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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

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

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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6.	**Hon'ble Shri Justice K. K. Lahoti**	Member
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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director

Esteemed Readers

Year 2007 is coming to an end. When this issue of JOTI reaches you, Year 2008 would have begun. On behalf of JOTI JOURNAL, we wish all the judicial officers a warm, happy and judicially rich and joyful New Year.

JOTRI, being a training institute is imparting training by publishing bi-monthly Journal JOTI and organizing training programmes and workshops on various subjects. Apart from this, the Institute is also sending various legal questions to each district bi-monthly for discussion and preparation of article on the topic concerned and the best is being published in the Journal. This programme was started with a view to inspire all judicial officers of each district to study the law on the relevant subject/topic and exchange views with other participants; junior and senior colleagues, to understand the law from different angles so that they can, not only understand the relevant law in right perspective but a reading habit may also be inculcated.

In this regard, it is observed that this programme is not functioning well in all the districts. In most of the districts, bi-monthly meetings are not being held regularly; as a result articles are not being received by the Institute for publication in JOTI. I am sorry to say that only few districts are showing interest and sincerity to make the programme successful. Looking to the utility of this programme, we are inclined to implement it and the success of this programme completely depends upon the District Judges. They can only arrange and compel all the judicial officers to sit together and participate actively and seriously for successful implementation of this programme in the true sense and to cultivate reading habit amongst the members of Subordinate Judiciary. Undoubtedly, this programme will help all the judicial officers to enrich their knowledge and to uplift the standard of our district judiciary. Therefore, I humbly request all the District Judges to regularly arrange bi-monthly meetings in the concerned districts and to play the role of a leader to inspire and motivate all the judicial officers of the districts to participate actively and sincerely in the discussions. Here, I would also like to suggest that apart from the topics sent by the Insttitue, there may be discussions or exchange of views on new legislations so as to make all the judicial officers aware of the provisions of new legislations, particularly laws relating to those cases which frequently come before them.

During the year 2007, the Institute has organized a number of workshops on Protection of Human Rights – Role of District Judiciary, Cases u/s 138 Negotiable Instruments Act, State Level Workshop on Plea Bargaining, Basic Issues Involved in the Offences for Attempt to Murder, Culpable Homicide not Amounting to Murder and Culpable Homicide Amounting to Murder, Legal Issues in Accident Claim Cases under Motor Vehicles Act, Expeditious Execution of Decrees, Criminal Justice Administration, Prevention of Corruption Act, Offences against Married Women and Domestic Violence and workshop on Scheduled Castes and Scheduled Tribes (P.A.) Act for judicial officers of different cadres. Besides this, the Institute has organized four workshops on Juvenile Justice (Care & Protection of Children) Act, 2000 for judicial officers and one workshop on Juvenile Justice (Care & Protection of Children) Act, 2000 for Members of Juvenile

Justice Board. Workshops on PC & PNDT Act, Judicial Process under Co-operative Societies Act and Forest Laws have also been organized for the officers of other departments. The Institute has imparted 'Basic Training in Office Administration' to the Ministerial staff of the High Court. In addition to that, the Institute also imparted training to the Private Secretaries and Personal Assistants posted in different Courts of High Court of Madhya Pradesh Main Seat on the topic 'Developing Language Skills and Use of Computers in Court Working'.

The Institute is gaining new heights day by day. A new chapter has been added in the history of the Institute with the opening of a temporary hostel, consisting of 21 rooms with all amenities having a capacity to accommodate 50 judicial officers at a time, on the second and third floors of the Institute. All this is achieved only because of the valuable guidance and blessings of Hon'ble the Chief Justice and the Hon'ble Chairman of High Court Training Committee. The Institute will remain extremely obliged for the same.

The Institute has adopted a new training scheme for Induction Training of newly recruited Civil Judges Class II. The main aim of the new scheme is to impart training mainly on four themes, namely, knowledge, skills, attitude and ethics. Knowledge regarding the laws both procedural as well as substantive; skills of court craft, application of laws to resolve problems, judgment writing and court management etc; attitude of impartiality, sensitivity to human problems, confidence and credibility; and ethics concerning integrity, conduct inside and outside the court room, judicial discipline etc.

In the last quarter of the year 2007, the Institute is busy in imparting First Phase Induction Training to the newly recruited Civil Judges Class II. The Institute has imparted first phase induction training to first batch of 50 Civil Judges. First phase induction training to the second batch consisting of 50 newly recruited Civil Judges Class II is under progress. Third batch of 38 newly recruited civil judges will come for training in the month of January, 2008. More than 100 topics, consisting of both substantive and procedural laws, have been included in the training curriculum of Induction Training. To reduce the stress, lectures on Art of Living are also included in the training curriculum. Yoga is made part of the curriculum so as to help the judicial officers in developing their over-all personality.

In most of the workshops, Hon'ble the Chief Justice and Chairman of the High Court Training Committee have blessed the trainee judicial officers on the occasion of inaugural and valedictory sessions. This Institute is fortunate enough to get kind support of Hon'ble Judges of the High Court, who spared valuable time out of their busy schedule to grace this Institute and to enlighten the trainee judicial officers on various topics of perennial importance. Registry Officers and judicial officers posted in Jabalpur District Court also spared their time to deliver lectures in the institute. Guest lecturers from various other fields were also invited to deliver lectures. Indeed, we received overwhelming support from every corner. I extend my sincere thanks and gratitude on behalf of the Institute for their support.

I conclude by wishing all of you 'A Happy and Prosperous New Year' once again.

Thank you.

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Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of M.P. addressing the Trainee Judicial Officers in the First Phase Induction Training programme for newly recruited Civil Judges Class II (First Batch). On His Lordship's left is Shri K.C. Sharma, Registrar General, High Court of M.P. and on the right is Shri J.P. Gupta, Director Judicial Officers' Training & Research Institute

Newly Recruited Civil Judges Class II during the First Phase Induction Training Programme (First Batch- 19.11.2007 to 09.12.2007)

Hon'ble Shri Justice R.S. Garg, Chairman, High Court Training Committee delivering inaugural address on the opening day (19.11.2007) of the First Phase Induction Training Programme for newly recruited Civil Judges Class II (First Batch)

Hon'ble Shri Justice K.K. Lahoti, Judge, High Court of M.P. & Member, High Court Training Committee delivering inaugural address on the opening day (24.12.2007) of the First Phase Induction Training programme for newly recruited Civil Judges Class II (Second Batch)

PART - I

साक्षियों की सुरक्षा में आने वाली बाधाएं और समाधान*

जस्टिस डी. एम. धर्माधिकारी,

अध्यक्ष,

म.प्र. मानव अधिकार आयोग, भोपाल.

ब्रिटिश कालीन विरासत में मिली भारत की अपराधिक विधि प्रक्रिया की असफलता के कई उदाहरण उजागर हुए हैं, उदाहरणार्थ सर्वाधिक चर्चित गुजरात दंगों का प्रकरण ***जाहिरा शेख विरूद्ध गुजरात शासन, 2004 (4) SCALE 375, प्रियदर्शनी मटटू तथा नीलम कटारा व अन्य।***

इन सभी प्रकरणों में प्रचलित अपराधिक विधि प्रणाली के माध्यम से जनता के समक्ष उपलब्ध साक्ष्य के आधार पर भी अपराधियों को दंडित नहीं किया जा सका क्योंकि न्यायालय के समक्ष साक्षी–गण निर्भीकता से साक्ष्य नहीं दे सके। साक्षियों को डराना, धमकाना, भयभीत करना उन्हें प्रलोभन देना और साक्षियों के परीक्षण में अत्यधिक विलम्ब, ऐसे अनेक कारण हैं जो न्यायिक प्रक्रिया को निष्प्रभावी बनाते हैं और न्यायाधीश, अपराधी को दोषमुक्त करने मजबूर हो जाते हैं। अपराधिक विधि प्रक्रिया का सबसे वीभत्स् उदाहरण ***जाहिरा शेख*** प्रकरण था जो ***बेस्ट बेकरी केस*** के नाम से मीडिया में सर्वाधिक चर्चा में रहा। गुजरात फास्ट ट्रेक कोर्ट के सत्र न्यायाधीश के समक्ष जाहिरा के परिवार के कई सदस्यों की नृशंस हत्या को अपने आंखों से देखने वाले गवाहों ने अपने बयान बदल दिये। सर्वोच्च न्यायालय ने उस प्रकरण में दुबारा ट्रायल आदेशित की और प्रकरण पुनः ट्रायल के लिए मुंबई स्थानान्तरित कर दिया। यह जाहिरा शेख के पहल पर ही किया गया था। मुबंई ट्रायल के दौरान ''जाहिरा शेख'' जो स्वयं पीड़िता थी उसने ही न्यायालय में अपने बयान बदल दिये तब सर्वोच्च न्यायालय को पीड़िता को ही न्यायालय की अवमानना एवं झूठी गवाही के लिए दंडित करना पड़ा। गुजरात दंगों में उसके परिवार के कई सदस्यों की हत्या के बाद स्वयं पीड़िता की एवं उस प्रकरण के साक्षियों की मजबूरी यह थी कि उन्हें अत्यधिक आतंकित किया गया और पैसों का प्रलोभन देकर अपना मुंह बंद रखने कहा गया। गुजरात दंगों का प्रकरण तो मीडिया ने बहुत उछाला, परन्तु ऐसे कई प्रकरण ग्रामीण क्षेत्रों में लगातार होते आ रहे है। न्याय प्रक्रिया से जुड़े सभी लोगों की संवेदनशीलता ही क्षीण होती जा रही है।

इन चिंतनीय परिस्थिति में सर्वोच्च न्यायालय ने कई प्रकरणों जैसे ***राष्ट्रीय मानव अधिकार आयोग विरूद्ध गुजरात शासन, 2003(9) SCALE 329, पी.यू.सी.एल. विरूद्ध केन्द्रीय शासन, 2003 (10) SCALE 967, जाहिरा शेख विरूद्ध गुजरात शासन, 2004 (4) SCALE 375*** एवं ***साक्षी विरूद्ध भारत सरकार, 2004 (6) SCALE 15*** में साक्षियों की पहचान गुप्त रखने तथा साक्षियों को संरक्षण देने के लिए कार्यक्रम उठाने के महत्व पर जोर दिया। सर्वोच्च न्यायालय ने उपरोक्त प्रकरणों में यह भी

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*मध्यप्रदेश शासकीय अधिवक्ता परिषद, प्रांतीय सम्मेलन दिनांक 9 सितम्बर,2007

कहा कि गवाहों के न्यायालय में परीक्षण के दौरान बयान बदल देने की प्रचलित कुसंस्कृति पर अंकुश लगाने के लिए आवश्यक है कि शीघ्रातिशीघ्र केन्द्रीय विधायिका, साक्षियों के संरक्षण हेतु एक उपयुक्त विधि निर्मित कर उसे अमल में लाये। सर्वोच्च न्यायालय द्वारा उपरोक्त प्रकरणों में की गई टिप्पणियों और दिशा निर्देशों के आधार पर राष्ट्रीय विधि आयोग ने स्वमेव इस विषय पर, विधि जगत से जुड़े सभी व्यक्तियों, संस्थाओं और सामान्य जनता से विचार–विमर्श करने हेतु कार्यशालाएं आयोजित की एवं एक प्रश्नावली जारी कर सुझाव मांगे हैं।

