or weapon must forthwith be taken before the Magistrate u/s 50 (4) to be dealt with according to law under intimation to the Chief Wild Life Warden or the officer authorized by the same in this regard. Aforesaid position makes it clear that the items seized under Section 50 (1) (c) have to be dealt according to the aforesaid 3 modes. As far as the final disposal of things which have been produced before the Magistrate u/s 50 (4) of the Act is concerned the same have to be dealt as per Section 39 of the Act, meaning thereby, if it is found that the seized animal article, trophy is one **in respect of which an offence has been committed under the Act**, then it will become the property of the Government.

Again any vehicle, vessel, trap or tool which has been used for committing an offence under the Act shall also become the property of the government. To make it more clear, it can be said that to make such property, the property of the Government under S. 39 (1) (d) it must be proved before the competent Court that it has been **used for committing an offence under**

the Act. Therefore, there is nothing to indicate that seizure simplicitor of the property will render it the property of the Government. This position of law has been made amply clear by a Full Bench decision rendered by our own High Court in *Madhukar Rao v. State of Madhya Pradesh and others, 2001 JLJ 304* where in it has also been held that such property may be given by the Magistrate on supurdagi.

However, a note of caution is there in this respect emerging from the pronouncement of the Apex Court in *State of Karnatak v. K. Krishnan, AIR 2000 SC 2729* wherein dealing with Karnataka Forest Act it has been ordained that generally, any forest produce, tools, vehicle used in the commission of forest offence which are liable to forfeiture should not be released. The liberal approach in the matter would perpetuate the commission of the more offences with respect to the forest and its produce which, if not protected, is surely to affect the mother earth and the atmosphere surrounding it. The Apex Court observed that the courts cannot shut their eyes and ignore their obligations indicated in the Act enacted for the purpose of protecting and safeguarding both the forests and their produce. The Court further held that when any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence. This mandate of law is equally applicable in respect of tools, vehicles etc. seized under Wild Life (Protection) Act.

CONFISCATION

Here, reference to Section 34 (a) of the Act is also apposite which authorizes the prescribed officers not only to remove encroachment on sanctuary/ national park but also to confiscate all the things, tools and effects belonging to the person who has encroached upon such land. This power has to be exercised by an officer not below the rank of Dy. Conservator of Forests.

CONFESSION

Sections 25 and 26 of the Evidence Act declare in unequivocal terms that confession made before police officer or in police custody are in-admissible in evidence. However, as held in Forest Range Officer v. Abu Bakar, 1990 FLT 22 (Ker) a forest officer is not a police officer, therefore, a confession made by an accused before forest officer is admissible before the Court against the accused.

●

PC AND PNDT ACT (PROHIBITION OF SEX-SELECTION) ACT, 1994 : A MERE PAPER TIGER ?

Shailendra Shukla
Addl. Director

A modern and developed country is known by the fact that men and women are afforded equal opportunities in all spheres of life. Equal opportunity must also mean equal opportunity to be born and live. However as we look into the sex ratio of men and women in India, the facade of equality fades away and stark reality glares into our face.

A recent study of ten most populous countries has shown that the sex ratio in India is the worst amongst these countries. The chart below is an eye opener.

Table : 1 Sex ratio in ten most populous countries

S.No.	Country	Sex Ratio
1	India	933
2	Pakistan	938
3	China	944
4	Bangladesh	953
5	Indonesia	1004
6	Nigeria	1016
7	Japan	1041
8	Brazil	1025
9	USA	1029
10	Rusian Federation	1140

A bare glance at the chart shows that developed countries such as U.S.A. and Japan have a very healthy sex ratio while India trails behind even Pakistan and Bangladesh due to peculiar cultural and socio- economic factors.

IMPORTANCE OF HEALTHY SEX RATIO :

One can see that if nature would have it, then every society would be having equal number of men and women. A lopsided or skewed sex ratio depicts that human factors are alone responsible for this disbalance. The disbalance is glaring in northern regions of India which have patriarchal society compared to regions with matriarchal society. There are only 793 females per thousand males in Punjab (patriarchal) compared to 986 females per thousand males in Sikkim (matriarchal). Regions with healthy sex ratio are those in which daughters are not considered to be economic liability and where sons are not considered imperative for performing religious last rites of parents "affording" the parents the ultimate "salvation".

Aspect of physical security of daughters is also a factor which discourages parents to have daughters. These cultural, religious and socio economic factors have had a negative impact on parents, making them prone to go in for sex selection of their babies.

The ill effects of adverse sex ratio are already evident and future foretells grimmer prospects. With men not being able to find brides for themselves, instances of moral depravity and violence against women will increase and in fact crime chart of "violence against women" has shown an upward trend in recent years.

FEMALE FOETICIDE, A GROWING PHENOMENON :

Instances of female infanticide (killing girls between 0 to 6 years) in rural parts of India are not an uncommon feature. In urban areas the practice of female foeticide (killing the foetus) has now assumed menacing proportions. This has been made possible by mushrooming of ultra sonography clinics in which sex determination tests are performed. Technique of ultra sonography was developed in order to determine congenital, chromosomal and other abnormalities of foetus in pregnant women. Congenital disorders such as thalessemia can be detected in foetus and some of the disorders can either be corrected or the foetus can be aborted if it were found to be afflicted with any of any of such disorders. However in course of time, sonologists took advantage of "son preference syndrome"" of Indian parents and started using this technique to disclose the sex of the unborn baby to the parents for a price. Catchy advertisements could be seen such as "invest Rs. 500/- now to save Rs. 5,00,000/ - later". *Medical Termination of Pregnancy Act, 1972* had already legalized the abortions a d provisions of this Act came in handy for people wanting to abort the female oetus.

COMING INTO FORCE OF PC AND PNDT ACT :

The alarming trend of female foeticide ultimately prompted the Central Government to come up with a new enactment called *Preconception and Prenatal Detection Technique (Prohibition of Sex selection) Act, 1994.* After a great deal of teething troubles, this Act though enacted in 1994 came into force in the year 1996. This Act absolutely banned the use of ultra sonograhpy machine for the purpose of sex determination of foetus and it also banned sex selection even prior to conception. A technique had been developed for sex selection and this technique was called sperm sorting. Female eggs carrying 'X' chromosome was made to fertilize only with 'Y' chromosome in males which resulted in birth of males only. Such techniques were also banned under this Act.

Use of ultra sonography machines have now been regulated and pre-natal detection techniques can now be used only for chromosomal abnormalities and congenital anomaly etc. of the foetus [Section 4(2)]. Such tests can be carried out only in specified cases such as:

i. age of pregnant woman being more than 35 years;

ii. the pregnant woman had undergone two or more spontaneous abortions or foetal loss;

iii. when pregnant woman has been exposed to radiation, infection etc.,

iv. the pregnant woman or her spouse has a family history of mental retardation or physical deformities or other genetic disease;

v. any other conditions as may be specified by the Board [Section 4(3)].

OTHER SALIENT FEATURES OF THE ACT :

1. Offences under the Act are *cognizable, non-bailable and non-compoundable (Section 27).* However, the cognizance can only be taken up by JMFC on the basis of complaint made by the appropriate authority (Section 28).

2. **Punishment Aspect :**

The medical practitioner, gynaecologist etc. rendering his service for sex determination or found involved in contravening the provisions of the Act is now liable to suffer punishment upto 3 years and with fine extending upto Rs. 10,000/- and for subsequent conviction with imprisonment upto 5 years and fine extending upto Rs. 50,000/- [Section 23 (1)]. A person seeking the aid of such ultra sound clinic etc. for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman in case other than those already specified would invite punishment upto three years and with fine extending upto Rs. 50,000/- and for subsequent offence with imprisonment upto 5 years alongwith fine which may extend upto Rs. 1,00,000/- [Section 23(3)]. The name of the medical practitioner shall be deleted from the register of State Medical Council for a period of 5 years for the first offence and permanently for subsequent offence [Section 23(2)].

Where there is no specific punishment provided under the Act, the punishment shall be three months imprisonment or fine extending upto Rs. 1,000/- or with both (Section 25).

3. **Presumption in favour of Pregnant Woman :**

Section 24 of the Act prescribes that unless contrary is proved, the Court shall presume that the pregnant woman was compelled by her husband or any other relative and such person shall be liable for abetment of offence committed under sub-Section 3 of Section 23.

4. **Requirement of Maintaining records :**

Now it is mandatory for all registered genetic clinics to maintain complete records, reports, consent letters for a period of two years or for a period as may prescribed (Section 27).

5. **Power to Search and Seizure :**

The appropriate authority has been given power to search and seize the records, registers, documents, etc. if it has reason to believe that an offence under the Act is being committed or has been committed (Section 30).

APEX COURT SHOWS DISSATISFACTION :

The Apex Court in its judgment in *Centre for Enquiry into Health and Allied Themes (Cehat) and others v. Union of India and others, AIR 2003 SC 3309* noted

with concern the total slackness on the part of Central and State Governments in implementing the PNDT Act and issued directions to States and Central Government. The Apex Court directed that the report of the appropriate authority be published annually for information to public. The State Governments and Union Territories were asked to issue advertisement to create awareness in public.

Pursuant to the Apex Court's judgment, an amendment was again carried out in Act in the year 2003 and *Pre-natal Determination Test (Amendment) Rules* were also formulated. Rule 10 authorizes appropriate authority to seize and seal any machine by organization and only when the organization pays penalty equal to five times the registration fees alongwith giving an undertaking against implementing sex detection techniques can the machines be released. Every such registered clinic or laboratory or counseling centre shall now have to fill up forms A to G. These forms are required to be filled to curb the practice of foeticide. Amendments in the main Act were also carried out in order to make it more practical.

INEFFICACIOUS ACT :

Despite laudable objectives of the Act i.e. curbing the practice of female foeticide and reversing the prevailing sex ratio, the ground situation has not changed and even after nine years of the Act coming into force, instances of cases filed under the provisions of this Act are negligible. Terming the Act to be a "paper tiger" would not therefore be an exaggeration at this stage. Main fathomable reasons for the sorry state of affairs can be enumerated as below :

i. Inherent inconsistencies of the Act :–

a. Although the offences under the Act have been made cognizable (Section 27) meaning there by that police can take cognizance on the basis of FIR, but in the same breath it provides that Courts cannot take cognizance except on complaint filed by the appropriate authorities (Section 28). This provision is a major dampener in realizing the objectives of the Act. Appropriate authorities are none but Government doctors (C.M. Os.) and as already seen they are not forthcoming in taking action against the members of their own fraternity.

Remedy : To overcome the above stated difficulty regarding cognizance, the pronouncement of the Apex Court in the case of *State of Punjab v. Raj Singh and others, (1998) 2 SCC 391* has to be employed. As per this ruling when the offence is cognizable and the cognizance by Court can be taken only on the basis of complaint, the appropriate course of action would be that police may investigate into the matter on the basis of FIR as the offence is cognizable and instead of filing a challan before the Court, the police may send a report to the appropriate authority and the appropriate authority may file its complaint alongwith the police report. However, this may also not yield good results as it is the ultimate satisfaction of appropriate authorities which matters the most.

b. Although the Act provides for complaint by private persons (NGO included) but such persons can make complaint only after first giving 15 days' notice to the appropriate authorities. This gap may give opportunity to the offending clinic to tidy up their irregularities and records. Moreover the gap of 15 days may weaken the desire to file private complaints.

c. The tests provided under the Act are held under utmost privacy and the persons involved are the pregnant woman and relatives and no one else. Therefore, it is difficult for appropriate authority to make the complaint and investigate the offence as there are no complainants. It is only from conduction of decoys or auditing the records of clinics that the perpetrators or violators of the Act may be brought to book.

ii. Indifferent Attitude of Appropriate Authorities :

Much headway can be made in implementing the provisions of the Act if the appropriate authorities made regular inspections and periodical checkups of all genetic clinics operating in a district. But it appears that such authorities are not even doing this much. No complaint appears to have been filed by appropriate authorities against clinics for violating the provisions of the Act.

EPILOGUE :

Thus it appears that lack of will on the part of appropriate authorities and peculiar anomalous position relating to cognizance of offence are the factors which are primarily responsible for allowing the perpetration of offences under this Act and if this trend continues then the State of Madhya Pradesh may equal and even surpass the notoriety of States such as Punjab and Haryana as cases under this Act are now being filed in these States.

SUGGESTIONS :

i. Judicial officers should bear in their minds that the evil of dowry is one of the major causes of the adverse sex ratio and they must endevour to expedite the trial of cases pending in their Courts under Dowry Prohibition Act, 498-A IPC another cases involving cruelty against women and hand out punishments with deterrent effect.

ii. Trial of criminal cases under Sections 312 to 318 IPC need to be expedited.

iii. Organizing legal literacy camps and workshops on PC and PNDT Act involving appropriate authorities, District Collectors, etc. would help in dissemination of information and sensitization on the issue of female foeticide.

iv. If State Government incorporates amendments in PC and PNDT Rules (on the lines of amendments in Electricity Rules) providing for filing of challan by police, there would be a spurt in filing of cases under this Act as the existing anomaly would be removed to a great extent.

●

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bimonthly district level meeting of June, 2005. The Institute has received articles from various districts. Articles regarding topic no. 1& 2 received from Chhindwara & Chhatarpur, respectively, are being included in this issue. An exhaustive article, which also covers the controversy involved in topic no. 3 has already been published in JOTI JOURNAL October, 2005 while dealing with topic no. 4 of April, 2005 (See page No. 212), therefore, we are not including any article in this issue on the topic. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 4 and 5, institutional article is being published on topic no. 5. Topic no. 4 shall be allotted to other group of districts in future.

Q.1 Whether Officers under M.P. Excise Act, 1915, Customs Act, 1962 Railway Property (U.P.) Act, 1966 and Forest, Act, 1966 and Forest Act, 1927 having power to investigate in to the offences are covered by the expression "Police Officer" for the purpose of Section 25/26 Evidence Act, 1872 and Section 162 Criminal Procedure Code, 1973.?

क्या मध्यप्रदेश आबकारी अधिनियम, 1915, कस्टम्स अधिनियम, 1962, रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 एवं वन अधिनियम, 1927 के अन्तर्गत आने वाले अधिकारीगण, जिन्हें अपराधों के अनुसंधान के अधिकार प्राप्त हैं, साक्ष्य अधिनियम, 1872 की धारा 25/26 तथा दण्ड प्रक्रिया संहिता, 1973 की धारा 162 के प्रयोजनार्थ "पुलिस अधिकारी" हैं?

Q.2 What is the legal position regarding maintainability of eviction suit in which one of the co- landlords/plaintiffs transfers his interest in disputed accommodation to the tenant/defendant?

सह भवन स्वामीगण/वादीगण में से एक के द्वारा विवादित भवन में अपने स्वत्व प्रतिवादी/भाड़ेदार को अन्तरित किये जाने पर निष्कासन वाद की संधारणीयता के बारे में विधिक स्थिति क्या है?

Q.3 What is the legal position regarding jurisdiction of a Court to restore a criminal complaint which has been dismissed in default of the appearance of complainant?

परिवादी की अनुपस्थिति के कारण निरस्त किये गये दाण्डिक परिवाद के पुनर्स्थापन के विषय में न्यायालय की अधिकारिता विषयक विधिक स्थिति क्या है?

Q.4 What is the evidential value of seized article where seizure is pursuant to an illegal search?

अवैधानिक तलाशी के क्रम में अभिग्रहीत वस्तु का साक्षिक मूल्य क्या है?

Q.5 What is the legal position regarding maintainability of a suit for declaration of Bhuswami rights in agricultural land?

कृषि भूमि के लिये भूमिस्वामी अधिकारों की उद्घोषणा हेतु संस्थित वाद की संधारणीयता के विषय में विधिक स्थिति क्या है?

●

म.प्र. आबकारी अधिनियम, 1915 कस्टम्स अधिनियम, 1962, रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 एवं वन अधिनियम, 1927 के अर्न्तगत विवेचना अधिकारी के संदर्भ में साक्ष्य अधिनियम, 1872 की धारा 25/26 तथा दण्ड प्रक्रिया संहिता, 1973 की धारा 162 की प्रयोज्यता

न्यायिक अधिकारीगण
जिला -- छिन्दवाड़ा

भारतीय साक्ष्य अधिनियम, 1872 (जिसे अत्रपश्चात 'अधिनियम' संबोधित किया जायेगा), की धारा–25 एवं 26 जो विचाराधीन विधिक मुद्दे के विश्लेषण एवं परीक्षण हेतु सुसंगत है, निम्नवत् प्रावधित करती हैः

> धारा–25. किसी पुलिस अधिकारी से की गई कोई भी संस्वीकृति किसी अपराध के अभियुक्त व्यक्ति के विरूद्ध साबित नहीं की जायेगी।
>
> धारा–26. कोई भी संस्वीकृति, जो किसी व्यक्ति ने उस समय की है, जब वह 'पुलिस अधिकारी' की अभिरक्षा में है, ऐसे व्यक्ति के विरूद्ध साबित न कीं जायेगी, जब तक कि वह मजिस्ट्रेट की साक्षात् उपस्थिति में न की गई हो।

उक्त दोनों धाराओं को संयुक्त रूप से पढ़ने से स्पष्ट है कि किसी अभियुक्त व्यक्ति के द्वारा 'पुलिस अधिकारी' से गई संस्वीकृति उसके विरूद्ध साबित नहीं की जायेगी तथा 'पुलिस अधिकारी' की अभिरक्षा में की गई संस्वीकृति भी तब तक साबित नहीं की जायेगी, जब तक कि वह मजिस्ट्रेट की साक्षात् उपस्थिति में नहीं की गई हो।

दण्ड प्रक्रिया संहिता, 1973, जिसे अत्रपश्चात् 'संहिता' कहा जायेगा, की धारा–162 भी मोटे तौर पर यह प्रावधित करती है कि अन्वेषण के दौरान अभियुक्त के द्वारा 'पुलिस अधिकारी' को किया गया कथन साक्ष्य में सम्पुष्टि हेतु पूर्णतः अमान्य हैं।

यदि उपरोक्त तीनों धाराओं को संयुक्त रूप से पढ़ा जाय तो यह प्रकट होता है कि किसी अभियुक्त के द्वारा 'पुलिस अधिकारी' से किये गये किसी कथन का उपयोग अभियुक्त के विरूद्ध नहीं किया जा सकता है। अतः अधिनियम की धारा–25, 26 एवं संहिता की धारा–162 के अन्तर्गत संरक्षण अभियुक्त को तभी प्राप्त होगा, जबकि उसके द्वारा कोई संस्वीकृति या कथन 'पुलिस अधिकारी' से किया गया हो। अतः यह प्रश्न उत्पन्न होता है कि 'पुलिस अधिकारी' किसे माना जाये? 'पुलिस अधिकारी' की परिभाषा न तो अधिनियम में दी गई है और न ही संहिता, 1973 में। पुलिस अधिनियम, 1961 में भी केवल 'पुलिस' शब्द को परिभाषित किया गया है जिसके अन्तर्गत वे सब व्यक्ति आते हैं जो पुलिस अधिनियम, 1861 के अन्तर्गत भर्ती किए गए हैं।

जहां किसी अपराध का अन्वेषण थाना के भारसाधक अधिकारी द्वारा अथवा अन्य 'पुलिस अधिकारी' द्वारा किया गया हो, वहां यह प्रश्न स्वाभाविक रूप से नहीं उठेगा कि ऐसा अधिकारी 'पुलिस अधिकारी' है या नहीं, परन्तु जहां किसी विशेष अधिनियम में किसी अधिकारी को उस अधिनियम के अधीन किसी अपराध के

अन्वेषण के लिए अधिकृत किया गया हो, वहां यह प्रश्न उत्पन्न होता है कि उस अधिकारी को अधिनियम की धारा–25, 26 एवं संहिता की धारा–162 की प्रयोज्यता के संदर्भ में 'पुलिस अधिकारी' माना जाये या नहीं। चूंकि 'पुलिस अधिकारी' को कहीं परिभाषित नहीं किया गया है, अतः ऐसी स्थिति में यह निर्धारित करने के लिए कि किसी विशेष विधि में अन्वेषण के लिए अधिकृत व्यक्ति 'पुलिस अधिकारी' है या नहीं, न्यायदृष्टांतों से मार्गदर्शन प्राप्त करना होगा।

माननीय उच्चतम न्यायालय द्वारा *राजाराम जायसवाल विरूद्ध बिहार राज्य, ए.आई.आर. 1964 एस.सी. 828* के प्रकरण में यह अभिनिर्धारित किया गया है कि इस बात का अवधारण करने के लिए कि अधिनियम की धारा–25 के प्रयोजनार्थ कोई व्यक्ति 'पुलिस अधिकारी' है या नहीं, जांच की कसौटी यह होगी कि क्या 'पुलिस अधिकारी' की शक्तियां जो उसे प्रदत्त की गई है अथवा जिनका उसके द्वारा प्रयोग किया जाता है, अधिनियम की धारा–25 द्वारा अधिनियमित प्रतिषेध के साथ उसका प्रत्यक्ष या वास्तविक संबंध स्थापित होता है या नहीं। इस न्यायदृष्टांत में प्रतिपादित सिद्धांत को माननीय उच्चतम न्यायालय की संवैधानिक पीठ के द्वारा *बड़कू ज्योति सावंत विरूद्ध स्टेट ऑफ मैसूर, ए.आई.आर. 1966 एस.सी. 1746* के प्रकरण में प्रभेदित करते हुए यह सिद्धांत प्रतिपादित किया गया कि किसी विशेष विधि के अधीन किसी अधिकारी को भले ही वे शक्तियां दी गई हों जो कि संज्ञेय अपराध का अन्वेषण करने वाले आरक्षी केन्द्र के प्रभारी अधिकारी को प्राप्त हों, परन्तु फिर भी वह अधिनियम की धारा–25 के अन्तर्गत 'पुलिस अधिकारी' नहीं होगा, जब तक कि उसे संहिता की धारा–173 के अधीन 'रिपोर्ट' प्रस्तुत करने की शक्ति प्राप्त न हो, अर्थात् यह निश्चित करने के लिए कि किसी विशेष विधि के अधीन किसी अधिकारी को 'पुलिस अधिकारी' माना जाय या नहीं, कसौटी यह है कि क्या उसे अपराध का अन्वेषण करने में 'पुलिस अधिकारी' के सभी अधिकार प्राप्त हैं, जिसमें संहिता की धारा–173 के अधीन रिपोर्ट प्रस्तुत करने की शक्ति भी सम्मिलित है। इसी मत को पुनः माननीय उच्चतम न्यायालय की संवैधानिक पीठ द्वारा *इलियास विरूद्ध कलेक्टर ऑफ कस्टम्स, मद्रास, ए.आई.आर. 1970 एस.सी. 1065* के प्रकरण में भी पुष्ट किया गया है। 'पुलिस अधिकारी' को परिभाषित करने के संदर्भ में माननीय उच्चतम न्यायालय अथवा माननीय उच्च न्यायालय के समस्त पश्चात्वर्ती न्यायदृष्टांत इन्हीं दो न्यायदृष्टांतों पर आधारित हैं।

उपरोक्त न्यायदृष्टांतों के आलोक में यह कहा जा सकता है कि 'पुलिस अधिकारी' की शक्ति का महत्वपूर्ण लक्षण न केवल संज्ञेय अपराध के बारे में अन्वेषण करने की शक्ति है, बल्कि संहिता की धारा–173 के अन्तर्गत रिपोर्ट या अभियोग–पत्र दाखिल करके अपराधी को अभियोजित करना भी है। जब तक संहिता की धारा–173 के अन्तर्गत 'रिपोर्ट' दाखिल करने की शक्ति को सम्मिलित करके, संहिता के अन्तर्गत अन्वेषण की शक्ति के साथ किसी विशेष अधिनियम के अन्तर्गत अधिकारी को सशक्त नहीं किया जाता तब तक वह अधिकारी अधिनियम की धारा–25/26 के संदर्भ में 'पुलिस अधिकारी' नहीं माना जा सकता है। अतः इस कसौटी के अन्तर्गत अब यह देखना होगा कि क्या मध्यप्रदेश आबकारी अधिनियम, 1915, कस्टम्स अधिनियम, 1962, रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 एवं वन अधिनियम, 1927 के अन्तर्गत आने वाले विवेचनाकर्ता अधिकारीगण 'पुलिस अधिकारी' हैं या नहीं।

