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मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

Ved Prakash
Director

Esteemed Readers

By the time this issue reaches your hands, we might have entered into the New Year, i.e. Year 2007, after saying adieu to the year gone by which has become part of the immeasurable past. The advent of New Year, generally, is an occasion to rejoice but it also requires dispassionate assessment of what we had been able to contribute to the system, to the society and to the nation and what we are expected to perform in future. In the words of G.K. Chesterton, 'The object of a New Year is not that we should have a new year. It is that we should have a new soul and a new nose; new feet, a new backbone, new ears, and new eyes. Unless a particular man made New Year resolutions, he would make no resolutions. Unless a man starts afresh about things, he will certainly do nothing effective'.

Inspite of the wide spread concern expressed from various quarters about increasing arrears and delay in dispensation of justice and its impact on the quality of justice; Indian Judiciary, as a Constitutional Institution, continues to enjoy the faith of common man as the ultimate savoir, of course it has been denuded to some extent in recent past. As expressed by the First Citizen of the Nation, His Excellency Dr. A.P.J. Abdul Kalam, in his address in the Golden Jubilee Celebrations of the High Court of Madhya Pradesh (at Jabalpur on 12.10.2006) - 'the only hope the Nation cherishes and looks to is the Judiciary with its excellence and impeccable integrity;' but then, as supplemented by Dr. Kalam - 'this casts a very heavy responsibility on the entire judicial system to live up to the expectations reposed in it and to maintain the sacred aura attached to it unsullied.' Being at the cutting edge, the responsibility of District Judiciary is quite obvious in this respect.

In the aforesaid backdrop the singular most important question which stares at our face is how to discharge this onerous responsibility? With the existing limited infrastructural resources and ever increasing load of cases as well as complexity of their nature; particularly, because of newer legislations, the problem is assuming serious proportions. Section 138 Negotiable Instruments Act, 1881 alone has given rise to around one lakh new cases in Madhya Pradesh during past couple of Years. Protection of Women from Domestic Violence Act, 2005, which has come into force w.e.f 26th October, 2006, again is bound to

generate a lot of litigation increasing the burden of Magistrate Courts which are already overburdened.

Should it lead us to some sort of pessimism or made us to chalk out a strategy to deal with the situation? Addressing almost a similar question in the context of U.S. Judicial System Warren, Earl said almost 30 years ago that - 'Our Courts must advance with the times. They must adjust to the setting in which they function. They must fashion new tools to repair the dislocations of a changing, burgeoning and increasingly complicated social order. The techniques of a more leisurely past are not adequate to the future or even to the present.' The solution cannot be a different one for us. It is not that we are bare handed; rather we have tools, techniques and methodologies which can help us in this respect. ADR Mechanism introduced by CPC Amendment Act, 1999, the provisions of O.18 C.P.C. as amended by Act of 2002, the Scheme of Plea Bargaining introduced by Criminal Law (Amendment) Act, 2005, the skills of Court Management, Board Management and Case Flow Management, and the latest tool of information and communication technology, if applied cumulatively in an innovative manner can herald a new era of expeditious and effective justice, replacing the existing gloomy spectrum by a promising one.

The saying goes that - 'when the going gets tough, the tough gets going'. It is the time to accept the challenge and to come out with a strong resolution and commitment so that we can live up to the aspirations of teaming millions whose hopes are focused on us. At the same time we should also make earnest efforts to evoke a positive response from the Bar by involving lawyers as well in this process of rejuvenating the system.

Let me wish all our esteemed readers a happy New Year, a year which may end with a little more satisfaction to us as well as to those for whom we owe our existence in this system.

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PART - I

DO WE SIT AND WATCH?

Justice R.V. Ravendran
Judge, Supreme Court of India

INTRODUCTORY NOTE :

Justice S.M. Samvatsar after a successful career at the Bar, was appointed as a Judge of the High Court in the year 1953 and died in harness in 1958. He distinguished himself as a lawyer and as a Judge. Justice Sohani, Justice Vijay Vargiya, M. Chaphekar and several other notable lawyers were products of his office.

Shri R.G. Waghmare was a lawyer for more than half a century. He excelled in civil law and specialized in Revenue Laws and drafting. His third son Ravi and daughter-in-law Shubhada followed in his footsteps by becoming lawyers. Shubhada has the distinction of being the first woman from the Bar to be elevated to the Madhya Pradesh High Court.

Shri S.K. Kemkar had a chequered career. He started as a teacher. He was a social worker, politician and lawyer specializing in Transport laws. He was very popular and was Deputy Mayor during 1969-70. His efforts to solve the water crisis of Indore and bring Narmada water to Indore are well known.

More importantly, all three were good human-beings with large hearts. They were known for their hard work, commitment to the cause of justice and interest in the welfare of the Bar. They were role models for the younger generation to follow and emulate.

LECTURE

May I start by reminding you that the real power of courts does not lie in deciding the cases, or imposing sentences or punishing for contempt, but lies in the credibility of Judiciary as an institution. It lies in the trust and confidence reposed by the public in the judicial system. If that faith and trust is eroded, the power of Judiciary is eroded, and Rule of Law is also eroded. Bar is a part of the judicial system. Therefore, its success and in fact its very existence depends on the credibility of judicial system as an institution rendering speedy and effective justice to the public. If people start hesitating to come to courts, the first casualty will be the Bar.

Today, the country is at crossroads, The Judiciary is at crossroads. The question is whether we, the Judges and lawyers, should sit and watch and allow things to deteriorate or act with a sense of urgency and commitment, to improve the justice delivery system, so as to provide speedy, affordable and quality justice and legal services to the people? Should we not try to rid ourselves of the shackles

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* Law Lecture delivered on 25th March, 2006 organized in the memory of three stalwarts of Indore Bar-Justice S.M. Samvatsar, Shri R.G. Waghmare and Shri S.K. Kemkar, during the Golden Jubilee Celebrations of Madhya Pradesh High Court.

of complacency to save the credibility of the Institution and re-generate faith and confidence in the judicial system?

While on the question of trust and confidence, let me refer to a programme I saw on BBC Question Time. The topic was : "Are people staying away from courts?" The audience consisted of about 100 members of the public from higher middle class. The panelists were Mr. Fali S. Nariman, Mr. Kapil Sibal and Mr. Abhishek Singhvi. After a lengthy discussion, a question was put to the public "How many are afraid of courts and lawyers?" Except 3 or 4, all raised their hands in the affirmative. The reasons given by them were delay and harassment relatable to litigation, uncertainty in regard to outcome, high cost of litigation, and lingering doubts about the integrity of lawyers and Judges. If I remember correctly, Mr. Pranab Roy, who was the anchor person, out of sheer curiosity asked the 3 or 4 participants who did not raise their hands as to why they were not afraid of courts, is it because their experiences were pleasant? The sheepish answer that came forth was that they were themselves lawyers.

I find, of late, more and more airing of complaints by people, both in print and electronic media, that they are not satisfied with the justice delivery system, the Judges and lawyers for a variety of reasons. Some reasons are logical, some are not.

Should the Judges and lawyers merely sit and watch and hope that things will improve, when multinational companies routinely stipulate in contracts that Indian courts shall not have jurisdiction, thereby implying that they do not have faith in Indian Judiciary and lawyers; or when contested civil cases relating to partition and property disputes travel from trial court to Supreme Court taking a decade each before the trial court, the appellate court, the second appellate court and the Supreme Court; or when sessions trials relating to murder, rape, dowry harassment and corruption take several years to complete; or when Banks and financial institutions have stopped approaching courts for relief, and prefer to recover their dues by engaging recovery agents or even writing off loans; or when private litigants routinely approach underworld/mafia or Police to recover money, to evict tenants and get the disputes settled; or when several under-trial prisoners languish in jails for years, many a time for periods exceeding the prescribed period of punishment itself. Or should we act and get the system back on rails?

In several States including Madhya Pradesh, number of criminal cases are many times the number of civil cases, the unhealthy ratio indicating that instead of settling disputes in civilized manner, people are taking recourse to force, extortion, coercion, even murder as means of settling disputes.

The credibility of the institution is being questioned on account of decisions in high profile cases perceived as erroneous. The comments about Judiciary in the newspapers relating to Jessica Lal, Priyadarshini Mattoo, Nitish Katara etc. have not been flattering. Let me hasten to add that I am not commenting on the merits or about the correctness of any particular decision. Judges need not

necessarily be swayed by the comments of the public or the Press about their judgments in individual cases. Judges decide cases on merits, on material placed, as law requires. I am only referring about the trend of public perception in regard to judiciary that cases can be manoeuvred and adjusted, that facts can be falsified, that law can be twisted, and that matters can be delayed. This is what Dr. Abhhishek Singhvi, an eminent lawyer, recently wrote with anguish, in a newspaper article - *"In India many major crimes are not reported. If reported, frequently not registered. If registered, the true perpetrator is not identified or found. If found, not prosecuted and charged. If charged, not usually convicted. If convicted, not punished. At each crucial stage- reporting the crime, registering FIR, investigation, prosecuting, charging, letting evidence and convicting, the system has enough loopholes to allow criminals to walk free."*

The articles appearing in newspapers and magazines routinely assume that when the accused are rich and powerful, they manage to go scot-free; that Police connive with the rich and powerful accused to sabotage the case right from the stage of First Information Report; that evidence will be tampered; that trial will not be commenced until crucial witnesses are made to turn hostile by threats and inducements; that prosecutors will go easy on instructions from their political masters; and that courts will acquit on technicalities and frivolous grounds. What should pain every Judge and lawyer is the innuendo that courts favour the rich and powerful. Of course, if you take the statistics of the poor who are prosecuted and the rich and the powerful who are prosecuted and then compare the conviction rate, you will certainly find an alarming difference. In most of the cases, the real reason for the difference is the better defence facilities available to the rich and powerful. But in some cases, it may also be for any of the other reasons, which the newspaper articles assume. Our endeavour, should be to ensure that all accused, whether poor or rich, get the same treatment and that justice is done.

The political and social ramifications of documents of discontent about inability to get justice should also not be lost sight of. If the poor are not in a position to go to Police for fear of being ignored, harassed or being falsely implicated, and if they do not have any effective forum to ventilate their grievance, it leads to resentment which, when bottled up, erupts into violence. They become easy prey to persons who preach terrorism and anarchy. To save democracy, to have rule of law, it is imperative to build and maintain the trust and confidence of the people. My purpose is to make you think, and, in fact, even make you feel guilty for not doing more for improving the justice delivery system. Please, therefore, start providing speedy justice, start showing concern and care for the poor, down-trodden and the weaker-sections of the society; and start providing easy access to justice by providing legal aid. Let us start taking steps to give the much-needed succour to the teeming millions in search of justice.

Recently (on 11.3.2006, in the Joint Conference of Chief Ministers and Chief Justice), the Prime Minister said -

"The manner in which some cases are being prosecuted, particularly where cases fail because witnesses turn hostile or change their evidence is causing concern to ever increasing sections of society. There is a need for all of us to reflect whether the existing procedures are adequate and foolproof; whether we are using all available provisions to prevent deviant behaviour; and whether we need new provisions in law so that the justice system is seen to deliver justice."

At the same meeting, Hon'ble the Chief Justice of India said -

"The criminal justice delivery system appears to be on the verge of collapse due to diverse reasons. The public outrage over the failure of the criminal justice system in some recent high profile cases must shake us all up into the realization that something needs to be urgently done to revamp the whole process, though steering clear of knee-jerk reaction, remembering that law is a serious business."

Should we be happy with a criminal justice system where in 90% of contested cases, the accused are acquitted, mostly by giving benefit of doubt, on the ground that guilt has not been proved beyond reasonable doubt? In such a system, the accused/wrongdoer who is set free is happy and the defence lawyer who wins the case is happy, but the society suffers. Slowly the entire society gets criminalized as more and more feel encouraged or feel bold to commit crimes because they feel that they can get away with it. Of course, amendment to laws implementing the recommendations of Committees constituted on reforms of criminal justice system may be a solution. An alternative or modified system which will protect the innocent but punish the guilty, and at the same time achieving a conviction rate of 80% to 90%, will act as a strong deterrent to crime. It is no doubt true that any reform of criminal justice system should also take note of the fact that many a time, the accused himself is a victim of framing by trumped up charges. While strengthening the existing system, the basic safeguards that are available to an accused should not be weakened nor should there be interference with fair trial or human rights. A fine balance will have to be achieved between the interests of the society, interests of the individuals, interests of the victim, interests of the accused and interests of the law enforcing agencies.

Apointing more Judges, amending procedural laws, recording the statement of witnesses and confessions of accused under section 161/164 Cr.P.C. in the presence of a Magistrate and to be videographed, improving the working conditions, encouraging scientific investigation, disciplining and re-organising investigating agencies, training prosecutors, giving more autonomy to police will no doubt improve the criminal justice system.

But we need not wait for a solution from the legislature. We should do whatever we ourselves can do to improve the efficiency by exercising powers which till now were seldom invoked or used and by improving the co-ordination between Judges, prosecuting agencies, investigating agencies and enlightened Defence counsel.

THE ROLE OF JUDGES:

Judges should stop considering litigation as mere statistics and that cases are meant to enable them to earn units or points of disposal. Each case that comes before a Judge, is a human problem concerning life, liberty, food, shelter, safety and security of the citizens. Most of the litigants are of weaker sections, down-trodden, defenceless, poor and ignorant. They are crying out for justice, for a civilized solution to their grievances and problems and a level playing field.

A Judge should take interest and play an active role in rendering justice. There has been much debate on the role of Judge during the court proceedings. We generally follow the British system where the Judge is considered to be a neutral umpire who does not participate in the investigation into truth, or examination of witnesses but merely records what the witnesses have stated, reads the documents that are presented, hears the arguments that are advanced by the counsel and then decides the matter. He takes no active or positive part in moulding or guiding the case. In an ideal adversarial litigation, where the parties are capable and are represented by competent lawyers, it may be proper for the judge to merely sit, listen and watch. But what happens where the litigation is between a rich and powerful person on one side and a poor and down-trodden person on the other? What happens when the litigation is between the mighty State on one side and the poor citizen on the other? What happens if the person who comes knocking at the doors of the court is a woman, child, old, infirm or disabled who do not have the resources to fight? What happens when an Adivasi, who does not know what his rights and obligations are, is catapulted into a treacherous scheming society? Should the judges keep quiet and watch when their interests are being adversely affected by inefficient handling or when the other side is covering up their misdeeds? Should a judge keep quiet in a land acquisition case where the claimants make claim for huge amount of compensation and lead evidence which is not challenged by a collusive LAO or the State counsel? Does the judge merely sit and watch when a false and trumped charge is brought up by police? Should the Judge sit and watch when even the basic evidence is not presented by the prosecution and sabotaging the trial begins from the stage of FIR itself?

Section 165 of the Evidence Act provides that the Judges may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time of any witness or of the parties about any fact, relevant or irrelevant and may order production of any document or thing. Section 311 Cr.P.C. empowers a court, at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance or

recall and re-examine any person already examined. He is in fact duty bound to summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. While a judge should remain neutral, he need not be passive, every trial being an effort to discover the truth. The Judge may play an active role within the parameters defined by the procedural law. In *Mohanlal Shamji Soni v. Union of India [1991 Supp (1) SCC 271]*, referring to Section 165 of the Evidence Act and Section 311 of the Criminal Procedure Code, the Supreme Court stated that the said two Sections were complementary to each other and they between them, confer jurisdiction on the Judge to act in aid of justice. Referring to a situation where best available evidence is not brought before the court for one or the other reason by either of the parties, it was observed thus:

> *"...In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge the statutory function - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done."*

The following words of Bhagwati, J. (as he then was) in *S.P. Gupta v. Union of India (AIR 1982 SC 149)* should reverberate in the minds of Judges:

> *"The judiciary has therefore a socio-economic destination and a creative function. It has (to use the words of Glanville Austin) to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice."*

Referring to the British concept of justicing, that is, a Judge is only a neutral and passive umpire, who merely hears and determines issues of fact and law, he observed:

> *"Now this approach to the judicial function may be alright for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice, between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does*

not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal-oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values."

"What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives."

Let Judges stop being passive spectators. Let them become active crusaders for justice, of course, acting within the recognized parameters.

Recently, in the case of a German rape victim at Jodhpur, with the intervention of the Rajasthan High Court, the entire trial was completed within about 28 days leading to a conviction. If it can be done in one case, it can certainly be done in other cases, particularly high-profile cases, and sensitive cases which may create disharmony in the society.

The murmurs about corruption in the Judiciary, the subordinate judiciary are slowly increasing. It should be noted that while corruption is a matter of concern in regard to any service, it is more so in respect of Judiciary. That if corruption is viewed seriously in general administration, it should be viewed much more seriously in the Judiciary. Acts that are condonable in normal service, may not be condoned in judicial service. Standard of conduct expected of Judges is very high. The expectations from the judiciary are also very high. Though the instances of corruption may be few and are merely in the nature of aberrations, rather than the general malaise, none can shut their eyes to the problem. Corruption, if exists, will have to be dealt with promptly and firmly. While ensuring that there is no undue publicity or misleading debate in regard to corruption in judiciary, there should be constant vigil within the judiciary itself for eradication of corruption, wherever found. The popular saying is that justice should not only be done but seem to be done. I would add that 'Judges should not only be

honest but also seem to be honest. Judgments rendered by them should be well-informed, clear and just. They should stay aloof and avoid unnecessary mixing with the members of the Bar or the litigants.

ROLE OF LAWYERS:

I am not going to speak about the need for better legal knowledge or forensic skills. Let me talk about things which are seldom discussed. I do so in the interests of Bar. I do so as a product of the Bar. I do so in the interests of the Judiciary. My intention is not to belittle the role of the Bar or to find fault with the Bar, but to improve its standards. I take this liberty because of the affection and understanding shown to me by the Bar at Jabalpur, Indore and Gwalior.

The Bar can do a lot to reduce the period of pendency of cases and rendering speedy justice. The lawyer controls the length of the pleadings, the number of witnesses examined, the number of interlocutory applications filed, the number of adjournments taken and the length of the arguments. If lawyers exercise care and caution at every stage and plead only what is relevant, examine only witnesses who are material, file interlocutory applications only when necessary, proceed with the case without seeking unnecessary adjournments, argue briefly and to the point, the period of pendency of a case can be drastically reduced. The litigant is interested only in the relief and that too speedy relief.

There is no need for every difference or dispute to be converted into a litigation. There is also no need for every litigation to go to trial and fight till final judgment. Different cases require different treatments. Lawyers are already choosing the forum suitable for obtaining redressal - that is a suit in a civil court, a complaint before a criminal court, a Writ petition before the High Court, an application before a Tribunal etc. Why not also choose appropriate alternative dispute resolution processes like conciliation (which includes Lok Adalats and meditation) and arbitration. All these alternative dispute resolution processes require the consent of both parties. Such consent will be given only if there is proper advice from the counsel. If the counsel belittles or discourages alternative dispute resolution processes, the litigant would naturally think of only adjudication by Courts as the only remedy. The Bar owes a duty to identify cases which deserve conciliation or mediation and settle them by such process.

A litigation ending in a contested decision invariably leads to bitterness, hostility and enmity between the parties to the *lis*, as the losing party continues to nurture a grievance against the successful party. In a civilized society, parties are expected to accept the decisions of Court with grace, but in reality it seldom happens, particularly in suits relating to partition among family members, disputes between neighbours, disputes between partners and disputes between spouses. If there is a settlement by conciliation, there are no winners or losers, as the result is acceptable to all. Contest fosters enmity. Consent fosters friendship. Settlement of a good percentage of disputes by conciliation has other beneficial fallouts also. They are:

i) The pressure on Courts and Lawyers on account of heavy pendency is eased with the result that the Court's Board comes to manageable limits and Courts and Lawyers can deal with contested cases, more effectively, thoroughly and expeditiously.

ii) The cost of litigation is reduced considerably. The expenses of a long litigation is avoided. There is enormous saving of time and energy for litigants and witnesses.

iii) The average period of pendency of cases will come down drastically and it will be possible to have decisions in any litigation within a short and reasonable period.

We have to remember that timely and effective dispute resolution is one of the hall marks of civilized democratic societies. It is necessary to prevent people from taking law into their own hands or relying on extra-legal agencies for settlement of disputes.

Litigants do not like litigation, because of the time, energy and money to be spent on it. They want quick and favourable results. A citizen comes into contact with Courts and lawyers when in difficulties or distress. As in the case of a patient entering a hospital for treatment, the contact with courts is not in the happiest of circumstances. Courts function under procedural laws, which give as much importance to decision making process, as to the decision itself. As a result they are not structured or equipped to render quick decisions. The procedural laws were made to ensure fair play and avoid judicial error. They were made when litigations were few and when absolute adherence to procedure ensuring fair and elaborate hearing, did not lead to delay in disposals. The procedural laws are full of appeals, revisions and reviews. They enable filing of innumerable interlocutory applications which often results in the main matter itself being lost sight of. Pendency of suits for long periods give room for more number of interlocutory applications; and more the number of interlocutory applications, the more the period of pendency. The circle is 'vicious' and time consuming.

With the gradual growth in the number of laws and number of litigations, without proportionate increase in the number of Courts, a stage has reached where the Courts are choked with cases. Delay has now virtually become a part of the judicial process. It has become quite common for civil disputes, in particular litigations involving partitions, evictions, and specific performance to be fought for several decades, through the judicial hierarchy. In commercial litigation, delay can destroy business. In family disputes, delay can destroy physical and mental health turning litigants into nervous wrecks. Long pendency leads to frustration and desperation. The delay, uncertainty about the final outcome, changes in laws during the pendency of the cases, and the expenditure of time, energy and money during the period of litigation, take their toll on the patience of litigants and erode the confidence in the rule of law and the justice delivery system. When memories of litigation tend to be unpleasant and harsh, there is a tendency

on the part of the litigant to avoid approaching the Courts and lawyers for relief, but seek remedy outside the legal framework. Though well aware that such methods are illegal, costly and risky, more and more persons are being tempted to have recourse to illegal methods, thinking that the end justifies the means, ignoring the disastrous effect on the orderly society. In this background, it became necessary to seriously consider the need to encourage alternative dispute resolution methods so as to reduce litigation in Courts and at the same time give speedy and cost-effective justice. Encouraging litigants to sort out their disputes and differences by conciliation, with proper legal assistance, achieves the twin objects of giving relief to litigants and building a law abiding and orderly society. It also helps the Bar, as litigants will more and more rely on Advocates, for advice, legal documentation and dispute resolution. There is, therefore, a need for a constant effort on the part of the Bar to make litigation to the extent possible, comfortable, short and cheap.

There is also some reluctance on the part of some sections of Advocates, to settle cases. They fear that they may not receive the full fee, if the case is settled. The fee received for a case involving a full-fledged trial with possibilities of further appeals, it is felt, is several times more than the fee that can, legitimately, be claimed if a matter is settled without trial. In some mofussil areas where the number of lawyers is high, in proportion to the pending litigation, there is also a feeling of insecurity associated with any negotiated settlement. At many places, the members of the Bar are of the view that encouraging settlements and early disposal of cases will affect their very livelihood. At Taluk level places, where the number of lawyers is about 30 to 40 and the pendency of cases is about 500 to 600, the members of the Bar have pointed out that with an average of hardly about 20 Briefs per Advocate, they can ill-afford to settle cases. Such insecurity is prevalent among section of City Lawyers also.

Some Lawyers have also expressed reluctance to persuade their client to arrive at a negotiated settlement for another reason. It is said that when a Lawyer suggests a settlement, the client (litigant) thinks that his counsel is suggesting settlement instead of proceeding with the case on account of incompetence. Some times the client also uncharitably alleges that his Advocate is suggesting settlement because of collusion with the other side. These can be changed only by educating the litigant public about the advantages of negotiated settlements..

Settling claims and disputes by mediation and conciliation will not reduce the work of Lawyers. They will be actively participating in the process of mediation and conciliation. Only the forum is changed. When the litigant starts getting reliefs without delay and to his satisfaction, by conciliation, there is more likelihood of the litigant coming back to his lawyer in regard to future disputes and grievances than staying away from courts and lawyers.

Many lawyers consider that their duty ends with securing a decree or order in favour of their clients. But please remember that as far as the litigant is concerned, the decree or order is nothing but a piece of paper. He gets relief not when the decree/order is made in his favour but when the decree is enforced

or the order is implemented. Unfortunately, many lawyers do not show interest in securing the fruits of the decree or order to the litigant. Please take prompt steps to ensure that litigants get relief in terms of the decree by filing execution and pursing them with vigour. In regard to orders in writ petitions, write to the government or the concerned department about the orders or file contempt petition promptly. In medical treatment post-surgical care is as important as the surgery itself. I have known cases where the surgeon was extraordinarily good and the surgery was successful, but the patient died for want of post-operational care. Not only the surgeon should be efficient and surgery successful, but the patient should get post-surgery care till he is cured. Similarly, a lawyer should ensure that his client gets not only the decree or order, but the fruits of it. Let us disprove the old saying that the difficulties of a plaintiff really begin when he obtains a decree and tries to execute it.

There exists a complaint that the lawyers use their skills and expertise to distort the truth. It is not uncommon to hear that leading criminal lawyers will not permit a Sessions trial to commence unless most, if not all, relevant witnesses are made to turn hostile. The question is how far a lawyer can go, when helping his client. Whether the lawyer's duty is towards the client? Does he not owe a duty to the court? Does he not owe a duty towards the society? Does he not have a duty towards the cause of justice itself?

Lord Binkett, an outstanding Advocate, Judge and Parliamentarian, while listing the qualities expected from members of the Bar says thus in his celebrated article on Advocacy:

> *"The Advocate has a duty to his client, a duty to the Court, and a duty to the State. But above all, he has a duty to himself to remain a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them. But whatever gifts an Advocate may possess, howsoever dazzling his skills are, without the supreme qualifications of an inner integrity he is worth nothing."*

Lord Denning said while defining the role of a lawyer that "he must never suppress or distort the truth." His duty is to present the case of his client fully and properly to the best advantage of his client. The duty is to offer a proper explanation for the conduct of the client and bring out the extenuating or mitigating circumstances, where necessary. But his duty never extends to subverting witnesses or falsifying evidence. A lawyer is not a mouthpiece of criminals and wrong doers, paid to somehow win by hook or crook. They belong to a noble profession, their duty lies not only to his clients but also to the court, to the society and to the cause of justice. Mahatma Gandhi (in Law and Lawyers) had said :

> *"Almost everywhere I have found that in the practice of their profession, lawyers are consciously or unconsciously led into untruth for the sake of their clients. An eminent English*

lawyer has gone so far as to say that it may even be the duty of a lawyer to defend a client whom he knows to be guilty. There I disagree. The duty of lawyer is always to place before the judges, and to help them to arrive at the truth, never to prove the guilty as innocent. It is up to you to maintain the dignity of your profession. If you fail in your duty what shall become of the other professions? You, young men, claiming as you have just done to be the fathers of tomorrow, should be the salt of the nation. If the salt loses its savour wherewith shall it be salted."

I know it is very tough to live up to great ideals. You may even think it is not practical. But to save the bar, to save he judiciary and save the democracy itself, sacrifices are necessary.

Whenever a case was weak and without merit and consequently, lost, the lawyer should have the courage to tell the truth to the client. But if instead, he tells the client irresponsibly that a case is lost because the Judge is corrupt, just to save himself from blame, is he not bringing down the good name of the institution? The client will never come back to court if a client is told that he lost it because the Judge is corrupt. Next time, he has a grievance or problem, he will rather go to the local mafia or police for getting relief, than come to court. Please remember that your survival depends upon the litigants having confidence in justice delivery system in court and your ability to properly present their case and get justice to them.

There is nothing wrong in expressing an honest opinion about the decision of judges. Everyone knows about the comments the losing lawyer makes when they come out of the court, or in the Bar room when they feel strongly about the case. The scene is not uncommon when a lawyer coming out with a red face on losing a case, followed by innocent client asking him - "KYA HUA SAHAB" [Sahab what happeed]. The lawyer many a time may say "BUDDA SAMJHA NAHI" [the old man did not understand]. But the problem arises not infrequently when a lawyer imputes dishonest motive to the Judge, when the client queries as to why the case was lost. Such comments will undermine the very system.

I remember an anecdote relating to Lord Templeton narrated by Shri Nariman. Lord Templeton was a member of a three judge Bench in England which decided a rather controversial matter having political overtones. The next day, one of the London Tabloids carried the photographs of the three judges side by side under the caption "THREE OLD FOOLS". No action was taken by the judges. When Lord Templeton visited India, Shri Nariman asked him why no action was taken for contempt. Lord Templeton replied that there was nothing objectionable in the caption "THREE OLD FOOLS". The word 'THREE' referred to the number of judges who decided the case and whose photographs were published. The word 'OLD' described the age of the Judges. The word 'FOOLS' was the opinion of the newspaper about the capacity of the Judges and the correctness of the decision. He, further, stated that the position would have

been different if the caption had said "THREE OLD CORRPUPT JUDGES". You may criticize the judgment. You may fight for your clients rights. But never impute dishonesty to a Judge in an irresponsible manner.

If a lawyer comes to know that a particular Judge is corrupt, he is duty bound to immediately bring it to the notice of the High Court or the Vigilance Cell so that prompt action can be taken. They should also avoid influencing the Judges and also discourage any such effort on the part of their clients to influence Judges.

One more aspect needs to be remembered. There is a large influx of law graduates into the legal profession. The increase in the number of cases is not keeping pace with the increase in numbers of lawyers. Let me illustrate. If there are 10,000 cases in a town having 100 lawyers, each lawyer would have an average of 100 briefs. In such a situation, the Bar as a whole would generally behave properly and settle cases which deserve to be settled and fight only those which merit a fight and also advise clients against unnecessary litigation. But let us say if for the very same 10,000 cases, there are 1,000 lawyers, then the number of cases per lawyer becomes ten. If a lawyer has only ten cases and he has to eke out his living from the average ten cases, his entire attitude would change. The lawyer naturally will not permit any of these case to be settled even if they merit settlement. The tendency then would be to prolong the case so that the number of briefs are not reduced. There will also be a tendency to somehow win those cases. Once this tendency develops, he becomes ready to adopt all means, fair and foul, to ensure success. This is also a cause for corruption. The remedy involves long-term planning. There should be strict restrictions at the bar entry level as in the case of Chartered Accounts. The standards of legal education should be strengthened and the mushrooming of dubious law colleges should be curbed. Lawyers should be made to realize that only the good reputation of the judiciary is their passport to survival in the profession and that they have therefore a vested interest in preventing corruption and ensuring the good name of the judiciary.

PILS:

Justice Anand said : "*Judicial activism in India encompasses and fills an area of legislative vacuum in the field of human rights and fundamental rights: Judicial activism reinforces the strength of democracy and reaffirms the faith of common man in the Rule of Law.*"

In *Bhagalpur Blinding case [Khatri (II) vs. State of Bihar]* [1981 (1) SCC 627], Justice Bhagwati, (as he then was), stated thus :

> *"....but if life or personal liberty is violated otherwise than in accordance with such procedure, is the Court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty."*

Where the Legislature and Executive failed to act, Judiciary has acted to solve the problems through Public Interest Litigation. By way of example we may refer to Delhi Vehicular Pollution case. In a PIL filed by a noted environmentalist, it was alleged that pollution in Delhi has reached alarming levels and there was an obligation on the part of the Government to take steps to reduce the pollution levels. After a series of orders between 1986 and 1998, which did not yield much results, the Supreme Court finally directed in 1998 that all public transport vehicles in Delhi should be converted to use CNG (Compressed Natural Gas) by 31.3.2001. Delhi Government did not even thereafter. This necessitated stringent follow up orders from the Court. Various owners and the Delhi Administration filed applications before the Court requesting postponement of the enforcement of the CNG rule. The Supreme Court stood firm and refused to extend the deadline. On 1st April, 2001, thousands of buses, taxis and autos went off the roads and DTC was able to run hardly 500 of its 2000 vehicles. Initially, there was chaos in the city. However, the Delhi Administration realized and started acting by investing large sums for purchasing new CNG buses and conversion kits for the older buses. As a result, all Autos and taxis now plying on the Delhi roads are using CNG. Before the introduction of CNG in Delhi, the city was recognized as being among the top polluted cities in the world. The SPM (suspended particulate matter) in Delhi's air was dangerously above international standards. It was only when the Government failed to act, the Supreme Court intervened. It recognized that more than 60% of Delhi's air pollution was caused by vehicular emissions and ordered the Delhi Government to convert commercial vehicles from diesel to CNG. Since the introduction of CNG, there has been a vast change in the air quality within the city. Compared to 1997, the concentration of carbon monoxide, Benzene and sulphur dioxide levels came down drastically. The air has become fit to breath.