राष्ट्रीय विधि आयोग के मत से पीड़ितों और साक्षियों पर लगातार बनते सामाजिक दबाव को देखते हुए यह आवश्यक है कि ऐसा संतुलित कानून बनाया जाए,जिसमें एक तरफ तो साक्षियों की पहचान गुप्त रख उन्हें सुरक्षा दी जावे तथा दूसरी ओर अपराधी को भी न्यायिक प्रक्रिया के दौरान अपने बचाव का पूर्ण अवसर प्राप्त हो। विधि आयोग ने अपने अध्ययन के दौरान यह पाया कि साक्षी सुरक्षा के संबंध में विश्व के अनेक देश जैसे, आस्ट्रेलिया, दक्षिण अफ्रिका, हॉगकॉग, कैनेडा, न्यूजीलैंड, पुर्तगाल, फिलीपींस और संयुक्त राष्ट्र अमेरिका में कानून विद्यमान है, जिनमें गंभीर एवं संवेदनशील प्रकरणों में साक्षियों की पहचान गुप्त रख कर उनकी सुरक्षा हेतु एक कार्यक्रम संचालित किया जाता है। उन देशों में पुलिस एवं अनुसंधान विभाग में साक्षी की सुरक्षा के लिए अलग प्रकोष्ठ बनाया गया है। विधि आयोग के मतानुसार भारतीय परिस्थितियों को देखते हुए न्यूजीलैंड एवं पुर्तगाल में साक्षियों की सुरक्षा के संबंध में जो कानून है, उसका भारत में विधि निर्मिती के लिए आधार स्वरूप उपयोग किया जा सकता है।

राष्ट्रीय विधि आयोग ने जो प्रश्नावली विधि जगत से जुड़े व्यक्तियों और आम जनता से सुझाव प्राप्त करने हेतु जारी की है उनमें कुछ प्रमुख बिंदु है कि क्या साक्षियों की पहचान गंभीर अपराधिक मामलों में गुप्त रखने के लिए टाडा अधिनियम की धारा 16 एवं 30 के अनुरूप न्यायालय से आदेश प्राप्त किये जाने चाहिए, जैसे साक्षियों के नाम तथा पते न्यायिक परीक्षण के दौरान प्रकट नहीं किये जावे, न्यायिक प्रक्रिया के दौरान किसी भी तरह मीडिया द्वारा जानकारी प्रकाशित न की जावे आदि। विधि आयोग ने यह भी प्रश्न किये हैं कि क्या किन्हीं गंम्भीर अपराधिक मामलों में साक्षियों के बयान न्यायाधीश उनके घर या निर्दिष्ट स्थान पर लें अथवा वीडियो लिंक प्रक्रिया के माध्यम से उनके बयान दर्ज किये जाएं।

विधि आयोग की प्रश्नावली में सुझाव मांगे गये हैं कि गवाहों की सुरक्षा के कार्यक्रमों के अन्तर्गत उनकी पहचान गुप्त रखे जाने के साथ–साथ क्या उन्हें शासन के माध्यम से परिवहन की विशेष व्यवस्था दी जावे, न्यायालय में उनके लिए विशेष सुरक्षित कक्ष हो, उन्हें स्वयं अथवा उनके रिश्तेदारों और निकटस्थ परिवारजनों को भी पुलिस सुरक्षा प्रदान की जावे। विधि आयोग ने प्रश्न किये हैं कि साक्षी की सुरक्षा का उत्तरदायित्व किस संस्था पर डाला जाए, किसी शासकीय विभाग या स्व–ईकाई संस्था अथवा पुलिस अथवा न्यायिक संस्था पर।

राष्ट्रीय आयोग ने अपने पूर्व की कुछ अनुशंसाओं में यह भी सुझाव दिये थे कि धारा 164 भा.द.सं. में एक अलग धारा 164–क संशोधन से प्रविष्ट की जाए। इस प्रस्तावित संशोधित प्रावधान के अनुसार ऐसे अपराधिक प्रकरणों में जिनमें निर्धारित दंड मृत्यु या 10 वर्ष से अधिक का कारावास की सजा हो, उन सब प्रकरणों में अनुसंधान के दौरान ही अनुसंधानकर्ता पुलिस अधिकारी को यह अधिकार दिये जाएं कि वह मुख्य

साक्षियों की गवाहियॉ निकटस्थ न्यायिक दंडाधिकरी के समक्ष लिपिबद्ध कर लें। न्यायिक दंडाधिकारी यदि अपराध के संबंध में सक्षम न्यायालय नहीं है तो वह अपने द्वारा लिपिबद्ध किये हुए साक्षियों के बयान समक्ष न्यायिक दंडाधिकारी को अपने स्तर पर उचित कार्यवाही हेतु भेज देगा। इस तरह की न्यायिक दंडाधिकारी के समक्ष लिपिबद्ध गवाही को साक्ष्य अधिनियम में साक्ष्य के बतौर स्वीकार योग्य माना जावेगा। विधि आयोग के उपरोक्त प्रस्तावित संशोधन पर अभी तक विधायिका ने विचार नहीं किया है। यदि TADA और POTA कानूनों में न्यायालय के आदेश पर गवाहों की पहचान तथा पता गुप्त रख उनके बयान लिपिबद्ध किये जा सकते हैं तो क्यों न गम्भीर अपराधिक प्रकरणों में जहां न्यायालय को संभावना प्रतीत होता है कि साक्षी निर्भीकता से साक्ष्य नहीं दे सकेगा, वहां न्यायालय विशेष सुरक्षा का आदेश प्रदान करे।

सर्वोच्च न्यायालय के आदेश, राष्ट्रीय विधि आयोग की अनुशंसाओं और भारत की वर्तमान बढ़ते अपराधों की परिस्थितियॉ तथा अपराधियों को दंड ही न दिला पाने की मजबूरियों को देखते हुए अब यह अति आवश्यक हो गया है कि शीघ्रातिशीघ्र साक्ष्य अभिरक्षा के लिए कोई विशेष कानून बने या प्रचलित अपराधिक विधि प्रणाली में उपयुक्त संशोधन प्रविष्ट किये जावे। मानव अधिकार के परिप्रेक्ष्य में भी साक्षी–गण जो अपराधिक विधि प्रक्रिया के प्रमुख सूत्रधार है उनका यह मानव अधिकार है कि न्यायालय और समाज से उन्हें संरक्षण, मानवोचित व्यवहार और आदर प्राप्त हो और उनकी प्रतिष्ठा को आंच न लगने पाये। दूसरे अर्थ में पूरी दांडिक न्यायिक प्रक्रिया के दौरान उन्हें भय, प्रताड़ना , प्रलोभन तथा उनके ऊपर अन्य किसी तरह के दबाव से उनकी सुरक्षा की जावे।

साक्षियों की सुरक्षा के संबंध में भारत में कोई भी कानून विद्यमान नहीं है और निकट भविष्य में पारित किये जाने की संभावना भी नहीं है। ऐसी परिस्थिति में न्यायिक संस्था के समक्ष चुनौती है कि किस तरह साक्षियों को सुरक्षा प्रदान की जाए, ताकि वे स्वेच्छा से, बगैर किसी दबाव, भय या प्रलोभन के न्यायालय में साक्ष्य दे सकें और उस आधार पर न्यायालय न्याय करने में सक्षम हो।

समस्याएं

गवाहों पर सम्मन तामीली में विलम्ब

अपराधिक प्रकरणों की न्यायिक प्रक्रिया में दैनंदिन अभियोजकों को जिन समस्याओं का सामना करना पड़ता है उनमें प्रमुख है कि न्यायालय में अपराध का चालान दर्ज हो जाने के बाद भी निर्धारित तिथि को गवाहों के बयान लिपिबद्ध नहीं हो पाना केवल इसलिए कि न्यायालयों के स्टाफ द्वारा गवाहों पर सम्मन की तामीली निर्धारित समयावधि में न किया जाना। अभियोजकों से चर्चा करने पर प्रकट हुआ कि गवाहों पर सम्मन तामीली की प्रक्रिया पूरी भ्रष्ट हो चुकी है तथा इसके ऊपर किसी प्रकार की न तो न्यायिक विभाग न पुलिस विभाग की निगरानी है। सर्वप्रथम तो संबंधित न्यायालय के अधीनस्थ कर्मचारी एवं पुलिस विभाग के कर्मी आपस में सांठ–गांठ कर तामीली में जानबूझकर विलम्ब करते हैं, ताकि उस विलम्बित अवधि का अपराधी को लाभ मिल सके और वह गवाहों पर दबाव डालकर अपने पक्ष में उन्हें कर सके। सम्मन विलम्ब से तामील होकर गवाही में

देरी होने का दूसरा परिणाम यह होता है कि भले ही गवाहों पर दबाव न डाला गया हो, केवल विलम्ब के कारण वे पूरी घटना को स्मरण नहीं रख पाते और न ही विस्तार से विश्वसनीय गवाही दे सकने की स्थिति में होते हैं।

सम्मन तामीली के विलम्ब पर अंकुश लगाया जा सकता है यदि न्यायिक संस्था में न्यायाधीश को मदद करने के लिए एक अलग अधिकारी रहे, जो इस बात पर निगरानी रखे कि कोर्ट लिपिक द्वारा सम्मनस् तामीली हेतु पुलिस को अविलम्ब भेज दिये गये हैं अथवा नहीं। पुलिस विभाग में भी हरेक वारंट तामीली के संबंध में उत्तरदायित्व सुनिश्चित करने हेतु तामीली पुलिस कर्मचारियों के अलावा उस पर निगरानी रखने हेतु उप निरीक्षक स्तर के अधिकारी पर यह जवाबदारी डाली जाए कि वह सुनिश्चित करे कि निर्धारित दिनांक के पूर्व गवाह पर तामीली हो चुकी है। प्रत्येक गवाह की तामीली के पश्चात् उसका सत्यापन उप निरीक्षक स्तर के पुलिस द्वारा किया जाए। इसी प्रकार समय–समय पर पुलिस में तामीली रजिस्टर का आकस्मिक निरीक्षण हो और जो दोषी पाये जाते हैं उनके विरूद्ध विभागीय दण्डात्मक कार्यवाही हो। मोहर्रिर सम्मन जारी करवाये और इसका सत्यापन कोर्ट द्वारा कराया जावे। साथ ही सम्मन तामीली का प्रमाण–पत्र भी प्राप्त किया जाए।

विवेचना अधिकारी की न्यायिक प्रक्रिया के दौरान सक्रिय भूमिका हो

यह भी विदित हुआ है कि पूर्व प्रणाली अनुसार अब न्यायिक प्रक्रिया के दौरान अपराध की विवेचना करने वाले विवेचना अधिकारी की भूमिका सिवाय गवाही देने के अन्य कोई भी नहीं बची। अब अभियोजन का पूरा भार शासकीय अभियोजक पर होता है। इस संबंध में ब्रिटिश कालीन पुलिस प्रणाली को फिर से जारी रखने की आवश्यकता प्रतीत होती है, ताकि प्रत्येक ट्रायल में अपराध से संबंधित विवेचना अधिकारी समय–समय पर और आवश्यक हुआ, तो लगातार ट्रायल के दौरान शासकीय अभियोजक की मदद के लिए उपस्थित रहें। यदि आवश्यक हुआ तो गवाहों को दी जा रही प्रताड़ना या उत्पीड़न की आशंका को देखते हुए वह न्यायालय से अभियोजक के माध्यम से तत्संबंधी गवाह की सुरक्षा के लिए आदेश प्राप्त करे। विद्यमान परिस्थितियां तो ऐसी हैं कि ट्रायल के दौरान विवेचना अधिकारी प्रकरण के प्रति कोई भी रूचि नहीं ले पाते। उन्हें उनके संबंधित प्रकरण का अफसर इंचार्ज बनाये रखना आवश्यक है, ताकि अपनी विवेचना की दिशा के आधार पर न केवल वह अभियोजक को उचित सहायता दे सके साथ ही साक्षियों की सुरक्षा के लिए वे स्वयं पुलिस स्तर पर उचित कदम उठा सके और आवश्यकतानुसार न्यायालय से आदेश प्राप्त कर सके।