(क) **मध्यप्रदेश आबकारी अधिनियम, 1915 :**

मध्यप्रदेश आबकारी अधिनियम, 1915 की धारा --55 (1) यह प्रावधित करती है कि :--

ऐसे पद श्रेणी से अनिम्न पद श्रेणी का तथा इस विनिर्दिष्ट क्षेत्र के भीतर, जिसे राज्य सरकार, अधिसूचना द्वारा, विहित करे, कोई भी आबकारी धारा--34, धारा--35, धारा--36--ए, धारा--38--ए, धारा--39, धारा--40 तथा धारा--40--ए, के अधीन, अपराधों के संबंध में उप शक्तियों का प्रयोग कर सकेगा, जो कि संहिता, 1973 के अध्याय--12 के उपबंध द्वारा किसी पुलिस थाना के भारसाधक अधिकारी को प्रदत्त की गई है:

1. परन्तु कोई भी ऐसी शक्तियां, ऐसे निबंधनों तथा उपांतरणों (यदि कोई हो) के अधीन होगी जैसा कि राज्य सरकार नियम द्वारा विहित करे।

2. उक्त संहिता की धारा--156 के प्रयोजन के लिए वह क्षेत्र जिसके कि संबंध में आबकारी अधिकारी को उप--धारा (1) के अधीन सशक्त किया गया हो, पुलिस थाना समझा जायेगा और ऐसा अधिकारी उस थाने का भारसाधक अधिकारी समझा जायेगा।

3. उस संबंध में राज्य सरकार द्वारा विशेष रूप से सशक्त किया गया कोई भी ऐसा अधिकारी मजिस्ट्रेट को निदेश किये बिना और ऐसे कारणों से जो उसके द्वारा अभिलिखित किये जायेगें, इस अधिनियम के अधीन किसी अपराध से, जिसका उसने अन्वेषण किया हो या जिसकी उसे रिपोर्ट की गई हो, संबंधित या संबधित समझे गये किसी भी व्यक्ति के विरूद्ध आगे की कार्यवाही रोक सकेगा।

मध्यप्रदेश आबकारी अधिनियम की धारा--56 यह प्रावधित करती है कि :

यदि धारा --55 की उप--धारा (1) के अधीन सशक्त किये गये किसी आबकारी अधिकारी द्वारा अन्वेषण किये जाने पर यह प्रतीत हो कि अभियुक्त के अभियोजन को न्यायोचित ठहराने के लिए पर्याप्त साक्ष्य है, तो अन्वेषण अधिकारी, जब तक कि वह धारा--55 की उप--धारा (3) के अधीन कार्यवाही न करे, रिपोर्ट प्रस्तुत करेगा, जिसे संहिता की धारा--190 के प्रयोजन के लिए न्यायिक मजिस्ट्रेट को की गई रिपोर्ट समझा जायेगा जो कि उस मामले की जांच करने या उसका विचारण करने की अधिकारिता रखता हो तथा पुलिस रिपोर्ट पर अपराधों का संज्ञान करने के लिए सशक्त हो।

उपरोक्त दोनों धाराओं के प्रावधानों से स्पष्ट है कि आबकारी अधिकारी को संहिता के अध्याय--12 (धारा--154 से धारा--176), की उन शक्तियों का प्रयोग करने का अधिकार प्रदान किया गया है, जिनका प्रयोग पुलिस थाना के भारसाधक अधिकारी के द्वारा किया जा सकता है, परन्तु शर्त (धारा--55 (1)) यह है कि इसके लिए पहले राज्य सरकार अधिसूचना द्वारा विहित करे कि आबकारी अधिकारी को ऐसी शक्तियां प्रदान की गई हैं। मध्यप्रदेश शासन के द्वारा मध्यप्रदेश आबकारी अधिनियम, 1915 की धारा--55 (1) के अन्तर्गत आबकारी अधिकारी को ऐसी शक्तियां प्रदान किये जाने के संबंध में कोई अधिसूचना जारी नहीं की गई है। अतः अधिसूचना के अभाव में यह नहीं कहा जा सकता है कि मध्यप्रदेश आबकारी अधिनियम, 1915 के अधीन आबकारी अधिकारी को संहिता की धारा--173 के अधीन रिपोर्ट प्रस्तुत करने की शक्ति प्राप्त है। अतः

मध्यप्रदेश आबकारी अधिनियम, 1915 के अन्तर्गत आबकारी अधिकारी को 'पुलिस अधिकारी' नहीं माना जा सकता है।

(ख) कस्टम्स अधिनियम, 1962:

कस्टम्स अधिनियम, 1962 की धारा–100, 102, 104, 107, 108 की व्याख्या करते हुए माननीय उच्चतम न्यायालय की संवैधानिक पीठ द्वारा *इलियास विरूद्ध कलेक्टर ऑफ कस्टम, ए.आई.आर. 1970 एस. सी. 1065* के प्रकरण में यह अभिनिर्धारित किया गया है कि कस्टम्स अधिनियम, 1962 के अधीन कस्टम्स अधिकारी का संहिता की धारा–173 के अन्तर्गत रिपोर्ट प्रस्तुत करने की शक्ति प्राप्त नहीं है। अतः कस्टम्स अधिकारी अधिनियम की धारा–25 के अन्तर्गत 'पुलिस अधिकारी' नहीं है। इसके पश्चात् माननीय उच्चतम न्यायालय द्वारा अनेक न्यायदृष्टांतों में इसी न्यायदृष्टांत पर निर्भर करते हुए यह अभिनिर्धारित किया गया है कि कस्टम्स एक्ट, 1962 के अधीन कस्टम्स अधिकारी को अधिनियम की धारा–25 के अन्तर्गत 'पुलिस अधिकारी' नहीं माना जा सकता। इस बिन्दु पर माननीय उच्चतम न्यायालय के न्यायदृष्टांत *नरेश जे. सुखवानी विरूद्ध भारत संघ, ए.आई.आर. 1996 एस.सी. 522 एवं ए.आई.आर. 2001 एस.सी. 746* अवलोकनीय हैं।

(ग) रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 :

माननीय उच्चतम न्यायालय द्वारा *बाल किसन विरूद्ध देवीदयाल, ए.आई.आर. 1981 एस.सी. 379, स्टेट ऑफ उत्तर प्रदेश विरूद्ध व्यास तिवारी, ए.आई.आर. 1981 एस.सी. 635, उत्तर प्रदेश राज्य विरूद्ध दुर्गा प्रसाद, 1975 (1) एस.सी.आर. 881* के प्रकरणों में रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 की धारा–8 (1) की व्याख्या करते हुए यह प्रतिपादित किया गया है कि अधिनियम की धारा–8 (1) के अधीन जांच करने वाले आर.पी.एफ. के अधिकारी की तुलना पूर्व संहिता के अध्याय–14 (वर्तमान संहिता, 1973 के अध्याय–12) के अधीन अन्वेषण करने वाले पुलिस स्टेशन के भारसाधक अधिकारी के साथ नहीं की जा सकती है, क्योंकि इस विशेष अधिनियम के अधीन अन्वेषण करने वाले अधिकारी को धारा–173 के अन्तर्गत रिपोर्ट प्रस्तुत करने की शक्ति प्राप्त नहीं है। अतः उपरोक्त न्यायदृष्टांतों के आलोक में आर.पी.एफ. के अधिकारी को अधिनियम की धारा–25 के अन्तर्गत 'पुलिस अधिकारी' नहीं माना जा सकता है।

(घ) वन अधिनियम, 1927:

भारतीय वन अधिनियम, 1927 में ऐसा कोई प्रावधान नहीं है कि वन अधिकारी को अन्वेषण के पश्चात् संहिता की धारा–173 के अन्तर्गत मजिस्ट्रेट के समक्ष रिपोर्ट प्रस्तुत करने की शक्ति प्राप्त है। अधिनियम की धारा–64 में वन अधिकारी को वारंट के बिना गिरफ्तार करने की शक्ति प्रदान की गई है, परन्तु मात्र इस अधिकार के आधार पर वन अधिकारी को 'पुलिस अधिकारी' नहीं माना जा सकता है। माननीय मध्यप्रदेश उच्च न्यायालय द्वारा *बाबूलाल लोधी विरूद्ध स्टेट ऑफ एम.पी., 1987 एम.पी.एल.जे. 316 एवं लक्ष्मीचंद विरूद्ध मध्यप्रदेश राज्य, 1995 जे.एल.जे. 746* के प्रकरणों में वन अधिनियम, 1927 एवं संहिता की धारा–457 के प्रावधानों की विवेचना करते हुए यह मत प्रतिपादित किया गया है कि वन अधिकारी को 'पुलिस अधिकारी' नहीं माना जा सकता है। अतः वन अधिकारी द्वारा यदि किसी संपत्ति का अभिग्रहण

किया जाता है तो उसे 'पुलिस अधिकारी' के द्वारा किया गया अभिग्रहण नहीं माना जा सकता। अतः वन अधिनियम, 1927 के अन्तर्गत आने वाले अधिकारी 'पुलिस अधिकारी' नहीं है।

माननीय उच्चतम न्यायालय एवं माननीय मध्यप्रदेश उच्च न्यायालय के उपरोक्त न्यायदृष्टांतों में प्रतिपादित सिद्धांतों के आलोक में निष्कर्षतः यह कहा जा सकता है कि 'पुलिस अधिकारी' की शक्ति में महत्वपूर्ण लक्षण न केवल संज्ञेय अपराध में अन्वेषण करने की शक्ति है, बल्कि संहिता की धारा–173 के अन्तर्गत रिपोर्ट या अभियोग–पत्र दाखिल कर अपराधियों को अभियोजित करना भी है। जब तक संहिता की धारा–173 के अन्तर्गत रिपोर्ट दाखिल करने की शक्ति को सम्मिलित करते हुए संहिता के अन्तर्गत अन्वेषण करने की शक्ति के साथ किसी विशेष अधिनियम के अन्तर्गत अधिकारी को सशक्त नहीं कर दिया जाता तब तक वह अधिनियम की धारा–25, 26 एवं संहिता की धारा–162 के अन्तर्गत 'पुलिस अधिकारी' के रूप में वर्णित नहीं किया जा सकता। कस्टम्स अधिनियम, 1962, रेल संपत्ति (अप्राधिकृत कब्जा) अधिनियम, 1966 तथा वन अधिनियम, 1927 के अन्तर्गत प्रावधित अधिकारीगण को ऐसी शक्ति प्राप्त नहीं है। अतः उन्हें अधिनियम की धारा– 25, 26 एवं संहिता की धारा–162 के संदर्भ में 'पुलिस अधिकारी' नहीं माना जा संकता, यद्यपि मध्यप्रदेश आबकारी अधिनियम, 1915 की धारा–55 एवं 56 में आबकारी अधिकारी को ऐसी शक्तियां प्रदान की गई है, परन्तु उपरोक्त शक्तियों के प्रभावी होने के लिए आवश्यक है कि राज्य शासन के द्वारा उन शक्तियों के लागू होने के संबंध में अधिसूचना जारी की जाये, परन्तु राज्य शासन द्वारा मध्यप्रदेश आबकारी अधिनियम, 1915 की धारा– 55 (1) के अन्तर्गत ऐसी कोई अधिसूचना जारी नहीं की गई है। अतः अधिसूचना के अभाव में आबकारी अधिकारी को भी संहिता की धारा–173 के अन्तर्गत अभियोग–पत्र दाखिल करने की शक्ति प्राप्त नहीं है। परिणामस्वरूप आबकारी अधिकारी को भी अधिनियम की धारा–25, 26 एवं संहिता की धारा–162 के संदर्भ में 'पुलिस अधिकारी' नहीं माना जा सकता है।

●

Editor's Note : *An exhaustive, in-depth and absorbing analysis in the light of various judicial pronouncements relating to the meaning and expanse of expression 'police officer' in the context of Sections 25 and 26 of Evidence Act, 1872 and Section 162 of Code of Criminal Procedure, 1973 is found in the judgment passed by the Apex Court in Raj Kumar Karnwal v. Union of India and others, AIR 1991 SC 45 Readers are requested to go through the same.*

LEGAL POSITION REGARDING MAINTAINABILITY OF EVICTION SUIT WHEN ONE OF THE CO-LANDLORDS/PLAINTIFFS TRANSFERS HIS INTEREST IN DISPUTED ACCOMMODATION TO THE TENANT/DEFENDANT

Judicial Officers
District Chhatarpur

The question for discussion is whether a tenant, after purchasing the share of one of the co-owners can resist the suit for ejectment against him from tenanted premises, claiming himself as co-owner of the property?

As per Section 44 of Transfer of Property Act when one of several co-owners transfers his share, the transferee stands in the shoes of the transferor. He acquires as against the other co-owners the same rights that the transferor had, but is subject to conditions and liabilities governing the transferor on the date of the transfer. But it is also a settled position of law that a co-owner cannot get exclusive possession of the joint property. He has to bring a suit for partition against other co-owners first and get the property in his share. Hon'ble Supreme Court in *T. Lakshmipati and others v. P. Nithyanand Reddy, (2003) 5 SCC 150* reiterated that "The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interests of the other co-owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so, he may be restrained by an injunction".

Therefore, a co-owner cannot defeat the rights of other co-owners by selling his share in the joint property to a tenant. In other words, a tenant can't restrict the rights of other co-landlords by purchasing a share of one co-landlord.

Now we have to consider whether a tenancy or lease continues or whether it gets extinguished (determined) in case of purchase of share of a co-owner by the tenant of the disputed premises? The provision for determination of lease is given in Section 111 of Transfer of Property Act which runs as under :

> **111. Determination of lease -** A lease of immovable property determines ..... (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.

Hon'ble Supreme Court in *T. Lakshmipati (supra)* reiterated in para 14 as, "the common- law doctrine of merger is statutorily embodied in Section 111 of Transfer of Property Act. A bare reading of doctrine of merger, as statutorily

recognized in India, contemplates (i) coalescence of the interest of the lessee and the interest of the lessor, (ii) in the whole of property, (iii) at the same time, (iv) in one person, and (v) in the same right. There must be a complete union of the whole interests of the lessor and the lessee so as to enable the lesser interest of the lessee sinking into the larger interest of the lessor in the reversion." The same principle was also adopted by Hon'ble Supreme Court in *Nalakath Sainuddin v. Koorikadan Sulaiman, AIR 2002 SC 2562.*

Therefore, it is necessary that the entire right of ownership should be transferred in favour of tenant to effect determination of tenancy because a person cannot be an owner and a tenant at the same time. If a part of ownership or a share of co-owner is purchased by the tenant, he will not become the owner of whole tenancy premises, and he will still remain as tenant of other co-owners who have not sold their shares to tenant.

Hon'ble Supreme Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others, (2005) 5 SCC 492* has recently held that, "unless the interests of the lessee and that of the lessor in the whole of the property leased, become vested at the same time in one person in the same right, a determination of lease cannot take place. A merger takes place and the lease gets determined only if the entire reversion or the entire rights of the landlord are purchased by the tenant. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property does not become vested at the same time in one person in the same right. There is no merger unless the interests are co-extensive. There must be a union of the entire interest of the lessor and the lessee. This does not happen when a lessee takes an assignment of only the rights of a co-owner lessor. Therefore, a lessee who has taken assignment of the rights of a co-owner/lessor cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord."

Therefore, in case of purchase of share of one or some of co-owners by tenant, the rights of other remaining co-owners do not get extinguished as landlord and tenant has to fulfill his obligation as a tenant towards them. Hence in this case the tenancy continues and does not get determined. Hon'ble Supreme Court in *Pramod Kumar Jaiswal's case (supra)* further laid down that, "Section 44 Transfer of Property Act does not enable the appellants to contend that the rights of a lessee and a co-owner lessor in the whole of the property had vested in the lessee. The right to joint possession acquired by the assignment from a co-owner, under Section 44 still leaves outstanding the right of other co-owners in the property and does not bring about a situation enabling the lessee to plead that the entire rights in the whole of the property have come to coalesce

in him so as to bring about a merger." Therefore, a tenant cannot take the benefit of Section 44 of Transfer of Property Act in case of purchase of share of one of co-owners.

In *Badri Narain Jha v. Rameshwar Dayal Singh, AIR 1951 SC 186* the Hon'ble Supreme Court had laid down that if the lessee purchases the lessor's interest, the lease no doubt is extinguished as the same man cannot at the same time be both the landlord and the tenant, but there is no extinction of the lease if one of the several lessees purchased only a part of lessor's interest. In such a case the lease hold and the reversion cannot be said to coincide.

CONCLUSION - Therefore, when the tenant acquires the rights of one of the co-owners, he has to workout his right against other co-owners. He cannot claim that the tenancy has been determined by way of merger under Section 111 (d) of Transfer of Property Act. Hence the tenancy continues and tenant is bound to comply with the requirements of the Rent Control Act, under which he has to pay rent and also give the vacant possession of accommodation in case of eviction decree. Thus eviction suit will be maintainable.

●

Until you make peace with who you are,
You'll never be content with what you have.

DORIS MORTMAN

When you reach for the stars you may not quite get one, but you won't come up with a handful of mud either.

LEO BURNETT

I don't know the key to success, but the key to failure is trying to please everybody.

BILL COSBY

MAINTAINABILITY OF CIVIL SUIT REGARDING DECLARATION OF BHUSWAMI RIGHTS

INSTITUTIONAL ARTICLE

There is some confusion regarding the correct legal position relating to maintainability of a suit for declaration of Bhuswami rights in agricultural land. One view is that no such suit can be instituted directly before a Civil Court and the issue can be raised only before the Sub-Divisional Officer under Section 57 (2) of M.P. Land Revenue Code, 1959 (hereinafter only the Code). The other view is that the suit is directly maintainable for declaration of Bhumiswami rights and Section 57 (2) is not maintainable.

Section 9 CPC provides for maintainability of civil suits. As per Section 9 of CPC, Civil Courts exercise general jurisdiction of civil nature and all kinds of civil suits are maintainable before the Civil Court unless their cognizance is either expressly or impliedly barred. We have to see as to whether there are any provisions in M.P.L.R.C. which bar the jurisdiction of Civil Courts?

Section 111 of M.P.L.R.C. is a relevant provision according to which Civil Courts shall have jurisdiction to decide any dispute to which the State Government is not a party relating to any right which is recorded in the record of rights. From this Section it is clear that the jurisdiction of Civil Court is not at all barred when the dispute does not involve the State Government. The two disabling Sections which bar the jurisdiction of Civil Courts are Sections 57 (2) and 257 of M.P.L.R.C.

Section 57 (1) declares that State is the owner of all lands and all rights in sub-soil of any land are the property of the State Government. Section 57 (2) stipulates that when the dispute arises between the State Government and any person in respect of any right under sub-section 1, such dispute shall be decided by the Sub Divisional Officer.

Thus in case of dispute between any individual and the State Government regarding any right in the sub-soil of the land is required to be agitated before the Sub Divisional Officer. Apart from this provision, Section 257 of the Code bars the jurisdiction of any Civil Court regarding any matter which the State Government or the Board or any Revenue Officer is empowered to determine. Such matters are classified in this Section.

The question is whether Section 57 (2) of the M.P.L.R.C. bars direct filing of the civil suit before Civil Court or not. As already mentioned above, if Bhumiswami right is considered to be a right in the sub-soil of the land then the suit is barred as per Section 57 (2). But if it is not considered to be so, then civil suit is maintainable.

Two divergent views are reflected by way of pronouncements of the Hon'ble High Court. One view which disfavours filing of civil suit is reflected in the cases of *State of M.P. v. Gyasi Ram and others, 1993 MPLJ 503 (Division Bench), Hukum Singh v. State of M.P., (2000) 1 MPLJ 93* and recently in *State of M.P. v. Krishnadas and others, 2004 RN 117.* These cases were based on the premise that the rights of Bhumiswami are almost akin to ownership of the land and as ownership vests with State Government, then provisions of Section 57 apply which means that such dispute can be resolved only by the Sub Divisional Officer and civil suit may be instituted only to contest the validity of the order of the Sub Divisional Officer under Section 57 (3) within the stipulated period. These cases are based on the Full Bench decision in *Ram Gopal v. Chetu, 1976 MPLJ 325.* However in *Gyasi Ram's case (supra),* there was an obiter by Hon'ble Justice Shri S.K. Chawla in which it was stated that a dispute as to rights short of ownership such as Bhumiswami rights fall outside the scope of Section 57 (2) of the Code and such a suit is directly maintainable before Civil Court.

The other view professing that the civil suit is directly maintainable is propounded in *State of M.P. v. Balbir Singh, 2001 (2) MPLJ 644 (3 Judges Full Bench).* It was the view of the Hon'ble High Court that rights as stipulated under Section 57 (1) does not include cultivator's rights in respect of the land as contemplated under Section 2 (1) (k) secured in favour of the 'Bhumiswami', 'occupancy tenant' or a 'Government lessee' as defined under the Code. The Court relied upon Apex Court judgment in *Mohd. Noor v. Mohd. Ibrahim and others, (1994) 5 SCC 562* in which the theoretical concept of ownership was discussed. It was concluded that a Bhumiswami cannot be taken to be the owner of the land and was ultimately held that the observation to the contrary made in the decision in case of *Ram Gopal v.Chetu (Supra)* have to be taken to have lost their efficacy. The Full Bench in *Balbir Singh's case (supra)* did not agree with the view expressed in *Ram Gopal Chetu's case (supra)* case that the right of a Bhumiswami is akin to that of a proprietor. Ultimately the Full Bench observed that the determination of the question of Bhumiswami rights lies within the province of the Civil Court excepting the cases falling within the ambit of those specified under Section 257 of the Code. Thus we see that the view of the Full Bench in *Balbir Singh's case (supra)* has coincided with the obiter expressed in *Gyasi Ram's case (supra).*

Although the Full Bench in *Balbir Singh's case (supra)* expressly overrules the Full Bench pronouncement in *Ram Gopal's case (supra)* but the pertinent question is whether a Bench of co-equal number of Judges can overrule earlier pronouncement by the same number of Judges? Actually *Ram Gopal's case (supra)* was concerned with operation of Section 250 of M.P.L.R.C. whereas *Balbir Singh's case (supra)* was concerned with the operation of Section 57 (2)

of M.P.L.R.C. A close look at *Ram Gopal's case (supra)* shows that it is not as if it puts Bhumiswami at par with with an owner. It would be proper to quote from *Ram Gopal's case (supra)* which goes as under –

> 14. It must be remembered that a Bhumiswami has a title though he is not the "Swami" of the "Bhumi" which he holds, in the sense of absolute ownership, because as declared in section 257 of the Revenue Code, ownership of land vests in the State Government, yet, he is a Bhumiswami. He is not a mere lessee. His rights are higher and superior. They are akin to those of a proprietor in the sense that they are transferable and heritable, and, he cannot be deprived of his possession, except by due process of law and under statutory provisions, and his rights cannot be curtailed except by legislation.

Thus we see that even in *Ram Gopal Chetu's case (supra)* it is clearly stated that Bhumiswami is not the absolute owner. This view is akin to the views expressed in *Balbir Singh's case (supra)*. The same view has been expressed by Hon'ble Shri Justice S.K. Chawla in his obiter in *Gyasi Ram's case (supra)*. Thus although Balbir Singh's case (supra) tends to overrule *Ram Gopal's case (supra)* but in substance there isn't much difference as far as understanding the position of Bhumiswami vis-à-vis State is concerned. Further, *Ram Gopal's case (supra)* deals with a different aspect i.e. Section 250 of M.P.L.R.C. which is different from the subject matter of *Balbir Singh's case (supra)* i.e. Section 57 (2) of the Code.

We can, therefore, by way of final conclusion say that M.P.L.R.C. does not expressly or impliedly bar a civil suit for claiming Bhumiswami rights against the State in view of the pronouncement in *State of M.P. v. Balbir Singh, 2001 (2) MPLJ 644 (3 Judges Full Bench)* and it not mandatory to seek recourse to Section 57 (2) of M.P.L.R.C. i.e. first approaching the Court of Sub Divisional Officer provided that the plaintiff's claim does not impinge on any right referred to in Section 257 of the M.P.L.R.C.