There are several other cases where the Court has been able to bring remarkable changes. I may refer to *Godavarman* (Forest Conservation), *Visaka* (Working Women), *Laxmikant Pandey* (adoption of children), *M.C. Mehta* (children employed in hazardous industry), and several cases relating to Environment including *Taj Mahal Pollution case* and *Ganga Pollution case.*

There is also need to tread carefully, lest the fine balance among the Judiciary, Legislature and Executive is affected. The Executive has voiced its concern in regard to PILs and judicial activism. The Prime Minister said (in the Chief Justices & Chief Ministers Conference on 11.3.2006):

> *"I would also like to draw your attention to two issues which are also becoming a matter of debate. One is the issue of Public Interest Litigation. A highly commendable mechanism when it was initiated, we need to reflect whether we have reached a stage where the pendulum has swung to the other extreme, whether it has become a tool for obstruction, delay and sometimes, harassment. A balanced approach in taking up PIL cases, I am certain, will continue to keep PILs as a potent tool for rectifying public ills. In a similar vein, I feel that judicial activism too must be used in a restrained manner*

to fill up any institutional vacuum or failure and to clarify legal positions, retaining its character as a powerful but sparingly used instrument for correction. Judicial activism must also take adequately into account the administrative viability of the reform process".

The role of lawyers in filing public interest litigation was recognized in *S. P. Gupta* (supra) as follows :

"The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular and they were, therefore entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates."

But, unfortunately, on account of some lawyers misusing the forum, the Supreme Court had to go to the other extreme and warn in *Dattaraj Nathuji Thaware vs.State of Maharashtra,* [2005 (1) SCC 590] that the Bar Councils and the Bar Associations should ensure that no member of the Bar becomes a party as petitioner or aids or abets in filing of frivolous petitions under the name of 'public interest litigation'; thereby bringing disgrace to the noble profession. The Supreme Court pointed out that public interest litigation which has come to occupy an important/pivotal field in the administration of law, should not be 'publicity interest litigation' or 'private interest litigation' or 'politics interest litigation' or the 'paise-income litigation'. The Court warned that if not properly regulated to avert abuse, it becomes also a tool in unscrupulous hands to extort money, seek vendetta and wreak vengeance.

When the Executive starts functioning properly in areas of vacuum, the need for judicial activism will automatically decrease. PIL, when properly handled, is judicial action/activism. Otherwise, it may become unwanted interference.

CONCLUSION

Let me conclude by reminding you that if justice is denied to someone today and nobody protests, the day is not far off when justice will be denied to everyone. The famous words of Pastor Niemoller who lived in Nazi Germany are worth quoting :

"They first came for the communists. I did not protest because I was not a communist. They next came for the Jews. I did not protest because I was not a Jew. They next came for the Catholics. I did not protest because I was not a Catholic. Then they came for me. But by then there was none who lived to speak for me."

Shiv Khera puts it differently : *"If injustice is happening to your neighbour and you sleep, wait for your turn. You are next".* He also says - *"If you are not part of the solution, you are part of the problem."*

Let us hand in hand, start acting for the benefit of the society, to render speedy and effective justice.

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PARDON ME MR. PRESIDENT

Justice Deepak Verma
Judge, Hgih Court of M.P.

Probably this is the last resort for a convict to pray to highest constitutional authority of India – "Pardon me Mr. President". But, how it works has to be analysed so as to critically examine it from all angles and all view points.

Article 72 of the Constitution of India, gives power to President to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence as provided to in the said Article. Similarly, Article 161 grants analogous power to Governor of the State.

Articles 72 and 161 are reproduced hereinunder for ready reference:

> **Article 72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.** – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –
>
> (a) in all cases where the punishment or sentence is by a Court Martial;
>
> (b) in all cases where the punishment or sentence is for an offence against law relating to a matter to which the executive power of the Union extends;
>
> (c) in all cases where the sentence is a sentence of death.
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.
>
> (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.
>
> **Article 161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.** – The Governor of State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter of which the executive power of the State extends.

The effect of pardon or what is sometimes called a free pardon is to clear a person from all infamy and from all statutory or other disqualifications following upon conviction. It makes him as if he were a new man. To cut short a sentence

by an act of clemency is in exercise of executive power which abridges the enforcement of the judgment, but it does not alter it qua judgment. The category of cases in which such a right can be exercised by President are enumerated hereinbelow:

(a) In all cases where the punishment or sentence is by a court-martial.

(b) In all cases where the punishment or sentence is for an offence against any law relating to the matter to which the executive power of the Union extends that is, to the matters with respect to which Parliament has power to make laws.

(c) In all cases where the sentence is a sentence of death.

Bare reading of Articles 72 and 161 of the Constitution would make it clear that they give the widest powers to the President or the Governor of State, as the case may be, and there are no words of limitation indicated in either of the two Articles. Though Article 161 does not make any reference to Article 72, but the power of the Governor of a State to grant pardon etc., to some extent overlaps the same power of the President, particularly in the case of sentence of death.

The power of pardon is a part of Constitutional scheme and it should be so treated in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State and enjoys high status. The power to pardon rests on the advice tendered by Executive to the President, who subject to provisions of Article 74 (1), must act in accordance with such advice. It is open to the President in exercise of the power vested in him by the aforesaid Articles, to scrutinize the evidence on the record of the criminal case and come to a definite conclusion from that in regard to the guilt of and sentence imposed on the accused. However, in doing so, the President does not amend or modify or supersedes the judicial record. The judicial record remains intact and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under the Constitutional power that is, all which is entirely different from the judicial power and can not be regarded as an extension of it.

The power under Articles 72 and 161 extends to all offences against Law. However, the Governor would be competent to exercise the power under Article 161 only if the offence in question relates to a law to which the executive power of the State extends. Hence, the Governor can not suspend, remit or commute a sentence in an offence under Sections 489-A to 489-B IPC, because the subject matter of Currency and Bank notes is exclusively within the legislative competence of Union Legislature under Entries 86 and 93 of List 1 of the 7th Schedule.

In that case the appropriate Government competent to remit the sentence would be the Central Government and not the State Government. While exercising the Constitutional powers under the aforesaid Articles, the President

or the Governor, as the case may be, must act on the advice of the Council of Ministers.

It is also well settled that where there has been inordinate delay in disposal of the mercy petition by the President or Governor, it could be a good ground for commuting the death sentence into one of life sentence, but in case the matter is still pending in a Court of law, the question of delay would not arise. The delay that is relevant is the period after the final decision of the Court. But, this specific period of delay has not been defined. It would mean a reasonable time within which such a mercy petition is to be decided. Though the power under Article 72 is to be exercised by the President, or under Article 161 by the Governor of the State, the Court may in a case of manifest injustice entertain a petition and recommend commutation of death sentence into imprisonment for life to the President and stay the execution of death sentence until the decision of the President, even if the mercy petition has been rejected earlier by the President.

There is no right in the condemned person to insist on an oral hearing before the President or the Governor as the case may be. The proceedings before them are of executive character, and when the condemned person files his petition, it is for him to submit with it all requisite information necessary for disposal of the same. He has no right to insist on presenting oral arguments. The manner of consideration of the petition lies within the sole discretion of the President or Governor. They, of course, have the power to call for more information, if required in a given case.

The order of President cannot be subjected to judicial review on its merits, except within certain limitations. Of course, a pardon obtained by fraud, or granted by mistake or granted for improper reasons would invite judicial review. It is also well established that power of pardon cannot be exercised for political considerations or on the grounds of religion, caste, colour or political loyalty, which are totally irrelevant and inherently fraught with discrimination.

It is also settled by a judgment of the Apex Court that accused who have been convicted in a multiple murder case and all of them have been sentenced to death by a common judgment, and if one of the accused gets the relief of commutation of death sentence to life imprisonment then the other co-accused should also be granted the same benefit, if facts were identical.

Matter was once again referred to the President of India, with recommendation of the Apex Court to exercise the powers under Article 72 of the Constitution, to commute the death sentence imposed upon the accused into imprisonment for life. *AIR 1982 SC 849 (Harbans Singh vs. State of UP & Others)*.

The power under Articles 72 and 161 of the Constitution of India, is absolute and cannot be fettered by any statutory provisions, such as Sections 432, 433 or 433-A of the Code of Civil Procedure. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules.

The question whether a Governor of a particular State, in exercise of clemency powers under Article 161 of the Constitution, could grant remission to prisoners convicted by Courts outside the State concerned, but undergoing sentences in jails in the State was raised before Supreme Court in the case of *Govt. of A.P. and others v. M.T. Khan, (2004) 1 SCC 616.* It was held that only that State would be justified to consider the clemency matter, in which the accused was charged, prosecuted and finally convicted. If he has been transferred to some other jail outside the said State, where he was convicted, then the Governor of that State where he is presently lodged shall have no jurisdiction to entertain his clemency matter.

The power of the President/Governor for grant/refusal of pardon under Articiles 72 and 161 is not unbriddled but is amenable to limited judicial review. This principle has recently been reiterated by the Apex Court in *Epuru Sudhakar and another v. Govt. of A.P. and others, 2006 AIR SCW 5089.* It has been laid down that where the power is exercised by President/Governor arbitrarily or malafidely, the order can be reviewed judicially. The Apex Court in this case has, apart from other cases, also relied upon *Tata Cellular v. Union of India, (1994) 6 SCC 651* wherein it was laid down that although the Court does not have the expertise to correct the administrative decision but it can interfere when :

(a) a decision making authority exceeded its powers;

(b) the authority has committed an error of law;

(c) the authority has committed a breach of rules of natural justice;

(d) the authority has reached a decision which no reasonable tribunal would have reached; or

(e) the authority has abused its powers.

Thus it is quite clear that the President or Governor while exercising the power under Art. 72 or 161 of the Constitution, as the case may be, is required to see that the order of pardon/clemency confirms to the finer cannons of Constitutionalism and natural justice and is not mala fide or arbitrary.

I must confess that this Article has been prepared on the strength of various judgments of the Supreme Court, pronounced from time to time. It is also based on the commentary available in the Constitution of India by Jagadish Swarup and Dr. L.M. Singhvi, 2nd Edition. I also had the added advantage of going through various paper clippings and gist of some of which is also included in the same. Thus, it can not be said that this is my personal opinion.

Before saying omega, I beg to say *'Pardon me, Mr. President'.*

●

INSTITUTIONAL EXCELLENCE

Justice Deepak Misra
Judge, High Court of M.P.

It may, at a first flush, appear that the conception of institutional excellence is not a matter of basic study for a judicial officer. One may harbour the notion that individual growth, understanding of individual problems and solvation of them adhering to the established parameters of law and personal ethicality is the warranted excellence. One may also have an obsession with the idea that sacrosanctity of law and justice are safely guarded and appropriately and fittingly maintained when one performs his duties, functions and responsibilities but, unless there is institutional excellence the individual achievement though not totally barren and arid but unquestionably and undeniably, paves the path of ineffectiveness and unprofitability. The rationale of this is that an institution advances by the achievement of the individuals in a collective manner and every individual is a part of the collective. Not for nothing it has been said that individual excellence is recognised by a homogenized society if the society itself has not softened of the doors for cynicism, envy, jealousy and skepticism.

In a democratic polity like India the judiciary has a sacrosanct role. The State in its fundamental concept constitutes three wings, namely, Legislature, Judiciary and Executive. Democracy, at its very root encapsulates participation of every citizen of the country. The Apex Court in the case of *R.C. Poudyal vs. Union of India and others, (1994) Supp 1 SCC 324* has expressed the view that democracy conveys the state of affairs in which each citizen is assured of the right of equal participation in the polity. Once one understands the connotative conceptuality of a democratic set-up in a country one would realise the importance of institutional philosophy and thereby of institutional excellence. Judiciary is such a wing in the constitutional framework of the Constitution of India whose importance can never be marginalised. A judicial officer exercises judicial power on the basis of existing law for the resolution of disputes between the parties. The Magistrate who carries out the judicial functions has been regarded by Cicero a speaking law, but the law is a silent Magistrate. The Judge is required to carry out the obligation of rendering justice which is not only a divine duty but also an onerous one. The concept of justice has many a connotation. Long back Ralph Waldo Emerson had said *'one man's justice is another man's injustice'*. It is the perception from an individual angle. Possibly for this reason Justice Cardozo had said:

> "The web is tangled and obscure, shot through with a multitude of shades and colours, the skeins irregular and broken. Many hues that seem to be simple, are found, when analysed, to be a complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as

> well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded."

(Reproduced from *Delhi Administration vs. Gurdip Singh Uban and others, (2000) 7 SCC 296.*)

Abraham Lincoln talking about the concept of ultimate justice laid emphasis on patient confidence. The patient confidence has to be properly understood. It must be given its true meaning. There must be confidence in continuum in the justice dispensation system, and the people, in a way, are the sole judges of it. The passion for dispensing/delivering justice has to be cultivated in every Judge. A civilized society is founded on justice. Wherever there has been corrosion and the citizenry rights are jeopardised, every institution related to administration of justice stands near the lava of a volcano. Not for nothing Alexander Hamelton had long back announced *'I think the first duty of society is justice'.* From the aforesaid the significance of duty of justice dispensation has to be understood.

A Judge who is required to perform divine duty has to renounce pride. He should also not culture a feeling that he is proud of his humility. A pride which is nurtured because of humility is one of the ways to become proud for it nourishes and pampers egoism. Humility teaches one the art of understanding oneself and acceptance of one's own limitations. The individual pride destroys the institutional ethos and creates a concavity on the walls of the institution. It should be understood in its complete sense that the institution is not made of stonewalls but of human minds and enriched souls to deal with humanity at large who knock at the doors of the Court to vindicate their natural human rights. The Constitution of India safeguards the fundamental rights of the citizens but these rights are founded on a different bedrock. The Apex Court in *M. Nagaraj vs. Union of India, (2006) 8 SCC 212* has opined thus:

> "It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse

does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. A fundamental right is a limitation on the power of the State."

The aforesaid pronouncement lays emphasis on the fundamental value and limitations on the powers of the State. In the constitutional bedrock the judiciary is the protector of the rights of the citizens. It is, in a way value based. Hence, the importance of every member of the judiciary.

In this structure, one has to perceive the personal duty and the institutional excellence. The basic tenets of one's duty and obligations to the society at large and the role in the constitutional set-up are to be properly perceived, comprehended and discerned. The institutional values cannot be underestimated. An attempt has to be made by all concerned to make the institution untarnished, stainless and totally uncontaminated. Every judicial officer should intensively and earnestly feel that without a strong ethicality reasoned by all the members of the institution there would be onslaught on it. Therefore, to safeguard the institutional philosophy, one has to bleed for institutional excellence. Institutional excellence cannot be achieved by the thought alone. Thought must occur. The idea must take path but concretization of the said thought with sense of empathy is the need of the hour. Every Judge should abdicate lethargy, extravagance, arrogance, ostentation and take a pledge to conceive the notion to march ahead with humility of knowledge, simplicity of character, realising the fact that he has to be a keen protector of rule of law, follower of social justice and aspirer of high values and a dedicated learner. One should never forget, learning is itself an excellence that no weapon can ever destroy. Learning, especially, requisite learning for one's own field is the seed to achieve excellence. The degree of knowledge is a useful tool to meet the requirement for vocational needs. No stone should be unturned to develop the aplomb as that will rise one in his own estimation as well as in the estimation of people. In this context it is seemly to quote Justice Frank Further: *"It is the quality of justice which will establish the Court in the confidence of people and it is the confidence of the people which is the ultimate reliance of the Court."*

For acquisition of institutional excellence certain individual qualities are fundamentally imperative. A Judge should never mortgage his conscience for any reason. He should always bear in mind that he cannot escape from his responsibility inasmuch as every member of the society expects of him to show wisdom, intellectual power, sobriety and impartiality. He should also remember, as Chief justice Burger would put it 'Good sense make good law'. These qualities improve his competence, conduct and productivity. A Judge has to have an institutional philosophy and certain other qualities than the understanding of

law. He has to have an acute observation, study of history and literature, analysis of cause and effect and, above all cultivation of spirit of fairness. A member of the judiciary should never conceive an idea that he is immune from criticism. Felix Frankfurter had once said.

> "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities."

As long as this is not forgotten, there would irrefragably be institutional excellence.

Excellence cannot be a matter of knowledge. One must endeavour to achieve it and to employ it in the working sphere. It is not expected to be a duty. It has to take the norm of habit. It should not be of a sporadic character but must be reared as a life long possession.

It should be borne in mind that in order to achieve excellence in the institutional sphere, one must garner courage and spread ideology of courage by one's own conduct. Courage, as has been said, is the mother of all virtues. Courage should not be confused with unnecessary and unwarranted boldness. The edifice of courage must be built on morality accepted by the society, recognised by norms of universal ethicality and pyramided in the conceptual paradigm of synthesis of law and mercy. An endeavour has to be made to bring together the systemic thoughts as the collective would perceive as an exemplary phenomena. In the realisation of excellence there should not be airy views, opinionated attitudes, a-priori assumptions but well thought out resuscitation of conduct, understanding and acceptance of limitations, appreciation of the guidance of the past without being totally obsessed with it and posterior dissection by the analysis of facts based data with the characterised aspirations to move on the path of correction, rectification and curative measures. Excellence, be it noted is not super personal but an amalgam of personal aspiration and expectation of collective postulates. It should be a synthesis of value of judgments and evaluation of one's conduct and the behavioural pattern of the judiciary. All attempts are to be made to avoid conflicts, controversies, misapprehensions of the situation and comprehend things with genuine scientific temper and prudent reason.

Excellence should not be understood at a superficial level. It should partake as an insegregable facet of character. One should remember that one may not be the master of his destiny but can always be the master of his character. The circumstances cannot be taken recourse to plead excuses or subterfuses. Law has its own logic. Ethicality has its own attribute, charisma, grace and, above all, the acceptance of the milieu. It is imperative on the part of every judicial

officer to remember that he has to meet the legitimate expectations of the society and act on the base of *'legal standards, possibilities and constraints'*. The 21st century has many a challenges before the judicial officers. Apart from the emergence of new laws such as law relating to prenatal diagnostic techniques, intellectual property rights, information technology, protection of juveniles, legal mediation, banking laws, laws relating to various facets which have nexus with globalisation of economy have to be dealt with. Alternative dispute resolution mechanisms cannot be kept at bay. They are the mandates of the statute. Personal whims, fancies, ideas of thought cannot be allowed to have the play in these spheres. It has become a part of the system and has come to stay. The law is changing its contour and one has to accept is for the purpose of institutional excellence. In this context I may refer with profit what Karl Llewellyn has said:

> "What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential, disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law... This doing something about disputes, this doing of it reasonably, is the business of law."

Thus, the new concepts are to be embraced as a part of training for excellence. Excellence does not repel criticism. It cannot frown at it. It should appreciate the same on the parameters of accountability.

In *D.C. Saxena and Dr. D.S. Saxena vs. Hon'ble the Chief Justice of India, AIR 1996 SC 2481,* the Supreme Court of India expressed its views in the following lines:

> ".... administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office, i.e., to defend and uphold the Constitution and the laws without fear and favour. Thus the Judges must do, in the light given to them to determine, what is right."
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> Further it has been observed:
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> "Law is not in any doubt that in a free democracy everybody is entitled to express his honest opinion about the correctness or legality of a judgement or sentence or an order of a court but he should not overstep the bounce. Though he is entitled to express that criticism objectively and with detachment in a language dignified and respectful tone with moderation, the liberty of expression should not be a license to violently make a personal attack on a Judge.

> Subject to that, an honest criticism of the administration of justice is welcome since justice is not a cloistered virtue and is entitled to respectful scrutiny. Any citizen is entitled to express his honest opinion about the correctness of judgment, order and sentence with dignified and moderate language pointing out the error or defect or illegality in the judgment, order of sentence. That is after the event as postmortem."

Personality building is a part of excellence. A Judge to be an insegregable part of the institution must have manifold qualities like independence, courtesy, patience, dignity, open mindness, impartiality, thoroughness and decisiveness. He is required to have the sagacity, far sight and a broad ideological philosophy. In fact, a Judge should have "inordinate patience" as Brennan, J. would kike to put it. Holmes, J. had once said that Judge should be a "Combination of Justinian, Jesus Christ and John Marshall." Maimonides has laid down that wisdom, humility, fear of God, disdain for money, love for truth, love of fellowmen, good reputation are the qualifications for a Judge. In *C. Ravichandra Iyer vs. Justice A.M. Bhattacharjee, (1995) 5 SCC 457* the Apex Court has expressed the opinion that Judicial office is essentially a public trust. Society, is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the Court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected to a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the Court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a laymen and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standards in the society.

In conclusion, be it remembered that one should never feel that he is taught and preached philosophy in abstraction. No one has ever suffered from abstractitis being enriched by institutional and systemic philosophy, for philosophy, as has been said, is the infrastructure of science and ripened relationship between idea and the action lead to institutional excellence. Let everyone promise to have it, for in it lies the universe of justice.

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MARSHALLING AND APPRECIATION OF EVIDENCE

(Concluding Part)

Ved Prakash
Director

In the previous part (October 2006) I attempted to deal with various issues relating to appreciation of ocular testimony. In this last and concluding part of the Article, I propose to deal with following three specific issues relating to appreciation of evidence, which are of recurring importance:

(i) First information report,

(ii) Statement recorded u/s 161 Cr.P.C., and

(iii) Injuries of the accused.

FIRST INFORMATION REPORT

First Information Report recorded u/s 154 Cr.P.C. happens to be the earliest version brought to the notice of police regarding commission of a cognizable offence. It has two fold objectives - Firstly, to obtain early information of the alleged criminal activity and to record the circumstances before forgotten or embellished and; secondly, to put the criminal law into the motion.(See : *Wilayat Khan v. State of U.P., AIR, 1953 SC 122*).

Being the First Information regarding a cognizable offence, FIR must be clear and complete. A Cryptic and anonymous telephonic message not clearly specifying cognizable offence cannot be treated as first information report and the mere fact that the information was the first in point of time does not by itself clothe it with the character of first information report. The question whether or not a particular report constitutes first information report has to be determined on the basis of relevant facts and circumstances of each case (See : *Tapinder Singh v. State of Punjab, AIR 1970 SC 1566*)

FIR happens to be an integral part of evidence in every criminal trial. It may be by a person who is the victim, an eyewitness or even by a person who might have heard about the incident and is not a witness because Section 154 Cr.P.C. does not require that the report must be given by a person who has personal knowledge of the incident reported. The Section speaks of an information relating to the commission of a cognizable offence given to an Officer-in-Charge of a police station(See : *Hallu v. State of Madhya Pradesh, AIR 1974 SC 1936*).

The issue relating to appreciation of FIR can be examined from the following main prospectives:

Firstly, contents of FIR.

Secondly, nature and use of FIR?

Thirdly, effect of delay in lodging FIR.

CONTENTS

It has been repeatedly said that FIR is not an encyclopaedia and account of everything that had happened is not required to be given in it (See : *Bhopat Singh Kishan Singh v. State of Maharashtra, AIR 1973 SC 446 & CBI and others v. Tapan Kumar Singh, (2003) 6 SCC 175.*

Elaborating this legal position, the Apex Court held in *Baldev Singh v. State of Punjab, AIR 1996 SC 372* that only the essential or broad picture need be stated in the FIR and all minute details need not be mentioned therein. It is not as if it were an "encyclopaedia" of the occurrence. It may not be even necessary to catalogue the overt acts therein. Non-mentioning of some facts or vague reference to some others is not fatal. In *Rattan Singh v. State of H.P., (1997) 1 Supreme (Cr.) 4* it was observed that Criminal Courts should not be fastidious with mere omissions in first information statement, since such statements cannot be expected to be a chronicle of every detail of what happened, nor to contain an exhaustive catalogue of the events which took place. The person who furnishes first information to authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing therefrom. Some may miss even important details in a narration.

NATURE AND USE

FIR is not a substantive piece of evidence. As held in *Shankar v. State of U.P., AIR 1975 SC 757* unless a First Information Report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act, such as a dying declaration falling under S.32 (1) as to the cause of the informant's death, or as part of the informant's conduct under Section 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting its author, respectively under Sections 157, 145 and 155, Evidence Act, subject to the condition that he/she has been examined. Clearly enough, it cannot be used to corroborate, contradict or discard the evidence of any other witness.

In *George v. State of Kerala, AIR 1998 SC 1376* where trial Court used the FIR for discarding the evidence of PW-3 and PW-4, who were not the informant, the Apex Court held that it was legally impermissible. Likewise in *Hasib v. State of Bihar, AIR 1972 SC 283* use of FIR to corroborate a witness, who was not its author, was held to be wrong.

USE AGAINST ACCUSED

As an FIR can be used only to contradict its maker as provided in Section 145 of the Evidence Act or to corroborate him as envisaged in Section 157 of the Evidence Act, it cannot be used against the accused when he happens to be the person at whose instance it was recorded unless he offers himself to be examined as a witness (See : *Nisar Ali v. State of U.P., AIR 1957 SC 366*)

In *Faddi v. State of Madhya Pradesh, (1964) 6 SCR 312* it has been held by the Apex Court that if the FIR given by the accused contains any admission as defined in Section 17 of the Evidence Act, then there is no bar in using such admission against the maker thereof u/s 21 of the Evidence Act provided it is not inculpatory in nature. In *Aghnoo Nagesia v. State of Bihar, (1966) 1 SCR 134* it was further pointed out that where it is difficult to separate the exculpatory portion then the whole report has to be excluded. The legal position has been precisely put in very clear terms in *Bandlamuddi Atchuta Ramaiah v. State of Andhra Pradesh, 1996 Cr.L.J.4463.* The Apex Court after elaborate consideration of various authorities has summed up the legal position in this respect as under :

> "A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against any accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under S. 21 of the Evidence Act against its maker alone unless the admission does not amount to confession."

DELAY

No doubt the promptness in lodging FIR justifies the inference that the report was not a concocted story but as pointed out in *Amar Singh v. Balwinder Singh & ors., (2003) 2 SCC 518* there is no hard and fast rule that delay in lodging the FIR would automatically render the prosecution case doubtful. It was expressed by Their Lordships that it necessarily depends upon facts and circumsances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR. In this connection observations made in *Tara Singh v. State of Punjab, 1991 Supp. (1) SCC 536* are noticeable wherein it has been held that 'knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. .....unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay'.

The Apex Court considering the question as to what can be treated as delay, observed in *Apren Joseph alias Current Kunjukunju v. State of Kerala, AIR 1973 SC 1* that no duration of time in the abstract can be fixed as reasonable for giving information of crime to the police. The question of reasonable time is a matter for determination by the Court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution.

In *Lalai alias Dindoo v. State of U.P., AIR 1974 SC 2118* delay of 12 hours in lodging the first information report, which was reasonably explained, was held to be of no consequence. Again in *Harpal Singh v. State of Himachal Pradesh, AIR 1981 SC 361* delay of 10 days in lodging FIR, which was reasonably explained by the prosecuterix by stating that as honour of the family was involved its members had to decide whether to take the matter to the Court or not (case of rape), was held not to be fatal.

STATEMENT UNDER SECTION 161 CR.P.C.

Statement recorded by police during investigation of a case u/s 161 Cr.P.C. can be used for the limited purposes outlined in Section 162 (1). These provisions do clearly indicate that such statement can never be used for the purpose of corroboration, be it a prosecution witness, defence witness or a Court witness. Regarding probative value of the evidence of a witness following issues are commonly raised before Courts with reference to Sections 161 and 162 of the Code:

(i) Delay in recording statement u/s 161 Cr.P.C.

(ii) Non-recording of statement u/s 161 Cr.P.C.

(iii) Obtaining signature of witness on the statement u/s 161 Cr.P.C.

(iv) Evidential value of spot map vis-à-vis Section 161 Cr.P.C.

DELAY

Considering the effect of delay in examining a witness u/s 161 Cr.P.C. it has been held in *Ranveer v. State of Punjab, AIR 1973 SC 1409* that delay is material only if it is indicative or suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. Hence, the investigating officer should be asked specifically about the delay and the reasons therefor. In *Bantu @ Guddu v. State of M.P., (2004) 1 SCC 414* Their Lordships of the Supreme Court have ordained that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable

and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

In *Nanhku Singh v. State of Bihar, AIR 1973 SC 491* statement of the star witness was recorded after about 12 days of the incident. Defence challenged his testimony on this ground. The prosecution came out with the explanation that statement could not be recorded immediately because the witness was in pain and could not speak, which was not challenged by the defence, therefore, the statement was found to be acceptable.

NON-RECORDING

Non-recording of statement of a witness u/s 161 Cr.P.C. cannot by itself be a ground to throw away his testimony because Section 231 relating to trial before a Court of Session and Section 242 (2) relating to warrant trial nowhere provide that only those witnesses shall be examined as prosecution witnesses whose statements have been recorded u/s 161 Cr.P.C. The issue was considered by a Division Bench of Allhabad High Court in *Ram Achal v. State of U.P., 1996 Cr.L.J. 111 (All).* In this case the star witness Ramu, who remained hospitalized for about a month was not examined by the Investigating Officer u/s 161. Later on he was produced as a prosecution witness and was examined with the permission of the Court. The testimony of Ramu was challenged on the ground that his statement has not been recorded u/s 161 Cr.P.C. Rejecting the plea, the Court held that right of the prosecution extends to the production of such persons as witnesses whose statements have not been recorded u/s 161 Cr.P.C.

OBTAINING SIGNATURE

Though Section 162 Cr.P.C. unequivocally mandates against obtaining signature of the witness on a statement recorded u/s 161 but then violation of this mandate is perceptible in a number of cases. The practice of getting witnesses sign their statements has been deprecated in no uncertain terms by the Apex Court and it has been held that violation of this mandate may sometimes diminish the value of testimony of a witness when he has been examined in the Court. (See - *Narpat Singh v. State of Haryana, AIR 1977 SC 1066)* However, in *Gurunam Kaur v. Baxi Singh, AIR 1981 SC 631* the Apex Court has made it clear that it cannot be taken as self evident that whenever I.O. takes the signature of a witness, it must be presumed that the witness was not considered reliable by the police. The Apex Court held that it is a question of fact to be determined in the light of the circumstances of each case. Obtaining the signature of a witness by police does not render his evidence inadmissible but puts the Court on caution and may require in-depth scrutiny of the evidence. However, the evidence of such witness cannot be outrightly rejected on this account because Section 162 of the Code does not provide that evidence of a witness given in Court becomes inadmissible if it is found that the statemei t of the witness recorded during investigation was signed by him at the instance of I.O. (See- *State of U.P. v. N.K. Anthony, AIR 1985 SC 48)*

SPOT MAP

The legal position regarding spot map has clearly been explained by the Apex Court in *Tori Singh v. State of U.P., AIR 1962 SC 399 (3 Judge Bench).* In this case it has been laid down that the sketch map would be admissible so far as it indicates all that the I.O. saw himself at the spot. However, any mark or indication put on the sketch map based on the statements made by the witnesses to the I.O. while preparing the map would be inadmissible in view of the clear prohibition of Section 162 Cr.P.C. because it will not be more than a statement made to the police during investigation. Referring to the pronouncement made in *Santa Singh v. State of Punjab, AIR 1956 SC 526,* it was further pointed out that a plan drawn to scale by a draftsman, in which after ascertaining from the witnesses where exactly the assailants and the victims stood at the time of commission of offence the draftsman put down the places in the map, would be admissible if the witnesses corroborated the sketch of draftsman and would not be hit u/s 162 of the Code.

INJURIES ON THE PERSON OF THE ACCUSED, EXPLANATION OF

For long it has been a debatable issue as to what extent prosecution is under an obligation to explain the injuries found on the person of the accused and what may be the effect of non-explanation of such injuries. Whether entire prosecution version can be doubted because of this lapse?

Few questions which have time and again cropped up in this respect are– whether as a rule of law prosecution is required to explain the injuries found on the person of the accused and non-explanation thereof renders the prosecution case doubtful? whether prosecution is under an obligation to explain only those injuries which are of serious nature and not otherwise? whether non-explanation of injuries either of minor or serious nature will require rejection of prosecution case even if the same is established by clear, cogent and trustworthy evidence.

Whereas it is settled by a catena of decisions that prosecution is not required to explain minor or superficial injuries found on the person of the accused; there happens to be some confusion regarding explanation of serious injuries. In *Jagdish v. State of Rajasthan, AIR 1979 SC 1010* it was held that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it is obligatory for prosecution to satisfy the Court as to the circumstances under which the occurrence originated, provided, it is established that such injuries are caused at the time of occurrence in question. In *Laxmi Singh v. State of Bihar, AIR 1976 SC 2263* it was held that non-explanation of the injuries on the accused may assume great importance where the evidence consist of interested or inimical witness or where the defence gives the version which competes with that of prosecution. In *Laxmi Singh's case* (supra) it was observed that where the prosecution fails to explain the injuries on the accused,

two results follow - that evidence of the prosecution witness is untrue; and that the injuries probabalize the plea taken by the accused.

It was further observed that in such a situation the Court can draw the following inferences :

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused, the same assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

On the contrary it *Hare Krishna Singh v. State of Bihar, AIR 1988 SC 863* where a bullet injury found on the arm of the accused was not explained by the prosecution, the Court held that in view of the clear, cogent and trustworthy evidence led by the prosecution, non-explanation of the bullet injury found on the person of the accused is inconsequential.

These two divergent views expressed by Division Benches of co-ordinate strength (DB) were considered by a Larger Bench (3 Judge) of the Apex Court in *Ram Sunder Yadav v. State of Bihar, AIR 1998 SC 3117.* It was held therein that the position of law is squarely covered by an earlier 3-Judge Bench pronouncement in *Baba Nanda Sarma v. State of Assam, AIR 1977 SC 2252* wherein it had been held that the prosecution is not obliged to explain the injuries on the person of the accused in all cases and in all circumstances and it is not the law.