समाधान

गवाहों की सुरक्षा सुनिश्चित करने हेतु विधि आयोग ने तथा न्यायालय ने अपने समय–समय पर दिये गये निर्देशों में इस संबंध में समुचित विधि का निर्माण किये जाने की अनिवार्यता पर जोर दिया है। विधायिका के समक्ष अभी यह विषय विचाराधीन है और इस संबंध में प्रमुख समस्या गवाह सुरक्षा प्रदान करने के लिए आवश्यक मात्रा में पुलिस बल की या तत्संबंध में अन्य बल की अनुपलब्धता है, साथ ही केन्द्र और राज्यों पर बढ़ता आर्थिक भार। वस्तुस्थिति यह है कि अपराध की विवेचना एवं पीड़ितों को संरक्षण देने के कारगर उपाय एवं व्यवस्थाएं विद्यमान नहीं हैं न ही उसके लिए आवश्यक पुलिस बल है और न ही उसके लिए आर्थिक स्त्रोत शासन के पास उपलब्ध है।

उपरोक्त विषम परिस्थितियों में, विद्यमान विधि एवं व्यवस्था के अन्तर्गत ही गवाहों की सुरक्षा के संबंध में समाधान ढूढंने होंगे।

अभियोजन संचालनालय (DIRECTORATE OF PROSECUTION)

दण्ड प्रक्रिया संहिता में संशोधन के पश्चात् अभियोजन संचालनालय गठित किये जाने की व्यवस्था है जिसका प्रमुख एक ऐसा अधिवक्ता, जिसे कम से कम 10 वर्ष का अधिवक्ता के रूप में अनुभव हो, रखे जाने की व्यवस्था है। मध्यप्रदेश में भी अभियोजन संचालनालय गठित हो चुका है। अभियोजन संचालनालय समस्त प्रदेश का अभियोजन कार्य संचालित करते हैं एवं उन प्रकरणों में जहां पर शासन दोषमुक्त आदेशों के विरूद्ध अपील करना चाहता है उसका भी विचारण एवं यथोचित मार्गदर्शन संचालनालय द्वारा होता है। अभियोजन उचित और सही दिशा में होकर अपराधी दंडित हो सके तथा साक्षियों पर दबाव न बने यह कार्य एवं उत्तरदायित्व भी अभियोजन संचालनालय को दिया जाना श्रेयस्कर होगा।

जिन न्यायिक प्रक्रियाओं में पुलिस या पीड़ित या अभियोजन अथवा मीडिया के माध्यम से यह प्रकट होता है कि गवाहों को डराया, धमकाया या उन्हें प्रलोभित किया जा रहा है या ऐसा करने की आशंका है तब संचालनालय पर यह जवाबदारी डाली जाए कि वे तत्संबंध में न्यायालय से उचित आदेश प्राप्त कर गवाह की पहचान गुप्त रखने तथा उन्हें विशेष सुरक्षा प्रदान करने का आदेश प्राप्त करें। गवाह की सुरक्षा का कार्य संचालनालय को दिया जावे तथा आवश्यक हुआ तो इस हेतु संचालनालय को एक विशेष पुलिस बल मुहैया कराया जाए। यह पुलिस बल अपराध से पीड़ित तथा न्यायिक प्रक्रिया में सहभाग देने तत्पर गवाहों की सुरक्षा की जहां–जहां एवं जब भी आवश्यक हुआ व्यवस्था करेगा।

विधिक सहायता प्राधिकरण

विधिक सहायता प्राधिकरण अधिनियम, 1987 के अन्तर्गत राष्ट्रीय स्तर, राज्य, जिला तथा तहसील स्तर पर विधिक सहायता प्राधिकरण तथा विधिक सहायता समितियां गठित की गई हैं। अधिनियम में उनके जो कार्य एवं कर्तव्य दिये गये हैं वे इतने व्यापक हैं कि उसमें न्यायिक प्रक्रिया में पीड़ितों एवं गवाहों को कानूनी मदद एवं उनकी सुरक्षा का कार्य उनके द्वारा किया जाना वाछंनीय है और अधिनियम के उद्देश्यों की पूर्ति ही कहा जायेगा। इस संबंध में ***नीलम कटारा*** के प्रकरण में अभी कुछ ही माह पूर्व दिल्ली उच्च न्यायालय द्वारा जो दिशा निर्देश आदेश दिये गये हैं वे अवलोकनीय एवं प्रवर्तनीय है। दिल्ली उच्च न्यायालय ने उस प्रकरण में आदेशित किया है कि ***दिल्ली विधिक सहायता प्राधिकरण*** के ***सदस्य सचिव,*** पीड़ित अथवा गवाह के निवेदन पर यह, तय करेंगे कि किस साक्षी को किस प्रकार का संरक्षण और कितनी अवधि के लिए दिया जावे। विधिक सहायता प्राधिकरण के निवेदन पर पुलिस अधीक्षक से अपेक्षा की जायेगी कि वह प्रकरण से संबंधित पीड़ित एवं गवाह को आवश्यक सुरक्षा उपलब्ध कराये।

अभियोजन संचालनालय और ***विधिक सहायता प्राधिकरण*** इन दोनों संस्थाओं के कार्य पद्धति के मध्य श्रृंखला निर्मित की जा सकती है, ताकि अपराधिक प्रकरणों में पीड़ितों एवं गवाहों की सुरक्षा की जो समस्याएं इन संस्थाओं के संज्ञान में आती है उसमें आवश्यकतानुसार वे न्यायालय से निर्देश प्राप्त कर पुलिस विभाग के माध्यम से पीड़ितों एवं गवाहों को सुरक्षा एक निश्चित अवधि तक करवायेंगे और इस हेतु आवश्यक हुआ तो उनकी पहचान गुप्त रख उन्हें मीडिया से भी दूर रखे जाने हेतु आदेश प्राप्त कर सकेंगे।

मानव अधिकार आयोग द्वारा गठित पीड़ितों के लिए सलाहकार समितियाँ

मध्यप्रदेश, मानव अधिकार आयोग के माध्यम से देश में पहला राज्य है जिसमें अपराध से पीड़ित मानव अधिकारों के संरक्षण हेतु जिला स्तर पर सलाहकार समितियाँ गठित करने की आयोग की अनुशंसा मान्यकर कई जिलों में सलाहकार समितियाँ गठित की गई हैं। आयोग द्वारा अनुशंसित कई जिलों में निर्मित ये सलाहकार समितियां वर्तमान में *अपराध से पीड़ित व्यक्तियों* को संरक्षण देने की व्यवस्था करती हैं। इन समितियों द्वारा अपराध घटित होने के तत्काल पश्चात् पीड़ित को चिकित्सा सुविधाएं, भावनात्मक सम्बल, पुलिस एवं प्रशासनिक सहायता एवं विधिक सहायता दिये जाने की अपेक्षा है। इन समितियों में जिला स्तर के शासकीय अधिकारी–गण के साथ मानव अधिकार सेवा कार्य में संलग्न सभ्य समाज के लोगों का समावेश किया गया है। यदि आयोग द्वारा प्रस्तावित एवं शासन द्वारा उस आधार पर गठित सलाहकार समितियाँ पीड़ितों के मानव अधिकारों का संरक्षण वांछित सीमा तक कर पाती है, तो भविष्य में इन समितियों का उपयोग गवाहों के संरक्षण के लिए भी किया जा सकता है। यदि पीड़ित का वैधानिक एवं मानव अधिकार, अपराधी को दंडित कराये जाने का है, तो उस हेतु अपराध से संबंधित गवाहों को संरक्षण दिये जाने का अधिकार भी पीड़ित का है। इन सलाहकार समितियों के गठन किये जाने का उद्देश्य यह था कि अपराधिक न्यायिक प्रक्रिया में पीड़ित की उपेक्षा न हो और तत्काल उसे आवश्यक सभी प्रकार की सहायता शासन तथा समाज द्वारा प्राप्त हो।

जब तक विधायिका, साक्षियों की पहचान गुप्त रखने तथा उन्हें सुरक्षा प्रदान किये जाने के कार्यक्रम उठाने के संबंध में विस्तृत विधि निर्मित नहीं कर लेती तब तक गवाहों की सुरक्षा का कार्य न्यायालय स्वयं, अभियोजन संचालनालय, विधिक सहायता प्राधिकरण तथा मानव अधिकार आयोग द्वारा गठित सलाहकार समिति के पारस्परिक सहयोग से संपादित किया जा सकता है। समग्र रूप से किया गया यह प्रयास यदि सफल होता है, तो बगैर किसी नई विधि के पारित किये, आर्थिक खर्च या पुलिस कर्मियों की संख्या बढ़ाते हुए, पीड़ितों एवं साक्षियों को सुरक्षा एवं आवश्यक सहायताएं उपलब्ध कराई जा सकती हैं और विद्यमान अपराध विधि प्रक्रिया प्रभावी हो सकती है।

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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 2007. The Institute has received articles from various districts. Articles regarding topic no. 1, 2, 3 & 4 received from Gwalior, Bhopal, Indore and Dhar respectively, are being included in this issue. As we have not received worth publishing article regarding topic no. 5, it will be sent to other group of districts for discussion in future:

1. Whether finding given by court under S.7 (A) of the Juvenile Justice (Care & Protection of Children) Act, 2000 regarding age of Juvenile would be binding on Juvenile Justice Board?

   क्या धारा 7 (क), किशोर न्याय (किशोरों की देखरेख एवं सरंक्षण) अधिनियम, 2000 के अन्तर्गत किसी किशोर की उम्र निर्धारण के संबंध में न्यायालय द्वारा जाँच उपरान्त किया गया विनिश्चय किशोर न्याय मण्डल पर बंधनकारी होगा ?

2. Explain the Law relating to territorial jurisdiction of Court regarding bail application filed under section 438 Cr.P.C.

   धारा 438 द. प्र. सं. के अन्तर्गत प्रस्तुत प्रतिभूति आवेदन पत्र के संबंध में न्यायालय के स्थानीय क्षेत्राधिकार संबंधी विधि स्पष्ट कीजिये ?

3. State the law relating to adverse comments against subordinate judges and authorities in hearing or disposal of appeal or revision?

   अपील एवं पुनरीक्षण याचिकाओं की सुनवाई एवं निराकरण के समय अधीनस्थ न्यायाधीशों या प्राधिकारियों के विरूद्ध प्रतिकूल टिप्पणियों संबंधी विधि समझाइये ?

4. A Hindu marries second time after getting exparte decree for divorce. What would be the legal status of that second marriage if such an exparte decree is set aside later on?

   किसी हिन्दु द्वारा एक पक्षीय विवाह विच्छेद की आज्ञप्ति प्राप्त करके दूसरा विवाह कर लिया जाता है एवं इसके बाद एक पक्षीय आज्ञप्ति अपास्त हो जाती है ऐसी दशा में दूसरे विवाह की विधिक स्थिति क्या होगी ?

5. Explain meaning, expanse and scope of expression 'custody' regarding applicability of Section 439 Cr.P.C. when an order u/s 438 Cr.P.C. is in existence?

   धारा 438 दं. प्र. सं. के अन्तर्गत पारित आदेश के अस्तित्व में रहने पर धारा 439 दं. प्र. सं. के संबध में 'अभिरक्षा' का अर्थ, विस्तार एवं परिधि समझाइये ?

DETERMINATION OF JUVENILITY UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Judicial Officers
District Gwalior

HISTORY AND GENESIS

The Constitution, which is the fountainhead of all legislation, provides under Art 39 of the Constitution that the State shall direct its policy so that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, so that childhood and youth are protected against exploitation. In keeping with the national policy on the children, the Juvenile Justice Act, 1986 came into force. However, keeping in mind the standards prescribed in the Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the UN Rules for the Protection of Juveniles Deprived of Their Liberty, and all other relevant International Instruments, the Juvenile Justice (Care and Protection of Children) Act, 2000, was passed. The object of the Act is to lay down the basic principles for administering justice to a juvenile in conflict with law and also to provide for effective provisions for rehabilitation and social re-integration such as adoption, foster care, etc of abandoned or neglected children. To give further impetus to the above objectives, the Amending Act, 2006 was passed.

REASONS FOR THE CONTROVERSY

The Act is doubtless, a beautiful piece of legislation but it raises certain debatable questions as to the factum of Jurisdiction of courts regarding determination of juvenility.