●

Never stand begging for what you have the power to earn.
MIGUEL DE CERBANTES

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE, HIGH COURT OF M.P., JABALPUR
TRAINING CALENDER - YEAR 2006 (JANUARY 2006-JUNE 2006)

S.NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
Jotri/ 06/I/1	Workshop-cum-Training Session on Judicial Ethics, Norms of Behaviour & Temperamental Moderation	Judicial Officers	**45**	**5 days**	**06.01.2006 to 10.01.2006 (Friday, Saturday, Sunday, Monday & Tuesday)**	**J.O.T.R.I.**
Jotri/ 06/I/2	Advance Course for District Prosecution Officers	District Prosecution Officers	**45**	**5 days**	**16.01.2006 to 20.01.2006 (Monday, Tuesday, Wednesday, Thursday & Friday)**	**J.O.T.R.I.**
Jotri/ 06/I/3	Workshop on PC & PNDT Act, 1994	Chief Medical Officers	**25**	**2 days**	**27.01.2006 & 28.01.2006 (Friday & Saturday)**	**J.O.T.R.I.**
Jotri/ 06/I/4	Refresher Course	Civil Judge Class II 2002 Batch (First Batch)	**40**	**10 days**	**30.01.2006 to 08.02.2006**	**J.O.T.R.I.**
Jotri/ 06/I/5	Workshop on PC & PNDT Act, 1994	Chief Medical Officers	**25**	**2 days**	**13.02.2006 & 14.02.2006 (Monday & Tuesday)**	**J.O.T.R.I.**

S.NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
Jotri/ 06/I/6	Workshop on Cooperative Laws – Judicial Procedure and Judgment Writing	Deputy Registrars and Asst. Registrars of Co-operative Societies	**20**	**2 days**	**16.02.2006 & 17.02.2006 (Thursday & (Friday)**	**J.O.T.R.I.**
Jotri/ 06/I/7	Workshop on Juvenile Justice (Care & Protection of Childern) Act, 2000	Judicial Officers and Members of Juvenile Justice Board	**30**	**2 days**	**24.02.2006 & 25.02.2006 (Friday & Saturday**	**J.O.T.R.I.**
Jotri/ 06/I/8	Workshop on Offences against Married Women and Domestic Violence	Additional Sessions Judges	**30**	**2 days**	**03.03.2006 & 04.03.2006 (Friday & Saturday)**	**J.O.T.R.I.**
Jotri/ 06/I/9	Workshop relating to Dishohour of Cheque	Judicial Magistrates & Addl. Chief Judicial Magistrates	**30**	**2 days**	**10.03.2006 & 11.03.2006 (Friday & Saturday)**	**J.O.T.R.I.**
Jotri/ 06/I/10	Refresher Course	Civil Judge Class II - 2002 Batch (Second Batch	**40**	**10 days**	**20.03.2006 to 29.03.2006**	**J.O.T.R.I.**
Jotri/ 06/I/11	Workshop on Prevention of Corruption Act, 1988	Special Judge Under Prevention of Corruption Act	**40**	**2 days**	**03.04.2006 to 04.04.2006 (Monday & Tuesday)**	**J.O.T.R.I.**

S.NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
Jotri/ 06/I/12	Workshop on Scheduled Castes Scheduled Tribes (Prevention of Atrocities) Act, 1989	Special Judges Under SC/ST (P.A.) Act	**30**	**2 days**	**12.04.2006 to 13.04.2006 (Wednesday & Thursday)**	**J.O.T.R.I.**
Jotri/ 06/I/13	Refresher Course	Civil Judge Class II - 2002 Batch (Third Batch)	**40**	**10 days**	**17.04.2006 to 26.04.2006**	**J.O.T.R.I.**
Jotri/ 06/I/14	Workshop on ADR and Expeditious Execution of Decrees	Civil Judge Class I and Civil Judges Class II	**40**	**2 days**	**05.05.2006 to 06.05.2006 (Friday & Saturday)**	**J.O.T.R.I.**
Jotri/ 06/I/15	Refersher Course	Civil Judge Class II- 2002 Batch (Fourth Batch)	**40**	**10 days**	**08.05.2006 to 17.05.2006**	**J.O.T.R.I.**
Jotri/ 06/I/16	Workshop on Scientific Evidence and its Appreciation	Additional District Judges	**30**	**2 days**	**19.06.2006 & 20.06.2006 (Monday & Tuesday)**	**J.O.T.R.I.**
Jotri/ 06/I/17	Advance Course Training	Additional District Judges (Fast Track (Courts)	**30**	**5 days**	**26.06.2006 to 30.06.2006 (Monday, Tuesday, Wednesday Thursday & Friday**	**J.O.T.R.I.**

PART - II

NOTES ON IMPORTANT JUDGMENTS

335. TORTS:

Medical negligence – Pregnancy due to failure of sterilization operation – Remedy under Law of Torts – Doctor liable only if negligence proved on his part – Cause of action arises on account of negligence and not on account of childbirth – Failure due to natural causes not a ground for claim – Couple after knowing of pregnancy, if opts for bearing of child, it seizes to be an unwanted child - Law explained.

State of Punjab v. Shiv Ram and others

Judgment dt. 25.8.2005 by the Supreme Court in Civil Appeal No. 5128 of 2002, reported in (2005) 7 SCC 1 (Three Judge Bench)

Held:

We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy *Bolam's test.* So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee.

The cause of failure of the sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by X-ray examination, or by pathological examination of the materials removed at a subsequent operation of resterilisation. The discrepancy between operation notes and the result of X-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynecologist in case of failure of sterilization operation. (*See Law of Medical Negligence and Compensation* by R.K. Bag, 2nd Edn., P. 139)

.....,the learned counsel appearing for the plaintiff-respondents placed reliance on a two-Judge Bench decision of this Court in *State of Haryana v. Santra, (2000) 5 SCC 182* wherein this Court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her

fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of Section 3 provides:

> *"Explanation II.-* Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

●

336. LAND ACQUISITION ACT, 1894 – Section 23
Compensation, determination of – Ascertainment of market value on the notification date – Factors to be considered.
R. P. Singh v. Union of India and others
Judgment dt. 04.8.2005 by the Supreme Court in Civil Appeal No. 1067 of 2001, reported in (2005) 7 SCC 24

Held :

Section 23 of the Act enumerates the matters to be considered by the court while determining the compensation. It provides that the claimant would be entitled to the market value of the land as on the date of publication of the notification under Section 4(1) of the Act. He would also be entitled to damage, if any, suffered by him because of the acquisition of the land.

The function of the court in determining the amount of compensation under the Act is to ascertain the market value of the land as on the date of the notification under Section 4 and the methods of valuation may be (1) opinion of the experts, (2) the price paid within a reasonable time in *bona fide* transaction of purchase of the land acquired or the lands adjacent to the lands acquired possessing similar advantages, and (3) capitalisation method or its potential value being close is the developed or developing colonies, nearness to road,etc.

●

337. N.D.P.S. ACT, 1985 – Section 50

Personal search, meaning of within Section 50 – Search of bag carried by accused not search of person – Law explained.

State of Rajasthan v. Daulat Ram

Judgment dt. 23.8.2005 by the Supreme Court in Criminal Appeal No. 1067 of 2005, reported in (2005) 7 SCC 36

Held :

In the instant case, the High Court held that the respondent was carrying a bag on his head which was searched and found to contain contraband opium. According to the High Court this amounted to a personal search of the respondent and, therefore, Section 50 of the NDPS Act was attracted.

The question as to what constitutes personal search within the meaning of Section 50 of the NDPS Act came up for consideration by a Bench of this Court in the case of *State of H.P. v. Pawan Kumar, (2005) 4 SCC 350* wherein it has been held : SCC pp. 358-60, paras 7 & 10-11)

> "7. The word 'person' has not been defined in the Act. Section 2(xxix) of the Act says that the words and expressions used herein and not defined but defined in the Code of Criminal Procedure have the meanings respectively assigned to them in that Code. The Code of Criminal Procedure, however, does not define the word 'person'. Section 2(y) of the Code says that the words and expressions used therein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. Section 11 of the Indian Penal Code says that the word 'person' includes any company or association or body of persons whether incorporated or not. Similar definition of the word 'person' has been given in Section 3(42) of the General Clauses Act. Therefore, these definitions render no assistance for resolving the controversy in hand.

★ ★ ★

10. .... Therefore, the most appropriate meaning of the word 'person' appears to be –' the body of a human being as presented to public view usually with its appropriate coverings and clothings'. In a civilised society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare case of some religious monks and sages, who according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word 'person' would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase of any such article or container, etc. can under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act."

In view of the principles laid down in the aforesaid judgment of this Court, there is no scope for the argument that in the facts and circumstances of this case, the provisions of Section 50 of the NDPS Act were attracted.

●

338. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal – Substantial question of law, meaning of – Law explained.

Rajeshwari v. Puran Indoria

Judgment dt. 25.8.2005 by the Supreme Court in Civil Appeal No. 5295 of 2002, reported in (2005) 7 SCC 60

Held :

In *Raghunath Prasad Singh v. Dy. Commr. of Partabgarh, AIR 1927 PC 110* the Privy Council. though, in the context of Section 110 of the Code of Civil

Procedure, negatived the theory that to be a substantial question of law, a question of law has to be of general importance and stated that "a substantial question of law" is a substantial question of law as between the parties in the case involved. This approach was adopted by this Court in *Dy. Commr. v. Krishna Narain, AIR 1953 SC 521.* This Court held, again in the context of Section 110 of the Code of Civil Procedure, that since the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties, on that ground alone the appellant was entitled to a certificate under Section 110 of the Code. In *Chunilal v. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd., AIR 1962 SC 1314* this Court, again in the context of Section 110 of the Code and Article 133 (1) (a) of the Constitution, had occasion to consider the question. A Constitution Bench of this Court held that the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or *whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views.* If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law.

Thus it was accepted that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council or of the Federal Court.

●

339. CONSUMER PROTECTION ACT, 1986 – Ss. 14 (1) (d), 18 and 22 (1) Interest, award of – Award of interest at a flat rate of 18%, held, not good – Law explained.
Bihar State Housing Board v. Arun Dakshy
Judgment dt. 23.8.2005 by the Supreme Court in Civil Appeal No. 7225 of 2002, reported in (2005) 7 SCC 103

Held :

It is noticed that in the impugned order while affirming the award of interest @ 18% awarded by the District Forum and the State Consumer Disputes Redressal Commission, the National Commission referred to the interest awarded @ 18% by the Commission in the case of *HUDA v. Darsh Kumar, RP No. 1197 of 1998 dated 31.8.2001(NC).* Awarding of interest @ 18% by the National Commission in *Darsh Kumar (Supra)* was considered by this Court in the case of *Ghaziabad Development Authority v. Balbir Singh, (2004) 5 SCC 65* where this Court deprecated the award of 18% interest at a flat rate after threadbare discussion. It was held in para 10 of the judgment as under : (SCC p. 81)

> "10. As has been set out hereinabove, the National Forum has been awarding interest at a flat rate of 18% per annum irrespective of the facts of each

case. This, in our view, is unsustainable. Award of compensation must be under different separate heads and must vary from case to case depending on the facts of each case."

●

340. CIVIL PROCEDURE CODE, 1908 – Section 11

'Res judicata', doctrine of – Object and purport – 'Res judicata', 'cause of action estoppel' and 'issue estoppel', difference amongst – Principle of res judicata also applicable in different stages of the same proceeding.

Ishwar Dutt v. Land Acquisition Collector and another

Judgment dt. 02.8.2005 by the Supreme Court in Civil Appeal No. 443 of 2001, reported in (2005) 7 SCC 190

Held :

In *The Doctrine of Res Judicata*, 2nd Edn. by George Spencer Bower and Turner, it is stated :

> "A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it ...."

Reference in this connection, may also be made to *Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319.*

Yet recently in *Swamy Atmananda v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51* in which one of us was a party, this Court observed : (SCC p. 61, paras 26-27)

> "26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.
>
> 27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."

It was further noticed : (SCC p. 64, para 42)

> "42. In *Ishwardas v. State of M.P., (1979) 4 SCC 163* this Court held: (SCC p. 166, para 7)

'In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim'."

Yet again in *Arnold v. National Westminster Bank Plc, (1991) 3 ALL ER 41* the House of Lords noticed the distinction between cause of action estoppel and issue estoppel : (All ER pp. 46 C-E and 47 C-D)

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been litigated between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened .... Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."

Here also the bar is complete to relitigation but its operation can be thwarted under certain circumstances. The House then finally observed: (All ER p. 50 C-E)

"But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject-matter of the two proceedings being identical, than they do in issue estoppel, where the subject-matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success."

In *Gulbachand Chhotalal Parikh v. State of Bombay, AIR 1965 SC 1153* the Constitution Bench held that the principle of res judicata is also applicable to subsequent suits where the same issues between the same parties had been decided in an earlier proceeding under Article 226 of the Constitution.

It is trite that the principle of res judicata is also applicable to the writ proceedings. (See-*H.P. Road Transport Corpn. v. Balwant Singh, 1993 Supp (1) SCC 552*).

In *Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787* It was held: (SCC p. 796, paras 18-19)

> "18. It is now well settled that principles of res judicata apply in different stages of the same proceedings. (See *Satyadhvan Ghosal v. Deorajin Debi, AIR 1960 SC 941* and *Prahlad Singh v. Col. Sukhdev Singh, (1987) 1 SCC 727*).
>
> 19. In *Y.B. Patil v. Y.L. Patil, 4 SCC 66* it was held : (SCC p. 68, para 4)
>
> '4. ..... It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding,".

●

341. SERVICE LAW :

Compassionate ground, appointment on the basis of – Object – Such appointment cannot be claimed as of right.

Commissioner of Public Instructions and others v. K.R. Vishwanath Judgment dt. 30.8.2005 by the Supreme Court in Civil Appeal No. 9132 of 2003, reported in (2005) 7 SCC 206

Held :

As was observed in *State of Haryana v. Rani Devi, (1996) 5 SCC 308* it need not be pointed out that the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependant on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 or 16 of the Constitution. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter or right. Die-in-harness scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In *Rani Devi case* (Supra) it was held that scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In *LIC of India v. Asha Ramchhandra Ambekar, (1994) 2 SCC 718* it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplates such appointments. It was noted in *Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138* that as a rule in public service appointment should be made strictly on the basis of open invitation of applications and merit. The appoint-

ment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

●

342. RENT CONTROL AND EVICTION :

Rent control legislation – Tenant to take advantage of the beneficial legislation must strictly comply with requirements of the Act – Law explained.

Atma Ram v. Shakuntala Rani

Judgment dt. 30.8.2005 by the Supreme Court in Civil Appeal No. 6742 of 2003, reported in (2005) 7 SCC 211

Held :

In *E. Palanisamy v. Palanisamy, (2003) 1 SCC 123* the provisions of the T.N. Buildings (Lease and Rent Control) Act, 1960 came up for consideration. The requirement of the Act was somewhat similar to the Rajasthan Rent Act and the A.P. Rent Act considered by this Court in *Kuldeep Singh v. Ganpat Lal, (1996) 1 SCC 243* and *M. Bhaskar v. J. Venkatarama Naidu, (1996) 6 SCC 228.* Reiterating the view in *Kuldeep Singh v. Ganpat Lal* (Supra) and *M. Bhaskar v. J. Venkatarama Naidu* (Supra) this Court observed: (SCC pp. 127 & 128. paras 5 & 8)

> "The rent legislation is normally intended for the benefit of the tenants. At the same time, it is well settled that the benefits conferred on the tenants through the relevant statutes can be enjoyed only on the basis of statutory provisions. Equitable consideration has no place in such matters. The statute contains express provisions. It prescribes various steps which a tenant is required to take. In Section 8 of the Act, the procedure to be followed by the tenant is given step by setp. An earlier step is a precondition for the next step. The tenant has to observe the procedure as prescribed in the statute. A strict compliance with the procedure is necessary. The tenant cannot straight away jump to the last step i.e. to deposit rent in court. The last step can come only after the earlier steps have been taken by the tenant. We are fortified in this view by the decisions of this Court in *Kuldeep Singh v. Ganpat Lal* (Supra) and *M. Bhaskar v. J. Venkatarama Naidu* (Supra).
>
> ★ ★ ★
>
> Admittedly the tenant did not follow the procedure prescribed under Section 8. The only submission that was advanced on behalf of the appellant was that since the deposit of rent had been made, a lenient view ought to be taken. We are unable to agree with this. The appellant failed to satisfy the conditions contained in Section 8. Mere refusal of the landlord to re-

ceive rent cannot justify the action of the tenant in straight away invoking Section 8 (5) of the Act without following the procedure contained in the earlier sub-sections i.e. sub-sections (2), (3) and (4) of Section 8. Therefore, we are of the considered view that the eviction order passed against the appellant with respect to the suit premises on the ground of default in payment of arrears of rent needs no interference."

It will thus appear that this Court has consistently taken the view that in the Rent Control legislations if the tenant wishes to take advantage of the beneficial provisions of the Act, he must strictly comply with the requirements of the Act. If any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with that condition. If he fails to do so he cannot take advantage of the benefit conferred by such a provision.

●

343. CONSTITUTION OF INDIA – Article 137

Curative petition, remedy of – Remedy when available – Law explained.

Sumer v. State of U.P.

Judgment dt. 29.8.2005 be the Supreme Court in Curative Petition (Crl.) No. 3 of 2005, reported in (2005) 7 SCC 220

Held :

In *Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388* , while providing for the remedy of curative petition, but at the same to prevent abuse of such remedy and filing in that garb a second review petition as a matter of course, the Constitution Bench said that except when very strong reasons exist, the court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of review petition. In this view, strict conditions including filing of certificate by a Senior Advocate were provided in *Rupa Ashok Hurra* (Supra). Despite it, the apprehension of the Constitution Bench that the remedy provided may not open the flood gates for filing a second review petition has come true as is evident from filing of large number of curative petitions. It was expected that the curative petitions will be filed in exceptional and in rarest of rare case but, in practice, it has just been opposite. This Court, observing that neither it is advisable nor possible to enumerate all the grounds on which curative petition may be entertained, said that nevertheless the petitioner is entitled to relief ex debito justitiae if he establishes (1) violation of principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner. To restrict the filing of the curative petitions only in genuine cases, *Rupa Ashok Hurra* (Supra) provided that the curative petition shall contain a certification by a Senior Advocate with regard to the fulfilment of all the requirements provided in the judgment.

Unfortunately, in most of the cases, the certification is casual without fulfilling the requirements of the judgment.

●

344. WORDS AND PHRASES : CIVIL PROCEDURE CODE, 1908–Section 2 (11)
Term 'Legal representative', meaning of – It also includes donee of the suit property.
Manovikas Kendra Rehabilitation & Research Institute v. Prem Prakash Lodha
Judgment dt. 08.4.2005 by the Supreme Court in Civil Appeal No. 2494 of 2005, reported in (2005) 7 SCC 224

Held :

The term "legal representative" has been defined in clause (11) of Section 2 of the Code of Civil Procedure as meaning a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. The question of abatement would arise only when there is no legal representative. The appellant before us who claims to be donee of the suit property certainly falls within the definition of "legal representative" as noticed hereinabove.

●

345. ELECTRICITY :
Electricity, consumption of by lawyer or firm of lawyers in office – Nature of user, whether commercial or domestic purpose? – Matter referred to larger Bench.
M.P. Electricity Board and others v. Shiv Narayan and another Judgment dt. 24.8.2005 by the Supreme Court in Civil Appeal No. 1065 of 2000, reported in (2005) 7 SCC 283

Held :

The Madhya Pradesh Electricity Board hereinafter referred to as "the Board" and its functionaries charged Respondent 2 advocate for electricity consumption at the rate applicable for commercial consumers. The demand was questioned by filing a writ petition before the Madhya Pradesh High Court which by the impugned judgment held that the legal profession does not involve a commercial activity and, therefore, the rate applicable to commercial consumers was not applicable to him. The judgment is questioned by the Board in this appeal.

A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and on activity of a commercial character. Considering a similar question in the background of Section 2 (4) of the Bombay Shops and Establishments Act, 1948 (79 of 1948), it was held by this Court in *Devendra M. Surti (Dr.) v. State of Gujarat, AIR 1969 SC 63* that a doctor's establishment is not covered by the expression "commercial establishment".

In the above background, we would have dismissed the appeal. But we notice that in *New Delhi Municipal Council v. Sohan Lal Sachdev, (2000) 2 SCC 494* certain observations are made, with which we do not agree. In para 12 it was observed as follows : (SCC p. 497)

> "12. The two terms 'domestic' and 'commercial' are not defined in the Act or the Rules. Therefore, the expressions are to be given in common parlance meaning and must be understood in their natural, ordinary and popular sense. In interpreting the phrases the context in which they are used is also to be kept in mind. In Stroud's Judicial Dictionary (5th Edn.) the term 'commercial' is defined as 'traffic, trade or merchandise in buying and selling of goods'. In the said dictionary the phrase 'domestic purpose' is stated to mean use for personal residential purposes. In essence the questions is, what the character of the purpose of user of the premises by the owner or lord is and not the character of the place of user. For example, running a boarding house is a business,but persons in a boarding house may use water for 'domestic' purposes. As noted earlier the classification made for the purpose of charging electricity duty by NDMC sets out the categories 'domestic' user as contradistinguished from 'commercial' user or to put in differently 'non-domestic user'. The intent and purpose of the classification, as we see it, is to make a distinction between 'purely private residential purpose' as against 'commercial purpose'. In the case of a 'guest house', the building is used for providing accommodation to 'guests' who may be travellers, passengers, or such persons who may use the premises temporarily for the purpose of their stay on payment of the charges. The use for which the building is put by the keeper of the guest house, in the context cannot be said to be for purely residential purpose. Then the question is, can the use of the premises be said to be for 'commercial purpose'? Keeping in mind the context in which the phrases are used and the purpose for which the classification is made, it is our considered view that the question must be answered in the affirmative. It is the user of the premises by the owner (not necessarily absolute owner) which is relevant for determination of the question and not the purpose for which the guest or occupant of the guest house uses electric energy. In the broad classification as is made in the Rules, different types of user which can reasonably be grouped together for the purpose of understanding the two phrases 'domestic' and 'commercial' is to be made. To a certain degree there might be overlapping, but that has to be accepted in the context of things."

Even if it is accepted that the user was not domestic, it may be non-domestic. But it does not automatically become "commercial". The words "non-domestic" and "commercial" and not interchangeable. The entry is "commercial". It is not a residual entry, unless the user is commercial the rate applicable to the commercial user cannot be charged merely because it is not considered

to be domestic user, as has been held in *New Delhi Municipal Council* case (supra).

The view expressed in the said case does not appear to be correct. We, therefore, refer the matter to a larger Bench.

●

346. CIVIL PROCEDURE CODE, 1908 – O.21 R. 106

Limitation for restoration application contemplated by R. 106 (3), starting point of – Limitation is 30 days from date of order and in case of ex parte order from the date of knowledge of order – Section 5 of Limitation Act or Section 151 C.P.C. not applicable for condonation of delay – Law explained.

Damodaran Pillai and others v. South Indian Bank Ltd.

Judgment dt. 08.09.2005 by the Supreme Court in Civil Appeal No. 1079 of 2004, reported in (2005) 7 SCC 300

Held :

Sub-rule (3) of Rule 106 provides for the period of limitation for filing such an application which reads as under :

> "106. (3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, the case of an exparte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order."

The learned executing court allowed application of restoration filed by the respondent herein on the ground that it acquired the knowledge about the dismissal of the execution petition only on 25-3-1998.

The learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of sub-rule (2) of Rule 105, the starting point of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabout. As the applicant is represented in the proceeding through his advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default under sub-rule (2) of Rule 105, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree-holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.

We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the Second Schedule appended to the Limitation Act, 1963.

It is also not in dispute that the Kerala Amendment providing for application of Section 5 of the Limitation Act in Order 21 Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963 (Act 56 of 1964).

It is also trite that the civil court in the absence of any express power cannot condone the delay. For the purpose of condonation of delay in the absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power.

It is well settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.

An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under order 21 of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maihtainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.

In *Ayappa Naicker v. Subbammal, (1984) 1 MLJ 214 Mohan, J.* (as His Lordship then was) opined: (MLJ p. 217, para 4)

> "Therefore having regard to the above language, it was permissible to have such a provision wherein the position is clearly changed at present. Section 5 of the present Limitation Act, 1963, states that any appeal or any application under any of the provisions of Order 21, Civil Procedure Code, 1908, may be admitted after the prescribed period if the appellant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Explanation is omitted as unnecessary. Therefore, with reference to applications under Order 21, Civil Procedure Code, there is the statutory bar in applying Section 5 of the Limitation Act. It may also be relevant to note Section 32 of the Limitation Act before it was repealed by Central Act 56 of 1974. It is stated under that section that the Indian Limitation Act, 1908 is hereby repealed. Therefore, after 1-1-1964, sub-rule (4) of Rule 105 of Order 21, Civil Procedure Code, could no longer be applied, because of the express language of Section 5 of the Limitation Act. That is why the Central code, in Rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that Section 5 of the Limitation Act would be applicable. In view of this, the order of the court below ought to be upheld."