From the aforesaid, as well as from the latest pronouncement of the Apex Court in *Shriram v. State of M.P., 2004 (1) JLJ 252 (SC)* the legal position is clear that prosecution is not required to explain the injuries which are of minor or superficial nature. The injuries which are of serious nature and sustained by the accused in the same incident have to be explained and non-explanation may effect the prosecution case unless the prosecution case is established by clear, cogent and trustworthy evidence in which situation even non-explanation of serious injuries may be inconsequential as was in the case of *Hare Krishna Singh* (supra).

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of June, 2006. The Institute has received articles from various districts. Articles regarding topic no. 1, 2, 3 & 4 respectively, received from Chhindwara, Ratlam, Indore & Shajapur, are being included in this issue. An article relating to topic no. 4 received from Guna is also being published. As we have not received worth publishing article regarding topic no. 5, it shall be sent in future to other group of districts for discussion.

1. Explain the legal position regarding revival of interim orders passed before dismissal in a suit after its restoration?

   वाद के पुनर्स्थापन पर ऐसे वाद के निरस्त होने के पूर्व उसमें पारित अंतरिम आदेशों के पुनः प्रभावी होने विषयक विधिक स्थिति का स्वरूप क्या है ?

2. Explain the legal position regarding financier's authority to take possession of hypothecated goods under hire purchase agreement?

   अवक्रय संविदा के अन्तर्गत आडमानित संपत्ति का आधिपत्य प्राप्त करने विषयक; ऋणदाता के अधिकार का स्वरूप एवं विस्तार क्या है ?

3. Whether counter claim provided under O. 8 R. 6-A CPC is limited only to the disputes in respect of a pecuniary claim?

   आदेश 8 नियम 6–ए व्यवहार प्रक्रिया संहिता में प्रावधित प्रतिदावा क्या केवल धन संबंधी दावों तक सीमित है ?

4. Explain the legal position regarding admissibility of secondary evidence where primary evidence (original document) is inadmissible u/s 35 of the Indian Stamp Act, 1899?

   स्टाम्प अधिनियम, 1899 की धारा 35 के अन्तर्गत प्रारम्भिक साक्ष्य (मूल प्रलेख) की अग्राह्यता की दशा में द्वितीयक साक्ष्य की ग्राह्यता विषयक विधिक स्थिति का स्वरूप क्या है?

5. What is the legal position regarding acquisition of ownership over agricultural land by adverse possession?

   कृषि भूमि पर विरोधी आधिपत्य के आधार पर स्वत्व अर्जन विषयक विधिक स्थिति का स्वरूप क्या है?

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THE LEGAL POSITION REGARDING REVIVAL OF INTERIM ORDERS PASSED BEFORE DISMISSAL IN A SUIT AFTER ITS RESTORATION

Judicial Officers
District Chhindwara

Often the problem arises as to what would be the legal position regarding revival of interim orders passed before dismissal in a suit after its restoration. When we look into the past, as early as in the year of 1887 (when Civil Procedure Code, 1859 was in existence), the Allahabad High Court in the case of *Chuni Kuer v. Dwarka Prasad, 1887 All. W.N. 297* held that, "temporary injunction came to an end on the passing of the decree, and nothing has happened to revive or keep alive the order for the temporary injunction". The Hon'ble Court also observed that, "Dwarka Prasad was not left without his remedy. He might have applied to this court for an injunction pending the determination of his appeal. No such application has been made to this Court and therefore, I am of opinion that Musammat Chunni Kuer was and is entitled to have the money paid out of Court to her and to have this appeal allowed with costs."

Again, in the year of 1888, Hon'ble Allahabad High Court reiterated this principle with approval in the case of *Ramchand v. Pitammal, (1888) I.L.R. 10 All. 506.*

But if we go through a decision passed by the Madras High Court in the case of *Sarantha Ayyangar v. Muthiah Moopanar and ors., reported in AIR 1934 Mad. 49,* we see that Hon'ble Court has held that on restoration of the suit dismissed for default, all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. Again the Madras High Court in its Full Bench judgment in the case of *T. Veeraswamy v. P. Ramanna and ors., AIR 1935 Mad. 365* held that even an order of attachment before judgment would automatically revive on restoration of a suit.

On the contrary, in the case of *Abdul Hamid v. Karim Bux and ors., reported in AIR 1973 All. 67 (F.B.),* it has been held that on the dismissal of the suit in default, attachment before judgment automatically ceases and does not revive on the restoration of the suit. Again same view has been taken in the case of *Nagar Mahapalika v. Ved Prakash,* reported in *AIR 1976 All. 264* wherein the Allahabad High Court observed that interim injunction came to an end on dismissal of the suit for default and it would not automatically revive on restoration.

In between these controversies, if we go through a landmark decision of Patna High Court in the case of *Bankim Chandra v. Chandi Prasad,* reported in *AIR 1956 Pat. 271,* the Patna High Court held that order of stay pending disposal of the suit are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit and therefore, when the suit dismissed for default is restored by the order of the Court, all ancillary orders passed in the suit shall revive unless there is any other factor on record or in the order of dismissal to show to the contrary (emphasis supplied).

This decision is an authority for the proposition that the Code of Civil Procedure, 1908 lays down two different schemes; one in relation to the ancillary orders which would aid and supplement the decision arrived at in the main suit or appeal the other one which may not have to do anything therewith.

Again in the case of *Shivray v. Sharnappa,* reported in *AIR 1968 Mys. 283,* the principle laid down in *Bankim Chandra's* case (supra) was followed and it was held that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the Court dismisses the suit for default without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However if the Court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders.

In the case of *Nandipati Ram Reddy v. Nandipati Padma Reddy, AIR 1978 AP 30,* it has been held by the Division Bench of the Andhra Pradesh High Court that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived and once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated when the Court dismissed the suit for default.

After that in the case of *Kanchan Bai v. Ketsidas and others, AIR 1991 Raj. 94,* it was held by the Rajasthan High Court that interlocutory orders which are meant to aid and supplement the ultimate decision arrived at in the main suit or appeal would be ancillary orders and such orders would stand revived automatically on the restoration of the suit.

Finally the controversy has been set at rest by the Apex Court in its landmark judgment (3 Judges Bench) in the case of *Vareed Jacob v. Sosamma Geeverghese and ors.* reported in *AIR 2004 SC 3992.*

If we go through the facts and circumstances of this case, we find that a suit for partition was filed in the Munsiff Court, Kottarakara and was registered as suit No. 332/1122 (NE) in which final decree was passed on 21st May, 1964. Under the decree, defendant No. 6 (since deceased) was granted recovery of items 10-16. Defendant No. 6 died after the decree. The third defendant in the said suit [No. 332/1122 (NE)] in turn filed suit No. 209 of 1969 on 25th June, 1969 against defendant No. 6 (decree holder) and others for setting aside the decree dated 21st May, 1964 in suit No. 332/1122 (NE). On 25th June, 1969 the Court passed an order of temporary injunction restraining the decree holder from executing the decree dated 21st May, 1964. The suit No. 209 of 1969 filed by the third defendant was dismissed for default. Thereafter application was moved for restoration of suit No. 209 of 1969 and that suit was ultimately restored on 20th December, 1974. However, ultimately on merits, suit No. 209 of 1969 was dismissed on 21st March, 1975. The above facts show that the decree holder was prevented from executing the decree dated 21st May, 1964 in suit No. 332/1122 (NE) during the period 25th June, 1969 upto 21st March, 1975

when suit No. 209 of 1969 was pending and ultimately dismissed on merits. Further, against the dismissal of the suit No. 209 of 1969 the matter was taken in appeal before the first Appellate Court which also dismissed the appeal of the plaintiff in suit No. 209 of 1969. Being aggrieved, the plaintiff in suit No. 209/69 carried the matter in appeal before the High Court, which was finally dismissed on 11th June, 1979. In other words, the decree in suit No. 332/1122 (NE) could not be executed during the period from 25th June, 1969 upto 11th July, 1979. On 18th March, 1981, execution petition was filed and the decree dated 25th June, 1964 in suit No. 332/1122 (NE) was put in execution to which the judgment debtor (the petitioner herein) objected on the ground that the execution petition was barred by limitation as it was not filed within 12 years from the date of decree, i.e. 21st May, 1964. The executing Court as also the High Court in revision held that the decree holder in suit No. 332/1122 (NE) was precluded from executing the decree during the period from 25th June, 1969 to 21st March, 1975 when the suit No. 209 of 1969 filed by the judgment debtor came to be finally dismissed on merits and if that period was excluded, the execution petition was well within the time. Being aggrieved by the decision of the High Court dated 25th July, 2001, in Civil Revision Petition (CP) No. 2003 of 1998 (B), the judgment debtor approached Hon'ble the Supreme Court by way of special leave petition under Article 136 of the Constitution of India.

In this Civil revision petition the petitioner contended that the suit No. 209 of 1969 was dismissed for default on 2nd April, 1973. That, during the pendency of the suit an order of temporary injunction was passed on 25th June, 1969. But on dismissal of the suit on 2nd April, 1973 the order of temporary injunction came to an end and that order did not revive even after restoration of that suit on 20th December, 1974 and consequently nothing prevented the decree holder from executing the decree dated 21st May, 1964 after restoration of the suit No. 209 of 1969. Per contra, it was argued on behalf of the respondent that on the restoration of the suit dismissed for default, all ancillary orders passed therin stood automatically revived and when the dismissed suit No. 209 of 1969 came to be restored, the order of temporary injunction dated 25th June, 1969 too stood revived and consequently the decree-holder could not have executed the decree.

Hon'ble the Supreme Court per majority held that on restoration of suit which was dismissed in default, revival of the order passed for temporary injunction is automatic and therefore, decree-holder is prevented from executing the decree and consequently, the appeal was dismissed by the Apex Court.

So the gist of the matter is that on restoration of the suit dismissed in default, all interlocutory order which are in the nature of ancillary orders passed before the dismissal of the suit would stand revived alongwith the suit when the dismissal is set aside and the suit is restored, unless the Court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration of the suit.

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FINANCIER'S AUTHORITY TO TAKE POSSESSION OF HYPOTHECATED GOODS UNDER THE HIRE PURCHASE AGREEMENT

Judicial Officers
District Ratlam

"Rin Kritwa Ghrit Piwa" i.e. enjoy the life on loans. This old Sanskrit saying has become true with the advent of increasing loan facilities from the Banking and Non-Banking Financial Institutions. Now-a-days everything ranging from a microwave oven to expensive four vehicles are available on easy instalments. Hire Purchase Act, 1972 passed by the Parliament to govern the hire purchase agreements by the Act is still inoperative.

In a hire purchase agreement there are three parties concerned, firstly the financier who purchases the goods, secondly the dealer from whom the goods are purchased and thirdly the hirer for whose use the goods are purchased. Thus a hire purchase agreement consists of financier, dealer and the hirer who holds the goods on behalf of the financier. The hirer enjoys the goods on monthly or periodical instalments as agreed in the hire purchase agreement but he is not the absolute owner unless and until he pays the last and final instalment of the hire purchase price. Meanwhile the goods remain hypothecated with the financier. In some cases the hirer fails to pay the instalments as per the hire purchase agreement and a dispute arises. Now the question arises is, whether the financier has the authority to take back the possession of the goods.

In order to secure their rights the financiers usually add a clause in the hire purchase agreement that in the event of default of payment of EMI i.e. equated monthly instalments, the financier will have power to take possession of the hypothecated goods. In several cases the authority of the financier to take possession of the goods was challenged and criminal cases against financiers were instituted. In *Damodar Valley Corporation v. State of Bihar, AIR 1962 page 440* and *Instalment Supply Private Limited v. Union of India, AIR 1962 SC 53,* Hon'ble the Supreme Court has held that the sale of goods under the hire purchase agreement is complete only when the hirer has paid the complete price of the goods as per the agreement. In other words, the sale is complete only when the hirer pays the total price of the goods in compliance of the terms and conditions of the hire purchase agreement.

In *Sundaram Finance v. State of Kerala, AIR 1966 S.C. page 1178* the hire purchase agreement has been discussed at length and it was held that the financier has the authority to seize the goods if the hirer fails to comply with the terms and conditions of the hire purchase agreement. In *Sardar Trilok Singh v. Satyadev Tripathi, (1979) 4 SCC 396,* Hon'ble the Supreme Court has held that taking possession back of the truck by the financier does not amount to any crime if the hirer has failed to pay the instalments of the price of the truck. In a leading pronouncement in *K.A. Mathai alias Babu v. Kora Bibikutty, (1996) 7 SCC 212,* it has been held by Hon'ble the Supreme Court that taking possession of the goods by the financier does not amount to any crime because this sort of agreement i.e. the

hire purchase contract is an executory agreement and does not confer any right in rem to the hirer unless the conditions of transfer of property are completed.

Similar view has been expressed in *Charan Singh Chaddha v. Sudhir Mehra, (2001) 7 SCC 417.* In this case the appellant was running a financial institute in the name of M/s Deluxe Leasing Limited and the respondent had purchased a truck under hire purchase agreement but the hirer failed to pay the arrears of the instalments of the hire purchase price. Consequently the possession of the truck was taken back by the appellant. The respondent filed a complaint against the appellant that the respondent has stolen his truck. But relying on *K.A. Mathai alias Babu's case* (supra) it was held that taking back possession of the truck due to failure to comply with the conditions of the hire purchase agreement does not amount to any crime.

Similarly in *Lalit Mittal v. Awdhesh Gupta, 2005 (4) MPLJ 154,* the financier took away the possession of the vehicle because the hirer failed to pay the instalments of the hire purchase price and in the result the financier took away the possession of the vehicle. Again relying on *K.A. Mathai's case* (supra), Hon'ble M.P. High Court held that this sort of dispute is of civil nature and the financier has the authority to take the possession of the goods if the hirer fails to pay the price of the goods.

In *Mohan Singh Rathore v. State of M.P., MPLJ 2006 (Vol I) page 271,* it has been again held by Hon'ble the High Court of Madhya Pradesh that if the possession of the vehicle is taken by the financier in accordance with the terms and conditions of the hire purchase agreement, the act does not amount to a criminal offence. In this case ICICI Ltd. had financed a Bajaj Calibre Motorcycle to one Anjum Jamal who failed to pay the instalments of the motorcycle and consequently the Ware Housers M/s Doon Motors took away the possession of the motorcycle. Anjum Jamal lodged an FIR that his motorcycle was stolen away from Habibganj Hospital. Chargesheet was filed against the employees of Doon Motors. But relying on *K.A. Mathai alias Babu's case* (supra), it was held that if the possession of the vehicle is taken as per the terms of the hire purchase agreement, the act does not amount to a criminal offence. In the result the proceedings of the criminal case were quashed.

Therefore, in view of the above legal position, it can be stated that the financier has a limited right to take the possession of the hypothicated goods if the hirer fails to comply with the conditions of the hire purchase agreement. It can be therefore concluded that the financier has the authority to take back the possession of the hire purchased goods from the hirer in the event if there is a stipulation to this effect in the hire purchase agreement and the hirer fails to pay the monthly or periodical instalments.

INSTITUTIONAL NOTE :

Notification dated 30.04.1973 notified 01.06.1973 as date of enforcement of Hire Purchase Act but by way of subsequent notification dated 31.05.1973 this earlier notification was rescinded and 1st September, 1973 was notified as date of enforcement. However, by way of another notification dated 30.08.1973, this subsequent notification was also rescinded. Therefore, presently it is clear that the Hire Purchase Act has not been brought into force.

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WHETHER COUNTER CLAIM PROVIDED UNDER ORDER VIII RULE 6-A C.P.C IS LIMITED TO THE DISPUTES IN RESPECT OF A PECUNIARY CLAIM

Judicial Officers
District Indore

Amendment Act of 1976 in Civil Prcedure Code, which has conferred a statutory right on a defendant to file a counter claim, contemplates three modes of setting up a counter claim in a civil suit. Firstly, the written statement filed under Order VIII C.P.C. may itself contain a counter claim which in the light of Rule 1 read with Rule 6-A would be a counter claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Second and third modes, respectively, are by way of amending written statement under Order VI Rule 17 and by way of a subsequent pleading under Order VIII Rule 9. Counter claim under the latter two modes, though referable to Rule 6-A of Order VIII, cannot be brought on record as of right but shall be governed by the discretion vested in the Court. Right to plead by way of counter claim under Order VIII Rule 6-A runs with the right of filing a written statement and such a right is in addition to the right of pleading a set-off conferred by Order VIII Rule 6. So the counter claim must necessarily find its place in the written statement. (See: *Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508*).

As the provisions of Order VIII Rule 6 C.P.C. pertain to the set-off claimed by the defendant in a suit for the recovery of money and the provision relating to counter claim by defendant in a suit finds place just after Order VIII Rule 6 C.P.C., the question is raised whether a counter claim is limited to the disputes in respect of a pecuniary claim?

A perusal of Order VIII Rule 6-A clearly indicates that a counter claim can be only in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired provided such counter claim does not exceed the pecuniary limits of the jurisdiction of the court. The basic rule is that the cause of action must have accrued within the limitation provided in Order VIII Rule 6-A C.P.C. (See : *Mahendra Kumar and another v. State of M.P. and others, AIR 1987 SC 1395 and Smt. Shanit Ranidas Dewanjee v. Dinesh Chandra Dey (dead) by LRs, AIR 1997 SC 3985*).

The object behind the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings and to save upon the court's time as also to exclude the inconvenience to the parties by enabling the defendant to put a claim so that all disputes between the parties may be decided in the course

of the same proceedings. The opening words, "where in a suit for the recovery of money" in Rule 6 and "a defendant in a suit" in Rule 6-A of Order VIII make the obvious distinction that whereas Rule 6 deals with only money suits, Rule 6-A deals with all kinds of suits. Rule 6-A is, therefore, not confined to money suits only. The object of enacting Rule 6-A is to reduce pendency of cases so that cause of action and cross claims can be clubbed together and disposed of by a common judgment.

In *Smt. Shivkali Bai v. Smt. Meera Devi, 1990 MPJR 412* it has been held that a cross suit is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. It need not be an action of the same nature as the original action or even analogous thereto, even though the claim has to be one entertainable by the Court. It was further held that the counter claim is not restricted to money suits only as a counter claim is substantially a cross suit.

Again in *Kavindra Jain v. Amrit Lal, AIR 1992 MP 131,* the Court observed that a plain reading of the language of Rule 6-A of Order VIII C.P.C makes it abundantly clear that a defendant has been given a right to set up any right or claim in respect of a cause of action accruing to the defendant against the plaintiff by way of a counter claim and such a counter claim can be made by the defendant on a cause of action which may have accrued either before or after filing the suit. However, such a counter claim can be made before delivery of the defence of the defendant or before the expiry of the time limited for delivering his defence. Sub-rule (2) of Rule 6-A of Order VIII C.P.C further provides that such counter claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit both on the original claim and on the counter claim and under sub-rule (3) of Rule 6-A a right has, therefore, been given to the plaintiff to file a written statement in answer to the counter claim of the defendant. In sub-rule (4), it has further been provided that the counter claim shall be treated as a plaint and governed by the rules applicable to the plaints. Thus it is clear that Rule 6-A introduced in C.P.C. by way of the amendment Act of 1976 has been brought especially with an intention to avoid multiplicity of the suits. Hon'ble the High Court has made it clear that the counter claim is not restricted to money suits only.

In *Gurbachan Singh v. Bhag Singh and others, AIR 1996 SC 1087,* the Apex Court held that by virtue of Order VIII Rule 6-A of C.P.C, in a suit for injunction the counter claim for possession can also be entertained. In *Jagmohan Chawla and another v. Dera Radhaswami Satsang and others, AIR 1996 SC 2222,* the Apex Court has put the legal position in quite clear terms by observing that the counter claim could be treated as a cross suit and it could be decided in the same suit without relegating the parties to a fresh suit. It is true that in money

suits, decree must be conformable to Order XX Rule 18 but the object of the amendments introduced by Rule 6-A to 6-G is conferment of a statutory right to the defendant to set up a counter claim independent of the claim on the basis which the plaintiff laid the suit on his own cause of action. In sub-rule (1) of Rule 6-A, the language is couched with words of wide width as to enable the parties to bring their own independent cause of action in respect of any claim that would be the subject matter of an independent suit. Thereby it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action of the plaintiff. The only limitation is that the cause of action should have arisen before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit.

The aforesaid analysis of law makes it clear that a counter claim can be brought in respect of any claim that could be subject of an independent suit. It is no longer confined to money claims or to causes of action of same nature as the original action and it need not relate to or be connected with the original cause of action or matter. A claim founded in tort may be opposed by one founded on contract. Further the defendant by his counter claim may ask for any relief, e.g. a declaration, relief against forfeiture, injunction, receiver, specific performance, or a claim for damages. The words "both before or after the filing of the suit" in Rule 6-A show that a defendant may set up a cause of action which has accrued after the suit was filed. The very object of Rule 6-A is to treat a counter claim as an independent suit to be heard together with the plaintiff's suit so as to enable the Court to pronounce final judgment that means a counter claim is in its nature a cross-suit.

In view of the aforesaid discussion we may conclude that a counter claim provided under Order VIII Rule 6-A C.P.C is not limited to the disputes in respect of a pecuniary claim and its scope is wide enough as discussed above.

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Absolute discretion is a ruthless master: It is more distructive of freedom than any of man's other inventions.

- William O. Douglas

स्टाम्प अधिनियम, 1899 की धारा–35 के अंतर्गत प्रारम्भिक साक्ष्य (मूल प्रलेख) की अग्राह्यता की दशा में द्वितीयक साक्ष्य की ग्राह्यता विषयक विधिक स्थिति का स्वरूप

न्यायिक अधिकारीगण
जिला शाजापुर

भारतीय स्टाम्प अधिनियम, 1899 की धारा–35, निम्नानुसार है :–

> ''धारा–35 सम्यक रूप से मुद्रांकित न की गई लिखतम साक्ष्य आदि में अग्राह्य हैं – शुल्क से प्रभारणीय कोई भी लिखतम जब तक कि ऐसी लिखतम सम्यक रूप से मुद्रांकित नहीं है किसी व्यक्ति द्वारा जो विधि द्वारा या पक्षकारों की सम्मति से साक्ष्य लेने के लिये प्राधिकार रखता है, किसी भी प्रायोजन के लिए साक्ष्य में ग्राह्य नहीं होगी अथवा ऐसे किसी व्यक्ति द्वारा या किसी लोक अधिकारी द्वारा उस पर कार्यवाही नहीं की जावेगी या वह रजिस्ट्रीकृत या अधि–प्रमाणकृत नहीं की जावेगी। परंतु.....''

इस प्रकार विचारणीय प्रश्न के संदर्भ में भारतीय स्टाम्प अधिनियम, 1899 की धारा–35 में ही स्पष्टतः वर्णन किया गया है कि जब तक मूल प्रलेख सम्यक् रूप से मुद्रांकित नहीं है, तब तक उक्त दस्तावेज साक्ष्य में अग्राह्य रहेगा।

किसी दस्तावेज के सम्बंध में द्वितीयक साक्ष्य किस परिस्थिति में ली जा सकेगी, इसका वर्णन भारतीय साक्ष्य अधिनियम–1872, की धारा–65 में किया गया है। उक्त अधिनियम की धारा–65, निम्नानुसार है:–

> ''धारा–65 अवस्थायें जिनमें दस्तावेजों के सम्बंध में द्वितीयक साक्ष्य दिया जा सकेगा– किसी दस्तावेज के अस्तित्व, दशा या अंतर्वस्तु का द्वितीयक साक्ष्य निम्नलिखित अवस्थाओं में दिया जा सकेगा –
>
> (क) जब कि यह दर्शित कर.दिया जावे या प्रतीत होता हो कि मूल ऐसे व्यक्ति के कब्जे में या शक्त्यधीन है, जिसके विरूद्व उस दस्तावेज का, साबित किया जाना इप्सित है, अथवा जो न्यायालय की आदेशिका की पहुँच के बाहर हैं, या ऐसी आदेशिका के अध्यधीन नहीं है, अथवा जो उसे पेश करने के लिये वैध रूप से आबद्व हैं, और जबकि ऐसा व्यक्ति धारा–66, में वर्णित सूचना के पश्चात् उसे पेश नहीं करता है।
>
> (ख) जब कि मूल के अस्तित्व, दशा या अंतर्वस्तु को उस व्यक्ति द्वारा जिसके विरूद्व उसे साबित किया जाना है या उसके हित प्रतिनिधि द्वारा लिखित रूप में स्वीकृत किया जाना साबित कर दिया गया हैं ।
>
> (ग) जबकि मूल नष्ट हो गया है, या खो गया है अथवा जबकि उसकी अंतर्वस्तु का साक्ष्य देने की प्रस्थापना करने वाला पक्षकार अपने स्वयं के व्यतिक्रम या उपेक्षा से अनुभूत अन्य किसी कारण से उसे युक्तियुक्त समय में पेश नहीं कर सकता।
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> (घ) जबकि मूल इस प्रकृति का है कि उसे आसानी से स्थानांतरित नहीं किया जा सकता ।
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> (ड) जबकि मूल, धारा–74 के अर्थ के अंतर्गत एक लोक दस्तांवेज हैं।

(च) जबकि मूल ऐसा दस्तावेज है जिसकी प्रमाणित प्रति का साक्ष्य में दिया जाना इस अधिनियम द्वारा या भारत में प्रवृत्त किसी अन्य विधि द्वारा अनुज्ञात हैं।

(छ) जबकि मूल, ऐसे अनेक लेखों या अन्य दस्तावेजों से गठित है, जिनकी न्यायालय में सुविधापूर्वक परीक्षा नहीं की जा सकती और वह तथ्य जिसे साबित किया जाना है संपूर्ण संग्रह का साधारण परिणाम है।

अवस्थाओं (क), (ग), और (घ) में दस्तावेजों की अंतर्वस्तु का कोई भी द्वितीयक साक्ष्य ग्राह्य है।

अवस्था (ख) में यह लिखित स्वीकृति ग्राह्य है।

अवस्था (ड़) या (च) में दस्तावेज की प्रमाणित प्रति ग्राह्य है, किंतु अन्य किसी प्रकार का द्वितीयक साक्ष्य ग्राह्य नहीं है।

अवस्था (छ) में दस्तावेजों के साधारण परिणाम का साक्ष्य ऐसे किसी व्यक्ति द्वारा दिया जा सकेगा जिसने उसकी परीक्षा की है और जो ऐसी दस्तावेजों की परीक्षा करने में कुशल है ।''

इस प्रकार भारतीय साक्ष्य अधिनियम की धारा–65, ऐसे दस्तावेज की अंतर्वस्तु को साबित करने की अनुकल्पी पद्धति का उपबंध करती हैं जो किन्ही कारणों से न्यायालय के समक्ष प्रस्तुत नहीं किया जा सकता है। यदि मूल प्रलेख सम्यंक रूप से मुद्रांकित नहीं है तब स्टाम्प अधिनियम–1899 की धारा–35 के अनुसार ऐसा प्रलेख साक्ष्य में ग्राह्य नहीं होगा अर्थात् उक्त प्रलेख की प्राथमिक साक्ष्य ही अग्राह्य है। ऐसी स्थिति में उक्त प्रलेख के सम्बंध में द्वितीयक साक्ष्य का लिया जाना युक्तिसम्मत नहीं होगा।

इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा न्यायदृष्टांत *''जुबूदी केशवराव विरूद्ध पुलावर्थि व्यंकटा सुब्बाराव आदि*, ए. आई. आर. 1971 एस. सी. 1878 में प्रतिपादित सिद्धान्त अवलोकनीय है।

न्यायदृष्टांत *करतार सिंह विरूद्ध मोहन्दर सिंह, ए.आई.आर. 1971 पंजाब 458* में स्पष्टतः बताया गया है कि मूल दस्तावेज स्टाम्प के अपर्याप्त होने से जहां पूर्णतः अग्राह्य हो गया हो, वहाँ किसी भी दशा में उसकी अंतर्वस्तु का द्वितीयक साक्ष्य नहीं दिया जा सकता है। जहां अस्टाम्पित मूल को स्टाम्प शुल्क और शास्ति कर संदाय कर देने पर स्वीकार किया जा सकता है तथा मूल खो गया हो, वहां भी द्वितीयक साक्ष्य नहीं दिया जा सकता है। *न्यायदृष्टांत साबा विरूद्ध कूका, ए. आई. आर. 1951, राज. 66, तथा रहीम बक्स विरूद्ध इलाही बक्स, निप. 1973 राज. 207,* में प्रतिपादित किया गया है कि साक्ष्य अधिनियम की धारा–65 में यह उपधारणा की गई है कि द्वितीयक साक्ष्य प्रस्तुत किये जाने के संबंध में उस धारा में कथित एक या अधिक बाधाओं को छोड़कर यह दस्तावेज धारा–62 के साथ पठित धारा–64 के अधीन उसकी अंतर्वस्तुओं को साबित करने में समर्थ होगा। परिणाम स्वरूप यह अभिनिर्धारित करना कि किसी ऐसे तथ्य को साबित करने के लिए द्वितीयक साक्ष्य दिया जा सकता है जिसका प्राथमिक साक्ष्य प्रतिषिद्ध है, स्पष्ट ही बेतुकी बात होगी।

इस प्रकार उपरोक्त न्याय दृष्टांतों के आलोक में तथा स्टाम्प अधिनियम 1899 की धारा–35 व साक्ष्य अधिनियम की धारा–65 के संयुक्त परिशीलन से विचारणीय प्रश्न के संदर्भ में यह निष्कर्ष निकलता है कि स्टाम्प अधिनियम 1899 की धारा–35 के अंतर्गत प्रारंभिक साक्ष्य की अग्राह्यता की दशा में द्वितीयक साक्ष्य औचित्यहीन व अग्राह्य हैं तथा दी जाने वाली द्वितीयक साक्ष्य का कोई मूल्य नहीं है।

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LEGAL POSITION REGARDING ADMISSIBILITY OF SECONDARY EVIDENCE WHERE PRIMARY EVIDENCE IS INADMISSIBLE U/S 35 OF THE INDIAN STAMP ACT, 1899

Judicial Officers
District Guna

Section 35 of the Indian Stamps Act, 1899 declares in quite unequivocal terms that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

Section 2(14) of the Stamp Act defines "instrument", as under :-

> "Instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded."

In view of the aforesaid definition of "instrument", it is clear that there is no scope for treating a copy of a document as an instrument for the purpose of the Stamp Act. This shows that Section 35 of the Stamp Act is not concerned with a copy of an instrument and a party can only be allowed to rely upon a document which is an instrument for the purpose of Section 35.

Considering the effect of Section 35 of the Stamp Act their Lordships of the Privy Council observed as under in *Rajah of Bobbili v. Inuganti China Sitaramaswami Guru, (1900) 23 Mad. 49, Privy Council* :

> "The provisions of this Section (Section 35) which allow a document to be admitted in evidence on payment of penalty, have no application when the original document which was unstamped or insufficiently stamped has not been produced and accordingly, secondary evidence of its contents can not be given. To hold otherwise would be to add to the Act a provision which it doesn't contain. Payment of penalty will not render secondary evidence admissible, for under the Stamp Law, penalty is leviable only on an unstamped or insufficiently stamped document actually produced in Court and that law does not provide for the levy of any penalty on lost documents."

In *V. Chidambaram Chettiar and another v. M.A. Meyyeppan Ambalam and others, AIR (33) 1946 Madras 296,* Hon'ble Madras High Court taking a similar view expressed that :—

> "The copy of the document was not admissible in evidence even on payment of the penalty. The fact that the original document was destroyed by the mob's action put the plaintiff in no better position."

Hon'ble the Supreme Court in *case of State of Bihar v. M/s Karam Chand Thapar and Brothers Ltd., AIR 1962 SC 110* relying on the ratio in case of *Rajah of Bobbili* (supra) held :—

> "Under Section 35 of the Stamp Act, there can be validation only of the original when it is unstamped or insufficiently stamped. It is now well settled that the copy of an instrument cannot be validated."

Dealing with the issue relating to admissibility of secondary evidence where primary one is inadmissible because of not being duly stamped the Apex Court in *Jupudi Kesava Rao v. Pulavarthi Venkata Subba Rao and others, 1971 JLJ SN 83* propounded as under :—

> "The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument for allowing such evidence to be let in when the original admitted chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfill the requirements of the proviso which enjoins upon the authority to receive nothing except the instrument itself."

In case of *Sugreeva Prasad Dubey and others v. Sitaram Dubey, 2004 (1) M.P.H.T. 488* Hon'ble M.P. High Court followed the law laid down in case of *Jupudi Kesava Rao* (supra) and held that secondary evidence, photocopy of the document, original of which is lost and was inadmissible in evidence, cannot be permitted. Photocopy of document filed, original of which was insufficiently stamped does not fall within the purview of Sections 35, 36 and 37 of the Stamp Act and cannot be received in secondary evidence. Secondary evidence of inadmissible document is not admissible under Sections 63 and 65 of the Evidence Act.