Before coming to grips with the problem, it would be appropriate to highlight the definitions to see things in their proper perspective. Thus –

- Section 2(1) of the Act defines a "juvenile in conflict with law" as a person who has not completed the eighteenth year of age as on the date of commission of such offence.
- Juvenile Justice Board means a Board constituted under Section 4 of the Act.
- Competent authority means in relation to children in need of care and protection, is a Committee and relation to juveniles in conflict with law is a Board.
- Committee means a Child Welfare Committee constituted under Section 29 of the Act.

If a person is found to be juvenile then a court under the Code of Criminal Procedure, 1973 cannot exercise jurisdiction over such 'juvenile'. Prior to the Amendment Act 2006, apparently the Juvenile Justice Board had exclusive jurisdiction to determine the question of juvenility.

Section 6 - Powers of Juvenile Justice Board – *(1) Where a Board has been constituted for any district or a group of districts, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act, relating to juvenile in conflict with law.*

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceedings comes before them in appeal, revision or otherwise.

However Section 7-A as inserted in the Act by the Amendment Act with effect from 22.8.06 mandates that whenever a claim of juvenility is raised at any stage before a court, it shall make an enquiry and record a finding. Thus,

7-A. 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 recognized 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 juvenile on the date of commission of the offence under sub-section(1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any passed by a court shall be deemed to have no effect.

Thus by virtue of the amendment, it is mandatory for the court to adjudicate on the question of juvenility and such finding must be arrived not on affidavit but by taking such evidence as may be necessary. Apparently here a 'court' under the General Clauses Act means and includes a Court of Sessions as also a Court of a Magistrate. While incorporating the Amendment Act 2006, the provisions of Section 7, which describes the procedure to be followed by a Magistrate not empowered under the Act, have been left untouched.

Now the various possibilities that could arise as grey areas are –

- Whether the "finding" determined as above by 'any court' is binding on the Juvenile Justice Board?
- Does this amendment make the provisions under Section 7 wholly redundant as Section 7-A makes it mandatory to make an enquiry whenever the claim of Juvenility is raised before 'any court'?
- Does the procedure for age determination under Section 7-A being analogous to the procedure under Section 49 of the Act, absolve the competent authority to determine the age of the person brought before it?

GENERAL DISCUSSION

Whenever problems as to interpretation crop up, it is always proper to read the text for a harmonious construction and ensure that the object of the legislation is not defeated by rendering any provision as redundant. Thus, when a text is clear, it should be applied and not interpreted, unless an absurd result would follow; when a text is ambiguous or obscure, courts look for the will of the legislature. If this study is insufficient, courts often go to the *'travaux preparatories'* to discover the legislature's thinking.

Now, again it will be appropriate to view the problem in the light of the object and reasons of the Act. Among the proposals forwarded before the framing of the Act, it was suggested –

2(5)– to ensure speedy disposal of cases by the authorities envisaged under this Bill regarding juvenile or the child within a time limit of four months.

Certainly the framers of the legislation would not want to incorporate a provision of 'double inquiry' when expeditious disposal was a priority. In fact the amendment 7-A makes it apparent that no court should waste time once the question of juvenility crops up and after making the requisite inquiry, if the juvenility is determined in the affirmative, forward the juvenile to the competent authority or as has been held in ***State of MP v. Dilip and others, 2002(2) MPHT 564*** return the charge sheet to the police for being submitted before the Board. It would also be appropriate to take heed to what the Hon'ble Supreme Court has held on the question of determination of juvenility. Thus in ***Bhola Bhagat v. State of Bihar, AIR 1998 SC 236*** it has been clarified:

> "Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the Court where such a plea is raised to examine that plea with care and it cannot fold its hand without returning a positive finding regarding the plea.... The Court must hold an enquiry and return a finding regarding the age one way or the other. We expect the High Court and subordinate courts to deal with such

cases with more sensitivity, as otherwise the object of the Act will be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society will be frustrated."

In ***Sunil v State of MP, 2001(2) MPHT 102*** it has been held that the Court of Session has the jurisdiction to hold enquiry regarding age of an accused in a trial pending before it. In ***Anjali Bannerjee v Azad Kumar Ratha, 2003(4) MPLJ 40*** it has been held that Sessions Court cannot interfere in the finding recorded by the Juvenile Justice Board except by way of appeal which is provided under Section 52 of the Act.

The aforesaid provision under Section 7-A appears to have been inserted because prior to the Act of 2006 there was a serious controversy regarding the course to be followed by a Court not being a Court of Magistrate, when the question of juvenility is raised before such court. Section 7 of the Act empowers only the Magistrate to form an opinion regarding juvenility and proceed forthwith. This flaw is now removed and in view of the provisions contained in Section 7-A every Court including a Court of Session or a Special Court is under an obligation to hold an enquiry regarding the question of Juvenility. Section 7-A does not demarcate any stage for making a claim of Juvenility and thus such claim can be made after final disposal or even at the stage of considering an application for bail.

Where the determination of juvenility under Section 7-A is determined by the Sessions Court, there seems to be no dispute as the Sessions Court is undoubtedly a superior Court under the provisions of the CrPC and also the appellate Court for any order of the competent authority under the provisions of Section 52 of the Act. The issue whether the Board has jurisdiction to redetermine the juvenility of the accused who has already been declared juvenile by the Sessions Court came up for consideration in ***Naseem v. State of U.P., 1995 All LJ 1473*** and it was held that the juvenile court will not hold enquiry as to the age of the person after the high court or the sessions court has recorded a finding as to juvenility after enquiry and receiving evidence. However, if only an opinion is expressed without holding an enquiry or on the basis of visual perception only then the juvenile court will proceed to hold an enquiry.

The situation may be different in a case where a Magistrate not specially empowered forms an opinion about the juvenility of the accused as soon as he is brought before him and sends the matter for consideration to the Juvenile Court under Section 7(1). Here the Competent Authority must conduct a detailed enquiry and determine the question of age under Section 49 of the Act and he is in no way bound by the 'opinion' of the Magistrate not specially empowered.

However when the enquiry is a detailed enquiry under Section 7-A (by any court at any stage whenever such claim is made), and the finding of juvenility has been recorded, the presumption of juvenility will arise and the Competent Authority need not again embark on a process of re-determination of age unless for explicit reasons the Competent Authority opines otherwise.

Thus it appears that when a detailed enquiry has not been made by a Magistrate not specially empowered, as for instance at the remand stage, the opinion as to juvenility must be sent to the competent authority along with the record and the Competent Authority must conduct a detailed enquiry under Section 49 of the Act. The finding of the competent authority cannot be shaken except by way of appeal under Section 52 of the Act.

RESULT AND CONCLUSION

On the basis of the aforesaid analysis the legal position could be summarised as such:

- It is incumbent for the Magistrate not empowered under the Act to forward the juvenile or the child along with the record to the competent authority as soon as he forms an opinion as to his juvenility (S.7);
- Whenever the claim of juvenility is raised before any court at any stage in any proceeding it is mandatory for the court to make an enquiry and record a finding as to the question of juvenility;
- The finding of juvenility recorded by the Court of Session should not be disturbed by the Juvenile Justice Board as a matter of judicial propriety;
- The finding of Juvenility by a court other than the Court of Session should also be enough ground for the Juvenile Justice Board for forming a presumption as to Juvenility (S. 49 of the Act);
- Once such finding has been reached by 'any court' after a detailed enquiry, further enquiry should normally not be called for as it would only entail delay;
- In all other cases where a person is brought before the competent authority under any of the provisions of the Act, the Competent Authority shall make due enquiry and record a finding on the question of juvenility and the age so recorded shall be deemed to be the true age of the person;
- The finding of the Board under Section 49 of the Act is final and cannot be interfered with even by the Court of Session unless the matter comes up for appeal under Section 52 of the Act.

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LAW RELATING TO TERRITORIAL JURISDICTION OF COURT REGARDING BAIL APPLICATION FILED U/S 438 CR.P.C.

Judicial Officers
District Bhopal

The literal meaning of jurisdiction is the power of a court to hear and determine a means the extent of authority to administer justice with reference to subject matter, territory and pecuniary limits. Sections 6 to 23 of Chapter II of the Code of Criminal Procedure, 1973 (in short 'the Code') deals with the constitution of criminal courts and Sections 177 to 189 of Chapter XIII of the Code provides for jurisdiction of the criminal courts in respect of inquiries and trials. As defined under the Code, enquiry is to be conducted by a Magistrate and a trial is an exclusive field of the Court. An investigation is the method of collection of evidence conducted by a police officer or by any person (other than Magistrate) authorized by the law. Normally an investigation of an offence is a pre-trial stage. Investigation is intrinsically connected with arrest.

Anticipatory bail means bail in anticipation of arrest. Section 438 of the Code deals with the provision of an anticipatory bail. The anatomy of the provision reads as under :–

> **438. Direction for grant of bail to person apprehending arrest –** (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, *inter alia,* the following factors, namely:–
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> (i) the nature and gravity of the accusation;
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> (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
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> (iii) the possibility of the applicant to flee from justice; and
>
> (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail ;
>
> Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including –

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

From a fair reading of the aforesaid provision, it is plain that the key words are "when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence". An apprehension of arrest on accusation is the *sine qua non* for taking recourse to the said provision. Section 48 of the Code recognizes extra-territoriality in matter of arrest by the investigating officer (See : ***Sachindra Mahawar v. State of M.P., 2000 (1) MPHT 127***)

Before going into the discussion in context to the extra-territorial power of the Court to grant bail under section 438 of the Code, it is palatable to see the

object and reasons of that section. The Law Commission in recommending this provision observed in its 41st Report :

> "The necessity for granting anticipatory bail arises because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days..... Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

Further, the Law Commission in its 48th Report observed thus:

> "We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one..... It will also be convenient to provide that notice of the interim order as well as of the final order will be given to the Superintendent of Police forthwith."

The question of territorial jurisdiction of Court to grant anticipatory bail is answerable by the deliberation given under the authorities of the High Courts and the Apex Court.

The Division Bench of the Calcutta High Court in the decision of ***B.R. Singh v. State of Punjab, 1982 CrLJ 61*** observed that 'there is nothing in the provision of Section 438 suggesting that it is only the High Court within whose jurisdiction the case against the persons apprehending arrest is registered that can grant bail. Therefore, the person apprehending arrest can seek bail in the High Court or the Sessions Court within whose jurisdiction he ordinarily resides even though the offence in respect of which arrest is apprehended and the case has been started outside the jurisdiction of that court in another State. Though the Division Bench of the Patna High Court was of the same view in case of ***Madan Mohan Choudhary v. State of Bihar, 1985 CrLJ 1754*** but this has been overruled by the Full Bench decision in case of ***Syed Zafrul Hassan v. State, AIR 1986 Pat. 194.*** The Full Bench of the Patna High Court has viewed that Section 438 does not permit grant of anticipatory bail by any High Court or any Court of Session within the country where the accused may choose to apprehend arrest. Such a power vests only in the Court of Session or the High Court having jurisdiction over the locale of commission of offence of which person is accused. Question of residence of accused is irrelevant in such a case. The J&K High Court in the case of ***Mohan Singh Parihar v. Commissioner of Police, New Delhi, 1983 CrLJ 1182*** laid down that the High Court and the Court of Session have no jurisdiction to grant anticipatory bail to a person against whom a case has been registered with the police station situated outside the local limits of its jurisdiction.

The Karnataka High Court in the decision of ***L.R. Naidu v. State of Karnataka, 1984 CrLJ 757*** viewed that the anticipatory bail of limited duration was granted by the Court within whose jurisdiction the applicant was residing with the direction to obtain order of bail from the concerned Court within stipulated period. The Delhi High Court has expressed the same view in case of ***Pritam Singh v. State of Punjab, 1980 CrLJ 1174.***

In case of ***T. Madhusudan v. Supdt. of Police, 1992 CrLJ 3442*** the power of the courts beyond territorial limits was recognized on the basis of an apprehended arrest by the Kerala High Court. The Bombay High Court in the decision of ***N.K. Nayar v. State of Maharashtra, 1985 CrLJ 1887*** laid down that if offence is committed in one State and arrest is likely to be made in another State, the High Court of latter State has jurisdiction to entertain application under Section 438.