If was further held : (MLJ p. 217, para 4)

> "The question of invoking inherent powers under Section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under Rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under Rule 106, and the Madras Amendment under sub-Rule (4) of Rule 105 of Order 21, it is Section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provi-

sion inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except insofar as such amendment or provision is consistent with the provisions of the principal Act, as amended by this Act, stand repealed."

We respectfully agree with the said opinion.

●

347. PARTNERSHIP ACT, 1932 – Sections 24 and 25
Liability of owner for acts of the firm – Decree in favour or against a firm is a decree in favour or against the partners – Law explained.
Ashutosh v. State of Rajasthan and others
Judgment dt. 30.8.2005 by the Supreme Court in Civil Appeal No. 5345 of 2005, reported in (2005) 7 SCC 308

Held :

It is not in dispute that the decree was passed against the firm in which Smt. Dhanwanti Devi was also a partner. Under the provisions of the Partnership Act, one partner is the agent of the other. The partner is always liable for partnership debt unless there is implied or express restriction. In the instant case, notice was duly served on Smt. Dhanwanti Devi and her husband at House No. 80, B-Block, Sri Ganganagar. Sections 24 and 25 of the Partnership Act 1932 can be usefully referred to in the present context which are reproduced hereunder :

> "24 *Effect of notice to acting partner.* – Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of the partner.
>
> 25. *Liability of a partner for acts of the firm.* – Every partner is liable, jointly with all the other partners and also serverally, for all acts of the firm done while he is a partner."

Section 24 deals with the effect of notice to a partner. Such notice may be binding if the following conditions are satisfied :

(a) the notice must be given to a partner;

(b) the notice must be a notice of any maater relating to the affairs of the firm;

(c) fraud should not have been committed with the consent of such partner on the firm.

Section 24 is based on the principle that as a partner stands as an agent in relation to the firm, a notice to the agent is tantamount to the principles and vice versa. As a general rule, notice to a Principal is notice to all his agents; and notice to an agent of matters connected with his agency is notice to his principal.

Under Section 25, the liability of the partners is joint and several. It is open to a creditor of the firm to recover the debt from any one or more of the partners. Each partner shall be liable as if the debt of the firm has been incurred on his personal liability.

The judgment in the caseof *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694* can be beneficially referred to in the persent context. Two questions arose for consideration by this Court in this case. Firstly, whether the recovery of sales tax dues amounting to Crown debt shall have precedence over the right of the Bank to proceed against the property of the borrowers mortgaged in favour of the Bank. Secondly, whether property belonging to the partners can be proceeded against for recovery of dues on account of sales tax assessed against the partnership firm under the provisions of the Karnataka Sales Tax Act, 1957. We are concerned only with regard to the second question. In para 18, R.C. Lahoti, J. (as he then was) observed as under : (SCC p. 706)

> "18. The High Court has relied on Section 25 of the Partnership Act, 1932 for the purpose of holding the partners as individuals liable to meet the tax liability of the firm. Section 25 provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. A firm is not a legal entity. It is only a collective or compendious name for all the partners. In other words, a firm does not have any existence away from its partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of firm".

In the case of *ITO (III) v. Arunagiri Chettair, (1996) 9 SCC 33* this Court considered the question as to whether an erstwhile partner is liable to pay the tax arrears due from the partnership firm pertaining to the period when he was a partner. The Madras High Court has held that he is not. Disputing the correctness of the said judgment, the Revenue came in appeal before this Court. This Court while allowing the appeal and setting aside the judgment of the High Court observed as follows : (SCC p. 33)

> "Section 25 of the Partnership Act does not make a distinction between a continuing partner and an erstwhile partner. Its principle is clear and specific viz. that every partner is liable for all the acts of the firm done while he is a partner jointly along with other partners and also severally. Therefore, it cannot be held that the said liability ceases merely because a partner has ceased to be partner subsequent to the said period."

348. CRIMINAL PROCEDURE CODE, 1973 – Section 195 (1) (b) (ii)

Bar contemplated u/s 195 (1) (b)(ii), applicability of – Bar not applicable if forgery committed before document was filed in Court – Law explained.

K. Vengadachalam v. K.C. Palanisamy and others

Judgment dt. 08.8.2005 by the Supreme Court in Criminal Appeal No. 976 of 2005, reported in (2005) 7 SCC 352

Held :

Undisputedly, the forgery is said to have been committed before the document was filed. Earlier, there was diverse opinion of this Court as to whether protection of Section 195 (1) (b) (ii) CrPC was available in relation to forgery committed prior to the filing of document or after its filing. A constitution Bench decision of this Court in the case of *Iqbal Singh Marwah v. Meenakshi Marwah, (2005) 4SCC 370* has categorically laid down in para 33 of the judgment that protection engrafted under Section 195 (1) (b) (ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it had been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in *custodia legis*. This being the position, in our view, the High Court was not justified in quashing prosecution of the respondents on the ground that provisions of Section 195 (1) (b) (ii) CrPC were applicable.

●

349. MOTOR VEHICLES ACT, 1988 – Sections 2 (28) and 2 (46)

'Motor Vehicle', definition of as contained in Section 2 (28) – It includes any mechanically propelled vehicle apt for use upon roads irrespective of source of power – 'Motor vehicle' includes a trailer – Whether tractor-trailer adopted for carriage of goods is goods carriage and consequently transport vehicle ? Held, Yes – Law explained.

Natwar Parikh & Co. Ltd. v. State of Karnataka and others

Judgment dt. 01.9.2005 by the Supreme Court in Civil Appeal No. 4631 of 2000, reported in (2005) 7 SCC 364

Held :

Section 2(28) is a comprehersive definition of the words "motor vehicle". Although, a "trailer" is separately defined under Section 2(46) to mean any vehicle drawn or intended to be drawn by a motor vehicle, it is still included into the definition of the words "motor vehicle" under Section 2(28). Similarly, the word "tractor" is defined in Section 2(44) to mean a motor vehicle which is not *itself* constructed to carry any load. Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature. Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles, etc. A combined reading of the aforestated definitions

under Section 2, reproduced hereinabove, shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor-trailer would constitute a "goods carriage" under Section 2(14) and consequently, a "transport vehicle" under Section 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for ansporting goods, it can be state that it is adapted for the carriage of goods. Applying the above test, we are of the view that the tractor-trailer in the present case falls under Section 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" under Section 2(47) of the MV Act, 1988.

●

350. CRIMINAL PROCEDURE CODE, 1973 – Section 437

Bail on the ground of delay in trial – Speedy trial though a fundamental right, still no invariable rule for grant of bail on completion of specified period of detention in custody – Law explained.

Surinder Singh alias Shingara Singh v. State of Punjab

Judgment dt. 06.09.2005 by the Supreme Court in Criminal Appeal No. 1154 of 2005, reported in (2005) 7 SCC 387

Held :

It is no doubt true that this Court has repeatedly emphasised the fact that speedy trial is a fundamental right implicit in the broad sweep and content of Article 21 of the Constitution. The aforesaid article confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair, or just, such deprivation would be violative of his fundamental right under Article 21 of the Constitution. It has also been emphasised by this Court that the procedure so prescribed must ensure a speedy trial for determination of the guilt of such person. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. These are observations made in several decisions of this Court dealing with the subject of speedy trial. In this case, we are concerned with the case where a person has been found guilty of an offence punishable under Section 302 IPC and who has been sentenced to imprisonment for life. The Code of Criminal Procedure affords a right of appeal to such a convict. The difficulty arises when the appeal preferred by such a convict cannot be disposed of within a reasonable time. In *Kashmira Singh v. State of Punjab, (1977) 4 SCC 291* this Court dealt with such a case. It is observed : (SCC pp. 292-93, para 2)

"The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Courts is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified ? Would it be just at all for the Court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent ?' What confidence would such administration of justice inspire in the mind of the public ? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal ? Would it not be an affront to his sense of justice ? of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it ? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

Similar observations are found in some of the other decisions of this Court which have been brought to our notice. But, however, it is significant to note that all these decisions only lay down broad guidelines which the courts must bear in mind while dealing with an application for grant of bail to an appellant before the court. None of the decisions lay down any invariable rule for grant of bail on completion of a specified period of detention in custody. Indeed in a discretionary matter, like grant or refusal of bail, it would be impossible to lay down any invariable rule or evolve a straitjacket formula. The court must exercise its discretion having regard to all the relevant facts and circumstances. What the relevant facts and circumstances are, which the court must keep in mind, has

been laid down over the years by the courts in this country in a large number of decisions which are well known. It is, threrfore, futile to attempt to lay down any invariable rule or formula in such matters.

●

351. CRIMINAL TRIAL :

Defects in investigation – Fire arms and empties not recovered – Such articles if recovered could have only corroborative value – Defect not fatal for prosecution.

State of Punjab v. Hakam Singh

Judgment dt. 31.8.2005 by the Supreme Court in Criminal Appeal No. 130 of 2000, reported in (2005) 7 SCC 408

Held :

It was also pointed out by learned counsel for the respondent that no fire-arms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the firearms and recovering the empties and sending them for examination by the ballistic expert would have only corroborated the prosecution case but by not sending them to the ballistic expert in the present case is not fatal in view of the categorical testimony of PW 3 about the whole incident.

●

352. INDIAN PENAL CODE, 1860 – Section 53 (2)

Expression 'imprisonment for life' as used in Section 53, meaning of– 'Imprisonment for life' not equivalent to imprisonment for 14/20 years but is imprisonment for whole of the remaining life – Nature of sentence – 'Imprisonment for life' means rigorous imprisonment for life – Law explained.

Mohd. Munna v. Union of India and others

Judgment dt. 16.9.2005 by the Supreme Court in W.P. (Crl.) No. 45 of 1998, reported in (2005) 7 SCC 417

Held :

In Case of *Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440* the Constitution Bench of this Court held that the sentence of Imprisonment for life is not for any definite period and the imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. It was also held in AIR para 5 as follows: (SCR pp. 444-45)

> "It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life, enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

Summarising the decision, it was held in AIR para 8 as under : (SCR 447)

"Briefly stated the legal position is this : Before Act 26 of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The Rules framed under the Prisons Act enable such a prisoner to earn remissions – ordinary, special and State – and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the Rules provide for a procedure to enable the appropriate Government to remit the sentence under Section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release."

We are bound by the above dicta laid down by the Constitution Bench and we hold that life imprisonment is not equivalent to imprisonment for fourteen years or for twenty years as contended by the petitioner.

●

353. LAND ACQUISITION ACT, 1894 – Section 18

Applicants neither present when award made nor having notice u/s 12(2) – Limitation of six months for making reference will commence from date of knowledge of the declaration of award – Law explained. Parsottambhai Maganbhai Patel and others v. State of Gujarat through Dy. Collector Modasa and another

Judgment dt. 06.9.2005 by the Supreme Court in Civil Appeal No. 8818 of 2003, reported in (2005) 7 SCC 431

Learned counsel for the appellants rightly placed reliance upon the judgment of this Court in *Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer, (1962) 1 SCR 676 : AIR 1961 SC 1500* and submitted that since the appellants were not present when the award was made, and no notice was given to them under Section 12(2) of the Act, the application for making a reference

under Section 18 of the Act must be held to be within time if it is filed within six months of the date of knowledge of the declaration of the award. In our view, the submission is sound and must be accepted. This Court in *Raja Harish Chandra Raj Singh (Supra)* was dealing with a case in which an award was declared under the Act on 25.3.1951. No notice under Section 12(2) of the Act was given to the claimants. It was only on 12-1-1953 that the claimants came to know about the declaration of the award whereafter they filed an application claiming a reference under Section 18 of the Act on 24.2.1953. The High Court of Allahabad held that the case fell under the latter part of clause (b) of the proviso the Section 18 and since the application made by the appellants before the Land Acquisition Officer for claiming a reference under Section 18 was made beyond six months from the date of the award in question, it was beyond time. This view of the High Court was overruled by this Court and in doing so the Court made the following pertinent observations : (SCR pp. 682-84)

> "Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to be party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words 'the date of the award' occurring in the relevant section would not be appropriate.
>
> There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced

and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression 'the date of the award' used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words 'from the date of the Collector's award' used in the proviso to Section 18 in a literal or mechanical way."

This Court, therefore, held that the limitation under the latter part of Section 18(2)(b) of the Act has to be computed having regard to the date on which the claimants got knowledge of the declaration of the award either actual or constructive. This principle, however, will apply only to cases where the applicant was not present or represented when the award was made, or where no notice under Section 12(2) was served upon him.

●

354. LAND ACQUISITION ACT, 1894 – Section 18
Limitation for making reference – Different situations contemplated by Section 18 regarding limitation explained.
Mahadeo Bajirao Patil v. State of Maharashtra and others
Judgment dt. 06.9.2005 by the Supreme Court in Civil Appeal No. 867 of 2003, reported in (2005) 7 SCC 440

Held :

The application under Section 18 of the Act was made by the appellant on 20.2.1995. Section 18 of the Act reads as follows:

> "18 *Reference to Court* – (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.
>
> (2) The application shall state the grounds on which objection to the award is taken :
>
> Provided that every such application shall be made,–
>
> (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;
>
> (b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12 sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

A mere perusal of Section 18 discloses that there are three situations for which period of limitation has been provided for making an application for reference. Firstly, if the person making the application was present or represented before the Collector at the time when he made his award, the application must be filed within six weeks from the date of the Collector's award.

In the instant case, it is not disputed that the appellant was not present when the award was made and, therefore, Section 18(2)(a) is not applicable to the facts of this case.

Second and third situations are envisaged by Section 18(2)(b). The second situation envisaged is where a notice is received by the applicant under Section 12 sub-section (2) of the Act. In such a case, the period of limitation prescribed is six weeks from the date of the receipt of the notice or within six months from the date of the Collector's award, whichever period shall first expire.

●

355. CRIMINAL PROCEDURE CODE, 1973 – Sections 190(1) and 204 Cognizance of offence within the meaning of Section 190 (1) – 'Taking of cognizance' u/s 190 (1) and 'issuance of process' u/s 204 not one and the same thing, difference between – Law explained. CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. and another Judgment dt. 23.8.2005 by the Supreme Court in Criminal Appeal No. 1063 of 2005, reported in (2005) 7 SCC 467

Held :

Cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent

authority, etc. These are cases where the Magistrate will refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry.

●

356. CRIMINAL PROCEDURE CODE, 1973 – Section 439

Grant or refusal of bail – Mode of exercise of discretion by the Court – Law explained.

Ajay Kumar Sharma v. State of U.P. and others

Judgment dt. 29.8.2005 by the Supreme Court in Criminal Appeal No. 1099 of 2005, reported in (2005) 7 SCC 507 (Three Judge Bench)

Held :

Though it is correct that detailed examination of the merits of the case is not required by the courts while considering an application for bail but, at the same time, the exercise of discretion has to be based on well-settled principles and in a judicious manner and not as a matter of course. This Court in *Chaman Lal v. State of U.P., (2004) 7 SCC 525* has laid down some of the factors, amongst others, to be taken into consideration while dealing with an application for bail.

●

357. CIVIL PROCEDURE CODE, 1908 – O. 7 R. 11 (d)

Rejection of Plaint – Ambit and scope of Rule 11 – Jurisdiction under R. 11 to be exercised only on the basis of averments in plaint – Jurisdiction can be exercised at any stage – Law explained.

Popat and Kotecha Property v. State Bank of India Staff Association

Judgment dt. 29.8.2005 by the Supreme Court in Civil Appeal No. 3460 of 2000, reported in (2005) 7 SCC 510

Held :

Before dealing with the factual scenario, the spectrum of Order 7 Rule 11 in the legal ambit needs to be noted.

In *Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557* is was held with reference to Order 7 Rule 11 or the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit – before registering the or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

In *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal, (1998) 2 SCC 70* it was held that the basic question to be decided while dealing with an application filed under Order 7 rule 11 of the Code is whether a real cause of action has been

set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the code. (See *T. Arivandandan v. T.V. Satyapal, (1977) 4 SCC 467*).

It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in *Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487* only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

In *Raptakas Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184* it was observed that the averments in the pliant as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.

There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

Keeping in view the aforesaid principles the reliefs sought for in the suit as quoted supra have to be considered. The real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to which and by searching examination of the party in case the court is prima facie of the view that the suit is an abuse of the process of the court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised.

Rule 11 of Order 7 lays down in independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say express terms about the filing of a written statement. Instead, the word "shall" is used clearly implying thereby that it casts a duty on the court to perform its

obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13.

The above position was highlighted in *Sopan Sukhdeo Sable v. Asstt. Charity Commr. (2004) 3 SCC 137.*

●

358. SERVICE LAW :

Termination of service – Termination whether simpliciter or punitive, determination of – Law explained.

State of Haryana and another v. Satyender Singh Rathore

Judgment dt. 08.9.2005 by the Supreme Court in Civil Appeal No. 9470 of 2003, reported in (2005) 7 SCC 518

Held :

The question whether the termination of service is simpliciter or punitive has been examined in several cases e.g. *Dhananjay v. Chief Executive Officer, Zilla Parishad, Jalna, (2003) 2 SCC 386* and *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd., (2003) 3 SCC 263.* An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60* and *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences, (2002) 1 SCC 520* after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of *Dipti Prakash Banerjee (Supra)* after referring to various decisions it was indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 or the said judgment a distinction is explained thus : (SCC pp. 71-72)

> "21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as *'founded'* on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circum-

stance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter of on motive on the ground of unsuitability to continue in service.

●

359. SPECIFIC RELIEF ACT, 1963 – Section 16 (c)
Readiness and willingness on the part of the plaintiff – Requirements as to pleading and proof – Law explained.
Aniglase Yohannan v. Ramlatha and others
Judgment dt. 23.9.2005 by the supreme Court in Civil Appeal No. 6260 of 2004, reported in (2005) 7 SCC 534

Held :

While examining the requirement of Section 16(c) this Court in *Syed Dastagir v. T.R. Gopalakrishna Setty, (1999) 6 SCC 337 noted as follows : (SCC p. 341, para 9)*

> "9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see she pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular

nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

Again in *Motilal Jain v. Ramdasi Devi, (2000) 6 SCC 420* it was noted as follows : (SCC pp. 424-26, paras 7-9)

"7. The other contention which found favour with the High Court, is that plaint averments do not show that the plaintiff was ready and willing to perform his part of the contract and at any rate there is no evidence on record to prove it, Mr. Choudhary developed that contention placing reliance on the decision in *Ouseph Varghese v. Joseph Aley, (1969) 2 SCC 539.* In that case, the plaintiff pleaded on oral contract for sale of the suit property. the defendent denied the alleged oral agreement and pleaded a different agreement in regard to which the plaintiff neither amended his plaint nor filed subsequent pleading and it was in that context that this Court pointed out that the pleading in specific performance should conform to Forms 47 and 48 of the First Schedule of the Code of Civil Procedure. That view was followed in *Abdul Khader Rowther v. P.K. Sara Bai, (1989) 4 SCC 313*

8. However, a different note was struck by this Court in the case of *R.C. Chandiok v. Chunnilal Subarwal (1970) 3 SCC 140.* In that case 'A' agreed to purchase from 'R' a leasehold plot.'R' was not having lease of the land in his favour from the Government nor was he in possession of the same. 'R', however received earnest money pursuant to the agreement for sale which provided that the balance of consideration would be paid within a month at the time of the execution of the registered sale deed. Under the agreement 'R' was under obligation to obtain permission and sanction from the Government before the transfer of leasehold plot. 'R' did not take any steps to apply for the sanction from the Government. 'A' filed the suit for specific performance of the contract for sale. One of the contentions of 'R' was that 'A' was not ready and willing to perform his part of the contract. This Court observed that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. It was held that in the absence of any material to show that 'A' at any stage was not ready and will-

ing to perform his part of the contract or that he did not have the necessary funds for payment when the sale deed would be executed after the sanction was obtained, 'A' was entitled to a decree for specific performance of contract.

9. That decision was relied upon by a three-Judge Bench of this Court in *Syed Dastagir case* (supra) wherein it was held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed: (SCC Headnote)

'Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form.'

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale."

Lord Campbell in *Court v. Ambergate, Nottingham and Boston and Eastern Junction Rely. Co, (1851) 117 ER 1229* observed that in common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, had it not been renounced by the defendant.

The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest, that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

●

360. N.D.P.S. ACT, 1985 – Sections 17, 18 and 21
'Opium derivative' within Section 2 (xvi) comes within the meaning of 'manufactured drug' u/s 2 (xvi) (e) – Law explained.
Amarsingh Ramjibhai Barot v. State of Gujarat
Judgment dt. 19.9.2005 by the Supreme Court in Criminal Appeal No. 1218 of 2005, reported in (2005) 7 SCC 550

Held :

Sections 17, 18 and 21 of the NDPS Act are intended to operate in different circumstances. Section 17 prescribes the punishment *inter alia* for possession of "prepared opium"; Section 18 prescribes the punishment *inter alia* for possession of "opium" and Section 21 deals with the punishment *inter alia* for possession of "manufactured drugs". Each one of these terms has been defined in the NDPS Act. "Opium" is defined in Section 2 (xv) as:

"2. (xv) 'opium' means –

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any natural material, of the coagulated juice of the opium poppy,

but does not include any preparation containing not more than 0.2 per cent of morphine;"

The term "opium derivative" is defined in Section 2 (xvi) as follows

"2. (xvi) 'opium derivative' means –

(a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine."

There does not appear to be any acceptable evidence that the black substance found with the appellant was "coagulated juice of the opium poppy" and "any mixture, with or without any neutral material, of the coagulated juice of the opium poppy". FSL has given its opinion that it is "opium as described in the NDPS Act". That is not binding on the court.

The evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (a), (b), (c) or (d) of Section 2 (xvi). The residuary clause (e) would take into its sweep all preparations containing more than 0.2 per cent of morphine. The FSL report proves that the substance recovered from the appellant had 2.8 per cent anhydride morphine. Consequently, it would amount to "opium derivative" within the meaning of Section 2(xvi)(e). Clause (a) of Section 2 (xi) defines the expression "manufactured drug" as:

"2. (xi) 'manufactured drug' means –

(a) all cocoa derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) ★ ★ ★"

All "opium derivatives" fall within the expression "manufactured drug" as defined in Section 2 (xi) of the NDPS Act. Thus, we arrive at the conclusion that what was recovered from the appellant was "manufactured drug" within the meaning of Section 2 (xi) of the NDPS Act. The material on record, therefore, indicates that the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of "manufactured drug".

●

361. INTERPRETATION OF STATUTES :

Retrospective legislation – Meaning of 'retrospective' or 'retroactive'. State Bank's Staff Union (Madras Circle) v. Union of India and others Judgment dt. 15.9.2005 by the Supreme Court in Civil Appeal No. 3396 of 2001, reported in (2005) 7 SCC 584

Held :

Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes the power to give it retrospective effect. Craies on Statute Law (7th Edn.) at p. 387 defines retrospective statutes in the following words:

> "A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

Judicial Dictionary (13th Edn.) by K.J. Aiyar, Butterworth, p. 857, states that the word "retrospective" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. *Words and phrases*, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as a one which takes away or impairs vested or accused rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a

new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

In *Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edn., 2005)* the expressions "retroactive" and "retrospective" have been defined as follows at p. 4124, Vol. 4:

"Retroactive. – Acting backward; affecting what is past.

(Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. – Also termed retrospective. (Black's Law Dictionary, 7th Edn., 1999)

"Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity", consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity", occurs when a new rule of law is applied to an act or transaction in the process of completion... The foundation of these concepts is the distinction between completed and pending transactions....' T.C. Hartley, *Foundations of European Community Law*, p. 129 (1981).

★ ★ ★

Retrospective. – Looking back; contemplating what is past.

Having operation from a past time.

'Retrospective' is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time antecedent to its passing." (Vol. 44, *Halsbury's Laws of England*, 4th Edn., p. 570, para 921.)

●

362. RENT CONTROL AND EVICTION :

'Inconsistent user' or 'change of user', meaning of – Mere alteration of business or trade in absence of a negative covenant not an inconsistent user – Law explained.