On the basis of the above discussion we conclude that when primary evidence (original document) is inadmissible under Section 35 of the Stamp Act, 1899, no secondary evidence can be adduced because the original documents can only be validated, not a copy of the document.

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विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायदान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या अचल सम्पति पर आधिपत्य में हस्तक्षेप के विरूद्ध पारित अंतरिम व्यादेश के उल्लंघन पर आदेश 39 नियम (2) ए. सिविल प्रक्रिया संहिता के अन्तर्गत संस्थित कार्यवाही में अधिपत्य वापस दिलाया जा सकता हैं?

आदेश 39 नियम (2) ए. सिविल प्रक्रिया संहिता (एतस्मिन् पश्चात् मात्र ''संहिता'') के अनुसार निषेधाज्ञा या संहिता के आदेश 39 नियम 1 या 2 के अंतर्गत पारित आदेश के उल्लंधन पर या निषेधाज्ञा/आदेश संबंधी शर्त के भंग किए जाने पर न्यायालय द्वारा दोषी व्यक्ति की संपत्ति कुर्क (Attachment) करने संबंधी आदेश दिया जा सकता है एवं यह आदेश भी दिया जा सकता है कि उसे तीन माह से अनाधिक अवधि के लिए सिविल कारागार में निरूद्ध रखा जाए ।

'संहिता' के आदेश 39 नियम (2) ए. में दोषी व्यक्ति को दंडित किए जाने की व्यवस्था तो की गई है ताकि उसे निषेधाज्ञा/आदेश के पालन के लिए बाध्य किया जा सके किन्तु निषेधाज्ञा या आदेश के उल्लंधन में वादग्रस्त संपत्ति से आधिपत्यच्युत किये गए व्यथित व्यक्ति को पुनः आधिपत्य सौंपने संबंधी कोई व्यवस्था इस प्रावधान में नहीं हैं।

ऐसी दशा में 'संहिता' के आदेश 39 नियम (2) ए. के अंतर्गत संस्थित कार्यवाही में आधिपत्य वापस दिलाना विधि सम्मत नहीं होगा किन्तु इसका तात्पर्य यह नहीं है कि व्यथित पक्ष को कोई विधिक उपचार उपलब्ध ही नहीं है। मूल प्रकरण (वाद) में न्यायालय 'संहिता' की धारा 151 के अंतर्गत अंतनिर्हित शक्तियों का प्रयोग कर व्यथित पक्ष को पुनः आधिपत्य दिला सकता है।

संहिता की धारा 151 के अंतर्गत उपलब्ध शक्ति के उक्तानुसार उपयोग के संबंध में न्यायदृष्टाँत *हरीनन्दन विरूद्ध एस. एम. पंडित, ए. आई. आर. 1975 इलाहाबाद 48, सतीशचन्द्र मैटी विरूद्ध सैला बाला डासी, ए. आई. आर. 1978 कलकत्ता 499, सुजीत पाल विरूद्ध प्रबीर कुमार सन, ए. आई. आर. 1986 कलकत्ता 220, एवं शिवदत्त पारिख, विरूद्ध भागीरथ, ए. आई. आर. 1990 राजस्थान 130 अवलोकनीय हैं।*

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स्वत्व घोषणा के वाद में प्रतिवादी द्वारा प्रतिकूल आधिपत्य का अभिवचन किए जाने की दशा में क्या तद्विषयक वाद प्रश्न विरचित किया जाना चाहिए ?

स्वत्व घोषणा के वाद में, स्वत्व का महत्वपूर्ण प्रश्न अन्तर्वलित होता है अतः स्वत्व संबंधी वादप्रश्न विरचित किया जाना उचित ही है, लेकिन चूंकि प्रतिवादी द्वारा प्रतिकूल (विरोधी) आधिपत्य के अभिवचन किये गये हैं अतः यह भी समीचीन है कि उक्त अभिवाक् संबंधी वाद प्रश्न पृथक से विरचित किया जाए, क्योंकि प्रतिकूल आधिपत्य संबंधी अभिवाक् तथ्य एवं विधि की एक तात्विक प्रतिपादना है जो एक पक्ष द्वारा प्रतिज्ञात करने एवं दूसरे पक्ष द्वारा प्रत्याखान करने से एक विवाद्यक को जन्म देती हैं तथा आदेश 14 नियम (1) सिविल प्रक्रिया संहिता के अनुसार ऐसी प्रत्येक तात्विक प्रतिपादना पर वादप्रश्न विरचित होना चाहिये। तदानुसार स्वत्व घोषणा के वाद में प्रतिवादी द्वारा प्रतिकूल आधिपत्य के अभिवचन किए जाने की दशा में तद्विषयक वाद प्रश्न विरचित किया जाना न केवल उचित अपितु आवश्यक है।

उक्त विषय में न्याय दृष्टांत *वी. सीथा रामा राजु विरूद्ध के. वेंकट नरसम्मा, ए. आई. आर. 1971 आंध्रप्रदेश–408* अवलोकनीय है जिसमें वादी द्वारा स्वत्व के आधार पर आधिपत्य प्राप्ति का वाद प्रस्तुत किये जाने पर प्रतिवादी द्वारा विवादित सम्पत्ति पर विरोधी आधिपत्य के आधार पर अपने स्वत्व परिपक्व हो जाने संबंधी अभिवचन किये गए थे। इस प्रकरण में विचारण न्यायालय द्वारा विवादित सम्पत्ति पर प्रतिवादी के विरोधी आधिपत्य के आधार स्वत्व अर्जन के अभिवचन के विषय में वाद प्रश्न विरचित किया गया था। माननीय आंध्रप्रदेश उच्च न्यायालय द्वारा प्रकरण में विरचित वाद प्रश्नों को उचित ठहराया गया।

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धारा 498 (ए.) भारतीय दण्ड संहिता के अपराध विषयक दाण्डिक मामलों में न्यायालय की क्षेत्रीय अधिकारिता विषयक विधिक स्थिति क्या हैं?

माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *वाय. अब्राहम अजीथ विरूद्ध पुलिस निरीक्षक चेन्नई, ए. आई. आर. 2004 सु. को. 4286 में पूर्व न्याय* दृष्टांत *बिहार राज्य विरूद्ध देवकरण, ए. आई. आर. 1973 सु. को. 908* के आधार पर 'निरन्तर अपराध' तथा 'एक बार में किये जाने वाले अपराध' में अन्तर इंगित करते हुए प्रकरण के तथ्यों के प्रकाश में धारा 498–क भारतीय दण्ड संहिता के अपराध के विचारण का क्षेत्राधिकार उस स्थान के न्यायालय को होना विनिश्चित किया गया है जहां 'परिवाद' के अनुसार क्रूर व्यवहार किया गया अर्थात जहां परिवाद का 'हेतुक' (Cause of action) उत्पन्न हुआ।

माननीय मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत *आलोक एवं अन्य विरूद्ध मध्यप्रदेश राज्य, 2006 (1) एम. पी. एल. जे., 205 तथा गुरूमीत सिंह विरूद्ध मध्यप्रदेश राज्य, 2006 (1) एम. पी. एल. जे 250 में न्याय दृष्टाँत वाय. अब्राहम अजीथ विरूद्ध पुलिस निरीक्षक, (उपरोक्त) के प्रकाश में धारा 498–क* भारतीय दण्ड संहिता के अपराध को 'निरन्तर अपराध' (Continuing Offence) नहीं पाते हुए यह विनिश्चित किया गया कि उक्त अपराध का विचारण उस स्थान पर होगा जहां अभियोक्त्री का उत्पीड़न हुआ, उसे त्रास दिया गया और दहेज की माँग की गई।

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सहदायिकी सम्पत्ति (**Coparcenary Property**) का विक्रय प्रतिषिद्ध करने के लिए व्यादेश जारी करने के बारे में विधिक स्थिति क्या है ?

यद्यपि सहदायिक को सहदायिकी सम्पत्ति में जन्म से ही अधिकार प्राप्त हो जाता है तथापि वह ऐसी सम्पति के स्वतंत्र आधिपत्य का अधिकारी नहीं होता है एवं उसके अधिकार 'कर्ता' के नियन्त्रण से परे नहीं होते है। सहदायिक को 'कर्ता ' के सम्पत्ति के प्रबंधन से संबंधित कर्तव्यों में हस्तक्षेप का कोई अधिकार प्राप्त नहीं होता है ।

सहदायिक को यद्यपि यह विधिक अधिकार प्राप्त है कि वह 'कर्ता' द्वारा किये गये अन्तरण को चुनौती दे सके किन्तु उसे अन्तरण में बाधा पहुंचाने का कोई विधिक अधिकार नहीं है।

तदानुसार 'कर्ता' द्वारा किये जा रहे सहदायिकी सम्पत्ति के विक्रय को प्रतिषिद्ध करने के लिये सहदायिक के पक्ष में व्यादेश जारी नहीं किया जा सकता है। विक्रय से व्यथित सहदायिक पृथक से वाद प्रस्तुत कर ही ऐसे विक्रय की वैधता को चुनौती दे सकता है। उक्त विधिक स्थिति के संबंध में माननीय सर्वोच्च न्यायालय द्वारा *न्याय दृष्टांत सुनील कुमार विरूद्ध रामप्रकाश, ए.आई.आर. 1988 सु. को. 576* में प्रतिपादित विधिक स्थिति अवलोकनीय है।

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Laws and institutions must go hand in hand with the progress of the human mind.

- Thomas Jefferson

If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow.

- Oliver Wendell Holmes

My conscience hath a thousand several tongues,
And every tongue brings in a several tale,
And every tale condemns me for a villain.

- Shakespeare

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF M.P., JABALPUR
TRAINING CALENDAR -YEAR 2007 (JANUARY-JUNE)

S. No.	NAME OF THE COURSE	TARGET GROUP	NUMBER OF PARTICIPANTS	DURATION	PERIOD	VENUE
1.	Workshop on PC & PNDT Act	Judicial Magistrates First Class, Additional Sessions Judges and State Appellate Authorities	45	2 days	06.01.2007 & 07.01.2007 (Saturday & Sunday)	J.O.T.R.I
2.	Condensed Course for Additional District Judges	Additional District Judges	25	5 days	09.01.2007,10.01.2007, 11.01.2007, 12.01.2007 & 13.01.2007 (Tuesday, Wednesday, Thursday, Friday and Saturday))	J.O.T.R.I
3.	Workshop on Judicial Process under Co-operative Societies Act	Deputy Registrars, Joint Registrars and Assistant Registrars of Co-operative Society	30	2 days	22.01.2007 & 23.01.2007 (Monday & Tuesday)	J.O.T.R.I.
4.	Workshop on - Legal issues in Accident Claim Cases under Motor Vehicles Act	Additional District & Sessions Judges	30-35	2 days	01.02.2007 & 02.02.2007 (Thursday & Friday)	J.O.T.R.I.
5.	Foundation Training in Counselling Skills	Counsellors appointed under Hindu Marriage Act	40	5 days	05.02.2007,06.02.2007 07.02.2007, 08.02.2007 & 09.02.2007 (Monday, Tuesday, Wednesday, Thursday & Friday)	J.O.T.R.I.

S. No.	NAME OF THE COURSE	TARGET GROUP	NUMBER OF PARTICIPANTS	DURATION	PERIOD	VENUE
6.	Workshop on - PC & PNDT Act	Chief Medical and Health Officers	40	2 days	18.02.2007 & 19.02.2007 (Sunday & Monday)	J.O.T.R.I.
7.	Workshop on - Protection of Human Rights - Role of District Judiciary	Civil Judges Class I and Class II	40	2 days	27.02.2007 & 28.02.2007 (Tuesday & Wednesday)	J.O.T.R.I.
8.	Advance (Course) Training on Prosecution Methods & Skills	Senior District Prosecution Officers	50	5 days	06.03.2007, 07.03.2007, 08.03.2007,09.03.2007 & 10.03.2007 (Tuesday, Wednesday, Thursday, Friday & Saturday)	J.O.T.R.I.
9.	Workshop on - Cases u/s 138 Negotiable Instruments Act (1st Workshop)	Recently appointed Special Magistrates	30	1 day	12.03.2007 (Monday)	J.O.T.R.I.
10.	Workshop on - Cases u/s 138 Negotiable Instruments Act (2nd Workshop)	Recently appointed Special Magistrates	30	1 day	13.03.2007 (Tuesday)	J.O.T.R.I.
11.	Workshop on - Criminal Justice Administration	Chief Judicial Magistrates	40	5 days	20.03.2007, 21.03.2007, 22.03.2007, 23.03.2007 & 24.03.2007 (Tuesday, Wednesday, Thursday, Friday & Saturday)	J.O.T.R.I.

S. No.	NAME OF THE COURSE	TARGET GROUP	NUMBER OF PARTICIPANTS	DURATION	PERIOD	VENUE
12.	Workshop on - Expeditious Execution of Decrees	Civil Judges Class I	40	2 days	29.03.2007 & 30.03.2007 (Thursday & Friday)	J.O.T.R.I.
13.	Basic Training in Office Administration	Class II & Class III employees of Administrative Section of High Court	40	2 days	31.03.2007 & 01.04.2007 (Saturday & Sunday)	J.O.T.R.I.
14.	Workshop on - Effective Judicial Administration	District & Sessions Judges or Additional District Judges	40	2 days	14.04.2007 & 15.04.2007 (Saturday & Sunday)	J.O.T.R.I.
15.	Workshop on Expanding Horizons of law : - Domestic violence - Criminal Justice Administration - Civil Justice Administration - Information Communication Technology in Judiciary	Civil Judges Class I & II	40	4 days	17.04.2007, 18.04.2007, 19.04.2007 & 20.04.2007 (Tuesday, Wednesday, Thursday & Friday)	J.O.T.R.I.
16.	Basic Training in Office Administration	Class II and Class III Employees of Establishment of High Court	50	2 days	21.04.2007 & 22.04.2007 (Saturday & Sunday)	J.O.T.R.I.

S. No.	NAME OF THE COURSE	TARGET GROUP	NUMBER OF PARTICIPANTS	DURATION	PERIOD	VENUE
17.	Judicial Ethics and Norms of Behaviour	Judicial Officers	40	5 days	01.05.2007,02.05.2007, 03.05.2007, 04.05.2007 & 05.05.2007 (Tuesday, Wednesday, Thursday, Friday & Saturday)	J.O.T.R.I.
18.	Workshop on - Basic issues involved in the offence for attempt to murder, culpable homicide not amounting to murder and culpable homicide amounting to murder	Additional District & Sessions Judges	40	2 days	10.05.2007 & 11.05.2007 (Thursday & Friday)	J.O.T.R.I.
19.	Workshop on - Application of Science and Technology in Judiciary	Additional District & Sessions Judges	40	5 days	14.05.2007, 15.05.2007, 16.05.2007, 17.05.2007 & 18.05.2007 (Monday, Tuesday, Wednesday, Thursday & Friday)	J.O.T.R.I.
20.	Workshop on - Juvenile Justice (Care & Protection of Children) Act, 2000	Members of Juvenile Justice Board	50	2 days	27.06.2007 & 28.06.2007 (Wednesday & Thursday)	J.O.T.R.I.

PART - II

NOTES ON IMPORTANT JUDGMENTS

334. INDIAN PENAL CODE, 1860 – Sections 299, 300 and 304
"Murder" and "culpable homicide not amounting to murder", difference between –Applicability of Clauses (1), (2) and (3) of Section 300 – Law explained.
Rajinder v. State of Haryana
Judgment dated 05.06.2006 passed by the Supreme Court in Criminal Appeal No. 689 of 2006, reported in (2006) 5 SCC 425

Held:

The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:

Section 299	*Section 300*
A person commits culpable homicide if the act by which the death is caused is done –	Subject to certain exceptions culpable homicide is murder if the act which the death is caused is done –
	Intention
(a) with the intention of causing death; or	(1) with the intention of causing death ; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused: or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of knowledge to cause death; or
	Knowledge
(c) With the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause

death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death was intentionally given. In clause 3 of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature to cause death" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degrees of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Kalarimadathil Unni v. State of Kerala, AIR 1966 SC 1874* is an apt illustration of this point.

In *Virsa Singh* v. *State of Punjab, 1958 SCR 1495* Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly". Firstly, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

The ingredients of clause "Thirdly" of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows: (SCR pp. 1500-01)

> "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 '3rdly'.
>
> First, it must establish, quite objectively, that a bodily injury is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

The learned Judge explained the third ingredient in the following words (at AIR p. 468): SCR p. 1503)

> "The question is not whether the prisoner intended to inflict as serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree

of seriousness but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion." These observations of Vivian Bose. J. have become locus classicus. The test laid down by *Virsa Singh case,* (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC. culpable homicide is murder, if both the following conditions are satisfied : i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

Thus, according to the rule laid down in *Virsa Singh case, (Supra),* even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

Clause (c) of the Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

The position was illuminatingly highlighted by this Court in *State of A.P. v. Rayavarapu Punnayya, (1976) 4 SCC 382, Abdul Waheed Khan v. State of A.P., (2002) 7 SCC 175, Aaugustine Saldanha v. State of Karnataka, (2003) 10 SCC 472 and Thangaiya v. State of T.N., (2005) 9 SCC 650.*

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335. CIVIL PROCEDURE CODE, 1908 – O.23 R.3 and O.23 R.3 (h)
Order 23 R.3, ambit and scope of – Difference between first and second parts of Rule 3 – Remedy available against consent/compromise decree by way of an application under O.23 R.3 – Meaning and significance of words "in writing and signed by the parties" as used in Rule 3 – Law explained.
Pushpa Devi Bhagat v. Rajinder Singh and others
Judgment dated 11.07.2006 passed by the Supreme Court in Civil Appeal No. 2896 of 2006, reported in (2006) 5 SCC 566

Held:

Order 23 deals with withdrawal and adjustment of suits. Rule 3 relates to compromise of suits, relevant portion of which is extracted below:

> "3. *Compromise of suit.*– Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:"

The said rule consists of two parts. The first part provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined to the parties to the suit whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit. We are not, however, concerned with this aspect of the Rule in this appeal.

What is the difference between the first part and the second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms

of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties. thereto can be held to their promise(s) in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so "satisfies" the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any "enforocement" or "execution" of the decree to be passed in terms of it. Let us illustrate with reference to a money suit filed for recovery of say a sum of rupees ond lakh. Parties may enter into a lawful agreement or compromise in writing and signed by them, agreeing that the defendant will pay the sum of rupees one lakh within a specified period or specified manner or may agree that only a sum of Rs. 75,000 shall be paid by the defendant in full and final settlement of the claim. Such agreement or compromise will fall under the first part and if the defendant does not fulfil the promise, the plaintiff can enforce it by levying execution. On the other hand, the parties may submit to the court that the defendant has already paid a sum of rupees one lakh or Rs. 75,000 in full and final satisfaction or that the suit claim has been fully settled by the defendant out of court (either by mentioning the amount paid or not mentioning it) or that the plaintiff will not press the claim. Here the obligation is already performed by the defendant or the plaintiff agrees that he will not enforce performance and nothing remains to be performed by the defendant. As the order that follows merely records the extinguishment or satisfaction of the claim or non-existence of the claim, it is not capable of being "enforced" by levy of execution, as there is no obligation to be performed by the defendant in pursuance of the decree. Such "satisfaction" need not be expressed by an agreement or compromise in writing and signed by the parties. It can be by a unilateral submission by the plaintiff or his counsel. Such satisfaction will fall under the second part. Of course even when there is such satisfaction of the claim or subject-matter of the suit by the defendant and the matter falls under the second part, nothing prevents the parties from reducing such satisfaction of the claim/subject-matter, into writing and signing the same. The difference between the two parts is this: where the matter falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable or being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling under the first part can only be by a instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under the second part, it is sufficient if the plaintiff or the plaintiff's counsel appears before the

court and informs the court that the subject-matter of the suit has already been settled or satisfied.

In a suit against the tenant for possession, if the settlement is that the tenant will vacate the premises within a specified time, it means that the possession could be recovered in execution of such decree in the event of the defendant failing to vacate the premises within the time agreed. Therefore, such settlement would fall under the first part. On the other hand, if both parties or the plaintiff submit to the court that the tenant has already vacated the premises and thus the claim for possession has been satisfied or if the plaintiff submits that he will not press the prayer for delivery of possession, the suit will be disposed of recording the same, under the second part. In such an event, there will be disposal of the suit, but no "executable" decree.

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The next question is where an agreement or compromise falls under the first part, what is the meaning and significance of the words "in writing" and "signed by the parties" occurring in Rule 3? The appellant contends that the words "in writing" and "signed by the parties" would contemplate drawing up of a document or instrument or a compromise petition containing the terms of the settlement in writing and signed by the parties. The appellant points out that in this case, there is no such instrument, document or petition in writing and signed by the parties.

We will first consider the meaning of the words "signed by parties". Order 2 Rule 1 CPC provides that any appearance, application or act in or to any court, required or authorised by law *to be made* or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, *or by a pleader appearing, applying or acting, as the case may be, on his behalf.* The proviso thereto makes it clear that the court can, if it so desires, direct that such appearance shall be made by the party in person. Rule 4 provides that no pleader shall act for any person in any court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment. Sub-rule (2) of Rule 4 provides that every such appointment shall be filed in the court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the court by a writing signed by the client or the pleader, as the case may be, and filed in the court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. The question whether "signed by parties" would include signing by the pleader was considered by this Court in *Byram Pestonji Gariwala v. Union Bank of India, (1992) SCC 31* with reference to Order 3 CPC: (SCC pp. 44 & 46-47, paras 30, 35 & 37-39)

> "30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of

proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject-matter of the suit. The relationship of counsel and his party or the recognised agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case.

The legislature has not evinced any intention to change the well-recognised and universally acclaimed common law tradition...

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35. So long as the system of judicial administration in India continues unaltered, and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has, though not expressly, but impliedly reduced counsel's role or capacity to represent his client as effectively as in the past....

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37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted...

38. Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the CPC (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject-matter of the suit, but relating to the parties, *the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorised agents. ...*

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. ...

If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

(emphasis spplied)

The above view was reiterated in *Jineshwardas v. Jagrani, (2003) 11 SCC 372.* Therefore, the words "by parties" refer not only to parties-in-person, but their attorney-holders or duly authorised pleaders.

Let us now turn to the requirement of "in writing" in Rule 3. In this case as noticed above, the respective statements of the plaintiffs' counsel and the defendants' counsel were recorded on oath by the trial court in regard to the terms of the compromise and those statements after being read over and accepted to be correct, were signed by the said counsel. If the terms of a compromise written on a paper in the form of an application or petition is considered as a compromise in writing, can it be said that the specific and categorical statements on oath recorded in writing by the court and duly read over and accepted to be correct by the person making the statement and signed by him, can be said to be not in writing? obviously, no. We may also in this behalf refer to Section 3 of the Evidence Act which defines a "document" as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording the matter. The statements recorded by the court will, therefore, amount to a compromise in writing.

Consequently, the statements of the parties or their counsel, recorded by the court and duly signed by the persons making the statements, would be "statement in writing signed by the parties". The court, however has to satisfy itself that the terms of the compromise are lawful.

Section 96 provides for appeals from original decrees. Sub-seciton (3) of Section 96, however, provides that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1(m) CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But clause (m) of Rule 1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a proviso was added to Rule 3 Order 23 with effect from 1-2-1977. We extract below the relevant portion of the said proviso:

> "Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question."

Rule 3-A was also added in Order 23 with effect from 1-2-1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

The position that emerges from the amended provisions of Order 23 can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise, on which it is made.

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336. MOTOR VEHICLES ACT, 1988 – Section 149

Invalidity or defect in driving licence, effect of – Owner expected only to check whether driver has driving licence which on the face of it looks genuine – Licence subsequently discovered to be fake – Insurer cannot claim exoneration.

Lal Chand v. Oriental Insurance Co. Ltd.

Judgment dated 22.08.2006 by the Supreme Court in Civil Appeal No. 3623 of 2006, reported in (2006) 7 SCC 318

Held:

... This Court in *United India Insurance Co. Ltd. v. Lehru, (2003) 3 SCC 338* in SCC para 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner having satisfied himself that the driver had a licence and was driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

Another decision rendered by a three-Judge Bench of this Court in *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297* can also be usefully referred to in the present context. This Court in para 110 of this judgment gave the summary of their findings to the various issues as raised in those petitions. We are concerned only with sub-para (iii) of para 110. The said sub-para (iii) reads thus : (SCC p. 341)

> "**110. (iii)** The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time."

As observed in the above paragraph, the insurer, namely, the Insurance Company, has to prove that the insured, namely, the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time.

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337. INDIAN PENAL CODE, 1860 – Section 300 Exception 4
Murder – Scope of applicability of Exception 4 of Section 300 – Law explained.
Pappu v. State of M.P.
Judgment dated 11.07.2006 by the Supreme Court in Criminal Appeal No. 751 of 2006, reported in (2006) 7 SCC 391

Held:

The pivotal plea relates to the applicability of Exception 4 of Section 300 IPC.

For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon

a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception. after which its place would have been more appripriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appripriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon

used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors.

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338. JUDICIARY

Judicial Officer – Strictures regarding discharge of judicial duties – Need to adopt utmost judicial restraint in using strong language against lower judiciary – Law explained.
Anjani K. Verma v. State of Bihar and anr.
Reported in 2006 (2) ANJ (SC) 17

Held :

At the outset, we may observe that a judicial officer who exceeds the limits of propriety and conduct and does not render justice in accordance with the facts of the case and the law, needs no protection from the superior Courts. But, at the same time, while passing strictures against a member of subordinate judiciary utmost care and caution is required to be taken, also having regard to the stress and conditions under which, by and large, the judicial officers have to render justice. It would be appropriate to remember what was said long time ago by Justice Gajendragadkar, as noticed in the decision of this Court in *Braj Kishore Thakur vs. Union of India & Ors., 1997 (4) SCC 65,* in the following words:

> "A quarter of a century ago Gajendragadkar, J. (as he then was) speaking for a Bench of three Judges of this Court, in the context of dealing with the strictures passed by a High Court against one of its subordinate judicial officers (suggesting that his decision was based on extraneous considerations) stressed the need to adopt utmost judicial restraint against using strong language and imputation of corrupt motives against lower judiciary more so "because the Judge against whom the imputations are made has no remedy in law to vindicate his position". *Ishwari Prasad Mishra vs. Mohd. Isa.* This Court had to repeat such words on subsequent occasions also. In *K.P. Tiwari vs. State of M.P.,* this court came across certain observations of a learned Judge of the High Court casting strictures against a Judge of the subordinate judiciary and the Court use the opportunity to remind all concerned that using intemperate language and castigating stricutures at the lower levels would only cause public respect in judiciary to dwindle. The following observations of this Court need repetition in this context:
>
> > "The higher Courts every day come across orders of the lower Courts which are not justified either in law or in fact and modify them or set them aside. This is one of the functions of the superior Courts. Our legal system acknowledges the fallibility of the Judges and hence provides for appeals and revisions. A Judge tries to discharge his duties to the best of his capacity. While

doing so, sometimes, he is likely to err.... It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks – more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher Courts to think coolly and decide patiently. Every error, however, gross it may look, should not, therefore, be attributed to improper motive".

In the same judgment an earlier decision in *Kashi Nath Roy vs. State of Bihar, 1996 (4) SCC 539* has been referred to the following effect:

> "It cannot be forgotten that in our system like elsewhere, Appellate and Revisional Courts have been set up on the presupposition that lower Courts would in some measure of cases go wrong in decision-making, both on facts as also on law, and they have been knit-up to correct those orders. The human element in justicing being an important element, computer-like functioning cannot be expected of the Courts, however hard they may try and keep themselves precedent-trodden in the scope of discretions and in the manner of judging. Whenever any such intolerable error is detected by or pointed out to a Superior Court, it is functionally required to correct that error and may, here and there, in an appropriate case, and in a manner befitting, maintaining the dignity of the Court and independence of judiciary, convey its message in its judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellow but clear, and result-orienting, but rarely as a rebuke. Sharp reaction of the kind exhibit in the afore-extraction is not in keeping with institutional functioning. The premise that a Judge committed a mistake or an error beyond the limits of tolerance, is no ground to inflict condemnation on the Judge-Subordinate, unless there existed something else and for exceptional grounds."

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339. TRANSFER OF PROPERTY ACT, 1882 – Section 113
Waiver of notice to quit – Whether acceptance of rent simplicitor after issuance of notice amounts to waiver? Held, No – Law explained.
Sarup Singh Gupta v. S. Jagdish Singh and ors.
Reported in 2006 (1) ANJ (SC) 445

Held:

....learned senior counsel appearing on behalf to the appellant, drew our notice to Section 113 of the Transfer of Property Act, 1882, which reads as follows :

> "113. *Waiver of notice to quit* – A notice given under Section 111, clause (h), is waived, with the express or implied consent of the person

to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting."

He submitted that the acceptance of rent by the respondent-landlord even after effecting notice under Section 111, clause (h), amounted to waiver of notice to quit within the meaning of Section 113 of the Transfer of Property Act. He submitted that waiver in the instant case was on account of implied consent of the landlord, who accepted the rent despite the notice, thereby evincing an intention to treat the lease as subsisting. He emphasised that even after filing the suit, the landlord continued to accept the rent tendered by the tenant.

Learned Senior Counsel also relied upon a decision of a learned Single Judge of the Calcutta High Court, reported in *AIR 1926 (Calcutta) 763,* wherein it was held that where rent is accepted after the notice to quite, whether before or after the suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting and, therefore, where rent deposited with the Rent controller under the Calcutta Rent Act is withdrawn even after the ejectment suit is filed, the notice to quit is waived. In our view, the principle laid down in the aforesaid judgment of the High Court is too widely stated, and cannot be said to be an accurate statement of law. A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given under Section 111, clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative.

A somewhat similar situatin arose in the case reported in *(2005) 5 SCC 543.* That was a case where the landlord accepted rent even an expiry of the period of lease. A submission was urged on behalf of the tenant in that case that Section 116, Transfer of Property Act was attracted and there was a deemed renewal of the lease. Negativing the contention, this Court observed that mere acceptance of rent for the subsquent months in which the lessee continued to occupy the premise even after the expiry of the period of the lease cannot be said to be a conduct signifying his assent to the contiuning of the lease even after the expiry of the lease period. Their Lordships noticed the conditions incorporated in the agreement itself, which provided for renewal of the lease and held that those conditions having not been fulfilled, the mere acceptance of rent after expiry of period of lease did not signify assent to the continuance of the lease.

In the instant case, as we have noticed earlier, two notices to quit were given on 10th February, 1979 and 17th March, 1979. The suit was filed on June

2, 1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter, The question is whether this by itself constitute an act on the part of the landlord showing an intention to treat the lease as subsisting. In our view, mere acceptance of rent did not by itself constituted an act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting.

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340. CONSUMER PROTECTION ACT, 1986 – Section 27
Section 27 as amended by Amending Act No. 62 of 2003 – Ambit and scope of S.27 – Law explained.
State of Karnataka v. Parmjit Singh and ors.
Reported in 2006 (1) ANJ (SC) 333

Held:

Section 27, prior to its amendment in 2003 read as follows :

> "**Penalties** : Where a trader or a person agaist whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extent to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both:
>
> Provided that the District Forum, the State Commission or the National Commission, as the case may be if it is satisfied that the circumstance of any case so require, impose a sentence of imprisonment or fine, or both, for a term lesser than the minimum term and the amount lesser than the minimum amount, specified in this section."

After amendment, Section 27 reads as follows:

> 1. **Penalties :** (1) Where a trader or a person against whom a complaint is made (or the complainant) fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person (or complainant) shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extent to ten thousand rupees or with both:
>
> (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the District Forum or the State

Commission or the National Commssion, as the case may be, shall have the power of a judicial Magistrate of the first class for the trial of offences under this Act, and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the first class for the purpose of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) All offences under this Act may be tried summarily by the District Forum or the State Commission or the National Commission, as the case may be."

It is to be noted that by the Consumer Protection (Amendment) Act, 2002 (62 of 2002), as contained in Section 23 of the Amending Act, the proviso which was struck down as unconstitutional by the High Court has been omitted. Sub-Section (2) has been introduced which provides that the District Forum or the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of First Class for the trial of offences under the Act and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the First Class of the Code. The amendment have been made effective with effect from 15.3.2003.

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341. CRIMINAL TRIAL :

Panchnama or memorandum, proof of – Contents of memorandum itself of no value unless proved by concerned witness – Law explained.

Shravan v. State of M.P.

Reported in 2006 (2) ANJ (MP) 233

Held:

... this is settled law that contents of memorandum or Panchnama itself are not admissible in evidence but the same are required to be proved in Court by the concerned witness. Merely exhibiting memorandum and Panchnama and proving the signature of it's ascribe is not sufficient to rely the contents of Panchnama.

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342. LIMITATION ACT, 1963 – Article 136

Execution – Execution of decree for partition, commencement of limitation for – Whether commencement of limitation depends upon engrossment of decree on stamp paper? Held, No – Law explained.

Ram Bachan Rai & Ors. v. Ram Udar Rai & Ors.