Thus it is shown that there are differences of opinion amongst the High Courts on the point of territorial jurisdiction of the Court to exercise the power under Section 438 of the Code. But we have some decisions of our own High Court and of the Supreme Court by which we can run with the issue.

In the case of ***Kailashpati Kedia v. State of Maharashtra and others, 1996 MPLJ 847,*** the Division Bench of the M.P. High Court has discussed the issue at length with referring the number of decisions of High Courts of the country. By inclined to the view taken by majority of High Courts, Their Lordships held that anticipatory bail can be granted by Court having power to grant anticipatory bail even in case where offence has been registered at a place beyond the jurisdiction of the High Court. Further, with reference to the decision of the Apex Court in the case of ***Gurubaksh Singh v. State of Punjab, AIR 1980 SC 1632,*** Their Lordships have observed that the distinction between an ordinary order of bail and order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. It was further held that looking to the scheme of the Code, it is evident that the legislature intended to extend the benefit of bail to a person arrested outside the jurisdiction of the court which issued the warrant and thereby the Courts have been authorized to exercise jurisdiction for release of the accused in case not arising within their jurisdiction.

The Division Bench approved the judgment rendered in case of ***Narendra Kumar v. State of M.P. and others, 1989 CCrJ 126*** in which it is held that Court has jurisdiction to entertain the application for anticipatory bail filed by the petitioner who resides within the jurisdiction of this Court though he apprehends arrest in connection with a case which has arisen and is registered against him outside the jurisdiction of this Court.

The Single Judge decision in case of ***Prakash Chandra Soni v. State of M.P., 1990 JLJ 513*** in which it was held that the place of the residence of applicant does not give power to the Court to invoke jurisdiction under Section 438, to

say the person apprehending his arrest is required to file application before the Sessions Court or the Court having jurisdiction over the case become overruled by the decision of *Kailashpati Kedia* (supra).

However, the Supreme Court in the case of ***State of Assam and others v. R.K. Krishna Kumar*** and ***others, AIR 1998 SC 144*** held that when anticipatory bail is granted without affording an opportunity of hearing to the State authorities, the order of grant of anticipatory bail is liable to be set aside. This judgment has been discussed in the decision of *Sachindra Mahawar's case* (supra). His Lordship observed thus–

> "The Apex Court did not consider it necessary to decide whether the High Court of Bombay had jurisdiction to pass any order. Their Lordships laid down as follows:
>
> 'the question of granting anticipatory bail to any person who is allegedly connected with the offence in question must for all practical purposes be considered by the High Court of Guwahati within whose territorial jurisdiction such activities should have been perpetrated.'
>
> Thus, Their Lordships of the Apex Court did not decide the controversy."

In the decision in ***Sachindra Mahawar's case*** (supra), His Lordship beautifully observed that Section 438 is really concerned with arrest and is safeguard against arrest. It is to be borne in mind that pre-trial arrest stands on a different footing than the trial of the case. Safeguard against arrest being the heart of Section 438 of the Code, I think it would engulf apprehension of arrest in its ambit and sweep.

In ***Kailashpati Kedia case*** (supra), it has been laid down that such anticipatory bail should normally be granted only for a limited duration and the person so released be directed to approach the Court within the period specified therein if he so desires and thereby the Court granting anticipatory bail should leave it to the regular Court to deal with the matter after expiry of the duration. In the decision of ***Neela J. Shah v. State of Gujarat and others, 1998 CrLJ 2228*** it has been held that an application under Section 438 Cr.P.C. should be finally decided only by the Court within whose territorial jurisdiction the alleged offence has been committed. The Court entertaining application for anticipatory bail at the first instance which does not have the territorial jurisdiction can give protection only for a brief period on adequate condition with a view to enable the person apprehending arrest to approach the Court within whose territorial jurisdiction the offence is alleged to have been committed. This view has been taken into consideration and countenanced in the ***Sachindra Mahawar's case*** (supra).

Thus, as the aforementioned authorities have enlightened the issue, it is clear that extra-territoriality in the matter of anticipatory bail has been recognized. But this recognition is subject to caution.

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LAW RELATING TO ADVERSE COMMENTS AGAINST SUBORDINATE JUDGES AND AUTHORITIES IN HEARING OR DISPOSAL OF APPEAL OR REVISION

Judicial Officers
District Indore

INTRODUCTION

Before discussion on the main subject, it will be useful to start with the expectations for a trial Judge, its freedom and constraints in his working atmosphere.

It is universally accepted that a trial Judge ought to be neutral and detached. He must be kind and benign. He must have an omni science and not subjective confidence. He must be quite familiar with the law and knowledgeable about human behavior. He must have manifold "personality". It consists of among others, independence, courtesy, patience, dignity, open-mind, impartiality, thoroughness and decisiveness. Above all, he must have social consciousness. There may be some variations in this personality of the Judge from person to person but whatever be the variations, the central core of agreed standard is that he should be neutral and impartial, calm and non-contentious umpire.

A Judge entrusted with the task of administering justice should be bold and fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within the four corners of law that any action taken by a subordinate judicial Officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet the approval and the superior Court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a Judge. (Pl. See In the matter of ***"K" a Judicial Officer, AIR 2001 SC 972***)

Every subordinate Judge or authority must be free to express his mind in the matter of appreciating of evidence before him. The phraseology used by a particular judge or authority depends upon his inherent reaction to falsehood, his comparative command of the language and felicity of expression. A judgment or order of a subordinate judge or authority may be wrong; it may even be perverse. The proper way to attack that judgment/order is by getting it judicially corrected while exercising revisional or appellate jurisdiction or even under the inherent powers for the purpose of securing ends of justice.

It is a principle of cardinal importance in the administration of justice, that the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by the Supreme

Court. At the same time it is equally necessary that in expressing their opinions, Judges and Magistrates must be guided by considerations of justice, fair play and restraint. (*PI. See The* ***State of U.P. v. Mohd. Naim, AIR 1964 SC 703***)

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. That 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 is well said that ***a judge who has not committed an error is yet to be born.*** And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right.

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, upto 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. (*PI. See* ***K.P. Tiwari v. State of M.P., AIR 1994 SC 1031***)

ON MAIN TOPIC

When an appeal is heard and Appellate Court finds non-application of mind or erroneous application of law or perversity in application of law or perversity in appreciation of evidence, it is not required to hear the concerned member(s) of judiciary whose orders are questioned. It is only when adverse comments are made personally attributing mala fides or personal bias or involvement in the case, dehors the roles as a judicial functionary and that too unrelated to the subject matter of lis in a given case, the position may be different. Observations made while considering the legality, propriety, reasonableness, rationality or in a given case perversity in the manner of exercise of powers and passing orders by the Courts below under challenge in relation to a particular case, do not reflect adversely on the competence of the entire network of Courts. A judgment, the observations and criticisms as to the manner of disposal have to be soberly reached with objectivity and not out of context or even as a provision of an Act or Rule, with pre conceived notions apparently exposing virtually ones own hidden desires or agendas, if any. (*PI. See* ***Zahira Habibullah Sheikh & another v. State of Gujarat & Ors., AIR 2004 SC 3467***)

Under the constitutional scheme, control over the District Courts and Courts subordinate thereto has been vested in the High Courts. The control so vested is administrative, judicial and disciplinary. The role of High Court is also of a friend, philosopher and guide of judiciary subordinate to it. The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures; the

power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition". The power to control is not to be exercised solely by wielding a teacher's cane; the members of subordinate judiciary look up at the High Court for the power to control to be exercised with parent like care and affection. The exercise of statutory jurisdiction, appellate or revisional and the exercise of constitutional power to control and supervise the functioning of the District Court and Courts subordinate thereto empowers the High Court to formulate an opinion and place it on record not only on the judicial working but also on the conduct of the judicial officers. [*PI. See* ***In the matter of "K" a Judicial Officer case (supra)***]

It can not be forgotten that in our system like elsewhere, appellate and revisional Courts have been set up on the pre-supposition 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, 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 that 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. 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. (*PI. See* ***Kashinath Roy v. State of Bihar, AIR 1996 SC 3240***)

The Judges Bench is a seat of power. Not only do Judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The Judges have the absolute and unchallengeable control of the Court domain. But they cannot misuse their authority by intemperate comments undignified banter or scathing criticism of counsel, parties or witnesses. The Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conducts.

Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command

respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect; that in respect by the judiciary. Respect to those who come before the Court as well as to other coordinate branches of the State, the Executive and Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process. (*PI. See* ***A M Mathur v. Pramod Kumar Gupta, AIR 1990 SC 1737***)

The Judges in the higher courts have also duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower levels are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the sub-ordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill.

It is also a cardinal principle that a judge should take special care in making disparaging remark against a person or authority whose conduct comes in for consideration before him in any case to be decided by him and should not make any uncalled for remarks which would be against the judicial discipline. If the relief sought for can be given to the applicant without dubbing the conduct of the person concerned to be mala fide, then the Court should refrain from coming to any conclusion on mere assertions in as much as the allegations of mala fides have to be specifically made and would have to be established by the person who seeks relief on that ground. To avoid harsh words and intemperate language and to have self restraint is a part of judicial training of a judge and, therefore, a judge should be extremely careful while commenting upon the conduct of another individual particularly when that individual is not before the Court. Court should refrain from using intemperate language as part of judicial discipline while examining the role and conduct of high constitutional functionaries. (*PI. See* ***P.K. Dave v. Peoples Union of Civil Liberties (Delhi) & Ors. AIR 1996 SC 2166***)

Judicial restraint is a virtue. A virtue, which shall be concomitant of every judicial disposition. It is an attribute of a Judge which he is obliged to keep refurbished time to time, particularly while dealing with matters before him whether in exercise of appellate or revisional or other supervisory jurisdiction. Higher Court must remind them selves constantly that higher tiers are provided in the judicial hierarchy to set right errors which could possibly have crept in the

findings or orders of Courts at the lower tiers. Such powers are certainly not for belching diatribe at judicial personages in lower cadre. No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when Judges of higher Courts publicly express lack of faith in the subordinate Judges. It has been said time and again, that respect for judiciary is not in hands by using intemperate language and by casting aspersions against lower judiciary. It is well to remember that a Judicial Officer against whom aspersions are made in the judgment could not appear before the higher Court to defend his order. Judges of higher Courts must, therefore, exercise greater judicial restraint and adopt greater care when they are tempted to employ strong terms against lower judiciary. *(PI. See* ***Braj Kishore Thakur v. Union of India AIR 1997 SC 1157)***

CAUTION WHILE EXERCISING THESE POWERS

It is not infrequent that sweeping generalisation defeats the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against 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 just decision of the case, as an integral part thereof, to animadvert on that conduct.

It has also been recognised that judicial pronouncements must be judicially in nature, and should not normally depart from sobriety, moderation and reserve. *(PI. See* ***The State of U.P. v. Mohd. Naim*** *(Supra)*

The primary purpose of pronouncing verdict is to dispose of the matter in controversy between the parties before it. A Judge is not expected to drift away from pronouncing upon the controversy, to sitting in judgment over the conduct of the judicial and quasi-judicial authorities whose decisions or orders are put in issue before him, and indulge into criticising and commenting thereon unless the conduct of an authority or subordinate functionary or anyone else than the party comes of necessity under review and expression of opinion thereon going to the extent of commenting or ctiticising becomes necessary as a part of .reasoning requisite for arriving at a conclusion necessary for deciding the main controversy or it becomes necessary to have animadverted thereon for the purpose of arriving at a decision on an issue involved in the litigation. This applies with added force when the superior Court is hearing an appeal or revision against an order of a subordinate judicial officer and feels inclined to animadvert on him. [*PI. See* ***In the Matter of "K", a Judicial Officer*** *(supra)*]

The Courts do have power to express opinion, make observations and even offer criticism on the conduct of anyone coming within their gaze of judicial review but the question is one of impelling need, justification and propriety. The High Court, as the supreme Court of revision, must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it. It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Court of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct.