Hari Rao v. N. Govindachari and others

Judgment dt. 15.9.2005 by the Supreme Court in Civil Appeal No. 5751 of 2005, reported in (2005) 7 SCC 643

Held :

Learned counsel for the landlord placed considerable reliance on the

decision in *M. Arul Jothi v. Lajja Bal, (2000) 3 SCC 723.* That case also arose under Section 10(2)(ii)(b) of the Act. The transaction between the parties was governed by a lease deed. The tenant covenanted that the premises, "shall be used by the tenant *only* for carrying on his own business... and *the tenant shall not carry on any other business than the abovesaid business"* (emphasis in original) (SCC pp. 730-31, para 10). The business intended was dealing in radios, cycles, fans, clocks and steel furniture. Subsequently, the tenant also started a trade in provisions (spices and dals, etc.). The landlord sought eviction and the courts below ordered eviction under Section 10(2) (ii)(b) of the Act. The tangent had appealed to this Court. This Court referred to the earlier decisions of this Court including the one in *M.K. Palaniappa Chettiar v. A. Pennuswami Pillai, (1970) 2 SCC 290.* It also referred to Section 108 (o) of the Transfer of Property Act. This Court distinguished the various decisions brought to its notice under other sister enactments and took the view that the covenant in the rent deed not to use the premises for any purpose, other than the one referred to in the rent deed, brought the user by the tenant within the mischief of Section 10(2)(ii)(b) of the Act and, therefore, the order for eviction was justified. With respect, as we see it, Their Lordships rested their decision on the existence of the negative covenant in the lease deed and on the view that a breach of that convenient would attract Section 10(2)(ii)(b) of the Act, and make the user one coming within the mischief of that provision. In this case, as observed, there is no covenant as the one involved in *Arul Jothi case* (supra). In *M.K. Palaniappa Chettiar v. A. Pennuswami Pillai* (supra) the tenant, while continuing the business for which the building was taken on rent, was using a negligible portion of the building for the purpose of cooking. This Court held that the High Court was in error in reversing the decision of the Rent Controller and the Appellate Authority to the effect that no ground for eviction under Section 10(2)(ii)(b) of the Act was made out. This Court dismissed the petition for eviction. In *Mohan Lal v. Jai Bhagwan, (1988) 2 SCC 474* this Court, interpreting the corresponding provision in the Haryana Urban (Control of Rent and Eviction) Act, 1973, held that when a tenant who had taken a building on lease for the purpose of running a business in liquor, converted the business into that of a general merchandise, in the absence of a negative covenant, the user did not amount to user for a purpose other than that for which the building was leaded. The same position was adopted in *Gurdial Batra v. Raj Kumar Jain, (1989) 3 SCC 441* where the premises were let out for repairing business and the tenant along with the repairing business, also carried on sale of television sets for a while. This Court held that there was no change of user which would attract the liability for eviction under the corresponding provision of the East-Punjab Urban Rent Restriction Act, 1949. It was clearly stated that the concept of injury to the premises which forms the foundation of Section 108(o) of the Transfer of Property Act is the main basis for a provision similar to the one in Section 10 (2) (ii) (b) of the Act. We think that the case on hand is governed by the principles recognised in the latter decisions and the ratio of the decision in *Arul Jothi (supra)* has no application in the absence of a

negative covenant as the one obtaining in that case. *Dashrath Baburao Sangale v. Kashimath Bhaskar Data, 1994 Supp (1) SCC 504* was a case where the premises were taken on rent for "sugarcane crushing with the help of an ox and for the shop thereof" and the tenant was to get constructed a temporary shed of tin-sheet for that purpose. The tenent started a cloth business in the premises. The courts below found that this was a user for a purpose other than that for which the premises were leased and this Court found no ground to interfere. This decision only reaffirms the position that everything would depend on the terms of the letting and the facts of the case. Obviously, the cloth business started, had no connection with crushing of sugarcane. The decision in *Ram Gopal v Jai Narain, 1995 Supp (4) SCC 648* shows that the user by the tenant of a building taken on rent for the purpose of running a shop (commercial), for a manufacturing purpose, would entail his eviction on the ground of change of user. The tenant, in that case, installed an atta chakki and on oil kolhu in the shop. The case on hand is not one of that nature. In other words, in the present case, there was no change of user, from non-residential to residential or from business to manufacturing or industrial. As emphasised already, there was also no negative covenant as was available in *Arul Jothi case* (supra). In such a situation, we are satisfied that the High Court was clearly in error in interfering with the decision of the Appellate Authority that there was no change of user in the case on hand attracting Section 10(2)(ii)(b) of the Act. Merely because a tenant, who has taken a building for the purpose of running a trade, alters the commodity in which he was trading when he took the building on lease or trades in other commodities also, he could not be held to be using the premises for a purpose other than the purpose for which it was let. The purpose has to be understood, as the purpose of trade and in the absence of a covenant barring the using of it for any other trade, it will be open to the tenant to use the premises for expanding his trade or even for taking up other lines of trade as befits a prudent trader.

●

363. RENT CONTROL AND EVICTION :

Disclaimer of tenancy by tenant, meaning of – Either tenant should have renounced his character or set up title in himself of a third party – Law explained.

Devasahayam (Dead) by L. Rs. v. P. Savithramma and others
Judgment dt. 16.9.2005 by the Supreme Court in Civil Appeal No. 5477 of 2004, reported in (2005) 7 SCC 653

Held :

In *Sheela v. Prahlad Rai Prem Prakash, (2002) 3 SCC 375* whereupon Mr Nageswara Rao placed strong reliance, Lahoti, J., as the learned Chief Justice then was, while construing the provisions of clause (c) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961 observed: (SCC p. 384, para 13).

"13. The law as to tenancy being determined by forfeiture by denial of the lessor's title or disclaimer of the tenancy has been adopted in India from the law of England where it originated as a principle in consonance with justice, equity and good conscience. On enactment of the Transfer of Property Act, 1882, the same was incorporated into clause (g) of Section 111. So just is the rule that it has been held applicable even in the areas where the Transfer of Property Act does not apply. (See : *Raja Mohammed Amir Ahmad Khan v. Municipal Board of Sitapur, AIR 1965 SC 1923.*) The principle of determination of tenancy by forfeiture consequent upon denial of the lessor's title may not be applicable where rent control legislation intervenes and such legislation while extending protection to tenants from eviction does not recognise such denial or disclaimer as a ground for termination of tenancy and eviction of tenant. However, in various rent control legislations such a ground is recognised and incorporated as a ground for eviction of tenant either expressly or impliedly by bringing it within the net of an act injurious to the interest of the landlord on account of its mischievous content to prejudice adversely and substantially the interest of the landlord."

It was further observed: (SCCp. 386, para 17)

"17. 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. A tenant bona fide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of Section 12(1)(c) abovesaid. It is the intention of the tenant, as culled out from the nature of the plea raised by him, which is determinative of its vulnerability."

●

364. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168
Determination of compensation – Multiplier method, rationale of – Law explained.
Tamil Nadu State Transport Corporation Ltd. v. S. Rajapriya and Ors. Reported in 2005 (2) ANJ (SC) 307

Held:

There were two methods adopted to determine and for Calculation of compensation in fatal accident actions, the first the multiplier mentioned in Daview Code (supra) and the second in *Nance vs. British Columbia Electric Railway Co. Ltd., (1951) (2) ALL ER 448).*

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed – up over the period for which the dependency is expected to last.

The considerations generally relevant in the selection of multiplicand and multiplier were adverted to by Lord Diplock in his speech in *Mallett vs. Mc Monglc, (1969 (2) ALL ER 178)* where the deceased was aged 25 and left behind his widow of about the same age and three minor children. On the question of selection of multiplicand Lord Diplock observed:

> "The starting point in any estimate of the amount of the 'dependency' is the annual value of the material benefits provided for the dependents out of the earnings of the deceased at the date of his death. But.... there are many factors which might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependants. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grew up and became independent the proportion of his earninings spent on his dependents would have been likely to fall. But in considering the effect to be given in the award of damages to possible variations in the dependency there are two factors to be borne in mind. The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller the allowance to be made for it is the assessment. The second is that as a matter of the arithmetic of the calculation of present value, the later the change takes place the less will be its effect upon the total award of damages. Thus at interest rates of 41/2% the present value of an annuity for 20 years of which the first ten years are at $100 per annum and the second ten years at $ 200 per annum, is about 12 years purchase of the arithmetical average annuity of $ 150 per annum, whereas if the first ten years are at $ 200 per annum and the second ten years at $ 100 per annum the present value is about 14 years' purchase of the arithmetical mean of $ 150 per annum. If therefore

the chances of variations in the 'dependency' are to be reflected in the multiplicand of which the years' purchase is the multiplier, variations in the dependency which are not expected to take place until after ten years should have only a relatively small effect in increasing or diminishing the dependency used for the purpose of assessing the damages."

In regard to the choice of the multiplicand the *Halsbury's Laws of England in Vol. 34, para 98* states the principle thus:

"98. Assessment of damages under the Fatal Accident Act, 1976. – The Courts have evolved a method for calculating the amount of pecuniary benefit that dependents could reasonably expect to have received from the deceased in the future. First the annual value to the dependants of those benefits (the multiplicand) is assessed. In the ordinary case of the death of a wage-earner that figure is arrived at by deducting from the wages the estimated amount of his own personal and living expenses. The assessment is split into two parts. The first part comprises damages for the period between death and trial. The multiplicand is multiplied by the number of years which have elapsed between those two dates. Interest at one-half the short-term investment rate is also awarded on that multiplicand. The second part is damages for the period from the trial onwards. For that period, the number of years which have based on the number of years that the expectancy would probably have lasted; central to that calculation is the probable length of the deceased's working life at the date of death."

As to the multiplier, Halsbury states:

"However, the multiplier is a figure considerably less than the number of years taken as the duration of the expectancy. Since the dependants can invest their damages, the lump sum award in respect of future loss must be discounted to reflect their receipt of interest on invested funds, the intention being that the dependants will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that they are compensated each year for their annual loss, and the fund will be exhausted at the age which the court assesses to the correct age, having regard to all contingencies. The contingencies of life such as illness, disability and unemployment have to be taken in to account. Actual evidence is admissible, but the Courts do not encourage such evidence. The calculation depends on selecting an assumed rate of interest. In practice about 4 or 5 per cent is selected, and inflation is disregarded. It is assumed that the return on fixed interest bearing securities is so much higher than 4 to 5 per cent that rough and ready allowance for inflation is thereby made. The multiplier may be increased where the plaintiff is a high tax payer. The multiplicand is based on the rate of wages at the date of trial. No interest is allowed on the total figure."

In both *Susamma Thomas General Manager, Kerala State Rood Trasport Corporation, Trivandrum v. U.P. State Rood Transport Corporation & ors., (1996) 4 SCC 362* the multiplier appears to have been adopted taking note of the prevalent banking rate of interest.

In *Susamma Thomas's case* (supra) it was noted that the normal rate of interest was about 10% and accordingly the multiplier was worked out. As the interest rate is on the decline, the multiplier has to consequentially be raised. Therefore, instead of 16 the multiplier of 18 as was adopted in *Trilok Chandra's case* (supra), after reference to Second Schedule to the Act, it was noticed that the same suffers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to be invariable ready reckoner. However, the appropriate highest multiplier was held to be 18. The highest multiplier has to be for the age group of 21 years to 25 years when an ordinary Indian Citizen starts independently earning and the lowest would be in respect of a person in the age group of 60 to 70, which is the normal retirement age.

Considering the age of the deceased and the principles indicated above, the appropriate multiplier would be 12 and not 16 as adopted by the Tribunal and affirmed by the High Court.

●

365. CIVIL PROCEDURE CODE, 1908 – Section 9

Inherent jurisdiction, lack of, effect – Order passed without inherent jurisdiction is a nullity – Law explained.

Devasahayam (Dead) By LRs. v. P. Savithramma and Others

Judgment dt. 16.09.2005 by the Supreme Court in Civil Appeal No. 5477 of 2004, reported in (2005) 7 SCC 653

Held :

In *Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 = (1955) 1 SCR 117 it was stated: (SCRp. 121)*

> "It is a fundamental principle well established that a decree passed by a court without jurisdiction is nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

In *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418 this Court held: (SCC p. 426, para 31)*

> "31.∴ An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waivar or estoppel would have no application in such a situation."

In *Dwarka Prasad Agarwal v. B.D. Agarwal, (2003) 6SCC 230, it was opined : (SCC p. 245, para 37)*

> "37. It is now well settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such."

(See also *Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1 and MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619.*)

●

366. EVIDENCE ACT, 1872 – Section 8

Conduct of the accused – Dead body exhumed from a place on being pointed out by accused – Circumstance admissible u/s 8 as conduct of accused.

A.N. Venkatesh and another v. State of Karnataka

Judgment dt. 08.08.2005 by the Supreme Court in Criminal Appeal No. 482 of 2003, reported in (2005) 7 SCC 714

Held :

By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand v. State (Delhi Admn.), (1979) 3 SCC 90.* Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused.

●

367. CIVIL PROCEDURE CODE, 1908 – Section 152

Amendment of judgment/decree – Correction of only clerical or arithmetical error permissible – Substantive relief cannot be changed u/s 152.

Bijay Kumar Saraogi v. State of Jharkhand

Judgment dt. 26.04.2005 by the Supreme Court in Civil Appeal No. 848 of 1999, reported in (2005) 7 SCC 748

Held :

We find no reason to interfere with the order of the High Court because a mere perusal of Section 152 makes is clear that Section 152 CPC can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgment. The section cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality reviewed. If any authority is required for this proposition, one may refer to the decision of this Court in *State of Punjab v. Darshan Singh, (2004) 1 SCC 328.*

●

368. DIVORCE ACT, 1869 – Sections 3 (2), 3 (3) and 8

Extraordinary jurisdiction of High Court to transfer the case under the Act from one Court to another, extent of – Law explained.

Mabel Treeza Pinto v. Francis Pinto

Judgment dt. 08.08.2005 by the Supreme Court in Civil Appeal No. 4902 of 2005, reported in (2005) 7 SCC 761

Held :

We are of the view that the High Court has erred in the construction of Section 8 of the 1869 Act which provides as follows:

> "8. *Extraordinary jurisdiction of High Court.* – The High Court may, whenever it thinks fit, remove and try and determine as a court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.
>
> *Power to transfer suits.* – The High Court may also withdraw any such suit or proceedings, and transfer it for trial or disposal to the Court of any other such District Judge."

It needs to be emphasised that the High Court is required to exercise its extraordinary jurisdiction under the section. The question is whether the phrase "any other such District Judge" occurring in the second portion of Section 8 means any District Judge which would otherwise have jurisdiction to entertain the suit.

The basis of the High Court's decision is the definition of the words "District Court and District Judge" in sub-sections (2) and (3) of Section 3 of the Act. These two sub-section read as follows:

"3. (2) *'District Judge.'* – 'District Judge' means a Judge of a Principal Civil Court of original jurisdiction however designated:

(3) *'District Court.'* – 'District Court' means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act the marriage was solemnised or, the husband and wife reside or last resided together;"

The High Court appears to have overlooked the words with which Section 3 begins, namely, "unless there be something repugnant in the subject or context". In the context of the extraordinary jurisdiction of the High Court it is clear that the word "District Judge" would mean what the definition expresses viz. any Judge which was a Principal Civil Court of original jurisdiction. The territorial limit in sub-section (3) is, as the sub-section itself denotes, only for the purpose of determining the ordinary jurisdiction for initiating proceedings under the Act.

If the power of the High Court is to be construed as being limited to transfers within the territorial limitations of a District Judge, it would defeat the object and express purpose of Section 8 and render it virtually nugatory. The power to transfer a proceeding within the territorial limits of a District is exercisable even by a District Judge under Section 24 of the Code of Civil Procedure. The intention behind Section 8 of the Act is to give the High Court an overriding power to transfer a suit or any proceeding initiated under the Act from the Court of one District Judge to any other District Judge within its jurisdiction. The words "its jurisdiction" means the jurisdiction of the High Court. Therefore when by the second portion of Section 8 the High Court has been given the additional power of transferring any such suit or proceedings for trial and disposal to the court to any other such District Judge, it is a reference to a District Judge within the territorial limits of the High Court. The transferee Court does not necessarily have to have territorial jurisdiction to try the transferred proceeding or suit. The only limitation is that the Court to which the suit is transferred must be a Principal Civil Court of original jurisdiction within the meaning of Section 3 sub-section(2).

●

369. CIVIL PROCEDURE CODE, 1908 – Sections 15 to 20

Jurisdiction of Courts – Scheme of the Code regarding jurisdiction of Courts – Section 20, ambit and scope of – Section 20 being a residuary provision can operate subject to the conditions provided in Sections 15 to 19 – Consent, waiver or acquiescence cannot confer jurisdiction when it is not there – Law explained.

Harshad Chiman Lal Modi v. DLF Universal Ltd. and another

Judgment dt. 26.09.2005 by the Supreme Court in Civil Appeal No. 2726 of 2000, reported in (2005) 7 SCC 791

Held :

Now, Sections 15 to 20 of the Code contain detailed provisions relating to jurisdiction of courts. They regulate forum for institution of suits. They deal with

the matters of domestic concern and provide for the multitude of suits which can be brought in different courts. Section 15 requires the suitor to institute a suit in the court of the lowest grade competent to try it. Section 16 enacts that the suits for recovery of immovable property, or for partition of immovable property, or for foreclosure, sale or redemption of mortgage property, or for determination of any other right or interest in immovable property, or for compensation for wrong to immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situate. The proviso to Section 16 declares that where the relief sought can be obtained through the personal obedience of the defendant, the suit can be instituted either in the court within whose jurisdiction the property is situate or in the court where the defendant actually or voluntarily resides, or carries on business, or personally works for gain. Section 17 supplements Section 16 and is virtually another proviso to that section. It deals with those cases where immoveable property is situate within the jurisdiction of different courts. Section 18 applies where local limits of jurisdiction of different courts are uncertain. Section 19 is a special provision and applies to suits for compensation for wrongs to a person or to movable property. Section 20 is a residuary section and covers all those cases not dealt with or covered by Sections 15 to 19.

★ ★ ★

The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

In *Halsbury's Laws of England, (4th Edn.), Reissue, Vol. 10, para 317,* it is stated:

> 317. *Consent and waiver.* – Where, by reason of any limitation imposed by a statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whetter, in the circumstances of the case, the Court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking

steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the urisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

In *Bahrein Petroleum Co. Ltd. v. P.J. Pappu, AIR 1966 SC 634* this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing". A decree passed by a court having no jurisdiction is *non est* and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a *coram non judice.*

●

370. CRIMINAL PROCEDURE CODE, 1973 – Sections 384, 385 and 386 SENTENCING

(i) Procedure for hearing appeals – Duty of the Appellate Court – Law explained.

(ii) Adequacy of sentence, necessity of – Law explained.

State of M.P. v. Bala Alias Balaram

Judgment dt. 03.10.2005 by the Supreme Court in Criminal Appeal No. 1277 of 2005, reported in (2005) 8 SCC 1

Held :

(i) Chapter XXIX of the Code of Criminal Procedure deals with Appeals. Section 384 CrPC empowers the appellate court to dismiss an appeal summarily if it considers that there is no sufficient ground for interference. Section 385 CrPC gives the procedure for hearing appeals not dismissed summarily and Section 386 CrPC gives the powers of the appellate court. In *Amar Singh v. Balwinder Singh, (2003) 2 SCC 518 : 2003 SCC (Cri) 641* the duty of the appellate court while hearing a criminal appeal in the light of the aforesaid provisions was explained and para 7 of the report reads as under : SCC pp. 525-26)

> "7. The learned Sessions Judge after placing reliance on the testimony of the eyewitnesses and the medical evidence on record was of the opinion that the case of the prosecution was fully established. Surprisingly, the High Court did not at all consider the testimony of the eyewitnesses and completely ignored the same. Section 384 CrPC empowers the appellate court to dismiss the appeal summarily if it considers that there is no sufficient ground for interference. Section 385 CrPC lays down the procedure for hearing appeal not dismissed summarily and Sub-section (2) thereof casts an obligation to send for the records of the case and to hear the parties. Section 386 CrPC

lays down that after perusing such record and hearing the appellant or his pleader and the Public Prosecutor, the appellate court may, in an appeal from conviction, reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction. It is, therefore, mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 CrPC. In *Biswanath Ghosh v. State of W.B., (1987) 2 SCC 55* it was held that where the High Court acquitted the accused in appeal against conviction without waiting for arrival of records from the Sessions Court and without perusing evidence adduced by the prosecution, there was a flagrant miscarriage of justice and the order of acquittal was liable to be set aside. It was further held that the fact that the Public Prosecutor conceded that there was no evidence, was not enough and the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused. In *State of U.P. v. Sahai, (1982) 1 SCC 352* it was observed that where the High Court has not cared to examine the details of the intrinsic merits of the evidence of the eyewitnesses and has rejected their evidence on general grounds, the order of acquittal passed by the High Court resulted in a gross and substantial miscarriage of justice so as to invoke extraordinary jurisdiction of the Supreme Court under Article 136 of the Constitution."

★ ★ ★

(ii) The rationale for advocating the award of a punishment commensurate with the gravity of the offence and its impact on society, is to ensure that a civilised society does not revert to the days of "an eye for an eye and a tooth, for a tooth". Not awarding a just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted.

Even in the time of Kautilya, the need for awarding just punishment was recognised. According to Kautilya, "Whoever imposes severe punishment becomes repulsive to people, while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well-being and pleasures of the senses." (See *Kautilyan Jurisprudence by V.K. Gupta* under the head "Nature and Scope of Punishment".) This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind.

This Court has on a number of occasions indicated that the punishment must fit the crime and that it is the duty of the court to impose a proper punishment depending on the degree of criminality and desirability for imposing such punishment. In *Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330* this Court observed : (SCC p. 341, para 14)

> "A sentence or pattern of sentence which fails to take due account of the gravity of the offence can seriously undermine respect for law. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders."

In *Rajendra Prasad v. State of U.P., (1979) 3 SCC 646 Justice Sen stated: (SCC p. 708, para 195)*

> "Judges are entitled to hold their own views, but it is the bounden duty of the court to impose a proper punishment, depending upon the degree of criminality and the desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders."

It is not necessary to multiply authorities. In a recent decision in *State of M.P. v. Munna Choubey, (2005) 2 SCC 710* this question has again been dealt with. This Court observed: (SCC p. 716, para 15)

> "15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the courts cannot forget their duty to society and to the victim. The court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim. Could a court afford to forget these aspects while imposing a punishment on the aggressor? I think not. The court has to do justice to society and to the victim on the one hand and to the offender on the other. The proper balance must be taken to have been struck by the legislature. Hence, the legislative wisdom reflected by the statute has to be respected by the court and

the permitted departure therefrom made only for compelling and convincing reasons.

●

371. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Grant or refusal of bail – Relevant factors to be considered while exercising discretion regarding bail – Conditions stipulated in Section 437 (1) (i) equally applicable while exercising discretion u/s 439 – Law explained.
State of U.P. Through CBI v. Amarmani Tripathi
Judgment dt. 26.09.2005 by the Supreme Court in Criminal Appeal No. 1248 of 2005, reported in (2005) 8 SCC 21

Held :

It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; *(v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280 and Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118].* While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528* (SCC pp. 535-36, para 11)

> "11, The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upahdhyay v. Sudarshan Singh, (2002) 3 SCC 598 and Puran v. Rambilas, (2001) 6 SCC 338.*)"

This Court also in specific terms held that : (SCC pp. 536-37, para 14)

"[T]he condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to be enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

●

372. CIVIL PROCEDURE CODE, 1908 – Sections 38, 47 and O.21 R.58
Scope of the controversy to be examined by the executing Court u/s 47 – Law explained.
TCI Finance Ltd. v. Calcutta Medical Centre Ltd & another
Judgment dt. 26.09.2005 by the Supreme Court in Civil Appeal No. 5893 of 2005, reported in (2005) 8 SCC 41

Held :

The executing court cannot go beyond the decree. It is the settled position in law which flows from Section 38 CPC; except when the decree is a nullity or is without jurisdiction. The crucial expression in Section 47 is "All questions arising between the parties to the suit" "or their representatives". Order 21 Rule 54 deals with attachment of immovable property, while Rule 58 deals with adjudication of claims to, or objections to attachment of property. Case of Respondent I is not covered by Section 47 or Order 21 Rule 54 or Rule 58. The High Court misconceived the nature of claim set up by Respondent 1. Learned Single Judge rightly noted that Respondent 1 was not having independent right to the properties. It found that the right claimed was as assignee under the judgment-debtor. The agreement, if any, in that regard was not produced before the Court and, therefore, the learned Single Judge drew adverse inference. Before the Division Bench, the stand of Respondent 1 was that it was a tenant. Without indicating any reason as to how the reasoning of the learned single Judge was wrong the Division Bench enlarged the scope of the controversy and directed the executing court to decide the question of tenancy, which is legally impermissible.