Reported in 2006 (III) MPJR 1 (SC)

Held :

The basic issue, therefore, is when would the period of limitation for execution of a decree passed in a suit commence. Article 136 of the Limitation Act reads as follows:

Description of application	**Period of limitation**	**Time from which period begins to run**
For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place; Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

Noticing some conflicts in views expressed by two Judge Benches judgment of this Court, reference was made to a three Judge Bench in *Chiranjilal (dead) by Lrs. V. Hari Das (dead) by Lrs. (2005) 2 SCC 261)*. A three Judge Bench by its judgmet dated May 13, 2005 in *Dr. Chiranjit Lal (D) by Lrs. V. Hari Das (d) by Lrs. (2005) 10 (SCC 746)* has decided the matter observing inter-alia as follows:

> "24. A decree in a suit for partition declares the right of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon."

In paragraph 25 of the same decision, this Court also observed as follows:

> 25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No. rule has been shown to us requiring the

Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of thereupon an only thereafter the period limitation would remain suspended till stamp paper is furnished and decree engrossed of twelve years will begin to run would lead to absurdity. In *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*, it was said that the payment of court fee on the amount found due was entirely in the power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

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343. LIMITATION ACT, 1963 – Article 59

Suit for cancellation of instrument, limitation for – Article 59, applicability of – It applies when coercion, undue influence, misappropriation or fraud has been alleged – Effect of fraudulent representation on document – Law explained.

Prem Singh & Ors. v. Birbal & Ors.

Reported in 2006 (III) MPJR 12 (SC)

Held :

Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.

A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under:

> "31. **When cancellation may be ordered** - (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument has been registered under the Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation. When a document is *void ab initio* a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.

Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be.

Article 59 would be attracted when coercion, undue influence. misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. (See *Unni & Anr. Vs. Kunchi Amma & Ors. (1891) ILR XIV Mad. 26*) and *Sheo Shankar Gir vs. Ram Shewak Chowdhri & Ors. (1897) ILR XXIV Cal. 77*).

In *Ningawwa Vs. Byrappa Shiddappa Hireknrabnar & Ors. (AIR 1968 SC 965*), this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating:

> "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable..."

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344. LAND REVENUE CODE, 1959 (M.P.) – Section 57
Suit not filed within one year of the dismissal of application u/s 57 (2) – Whether suit stands barred by limitation? Held, Yes – Law explained.
State of Madhya Pradesh v. Ram Singh
Reported in 2006 (III) MPJR 30

Held:

The plaintiff himself has pleaded that he submitted an application under section 57 (2) of the Code before the Sub Divisional Officer, Sonkachchha and that application was dismissed on 05.11.1971 by the said authority. The present suit has been filed on 21.12.1972 i.e. after one year from the date of dismissal of application under section 57 (2) of the Code. Under section 57 (3) of the Code prescribed period of limitation is one year and, therefore, the present suit is time barred. Learned counsel for the respondent-plaintiff has placed reliance on the decision in the case of *Jamna Prasad v. State of M.P., 1985 R.N. 344.* This case is not at all applicable in the present factual scenario for the simple reason that in that case, the case under section 57 (2) of the Code was closed by the S.D.O. and neither the application filed under section 57 (2) of the Code was allowed nor it was disallowed by the SDO. In these circumstances it was held by this Court that section 57 (3) of the Code is not applicable. Learned counsel for the respondent-plaintiff has also placed reliance on the Division Bench decision

of this Court in the case of *Jeewansing v. State of M.P., 1980 R.N. 531* and has contended that section 57 (3) of the Code is not applicable. According to me, Division Bench Decision in *Jeewansingh* (supra) is tangentially off the point. In that case application which was filed under section 57 (2) of the Code was allowed by the SDO on 05.06.1968. Thereafter Collector in *suo motu* revision set aside the order. The Commissioner and therefore the Board of Revenue by order dated 24.02.1995 affirmed the order of the Collector. Thereafter plaintiff filed a civil suit on 16.09.75. But the trial Court dismissed the suit as barred by time. Under these circumstances it was held by the Division Bench in para 3 that since said order was in favour of plaintiff of that case and the said order of SDO was set aside by the Collector and the order of the Collector was maintained by the Commissionier and the Board of Revenue, therefore, under those circumstances, the limitation prescribed under section 57 (3) of the Code was having no application. However, in the present case the application filed under section 57 (2) of the Code was dismissed by the SDO on 05.11.1971 (see para 4 of the plaint and the present suit was filed on 21.12.1972. Thus admittedly the plaintiff has filed the present civil suit after one year from the date of dismissal of his application and therefore, the present suit is barred by prescribed period of limitation as it has not been filed within one year from the date of order of the dismissal of application filed before SDO.

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345. MOTOR VEHICLES ACT, 1988 – Section 149

Driving licence, proof of – Whether driver under obligation to prove that he held valid driving licence ? Held, No – Further held, onus is on insurer to prove that driver had no valid licence.

Akhilesh Gupta v. Arvind Kumar & Ors.

Reported in 2006 (III) MPJR 38

Held:

The Apex Court in case of *Narcinva V. Kamat and another v. Alfredo Antonig Doe Martins and others, 1985 ACJ. 397* held thus:-

> "That the respondent driver was under no obligation to furnish evidence as to enable the Insurance company to wriggle out of its liability under the contract of Insurance. The onus is always on the Insurance Company to prove that the driver had no valid driving license to escape liability of payment of compensation.

This Court in *Smt. Sham Kunwar and others Vs. Kamal Singh and Others, 2000 (1) T.A.C. 129 (M.P.)* held :-

> "The Insurance Company pleaded that the owner of the offending vehicle committed breach of the condition of the policy that the driver of the vehicle had no valid license at the time of accident, therefore, it was not liable to pay compensation. As the Insurance Company is claiming exoneration on the ground of the breach of the condition of

the policy, the burden is squarely on it to prove that breach has been committed by the insured as if breach was not proved by leading evidence, the Insurance Company would fail. In this case, the Insurance Company did not examine any witness nor produced any document which could prove that the driver had no valid license."

The Insurance Co. had never issued any notice to the owner or driver of the bus or made any effort for the production of the driving license of the driver respondent No. 2. Therefore the burden had not been discharged by the Insurance Co. that concerning bus driver was not having valid license at the time of the accident.

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346. CIVIL PROCEDURE CODE, 1908 – Section 12 Order IX Rules 1 and 2 Suit Dismissed in default – Whether a fresh suit on the same cause of action maintainable? Held, No, because such suit is barred by S.12. Govind Das & Anr. v. Vikram Singh & Ors. Reported in 2006 (III) MPJR 56

Held:

Learned counsel for the appellants submits that the respondents No. 1 and 2 earlier also filed a civil suit wherein the validity of the decree dated 29.09.84 passed in Civil Suit No. 14-A/84 was challenged. The suit was registered as Civil Suit No. 20-A/87 and was dismissed in default vide order dated 16.08.1989 by Civil Judge, Class I, Bhander, Thereafter a restoration application was filed by respondents No. 1 and 2 which was numbered as 6/89 and was also dismissed in default vide order dated 23.04.1992. It is submitted that in view of this the learned trial Court has rightly held in the subsequent suit that for the same relief the suit shall not be maintainable under section 12 CPC. Learned counsel submits that in the circumstances learned lower Appellate Court has committed error in remanding the case for fresh decision. Reliance is placed on the decision in the matter of *Hariram v. Lichmaniya and others,* reported in *AIR 2003 Rajasthan 319,* wherein Rajasthan High Court while considering sections 10, 11 and 12 and order 2 Rules 1 and 2 CPC has held that fundamental aim and object is to avoid multiple suits may it be founded on same subject-matter. Section 12 bars the plaintiff from instituting "further suit" based on and in respect of such cause of action, which was cause action in earlier suit. Section 10 CPC says "Courts shall not proceed with the trial," section 11 CPC says "the Court shall not try any suit or issue." It was further observed that once suit is filed in Court, as far as possible dispute between the parties must be settled completely, which will be not only in the interest of the parties to the suit, but it will be in favour of public interest also as it will avoid dragging of the parties to Court again and again, it will save the precious time of the Courts, it will avoid multiplicity of suits, it will result in avoiding conflicting judgments and orders and it will settle the dispute once for all. By this time the Court can be made available for deciding bonafide litigation instead of Court's becoming tool in the hands of litigant to provide

litigant mould the proceeding of trial of suites to keep the dispute alive for indefinite period and to compel other party to file another suit for the decision on the issues, which were already subject matter in issues in the suit.

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347. CIVIL PROCEDURE CODE, 1908 – Order IX Rule 13
Dismissal of suit because plaintiff's counsel pleading 'no instruction' – Plaintiff neither informed by counsel or by the Court before dismissal – Whether it amounts to 'sufficient cause' for restoration? Held, Yes – Law explained.
Pankaj Agrawal & Ors. v. Shakuntala Devi & Ors.
Reported in 2006 (III) MPJR 72

Held:

Under Order 9 Rule 13 C.P.C. an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The Hon'ble Supreme Court in the Case of *G.P. Shrivastava Vs. R.K. Raizada and others,* reported in *(2000) 3 SCC 54,* has observed that the words" was prevented by any sufficient cause from appearing". Must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring pary. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearnce of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the dependent approaches the Court immediately and within the statutory time specified the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis, decided on merits. This is which the Hon'ble Apex Court had observed in the case of *G.P. Shrivastava* (supra).

Learned counsel for the appellant further placed reliance on a decision in the case of *Smt. Benibai Vs. Smt. Champabai,* reported in *1996 (1) MPJR 70= AIR 1996 MP 245* wherein this Court has taken the view that the counsel pleading no instructions and the Court is also not taking necessary steps to ensure that counsel had sufficient reason not to appear for party who engaged him or to

plead no instructions ex parte decree is liable to be set aside on this ground alone.

Learned counsel for the appellant further placed reliance on a decision in the case of *Malkiat Singh and another Vs. Joginder Singh and others,* reported in *1998 (2) SCC 206,* wherein the Hon'ble Supreme Court has dealt with a case in which the counsel for the party pleaded no instructions and has observed as under :

> "6. There is no denying the fact that the appellants had engaged a counsel to defend them in the civil suit. The counsel for the appellant pleaded "no instructions" but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions in the court. It is nobody's case that the counsel informed them after he had reported no instructions to the Court.
>
> 7. In this factual situation, the trial Court, which had admittedly had not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot in facts and circumstances of the case, be said to be at fault and they should not suffer.

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348. CRIMINAL PROCEDURE CODE, 1973 – Section 311

Power to summon material witness or to recall a witness already examined, exercise of – Duty of the Court to examine or recall a witness for just decision of a case – Exercise of discretion in such case cannot be dubbed as "filling in a lacuna in a prosecution case". U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan

Judgment dated 14.08.2006 by the Supreme Court in Criminal Appeal No. 834 of 2006, reported in (2006) 7 SCC 529

Held:

A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage or justice.

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349. SERVICE LAW:

Dismissal or termination of a probationer during probation period – Whether probationer entitled to opportunity of hearing? Held, No – Also held, unless prejudice shown, violation of principles of natural justice inconsequential.

Om Prakash Mann v. Director of Education (Basic) and others
Judgment dated 29.08.2006 by the Supreme Court in Civil Appeal No. 6014 of 2004, reported in (2006) 7 SCC 558

Held:

By now it is well-settled principle of law that the doctrines of principle of natural justice are not embodied rules. They cannot be applied in a straitjacket formula. To sustain the complaint of violation of the principle of natural justice one must establish that he has been prejudiced by nonobservance of the principle of natural justice. As held by the High Court the appellant has not been able to show as to how he has been prejudiced by non-furnishing of the copy of the enquiry report. The appellant has filed a detailed appeal before the Appellate Authority which was dismissed as noticed above. It is not his case that he has been deprived of making effective appeal for non-furnishing of copy of enquiry report. He has participated in the enquiry proceedings without any demur. It is undisputed that the appellant has been afforded enough opportunity and he has participated throughout the enquiry proceedings, he has been heard and allowed to make submission before the Enquiry Committee.

Admittedly, the enquiry was also initiated against the appellant when he was on probation. It is well-settled principle of law that if the probationer is dismissed/terminated during the period of probation no opportunity is required to be given and, therefore, the question of violation of principle of natural justice does not arise in the given facts of this case.

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350. ADVERSE POSSESSION:

Adverse possession, concept of – Person pleading adverse possession must show that it was hostile to the real owner – Person claiming to be in adverse possession not sure who is the true owner – Question of such person being in adverse possession does not arise – Law explained.

T. Anjanappa and others v. Somalingappa and another
Judgment dated 22.08.2006 by the Supreme Court in Civil Appeal No. 3594 of 2006, reported in (2006) 7 SCC 570

Held:

Adverse possession is that from of possession or occupancy of land which is inconsistent, with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding

under the rightful owner's title e.g. trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession.

> "14. ... Adverse possession means a [hostile possession] which is expressly or impliedly in denial of title of the true owner. Under Article 65 [of the Limitation Act,] burden is on the defendants to prove affirmatively. A person who based his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to be animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed...
>
> 15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statue of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. (See *Annasaheb Bapusahab Patil v. Balwant, (1995) 2 SCC 543, SCC* p. 554, paras 14-15).

An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. Thus, if A is in possession of a field of B's, he is in adverse possession of it unless there is something to show that his possession is consistent with a recognition of B's title (See *Ward v. Carttar, 55 ER 860.*) Adverse possession is of two kinds, according as it was adverse from the beginning, or has become so subsequently. Thus, if a mere trespasser takes possession of A's property, and retains it againts him, his possession is adverse ab initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of depriving the true owner of his right of action to

recover his property and this although the true owner is ignorant of the adverse possessor being in occupation. (See *Rains v. Buxton, (1880) 14 ch D 537.*)

It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential, Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise.

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351. SCIENCE AND LAW:

Balance between age old rigid law and advance technology, desirability of – Principle of 'updating construction' applicable for assimilating law with advance technology.

State of Punjab and others v. Amritsar Beverages Ltd. and others Judgment dated 08.08.2006 by the Supreme Court in Civil Appeal No. 3419 of 2006, reported in (2006) 7 SCC 607

Held :

Creative interpretation had been resorted to by the Court so as to achieve a balance between the age-old and rigid laws on the one hand and the advanced technology, on the other. The judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the filed of science.

Internet and other information technologies brought with them the issues which were not foreseen by law as, for example, problems in determining statutory liabilities. It also did not foresee the difficulties which may be faced by the officers who may not have any scientific expertise or did not have the sufficient insight to tackle with the new situation. Various new developments leading to various different kinds of

crimes unforeseen by our legislature come to immediate focus. The Information Technology Act, 2000 although was amended to include various kinds of cyber crimes and the punishments therefore, does not deal with all problems which are faced by the officers enforcing the said Act.

We may notice some recent amendments in this behalf. Section 464 of the Penal Code deals with the inclusion of the digital signatures. Sections 29, 167, 172, 192 and 463 of the Penal Code have been amended to include electronic documents within the definition of "documents". Section 63 of the Evidence Act has been amended to include admissibility of computer outputs in the media, paper, optical or magnetic form. Section 73-A prescribes procedures for verification of digital signatures. Sections 85-A and 85-B of the evidence Act raise a presumption as regards electronic contracts, electronic records, digital signature certificates and electronic messages.

In *SIL Import v. Exim Aides Silk Exporters, (1999) 4 SCC 567* notice in terms of Section 138 of the Negotiable Instruments Act was construed to include notice by fax.

In State of *Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601* this Court opined that recording of evidence through video conferencing is permissible in terms of Section 273 of the Code of Criminal Procedure; stating; (SCC pp. 611-12, para 16)

> "16. This Court has approved the principle of updating construction, as enuciated by Francis Bennion, in a number of decisions. These principles were quoted with approval in *CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482.* They were also cited with approval in *State v. S.J. Choudhary (1996) 2 SCC 428.* In this case it was held that the Evidence Act was an ongoing Act and the word 'handwriting' in Section 45 of that Act was construed to include 'typewriting' These principle were also applied in *SIL Import v. Exim Aides Silk Exporters'* (supra). In this case the words 'notice in writing', in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. On the same principle courts have interpreted, over a period of time, various terms and phrases. To take only a few examples. 'stage carriage' has been interpreted to include 'electric tramcar', 'steam tricycle' to include 'locomotive', 'telegraph' to include 'telephone', 'banker's books' to include 'microfilm', 'to take note' to include 'use of tape recorder', 'documents' to include 'computer database'".

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352. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 (2) Award, setting aside of – Award passed in violation of mandatory procedure prescribed u/ss 24, 28 and 31 (3) is open to interference by the Court – Law explained.
Hindustan Zinc Ltd. v. Friends Coal Carbonisation
Reported in 2006 (3) MPLJ 453 (SC)

Held:

This Court in *ONGC Ltd. vs. Saw Pipes Ltd., (2003) 5 SCC 705* held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the Court under section 34(2) of the Act. This Court observed:

> "13. The question, therefore, which requires consideration is – whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under sections 24, 28 or 31 (3), which affects the rights of the parties. Under sub-section (1) (a) of section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provision of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be – whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in acccordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be intefered. Similary, if the award is a non-speaking one and is in violation of section 31(3), can such award be set aside? In our view, reading section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under section 34.
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> ★ ★ ★
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> 31.... in our view, the phrase 'public policy of India' used in section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in

addition to narrower meaning given to the term "public policy" in *Renusagar Power Co. Ltd. Vs. General Electric Co., 1994 Supp (1) SCC 644,* it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

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353. WORDS AND PHRASES:

Expression "holding an office of profit" meaning and connotation of.
Jaya Bachchan v. Union of India and others
Reported in 2006 (3) MPLJ 463 (SC)

Held:

... The term "holds an office of profit" though not defined, has been the subject-matter of interpretation, in several decisions of this Court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclauture is not important. In fact, mere use of the word "honorarium" cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of Article 102 (1) (a). This position of law stands settled for over half a century commencing

from the decisions of *Revanna Subunna vs. G.S. Kaggeerappa, AIR 1954 SC 653, Shivamurthy Swami Inamdar vs. Agadi Sanganna Andanappa, (1971) 3 SCC 870, Satrucharla Chandrasekhar Raju vs. Vyricherla Pradeep Kumar Dev, (1992) 4 SCC 404* and *Shibu Soren vs. Dayanand Sahay, (2001) 7 SCC 425.*

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354. MOTOR VEHICLES ACT, 1988 – Sections 146, 147 and 149
Whether "Act Policy" covers death of or bodily injury to a gratuitous passenger (private) ? Private vehicle unauthorisedely used as taxi – Whether it amounts to breach of policy ? Held, Yes.
National Insurance Company Limited, Jayendraganj, Gwalior M.P., v. Smt. Tanuja and others
Judgment dated 23. 08.2005 by the High Court of M.P., Gwalior Bench in Misc. Appeal No. 725 of 2000.

Held :

A careful reading of the observations in *Asha Rani, Baljit Kaur and Bommithi Subbhaymma* would reveal that all of them are with reference to goods carriages vis-a-vis and passengers in goods carriages and owner of goods carried in goods carriages. They have no application to occupants/passengers in a motor car, a private vehicle. The observation in Asha Rani that "an owner of a passenger carrying vehicle must pay premium for covering the risk of the passengers", which is reiterated in *Baljit Kaur* (supra) and in *National Insurance Co. Ltd.. Vs. Bommithi Subbayamm (Rev. Petition [Civil] 935/2003 in SLP (Civil) 5628/2003 decided on 21.2.2005),* should be read in conjunction with the previous paragraphs in those decisions. When so read, it is crystal clear that the said observation related to passengers in a public service vehicle, that is vehicles that carry passengers for hire or reward or 'private service vehicles'. We are, therefore, of the view that an 'Act Policy' issued by an Insurer to cover the statutory liability as provided in Sections 146 and 147 of the new Act will provide the cover of indemnity in regard to the death of or bodily injury to a gratuitous passenger in a motor car (private use vehicle). It is no doubt true that if private vehicle (Motor Car) is used as a taxi and unauthorisedly carries passengers for hire or award, there would be a breach of the terms of the policy and the Insurance Company may not be liable.

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355. TRANSFER OF PROPERTY ACT, 1882 – Section 122
Gift, definition of – Acceptance of gift by or on behalf of donee in the life time of a donor *sine qua non* **for completing the gift.**
Hotam Singh and others v. Sewaram and others
Judgment dated 22.03.2004 by the High Court of M.P., Gwalior Bench in Letters Patent Appeal No. 116 of 1998

Held :

Section 122 of the Transfer of Property Act defines gift. It provides that gift

is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. In the erstwhile state of gwalior, Transfer of Property Act Gwalior State Samvat 2001 was applicable. Section 118 of the aforesaid Act defines "Gift" which is reproduced below:

> "Gift is the acceptance of certain existing moveable or immoveable property made voluntarily and without consideration by one person, called the donor, to another called the donee, and accepted by or on behalf of the donee."

The definition of the gift in Transfer of Property Act Gwalior State Samvat, 2001 is identical to Section 122 of the Transfer of Property Act, 1882 and gift is not complete unless it is accepted. In case of gift, acceptance by or on behalf of donee during the life time of donor is sin qua non. Thus, execution of registered gift deed, acceptance of gift and delivery of property makes the gift complete. See *Narmadaben Manganlal Thakker vs. Pranjivandas Manganlal Thakker [(1997) 2 SCC 255]*.

Thus, one of the ingredients essential for the gift is that there must be acceptance by or on behalf of donee and such acceptance must be made during the life time of the donor while he is still capable of giving.

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356. LAND ACQUISITION ACT, 1894 – Section 18
Agricultural Land, acquisition of – Determination of market value – Factors to be kept in view – Law explained.
Laxman Prasad Kushwaha and others v. State of Madhya Pradesh Judgment dated 24.09.2004 by the High Court of M.P., Gwalior Bench in First Appeal No. 30 of 1993.

Held :

In the case of *State of Harayana vs. Joginder Singh [(1997) 3 SCC, 628]*, it is held that when the land acquired has no potential value of any kind and was pure and simple agricultural land, High Court was not justified in taking into account future developments and the rates fixed by the District Judge based on factual matrix was confirmed. In the case of *Advola Sathiah vs. special Deputy Collector. L.A. Unit 4 [(1997) 1 SCC 130]*, it is held that the market value of agricultural lands varied between Rs. 6000/- and Rs. 6500/per acre as prevailed at the time, compensation at Rs. 6000/- per acre uniformly for all the acquired lands would be just and proper. It is held in the case of *Basant Kumar vs. Union of India [(1996)] 11 SCC 542]* that where agricultural land is not developed and not fit for construction of houses and as such possessed of no potential value, then the determination of market value on bigha basis instead of yard basis is proper. In the case of *Special Land Acquisition Officer, Dharwad Vs. Tajar Hanifabai (Smt.) [(1996) 10 SCC 627]* it is held that when acquired lands were found to be agricultural lands and certificate to that effect was also issued by

the Sub–Tehsildar, market value fixed by the High Court was reduced as the sale deed brought into existence by the claimants to inflate the market value could not be relied upon.

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357. COURT FEES ACT, 1870 – Section 7
CIVIL PROCEDURE CODE, 1908 – O. XXI R. 58 (4)
Appeal against order passed under O.XXI R. 58 (4), valuation of – Whether ad valorem court fees payable ? Held, No – Further held, fixed court fees for misc. appeal payable – Law explained.
Goverdhan Das v. Sitaram Gupta and others
Judgment dated 13.12.2002 passed by the High Court of Madhya Pradesh, (Gwalior Bench) in First Appeal No. 171 of 1996

Held :

First question involved in the appeal is whether appellant is required to pay ad valorem court-fee and what should be the valuation of the appeal if filed against the order passed under order XXI Rule 58(4) of the Code. To examine this question, we have to consider the import of order 21 Rule 58 of the Code, which is reproduced below :–

> Adjudication of claims to, or objections to attachment of property
>
> (1) where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :
>
> Provided that no such claim or objection shall be entertained–
>
> (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
>
> (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.
>
> (2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.
>
> (3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,–
>
> (a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
>
> (b) disallow the claim or objection: or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person: or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been ajudicated upon under this rule, the order made shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute: subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

Sub-rule (4) provides that attachment on the objection shall have force of a decree. It only provides that it will have force of a decree, but it will not be a decree.

Section 7 of the Court-fees Act relates to computation of fees payable in certain suits and it does not include application for objection to attachment.

Section 8 refers to payment of Court-fees on memorandum of appeal where order is passed in relation to compensation. Thus ad valorem court fees is payable in the matter of land acquisition which is filed under Section 54 of the Land Acquisition Act. But the same principle will not apply to an appeal under Rule 58(4) of order XXI of the Code. In this case, the property is not said to be transferred or given to any party, but is kept under attachment for either recovery of decreetal amount or for due performance of the decree. Therefore, said order though appealable as decree, shall be registered as Miscellaneous (First) Appeal or Miscellaneous (Second) Appeal under Sections 96 or 100 of the Code, as the case may be, on the principles of the appeals which were filed before this court under Section 47 of the Code. In the said facts of the case, fixed court-fees shall be payable as paid in miscellaneous appeal.

Therefore, we hold that the appellant is not required to pay ad valorem Court-fees in an appeal filed under order XXI Rule 58(4) of the Code.

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358. MOTOR VEHICLES ACT, 1988 – Section 166
Compensation, liability for – Vehicle taken by bank on hire – Whether bank can be held liable for compensation if the vehicle is involved in accident – Held, Yes – Law explained.
Arun Kumar Thapar v. Yashwant Indapurkar and others
Judgment dated 13.12.2002 passed by the High Court of Madhya Pradesh, (Gwalior Bench) in Misc. Appeal No. 609 of 1997

Held:

Question involved in this case is when the vehicle is taken on hire by the

Bank, then whether the Bank is also liable to pay compensation and shall be deemed to be the owner of the vehicle? Counsel for the appellant in support of his contention has relied upon the judgment in the case of *Rajasthan State Road Transport Corporation Vs. Kailash Nath Kothari [(1997)] 7 SCC 481]* and submitted that the owner includes hirer who is in possession and in actual control of the vehicle.

While interpreting the scope of Section 2(19) of the Motor Vehicles Act, 1939, the Apex Court held in para 17 of the judgment as under :-

> The definition of owner under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who was in the actual possession and control of the vehicle and under whose direction and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case. Shri Sanjay Kumar the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete "control" to RSRTC, under whose directions, instructions and command the driver was to ply the ill-fated bus on the fateful day. The passengers were being carried By RSRTC on receiving fare from them. Shri Sanjay kumar was therefore not concerned with the passengers travelling in that bus on the particular route on payment of fare to RSTRC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductors of RSRTS for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the manner may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (supra) the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an employer, that is the person

who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of conditions 6 and 7 (supra), which go to show that the owner had not merely transforred the services of the driver to the RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC.

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359. EVIDENCE ACT, 1872 – Section 108

Presumption of death u/s 108, nature of – Presumption is regarding death at the expiry of 7 years and not to the time of death at a particular period – Law explained.

State of M.P. and others v. Kiran Sengar and another

Reported in 2006 (3) MPLJ 518

Held:

... Presumption under section 108 of the Evidence Act extends to the fact of death at the expiry of seven years and not to the time of death at a particular period. If that is the rule, the Tribunal cannot presume death on the date on which the person was missing but presumption will arise only after expiry of seven years thereafter. Privy Council in the case of *Lalchand Maravari vs. Mahant Ramrup Gir, AIR 1926 P.C. 9* has taken a similar view and held that presumption about the death will arise only after expiry of seven years from the date from which the person is missing or not been heard of. Similar view is taken by the Bombay High Court in the case of *Subhash Ramchandra Weadekar vs. Union of India, AIR 1993 Bombay 64.*

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360. FAMILY COURTS ACT, 1984 – Section 7

(i) Family Court, jurisdiction of regarding determination of parentage of a child – Whether Family Court can go into the legitimacy or otherwise of a child born to the parents? Held, Yes – Law explained.

(ii) D.N.A. Test for determining parentage – Whether matrimonial Court can issue directions for DNA test? Held, Yes.

Seema Sharma v. Amar Sharma
Reported in 2006 (3) MPLJ 523

Held:

Section 7 of the Family Courts Act, 1984 (hereinafter referred to as the Act) deals with the question of jurisdiction of the Family Courts. Accoding to the provisions of this section, a Family Court shall have and can exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation to the said section. Clause (e) to the explanation pertains to a suit or proceedings for a declaration as to the legitimacy of any person.

In the case of *Renubala Moharana and anr. v. Mina Mohanty & Ors., AIR 2004 SC 3500* referred to by Shri S.B. Mishra, learned senior counsel, the scope of jurisdiction of the Family Court, with particular reference to clause (e) of the explanation was considered and it had been held by the Supreme Court in the case that under section 7 (1) of the Family Courts Act, read with clause (e) of the explanation, a suit or proceeding for declaration as to the legitimacy of a person is within the jurisdiction of the Family Court. It was held by the Supreme Court in the aforesaid case that the question of status of child in relation to the parties to the proceedings can be incidentally gone into by the Family Court if necessary while deciding the guardianship. The facts of the said case and the present case are entirely different. A complete reading of the observations made by the Supreme Court in paragraph 6 of the aforesaid judgment clearly indicates that in a particular case if question pertaining to status of a child in relation to the parties to the petition pending before the Family Court is involved, the said question can be gone into by the Family Court under clause (e) of the explanation to section 7(1) of the Act.

In the case of *Renubala Moharana* (supra), it has been held by the Supreme Court in paragraphs 5 and 6 as under:-

> ".... In effect, the High Court held that while deciding the petition for guardinship/custody, the question of status or inter se relationship of the parties can be incidentally considered by the Family Court."
>
> ".... The question of status of the child in relation to the parties to the petition can be incidentally gone into by the Family Court if necessary while deciding the guardianship petition. That liberty has been granted to the Family Court..... "

Keeping in view the aforesaid observations of the Supreme Court, so also, taking note of the observations made by the Supreme Court as contained in paragraph 14 of its judgment in the case of *K.A. Abdul Jaleel Vs. T.A. Shahida, AIR 2003 SC 2525,* the provisions of clause (e) to the explanation has to be given a liberal interpretation and the restricted meaning as advanced by Shri S.B. Mishra, learned senior counsel cannot be applied. Accordingly, it has to be held

that the legitimacy or otherwise of a child born to the parties in a proceeding before the Family Court can be gone into by the Family Court and for the said purpose, the Family Court has jurisdiction. Accordingly, the first ground raised by Shri S.B. Mishra, learned senior counsel has to be rejected.

It has to be held that the Family Court does have jurisdiction to grant the declaratory relief claimed by the respondent No.1.

(ii) The question of subjecting a person to blood test, DNA test or other medical examination has been subject-matter of deliberations in various cases. After the judgment of the Supreme Court in the case of *Goutam Kundu v. State of West Bengal & another, AIR 1993 SC 2295* in the year 1993, the matter has been considered again in various cases. In most of the cases, the development in genetic science and the new technology made available for determining parentage or maternity dispute has been taken not of. It has been observed in most of the cases that in cases of disputed paternity of a child, mere comparison of DNA obtained from the body fluid or body tissues of a child with his father and mother can offer infalliable evidence of biological parentage. In view of the established scientific fact, DNA parentage test provides evidence to show that a person has a biological cannection with another person and use of this technology is made available to the Courts in order to determine the parentage or maternity dispute so as to arrive at a correct conclusion.

The Supreme Court in the case of *Sharda v. Dharmpal, (2003) 4 SCC 493* has considered the effect of Article 21 of the Constitution in such matters and has also taken note of the fact as to whether a Matrimonial Court has the power to direct a party to undergo medical examination and whether passing of such an order would be in violation of Article 21 of the Constitution. It has been concluded by the Supreme Court in the aforesaid case that the Matrimonial Court has the prower to order a person to undergo medical test. Decision of the Supreme Court in the aforesaid case in paragraph 81 indicates the final conclusion arrived at by the Supreme Court and the same reads as under:

> "1. A Matrimonial Court has the power to order a person to undergo medical test.
>
> 2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
>
> 3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw an adverse inference against him."

It is clear from the aforesaid a Matrimonial Court has the power to issue such a direction. However before exercising the power, a prima facie case and sufficient material should be available before the Court. In the present case, it cannot be said that the prima facie case and material were not available.

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361. CRIMINAL PROCEDURE CODE 1973 – Section 389

Sentence of "till rising of Court" – Whether it amounts to imprisonment liable to be suspended u/s 389? Held, Yes.

Raju@ Rajiv Sharma v. State of M.P.

Reported in 2006 (3) MPLJ 566

Held:

The Sessions Judge Khandwa has in his order in order sheet dated 2-3-2006 in Criminal Appeal No. 65/2006 *Raju vs. State* Stated that since the sentence till rising of the Court is not jail sentence, it need not be suspended under section 389, Criminal Procedure Code.