Unless the persons in respect of whom comments and criticisms were being made were parties to the proceedings, and further were granted an opportunity of having their say in the matter, unmindful of the serious repercussions they may entail on such persons. Apart from that, when there is no relevance to the subject matter of adjudication, it is certainly not desirable for the Courts to make any comments or observations reflecting on the bona fides or credibility of any person or their actions. Judicial decorum requires dispassionate approach and the importance of issues involved for consideration is no justification to throw to winds basic judicial norms on mere personal perceptions as saviours of the situations.

Observations should not be made by Courts against persons and authorities unless they are essential or necessary for decisions of the case. Rare should be the occasion and necessity which should call for its resort. Courts are temples of justice and such respect they also deserve because they do not identify themselves with the causes before it or those litigating for such causes. The parties before it and the counsel are considered to be devotees and Pandits who perform the rituals respectively seeking protection of justice; parties directly and counsel on their behalf. There is no need or justification for any unwarranted besmirching of either the parties or their causes, as a matter of routine.

Courts are not expected to play to the gallery or for any applause from anyone or even need to take cudgels as well against anyone, either to please their own or anyone's fantasies. Uncalled for observations on the professional competence or conduct of a counsel, and any person or authority or harsh or disparaging remarks are not to be made, unless absolutely required or warranted for deciding the case. (*PI. See* ***Teesta Setalvad & another v. State of Guj. & Ors., AIR 2004 SC1979***)

INFIRMITIES OF THIS POWER:

The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the high Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities –

Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard.

Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment reportable or not, is a pronouncement in open and therefore becomes public. The same Judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a subordinate Judge may, sitting on administrative side and apprised of overall meritorious performance of the subordinate Judge, may irretrievably regret his having made those observations on judicial side, the harming effect whereof even he himself cannot remove on administrative side.

Thirdly, human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher Court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge.

Fourthly, seeking expunging of the observation by a judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court- a situation not very happy from the point of view of the functioning of the judicial system. May be for the purpose of pleading his cause he has to take the assistance of a legal practitioner and such legal practitioner may be one practicing before him. Look at the embarrassment involved.

And last but not the least, the possibility of a single or casual aberration of an otherwise honest, upright and righteous Judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralising effect not only on him but also on his colleagues.

If all this is avoidable why it should not be avoided? [*PI. See* ***"K", Judicial Officer's cse (supra)***]

ALTERNATE SAFER AND ADVISABLE COURSE

It should not be meant that any conduct of a subordinate judicial officer unbecoming of him and demanding a rebuff should be simply overlooked. But there is an alternate safer and advisable course available to choose –

The conduct of a judicial officer unworthy of him, having come to the notice of a Judge of the High Court hearing a matter on the judicial side, the lis may be disposed of by pronouncing upon the merits thereof as found by him but avoiding the judicial pronouncement criticism of, or observations on the 'conduct' of the subordinate judicial officer who had decided the case under scrutiny.

Simultaneously, but separately in-office proceedings may be drawn up inviting attention of Hon'ble Chief Justice to the facts describing the conduct of

the subordinate Judge concerned by sending a confidential letter or note to the Chief Justice.

It will thereafter be open to the Chief Justice to deal with the subordinate judicial officer either at his own level or through the inspecting Judge or by placing the matter before the Full Court for its consideration. The action so taken would all be on the administrative side.

The subordinate Judge concerned would have an opportunity of clarifying his position or putting forth the circumstances under which he acted. He would not be condemned unheard and if the decision be adverse to him, it being on administrative side, he would have some remedy available to him under the law. He would not be rendered remediless. [*PI. See* ***"K", Judicial Officer's cse (supra)***]

WHAT EMERGES IN SHORT

The higher tiers are provided in the judicial hierarchy to set right the errors which could possibly have crept, in the findings orders or proceedings of the courts at the lower tiers. "Such powers are certainly not for belching diatribe at judicial personages in lower cadre. It is well to remember the words of a jurist that a Judge who has not committed any error is yet to be born." Castigating members of the subordinate judiciary does no good to the system as placing on public record, the aspersions cast on them shakes the very confidence of the people in judicial institutions. Such remarks, if avoidable and uncalled for, compel the members of the subordinate judiciary to approach the High Court seeking expunging of the remarks, which is rather unfortunate. (*PI. See* ***R.C. Tamrakar & another v. Nidilekha, AIR 2001 SC 3806***)

It is necessary to emphasis that judicial decorum has to be maintained at all times and even where criticism is justified. It must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible. Judges should not use strong and carping language while criticizing the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognize that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice. (*PI. See* ***State of M.P. v. Nandlal Jaiswal & Ors., AIR 1987 SC 251***)

CONCLUSION

In view of the aforesaid analysis based on various pronouncements of the Apex Court, it is amply clear that fearlessness and maintenance of judicial independence are essential for efficacious judicial system. Making adverse comments against subordinate Judicial Officers or authorities and subjecting them to severe disciplinary proceedings will ultimately harm the judicial system at the grassroot level. The parameters and law laid down by the Apex Court, as enunciated above, should be complied with in letter and spirit.

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LEGAL STATUS OF SECOND MARRIAGE IF A HINDU MARRIES SECOND TIME AFTER GETTING AN EX PARTE DECREE FOR DIVORCE AND THE DECREE IS SET ASIDE LATER ON

Judicial Officers
District Dhar

Section 15 of the Hindu Marriage Act provides time limit where after either party to a marriage gets a right to remarry again.

Prior to Marriage Laws (Amendment) Act, 1976, the proviso to section 15 of the Hindu Marriage Act required the parties to a marriage, which has been dissolved by a decree of divorce to wait for a minimum period of one year from the date of the decree in the Court of first instance.

By the Marriage Laws (Amendment) Act, 1976 the proviso was deleted.

Section 15 of the Hindu Marriage Act as is stands today reads as under:

> "When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if the time for appealing has expired without an appeal having been presented or an appeal has been present but has been dismissed, it shall be lawful for either party to the marriage to marry again."

Therefore, in view of the amended provisions of Section 15 of the Hindu Marriage Act, parties whose marriage is dissolved by a decree of divorce can contract marriage soon after the period of appeal has expired without an appeal having been presented or if an appeal has been presented it has been dismissed.

In the case of ***Lata Kamat v. Vilas, AIR 1989 SC 1477*** it has been held that if before expiry of period of limitation for filing appeal or during pendency of appeal filed by the wife against the decree of divorce, husband contracts second marriage, the appeal filed by the wife does not become infructuous. If the exparte decree is set aside, the marriage petition would automatically stand restored at the stage prior to that which it stood when the proceeding got intercepted by the ex parte decree. But in this case the effect of setting aside of ex parte decree on second marriage was not considered.

In the case of ***Rajeshwari v. Jugal Kishore, 1994 JLJ 397 ex parte*** decree of divorce was passed in favour of husband on 30.04.1983. The wife filed an application under O. 9 R. 13 CPC on 11.07.1983. It was alleged by the wife that she had never received any summons. The trial court rejected the application

for setting aside ex parte decree of divorce on 05.04.1984 and thereafter the husband performed second marriage on 20.04,1984, i.e within the time limit prescribed under section 15 of the Act for filing appeal.

Since the husband had remarried just within 15 days of the said order dated 05.04.1984 the Hon'ble High Court of M.P. held that the second marriage is illegal since it was performed within the period of filing of appeal under Section 15 of the Act. The judgment also does not say that the effect of setting aside of second marriage would be that of nullity.

In *Smt. Lila Gupta v. Laxmi Narayan, AIR 1978 SC 1351* it has been held that a marriage contracted in contravention of or violation of Section 15 is not void but merely invalid not affecting the core of marriage and the parties are subject to a binding tie of wedlock flowing from the marriage. Even though the provision is prohibiting certain things to be done, that by itself is not sufficient to treat the marriage contracted in contravention of it as void. Examining the matter in all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages, which are made punishable, yet not void and no consequences having been provided for in respect of the marriage in contravention of Section 15 of Hindu Marriage Act. It cannot be said that such marriage would be void. As the marriage is not void, the woman cannot be denied the status of wife.

Though aforesaid decision of the Apex Court was passed on the basic ground of the proviso of Section 15 of Hindu Marriage Act, as was there before the Marriage Laws (Amendment) Act, 1976. The Act of 1976 has repealed the proviso to Section 15. However, the principle of the case is relevant and applicable in toto to the present provision of Section 15 of Hindu Marriage Act.

In the case of ***S.P. Shrivastava v. Prem Lata, AIR 1980 All 336*** exparte decree for divorce was passed in favour of husband on 02.06.1973 and the wife had filed an application for setting aside the ex parte decree on 15.04.1976 on the ground that she had never refused summons on divorce petition and she came to know of the decree only on 15.04.1976. The husband contracted second marriage on 14.04.1976. Relying upon the decision of Hon'ble the Supreme Court in ***Smt. Lila Gupta's case*** (supra) it was held that since no appeal was filed within the period allowed for filing appeal and the remarriage took place after 34 months, the second marriage cannot be said to be void. If there was no bar in remarrying on the date the second marriage was contracted, the marriage cannot be struck down. It has been further held that if the application for setting aside the ex parte decree was filed after the marriage had been contracted, the

application for setting aside the ex parte decree cannot be put on higher footing than that of an appeal. If there was no bar on the date the second marriage was contracted that marriage cannot be struck down.

In the matter of *Sadan Kumar v. Indira Bai, 1997 (1) MPLJ 124* it has been observed:

> "There was nothing in Section 15 of the Act to make marriage a nullity. The reason for this was an incapacity for second marriage for a certain period does not have the effect of treating the former marriage as subsisting. It is clear that the second marriage on the date when it was performed was absolutely legal and valid. The result of setting aside the ex parte decree may lead to an anomalous situation if the first marriage is subsisting and the second marriage on the date of performance was not illegal or nullity. Unfortunately nothing can be done."

On the basis of the above legal position and keeping in view the provisions of Section 15 of the Hindu Marriage Act it can be concluded that the party in whose favour ex parte decree for divorce is granted, marries second time, the second marriage is not void even if such an ex parte decree is set aside later on and the woman cannot be denied the status of wife for all purposes.

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Achievement seems to be connected with action. Successful men and women keep moving. They make mistakes, but they don't quit.

- Conrad Hilton

Never measure height of mountain, until you have reached the top. Then you will see how low it was.

- Dag Hammarskjold

विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्याय़ाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या तलाक शुदा महिला द्वारा धारा 125 दण्ड प्रक्रिया संहिता, 1973 के अन्तर्गत भरण पोषण हेतु प्रस्तुत आवेदन प्रकरण में पति जारता का बचाव ले सकता है?