The Division Bench unnecessarily enlarged the scope of the controversy observing that the matter has assumed the proportion of a full-blown suit. It permitted the executing court to deal with the matters which are clearly beyond the scope of its adjudication.

●

373. EVIDENCE ACT, 1872 – Section 68
SUCCESSION ACT, 1925 – Section 63
Proof of will –Suspicious circumstance surrounding execution of will, meaning of – Law explained.
Pentakota Satyanarayana and Others v. Pentakota Seetharatnam and Others
Judgment dt. 29.09.2005 by the Supreme Court in Civil Appeal No. 5941 of 2005, reported in (2005) 8 SCC 67

Held :

Section 68 of the Evidence Act, 1872 deals with proof of execution of document required by law to be attested. This section lays down that if the deed sought to be proved is a document required by law to be attested and if there be an attesting witness alive and subject to process of the court and capable of giving evidence, he must be called to prove execution. Execution consists in signing a document written out, read over and understood and to go through the formalities necessary for the validity of legal act. Section 63 of the Succession Act gives the meaning of attestation as under:

> "63. *Execution of unprivileged Wills.* – Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:
>
> (a) The testator shall sign or shall affix his marks to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

It is clear from the definition that the attesting witness must state that each of the two witnesses has seen the executor sign or affix his mark to the instrument or has seen other persons sing the instrument in the presence and by the direction of the executant. The witness should further state that such of the attesting witnesses signed the instrument in the presence of the executant. These are the ingredients of attestation and they have to be proved by the witnesses. The word "execution" in Section 68 includes attestation as required by law.

★ ★ ★

It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in *Sridevi v. Jayaraja Shetty, (2005) 2 SCC 784.* In the said case, it has been held that the onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the proof of signature of the testator as required by law would not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case.

Mr. Narasimha, learned counsel for the respondents, submitted that the natural heirs were excluded and the legally wedded wife was given a lesser share and, therefore, it has to be held to be a suspicious circumstance. We are unable to countenance the said submission. The circumstances of depriving the natural heirs should not raise any suspicion because the whole idea behind the execution of the Will is to interfere in the normal line of succession and so natural heirs would be debarred in every case of the Will. It may be that in some cases they are fully debarred and some cases partly. This is the view taken by this Court in *Uma Devi Nambiar v. T.C. Sidhan, (2004) 2 SCC 321.*

This Court in the case of *Rahasa Pandiani v. Gokulananda Panda, (1987) 3 SCC 338* held as under: (SCC p. 339)

> "An adoption would divert the normal and natural course of succession. Therefore the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the Will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is claimed on the basis of oral evidence and is not supported by a registered document or any other

evidence of a clinching nature, if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. (Para 4)"

This Court held in *Kishori Lal v. Chaltibai, AIR 1959 SC 504 = 1959 Supp (1) SCR 698.* We can do no better than to quote the relevant passage from the above judgment which reads as under : (SCR p. 705)

> "As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance.

●

374. HINDU LAW :

Adoption, proof of – Burden of proof – Person claiming to have been adopted dispel all suspicious circumstances beyond reasonable doubt – Law explained.

S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another

Judgment dt. 20.09.2005 by the Supreme Court in Criminal Appeal No. 664 of 2002, reported in (2005) 8 SCC 89

Held :

This matter arises from a reference made by a two-Judge Bench of this Court for determination of the following questions by a larger-Bench:

> "(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.
>
> (b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
>
> (c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

★ ★ ★

To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

In view of the above discussion, our answers to the questions posed in the reference are as under:

> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
>
> (b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.
>
> (c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible

for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

●

375. APPRECIATION OF EVIDENCE :

Appreciation of prosecutrix's evidence in a rape case – Corroboration not a condition precedent – Non-examination of doctor/non-production of doctor's report not fatal if remaining evidence instills confidence – Law explained.

State of M.P. v. Dayal Sahu

Judgment dt. 29.09.2005 by the Supreme Court in Criminal Appeal No. 8 of 1998, reported in (2005) 8 SCC 122

Held :

A plethora of decisions by this Court as referred to above would show that once the statement of the prosecutrix inspires confidence and is accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities.

●

376. PREVENTION OF CORRUPTION ACT, 1988 – Section 19 (3)

Lack of requisite valid sanction for prosecution – Effect of – Court can take cognizance only on the basis of a valid sanction – Sanction by incompetent authority, effect of – Competent authority may be permitted to issue fresh sanction.

State of Goa v. Babu Thomas

Judgment dt. 29.09.2005 by the Supreme Court in Criminal Appeal No. 215 of 2004, reported in (2005) 8 SCC 130

Held':

Learned counsel for the appellant, however referred to sub-section 3 of Section 19 of the Act. Sub-section 3 of the Section 19 reads as under :

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

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

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings."

Referring to the aforesaid provisions, it is contended by learned counsel for the appellant that the Court should not, in appeal, reverse or alter any finding, sentence or order passed by a Special Judge on the ground of the absence of any error, omission or irregularity in the sanction required under sub-section (1), unless the Court finds that a failure of justice has in fact been occasioned thereby. In this connection, a reference was made to the decision of this Court rendered in the case of *State v. T. Venkatesh Murthy, (2004) 7 SCC 763.* Reference was also made to the decision of this Court in the case of *Durga Dass v. State of H.P., (1973) 2 SCC 213* where this Court has taken the view that the Court should not interfere in the finding or sentence or order passed by a Special Judge and reverse or alter the same on the ground of the absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless that Court finds that a failure of justice has in fact been occasioned thereby. According to the counsel for the appellant no failure of justice has occasioned merely because there was an error, omission or irregularity in the sanction required because evidence is yet to start and in that view the High Court has not considered this aspect of the matter and it is a fit case to intervene by this Court. We are unable to accept this contention of the counsel. The present is not the case where there has ben mere irregularity, error or omission in the order of sanction as required under sub-section (1) of Section 19 of the Act. It goes to the root of the prosecution case. Sub-section (1) of Section 19 clearly prohibits that the Court shall not take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction as stated in causes (a), (b) and (c).

As already noticed, the sanction order is not a mere irregularity, error or omission. The first sanction order dated 2-1-1995 was issued by an authority

that was not a competent authority to have issued such order under the Rules. The second sanction order dated 7.9.1997 was also issued by an authority, which was not competent to issue the same under the relevant rules, apart from the fact that the same was issued retrospectively w.e.f. 14.9.1994, which is bad. The cognizance was taken by the Special Judge on 29.5.1995. Therefore, when the Special Judge took cognizance on 29.5.1995, there was no sanction order under the law authorising him to take cognizance. This is a fundamental error which invalidates the cognizance as without jurisdiction.

This being the law, we are unable to sustain the submission of learned counsel for the appellant.

Having regard to the gravity of the allegations levelled against the respondent, we permit the competent authority to issue a fresh sanction order by an authority competent under the Rules and proceed afresh against the respondent from the stage of taking cognizance of the offence and in accordance with law.

●

377. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142 Conditions requisite for taking cognizance for an offence u/s 138 – Expression 'cause of action' as used in Section 142 (b), meaning of – Computation of period of one month for filing complaint, mode of – Law explained.

Prem Chand Vijay Kumar v. Yash Pal Singh and another

Reported in 2005 (4) MPLJ 5

Held :

Clause (a) of the proviso to section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. On each presentation of the cheque and its dishonour, a fresh right-and not a cause of action – accrues in his favour. He may, therefore, without taking pre emptory action in exercise of his such right under clause (b) of section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.

But once he gives a notice under clause (b) of section 138, he forfeits such right in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise.

In a generic and wide sense (as in section 20 of the Civil Procedure Code, 1908 (in short 'CPC') "cause of action" means every fact which it is necessary

to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under section 138 of the Act:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make are payment within 15 days of the receipt of the notice.

Proceeding on the basis of the generic meanining of the term cause of action, certainly each of the above facts would constitute a part of the cause of action but clause (b) of section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. A combined reading of sections 138 and 142 makes it clear that cause of action is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of section 142 (c) arises – and can arise – only once.

The period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires.

●

378. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) and 13 (1)
Expression 'rent legally recoverable' as used in Section 12 (1) (a), meaning of – Whether it includes time barred rent – Held, No – Law explained.
Arun Kumar v. Krishna Gopal Sharma
Reported in 2005 (4) MPLJ 24

Held :

Supreme Court in the case of *Khadi Gram Udyog Trust* v. *Shri Ram Chandra Ji Virajman Mandir, AIR 1978 SC 287* has interpreted the words 'entire amount of rent due' as appearing in the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and it has been held that the aforesaid provision would include rent which has become time barred. However this case was considered by the Full Bench in the case of *Mankunwarbai* and *others v. Sunderlal Rambharosa Jain, 1978 MPLJ 405* and it has been held that aforesaid judgment will not apply in a case arises under the M.P. Accommodation Control Act. However, the learned Judge in the case of *Shyam Bhagwan Dubey v. Shikh Nizam and others, 1994 MPLJ 260* after following the law laid down by the Full Bench of Patna High Court in the said case has held that in a suit for eviction

under Section 12 (1) (A) and 13 (1) of the M.P. Accommodation Control Act tenant has to deposit even time barred rent. This judgment has been followed by another Single Bench in the case *Bharosilal v. Rihan Ahmed, 2002 (1) MPWN 146* and it has been held that tenant is required to deposit even time barred rent due for more than three years. However in both these i.e. in the cases of *Bharosilal* and *Shyam* (supra) the law laid down by a Full Bench of this Court in the case of *Mankunwarbai* (supra) has not been taken note of. It is seen that initially in the year 1977, a Full Bench of this Court had heard a reference and it was held by the Full Bench in the year 1977 that the tenant is not obliged to deposit time barred rent under the first part of Section 13 (1) of the M.P. Accommodation Control Act, 1961. However, after the aforesaid judgment was rendered by the Full Bench in the year 1977 it seems that the judgment of the Supreme Court in the case of *Khadi Gram Udyog Trust* (supra) the matter was again referred to a Full Bench. The question referred to the Full Bench reads as under :-

> "Whether in the light of the observation made by the Supreme Court in the case of *Khadi Gram Udyog Trust vs. Shri Ram Chandraji Virajman Mandir* (supra), the opinion of the larger Bench given on 19.11.1977 in this appeal, cannot hold the field and the tenant-defendant is bound to deposit even the time barred arrears of rent in compliance with the provisions of section 13(1) and (2) of the M.P. Accommodation Control Act, 1961?"

This question has been answered by the Full Bench in the case of *Mankunwarbai* (supra) in the following terms :-

> 17. We are, therefore, of the opinion that (i) the tenant is not obliged to deposit time barred rent under section 13 (1) or 13 (2) of the M.P. Accommodation Control Act, 1961, and (ii) their Lordships' decision in *Khadi Gram Udyog Trust vs. Shri Ramchandraji Virajman Mandir Sarasiya Ghat, Kanpur,* does not apply to section 13(1) and (2) of the M.P. Accommodation Control Act, as there is no corresponding provision in the Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, which was under consideration before the Supreme Court in that case.

From the aforesaid, it is clear that Full Bench has laid down the law in the case of *Mankunwarbai* to the effect that tenant is not obliged to deposit time barred rent under section 13(1) or 13(2) of the M.P. Accommodation Control Act. This judgment of the Full Bench is binding on this Court and the judgments in the case of *Shyam* (supra) and *Bharosilal* (supra) having been rendered without considering the aforesaid Full Bench judgment of this Court cannot be made applicable. Apart from the aforesaid judgments, learned Counsel have not pointed out any other judgments, legal principle, that being so, this Court is bound by the law laid down by the Full Bench in the case of *Mankunwarbai.*

●

379. MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Section 401
Requirement of notice for filing suit against Municipal Corporation, mode of compliance – Law explained.
Harmesh Chandra Dua and another v. Nagar Palika Nigam, Gwalior
Reported in 2005 (4) MPLJ 38

Held :

Section 401 of the Act as it stood on the date of filing of the suit provides that the notice in writing must contain :

(a) the cause of action;

(b) the name and residence of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit; and

(c) the relief which he claims.

Sub-section (2) further provides that every suit shall be commenced within six months next after the accrual of the cause of action, and the plaint therein shall contain a statement that a notice has been delivered or left as required by sub-section (1). It has been held that notice addressed to Municipal Corporation is not valid and suit is liable to be dismissed.

The Division Bench of this Court in the case of *Ram Sharan Bari, Municipal Councillor, Jabalpur vs. Dr. K.L. Dube, Mayor, Municipal Corporation, Jabalpur and another, reported in 1974 MPLJ 612* has held that the Corporation is a legal entity different from its office bearers. In legal proceedings, it is the Municipal Commissioner and not the Mayor. Division Bench of this Court has also considered the scope of sections 79 and 80 of Civil Procedure Code and has held that notice under section 80 was not proposed as the notice was sent to the Collector, District Gwalior and not to the State Government. Since the notice has been sent to Commissioner, Municipal Corporation the suit as filed will not be maintainable and is liable to be dismissed. Trial Court has therefore not committed any error in dismissing the suit. It is also held in the case of *Municipal Corporation Murwara-Katni vs. Lalchand Jaiswal, reported in 2000 (2) MPLJ 288* that it is mandatory to serve notice under section 401 (1) of the Act prior to filing of the suit. There is no provision in the Act that in case of emergency and where an injunction is sought a suit could be filed without serving a notice under sub-section (1). There is no provision for taking permission of the Court for filing the suit without complying with the requirement of service of notice. In the said facts of the case, plaint as filed is liable to be returned to the plaintiff for presentation after complying the provisions of section 401 of Municipal Corporation Act. Therefore, dismissal of the suit by the trial Court is modified and it is directed that the plaint be returned to plaintiff with liberty to present after complying with provisions of notice, if it is within limitation and permissible under the law.

●

380. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal – Appellate Court is required to formulate substantial question of law – Law explained.

Ram Sakhi Devi v. Chhatra Devi and others

Reported in 2005 (4) MPLJ 48 (SC)

Held :

As mandated by sub-section (3) of section 100 of the Code, the memorandum of appeal shall precisely state substantial question or questions of law involved in the appeal. Where the High Court is satisfied that in any case any sub-stantial question of law is involved it shall formulate that question under sub-section (4) and the second appeal has to be heard on the question so formulated as stated in sub-section (5) of section 100.

Section 100 of the Code deals with "Second Appeal". The provision reads as follows :

> "**100.** (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question: Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.

In *Ishwar Dass Jain vs. Sohan Lal, (2000) 1 SCC 434* this Court in para 10, has stated thus:

> "10. Now under section 100, Civil Procedure Code, 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 vs. 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:

> "**7.** It is to be reiterated that under section 100, Civil Procedure Code 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, Civil Procedure Code. 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-findings 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 vs. 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."

The position has been reiterated in Kanhaiyalal vs. Anupkumar, JT (2002) 10 SC 98.

●

381. CIVIL PROCEDURE CODE, 1908 – O.7 R.11
Jurisdiction of Court – Exercise of discretion under Rule 11 by Court, mode of – Duty of the Court to nip in the bud malafide, vexatious and meritless litigation – Law explained.
Dilip Kumar Jain v. Shobharani@ Sabitri Bai Jain and others
Reported in 2005 (4) MPLJ 66

Held :

Apex Court has given following verdict in the matter of *T. Arivandandam vs. T. V. Satyapal and anr., AIR 1977 SC 2421:*

> "5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the Court repeatedly and unrepentantly resorted to. From the statement of the facts found in

the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under O. VII, R. 11, Civil Procedure Code taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under O.X Civil Procedure Code. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi.

"It is dangerous to be too good."

6. The trial Court in this case will remind itself of section 35-A, Civil Procedure Code and take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. In any view, that suit has no survival value and should be disposed of forthwith after giving an immediate hearing to the parties concerned."

●

382. LIMITATION ACT, 1963 – Sections 64 and 65

Ambit, scope and applicability of Sections 64 and 65 – Nature of mortgagee's possession after automatic redemption u/s 165 (2) (a) M.P. Land Revenue Code – Such possession cannot be said to be hostile.

Ram Nath v. Baijnath and others

Reported in 2005 (4) MPLJ 72

Held :

Now the question is whether the suit is within limitation or not. Counsel for the appellant urged that the present suit is not on the basis of title and, therefore, it will be governed by Article 64 of the Limitation Act and as the suit is not filed within twelve years from the date of expiry of two years period the suit is barred by limitation. According to him as per section 164 (2) (a) of the M.P. Land Revenue Code period of six years is maximum period. In the present case as the parties have agreed to reconvey the property within two years, the period of limitation will start after expiry of two years and, therefore, the suit is barred by limitation. He further submits that even if it is held that property is redeemed after expiry of six years i.e. in the year 1975, still the suit which filed

in the year 1991 is barred by limitation and, therefore, the suit be dismissed as time barred. For this purpose counsel for the appellant has relied upon a decision of this Court in the case of *Ramsingh vs. Kashiram, 1997 RN 195* wherein it is held that once a period of six years is expired in case of usufructuary mortgage in respect of agricultural land then suit for redemption is not maintainable as the property is already redeemed by virtue of section 165 (2) (a) of the M.P. Land Revenue Code.

From the perusal of the aforesaid judgment I find that this Court in the aforesaid case has not laid down about the nature of possession of mortgagee after expiry of the said period. It is true that the suit for redemption will not lie as there is an automatic redemption but nonetheless a suit for possession is maintainable. In the present case, the plaintiffs have not only prayed for the relief of redemption but have also prayed for possession which cannot be said to be not maintainable in view of the aforesaid judgment.

Now the question is whether what is the nature of possession of the mortgagee after automatic redemption and whether Article 64 or 65 of the Limitation Act will be applicable in the present case. Article 64 of the Limitation Act applies where the suit is filed merely on the basis of dispossession while Article 65 is applicable when the suit is filed for possession on the basis of title. In the present case plaintiffs in para one of the plaint have alleged that they are the title holder of the suit property. They have also alleged in the plaint that being the owners they are entitled to possession of the suit land. In such circumstances in my view the suit will be governed by Article 65 of the Limitation Act and, therefore, unless and until it is not held that the defendant has acquired right to the suit property by way of adverse possession or his possession is hostile to that of plaintiffs the suit cannot be said to be barred by limitation. It is a settled principle of law that once a mortgage is always mortgage and the possession of the mortgagee will always remain that of a mortgagee even though the property is redeemed in the year 1975 or in the year 1971 as alleged by the defendant due to applicability of section 165 (2) (a) of the M.P. Land Revenue Code, still his possession shall be of mortgagee's and, therefore, his possession cannot be said to be hostile.

●

383. MOTOR VEHICLES ACT, 1988 – Sections 168 and 149
Exoneration of insurer's liability – Driver of vehicle involved in accident found intoxicated – Whether insurer stands exonerated – Held, No – Law explained.
Chameli Bai and others v. Munna Lal and others
Reported in 2005 (4) MPLJ 86

Held :

The learned counsel for the respondent No. 3 Insurer, Smt. Ruprah has submitted that according to the policy of the vehicle, such liability cannot be fastened on Insurance Company because respondent No. 1 was under the in-

toxicated condition at the time of the accident and the terms were violated. In our considered opinion, the aforesaid contention is not sustainable. Once the insurer has received the premium and insured the vehicle then the liability in relating to the third party like the deceased shall be covered under the policy. In any case, in the case at hand the breach is not so fundamental to exonerate the insurance company. In certain cases after satisfying the claim of the applicant, the insurer would be entitled to recover the amount of compensation from the registered owner and driver of the vehicle. In the case of *New India Assurance Co. Shimla vs. Kanku and others, AIR 2001 SC 1419,* the Apex Court has held thus :

> "25. The position can be summed up thus : the insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to be insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due inquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the Insurance Company succeeds in establishing that there was breach of the policy condition, the Claim Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimants-third parties) from the insured person."

This view was again followed by the Apex Court in the matter of *United India Insurance Co. Ltd. vs. Lehru and others reported in AIR 2003 SC 1292,* in which the driver was having fake licence and on that ground the matter was considered and decided. Their Lordships held as under :-

> "More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skandia's, Sohan Lal Passi's and Kamla's case.* We are in full agreement with the views expressed therein and see no reason to take a different view."

Besides this the insurer cannot deny the liability to satisfy the claim relating to the Motor vehicle which insurer has insured and there has been really no breach. Therefore, we hold that the respondent No. 3 Insurance Company is liable and bound to satisfy the claim of the applicant and in this regard the findings of the Tribunal are perverse and contrary to law and the same are set aside.

384. WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974 – Section 49

Cognizance of offence by Court – Cognizance can be taken on the complaint made by the Board or any officer authorized by the Board – Law explained.

Rairu Distillers Ltd. and others v. M.P. Pollution Control Board Reported in 2005 (4) MPLJ 91

Held :

Section 49 of the Act is reproduced below :–

49. *Cognizance of offences.* – (1) No Court shall take cognizance of any offence under this Act, except on a complaint made by –

(a) a Board or any officer authorised in this behalf by it; or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Board or officer authorised as aforesaid,

and no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(2) where a complaint has been made under Cl. (b) of sub-section (1), the Board shall, on demand by such person, make available the relevant reports in its possession to that person:

Provided that the Board may refuse to make any such report a available to such person if the same is, in its opinion, against the public interest.

(3) Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973 (2 of 1974) it, shall be lawful for any Judicial Magistrate of the first class or for any Metropolitan Magistrate to pass a sentence of imprisonment for a term exceeding two years or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act.

It clearly specifies that cognizanoe can be taken by Court on the complaint made by the Board or any officer authorised in this behalf by it.

Respondents have filed a copy of resolution of the Board of meeting dated 18.4.1991 whereby the Board has authorised and empowered the Chairman, Member-Secretary, Zonal Officer and the Regional Officer for initiating Judicial proceedings. As per the resolution of the Board, these officers are competent to file compliant on behalf of the Board.

Once the resolution is passed, question is whether by such resolution, powers can be conferred. Section 49 of the Act is very clear. It provides that complaint can be filed by the Board or a person or officer authorised by it. Authorisation can be general or specific. Board has passed a resolution and

issued general authorisation to its officers to file complaint on its behalf. Since Regional Officers have been authorised by the Board to file complaint on behalf of the Board, complaint filed before the trial Court is maintainable.

●

385. INDIAN PENAL CODE, 1860 – Section 420

Whether existence of civil remedy a bar for trial of offence u/s 420 – Held, No – Law explained.

Harjinder Kaur Chukkal v. Gurubaksh Singh Dhanoya and others
Reported in 2005 (4) MPLJ 104

Held :

So far as the dismissal of the suit is concerned, it is alleged at the Bar that the appeal against the judgment of the Additional District Judge dismissing the suit is pending and the matter is sub-judice. Even otherwise the existence of civil remedy is no bar to trial for an offence under section 420 of the Indian Penal Code. A person who is deprived of his property can file a suit for recovery of the possession of the property and also proceed against wrong doer for cheating and forgery. Mere pendency of civil suit is no ground to bar the proceedings in criminal Court in respect of cheating or forgery. Both the proceedings can continue simultaneously. Therefore, the existence of civil remedy or decision of Civil Court against which an appeal is pending is no bar to a trial and on this ground also the proceedings cannot be quashed.

●

386. CRIMINAL PROCEDURE CODE, 1973 – Sections 340 and 341

Order passed u/s 340, nature of – Such order cannot be said to be order of Civil Court – Appeal against such order lies u/s 341 – Law explained.

Balkrishna v. Madhusudan and others
Reported in 2005 (4) MPLJ 127

Held:

Under section 341, Criminal Procedure Code an appeal lies against the order said to have been passed by any Court exercising jurisdiction under section 340, Criminal Procedure Code. The present appeal although one under section 341 has been preferred as a Misc. Civil Appeal arising out of the impugned order dated 31.8.2004.

In *Sambhu Nath Sadhukhan vs. Maghesh Kumar Sadhukhan and others, 1981 Cri. L.J. 1102* it has been held :–

> "It cannot be said that since the power of the Civil Court under section 476 or 476B emanates from the Code of Criminal Procedure it must be governed by the Code of Criminal Procedure. It is undoubtedly true that the power of entertain the application of the appeal is derived from the Code of Criminal Procedure but that does not necessarily mean that it has to be governed by the Code of Criminal

Procedure and not by the procedure of the Court itself. Sections 476 and 476 B decide the forum and the character of the Court. So long the Court is not forced to change its character by express provision it must maintain is own character and own Code. Since entertainment of an application under section 476 of the Code of Criminal Procedure till its disposal, either by rejection or by filing a complaint as provided for therein, the proceeding before a Civil Court continues to be a civil proceeding."