On perusal of section 389, Criminal Procedure Code it reveals that the section does not speak about jail sentence but of imprisonment. The dictionary meaning of the word sentence is 'punishment given by a law court : a Jail/ prison/custodial sentence'. The meaning of the word "imprisonment" means putting an accused in prison (Oxford Advances Learners Dictionary). A sentence of imprisonment till rising of the Court is a sentence which is in accordance with law. A direction by the Court that a person shall be confined in the Court premises till the Court rises constitute imprisonment within the meaning of the Penal Code and the Code of Criminal Procedure *Muthu Nadar's case, AIR 1945 Mad. 313,* Mulchandani in his esteemed Law Lexicon Digest 1990 Edition, Vol. 1 Page 728 explains the meaning of the words "till the rising of the Court and for "one day" like this " There is no practical difference because 'day' in this context does not mean 24 hours or does not even include 'night'. 'Day' here means 'Lockup time' which is generally 5 p.m. in the winter and 6 p.m. in the summer. If a convict is ordered to undergo sentence of one day, he must be released before lockup time from the prison." The words imprisonment, confinement and detention have also been explained in the said book. They respectively mean conviction and the last two means without conviction. Therefore, the last two may prove to be unlawful also.

In the present case the revisionist is sentenced to imprisonment till rising of the Court, the Sessions Judge Khandwa said that it is no jail sentence and hence, it cannot be suspended under section 389, Criminal Procedure Code since sentence till rising of the Court amounts to curtilment of liberty of an accused. Such sentence can be suspended by the Court exercising the powers under section 389, Criminal Procedure Code.

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362. STRICTURES:

Strictures or disparaging remarks against person/authotiry by Courts in Judicial orders – Relevant considerations – Law explained.

Sushil Ranjan Singh and others v. State of M.P.

Reported in 2006 (4) MPLJ 20

Held:

The learned trial Court having taken into consideration that the investigation was initiated by applicant Nos. 2 and 3, who on the relevant date were not holding the posts of Dy. Superintendent of Police, thus they were not empowered to do so. According to learned trial Court, it should have been done only by applicant No. 1 who, on the relevant date, was empowered to initiate and complete the investigation by virtue of the fact that he was holding the post of SDO (Police) which is equivalent to the post of Dy. Superintendent of Police.

The learned trial Court, therefore, has passed remarks against the conduct of the applicants and has directed that copy of the judgment be sent to Inspector General of Police, Rewa and offence be registered against the applicants under section 4 of the Act and they be prosecuted with accordingly.

We may profitably refer to a judgment of the Supreme Court reported in *AIR 1964 SC 1, Dr. Reghubir Saran vs. State of Bihar and another* in which, it has been held that the High Court has inherent powers to expunge objectionable remarks in judgment or order of subordinate Court against stranger after it has become final.

In the case in hand, the Supreme Court was dealing with the provisions as contained in section 561-A of the old Code of Criminal Procedure. The provisions under section 561-A is analogous to the provisions of section 482 of the present Code of Criminal Procedure.

Dealing with the said provisions, the Supreme Court has held that the remarks with were unwarranted may effect the reputation or even the career of such person. In such a case the Appellate Court in a suitable case may judicially correct the observations of the lower Court by pointing out that the observations made by that Court were not justified or were without any foundation or were wholly wrong or improper as this can be done under the inherent powers of the Court which are conferred on this Court by virtue of the provisions as contained under section 482, Criminal Procedure Code.

In yet another judgment of the Supreme Court reported in *AIR 1964 SC 703, State of U.P. vs. Mohammad Naim,* it has been held that before making disparaging remarks against any persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them, it is relevant to consider:

(a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself;

(b) whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct.

Supreme Court has further held that judicial pronouncements must be judicial in nature and should not normally depart from sobriety, moderation and reserve.

Similar view has been expressed again by the Supreme Court in a judgment reported in *AIR 2001 SC 93, Manish Dixit vs. State of Rajasthan* wherein it has been held that castigating remarks made by Court against any person which are likely to have serious consequences on future career of a person concerned should not be made unless the person concerned has been given an opportunity of hearing in the matter in respect of the proposed remarks or strictures and such opportunity is basic requirement for otherwise offending remarks would be in violation of the principles of natural justice.

The earlier judgment of the Supreme Court as mentioned hereinabove, has been approved in this judgment.

In the light of the aforesaid discussion and keeping in mind that admittedly applicants were neither issued any notices nor were afforded any opportunity of herring, we have no hesitation to hold that no such remarks could have been made against them. Thus, on ground No. 1 itself the said remarks are hereby expunged.

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363. CRIMINAL PROCEDURE CODE, 1973 – Section 197
CO-OPERATIVE SOCIETIES ACT, 1961 (M.P.) – Section 76 (2)
Sanction for prosecution – Prosecution against Secretary of Co-operative Bank for shortage of cash and material – Whether sanction u/s 197 necessary? Held, No – Further held, no sanction required u/s 76(2) of the Co-operative Societies Act.
Jaipal Singh Chandel v. State of M.P.
Reported in 2006 (4) MPLJ 56

Held:

Learned counsel for the applicant submitted that no sanction for prosecution as envisaged under section 197 of the Criminal Procedure Code was obtained from the competent authority and so the prosecution of the applicant was bad in law for want of such sanction. It is also contended by him that as per the provisions of section 76(2) of the M.P. Co-operative Societies Act sanction for prosecution from Registrar Co-operative Society was also required, such sanction was also not obtained before prosecution of the applicant and on this count alone applicant deserves acquittal in the present case.

Learned Additional Sessions Judge has considered this aspect of the matter in paragraph 9 to 12 of the impugned judgment. It has been observed that applicant does not come in the category of such public servant who is not removed from his office save by or with the sanction of the Government so any sanction under section 197, Criminal Procedure Code for prosecution is not necessary in the facts of the present case. Applicant was working on the post of secretary, Co-operative Society and his appointing authority was District Central

Co-operative Bank, Dewas. He does not come in the category of such public servants who cannot be removed from service save by or under the sanction of the Government, therefore, learned Lower Appellate Court rightly held that not obtaining sanction under section 197 of the Criminal Procedure Code does not put any bar on taking cognizance of the offence against the present applicant.

Similary the provisions of section 76(2) of the Co-opeartive Societies Act are relating to the prosecution of a person under the provision of that Act and that provision has no application when a public servant is prosecuted for an offence punishable under section 409 of Indian Penal Code, Therefore, learned Lower Appellate Court rightly held that section 76(2) of the Co-operative Societies Act also does not come in the way of the prosecution of the applicant.

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364. CRIMINAL PROCEDURE CODE, 1973 – Section 319
Summoning a person as accused – Whether Session Judge can summon u/s 319 at the stage of charge? Held, No – Power u/s 319 has to be exercised after recording of evidence.
Reghvendra and others v. State of M.P.
Reported in 2006 (4) MPLJ 83

Held:

Contention of the learned counsel for the petitioners is that at the time of framing of charge, on the basis of material collected in the charge-sheet and after perusal of the statements of witnesses, trial Court has added the names of petitioners as accused. This exercise by the trial Court is illegal. Under section 190 of the Code of Criminal Procedure Sessions Judge is not having any power to add the names of accused persons at the time of framing of charge. It is not in dispute that under section 319 of Criminal Procedure Code, during trial or at the time of investigation names of other persons can be added as accused but that can only be done at the stage of recording evidence. Thus, the sole contention of learned counsel for the petitioner is that at the stage of framing of charge the Sessions Judge cannot invoke the powers provided under section 319, Criminal Procedure Code and cannot issue any directions for joining the petitioners as accused in the case.

It is specifically mentioned under section 319(1) of Criminal Procedure Code that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. In order to apply section 319 it is essential that Court should record evidence of witnesses and after recording the evidence of witnesses, during the course of inquiry or trial, if the Court comes to the conclusion that other persons should also be added as accused it can proceed against other persons by adding them as accused in the case.

In the case of *Ranjit Singh vs. State of Punjab, 1998 (3) Crimes 258* the Hon'ble Apex Court has held that Sessions Judge has no jurisdiction to add a new person in a case pending before it at a stage prior to recording evidence. The ratio of decision in the case of *Ranjit Singh* is being following by the High Court. Again in the case of *Tek Narayan Prasad Yadav vs. State of Bihar and another, 1999 SCC (Cri) 356* Hon'ble Apex Court has held that Sessions Court is competent to issue process against a person, who is not charge-sheeted under section 193 after having begun the trial and having recorded some evidence of the prosecution. In the case of *Raj Kishore Prasad vs. State of Bihar, 1996 (2) Crimes 142 (SC)* it was held by the Hon'ble Apex Court that addition of an accused by summoning or resummoning has only been permitted by manner provided under section 319 of Criminal Procedure Code on evidence adduced during trial and in no other way.

Therefore, on a plain reading of provisions of section 319 of Criminal Procedure Code and in the light of aforesaid law laid down by the Apex Court in the cases cited (supra), it is clear that provisions of section 319, Criminal Procedure Code cannot be exercised at the stage of framing of charge. The Court can add the accused persons and summon them only after recording evidence of the prosecution witnesses and also after evaluation of their evidence...

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365. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) & 12 (3)

Whether deposit of arrears of rent after statutory period of 30 days without time being extended by Court for deposit can provide shelter u/s 13 (5)? Held, No – Law explained.

Rajendra Kumar Jain v. Laxmi Bai

Reported in 2006 (4) MPLJ 115

Held:

Now to appreciate the contention of the parties, firstly the ground under section 12(1)(a) of the Act may be seen. In this case it is not in dispute that on 6-1-1998, the trial Court while considering both the applications directed tenant to deposit entire arrears of rent within a period of 30 days from the date of order. It is not in dispute that the tenant had not deposited the entire arrears of rent within the aforesaid period. The contention of the appellant, is that on 19.3.1998, the trial Court extended a period of one week to deposit the rent and the tenant deposited the entire arrears of rent on 20.3.1998, on succeeding day. While the contention of the respondent is that no such time was extended by the trial Court and in the absence of extension of time or condonation of delay in depositing the rent, the tenant was not entitled for benefit under section 12(3) of the Act and the Appellant Court has rightly granted decree under section 12(1)(a) of the Act.

To consider the rival contention of the parties, the order dated 19.3.1998 passed by the trial Court may be seen. This order was passed by the trial Court

on an application filed by the landlord under section 13(6) of the Act in which it is alleged that the tenant has not deposited the entire rent nor has furnished the receipts of deposit of the rent. On the aforesaid application, the trial Court very specifically passed the order that one week time is allowed to the tenant to furnish the deposit receipts in compliance of the order dt. 6.1.1998 and shall also furnish the particulars of deposit of the rent to the Court, otherwise the defence of the tenant shall be struck out. From the perusal of the entire order, nowhere the trial Court had extended the time to deposit the amount to the tenant in continuation to order dt. 6.1.1998. When time period was not extended by the trial Court, the tenant on deposit of the rent on 20.3.1998 was under an obligation to file an application for seeking condonation of delay or extension of time for depositing the rent. In the absence of which, it can very well be presumed that the tenant has failed to comply with the provisions of section 13(1) of the Act or order dated 6.1.1998 by the trial Court and the landlord was entitled for decree under section 12(1)(a) of the Act. The benefit of section 12(3) of the Act is available only when the provisions of section 13(1) of the Act are complied with. In the absence of which the tenant could not invoke benefit under section 12(3) or 13(5) of the Act and the landlord was entitled for a decree under section 12(1)(a) of the Act...

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366. SERVICE LAW:

M.P. CIVIL SERVICES (PENSION) RULES, 1976 – Rule 42 (1) (b) Compulsory retirement of Government servant under Rule 42 (1) (b), requirements for – Entire record of Government servant including the latest entries should be considered before taking decision – Law explained.

State of M.P. and another v. Ram Sewak Jaiswal and another Reported in 2006 (4) MPLJ 150

Held:

Rule 42 (1)(b) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 is quoted hereinbelow:

> 42(1)(b). The appointing authority may in the public interest require a Government servant to retire from service at any time after he has completed 20 years qualifying service or he attains the age of 50 years whichever is earlier, with the approval of the State Government by giving him three months notice in Form 29:
>
> Provided that such Government servant may be retired forthwith and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing then immediately before his retirement or, as the case may be, for the period by which such notice falls short of three months.

The aforesaid Rule thus empowers the appointing authority to require a Government servant to retire from service at any time after he has completed 20 years of qualifying service or he attains the age of 50 years whichever is earlier in the public interest. Interpreting similar provision in Rule 71 of the Orissa Service Code, the Supreme Court has held in *Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another, (1992) 2 SCC 299* that the review committee or the Government while deciding the cases of Government servant regarding compulsory retirement from service in public interest should not be swayed by one or two remarks but should form an opinion on a totality of consideration of the entire record attaching more importance to later period of his service.

Similarly, in *State of Orissa and others vs. Ram Chandra Das, (1996) 5 SCC 331* the Supreme Court again reiterated that the Government was empowered and would be entitled to compulsorily retire a Government servant in public interest with a view to improve efficiency of the administration or to weed out the people of doubtful integrity, but before taking such a decision to retire a government employee compulsorily from service, the Government has to consider the entire record of the government servant including the latest reports.

In *State of Gujarat vs. Umedbhai M. Patel, (2001) 3 SCC 314* the aforesaid law laid down by the Supreme Court in the case of *State of Orissa and others vs. Ram Chandra Das* (supra), was quoted in para 5 of the judgment as reported in *(2001)3 SCC 314* that Government before taking such a decision to retire a government employee compulsorily from service, has to consider the entire record of the Government servant including the latest reports.

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367. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995 – Rules 7
PREVENTION OF CORRUPTION ACT, 1947 – Section 5
Whether provisions of Rule 7 of the Rules and S.5 of the Act are *pari materia*? **Held, No.**
Bharatsingh and another v. State of M.P.
Reported in 2006 (4) MPLJ 171

Held:

With great respect, this Court does not agree with the ratio decided in the case of *Penta Cota Koteshwar Rao v. State of A.P., 1993 (3) Crimes 582* that the provision of section 5 of the Prevention of Corruption Act and Rule 7 of the Act are pari materia. The Division Bench of Bombay High Court in the case of *Shatrughan Sawan Comble, 2002 Cri. L.J. 790,* para 15 has also held that the provisions under the Prevention of Corruption Act and Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act are not identical with regard to the power of investigation. But, the Division Bench of Bombay High Court, relying on the Supreme Court judgment passed in the case of *H.N. Rishbud and Inder*

Singh v. State of Delhi, AIR 1955 SC 186 held that in view the provisions under section 465 of the Criminal Procedure Code though investigation was done by Sub-Inspector of Police, but, the accused failed to point out any prejudice caused to him, set aside the order of discharge passed by the learned Addl. Sessions Judge and directed to pass appropriate orders to rectify the defect and cure the illegality in the investigation, by order, the Dy. Superintendent of Police to Investigate the matter.

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Having given anxious consideration to the rival contentions and judgments passed by the various High Courts directly dealing with the provisions of Rule 7 of the Act, and this Rule is not pari materia to section 5 of the Prevention of Corruption Act, therefore, this Court is of the opinion that the investigation done by inferior officer of the police, than the Superintendent of Police duly appointed as per the provision under Rule 7 has caused prejudice to the appellants because the Investigating Officer even did not obtain the certificate from the competent authority to establish that the complainant belongs to the Scheduled Caste or Scheduled Tribe Community, shows that the Investigating Officer (Sub-Inspector of Police) was not aware of the provision of the Act and Rules and investigated the matter in a routine manner. If investigation would have been done by designated police officer, he would have probably first ascertained whether complainant was falling within the category of Scheduled Caste or Scheduled Tribe.

●

368. CRIMINAL PROCEDURE CODE, 1973 – Section 389 (3)
Suspension of sentence – Ambit and scope of Section 389 (3) – Provisions not applicable where there is no right of appeal.
Mayuram Subramanian Srinivasan v. C.B.I.
Reported in 2006 Cri. L.J. 3285 (SC)

Held:

Section 389 of the Code of Criminal Procedure, 1973 (in short the 'Code') permits a Court to suspend the sentence pending the appeal and for release of the appellant on bail.

Section 389 so far as relevant reads as follows:

Suspension of sentence pending the appeal; release of appellant on bail. – (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail 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.".

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall. –

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."

Section 389(3) has application when there is a right of appeal. Where prayer for grant of certificate of High Court to appeal in this Court in terms of Article 136 of the Constitution of India, 1950 (in short the 'Constitution') or is made under Article 134(A) of the Constitution there is no right of appeal involved. In such cases Section 389(3) has no application. Merely because somebody intends to file application under Article 136 of the Constitution and seek leave to appeal under Article 136 of the Constitution. Section 389 (3) of the Code has no application.

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369. CRIMINAL TRIAL

Appreciation of Evidence – Ocular evidence and medical evidence, variance between – Though ocular evidence not to be rejected simply for this reason, explanation, therefore, would depend whether alleged injury was suffered in the circumstances of the case.

Khambam Raja Reddy & Anr. v. Public Prosecutor, High Court of Andhra Pradesh

Reported in 2006 AIR SCW 5021

Held:

The present case is an example of contradiction between the ocular evidence and the medical evidence, where the medical evidence is not borne out by the ocular evidence. In such a situation it was suggested on behalf of the appellants on the authority of a decision of this Court in the case of *State of M.P. vs. Dharkole alias Govind Singh and Ors.*, reported in *(2004) 13 SCC 308,* where

the medical evidence was at variance with the ocular evidence, the testimony of the eyewitness should be decided independently and if found trustworthy, the same could not be discarded merely because it is at variance with medical opinion. While there can be no difference of opinion with the principle explained in the aforesaid decision, the application thereof will depend on whether the story as made out by the prosecution is trustworthy and can be related to the injuries suffered by the victim in the manner as sought to be projected. If the ocular testimony is such that it is not possible to relate the injuries with the circumstances in which they were said to have been inflicted, the court has the discretion not to accept the ocular evidence. The principle emaciated in *Dharkole's case* (supra) may be applied in an appropriate case, but each case has to be determined having regard to its own set of facts.

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370. INDIAN PENAL CODE, 1860 – Section 304-B
EVIDENCE ACT, 1872 – Section 113-B
Expression "soon before her death" as used in S.304-B, meaning and connotation of.
T. Aruntperunjothi v. State
Reported in 2006 Cri. L.J. 3290 (SC)

Held:

The significant words are "soon before her death". Here, it was, thus, necessary for the prosecution to establish that the deceased must have been subjected to cruelty or harassment by her husband or relative of her husband soon before her death.

It is now well-settled in view of a catena of decisions of this Court that what would constitute 'soon before her death' depends upon the facts and circumstances of each case.

We would examine some of them.

In *State of A.P. v. Raj Gopal Asawa and another, (2004) 4 SCC 470,* it is stated:

> "10. Section 113-B of the Evidence Act is also relevant for the case at hand. Both Section 304-B IPC and Section 113-B of the Evidence Act were inserted as noted earlier by Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths this. Section 113-B reads as follows:
>
> **"113-B. Presumption as to dowry death.** – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation. – For the purposes of this section 'dowry death' shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860)."

The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its 21st Report dated 10.8.1988 on "Dowry Deaths, and Law Reform". Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry-related deaths, the legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background that presumptive Section 113-B in the Evidence Act has been inserted. As per the definition of "dowry death" in Section 304-B, IPC and the wording in the presumptive Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the woman concerned must have been "soon before her death" subjected to cruelty or harassment "for, or in connection with, the demand for dowry". Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offene under Section 304-B, IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(4) Such cruelty or harassment was soon before her death."

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371. HINDU SUCCESSION ACT, 1956 – Section 6 (Pre-amendment) Ambit, scope and applicability of S.6 as it stood prior to Amendment in 2005 – Law explained.
Anar Devi & ors. v. Parmeshwari Devi & ors.
Reported in 2006 AIR SCW 5063

Held:

In the case of *Gurupad Khandappa Magdum vs. Hirabai Khandappa Magdum, AIR 1978 SC 1239* at page *1243* it has been laid down by this Court as under:

"What is therefore, required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the shares of the deceased in the

coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages... All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during, the lifetime of the deceased."

Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and, i.e., that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a national partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in national partition.

In the case on hand, national partition of the suit properties between Nagarmal and his adopted son Nemi Chand has to be assumed immediately before the death of Nagar Mal and that being so Nagar Mal's undivided interest in the suit property, which was half, devolved on his death upon his three children, i.e., the adopted son Nemi Chand and the two daughter who are plaintiffs in equal proportion. Nemi Chand, the adopted son, would get half of the entire property which right he acquired on the date of adoption and one third of the remaining half which devolved upon him by succession as stated above. This being the position, each of the two plaintiffs was not entitled to one-third share in the suit property, but one-sixth and the remaining properties would go to the adopted son, Nemi Chand

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372. INDIAN PENAL CODE, 1860 – Section 307
Attempt to murder – Intent to commit murder coupled with some overt act sufficient to bring the act within S. 307 – Law explained.
Bipin Bihari v. State of M.P.
Reported in 2006 AIR SCW 5060

Held:

Section 307, IPC reads as follows:

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

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

In *Sarju Prasad v. State of Bihar (AIR 1965 SC 843)* it was observed that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not itself sufficient to take the act out of the purview of Section 307, IPC.

The above position was highlighted in *State of Maharashtra v. Balram Bama Patil and Ors. (1983 (2) SCC 28); Girija Shankar v. State of U.P. (JT 2004 (2) SC 140)* and *Vasant Vithu Jadhav v. State of Maharashtra (2004 AIR SCW 1523) and Bappa @ Bapu v. State of Maharashtra and Anr. (2004 (6) SCC 485).*

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373. INDIAN PENAL CODE, 1860 – Sections 292 and 293

"Obscenity" meaning of – Basic factors to determine whether alleged information comes within the ambit of 'obscenity' – Law explained.

Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.

Reported in 2006 AIR SCW 5026

Held:

The crucial question therefore, is, 'what is obscenity'? The law relating to obscenity is laid down in Sec. 292 of the Indian Penal Code, which came about, by Act 36 of 1969.

Under the present Sec. 292 and Sec. 293 of the Indian Penal Code, there is a danger of publication meant for public good or for bona fide purpose of

science, literature, art or any other branch of learning being declared as obscene literature as there is no specific provision in the Act for exempting them from operations of those sections.

The present provision is so vague that it becomes difficult to apply it. The purposeful omission of the definition of obscenity has led to attack of Section 292 of the Indian Penal Code as being too vague to qualify as a penal provision. It is quite unclear what the provisions mean. This unacceptably large 'grey area', common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators.

The Indian Penal Code on obscenity grew out of the English Law, which made court the guardian of public morals. It is important that where bodies exercise discretion, which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law. The effect of provisions granting broad discretionary regulatory powers is unforeseeable and they are open to arbitrary abuse.

In *Samaresh Bose & Anr v. Amal Mitra & Anr, (1985) 4 SCC 284* it was observed by this Court: "The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author. The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. The judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292, IPC by an objective assessment of the book as a whole and also of the passages complained of as obscene separately."

This is one of the few liberal judgments the courts have given. The point to worry about is the power given to the judge to decide what he/she thinks is obscene. This essentially deposits on the Supreme Court of India, the responsibility to define obscenity and classify matters coming on media as obscene or otherwise. This Court has time and again adopted the test of obscenity laid down by Cockburn CJ. The test of obscenity is, 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and in whose hands a publication in madia of this sort may fall.'

Interestingly, this test of obscenity, which was laid down in the *Hicklin case* in 1869, is the only test in India to determine obscenity.

The Encyclopedia definition of obscenity states, 'By English law it is an

indictable misdemeanor to show an obscene exhibition or to publish any obscene matter, whether it be writting or by pictures, effigy or otherwise.' The precise meaning of "obscene" is, however, decidedly ambiguous. It has been defined as something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".

In the United States, obscene material is any material or performance, if: the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest; the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

Therefore, one can observe that, the basic guidelines for the tier of fact must be:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest...;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and
>
> (c) whether the work, taken as a whole, lacks serious literary , artistic, political, or scientific value.

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374. CONSTITUTION OF INDIA – Articles 72 and 161
Power of the President/Governor for grant/refusal of pardon under Articles 72 and 161 – Held, power is subject to limited judicial review.
Epuru Sudhakar & Anr. v. Govt. of A.P. & Ors.
Reported in 2006 AIR SCW 5089

Held:

It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases.

In *Maru Ram v. Union of India* and *others, (1981) 1 SCC 107* it was held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.

It is noteworthy that in *Kehar Singh and another v. Union of India and another, (1989) 1 SCC 204* the contention that the power of pardon can be exercised for political consideration was unequivocally rejected. In *Maru Ram's case* (supra) it was held that consideration of religion, caste, colour or political loyalty are totally irrelevent and fraught with discrimination.

In *Kehar Singh's case* (supra) it was held that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations delineated in *Maru Ram's case* (supra). The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court.

In *Kehar Singh's case* (supra), placing reliance on the doctrine of the division (separation) of powers it was pleaded, that it was not open to the judiciary to scrutinize the exercise of the "mercy" power. In dealing with this submission this Court held that the question as to the area of the President's power under Art. 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review.

As regards the considerations to be applied to a petition for pardon/ remission in *Kehar Singh's case* (supra) this Court observed as follows :

> "As regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in *Maru Ram*."

In the case of *Swaran Singh v. State of U.P. (1998 (4) SCC 75)* after referring to the judgments in the cases of *Maru Ram's* (supra) and *Kehar Singh's* (supra) this Court held as follows:

> "we cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Art. 161 of the Constitution. If such power was exercised arbitrarily, *mala fide* or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."

The factual scenario in *Swaran Singh's case* (supra) needs to be noted. One Doodh Nath was found guilty of murdering one Joginder Singh and was convicted to imprisonment for life. His appeals to the High Court and Special Leave Petition to this Court were unsuccessful. However, within a period of less than 2 years the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. This Court quashed the said order of the Governor on the ground that when the Governor was not posted with material facts, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the impugned order, it was observed "fringes on arbitrariness".

The Court held that if the pardon power "was exercised arbitrarily, *mala fide* or in absolute disregard of the finer cannons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it". The Court further observed that when the order

of the Governor impugned in these proceedings is subject to judicial review within the strict parameters laid down in *Maru Ram's case* (supra) and reiterated in *Kehar Singh's case* (supra) "we feel that the Governor shall reconsider the petition of Doodh Nath in the light of those materials which he had no occasion to know earlier", and left it open to the Governor of Uttar Pradesh to pass a fresh order in the light of the observations made by this Court.

In the case of *Satpal and Anr. v. State of Haryana and Ors. (2000 (5) SCC 170)*, this Court observed that the power of granting pardon under Art. 161 is very wide and does not contain any limitation as to the time at which and the occasion on which and the circumstances in which the said powers could be exercised.

Thereafter the Court held as follows:

> ".... the said power being a constitutional power conferred upon the Governor by the Consitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Art. 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is *mala fide* one or the Governor has passed the order on some extraneous consideration."

The principles of judicial review on the pardon power have been re-stated in the case of *Bikas Chatterjee v. Union of India (2004 (7) SCC 634)*.

In *Mansukhlal Vithaldas Chauhan v. State of Gujarat, (1997) 7 SCC 622* it was *inter alia* held as follows:

> "25. This principle was reiterated in *Tata Cellular v. Union of India (1994 (6) SCC 651)* in which it was, *inter alia,* laid down that the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The Court pointed out that the duty of the Court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers?;
> 2. committed an error of law;
> 3. committed a breach of the rules of natural justice;
> 4. reached a decision which no reasonable tribunal would have reached; or
> 5. abused its powers.

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375. CONTEMPT OF COURTS ACT, 1971 – Section 12

Apology by contemnor – Apology not a weapon of defence but an act of contrition.

T.N. Godavarman Thirumulpad v. Ashok Khot & Anr.

Reported in 2006 Cri.L.J. 2773 (SC)

Held:

Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and becomes an act of cringing coward.

Apology is not a weapon of defence to purge the guilty of their offence, nor is it intended to operate as universal panacea, but it is intended to be evidence of real contriteness. As was noted in *L.D. Jaikwal v. State of Uttar Pradesh (AIR 1984 SC 1374)* "We are sorry to say we cannot subscribe to the 'slap– say sorry – and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper taken the slap smart less upon the said hypocritical word being uttered. Apology shall not be paper apology and expression of sorrow should come from the heart, and not from the pen. For it is one thing to 'say' sorry – it is another to 'feel' sorry.

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376. INDIAN PENAL CODE, 1860 – Section 107

Abetment to commit suicide – Ordinary misbehaviour or utterance like asking the deceased to go and die, whether amounts to abetment to commit suicide? Held, No.

Madiya@ Mahadev v. State of M.P.

Reported in 2006 (2) JLJ 296

Held :

Our High Court and Hon'ble Supreme Court has considered the scope of sections 107 and 306 of Indian Penal Code in many cases. In *Sanju v. State of M.P. [2002 (2) JLJ 275*=(2002)5 SCC page 371] the Hon'ble Apex Court in paragraph 9 to 12 observed as under:

> "Para 9. In *Swamy Prahaladdas v. State of M.P. and another* [1995 Supp (3) SCC 438]. the appellant was charged for an offence under section 306 Indian Penal Code on the ground that the appellant during the quarrel is said to have remarked the deceased "to go and die". This Court was of the view that mere words uttered by the accused to the deceased "to go and die" were not even *prima facie* enough to instigate the deceased to commit suicide.
>
> 10. In *Mahendra Singh v. State of M.P.* [1995 Supp. (3) SCC 731]. the appellant was charged for an offence under section 306 Indian Penal

Code basically based upon the dying declaration of the deceased, which reads as under:

> My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me, abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning...

11. This Court, considering the definition of 'abetment' under section 107 Indian Penal Code, found that the charge and conviction of the appellant for an offence under section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

12. In *Ramesh Kumar v. State of Chhattisgarh* [(2001) 9 SCC 618] this Court while considering the charge framed and the conviction for an offence under Section 306 Indian Penal Code on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire. Acquitting the accused this Court said:

> "A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulanc, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

Learned counsel for the petitioner has placed reliance on the case of *Mangleshwar Singh (Dr.) v. State of M.P. [2003 CrLR (MP) 521], Omprakash Agrawal v. State of MP [2003 (1) MPHT 127], Anant Kumar Denial v. State of Chhattisgarh and others [2003 (5) MPHT 6 (CG), Nanka and others v. State of M.P. [1998 CrLR (M.P.) 336], Utkal and another v. State of M.P. [1997 CrLR (MP) 354], Rejalal @ Kamlesh s/o Philips v. The State of M.P. [1998 CrLR (M.P.) 354], Manish Tiwari v. State of M.P. [2001 CrLR (MP) 167]*, and on the basis of these reported cases he Submitted that no offence under section 306 of the Indian Penal Code is made out against the accused petitioner.

The facts of the *Utkal and another v. State of M.P.* (supra) are more similar

to the facts of the present case, in that case also it was found that the alleged misbehaviour may be a cause for committing suicide but would not amount to abetment to commit same as defined under section 107 of the Indian Penal Code and in the facts and circumstances of that case charge under section 306 of the Indian Penal Code was not found justified and, therefore, that charge was quashed.

In the present case also when we apply the definition of abetment as given in section 107 of Indian Penal Code then it becomes manifestly clear that the act of accused petitioner does not come in any of the categories enumerated in that section unless the act of the accused petitioner comes under any category mentioned in section 107 of the Indian Penal Code, he cannot be held guilty for commission of the offence punishable under section 306 of the Indian Penal Code.

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377. CIVIL PROCEDURE CODE, 1908 – O.VI R.14

Verification of pleading – Expression "duly authorised" as used in O.VI R. 14, meaning of – Held, expression need not be restricted to mean authorization by written authority or power of attorney
Nav Bharat Corporation v. M.P. Electricity Board
Reported in 2006 (2) JLJ 311

Held:

The first point to be decided is whether the officer in charge had authority to sign the plaint and verify the pleading or not. The plaintiff has pleaded that as per the provisions of section 5 read with section 12 of the Indian Electricity Supply Act, 1948 the officer in charge V.K. Shukla, Divisional Engineer was appointed to sign and verify the plaint and pleadings. This fact has not been specifically denied by the defendant in his written statement. What the defendant says is no authority in writing has been filed by the plaintiff. But that has not been challenged in the statement of Shri V.K. Shukla (PW 1). There is no reason to disbelieve the version of Shri V.K. Shukla that he had authority to do so. In *Sarju Prasad v. Badri Prasad [AIR 1939 Nag. 242], All India Reporter v. Ramchandra* [AIR 1961 Bom. 292] and in *Netram v. Bhagwan [AIR 1941 Nag. 159],* it was held that the words 'duly authorized' in the proviso to Order VI Rule 14 need not be restricted to mean authorised by proper written authority or by power of attorney. It may be oral also. Therefore, it is held that the plaint has been duly signed and verified by the person authorised in this behalf.

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378. SERVICE LAW :

Compulsory retirement, norms for making an order for compulsory retirement – Law explained.
Chandrashekhar Shrivastava v. State of M.P. and another
Reported in 2006 (2) JLJ 318

Held:

The Apex Court in the case of *State of Gujarat v. Umedbhai M. Patel, (2001) 3 SCC 314* had laid down certain norms on the basis of which order of compulsory retirement can be passed. In that regard it will be fruitful to quote para 11 which reads thus :

"11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:

(i) Whenever the services of public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be pased after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken not of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

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379. CRIMINAL TRIAL

Appreciation of Evidence – FIR, use of – Whether it can be used to corroborate or contradict any other witness than its author – Held, No – Spot map prepared by IO on the basis of facts discovered by witness – Whether it can be used to contradict the witness ? Held, Yes.
Dayaram and others v. State of M.P.
Reported in 2006 (2) JLJ 330

Held:

The learned trial Court has also erred in seeking corroboration to the statement of both the witnesses by the contents of FIR (Dehati Nalishi) Ex. P-3. The law is very clear that FIR can be used to corroborate and contradict its lodger when he is examined in the Court. The corroboration cannot be sought

from FIR to any other witness than its author. The learned trial Court has committed error on this count, also.