धारा 125 (1) दं. प्र. सं. में दो स्पष्टीकरण दिये गये है। सुसंगत स्पष्टीकरण इस प्रकार हैं :–

(ब) "पत्नी" में ऐसी महिला भी सम्मिलित है जिसे तलाक दिया जा चुका है या जिसने तलाक लिया और पुर्नविवाह नहीं किया है।

धारा 125 (4) दं. प्र. सं. यह प्रावधान करती है कि कोई पत्नी अपने पति से भरण पोषण पाने की अधिकारी नहीं होगी यदि वह जारता की दशा में रह रही है अथवा बगैर किसी पर्याप्त कारण के अपने पति के साथ रहने से इनकार करती है अथवा आपसी सहमति से पृथक रह रही है।

यदि हम धारा 125 (4) दं. प्र. सं. को देखे तो ऐसा प्रतीत होगा कि इसमें वर्णित दशाओं में पत्नी अपने पति से भरण पोषण प्राप्त नहीं कर सकेगी। परन्तु यदि हम इसकी तह तक जायें तो पूर्णतः स्पष्ट है कि धारा 125 (4) दं. प्र. सं. उन परिस्थितियों को आच्छादित करती है जहाँ वैवाहिक सम्बन्ध है और पत्नी 125 (4) दं. प्र. सं. में वर्णित किसी स्थिति में पायी जाती है तब निश्चित ही उसे भरण पोषण नहीं मिल सकता।

धारा 125 द. प्र. सं. के अधीन भरण पोषण के आवेदन इस पर अवलम्बित होते हैं कि पक्षकारों के मध्य वैवाहिक सम्बन्ध बरकरार है। पत्नी तभी भरण पोषण पायेगी जब कि वह वैवाहिक धर्म का निवर्हन करती है । धारा 125 (1) के स्पष्टीकरण "ब" के अधीन आवेदन इस पर आधारित होते है कि तलाक शुदा महिला अपने आप का भरण पोषण करने में सक्षम नहीं है और उसने दूसरा विवाह नहीं किया है।

रोहतास सिहं विरूद्ध श्रीमति रामेन्द्री, जे. टी. 2000 (2) एस. सी. 553 के मामले में माननीय उच्चतम न्यायालय ने यह निर्धारित किया है कि "जारता" किसी स्त्री और पुरूष के मध्य आपसी लैंगिक सम्बन्ध को कहते हैं जबकि स्त्री किसी तीसरे व्यक्ति से ब्याही हो। दूसरे शब्दों में जारता वैवाहिक जीवन के दौरान ही हो सकता है। जहाँ वैवाहिक समबन्ध नहीं हैं वहाँ जारता का प्रश्न उत्पन्न नहीं होता। ***दिलीप सिंह विरूद्ध राजबाला, 2007 (2) Crimes 260 (पंजाब एवं हरियाणा)*** के मामले में माननीय उच्च न्यायालय ने ***रोहतास सिंह*** (उपरोक्त) के मामले का अवलम्बन लेते हुये यह निर्धारित किया है कि तलाक शुदा पत्नी द्वारा प्रस्तुत भरण पोषण के आवेदन में पति को जारता का बचाव उपलब्ध नहीं है।

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अन्वेषण के दौरान पुलिस अधिकारी द्वारा धारा 161 द.प्र.सं. के अन्तर्गत साक्षियों के लिये गये कथन की प्रति यदि अभियुक्त को नहीं दी जाती है तो विचारण पर इसका क्या प्रभाव होगा ?

धारा 161 (1) दं. प्र. सं. यह प्रावधान करती है कि किसी संज्ञेय अपराध के अन्वेषण के समय पुलिस अधिकारी किसी ऐसे व्यक्ति की, जो मामले के तथ्यों एवं परिस्थितियों से परिचित है, मौखिक परीक्षा कर

सकेगा। इसमें वे कथन भी सम्मिलित हैं जो मर्ग की जाँच के समय लिये गये (देखिये ***बेदीलाल रजक विरूद्ध स्टेट आफ मध्यप्रदेश, MPLJ 496***) तथा वे कथन भी सम्मिलित है जो प्रारंभिक जाँच के दौरान लिये गये है (देखिये ***दामोदर देव विरूद्ध स्टेट आफ मध्यप्रदेश, 1998 (2) WN 217)***। धारा 161 (3) यह प्रावधान करती है कि ऐसा अधिकारी कथन को लेख बद्ध करता है तो वह उसका पृथक से सही अभिलेख तैयार करेगा। धारा 170 यह प्रावधान करती है कि अन्वेषण के पश्चात् यदि पुलिस अधिकारी की यह राय है कि अभियुक्त के विरूद्ध पर्याप्त आधार है तो वह धारा 173 (2) की रिपोर्ट संबंधित मजिस्ट्रेट को अभियुक्त के विचारण के लिये भेजेगा। धारा 173 (5) यह प्रावधान करती है कि रिपोर्ट के साथ अन्वेषण के दौरान धारा 161 के तहत लिये गये कथन, जिन्हें अभियोजन साक्ष्य के दौरान प्रस्तुत करना चाहता है, भेजेगा। धारा 207 न्यायालय पर यह कर्तव्य अधिरोपित करती है वह अभियुक्त को आरोप पत्र एवं समस्त दस्तावेजों की प्रति उपलब्ध कराये।

यदि हम धारा 173 (5) एवं 207 दं.प्र.सं. की शब्दावली देखें तो यह आज्ञापक प्रावधान प्रतीत होता है। धारा 173 (5) और 207 दोनों ही "Shall" शब्द का प्रयोग करते हैं। परन्तु यह आवश्यक नहीं है कि जहाँ "Shall" शब्द का प्रयोग हो वह आज्ञापक ही हो। निश्चित ही धारा 161 के कथन एवं दस्तावेज अभियुक्त को देने के पीछे उद्धेश्य यह है कि अभियुक्त को विचारण के पूर्व यह ज्ञात हो जाए कि उसके विरूद्ध क्या आरोप है एवं किस प्रकृति की साक्ष्य उसके विपरीत अभियोजन प्रस्तुत करेगा। वास्तव में इसका उद्धेश्य मात्र यह है कि अभियुक्त को विचारण के पूर्व अभियोग की पूरी तस्वीर स्पष्ट हो सके, जिससे वह अपना उचित बचाव कर सके। परन्तु इसके अभाव में न्यायालय का विचारण का क्षेत्राधिकार प्रभावित नहीं होता। यद्यपि ***बलराम विरूद्ध इम्परर, AIR 1945 Nag.1 एवं मगनलाल विरूद्ध इम्परर, AIR 1946 Nag. 173*** में माननीय उच्च न्यायालय ने यह निर्धारित किया है कि अन्वेषण के दौरान लिये कथनों की प्रति अभियुक्त को प्रदान नहीं किया जाना प्रक्रिया की मूलभूत कमी है और इससे अभियुक्त अपनी प्रतिरक्षा करने में असमर्थ होता है इसलिये ऐसे साक्षी, जिनके कथन अभियुक्त को नहीं दिये गये, उनकी अभिसाक्ष्य साक्ष्य में ग्राह्य नहीं है। परन्तु ***नारायण राव विरूद्ध आंध्रप्रदेश राज्य, AIR 1957 SC 737*** में माननीय उच्चतम न्यायालय ने मत दिया कि अभियुक्त को धारा 161 के कथनों की प्रति नहीं दी जाना मात्र विचारण को दूषित नहीं करता हैं। उपरोक्त मत का अनुसरण करते हुये उच्चतम न्यायालय ने ***नूर खान विरूद्ध स्टेट आफ राजस्थान, AIR 1964 SC 286*** में विधि को स्थिर करते हुये यह प्रतिपादित किया कि अभियोग पत्र के साथ प्रस्तुत दस्तावेजों की प्रति अभियुक्त को नहीं देने से विचारण तब तक दूषित नहीं होता जब तक न्यायालय इस निष्कर्ष पर नहीं पहुंचे कि इसके अभाव में अभियुक्त पूर्वाग्रह से ग्रसित हुआ है। यदि न्यायालय ऐसा पाता है तो ऐसी कमी को दूर करने के लिये प्रतियां दिलाने का आदेश कर सकता है तथा पुनः प्रतिपरीक्षण का मौका दे सकता है। परन्तु पूर्वाग्रह का आंकलन करने के लिये न्यायालय को देखना होगा कि क्या अभियुक्त ने विचारण न्यायालय से सही समय पर इसकी मांग की? तथा किस प्रकार से अभियुक्त ने साक्षियों का विचारण के दौरान प्रतिपरीक्षण किया एवं किस प्रकार से मामले की पैरवी (Conduct) की। यदि कोई पूर्वाग्रह कारित नहीं हुआ है तो दोष सिद्धि अवैधानिक नहीं है। नवीनतम वाद ***शकीला अब्दुल गफ्फार खान विरूद्ध वसत रघुनाथ धोबले, (2003) 7 SCC 749, सुनीता देवी विरूद्ध बिहार राज्य, (2005) 1 SCC 608*** में भी माननीय उच्चतम न्यायालय ने यही निर्धारित किया है कि धारा 161 द.प्र.सं. के कथनों की प्रति अभियुक्त को नहीं देने मात्र से ही विचारण दूषित नहीं होता।

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नोटः स्तम्भ ***'समस्या एवं समाधान'*** के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे– **संचालक**

PART - II

NOTES ON IMPORTANT JUDGMENTS

321. ARBITRATION ACT, 1940 – Section 2 (a)

Arbitration agreement, essential ingredients of – Law explained. Arbitration agreement is not required to be in any particular form – To interpret an agreement as an 'arbitration agreement' one has to ascertain the intention of the parties and also treat the decision as final.

Punjab State and others v. Dina Nath

Reported in 2007 (3) MPLJ 430 (SC)

Held:

A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject-matter of the contract, such dispute shall be referred to arbitration. In that case such agreement would certainly spell out an arbitration agreement. (See *Rupmani Bai Gupta vs. Collector of Jabalpur, AIR 1981 SC 479*). However, from the definition of the arbitration agreement, it is also clear that the agreement must be in writing and to interpret the agreement as an 'arbitration agreement' one has to ascertain the intention of the parties and also treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties to have an arbitration agreement; that is to say, an arbitration agreement immediately comes into existence.

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322. ARBITRATION AND CONCILIATION ACT, 1996 – General

Nature and scope of arbitration – Role of Arbitrator and Court – Law explained.

Markfed Vanaspati & Allied Industries v. Union of India

Judgment dated 14.09.2007 passed by the Supreme Court in Civil Appeal No. 2668 of 2007, reported in (2007) 7 SCC 679

Held:

Russell on Arbitration 19th Edn. at pp. 110-111 described the entire genesis of arbitration as under:

> "An arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales

fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants' agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."

Whatever has been mentioned by Russell in this paragraph is equally true for Indian Arbitrators.

In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises, (1999) 9 SCC 283 in para 44 at page 309,* the Court observed that in a non-speaking award the jurisdiction of the court is limited. It is not open to the court to speculate where no reasons are given by the arbitrator as to what impelled the arbitrator to arrive at his conclusion. It is also not possible to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award. Similar view has been taken in the following cases, namely, *State of Bihar v. Hanuman Mal Jain, (1997) 11 SCC 40, P.V. Subba Naidu v. Govt. of A.P., (1998) 9 SCC 407, Star Construction and Transport Co. v. India Cements Ltd., (2001) 3 SCC 351 and D.D. Sharma v. Union of India, (2004) 5 SCC 325.*

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323. ARBITRATION & CONCILIATION ACT, 1996 – Section 9

Principles applicable for exercise of power u/s 9 of the Act – No special procedure is prescribed – General Rules that govern the Court while considering an application for interim injunction and Receiver should be applied to application u/s 9 of the Act.

Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation and others

Judgment dated 17.05.2007 passed by the Supreme Court in Civil Appeal No. 2707 of 2007, reported in (2007) 6 SCC 798

Held:

The argument that the power under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act, cannot prima facie be accepted. The power

under Section 9 is conferred on the District Court. No Special procedure is prescribed by the Act in that behalf. The court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that govern the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act.

There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. On the basis of the submissions made in this case, the question is not being answered finally. But it is being indicated prima facie that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.

Note : Please also go through the case of *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125* in respect of the same point.

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324. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11

Venue of arbitration – Mere fact that parties agreed that venue of arbitration shall be Hong Kong – It does not follow that law of Hong Kong will apply.

National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd.

Reported in AIR 2007 SC 2327

Held:

The rules of interpretation require the clause to be read in the ordinary and natural sense, except where that would lead to an absurdity. No part of a term or clause should be considered as a meaningless surplusage, when it is in consonance with the other parts of the clause and expresses the specific intention of parties. When read normally, the arbitration clause makes it clear that the matter in dispute shall be referred to and finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any statutory modification, enactment or amendment thereof) and the venue of arbitration shall be Hong Kong. This interpretation does not render any part of the arbitration clause, meaningless or redundant. Merely because the parties have agreed that the venue of arbitration shall be Hong Kong, it does not follow that Laws in force in Hong Kong will apply. The arbitration clause states that the Arbitration and Conciliation Act, 1996 (an Indian Statute) will apply. Therefore, the said Act will govern the appointment of arbitrator, the reference of disputes and the entire process and procedure of arbitration from the stage of appointment of arbitrator till the award is made and executed/given effect to.