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

In *Dhup Narain Singh vs. State, AIR 1954 Patna (FB) 76* it has been held that the Court directing initiation of proceedings in exercise of power under section 340, Criminal Procedure Code (old 476) cannot be said to be a Civil Court. Therefore, an appeal under section 341 must be governed by the provisions of Criminal Procedure Code only. As such, appeal against the impugned order said to have been passed under section 340 shall be deemed to be a criminal appeal under section 341, Criminal Procedure Code. The procedure laid down for a miscellaneous appeal under Order 43, Rule 1, Civil Procedure Code would not be applicable even if the order filing a criminal complaint has been passed by a Civil Court.

●

387. TORTS :

Medical negligence – Pregnancy due to failure of sterilization operation – Doctor may be held liable only when failure attributable to his negligence – Law explained.

State of Harayana and others v. Raj Rani

Judgment dt. 29.8.2005 by the Supreme Court in Civil Appeal No. 2743 of 2002, reported in (2005) 7 SCC 22 (Three Judge Bench)

Held :

A three-Judge Bench of this Court has held in *State of Punjab v. Shiv Ram, (2005) 7 SCC 1* that childbirth in spite of a sterilisation operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous recanalisation. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognised the percentage of failure of the sterilisation operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed

by proficient doctor successfully by adopting a technique recognised by medical science. Thus, the pregnancy can be for reasons *dehors* any negligence of the surgeon. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. The decrees cannot, therefore, be upheld.

●

388. CRIMINAL PROCEDURE CODE, 1973 – Section 311
Recall of witness for further examination/cross-examination on the basis of his alleged affidavit, propriety of – Witness not to be recalled for such examination – Law explained.
Manghi @ Narmada v. State of M.P.
Reported in 2005 (4) MPLJ 136

Held :

Learned counsel of the applicant submitted that even after recording evidence of prosecution witnesses, if any affidavit/affidavits sworn by him/them then in view of these new circumstances and specially on the basis of affidavits the concerning witnesses should be recalled and opportunity of further examination should be given. In support of his contention he placed reliance on a reported case *Mangilal vs. State of M.P., 1997 (1) MPWN 138 page No. 204* in which it is held that :

> "The counsel for petitioners submits that an eye witness namely Bhola Ram s/o Shri Kanhai Ram has filed an affidavit to the effect that he had not seen the occurrence. This affidavit is dated 7th February, 1997. On the basis of this, it is submitted that this Bholaram who had earlier appeared as prosecution witness as P.W. 1 be permitted to be cross- examined. Reliance is being placed on a decision given by the Allahabad High Court reported as *Sukhan and another vs. State of U.P., 1988 (1) Crimes 245.* Circumstances were similar in the aforementioned case. After the statement was recorded in the Court an affidavit was filed. Allahabad High Court observed that it is natural and proper that such a person should be summoned afresh under section 311 of the Criminal Procedure Code and he should be confronted with the statement contained in the affidavit."

He further referred *2000 (1) MPLJ Short Note 8, Mansingh vs. State of M.P.* in which it is held that :

> "Criminal Procedure Code (2 of 1974), section 311 : Prosecutrix in affidavit stated that report against applicant/accused was not true – In view of affidavit of prosecutrix it is necessary to call her again and be permitted to be examined and cross-examined – Trial Court directed to resummon prosecutrix for examination and cross examination. Revision allowed."

In view of above cited decision prayed for allowing this revision petition.

On the other hand Shri Akhil Singh, learned Panal Lawyer for State has supported the impugned order and submitted a judgment rendered by the Apex Court *AIR 2004 SC 4209, Yakub Ismailbhai Patel vs. State of Gujarat,* in which it is held that:

> "Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as P.W. 1 was not true and it was so done at the instance of police.
>
> The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as P.W. 1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there."

Having heard the counsels of the parties and after perusing the impugned order and papers placed with the record and in view of Apex Court decision, I am of the view that this revision petition does not have any merit.

In the present matter it is an admitted position that the abovesaid all three witnesses were examined and after cross-examination they were discharged and thereafter for one reason or another they have sworn the affidavit just contrary to the deposition made before the trial Court and these affidavits were submitted before the trial Court and an application was moved by the applicants for recalling of these witnesses for cross-examination in respect of these affidavits. In view of above cited Apex Court decision once the witness is examined as a prosecution witness, he cannot be recalled for examination/cross-examination in view of the said affidavits.

●

389. SPECIFIC RELIEF ACT, 1963 – Section 34
LAND ACQUISITION ACT, 1894 – Sections 11 (a) and 17
Civil Suit for declaration that proceedings subsequent to notification u/s 4 of Land Acquisition Act have lapsed and subsequent notification u/s 6 void, maintainability of – Held, such suit not maintainable.
Dev Kunwar Ben Shah v. State of M.P. and another
Reported in 2005 (4) MPLJ 146

Held :

Question which requires to be determined in the present appeal is whether civil suit is maintainable.

In this case, notification is not under challenge, but declaration is sought that acquisition proceedings have lapsed on the expiry of period of two years after acquisition of land. In the relief clause, plaintiff has prayed that it be declared that after publication of notification under section 4 of the Act on

15.12.1995 entire proceedings had lapsed as the award was not passed within two years and fresh notification under section 6 of the Act on 13.8.1998 without publication of notification under section 4 is void and contrary to law and is unenforceable against the plaintiff.

In this case, proceedings under section 4 of the Act have not been challenged. What is under challenge is the fresh notification under section 6 of the Act dated 13.8.1998. Therefore, in such a situation, whether such suit will be maintainable. Apex Court in the case of *State of Bihar vs. Dhirendra Kumar* (supra) has held that the Act being a complete Code in itself, jurisdiction of Civil Court is excluded by necessary implication and jurisdiction under Article 226 of the Constitution of India can be invoked. Thus, in view of the judgment of the Apex Court in the aforesaid case which has been followed by Division Bench of this Court in the case of *Pashu Chikitsa Vibhagiya Sahkari Nirman Samiti Maryadit, Bhopal* (supra), suit will not be maintainable. Since, direct judgment covering the question of law has been delivered in the matter of the Act, therefore, judgment referred in the case *Dhulabhai* (supra) will not be applicable to the present case. Therefore, the suit as filed itself is not maintainable. Even otherwise, since the proceedings are under section 17 of the Act and emergency clause was invoked, therefore, in the light of the judgment in the case of *Satendra Prasad Jain* (supra), provisions of section 11A of the Act will not be applicable, the suit has rightly been dismissed by the trial Court.

●

390. INDIAN PENAL CODE, 1860 – Sections 354, 376 and 511
Attempt to commit rape – 'Attempt' meaning and connotation of – Law explained.
Pancham Batham v. State of M.P.
Reported in 2005 (4) MPLJ 151

Held :

From the aforesaid evidence on record, trial Court has found that there is no evidence available on record about the penetration. The only evidence available is of removing her clothes by the appellant and thereafter laying over the body of the girl and fingering. Now the question would be whether under such facts the case will fall under section 354 or under section 376/511, Indian Penal Code.

Learned counsel for the appellant submitted that as per the decision in the case of *Balkrishna vs. State of Madhya Pradesh, Criminal Appeal No. 131/87 (G), decided on 27.10.1988*, in a case where the evidence of fingering in private part, pressing her breast and biting cheek was available, the offence was considered under section 354, Indian Penal Code and not under sections 376, 511 Indian Penal Code.

No doubt, the act will come under section 354, Indian Penal Code but in the case *Madanlal vs. State of J. and K., 1998 Cri. L.J. 667* the Supreme Court has summarized the difference between preparation and an attempt to commit

the offence which consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it cannot be said that it was a case of merely assault under section 354, Indian Penal Code but it will be an attempt to commit rape under section 376 read with section 511, Indian Penal Code.

In the case of *Abhayanand Mishra vs. State of Bihar, AIR 1961 SC 1698,* Supreme Court has held that there is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The Supreme Court has further held about the construction of section 511, Indian Penal Code as under :–

> "A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

Section 511, Indian Penal Code clearly provides that whoever attempts to commit an offence punishable by this Code shall be punished with the imprisonment for one-half of the longest term of imprisonment provided for that particular offence.

Considering the facts of this case and the evidence on record and also the medical evidence on record in this case the appellant has travelled beyond the stage of preparation. On the pretext of toffee and chocolate he brought the girl in his home, he stripped her naked then made her flat on the ground, undressed himself and laid over her and then started fingering in her vagina. Dr. Yashodhara Batham (PW 4) has stated that she has applied stitches on the skin as well as on the rectum. From this, it is clear that such an injury can be caused by inserting the finger into the vagina of the prosecutrix. Therefore, it appears that the trial Court has rightly concluded the matter and has rightly held and it is proved beyond reasonable doubt that the intention of the accused was clear and he wanted to commit sexual act with the prosecutrix, but either due to her tender age or due to some other reason he could not commit rape though he attempted

for it. Considering the totality of the facts and circumstances of the case, it is a case of attempt to commit rape and not only a case of merely assault. Thus, I do not find that the trial Court has committed any illegality in convicting the appellant under sections 376 and 511, Indian Penal Code.

●

391. HIRE PURCHASE :

Financer seizing the financed vehicle for default in payment of instalments – Whether it amounts to theft – Held, No – Law explained.
Lalit Mittal and another v. Adesh Kumar Gupta
Reported in 2005 (4) MPLJ 154

Held :

A perusal of the above referred documents reveals that the issue between the parties relates to the purchase of the vehicle and the same is purely of civil nature. Money was advanced to the respondent by the Financer. Even assuming that the petitioners have seized the vehicle, it was claimed to have been done in exercise of bona fide right of seizing the vehicle on borrower's failure to pay the instalments in time.

In *K.A. Mathai @ Babu and another vs. Kora Bibikutty and another, (1996) 7 SCC 212,* the Apex Court has observed thus :–

> "Recovery of possession of goods by owner-financer as per terms of the hire-purchase agreement, does not amount to criminal offence because such an agreement is an executory contract of sale, conferring no right in rem on the hirer until the conditions for transfer of the property to him, have been fulfilled."

In *Charanjit Singh Chadha and others vs. Sudhir Mehra, (2001) 7 SCC 417,* the Apex Court has observed thus :–

> (16) In *K.A. Mathai vs. Kora Bibbikutty,* (supra) the bus was obtained by the complainant on a hire-purchase agreement. The complainant paid only part of the consideration and defaulted in paying the instalments and the vehicle was taken possession of by the financer and at that time, both the first accused who had driven away the bus from the possession of the complainant and the second accused were present in the bus. They were prosecuted for the offence punishable under section 379 read with section 114 of the Indian Penal Code. This Court holding that the bus was taken away at the instance of the financer and the accused had not committed any offence observed as under : (SCC PP. 212-13, Para-3)
>
> > "Though we do not have the advantage of reading the hire-purchase agreement, but as normally drawn it would have contained the clause that in the event of the failure to make payment of instalment/s the financer had the right to resume possession of the vehicle. Since the financer's agreement with A-2 contained

that clause of resumption of possession that has to be read, if not specifically provided in the agreement, as part of the sale agreement between A-2 and the complainant. It is, in these circumstances, the financer took possession of the bus from the complainant with the aid of the appellants. It cannot thus be said that the appellants, in any way, had committed the offence of theft and that too, with the requisite *mens rea* and requisite dishonest intention."

(17) The hire-purchase agreement in law is an executory contract of sale and confers no right in rem on the hirer until the conditions for transfer of the property to him have been fulfilled. Therefore, the repossession of goods as per the term of the agreement may not amount to any criminal offence. The agreement (Annexure P-1) specifically gave authority to the appellants to repossess the vehicle and their agents have been given the right to enter any property or building wherein the motor vehicle was likely to be kept. Under the hire-purchase agreement, the appellants have continued to be the owners of the vehicle and even if the entire allegations against them are taken as true, no offence was made out against them. The learned Single Judge seriously flawed in his decision and failed to exercise jurisdiction vested in him by not quashing the proceedings initiated against the appellants. We therefore, allow this appeal and set aside the impugned judgment. The complaint and any other proceedings initiated pursuant to such complaint are quashed.

●

392. SUCCESSION ACT, 1925 – Sections 57 and 213
Adjudication about validity of Will – Jurisdiction of Civil Court vis-a vis Probate Court – Whether jurisdiction of Civil Court barred – Law explained.
Vijendra (Brijendra) Singh Yadav v. Rajkumari Yadav and others
Reported in 2005 (4) MPLJ 160

Held:

By this order preliminary issue No. 6 has been decided wherein it is held that Datar Singh Yadav has executed a 'Will' at Bhopal on 28.3.1998 in favour of plaintiff and he has further pleaded that a forged Will has been prepared by defendants No. 1 to 3. Objection was raised that said Will cannot be examined in the Court unless probate has been obtained. Court while deciding the application has held that only probate court has right to adjudicate the validity of the Will relying upon the judgment in the case of *Chiranjilal Shrilal Goenka (deceased) through LRs. vs. Jasjit Singh and others, (1993) 2 SCC 507.* Contrary view has been taken in two judgments that the validity of Will can only be examined in a probate proceeding. Previous judgments of this Court were not considered by the two Single Bench judgments and law settled earlier. Dispute was

referred to the Larger Bench and which has been decided in the case of *Phool Singh and two others vs. Smt. Kosa Bai and two others, 1999 (I) MPJR 352.* Division Bench has referred to various judgments of this court and other High Courts and has held that in case of two contesting or rival "Wills", which are not covered by section 57 (a) and (b) of the Indian Succession Act, obtaining of probate is not compulsory and jurisdiction of the Civil Court would not be barred. Division Bench has considered the applicability of Will made by a Hindu, Buddhist, Sikh or Jain, Who is residing outside the territories mentioned in section 57 (a) of the Indian Succession Act is not covered by the said Act. In other words it is not mandatory to get probate of Will by Hindu, who is not residing within the territories mentioned in section 57 (a) of the Indian Succession Act.

Earlier view of this Court was considered by this Court in *Lachhman Singh vs. Smt. Brishbhan Dulari, 1966 MPLJ SN 8, Marwad Saw Mills vs. Nemichand, 1984 MPLJ SN 6, Chandmal vs. Devisingh, 1982 MPWN 297, Shobha Kshirsagar vs. Janki Kshirsagar and another, 1988 MPLJ 28 and Ruprao Ranoji vs. Ramrao Bhagwantrao, 1952 NLJ 86 = AIR 1952 Nagpur 88 and Ahemad S/o Abdul Latif and another vs. Ghisia Hira Teli and another, 1945 NLJ 289 = AIR 1945 Nagpur 237* and *Madangopal and another vs. Smt. Ramjiwanibai and others, 1987 CCLJ (M.P.) 28,* wherein it is that in a case of a Hindu executing a 'Will' in Madhya Pradesh regarding the property situated within the territories of Madhya Pradesh, probate of a "Will" need not compulsorily be obtained, in view of section 213(2) of the Act. Contrary view has been taken in the case of *Ram Dutta vs. Krishna Datta, 1987 JLJ 198 and in the case of Ramshankar vs. Balakdas, AIR 1992 M.P. 224* It is held that *Ramshankar's case* (supra) and *Ram Dutta* (supra) does not lay down correct law. Under section 213 (2) probate of "Will" is applicable to those who are residing within the territories mentioned in section 57(a) of the Indian succession Act. Punjab High Court in the case of *Ram Chand vs. Sardara Singh, AIR 1962 Punjab 382, Dr. (Mrs.) Joginder Kaur Malik and another vs. Malik Anup Singh, AIR 1966 Punjab 385, M/s Behari Lal Ram Charan vs. Karam Chand Sahani and others, AIR 1968 Punjab 108, Allahabad High Court in the case of Bhaiya ji vs. Jageshwar Dayal Bajpai, AIR 1978 All. 268, Administrator General, Allahabad vs. Dharamvir, AIR 1997 All. 158 and Rajasthan High Court in the case of Mst. Jadav vs. Ram Swarup and another, AIR 1961 Raj.* 40 has taken a view that probate is not necessary in the light of plain and simple language of section 57 and section 213 of the Act. Contrary view taken in the case of *Ram Dutta* (supra) and *Ramshankar* (supra) does not lay down the correct law. Division Bench of *Madras High Court in the case of Namberumal Chetti vs. Veeraperumal Pillai and others, AIR 1930 Madras 956* has held that probate need not be taken where disposition does not relate to immovable property in Madras and it is not necessary to take probate of the Will as the disposition did not relate to immovable property in Madras.

Judgment of Division Bench was referred before the learned Additional District Judge. He held that only probate court has jurisdiction to decide the question of Will relying upto the judgment in the case of Chiranjilal Shrilal Goenka

(supra), Chiranjilal Shrilal Goenka died at Bombay and an application for probate of his 'Will' as filed in the Bombay High Court. While probate proceedings were pending the same dispute relating to properties came before the Delhi High Court and with the consent of the parties Delhi High Court appointed Arbitrator to decide the dispute. In this case Apex Court held that even with the consent powers cannot be conferred upon the arbitrator to decide the 'Will'. It is held in para 17 that in this country, jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. Thus, since the probate proceedings were pending and said Chiranjilal died in Bobmay, the rival 'Will' could only be examined by the probate court and not by the Civil Court.

Learned Additional District Judge while disagreeing with the Division Bench Judgment has completely overlooked the law laid down by the Division Bench and without considering the facts of the case has held that Division Bench has overlooked the decision in the case of *Chiranjilal* (supra). Law laid down by the Apex Court is on the different aspect and the question was whether arbitrator has right to determine the question of 'Will'. This case again came before the Apex Court in the case of *Chiranjilal Shrilal Goenka (dead) vs. Jasjit Singh, (2001) 1 SCC 486,* wherein the question of 'Will' was considered and it was held that in the probate court execution of 'Will' was not objected and the orders were passed. In the circumstances it was held that the arbitrator had no jurisdiction to hold that the 'Will' executed by Chiranjilal is inoperative and award requires to be set aside and was set aside because the caveators/ defendants conceded execution and genuineness of the 'Will' executed by deceased Shrilal Goenka before the probate court.

It is apparent that learned Additional District Judge has not at all cared to go through the provision of section 57 and section 213 of the Indian Succession Act. The ratio is laid down by the Division Bench that since the "Will" is not executed within the territories mentioned in section 57(a) and (b) of the Act, provision to obtain probate is not mandatory in the light of section 213 of the Act. Section 213 of the Act is not applicable to cases not covered by Clauses (a) and (b) of section 57. Section 213 provides that this section shall not apply to the cases of 'Will' and shall only apply in the cases of 'Will' made by Hindu, Buddhist, Sikh or Jain where such 'Wills' are of classes specified in clause (a) and (b) of section 57. Section 213 relates to grant of probate and this section will not be applicable to the 'Will' executed by Hindu, Buddhist, Sikh or Jain, who are not residing within the territories mentioned in section 57(a) and (b) of the Act. Learned Additional District Judge has not read the provisions and has not considered the ratio laid down by the Division Bench of this Court. It should be kept in mind that the judgment of Division Bench is binding upon the subordinate courts. Judicial decorum should be maintained by the Judicial Officers.

●

393. CRIMINAL PROCEDURE CODE, 1973 – Section 303

Accused's right to be defended by counsel of his choice, nature of – Defence counsel provided to the accused by Legal Aid Committee – Whether accused can engage independent counsel – Held, Yes.

Ram Kishan v. State

Reported in 2005 (4) MPHT 112

Held :

Applicant engaged a Counsel namely, Brajesh Kishore Pandey to defend his case. Earlier, he was defended by a Counsel appointed by Legal Aid Committee. The prayer to engage the Counsel to defend the case was made from jail where the applicant is kept in judicial custody. By passing the impugned order the permission was rejected while the permission should have been given by the Trial Court in view of the provisions of Section 303 of Code of Criminal Procedure, which says as under :–

> **"Right of person against whom proceedings are instituted to be defended.**
>
> **Section 303,** Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice."

In view of the abovesaid provisions any accused of an offence before a Criminal Court has a right to defend his case by a pleader of his choice, so, apparently the error of jurisdiction has been committed by the Trial Court.

●

394. CONTRACT ACT, 1872 – Section 128

Guarantor's liability – Whether acknowledgement made by principal debtor binding upon guarantor – Held, Yes.

Om Prakash and others v. UCO Bank and others

Reported in 2005 (4) MPHT 119 (DB)

Held :

Under the cash credit facility on 2.3.1989 promissory note for Rs.28,000/- was executed by the borrower and hypothecation deed for Rs. 62,000/- was executed *vide* Ex. P-11. Guarantee Ex. P-16 was executed by Kasturibai, which bears her thumb impression, whereby the house is mortgaged with the plaintiff bank. Third guarantee is executed by appellants as guarantor. They have signed the guarantee vide Ex. P-17 and the property was mortgaged by the appellants. P.W. 3 Dinesh Kumar Pachnanda has mentioned about the execution of document dated 1.4.1999 *vide* Ex. P-29 by Rishabhchand Jain and deposed that between 1.4.91 to 24.3.91 amount of Rs. 17,513.94 was due against the said Rishabhchand Jain then the revival letter dated 24.7.1992, hypothecation deed and other documents were executed and balance confirmation was done on 26.2.1994. Document dated 26.2.1994 Ex. P-36 is executed by Rishabhchand Jain whereby he acknowledged and confirmed the balance amount of

Rs. 28,000/-. Ex. P-37 is again executed by Rishabhchand Jain whereby the said borrower has undertaken to pay the amount due on the promissory note dated 26.2.1994. Vide Ex. P-38 said Rishabhchand Jain has admitted his liability to pay Rs. 28,000/-. By Ex. P-39 executed on 26.2.1994 the borrower has acknowledged the balance of Rs. 18,575/- in December, 1993 and acknowledged his liability. Similarly on 26.2.1994 he has acknowledged the balance of Rs. 55,095/- as on 31st December, 1933 *vide* Ex. P-40 and the deed of hypothecation is also executed by him on 26th February, 1994. Suit has been filed on 14.2.1997. Thus, from the aforesaid documents suit is well within limitation. It is not necessary for the bank to prove the deposit. Even if some deposits are made and deposit by borrower is not proved then also the suit is within limitation from 26th February, 1994. Since borrower has acknowledged his liability, the acknowledgment will also be binding upon the guarantors. Therefore, we hold that the suit is well within limitation and Trial Court has not committed any error in holding the suit to be within limitation

●

395. CRIMINAL PROCEDURE CODE, 1973 – Sections 441 and 446
Surety bond – Liability of surety, extent of – Surety is liable to produce accused till conclusion of the proceedings – Law explained.
Sahab Singh v. State of M.P.
Reported in 2005 (4) MPHT 127

Held :

Section 446 of the Code of Criminal Procedure provides about the forfeiture of bond. Section 441 makes provision regarding bond of accused and sureties. It provides that before any person is released on bail or released on his own bond, a for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more than sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to the attend until otherwise directed by the police officer or Court, as the case may be. From a bare reading of the aforesaid provision of Section 441, it is clear that the surety shall be liable for the appearance of the accused in the Court not only on one hearing but on all subsequent hearings as may be fixed by the Court and the bond shall continue to remain in operation until otherwise directed by the Court. This clearly mean that the accused will not only appear on one hearing but shall continue to appear until otherwise directed on the assurance given by the surety in the surety bond. Sub-section (2) of Section 441, Cr. PC clearly provides that the bond shall also contain that condition. Section 441, Cr. PC also provides the conditions in which surety will be discharged. Therefore, as per the surety bond, appellant is liable to produce the accused and secure his presence and until and unless otherwise directed the accused is bound to remain present before the Court on all the days of hearing. Appellant can not be absolved from his liability merely by saying that accused was present in the Court and was under the custody of the Court and

if he ran away he is not liable. The very object of the bail bond is to ensure the appearance of the accused in Court and the duty of the surety is to see that he remained present continuously until he is directed otherwise. If the accused appears and does not remain present till the conclusion of the proceedings or orders passed by the Court, it can not be said that he appeared and thereafter the surety is not liable. Appearance clearly means that he will appear and remain present till further orders passed by the Court either to fix next date of hearing or pronouncement of judgment or any other direction given by the Court. Surety can not say that for some time he remained present in the Court, therefore, he is not liable. If the accused ran away it means he did not remain present in the Court till the orders were passed by the Court and in such circumstances the liability of the surety can not be discharged and the surety is liable.

●

396. EVIDENCE ACT, 1872 – Section 27

Section 27, applicability of – Section 27 not applicable when property is recovered on the basis of information by third person named by accused.