The further illegality committed by the learned trial Court is about placing reliance on the contents of spot map Ex.P-3 prepared by L.S. Yadav PW12 Investigating Officer because this spot map was prepared at the instance of PW 2 Mangilal, therefore, the facts mentioned in the map Ex.P-3 is the statement of PW 2 Mangilal recorded by the Investigating Officer PW 12 L.S. Yadav and the same can be used only to contradict PW 2 Mangilal as per provision u/s 162 of as per provision under section 162 of the Criminal Procedure Code....

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380. APPRECIATION OF EVIDENCE

Evidence of identification by snifer/tracker dog, admissibility and evidential value of – Law expalined

Mahesh v. State of M.P.

Reported in ILR 2006 1211

Held:

... Apex Court in its judgment in the case of *Gade Lakshmi Mangraju v. State of Andhra Pradesh, AIR 2001 SC 2677* after referring to, previous judgments in the case of *Surinder Pal Jain v. Delhi Administration, AIR 1993 SC 1723* and *Abdul Razak Murtaza Dafadar v. State of Maharashtra, AIR 1970 SC 283*, considered the question of evidence of sniffer dog in paragraph 10 which is answered in paragraphs 11 to 13 of the judgment which are reproduced below :-

> "10. The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hideouts. Developing countries have utilised such sniffer dogs in a large measure. In India also the utilisation of such tracker dogs is on the increase. Though such dogs may be useful to the investigating officers, can their movements be of any help to the court in evaluating the evidence in criminal cases?
>
> 11. A four fold criticism is advanced against the reception of such evidence. First it is not possible to test the correctness of the canine movements through the normal method available in ciminal cases i.e. in cross-examination. Second is that the life and liberty of human beings should not be made to depend on animal sensibilities. Third is that the possibility of a dog misjudging the smell or mistaking the track cannot be ruled out, or many-a-times, such mistakes have happened. Fourth is that even today the

science has not finally pronounced about the accuracy of canine tracking.

12. There are basically three kinds of police dogs-the tracker dogs, the patrol dogs and sniffer dogs. Recent trends show that hounds belonging to certain special breeds sheltered in specialised Kennels and imparted with special training are capable of leading investigating agency to very useful clue in crime detection and thereby help detectives to make a breakthrough in investigation. English courts have already started treating such evidence as admissible. In Canada and in Scotland such evidence has become, of late, admissible through in United States the position is not unifiorm in different States.

13. The weakness of the evidence based on tracker dogs has been dealt with in an article "Police and security Dogs". The possibility of error on the part of dog or its master is the first among them. The possibility of misunderstanding between the dog and its master is close on its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainity as to the precise faculties which label police dogs to track and identify criminals. Police dogs engaged in these actions by virtue of instincts and also by the training imparted to them."

After referring to the judgments in the case of *Surinder Pal Jain v. Delhi Administration* (Supra) and *Abdul Razak Murtaza Dafadar v. State of Maharashtra* (Supra), Apex Court has held that the criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailities adumbrated above, although the investigating agency employing such sniffer dogs for helping the investigation to track down criminals is not disapproved.

Even otherwise, in the given case, we have to examine about the nature of evidence to convict a person on the basis of indentification by sniffer dog and whether mere proof of identification by sniffer dog is sufficient to warrant conviction of the appellant.

In the case of *Bhadran v. State of Kerala, 1995 Cr.L.J. 943* referred by the trial Court, Kerala High Court has considered the question of admissibility of the evidence of tracker dog under section 45 of the Evidence Act. In paragraph 24 of the judgment, it is held that the evidence relating to movements of tracker dogs cannot be rejected as inadmissible and in appropriate cases it is open to the court to consider it. Its reliability, of course, depends upon the acceptability of the testimony of persons who manned the dog and those who witnessed the

movements and conduct of the animal. In the case of *Jeet Singh v. State of Punjab, 1988 Cr.L.J. 39* the Punjab High Court rejected the evidence of identification by sniffer dog as it was not proved that the dog was first taken at the place of incident to collect the smell. In the case of *Babu Magbool Shaikh v. State of Maharashtra, 1993 Cr.L.J. 2808* Bombay High Court has laid down the guidelines for recording the manner of proof of the identification by sniffer dog which are as under:-

> (a) That there must be a reliable and complete record of the exact manner in which the tracking was done and to this extent, therefore, in this country, a panchnama in respect of the dog tracking evidence will have to be clear and complete. It will have to be properly proved and will have to be supported by the evidence of the handler.
>
> (b) It will be essential that there are no discrepancies between the version as recorded in the Panchnama and the evidence of the handler as deposed to before the Court.
>
> (c) The evidence of the handler will have to independently pass the test of cross-examination.
>
> (d) Material will have to be placed before the Court by the handler such as the type of training imparted to the dog, its past perfomance, achievements, reliability etc. supported if possible and available by documents.

Similarly, Division Bench of the Bombay High Court, in the case of *Ashok Gavade v. State of Goa, 1995 Cr.L.J. 943* has considered the relevancy of identification by tracker dog. In this case, it is mentioned that dog was taken to the place where dead body was lying. Dog was given the smell of deceased's clothes. Dog then proceeded tracking in a particular way till the house of accused. He entered the house from back side. After entering the house, dog went to one room in which there was photograph of some deity and started barking after stopping there. The path through which the dog went on tracking was the same where dragging marks were found. Court held that the dog following the same path is a very relelvant circumstance to connect the dragging of the dead body of deceased which was found lying 500 maters away from the back portion of the house of accused and the Court held that the courts should be satisfied and free to accept any test of scrutiny of such evidence so as to enable them to reach to the conclusion that such evidence is reliable and far from any doubt as corroborative evidence of the various other circumstances placed or made available by the prosecution in support of their case. Thus, in the judgment it is held that the Court must consider other circumstances apart from the evidence of identification by sniffer dog to arrive at the conclusion about the prosecution case.

Therefore, we are of the opinion that the evidence of identification by tracker dog must pass test of scrutiny and reliability as in case of any other evidence. There must be reliable and complete record of the exact manner in which the tracking was done and panchnama in respect of identification by tracking dog should be clear and complete and it has to be properly proved and supported by the evidence of dog handler. There should not be any discrepancy between the version recorded in the panchnama and the evidence of dog handler deposed before the Court. The type of training given to the dog must also be proved. The material should be placed before the Court by handler or trainer of the dog regarding the type of training imparted to the dog. Thus evidence regarding past Performance, achievements, reliability of the dog should be made available on record and proved by documents. It is true that there are some breeds of dogs which are utilized for hunting and tracking because of their abnormally high talents. If the dog belongs to one of those categories and it is proved before the Court that the dog has been specially trained for the purpose, then evidence of tracking by the dog will be reliable otherwise the said evidence is insufficient.

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381. EVIDENCE ACT, 1872 – Section 32

Dying declaration – Multiple dying declarations, value of – Statement recorded by police officers, use of, as dying declaration – Law explained.

Basanti (Smt.) v. State of M.P.

Reported in 2006 (2) JLJ 349

Held:

The learned counsel for the appellant submitted that in this case there are four dying declarations and they are inconsistent and contradictory to each other and therefore they are not reliable and no conviction can be based thereon. We have perused all the dying declarations. First is Ex. P-10, a statement recorded by Head Constable Mahendrasingh (PW-8), under section 161 CrPC; second is Ex. P-16, a dying declaration recorded by O.N. Shrivastava, Dy. Collector-cum-Executive Magistrate (PW-13) and the rest two are the oral dying declarations given to Ramkunwar (PW-1) and Ramlakhan (PW-4). Both these witnesses stated that deceased Guddi had told them that she received burn injuries while she was coking food, but later on they were declared hostile by the prosecution. In the cross-examination they have denied their earlier statements recorded under section 161 of CrPC and stated that they have not given any such statement to the police. We have also seen the statement of the defence recorded under section 313 CrPC in which the appellant has not stated that the deceased caught fire while preparing meal. In the spot-map (Ex.P-5), the place of incident has been shown in a room and not in the kitchen. From the bare perusal of this document, i.e., spot-map (Ex.P-5) it is clear that the incident took place in a room and that place has not been shown as a kitchen or as place where food

was being cooked. This document has been proved by hostile witness Ramlakhan (PW4), who admits that it was prepared in his presence and his signatures were obtained on it. Therefore, the evidence of Ramkunwar (PW-1) and Ramlakhan (PW4) is not at all reliable and thus the version given to these witnesses by the deceased cannot be treated as dying declaration. A witness can resile from his earlier statement but if he sets up a different case from his statement recorded under section 161 of CrPC that cannot be considered as a dying declaration. So far as another statement (Ex.P-10) is concerned, it is recorded by the Head Constable Mahendrasingh (PW-8) in the form of statement under section 161, CrPC, As prayed by Shri Gupta, though, there is no bar for admitting or treating it to be a dying declaration after the death of deceased and the same cannot be discarded merely on the ground that it was recorded by a police officer, if it is corroborated by other evidence. It is clear that the aforesaid statement recorded under section 161, CrPC can be treated as dying declaration. We also find that there is another dying declaration (Ex.P-16) which is recorded by O.N. Shrivastava, Dy. Collector-cum-Executive Magistrate (PW-13). It is not only admissible in evidence but it fully corroborates the prosecution story and it is also corroborated by the medical evidence given by Dr.R.K. Rajoriya (PW10). The evidence of O.N. Shrivastava, Executive Magistrate (PW-13) is fully reliable. There is nothing on record to disbelieve his statement and why he will falsely implicate the appellant in the case. We have also examined this contention of Shri Gupta, learned Sr. Counsel for the appellant that there are inconsistencies between these two statements (Ex.P-10 and Ex. P-16) and as such they are not reliable, but we find that this contention is also having no force. There are no inconsistencies between these two statements. Ex.P-10 has been recorded in the form of a statement under section 161 CrPC and Ex. P-16 has been recorded in the form of dying declaration. There is only difference of time as in Ex. P-10 time of the incident has been shown between 8 to 9 in the morning while in Ex.P-16 the time between 10-11 has been shown. The statement (Ex. P-10) is nothing but an elaborate version of the incident with some additional details. Therefore, after considering the two documents it can be held that they are reliable and admissible in evidence. Merely because there is some difference about time of the occurrence in the statements or one statements is elaborate, it cannot be held that they are inconsistent to each other in material particulars and not reliable.

On the question of conviction based on sole evidence of dying declaration, though Shri Gupta admits that the conviction can be based on the basis of sole evidence of dying declaration still his submission is that since there are inconsistences between these two dying declarations, therefore, the conviction cannot be based thereon. The Apex Court in the case of *Kamla v. State of Punjab [AIR 1993 SC 374]* has held that a dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one

dying declaration they should be consistent particularly in material particulars. In the said decision it has been further held that the dying declaration can form the sole basis of conviction provided it is free from infirmities and satisfies various tests. See also *Khushal Rao v. State of Bombay [AIR 1958 SC 22).* The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled position of law according to these cases that the statement should be consistent throughout if the deceased has several opportunities of making such dying declaration, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be vountary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the Court has to examine the nature of the inconsistencies namely whether they are material or not. On scrutinising the contents of various dying declaration, the Court has to examine the same in the light of the various surrounding facts and circumstances. Applying the same principle of law we have examined the evidence of this case and after examining the case in the light of the evidence, surrounding facts and circumstances, we find that there are no that there are no inconsistencies between both of them. They are found to be voluntary, reliable and made in a fit mental condition and therefore reliance can be placed on them without even any kind of corroboration. In the case of *Sarwansingh v. State of Punjab [1995 AIR SCW 3088),* the doctor recorded the dying declaration after waiting for the police for some time, sensing the condition of the deceased getting worsened. The police recorded the statement nearly an hour thereafter. In the statement recorded by the police some more details pertaining to the motive and manner of the ghastly occurrence were given. The more details furnished to the police cannot be termed to be an improvement in the statement from what the statement was before the doctor, material basis of the prosecution case remaining the same. It cannot be held that there was any improvement in the second dying declaration made to the police. It was further held that both the statements were found reliable and there was no reason to disbelieve them and conviction was upheld. In the case *Bhagrath v. State of Haryana [AIR 1997 SC 234]* the Head Constable on getting message from doctor that a person with gun shot injuries had been admitted in the hospital, immediately rushed to the said place and after obtaining certificate from the doctor about the condition of the injured recorded the statement of the injured for the purpose of registering a case. It was held that at the time of recording such statement the said Head Constable hed no intention to record the statement as dying declaration and on the contrary he genuinely made an attempt to get dying declaration recorded by a Magistrate and therefore, it cannot be held that the statement recorded by him was unfounded and no reliance can be placed on it. In the case of *Babu Ram v. State of Punjab [AIR 1998 SC 2808],* the statement which was recorded by ASI Jagdishsingh was initially recorded as the FIR and it was subsequently

treated as dying declaration after she had died. The Apex Court has held tht the High Court was right in relying on both the dying declarations.

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382. WORDS AND PHRASES

Expremion 'House', meaning and connotation of.

Jai Narain Parasrampuria (Dead) and Others v. Pushpa Devi Saraf and others

Judgment dated 24.08.2006 passed by the Supreme Court in Civil Appeal No. 3801 of 1999, reported in (2006) 7 SCC 756

Held:

In *P. Ramanatha Aiyar's advanced Law Lexicon,* Vol. 2, 2005 the word "house" has been defined to mean:

> " 'House' means a house suitable for occupation by a military officer or a military mess. The term included the land and buildngs appurtenant to a house. [Cantonment (House Accommodation) Act (6 to 1923), Section 2 (f)]
>
> 'House' includes any building or part of a building with its appurtenances and outhouses used for any purpose whatsoever. [Orissa House Rent Control Act, 1967 (4 of 1968), Section 2 (3)]

'House' includes –

> (a) any part of a building occupied or intended to be occupied as a separate dewelling, and
>
> (b) any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it [Housing Act, 1996 (Act 52 of 1996), Section 6-B (1)]"

In *Words and Phrases,* Permanent Edn., Vol. 19-A, it is stated:

> "The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one, under the edifice, is also included in the term "house" or "building". If there be a cellar, the word "building" includes it, unaffected by the height above the foundation; *Benedict v. Ocean Ins. Co., 31 N.Y. 389, 394."*

Furthermore, it is now well settled that the building includes; the land on which it stands, unless by express stipulation it is excluded (See *T. Lakshmipathi v. P. Nithyananda Reddy, (2003) 5 SCC 150 SCC paras 19 to 24*)

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383. EVIDENCE ACT, 1872 – Section 112

Marriage, presumption about – Mere living together as husband and wife does not give them status of husband and wife – Law explained.

Ramji Khharya and another v. Murlidhar and others

Reported in 2006 RN 337

Held:

So far presumption regarding marriage of Ganesh with Barorawali is concerned on behalf of the appellants, a reported case in the matter of *Karan Singh v. Sitaram,* reported in *2005 (3) JLJ 140* has been cited in which it is held that a lady residing with a man for 40-45 years on account of this the presumption of valid marriage should be drawn. But in view of decided case of the Apex Court in the matter of *Surjit Kaur v. Garja Singh & others,* reported in *AIR 1994 SC 135* the case cited by the appellant is not helping to him. The Apex Court had held in the said case as under:

> "Reliance placed on *Charan Singh,s case* [AIR 1961 Punjab 301 (FB)] (supra) is not correct because that will apply only if the widow were to marry the brother of the husband. But, here Gulab Singh is a stranger. As rightly contended by the respondent, mere living as husband and wife does not, at any rate, confer the status of wife and husband. In *B.S. Lokhande's case* [AIR 1965 SC 1564] it was laid down that the bare fact that the man and woman living as husband and wife does not at any rate, normally give them the status of husband and wife and even though they may hold themselves out before the society as husband and wife and the society treats them as such. The following extract is useful for the purpose (at p. 1564 of AIR).
>
> "*Prima facie,* the expression 'whoever.... marries' must mean 'whoever ... marries validly' or 'whoever.... marries and whose marriage is a valid one'. If the marriage is not valid one according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats as husband and wife."

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384. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141
Vicarious liability of Director and other officers of the Company for acts of the company – Requirement as to averment and proof – Duty of the Court – Law explained.
Sabitha Ramamurthy and another v. R.B.S. Channabasavaradhya
Reported in 2006 (4) MPHT 212 (SC)

Held:

Section 138 of the Negotiable Instruments Act provides that where a cheque drawn by a person is returned by the bank unpaid on the grounds specified therein, the person who had drawn the said cheque shall be deemed to have committed an offence thereunder. Section 139 provides for a presumption in

favour of a holder of a negotiable instrument. Section 141 of the Act provides for offences by a company. Sub-section (1) of Section 141 reads as under :–

> **"141. Offences by companies.**– (1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> Provided further that, where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a Financial Corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter."

A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the Court to arrive at a *prima facie* opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted.

Not only the averments made in Paragraph 7 of the complaint petitions does not meet the said statutory requirements, the sworn statement of the witness made by the son of respondent herein, does not contain any statement that appellants were in charge of the business of the company. In a case where the Court is required to issue summons which would put the accused to some sort of harassment, the Court should insist strict compliance of the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statement on oath as to how the offence has been committed and how the accused person are responsible therefor. I the event, ultimately, the prosecution is found to be frivoluous or otherwise *malafide*,

the Court may direct registration of case against the complainant for *malafide* prosecution of the accused. The accused would also be entitled to file a suit for demages. the relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view.

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385. CRIMINAL PROCEDURE CODE, 1973 – Section 391

Jurisdiction of Appellate Court as to recording additional evidence – Retrial not to be ordered for recording additional evidence – Appellate Court can also record additional evidence itself – Law explained.

Ajay Pratap Singh v. State of Madhya Pradesh.

Reported in 2006 (4) MPHT 253

Held:

... In the cae of *Machander vs. State of Hyderabad, AIR 1955 SC 792* it was held that the justice is not one sided. It has many facets and Court has to draw a nice balance between conflicting rights and duties. While it is incumbent on the Court to see that the guilty does not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed. In the case of *Bir Singh vs. State of U.P., AIR 1978 SC 59* it has been held :–

> "It is well settled that though an Appellate Court has power to take additional evidence in a suitable case yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. If the prosecution was serious about this matter there was no reason why Ejaz Hussain could not be examined before the Sessions Court."

From perusal of the record adduced by the petitioner and the judgment passed by the Appellate Court, it is apparent that the produced documents (Ex. P-9 to Ex. P-40) were wrongly exhibited by Vinayak Ramchandra Joshi (P.W. 4) and the witnesses (the customers) who had executed the aforesaid documents and were the aggrieved person were not examined before the Trial Court. Though it is called legal position that the case should not be remanded for retrial except in exceptional circumstances, yet in suitable cases, if the Sessions Judge thinks that in the interest of justice and for just and proper decision of the case, it is necessary that additional evidence should be brough on record, he should instead of directing retrial, resort to the procedure prescribed in Section 391 (old Section 428) of the Cr.P.C. *In Ukha Kolhe Vs. The State of Maharashtra* (AIR 1963 SC 1531), the Supreme Court observed :–

> "In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions Judge thought that in the interests of justice and for a just and proper decision of the case, it was necessary that additional evidence should be brought on the record he should have, instead of

directing a retrial and reopening the entire proceeding, resorted to the procedure prescribed by Section 428 (1) of the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the Appellate Court should exercise its power under the said section."

The observations made by the Additional Sessions Judge clearly spell out the necessity of recording additional evidence for which he rightly made direction as well, presumably under Section 391 of the Code of Criminal Procedure, but while doing so, he however, fell into error of setting aside the conviction and remanding the case for the trial afresh which was entirely uncalled for and which part is accordingly liable to be quashed...

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386. EVIDENCE ACT, 1872 – Section 24
Extra-judicial confession – Extra-judicial confession unless voluntary, is inadmissible in evidence – Law explained.
Anil Sharma v. State of Madhya Pradesh
Reported in 2006 (4) MPHT 278 (DB)

Held:

... The condition precedent for extra-judicial confession also is that the same must be voluntary nature and it should not be obtained under coercion, threat, inducement or promise, in the instant case, it is the prosecution case itself that appellant made extra-judicial confession and pointed out the place of incident and the dead body after his beating by Mahesh Yadav (P.W.3). Therefore, his disclosure statement could not be construed as voluntarily disclosure and thus the same is not admissible in evidence. For this legal proposition, we can safely rely on a Supreme Court judgment rendered in case of *State of Andhra Pradesh vs. Kanda Gopaludu* [(2005) 13 SCC 116]. The relevant portion of Paragraph 5 reads as under :–

> "P. Ws. 1, 2 and 3 were subjected to lengthy cross-examination. Not even a suggestion was put to the witnesses that the confession was tainted and non-voluntary or that it was obtained by coercion, inducement or promise of favour. In case of *Guru Singh vs. State of Rajasthan, (2001) 2 SCC 205* this Court held in Para 6 at SCC pp. 212-13 as under :–
>
> > "It is settled position of law that extra-judicial confession, if true and voluntary, it can be relied upon by the Court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Relying upon an earlier judgment in *Rao Shiv Bahadur*

Singh vs. State of U.P. (AIR 1954 SC 322), this Court again in *Maghar Singh vs. State of Punjab [(1975) 4 SCC 234]* held that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the Court believes the witness before whom the confession is made, then the conviction can be founded on such evidence alone."

The Apex Court in case of *Kanda* (supra), relying on earlier judgment passed in case of *Guru Singh vs. State of Rajasthan* [(2001) Volume 2 SCC 205] held that if the extra-judicial confession is not voluntary one, the same cannot be relied upon.

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387. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000– Section 20

Accused who was a juvenile on the date of offence tried with other persons in regular Court – Plea of juvenility raised for the first time in appeal – Held, maintaining the conviction, the accused be forwarded to the Juvenile Justice Board for being dealt u/s 20.

Bablu v. State

Reported in 2006 (4) MPHT 302 (DB)

Held:

As has been mentioned hereinabove that on the date when this appellant was produced before the Court for the first time he was aged about 15 years and at least less than 16 years of age. Thus, he could not have been tried alongwith other co-accused by Sessions Judge. However, since this plea was not specifically raised by the appellant herein, we do not intend to hold that the whole proceedings against him stood vitiated. The said plea has been raised before us in appeal for the first time.

Learned Counsel for the appellant placed reliance on the judgment of Supreme Court, reported in (2005) 3 SCC 592 *(Upendra Kumar vs. State of Bihar)*, which touches the issue directly involved in this case. The Supreme Court has held that in view of the fact that the appellant was Juvenile at the time when he was first produced before the Court, benefit of the Act has to accrue to him. They have also given direction as to what should be the course open for deciding such a case. They have directed that the conviction of the appellant has to be sustained, but at the same time sentence awarded to him has to be quashed. Following the aforesaid dictum of the Supreme Court, same course of action has to be applied to this case also, as it has been established that on the relevant date appellant was a juvenile.

Section 20 of the latter Act is the saving clause. For ready reference Section 20 is reproduced hereinbelow :–

> **"20. Special provision in respect of pending cases.** – Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

As per this provision, the appellant is to be produced before the Juvenile Board, which shall pass on order in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. The aforesaid provision is clear and leaves no doubts in our mind with regard to the mode of implementation, thus we have followed the same mode, as has been mandated in the aforesaid section.

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388. HINDU LAW :

Adoption, proof of – Evidence to prove adoption should be free from suspicion of fraud – Old adoption, proof of – Law explained.
Dinesh Kumar and others v. Kaushal Chand Jain and others
Reported in 2006 (4) MPHT 314

Held:

.... The Apex Court in the case of *Madhusudan Das Vs. Narayani Bai and others* (AIR 1983 Supreme Court 114), has laid down the aforesaid. Similar view taken by the Apex Court in the case of *Moran Mar Basselios Chatholicos and another Vs. Most. Rev. Mar Poulose Athanasius and others* (AIR 1954 SC 526) and also in the case *Lakshman Singh Kothari vs. Smt. Rup Kanwar* (AIR 1961 Supreme Court 1378). There is no doubt that for proving adoption the validity as well as factum is to be proved by the person, who is claiming right under the adoption and the said burden is very heavy.

In the present case, the adoption has taken place in the year 1925 and i.e., more than 60 years before filing of the suit. In case of an old adoption it is very difficult to get a direct evidence. Division Bench of this Court has considered this aspect in the case of *Surajbai w/o Kaluram and others vs. Sadashiv Jugal Kishore and another, AIR 1958 MP 100,* wherein this Court has held that where alleged adoption is an old one and has taken place many years ago strict proof of giving and taking or performance of the ceremonies necessary to constitute valid adoption is not necessary and may be difficult to obtain the evidence as

alleged adopted son has been treated as such for long series of years very slight evidence is sufficient to prove the adoption for long. This Court in the aforesaid case relied on a judgment in the case of *Dal Bahadur Singh and others vs. Bijai Bahadur Singh and others, AIR 1930 Privy Council 79,* wherein the Privy Council has held that onus of proving the adoption is on the part of setting it up, but it is also true that if the plaintiff's adoption is old one and the plaintiff had been treated as adopted boy by the member of the family and in public transactions, then presumption arises in his favour.

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389. EVIDENCE ACT, 1872 – Section 27

WORDS AND PHRASES

(i) Discovery of fact u/s 27 – Recovery of incriminating article from open place – Recovery of the dead body at the instance of the accused, nature of the evidence – Held, it is not a conclusive circumstance.

(ii) Expression "open place", meaning of.

Chandra Kumar Kankariya and others v. State of M.P.

Reported in 2006 (3) MPHT 224 (DB)

Held:

... In *Bakshish Singh vs. The State of Punjab* (AIR 1971 SC 2016), the Apex Court observed that recovery of the dead body at the instance of accused is not a conclusive circumstance that he committed the murder. The Apex Court further observed :–

> "8. Therefore, the only incriminating evidence against the appellant is his pointing the place where the dead body of the deceased had been thrown. This, in our opinion, is not a conclusive circumstance though undoubtedly it raises a strong suspicion against the appellant. Even if he was not a party to the murder, the appellant could have come to know the place where the dead body of the deceased had been thrown."

(ii) Learned Counsel for the appellants, for interpretation of the word 'open place', placed reliance on *State of Maharashtra vs. Bharat Fakira Dhiwar* (AIR 2002 SC 16), wherein the Apex Court approved the observations made in the case of *State of H.P. vs. Jeet Singh,* reported in (1999) 4 SCC 370, holding:–

> "27. There is nothing in Section 27 of the Evidence Act, which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is open or accessible to other. "It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others.

For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is place accessible to others."

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390. CIVIL PROCEDURE CODE, 1908 – Order XXII Rule 4(4)
Exemption from necessity of substituting L.Rs. under R.4 (4) – Expression "Court whenever it thinks fit", meaning and connotation of – Held, the provisions can be applied even without setting aside abetment and even without formal application – Law explained.
Reghuwar Prasad v. Smt. Ramadevi and others
Reported in 2006 (3) MPHT 237

Held:

Learned Counsel for appellant contended that in the present case Siyarani did not file her written statement though she was represented by her Counsel Shri Roop singh Yadav, therefore, Trial Court should have exempted the plaintiff from necessity of substituting the L.Rs. of Siyarani. Siyarani neither filed written statement nor appeared in the case to contest the suit and the case proceeded *ex parte* against her. In such case, Court should have pronounced the judgment against her notwithstanding her death and the same would have been presumed to have been pronounced before the death took place.

The contention is acceptable. It is true that application to exempt the plaintiff from necessity of substituting the L.Rs. of non-contesting defendant was filed after the abatement has taken place but sub-rule (4) of Rule 4 of Order 22 of the Code opens with the words "Court whenever it thinks fit". These words accord the Court discretion of wide amplitude to be exercised at any time before the actual disposal of the case. When the Counsel for the deceased defendant did not announce her death for years and the plaintiff learnt about her death only when the power of attorney holder of Sudha Rani informed the Court about the death of Siyarani, the delay in making application cannot be attributed to plaintiff. It is not the finding o the Court that the plaintiff had learnt about the death of Siyarani prior to the information given in Court by power of attorney holder of Sudha Rani. If the conditions for applying sub-rule (4) of Rule 4 are fulfilled, Court should have applied the provisions of Order 22 Rule 4 (4) of the Code.

The Court can dispense with substitution of L.Rs. of deceased defendant even without setting aside the abatement at any stage of the suit or before delivery of judgment. See: *Rajnath Sahgal and others vs. Shiva Prasad Sinha and*

others (AIR 1979 Patna 239), *Gurubasappa Siddappa (deceased by L.Rs. and another vs. Nagendrappa Veerabhadrappa Angadi (deceased by L.Rs.)* (AIR 1984 Karnataka 1), and *Yog Raj Puri vs. Yogeshwar Raj Puri and others* (AIR 1982 Delhi 62).

It is not necessary for invoking the power of exemption conferred by sub-rule (4) of Order 22 rule 4 to make an application within the specified time. In fact, even an application for this purpose is not required and the Court by looking into the record itself grant the exemption. The power has been conferred on the Court and invoking of the same by an application of the plaintiff is not a condition precedent for its exercise. See *Abdul Hasan vs. Kirti Saran and others* (AIR 1983 Allahabad 182). Thus, the Trial Court committed grave error in rejecting the application under Order 22 Rule 4 (4) of the Code.

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391. ACCOMMODATION CONTROL ACT, 1961 – Section 12 (1) (f)
Eviction suit by husband – Whether accommodation available with wife or with joint family can be categorized as alternative accommodation? Held, No.
Ajay Kumar and others v. Ashok Kumar and others
Reported in 2006 (3) MPHT 292

Held:

Having heard the learned Counsel on perusing the record it appears from the pleadings and the evidence that whatever other alternate accommodation as said and alleged by the appellant are not belonging to the respondents although some of the accommodation belonging to other members of their family or joint family. In view of the settled position of law that the house of the wife could not be treated as alternate accommodation for the husband as laid down by this Court in the matter of *Rajkumar vs. Ved Prakash,* reported in *1982 JLJ 451,* and house of joint family could also not be treated as alternate accommodation in view of the decision of this Court in the matter of *Sushila vs. Maharaj Singh,* reported in *1990 MPLJ 445.* Thus, the need of the plaintiff/landlord to start his business in his own premises for which they have no any other accommodation of his own then their need could not be said malafide and decree cannot be refused.

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392. CIVIL PRACTICE :
Appellate Court, jurisdiction of, to interfere with the finding recorded by lower Court – In a case finding based on oral evidence – Trial Court's finding to be allowed to prevail unless some specific feature has escaped the attention of Trial Court.
Nagar Palika Nigam v. Gopal Krishna
Reported in 2006 (3) MPHT 296 (DB)

Held:

The Apex Court in the case of *Madhusudan Das vs. Narayani Bai and others, AIR 1983 SC 114,* has laid down that in an appeal against a Trial Court decree, when the Appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the Trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the Appellate Court should permit the findings of fact rendered by the Trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the Trial Court or there is sufficient balance of improbaility to displace its opinion as to where the credibility lies ...

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393. POLICE REFORMS :

Police reforms – Need for preservation and strengthening rules of law vis-a-vis police reforms – Need of independent investigation police to ensure speedy and quality investigation – Directions issued by the Apex Court.

Prakash Singh and others v. Union of India and others

Judgment dated 22.09.2006 passed by the Supreme Court in Writ Petition (C) No. 310 of 1996, reported in (2006) 8 SCC 1

Held:

With the assistance of learned counsel for the parties, we have perused the various reports. In discharge of our constitutional duties and obligations having regard to the aforenoted position, we issue the following directions to the Central Government, State Government and Union Territories for compliance till framing of the appropriate legislations:

State Security Commission .....

Selection and minimum tenure of .....

Minimum tenure of IG of police and other officers .....

Separation of investigation

(4) The investigation police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/areas also.

Police Establishment Board .....

Police Complaints Authority .....

National Security Commission

> ..... The aforesaid directions shall be complied with by the Central Government, State Government or Union Territories, as the case may be, on or before 31.12.2006 so that the bodies aforenoted become operational on the onset of the new year. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/ Union Territories are directed to file affidavits of compliance by 3.1.2007.