Vasu Deo & others v. State of Madhya Pradesh

Reported in 2005 (II) MPJR 372

Held :

On the basis of peculiar facts and circumstance when the discovery of the fact was discovered from the appellants. No. 1 to 8 but no recovery was made in pursuance to the discovery of the fact, according to us Section 27 of the Evidence Act has no applicability in the present case. Section 27 would be applicable only when there is a direct recovery of the property and then only it is admissible in evidence but where it has been stated by the accused that he handed over the property to some other and that person has state that he/she handed over to another person, the statement of the accused persons have no direct bearing of the recovery of the property though it may have an indirect bearing in giving a clue to the police for a fresh starting point of investigation and, therefore, this type of evidence cannot be admitted in evidence (see *Maganlan Bagdi Vs. Emperor, AIR 1934 Nagpur 71*)

●

397. N.D.P.S. ACT, 1985 – Section 57

Provisions of Section 57, nature of – Provisions are directory and not mandatory.

Istak Mohd. @ Stak v. State of M.P.

Reported in 2005 (II) MPJR SN 27

Held :

Learned counsel for appellant next contended that requirements of Section 57 have not been complied with. Accepting that the provisions of Section 57 have not been complied with in letter and spirit the compliance of such section is only directory and not mandatory as has been held in *Guru Baksh Singh*

Vs. State of Harayana, AIR 2001 SC 1002. At the most, non-complinace of this section may affect the credibility of the investigation.

●

398. CONTEMPT OF COURTS ACT, 1971 – Sections 2 (c) & 12
Contempt of Court – Criticism of a judgment – Limit of fair and reasonable criticism, nature of – Criticism likely to interfere with due administration of justice or scandalizing Court not of a fair and reasonable criticism – Law explained.
Rajendra Sail v. M.P. High Court Bar Association and others
Reported in 2005 (3) JLJ 1 (SC)

Held :

Undoubtedly, judgments are open to criticism. No. criticism of a judgment, however, vigorous, can amount to contempt of Court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts.

It is one thing to say that a judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. But when it is said that the Judge had a pre-disposition to acquit the accused because he had already resolved to acquit them or has a bias or has been bribed or attributing such motives, lack of dispassionate and objective approach and analysis and prejudging of the issues, the comments that a judge about to retire is avaiable for sale, that an enquiry will be conducted as regards the conduct of the judge who delivered the judgment as he is to retire within a month and a wild allegation that judiciary has no guts, no honesty and is not powerful enough to punish wealthy people would bring administration of justice into ridicule and disrepute. The speech that judgment is rubbish and deserves to be thrown in a dustibin cannot be said to be a fair criticism of judgment. These comments have transgressed the limits of fair and *bona fide* criticism and have a clear tendency to affect the dignity and prestige of the judiciary. It has a tendency to create an apprehension in the minds of the people regrading the integrity, ability or fairness of the Judge and to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, it is also likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties.

When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice to undermine the confidence which the public reposes in the Courts of law as Courts of justice, the criticism would cease to be fair and reasonable criticism but would scandalise Courts and substantially interfere with adminis-

tration of justice. Having perused the record, we are unable to accept the contention urged on behalf of Mr. Rajendra Sail that on facts, the conclusions arrived at by the High Court are not sustainable. Once this conclusion is reached, clearly the publication amounts to a gross contempt of Court. It has serious tendency to undermine the confidence of the society in the administration.

●

399. CRIMINAL PROCEDURE CODE, 1973 – Section 451
N.D.P.S. ACT, 1985 – Section 60
Interim supurdagi of vehicle involved in an offence under N.D.P.S. Act – In appropriate cases vehicle may be given on supuradagi despite that it can be confiscated u/s 60 – Law explained.
Pandurang Kadam v. State of Madhya Pradesh and others
Reported in 2005 (2) ANJ (M.P.) 351

Held :

In support of his contention he placed reliance in a reported case *1999 M.P.W.N. (Vol. 2) 217 page 351 (Khalil Ahmad Ansari vs. State of M.P.)*, in which it was held as under:

> "Heard parties. It is true that the conveyance carrying contraband is liable to confiscation under the NDPS Act, but that does not mean that the vehicle can be allowed to remain at the police station for indefinite period during the trial. The trial may take a considerable time and it would be proper to release the vehicle on supardnama of the registered owner on suitable terms and proper security.

The peitition is therefore, allowed. The Trial Court is directed to release the truck on Supurdnama to the registered owner with proper security and on suitable terms keeping in mind Section 60/63 of the NDPS Act."

He also referred to *AIR 2003 SC 638 (Sunderbhai Ambalal Desai vs. State of Gujarat)*, in which it was held as under:

> "In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles."

In view of the aforesaid submission he assailed the impugned order of the Special Court.

On the other hand the counsel of the Respondent/State has supported the impugned order and prayed for dismissal of this revision petition in view of Section 60 in respect of provisions of confiscation of the property.

Having heard the learned counsles of the parties, I am of the considered view that the impugned order was passed without considering all the aforesaid

legal position, and therefore, it can be struck down by invoking the revisional jurisdiction.

In view of the admitted position that the present applicant Pandurang Kadam is not an accused in the alleged case and being a registered owner he is entitled for interim custody of the said vehicle and also in view of the settled legal position as held in the above mentioned dictums of the Courts.

So far as the sumission of the Govt. Advocate is concerned the property seized during the investigation can be confiscated but till the final disposal of the case, the Court may pass the appropriate order for interim custody of the vehicle under Section 457 or 451 Cr.P.C. and whenever order of confiscation is passed then the property may be recalled by the Court for apporpaite proceedings.

●

400. CRIMINAL PROCEDURE CODE, 1973 – Section 439

Grant of bail – Co-accused enlarged on bail by higher Court – Other accused seeking bail on the basis of parity of fact situation with the person released on bail – As a matter of judicial propriety such accused is entitled to bail – Law explained.

Smt. Vimla Bai v. State of M.P.

Judgment dated 10.11.2005 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 7393 of 2005 (Jabalpur)

Held :

When an order, passed by a higher Court with regard to a particular accused, is produced before the lower Court with an application of another accused claiming that his case is identical to the case of an accused who has been granted bail then, while rejecting the said application, it is necessary for the lower Court to distinguish the case of accused whose application is in hand, from the case of another accused who has already been granted bail by the higher Court or even by the Court of similar jurisdiction. This Court is of the opinion that where a higher Court passes an order in favour of particular accused and if an application of similarly placed accused is filed in the Court then, it is for the Court to take similar view on this ground that the case of the accused who has been enlarged on bail, is similar to the case of applicant on whose behalf, the application for bail has been filed or if it is not possible to take similar view, then it is the duty of the Court to distinguish the cases of both the accused persons and then disallow the bail application.

No doubt, the lower Court has discretion to decide the bail application either way but, if a person is granted bail by a higher Court then, as a matter of judicial propriety, it is necessary for the lower Court to take the similar view with regard to that accused whose case is identical to the case of other accused who has been enlarged on bail.

●

PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADESH, JABALPUR

NOTIFICATION

No. C/871/_____/ Jabalpur, dt. 21st/Feb., 2005
III-10-40/78 (Economic Offences)

In exercise of the powers conferred by sub-section (2) of Section 11 of the Code of Criminal Procedure, 1973 (No. 2 of 1974) and in supersessions of all its Notifications leaving the Notification No. C/2725 dt. 27th June, 2003 and Notification No. C/1840 dated 26th April, 2004, the High Court of Madhya Pradesh hereby appoints the Judicial Magistrates specified in column No. (2) of the Schedule below as Special Judicial Magistrates of the First Class as Presiding Officers of the Courts established by the Government of Madhya Pradesh under the proviso to sub-section (1) of Section 11 of the Code of Criminal Procedure, 1973 Vide Law and Legislative Affairs Department Notification No. F-1/8/79/XXI-B(I) dated 21st November, 1995 with the head quarters specified in the corresponding entry in Column No. (3) of the said Schedule for the local areas specified in corresponding entries in column No. (4) thereof from the date they assume charge of their offices for trial of cases relating to the offences punishable under :—

1. The Central Excise Act, 1944 (No. 1 of 1944)
2. The Foreign Trade (Development and Regulation) Act, 1992 (No. 20 of 1992).
3. The Companies Act, 1956 (No. 1 of 1956).
4. The Wealth Tax Act, 1957 (No. 22 of 1957).
5. The Gift Tax Act, 1958 (No. XVIII of 1958).
6. The Income Tax Act, 1961 (No. 43 of 1961).
7. The Customs Act, 1962 (No. 52 of 1962).
8. The Export (Quality Control and Inspection) Act, 1963 (No. 22 of 1963).
9. The Companies (Profits) Surtax Act, 1964 (No. 7 of 1964).
10. The Monopolies and Restrictive Trade Practices Act, 1969 (No. 54 of 1969); and
11. The Foreign Exchange Regulation Act, 1973 (No. 46 of 1973).

SCHEDULE

S.No.	Presiding Officer of The Special Courts	Head Quarters	Local Areas (Revenue Districts)
(1)	(2)	(3)	(4)
1.	Chief Judicial Magistrate	Ratlam	Ratlam, Mandsaur
2.	Chief Judicial Magistrate	Khandwa	Khandwa, Hoshangabad, Mandleshwar
3.	Chief Judicial Magistrate	Ujjain	Ujjain, Dewas Shajapur
4.	Chief Judicial Magistrate	Bhopal	Bhopal, Vidisha, Rajgarh (Biaora) Raisen, Sehore
5.	Chief Judicial Magistrate	Chhindwara	Chhindwara, Seoni, Balaghat, Narsinghpur, Betul

BY ORDER OF THE HIGH COURT
ADDITIONAL REGISTRAR

GOVT. OF M.P., LAW & LEGISTATIVE DEPARTMENT

NOTIFICATION

Bhopal, dated Nov. 2005

F. No. 6-75-1979/21-B (1) - In exercise of the powers confierred by section 312 of the Code of Criminal Procedure, 1973 (No. 02 of 1974), the State Government hereby makes the following amendment in the rules made in this behalf for payment of the reasonable expenses of any complainant or witnesses attending for the purpose of any inquiry, trial other proceedings before any crininal court, issued vide this Deparment's Notification No. F-6-75-1979-XXI-B (1) dated 14th December 1994 and published in the Madhya Pradesh Gazette (Extra-ordinary) dated 23rd December 1994, namely :-

AMENDMENT

In the said rules, in rule (3) for sub-rule (1), the following sub-rule shall be substituted, namely :-

"(1) Daily Allowance Rs. 40/- (Rupees forty only)"

●

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005 (Contd....)

11. Insertion of new Section 54-A.– After Section 54 of the principal Act, the following section shall be inserted, namely :

> *"54-A Identification of person arrested.*– Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit."

12. Amendment of Section 82.– In Section 82 of the principal Act, after sub-section (3), the following sub-sections shall be inserted, namely :

> "(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 302, 304, 364, 367, 382, 392, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.
>
> (5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1)."

13. Amendment of Section 102.– In Section 102 of the principal Act,–

(a) In sub-section (3), after the words "transported to the Court" the words "or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation" shall be inserted;

(b) after sub-section (3), the following proviso shall be added at the end, namely :

"Provided that where the property seized under sub-section (1) is subject to speedy and natural deny and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees. It may forthwith be sold by auction under the orders or the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be praetleable, apply to the net proceeds of such sale."

14. Amendment of Section 110.– In Section 110 of the principal Act, in clause (f), In sub-clause (i),–

(i) in item (g) the word "or" shall be omitted;

(ii) after item (g) the following item shall be inserted, namely :

"(h) the Foreigners Act. 1946 (31 of 1946); or"

15. Amendment of Section 122.– In Section 122 of the principal Act, in sub-section (1), in clause (b) for the words "bond without sureties", the words" bond, with or without sureties," shall be substituted.

16. Inscrtion of new Section 144-A.– In Chapter X of the principal Act, under sub-heading "C.–Urgent cases of nuisance or apprehended danger", after Section 144, the following section shall be inserted, namely :

"144-A Power to prohibit carrying arms in procession or mass drill or mass training with arms.– (1) The District Magistrate may, whenever he considers it necessary so to do for the preservation of public peace or public safety or for the maintanance of public order, by public notice or by order, prohibit in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding or, taking part in, any mass drill or mass training with arms in any public place.

(2) A public notice issued or an order made under this section may be directed to a particular person or to persons belonging to any community, party or organisation.

(3) No public notice issued or an order made under this section shall remain in force for more than three months from the date on which it is issued or made.

(4) The State Government may, If it considers necessary so to do for the preservation of public peace or public safety or for the maintenance or public order, by notification, direct that a public notice issued or order made by the District Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which such public notice or order was issued or made by the District Magistrate would have. but for such direction, expired, as it may specify in the said notification.

(5) The State Government may, subject to such control and directions as it may deem fit to impose, by general or special order, delegate its powers under sub-section (4) to the District Magistrate.

Explanation– The word "arms" shall have the meaning assigned to it in Section 153-AA of the Indian Penal Code (45 of 1860)

17. Insertion of new Section 164-A.– After Section 164 of the principal Act, the following section shall be inserted, namely ;

"164-A. Medical examination of the victim of rape.– (1) Where, during the stage when an offence of committing rape of attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely :

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks or injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation– For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in Section 53.

18. Amendment of Section 176.– In Section 176 of the principal Act,–

(i) in sub-section (1), the words "where any person dies while in the custody of the police or" shall be omitted;

(ii) after sub-section (1), the following sub-section shall be inserted, namely:

"(1-A) Where,–

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman.

While such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offences has been committed".

(iii) after sub-section (4) before the Explanation, the following sub-section shall be inserted, namely :

"(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (1-A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing."

19. Amendment of Section 202.– In Section 202 of the principal Act, In sub-section (1), after the words "may, if he thinks fit," the following shall be inserted, namely :

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction."

20. Amendment of Section 206.– In Section 206 of the principal Act, in sub-section (1),–

(a) in the opening paragraph, after the words and figures "under Section 260", the words and figures" or Section 261" shall be inserted;

(b) in the proviso, for the words "one hundred rupees" the words "one thousand rupees" shall be substituted.

21. Amendment of Section 223.– In Section 223 of the principal Act, in the proviso,–

(a) for the word "Magistrate", the words "Magistrate or Court of Session" shall be substituted;

(b) for the words "if he is satisfied", the words "if he or it is satisfied shall be substituted.

22. Amendment of Section 228.– In Section 228 of the principal Act, In sub-section (1), in clause (a), for the words, "and thereupon the Chief Judicial Magistrate", the words "or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate" shall be substituted.

23. Amendment of Section 260.– In Section 260 of the principal Act, in sub-section (1),–

(a) for the words "two hundred rupees", wherever they occur, the words "two thousand rupees" shall be substituted;

(b) in clause (vi), for the words "criminal intimidation", the words "criminal intimidation punishable with imprisonment for a term which may extend to two years, or with fine, or with both" shall be substituted.

24. Insertion of new Section 291-A.– After Section 291 of the principal Act, the following section shall be inserted, namely :

"291-A. Identification report of Magistrate– (1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceedings under this Code, although such Magistrate is not called as a witness :

Provided that where such report contains a statement of any suspect or witness to which the provisions of Section 21, Section 32, Section 33, Section 155 or Section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report."

25. Amendment of Section 292.– In Section 292 of the principal Act,–

(a) in sub-section (1), after the words "the Mint", the words "or of the Currency Note Press or of the Bank Note Press or of the Security Printing Press" shall be inserted;

(b) in sub-section (3), for the words "the Master of the Mint of the India Security Press", the words "the General Manager of the Mint or of the Currency Note Press or of the Bank Note Press or of the Security Printing Press or of the India Security Press" shall be substituted.

26. Amendment of Section 293.– In Section 293 of the principal Act, in sub-section (4),–

(a) for clause (b), the following clause shall be substituted, namely :

(b) "the Chief Controller of Explosives."

(b) after clause (f), the following clause shall be added, namely :

(g) "any other Goverment Scientific Expert specified by notification by the Central Government for this purpose."

27. Insertion of new Section 311-A.– After Section 311 of the principal Act, the following section shall be inserted, namely :

"311-A. Power of Magistrate to order person to give specimen signatures or handwriting.– If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting :

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

28. Amendment of Section 320.– In Section 320 of the principal Act, in the Table under sub-section (2),–

(a) the words "Voluntarily causing hurt by dangerous weapons or means" in column 1 and the entries relating thereto in columns 2 and 3 shall be omitted;

(b) in column 3, for the word "Ditto", against the entry relating to Section 325, the words "The person to whom the hurt is caused" shall be substituted;

(c) in column 1, for the words "two hundred and fifty rupees", wherever they occur, the words "two thousand rupees" shall be substituted.

29. Amendment of Section 356.– In Section 356 of the principal Act, in sub-section (1),–

(a) after the words, figures and letter "or Section 489-D", the words, figures and brackets "or Section 506 (in so far as it relates to criminal intimidation punishable with imprisonment for a term which may extend to seven years or with fine or with both)" shall be inserted;

(b) after the word and figures Chapter XII, the words and figures "or Chapter XVI" shall be inserted.

30. Amendment of Section 358.– In Section 358 of the principal Act, in sub-sections (1) and (2), for the words "one hundred rupees", the words "one thousand rupees" shall be substituted.

31. Amendment of Section 377.– In Section 377 of the principal Act,–

(a) in sub-sections (1) and (2), for the words "an appeal to the High Court against the sentence on the ground of its inadequacy" the following shall be substituted, namely :

"an appeal against the sentence on the ground of its inadequacy–

(a) to the Court of session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court":

(b) in sub-section (3), for the words "the High Court", the words "the Court of Session or, as the case may be, the High Court" shall be substituted.

32. Amendment of Section 378.– In Section 378 of the principal Act–

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

"(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),–

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence ;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision";

(ii) in sub-section (2) for the portion beginning with the words "the Central Government may" and ending with the words "the order of acquittal", the following shall be substituted, namely :-

"the Central Government may subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal—

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision;"

(iii) in sub-section (3), for the words "No appeal", the words "No appeal to he High Court" shall be substituted.

33. Amendment of Section 389.– In Section 389 of the principal Act, to sub-section (1), the following provisions shall be added, namely :-

"Provided that the Appellate Court shall, before releasing on bafl or on his own bond a convicted person who is convicted of an offence punishable with death or Imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release :

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

34. Amendment of Section 428.– To Section 428 of the principal Act, the following proviso shall be added, namely :

"Provided that in cases referred to in Section 433-A, such period of detention shall be set off against the period of fourteen years referred to in that section."

35. Amendment of Section 436.– In Section 436 of the principal Act, in sub-section (1),–

(a) in the first proviso, for the words "may, instead of taking bail" the words "may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail" shall be substituted ;

(b) after the first proviso, the following Explanation shall be inserted, namely :

"Explanation.– Where a person is unable to give bail within a week of the date of his arrest it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso."

36. Insertion of new Section 436 A.– After Section 436 of the principal Act, the following section shall be inserted, namely :

"436-A, Maximum period for which an undertrial prisoner can be detained.– Where a person has during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one half of maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties :

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instered of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the perlod of investigation, inquiry or trial for more than the maximum perlod of imprisonment provided for the said offence under that law.

Explanation.– In computing the period of detention under this section for granting ball the period of detention passed due to delay in proceeding caused by the accused shall be excluded."

37. Amendment of Section 437.– In Section 437 of the principal Act.–

(i) In sub-section (1),–

(a) In clause (ii), for the words "a non-bailable and cognizable offence", the words "a cognizable offence punishable with Imprisonment for three years or more but not less than seven years" shall be substituted.

(b) after the third proviso, the following proviso shall be inserted, namely :-

"Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.".

(ii) In sub-section (3), for the portion beginning with the words "the Court may impose", and ending with the words "the interests of justice", the following shall be substituted, namely :-

"the Court shall impose the conditions.–

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter;

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

and may also impose, in the interests of Justice, such other conditions as it considers necessary."

38. Amendment of Section 438.– In Section 438 of the principal Act. for sub-section (1), the following sub-sections shall be substituted, namely :-

"(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely :-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from Justice; and

(iv) where the accusation has been made with the object of Injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail :

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, Without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice."

39. Insertion of new Section 441-A.– After Section 441 of the principal Act, the following section shall be inserted, namely :-

"441-A. Declaration by Sureties.– Every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars."

40. Amendment of Section 446.– In Section 446 of the principal Act, in sub-section (3), for the words "at its discretion", the words "after recording its reasons for doing so" shall be substituted.

41. Amendment of Section 459.– In Section 459 of the principal Act, for the words "less than ten rupees", the words "less than five hundred rupees" shall be substituted.

42. Amendment of the First Schedule.– In the First Schedule to the principal Act, under the heading "1– OFFENCES UNDER THE INDIAN PENAL CODE",–

(a) after the entries relating to section 153-A, the following entries shall be inserted, namely :-

1	2	3	4	5	6
"153-AA	*Knowingly carrying arms in any procession or organising or holding or taking part in any mass drill or mass training with arms.*	*imprisonment for 6 months and fine of 2,000 rupees*	*Ditto*	*Ditto*	*Any Magistrate.";*

(b) in the 6th column, in the entries relating to Section 153-B, for the word "Ditto", the words "Magistrate of the first-class" shall be substituted;

(c) after the entries relating to Section 174, the following entries shall be inserted, namely:-

1	2	3	4	5	6
"174-A	*Failure to appear at specified Place and specified time as required by a proclamation published under sub-section (1) of Section 82 of this Code.*	*Imprisonment for 3 years or with fine or with both*	*Congizable*	*Non-bailable*	*Magistrate of the first class.*
	In a case where declaration has been made under sub-section (4) of Section 82 of this Code pronouncing a person as proclaimed offender.	*Imprisonment for 7 years and fine*	*Ditto*	*Ditto*	*Ditto;"*

(d) in the entries relating to Section 175.–

(i) in the 4th column, for the word "Ditto" the word "Non-cognizable", and

(ii) in the 5th column, for the word "Ditto" the word "Bailable", shall be substituted;

(e) after the entries relating to Section 229, the following entries shall be inserted, namely :-

1	2	3	4	5	6
"229-A	*Failure by person released on bail or bond to appear in Court.*	*Imprisonment for 1 year, or fine or both*	*Congiz-zble*	*Non-bailable*	*Any Magis-trate;"*

(*f*) in the 5th column, in the entries relating to,—

(i) Section 274, for the word "Ditto" the word "Non-bailable" shall be substituted;

(ii) Section 275, for the word "Ditto", the word "Bailable" shall be substituted;

(Iil) Section 324, for the word "Ditto", the word "Non-bailable" shall be substituted;

(iv) Section 325, for the word "Ditto", the word "Bailable" shall be substituted;

(v) Section 332, for the word "Bailable", the word "Ditto" shall be substituted;

(vi) Section 333, for the word "Non-bailable", the word "Ditto" shall be substituted;

(vii) Section 353, for the word "Ditto" the word "Non-bailable" shall be substituted;

(viii) Section 354, for the word "Ditto", the word "Bailable" shall be substituted.

43. Amendment of the Second Schedule.– In the Second Schedule to the principal Act, in Form No. 45, after the words and figures "*See* Section 436" the figures and letter "436-A." shall be inserted.

44. Amendment of Act 45 of 1860.– In the Indian Penal Code,–

(a) after Section 153-A, the following section shall be inserted, namely :-

"153-AA. Punishment for knowingly carrying arms in any any procession or organising, or holding or taking part in any mass drill or mass training with arms.– Whoever knowingly carries arms in any procession or organizes or holds or takes part in any mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under Section 144-A of the Code of Criminal Procedure, 1973 (2 of 1974) shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation.– "Arms" means articles of any description designed or adapted as weapons for offence or defence and includes firearms, sharp edqed weapons, *lathies, dandas* and sticks."

(b) after Section 174, the following section shall be inserted, namely :

"174-A. Non-appearance in response to a proclamation under Section 82 of Act 2 of 1974.– Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of Section 82 of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.";

(c) after Section 229, the following section shall be inserted, namely :

"229-A Failure by person released on bail or bond to appear in Court.– Whoever, having been charged with an offence and released on bail or on bond without sureties, fails without sufficient cause (the burden of proving which shall lie upon him), to appear in Court in accordance with the terms of the bail or bond, shall be punished with imprisonment of elther description for a term which may exterd to one year or with fine, or with both.

Explanation– The punishment under this section is–

(a) in addition to the punishment to which the offender would be liable on a conviction for the offence with which he has been charged; and

(b) without prejudice to the power of the Court to order forfeiture of the bond.".