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394. LIMITATION ACT, 1963 – Sections 5 and 14
ARBITRATION & CONCILIATION ACT, 1996 – Section 34 (3)
Applicability of Ss. 5 and 14 for condonation of delay in proceedings u/s 34 – While S.5 is inapplicable, S. 14 can be applied – Law explained.
Union of India v. Shring Construction Co. (P) Ltd.
Judgment dated 17.10.2006 passed by the Supreme Court in Civil Appeal No. 4516 of 2006, reported in (2006) 8 SCC 18

Held:

... learned Additional Solicitor General for the appellant submitted that it is true that Section 5 of the Limitation Act will have no application in these proceedings because the period of limitation has already been prescribed under Section 34(3) of the Act but Section 14 of the Limitation Act has not been excluded from its abmit. It is pointed out that the impugned award was challenged by filing a writ petition before the High Court but later on it was found that the writ petition was not maintainable and accordingly, after dismissal of the writ petition the present application was filed under Section 34 of the Act along with application under Section 5 of the Limitation Act. It appears that the question with regard to applicability of Section 14 of the Limitation Act was not examined by the High Court as well as the District Judge. In fact, it was bona fide error on the part of the Union of India to have approached the High Court. It was a misplaced impression that since the High Court has appointed the arbitrator, therefore, his award can be challenged before the High Court only. This Court recently in *State of Goa v. Western Builders, (2006) 6 SCC 239* has taken a view that applicability of Section 14 of the Limitation Act is not excluded from the Act of 1996. This Court in *Western Builders* (Supra) has observed as follows : (SCC 240h-24la; para 19 on p. 247)

> "By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act of 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act should not be read in the Act of 1996, which will advance the cause of justice."

●

395. CIVIL PROCEDURE CODE, 1908 – Order XXXVII Rules 2 and 3
Leave to defend in suit under O. XXXVII R.3 – Principles governing grant of leave – Law explained.
Defiance Knitting Industries (P) Ltd. v. Jay Arts
Judgment dated 30.08.2006 passed by the Supreme Court in Civil Appeal No. 3846 of 2006, reported in (2006) 8 SCC 25

Held :

This Court in *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn, (1976) 4 SCC 687* has laid down the principles to be followed in grainting leave to defend the suit under Order 37 Rule 3 of the Code. One of the aforesaid principles is that if the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign the judgment and the defendant is entitled to unconditional leave to defend. It has also been laid down therein that if the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign the judgment and the defendant is not entitled to leave to defend.

While giving leave to defend the suit the court shall observe the following principles :

(a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. See *Milkhiram (India) (P) Ltd. v. Chamanlal Bros, AIR 1965 SC 1698.* The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious it may refuse leave to defend altogether. *Kiranmoyee Dassi v. Dr. J. Chatterijee, AIR 1949 Cal 479 [*Noted and approved in Mechelec case (Supra)]

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend.

14. In *Raj Duggal v. Ramesh Kumar Bansal, AIR 1990 SC 2218* it was held as follows:

"3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a

good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sence that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

●

396. SERVICE LAW :

Regularisation of service – Whether a person appointed without following statutory requirements and without there being a sanctioned post can claim regularization? Held No.

State of M.P. and others v. Yogesh Chandra Dubey and others

Judgment dated 08.09.2006 passed by the Supreme Court in Civil Appeal No. 3982 of 2006, reported in (2006) 8 SCC 67

Held:

It is neither in doubt nor in dispute that the respondents were not appointed in terms of the statutory rules. Their services were taken by the officers only to meet the exigencies of situation. No post was sanctioned. Vacancies were not notified. It is now trite that a State within the meaning of Article 12 of the Constitution of India, while offering public employment, must comply with the constitutional as also statutory requirements. Appointments to the posts must be made in terms of the existing rules. Regularisation is not a mode of appointment. If any recruitment is made by way of regularisation, the same would mean a back door appointment, which does not have any legal sanction.

In *State of Karnataka v. KGSD Canteen Employees' Welfare Assn., (2006) 1 SCC 567* this Court laid down the law in the following terms: (SCC pp. 585-86, paras 48-49)

> "48. The contention that at least for the period they have worked they were entitled to the remuneration in the scale of pay as that of the government employees cannot be accepted for more than one reason. They did not hold any post. No post for the canteen was sanctioned by the State. According to the State, they were not its employees. Salary on a regular scale of pay, it is trite, is payable to an employee only when he holds a status. (See *Mahendra L. Jain v. Indore Development Authority, (2005) 1 SCC 639*)

49. The High Court was, thus, not correct in holding that the members of the first respondent could be treated on a par with the Hospitality Organisation of the State of Karnataka. Such equation is impermissible in law. In the Hospitality Organisation of the State, the posts might have been sanctioned. Only because food is prepared and served, the same would not mean that a centeen run by a committee can be equated thereto."

A person, who had been appointed by a State upon following the Recruitment Rules, enjoys a status. A post must be created and/or sanctioned before filling it up...

●

397. HINDU SUCCESSION ACT, 1956 – Section 14 (1)

Whether S.14 (1) in any way curtails the right of holder to bequeath u/s 30? Held, No – Law explained – Further held, widow taking the limited right under a will cannot claim higher right by invoking S.14 (1) – Law explained.

Sandhu Singh v. Gurdwara Sahib Narike and others

Judgment dated 08.09.2006 passed by the Supreme Court in Civil Appeal No. 1854 of 2003, reported in (2006) 8 SCC 75

Held:

An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, not only does not curtail or affect this right, it actually reaffirms that right. Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs. Hence, when a male Hindu executes a will bequeathing the properties, the legatees take it subject to the terms of the will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a life estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by him as he deems fit. His will hence could not be challenged as being hit by the Act.

When he thus validly disposes of his property by providing for a limited estate to his heir, the wife, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14 (2) of the Act, that in such a case, the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. In other words, conferment of a limited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect

after the Act, would make Sections 30 and 14(2) redundant or otiose. It will also make redundant, the expression "property possessed by a female Hindu" occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the Act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara law or the right to maintenance.

●

398. HINDU SUCCESSION ACT, 1956 – Section 14

Widow – Conversion of limited estate into full estate u/s 14(1) – Ambit, scope and applicability of S.14 (1) and (2) – Law explained.

Sharad Subramanyan v. Soumi Mazumdar and others

Judgment dated 28.04.2006 passed by the Supreme Court in Civil Appeal No. 4153 of 2002, reported in (2006) 8 SCC 91

Held :

Section 14 of the Act was enacted by Parliament in order to ensure that the limited estate devolving upon a female Hindu be abolished and the female Hindu who possessed property, acquired before or after coming into force of the Act, should hold it as full owner thereof and not as a limited owner. Section 14 of the Act reads as under:

> "14. *Property of a female Hindu to be her absolute property.* – (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation.* – In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

A judgment of this Court has recognised that sub-section (2) is in the nature of a *proviso* to the rule enacted in sub-section (1) of Section 14 of the Act. In *V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99* (hereinafter "Tulasamma[1]") after a complete survey of the Shastric Hindu law and the changes brought therein by

Section 14 of the Act, this Court culled out the principle arising thereunder in the following words:

> "31. (1) that the provisions of Section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;
>
> (2) it is manifestly clear that sub-section (2) of Section 14 does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow. This was clearly held by this Court in *Badri Prasad v. Kanso Devi, (1969) 2 SCC 586;*
>
> (3) that the Act or 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long-felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;
>
> (4) that sub-section (2) of Section 14 is merely a proviso to sub-section (1) of Section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision."

Analysing the scope and extent of sub-section (2) of Section 14 of the Act, which this Court treated as *proviso* to sub-section (1), this Court took the view that as a *proviso* it should be interpreted in such a way so as not to substantially erode sub-section (1) of Section 14 and the Explanation thereto. It was pointed out that sub-section (2) had carved out a completely separate field and before it could apply, the following three conditions must be satisfied:

> "(i) that the property must have been acquired by way of gift, will, instrument decree, order of the court or by an award;
>
> (ii) that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and
>
> (iii) that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognise or give effect to a pre-existing right which the female Hindu already possessed."

Finally, this Court said:

> "Where any of these documents are executed but no restricted estate is prescribed, sub-section (2) will have no application. Similarly where these instruments do not confer any new title for the first time on the female Hindu, Section 14 (2) would have no applicaiton. It seems to me that Section 14(2) is a salutary provision which has been incorporated by Parliament for historical reasons in order to maintain the link between the Shastric Hindu law and the Hindu law which was sought to be changed by recent legislation, so that where a female Hindu became possessed of property not in virtue of any pre-existing right but otherwise, and the grantor chose to impose certain conditions on the grantee, the legislature did not want

to interfere with such a transaction by obliterating or setting at naught the conditions imposed."

●

399. CONSUMER PROTECTION ACT, 1986 – Sections 14 and 22
Interest, grant of – Clean discharge given in writing by accepting the amount – Whether protest can be raised later on for interest without there being any fraud, undue influence or misrepresentation by insurer? Held, No – Law explained.
National Insurance Co. Ltd. v. Nipha Exports (P) Ltd.
Judgment dated 29.09.2006 passed by the Supreme Court in Civil Appeal No. 619 of 2005, reported in (2006) 8 SCC 156

Held:

The next question to be considered is as to whether after giving a clean discharge certificate by accepting the amount signing the voucher, the complainant respondent can raise the complaint.

As already noticed, the payment was made to the respondent on 8-6-1994 and the respondent gave a clean discharge to the appellant without any qualification signifying receipt of the amount in full and final settlement of the claim. Thereafter, after a lapse of two months the respondent addressed a latter dated 6.8.1994 to the appellant which is extracted:

"Re : Marine Loss No. 101500/43/90-91/86-90
Ex. MV Eagle Nov/Fresia.

Dear Sir,

> Thank you for your letter dated 9.6.1994 enclosing a cheque for Rs. 70,38,038 in discharge of your liability under the policies, which, however, did not include interest.

In the letter thus read, there is no complaint that the discharge voucher or receipt had been obtained from the complainant respondent herein fraudulently or by exercise of undue influence or by misrepresentation or the like or coercive bargaining. In *United India Insurance v. Ajmer Singh Cotton & General Mills, (1999) 6 SCC 400* it was pointed out by this Court that mere execution of discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. If was further pointed out that despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like, and if such a case is proved the authority before whom the complaint is made would be justifed in granting appropriate relief.

●

400. MOTOR VEHICLES ACT, 1988 – Section 166

Whether lodging of FIR a *sine qua non* for entertaining claim case under Motor Vehicles Act? Held, No – Law explained.

Yashwant Singh Bhagel and another v. Shiv Prasad Vishwakarma and others

Reported in 2006 ACJ 2325 (M.P.)

Held:

The provisions regarding claim under the *Motor Vehicles Act* are enacted by keeping in view the social welfare or the justice to the community and whenever the incident of vehicular accident takes place and in pursuance of it any person like appellant No. 1 got injured and circumstances are proved then claimant is always entitled for compensation irrespective whether the police has registered the offence regarding the incident or not. Because no claim case can be left over on the mercy of the police.

It is also a settled principle that every case is decided on appreciation of its own pleadings, circumstances and the evidence recorded in it, if such accident and injuries are proved then the compensation should be awarded such claim cannot be left over on the mercy of the criminal case or its papers. The party has right to prove his case by leading evidence before the Tribunal and Tribunal may consider even in the absence of the criminal case. My aforesaid view is based on a decided case in the matter of *Brestu Ram v. Anant Ram, 1990 ACJ 333* (HP), in which it was held as under:

> "(17).... I am not impressed by the assertion of the respondents that no report to the police was made as to this accident. Circumstances have been explained by Sukh Dev, PW 2, as to why the same was not lodged. In case the same was not done by the claimant or Sukh Dev, PW 2 and Sant Ram, PW 3, it is not understood as to why the same was not made by the doctor as it was a medico-legal case. In case it was not done by the doctor, who was legally bound to do so, could it be expected that an injured person and Sukh Dev, PW 2 and Sant Ram, PW 3, who were looking after him, would do so after leaving the claimant in such a stage of tragedy. Therefore, even if no report to the police was made, no adverse inference can be drawn out of this failure. The Tribunal has drawn certain inferences as if it was trying a criminal case. Such a course is not available to the Tribunal."

The aforesaid principle was also laid down by the High Court of Judicature at Patna (Ranchi Bench) in the matter of *Mohd. Moinuddin v. Haliman Nisha, 2000 ACJ 532* (Patna).

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PART - III

CIRCULARS/NOTIFICATIONS

(Continued from October 2006 Issue)

PART II

CIVIL PROCEDURE MEDIATION RULES, 2006

1. **Short Title and Commencement.** – (1). These Rules may be called the Civil Procedure Mediation Rules, 2006.

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

2. Definitions. – (1) In these rules, unless the context otherwise requires,-

'Code' means the Code of Civil Procedure, 1908 (No. 5 of 1908);

(2) Words and expressions under but not defined in these rules, shall have the same meaning, as assigned to them in the Code.

3. Appointment of mediator. – (a) Parties to a suit or proceeding may all agree on the name of the sole mediator for mediating between them.

(b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

(c) Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 4 nor bear the qualifications referred to in Rule 5 but should not be a person who suffers from the disqualifications referred to in Rule 6.

(d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

4. Panel of mediators. – (a) The High Court shall, for the purpose of appointing mediators between parties in any proceedings pending before it, prepare a panel of mediators and publish the same on its Notice Board, within thirty days of the coming into force of these Rules, with copy to the Bar Association attached to the original side of the High Court.

(b) (i) The Courts of the Principal District and Sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective Notice Board;

(ii) Copies of the said panels referred to in sub-clause (i) shall be forwarded to all the Courts of equivalent jurisdiction or Courts subordinate to the Courts referred to in sub-clause (i) and to the Bar associations attached to each of the Courts;

(c) The consent of the persons whose names are included in the panel shall be obtained before empanelling them;

(d) The panel of names shall contain a detailed Annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

5. Qualifications of persons to be empanelled under Rule 4. – The following shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 4, namely : -

(a) (i) Retired Judges of the Supreme Court of India ;

(ii) Retired Judges of the High Courts ;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.

(iv) Any other officer or persons authorized by the Chief Justice ;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or Courts of equivalent status ;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

6. Disqualifications of persons. – The following persons shall be deemed to be disqualified for being empanelled as mediators:

(i) any person who has been adjudged as insolvent or is declared of unsound mind;

(ii) any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(iii) any person who has been convicted by a criminal court for any offence involving moral turpitude;

(iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment;

(v) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing;

(vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings;

(vii) such other categories of persons, as may be notified by the High Court.

7. Venue for conducting mediation. – The mediator shall conduct the mediation at one or other of the following places :

(i) Venue of the Lok Adalat or permanent Lok Adalat.

(ii) Any place identified by the High Court.

(iii) Any place identified by the District Judge within the Court precincts for the purpose of conducting mediation.

(iv) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

(iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

8. Preference. – The Court shall, while nominating any person from the panel of mediators referred to in Rule 4, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

9. Duty of mediator to disclose certain facts. – (a) When a person is approached in connection with his possible appointment as a mediator, the person shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

(b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a).

10. Cancellation of appointment. – Upon information furnished by the mediator under Rule 9 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

11. Removal or deletion from panel. – A person whose name is placed in the panel referred to in Rule 4 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if:–

(i) he resigns or withdraws his name from the panel for any reason;

(ii) he is declared insolvent or is declared of unsound mind;

(iii) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(iv) he is a person who has been convicted by a criminal court for any offence involving moral turpitude ;

(v) he is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by appropriate disciplinary authority which are pending or have resulted in a punishment;

(vi) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

(vii) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deem fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel :

Provided that, before removing or deleting his name, under clause (vi) and (vii), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

12. Procedure of mediation. – (a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely:–

(i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;

(ii) he shall hold the mediation conference in accordance with the provisions of Rule 7;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memorandum shall also be mutually exchanged between the parties;

(v) each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved.

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time, as the Court may fix.

(vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

(c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

13. Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908.– The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

14. Non-attendance of parties at sessions or meetings on due dates.– (a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.

(c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

15. Administrative assistance. – In order to facilitate the Conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, arrange for administrative assistance by a suitable institution or person.

16. Offer of Settlement by Parties. – (a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

17. Role of Mediator. – The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties.

18. Parties alone responsible for taking decision. – The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

19. Time limit for completion of mediation. – On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either *suo motu,* or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

20. Parties to act in good faith. – While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

21. Confidentiality, Disclosure and Inadmissibility of Information. – (1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) When a party give information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.

(4) parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:–

(a) views expressed by a party in the course of the mediation proceedings;

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) proposals made or views expressed by the mediator;

(d) admission made by a party in the course of mediation proceedings;

(e) the fact that a party had or had not indicated willingness to accept a proposal;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

22. Privacy. – Mediation sessions and meetings are private, only the concerned parties or their counsel or power of attorney holders can attend.

Other persons may attend only with the permission of the parties or with the consent of the mediator.

23. Immunity. – No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

24. Communication between mediator and the Court. – (a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.

(b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

(c) Communication between the mediator and the Court shall be limited to communication by the mediator:

(i) with the Court about the failure of party to attend;

(ii) with the Court with the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through mediation;

(iv) that the parties have settled the dispute or disputes.

25. Settlement Agreement. – (1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsels have represented the parties they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 19 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

26. Court to fix a date for recording settlement and passing decree. – (1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement, and (i) if the issues are servable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled. (ii) if the issues are not servable, the Court shall wait for a decision of the Court on the other issues which are not settled.

27. Fee of mediator and costs. – (1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

(2) As far as possible, a consolidated sum may be fixed rather than for each session or meeting.

(3) Where there are two mediators as in clause (b) of Rule 3, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.

(4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be born equally by the various contesting parties or as may be otherwise directed by the Court.

(5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in sub-rules (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of costs paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

(8) Where a party is entitled to legal aid under Section 12 of the **Legal Services Authorities Act, 1987 (39 of 1987),** the amount of fee payable to the mediator and costs shall be paid by the concerned Legal Services Authority that Act.

28. Ethics to be followed by mediator. - The mediator shall : –

(1) follow and observe these rules strictly and with due diligence;

(2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) uphold the integrity and fairness of the mediation process;

(4) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) satisfy himself/herself that he/she is qualified to undertake and complete the Assignment in a professional manner;

(6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

(9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

(11) maintain the reasonable expectations of the parties as to confidentiality;

(12) refrain from promises or guarantees of results.

29. Transitory provisions. – Until a panel of mediators is prepared by the High Court and the District Court, the Courts, referred to in Rule 4, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 5 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute.

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MINISTRY OF WOMAN & CHILD DEVELOPMENT
NOTIFICATION

NEW DELHI, THE 17TH OCTOBER, 2006

S.O. 1776 (E). – In exercise of powers conferred by sub-section (3) of Section 1 of Protection of women from 'Domestic Violence Act, 2005 (43 of 2005) the Central Govt. hereby appoints the 26th day of October, 2006, as the date on which the said Act shall come into force.

[No. M-3/2005-WW]
Parul Debi Dey, Jt. Secy.

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No.C-3115-II 15-50-87.- (Published in M.P. Gazette (Extra-ordinary) dated 10.8.2006 at page 806 (5)) In exercise of the powers conferred by section 477 of the Code of Criminal Procedure, 1973 (2 of 1974), the High Court of Madhya Pradesh, with the previous approval of the State Government hereby, makes the following rules in regard to **case management in Trial Courts and First Appellate Subordinate Courts (Criminal)** in the State of Madhya Pradesh, namely:-

RULES

1. Short title and commencement – (1) These rules may be called **the Madhya Pradesh Case Management in Trial Courts and First Appellate Subordinate Courts (Criminal) Rules, 2006.**

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

2. Definitions – In these rules, unless the context otherwise requires,-

(a) "Code" means the Code of Criminal procedure, 1973 (2 of 1994)

(b) The words and expressions used but not defined in these rules, shall have the same meaning as assigned to them in the Code.

3. Criminal Trials and Criminal Appeals to Subordinate Courts.–

(a) Criminal Trials – Criminal Trials should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in Track-I. Other cases where the accused is not granted bail and is in jail, should be kept in Track-II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc, should be kept in Tack-III. Offences which are tried by special court such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track-IV. Track V - all other offences.

An endeavour should be made to dispose of Track-I cases within a period of nine months, Track-II and Track-III cases within twelve months and Track-IV within fifteen months.

(b) Criminal Appeals.- Wherever an appeal is filed by a person in jail, as far as possible, the memorandum of appeal may be accompanied by important documents, if any, having a bearing on the question of bail.

4. Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the subordinate Court, so as to enable the other party to appear if they so choose even at the first hearing stage.

Note - Whenever there is any inconsistency between these rules and the provision of the Code of Criminal Procedure, 1973 or any other statutes, the provision of such Code or Statute shall prevail.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2006

(No, 33 OF 2006)

(Received the assent of the President on the 22nd August, 2006, and Act published in the Gazette of India (Extraordinary) Part II Section I dated 23.8.2006 pages 1-7)

[22nd August, 2006.]

An Act to amend the Juvenile Justice (Care and Protection of Children) Act, 2000.

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

1. Shorttitle.– This Act may be called the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006,

2. Amendment of long title.– In the Juvenile Justice (Care and Protection of Children)Act, 2000 (56 of 2000) (hereinafter referred to as the Principal Act), in the long title, for the words "though various institutions established under this enactment", the words "and for matters connected therewith or incidental thereto" shall be substituted.

3. Amendment of Section 1. In section 1of the principal Act,-

(i) in the marginal heading, for the words "and commencement",the words "commencement and application" shall be substituted;

(ii) after sub-section (3),the following sub-section shall be inserted, namely:-

"(4) Notwithstandingany thing contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.".

4. Amendment of Section 2.- In section 2 of the principal Act,–

(i) after clause *(a),* the following clause shall be inserted, namely:–

(aa) "adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and res ponsibilities that are attached to the relationship;';

(ii) in clause *(d),*-

(I) after sub-clause (i*)*, the following sub-clause shall be inserted, namely:–

"(ia*)* who is found begging, or who is either a street child or a working child,";

(II) in sub-clause (v), after the word 'abandoned', the words 'or surrendered' shall be inserted;

(iii) in clause *(h),* for the words "competent authority", the words "'State Government on the recommendation of the competent authority" shall be substituted;

(iv) for clause (l*)*, the following clause shall be substituted, namely:-

'(l) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;';

(v) clause (m) shall be omitted.

5. Omission of Certain expressions.– Throughout the principal Act, the words "local authority", "or local authority" and "or the local authority", wherever they occur, shall be omitted.

6. Amendment of Section 4.– In section 4 of the principal Act, in sub-section (1), for the words "by notification in the Official Gazette, constitute for a district or a group of districts specified in the notification", the words "within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette,constitute for every district" shall be substituted.

7. Amendment of Section 6.– In section 6 of the principal Act, in sub-section *(1),* the words "or a group of districts" shall be omitted.

8. Insertion of new Section 7A.– After section 7 of the principal Act, the following section shall be inserted, namely:-

"7A. Procedure to be followed when claim of juvenility is raised before any court.- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence; the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case,

and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.".

9. Amendment of Section 10.– In section 10 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:–

"(1) As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty-four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board:

Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in a jail.".

10.Amendment of Section 12.– In section 12 of the principal Act, in sub-section (1), after the words "with or without surety", the words "or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person" shall be inserted.

11. Amendment of Section 14.– Section 14 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:–

"(2) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board at every six months, and shall direct the Board to increase the frequency of its sittings or may cause the constitution of additional Boards.".

12. Amendment of Section 15.– In Section 15 of the principal Act, in sub-section (1), for clause *(g)*, the following clause shall be substituted, namely:-

"(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.".

13. Amendment of Section 16.– In section 16 of the principal Act,–

(i) in sub-section (1), for the words "or life imprisonment", the words "or imprisonment for any term which may extend to imprisonment for life" shall be substituted;

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

"Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act.".

14. Amendment of Section 20.– In section 20 of the principal Act, the following proviso and Explanation shall be inserted, namely::–

"Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause *(l)* of section 2,even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.".

15. Substitution of new section for Section 21.– For section 21 of the principal Act, the following section shall be substituted, namely:–

"21. **Prohibition of publication of name, etc., of juvenile in conflict with law or child in need of care and protection involved in any proceeding under the Act.**–(1) No report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile or child nor shall any picture of any such juvenile or child be published:

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile or the child.

(2) Any person who contravenes the provisions of sub-section (1), shall be liable to a penalty which may extend to twenty-five thousand rupees.".

16. Amendment of Section 29.– In section 29 of the principal Act, in sub-section (1), for the words "by notification in Official Gazette, constitute for every district, or group of districts specified in the notification", the words "within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district" shall be substituted.

17. Amendment of Section 32.– In section 32 of the principal Act,–

(a) in sub-section(1),-

(i) in clause *(iv)*, the words "authorised by the State Government" shall be omitted;

(ii) the following proviso shall be inserted at the end, namely:–

"Provided that the child shall be produced before the Committee without any loss of time but within a period of twenty-four hours excluding the time necessary for the journey.";

(b) in sub-section (2), the words "to the police and" shall be omitted.

18. Amendment of Section 33.– In section 33 of the principal Act,–

(a) in sub-section (1), the words "or any police officer or special juvenile police unit or the designated police officer" shall be omitted;

(b) for sub-section (3), the following sub-sections shall be substituted, namely:–

"(3) The State Government shall review the pendency of cases of the Committee at every six months, and shall direct the Committee to increase the frequency of its sittings or may cause the constitution of additional Committees.

(4) After the completion of the inquiry, if, the Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.".

19. Amendment of Section 34.– In section 34 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Without prejudice to anything contained in any other law for the time being in force, all institutions, whether State Government run or those run by voluntary organisations for children in need of care and protection shall, within a period of six months from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, be registered under this Act in such manner as may be prescribed." .

20. Amendment of Section 39.– In section 39 ofthe principal Act, for the Explanation, the following Explanation shall be substituted, namely:–

'Explanation.- For the purposes of this section "restoration of and protection of a child" means restoration to-

(a) parents;

(b) adopted parents;

(c) foster parents;

(d) guardian;

(e) fit person;

(f) fit institution.".

21. Amendment of Section 41.– In section 41 of the principal Act,-

(i) for sub-sections (2), (3) and (4), the following sub-sections shall be substituted, namely:–

"(2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed,

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

(4) The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section(3):

Provided that the children's homes and the institutions run by the State Government or a voluntary organisation for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3).";

(ii) for sub-section (6), the following sub-section shall be substituted, namely:–

"(6) The court may allow a child to be given in adoption-

(a) to a person irrespective of marital status; or

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

(c) to childless couples.".

22. Substitution of new section for Section 57.– For section 57 of the principal Act, the following section shall be substituted, namely:–

> **"57. Transfer between children's homes under the Act, and juvenile homes of like nature in different parts of India.–** The State Government may direct any child or the juvenile to be transferred from any children's home or special home within the State to any other children's home, special home or institution of a like nature or to such institutions outside the State in consultation with the concerned State Government and with the prior intimation to the Committee or the Board, as the case may be, and such order shall be deemed to be operative for the competent authority of the area to which the child or the juvenile is sent.".

23. Amendment of Section 59.– In section 59 of the principal Act, in sub-section (2), for the words "for maximum seven days", the words "for a period generally not exceeding seven days" shall be substituted.

24. Insertion of new Section 62A.– After section 62 of the principal Act, the following section shall be inserted, namely:-

> "62A. Constitution of Child Protection Unit responsible for **implementation of the Act.-** Every State Government shall constitute a Child Protection Unit for the State and, such Units for every District, consisting of such officers and other employees as may be appointed by that Government, to take up matters relating to children in need of care and protection and juveniles in conflict with law with a view to ensure the implementation of this Act including the establishment and maintenance of homes, notification of competent authorities in relation to these children and their rehabilitation and co-ordination with various official and non-official agencies concerned.".

25. Amendment of section 64.– In section 64 of the principal Act,–

(i) for the words "may direct", the words "shall direct" shall be substituted;

(ii) the following proviso and *Explanation* shall be inserted, namely:–

> "Provided that the State Government, or as the case maybe the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing a sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.
>
> **Explanation.**-In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clause *(l)* of section 2 and

other provisions contained in this Act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in section 15 of this Act.".

26. Amendment of Section 68..- In section 68 of the principal Act,-

(a) in sub-section (1), the following proviso shall be inserted, namely:-

"Provided that the Central Government may, frame model rules in respect of all or any ofthe matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter is made by the State Government and while making any such rules, so far as is practicable, they conform to such model rules.";

(b) in sub-section (2),-

(i) in clause *(x),* after the words, letter and brackets "sub-section (2)", the following words, letter and brackets shall be inserted, namely:- "and the manner of registration of institutions under sub-section (3)";

(ii) after clause *(xii),* the following claue shall be inserted, namely:-

"*(xiia)* rehabilitation mechanism to be resorted to in adoption under sub-section (2), notification of guidelines under sub-sectbn (3) and the manner of recognition of specialised adoption agencies under sub-section (4) of section 41;";

(c) sub-section(3) shall be re-numbered as sub-section(4) thereof, and before sub-section (4) as so re-numbered, the following sub-section shall be inserted namely:-

"(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House *of* Parliament, while it is in session, for a total period *of* thirty days which may be comprised in one session *or* in two *or* more successive sessions, and if, before the expiry *of* the session immediately following the session *or* the successive sessions aforesaid, both Houses agree in making any modification in the rule *or* both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form *or* be *of* no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity *of* anything previously done under that rule.".

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(This matter relating to the Criminal Law (Amendment) Act, 2005 has to be placed after page 8 of Part IV)

265C. Guidelines for mutually satisfactory disposition.– In working out a mutually satisfactory disposition under clause (a) of sub-section (4) of section 265-B, the Court shall follow the following procedure, namely :–

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case :

Provided that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting :

Provided further that the accused may, if he so desires, participate in such meeting with his pleader, if any, engaged in the case ;

(b) in a case instituted, otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case :

Provided that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting :

Provided further that if the victim of the case of the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.

265D. Report of the mutually satisfactory disposition to be submitted before the Court.– Where in a meeting under section 265C, a satisfactory disposition of the case has been worked out the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265B has been filed in such case.

265E. Disposal of the case.– Where a satisfactory disposition of the case has been worked out under section 265D, the Court shall dispose of the case in the following manner, namely :–

(a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused;

(b) after hearing the parties under clause (a), if the Court is of the view that section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provided the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

265F. Judgment of the Court.– The Court shall deliver its judgment in terms of section 265E in the open Court and the same shall be signed by the presiding officer of the Court.

265G. Finality of the judgment.– The judgment delivered by the Court under section 265G shall be final and no appeal (except the special leave petition under article 136 and writ petition under articles 226 and 227 of the Constitution) shall lie in any Court against such judgment.

265H. Power of the Court in plea bargaining.– A Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under this Code.

265I. Period of detention undergone by the accused to be set off against the sentence of imprisonment.– The provisions of section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

265J.Savings.– The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of this Code and nothing in such other provisions shall be construed to constrain the meaning of any provision of this Chapter.

Explanation.– For the purposes of this Chapter, the expression "Public Prosecutor" has the meaning assigned to it under clause (u) of section 2 and includes and Assistant Public Prosecutor appointed under section 25.

265K. Statements of accused not to be used. – Notwithstanding anything contained in any law for the time being in force, the statements or facts state by an accused in an application for plea bargaining filed under section 265B shall not be used for any other purpose except for the purpose of this Chapter.

265L. Non-application of the Chapter.– Nothing in this Chapter shall apply to any juvenile or child as defined in clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)".

5. Amendment of section 292.– In section 292 of the Code of Criminal Procedure, –

(a) in sub-section (1), for the portion beginning with the words "gazetted officer" and ending with the brackets and words ""(including the officer of the Controller of Stamps and Stationery)", the following shall be substituted, namely :–

"officer of any Mint or of any Note Printing Press or of any Security Printing Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents, as the case may be,";

(b) in sub-section (3), for the portion beginning with the words "except with" and ending with the words "as the case may be", the following shall be substituted, namely :–

"except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be".

6. Amendment of section 340.– In section 340 of the Code of Criminal Procedure, in sub-section (3), for clause (b), the following clause shall be substituted, namely :–

"(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.".

7. Amendment of the First Schedule.– In the First Schedule to the Code of Criminal Procedure, under the heading "I.– Offences Under The Indian Penal Code."–

(a) after the entries relating to section 195, the following entries shallbe inserted, namely :–

1	2	3	4	5	6
"195A.	Threatening any person to give false evidence	imprison-ment for 7 years,or fine, or both	Cog-nizable	Non-bailable	Court by which offence of giving false evidence is triable.
	If innocent person is convicted and sentenced in consequence of false evidence with death, or imprisonment for more than seven years.	The same as for the offence.	Ditto	Ditto	Ditto".

(b) in the 4th column, in the entry relating to section 196, for the word "Ditto the word" Non-cognizable shall be substituted.

8. Omission of section 25 of Act 25 of 2005.– Section 25 of the Code of Criminal Procedure (Amendment) Act, 2005 shall be omitted.

CHAPTER IV

Amendment to the Indian Evidence Act, 1872

9. Amendment of section 154 of Act 1 of 1872.– In the Indian Evidence Act, 1872, Section 154 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely :–

"(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.".

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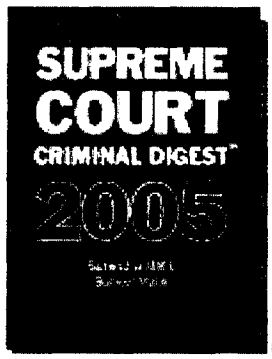
Supreme Court Criminal Digest, 2005

by
Surendra Malik
B.Sc. (Hons), LL.M. (Columbia),
Gold Medallist
Chief Editor: **Supreme Court Cases**™
&
Sumeet Malik
B.A., LL.B. (Hons.) (NLSIU),
LL.M. (IP) (Franklin Pierce, USA), Advocate
Associate Editor, **Supreme Court Cases**™



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