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325. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 11 (6), 11(5) & 11 (4)

Limitation for filing application u/s 11(6) – The period of limitation is only provided u/s 11(4) and 11(5) – No period of limitation is provided u/s 11 (6) of the Act – Hence, the appointing authority under the agreement does not automatically forfeit right to make appointment after 30 days from the receipt of request from the other party.

Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.

Judgment dated 04.04.2007 passed by the Supreme Court in Civil Appeal No. 1783 of 2007, reported in (2007) 5 SCC 304

Held :

Before we deal with each case cited above, it may be relevant to deal with scope of Section 11 of the Act. A person of any nationality may be appointed as arbitrator, unless otherwise agreed between the parties. Sub-section (2) of Section 11 says that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (3) provides that failing any agreement referred to in sub-section (2), one arbitrator can be appointed by each party and the two arbitrators so appointed shall appoint the third arbitrator who shall act as the presiding arbitrator. Sub-section (4) says that in case a party fails to make appointment within thirty days from the date of receipt of the request to do so from the other party, or that the two appointed arbitrators fail to nominate the third arbitrator within thirty days from the date of their appointment, the appointment shall be made by the Chief Justice or by any person or institution designated by him, Sub-section (5) says failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Therefore, the concept of thirty days is there in sub-sections (4) and (5). This is in the event of the parties did not come to appoint arbitrator or the two nominated arbitrators fail to agree within thirty days for appointment of third arbitrator, application can be moved under Section 11(5) of the Act to the Chief Justice for appointment of arbitrator. But in sub-section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fails to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or a person or an institution designated by him to make necessary measres, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in sub-section (6). The period of limitation is only provided under sub-sections (4) and (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-section (6) of Section 11 of the Act. In this

context, their Lordships in *Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151* did not permit to count 30 days as such in sub-section (6). We cannot do any better than to reproduce paras 19, 20 and 21 of the judgment in that case: (SCC p. 158)

> "19. So far as cases falling under Section 11 (6) are concerned – such as the one before us – no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11 (4) and Section 11 (5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appiontment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appintment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.
>
> 20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.
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> 21. We need not decide whether for purposes of sub-sections (4)and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not."
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> (emphasis in original)

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326. BANK GUARANTEE :

Unconditional bank guarantee – Injunction against enforcement, grounds of – Principle restated.

Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and another

Judgment dated 11.07.2007 passed by the Supreme Court in Civil Appeal No. 2952 of 2007, reported in (2007) 6 SCC 470

Held:

If the bank guarantee furnished is an unconditional and irrevocable one, it

is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

In the present case no factual foundation as such has been laid in the pleadings as regards the allegation of fraud. In fact there is no serious allegations of any fraud except using the word "fraud". It is also not stated as to how irreparable loss would be caused in case the appellant is allowed to encash the bank guarantee. The only two exceptions, namely fraud and irretrievable injury based on which injunction could be granted restraining encashment of bank guarantee are singularly absent in the pleadings. Once it is held that the bank guarantee furnished by the banker is an unconditional one, the appellant cannot be restrained from encashing the bank guarantee on the ground that a serious dispute had arisen between the parties and on the allegations of breach of terms and conditions of the agreement entered between the parties.

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327. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 3 Whether transaction is Benami in nature – Determination of – Source of money is merely one of the relevant considerations but not determinative in character – Essence of Benami is the intention of the parties – Onus to prove – Lies on the parties who assert it.

Binapani Paul v. Pratima Ghosh and others

Judgment dated 27.04.2007 passed by the Supreme Court in Civil Appeal No. 8098 of 2004, reported in (2007) 6 SCC 100

Held :

Burden of proof as regards the benami nature of transaction was also on the respondent. This aspect of the matter has been considered by this Court in *Valliammal v. Subramaniam, (2004) 7 SCC 233* wherein a Division Bench of this Court held: (SCC pp. 239-41, paras 13-14 & 18)

> "13 . This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of

mere conjectures or surmises, as a substitute for proof. Refer to *Jaydayal Poddar v. Bibi Hazra, (1974) 1 SCC 3, Krishnanand Agnihotri v. State of M.P., (1977) 1 SCC 816, Thakur Bhim Singh v. Thakur Kan Singh, (1980) 3 SCC 72, Pratap Singh v. Sarojini Devi, 1994 Supp (1) SCC 734 and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah, (1996) 4 SCC 490.* It has been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:

'(1) the source from which the purchase money came;

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

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

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

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

(6) the conduct of the parties concerned in dealing with the property after the sale.' (*Jaydayal Poddar* (supra)

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

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18. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami . The evidence shows clearly that the original plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable

to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case."

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328. CARRIERS ACT, 1865 – Sections 6 & 9

(i) Merely printing of any condition on the consignment unilaterally is not sufficient to constitute a special contract between the parties.

(ii) Negligence by carrier – Applicability of S. 9 of the Act is not dependent upon mention of goods in the Schedule – Carrier is bound to take due care as it would have taken of his own goods – It would be liable if any loss or damage caused to goods on account of its own negligence or criminal act.

Mama Roadways Transport v. M/s Oriental Insurance Co. Ltd. and another

Reported in 2007 (4) MPLJ 33 (DB)

Held:

(i) First question for consideration is whether there was special contract between the parties as envisaged under section 6 of the Act, due to the conditions mentioned in the printed consignment note that goods, were carried at the owner's risk and that liability was put on transporter/driver, thus for loss of goods due to fire, the Carrier would not be responsible.

It is apparent from section 6 that liability of common carrier for loss or damage to any property shall not be limited merely by the fact that goods carried were not of description contained in the Schedule. At the same time the Carrier who is not an owner of a railroad or tramroad may, by special contract, "signed" by the owner of such property so delivered or by some person duly authorized in that behalf by such owner, limit the liability. What is necessary is that a special contract envisaged under section 6 has to be signed by the owner of the property or any person duly authorized on his behalf. Merely printing of any condition on the consignment note unilaterally as done in the instant case did not make out a special contract between the parties.

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(ii) We find that the applicability of Section 9, it is not necessary that goods carried must be mentioned in the "schedule". In Section 6 there is a mention of schedule with respect to limiting the liability by a special contract. In that context schedule has been referred. Reading of Section 6 and Section 9 make it clear that operation of Section 9 is not limited by the mention of goods carried in the schedule. Applicability of Section 9 is not dependent upon mention of goods in the schedule there we hold that in the suit brought against a common carrier for loss, damage or non-delivery of the goods, it shall not be necessary for the

plaintiff to prove that loss, damage or non-delivery was owing to negligence or criminal act of Carrier or on his behalf. Thus, it was not necessary for the plaintiff to adduce evidence to prove the negligence, on the contrary, defendant Tarachand examined on behalf of Carrier has not stated that it was vis major due to which fire was caught. He has expressed his ignorance as to how the cotton bales caught fire or whether it was put by some one else. Thus, Carrier has not been able to oust the negligence, it was incumbent upon the Carrier to take due care as it would have taken of his own goods and it would be liable if any loss or damage was caused to the goods on account of its own negligence or criminal act.

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329. CIVIL PROCEDURE CODE, 1908 – Section 10

Stay of suit – S. 10, applicability of – Law explained – Common identity about the subject matter, parties to the litigation and jurisdiction of the Court are necessary factors.

Poonamchand v. Murti Madanmohanji and others

Reported in 2007(3) MPLJ 340

Held :

Provisions of sections 10 and 11 of the Code of Civil Procedure are quite interwoven and for deciding an application under section 10 of the Code of Civil Procedure, aid may well be taken from the provision contained in section 11 of the Code of Civil Procedure. Section 10 of the Code of Civil Procedure is reproduced below :–

> "10. *Stay of suit.* – No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in (India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of (India) established or continued by (the Central Government) and having like jurisdiction, or before (the Supreme Court)."

For applying section 10 of the Code of Civil Procedure, there needs to be common identity about the subject-matter, parties to the litigation and jurisdiction and the present petition is to be examined on these parameters.

In the earlier plaint (i.e. C.S. No. 143-A/98) contained in Annx. P/6, the plaintiff/petitioner clearly averred that the respondent No. 2 treated the suit property as temple Madanmohan Ji and further treated it to be a Government property. In paragraph 1 of the written statement submitted by the State of Madhya Pradesh and Manager Court of Wards (Tahsildar) Ratlam, it was clearly averred that the suit property is known as temple Madanmohan Ji and the same is owned and possessed by the State of Madhya Pradesh. Thus, it was not the case of the respondents No. 1 to 3 that the suit property was ever owned by the

deity Murti Madanmohan Ji. On the contrary, it was a categorical stand of the respondents No. 1 and 2 that the suit property was a Government Property.

In the current suit, the plaintiffs/respondents No. 1 to 3 have clearly averred in paragraph 1 of the plaint (Annx. P/12) that the temple Madanmohan Ji is a Government property. The plaint has been instituted by the present Plaintiffs respondents No 1 to 3 including temple Madanmohanji. Thus, though Madanmohan Ji has been impleaded as plaintiff No. 1, but it has not asserted its own title. Title as per the current plaint is stated to be with the State Government of Madhya Pradesh. Temple Madanmohan Ji though has been made a co-plaintiff in the current suit, but it has not asserted its own title, rather it is litigating under the title of respondents No. 2 and 3 who were already impleaded in the earlier suit as defendants No. 1 and 2.

As regards identity of jurisdiction, it may be seen that the earlier suit was decided by the Court of Civil Judge Class-I, Ratlam with less pecuniary jurisdiction, whereas, the subsequent suit (i.e. Current Suit) is pending with the Court of Additional District Judge having higher pecuniary jurisdiction. Now, it is to be seen that whether the judgment and decree rendered in the earlier suit by the Court having lesser pecuniary jurisdiction would operate as res-judicata in a subsequent suit, pending in the Court with higher pecuniary jurisdiction. At this juncture, I may successfully refer to explanation VIII of section 11 of the Code of Civil Procedure, which reads as under :–

> *"Explanation VIII.* – An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

However, predecessor Court (i.e. Nagpur High Court) has held in the case of The *Laxmi Bank Ltd., Akola and others vs. Harikisan and others, 1948 NLJ 250 = AIR 1948 Nagpur 297* that *"subject-matter of subsequent suit must be covered by the previously instituted suit and not the vice versa"*. In the present case, admittedly, the subject-matter of subsequent suit in substance was covered in the earlier suit. In order to apply section 10, the subject-matter in dispute in earlier suit and subsequent suit must not identical. In *Arun General Industries Ltd. vs. Rishabh Manufactures Private Ltd. and others, AIR 1972 Calcutta 128* it has been clearly held that it is enough that there is a substantial identity for application under section 10 of the Code of Civil Procedure. It is enough if the matters in controversy in the two suits are substantially the same. From the above mentioned facts, it is clear that the main controversy in both the suits is about title of the suit property which has been claimed by the plaintiff/petitioner against the State of Madhya Pradesh.

As regards objection with respect to identity of jurisdiction, it may be seen that the Hon'ble Supreme Court in the case of *Sulochana Amma vs. Narayanan Nair, AIR 1994 SC 152* has held that *"a decree in a previous suit will not apply as*

res judicata unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised." It has been further held that :–

> "5. The words "competent to try such subsequent suit" have been interpreted that it must refer to the pecuniary jurisdiction of the earlier Court to try the subsequent suit at the time when the first suit was brought. Mere competency to try the issue raised in the subsequent suit is not enough. A decree in a previous suit will not operate as res judicata unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised. This interpretation had consistently been adopted before the introduction of Explanation VIII. So the earlier decree of the Court of a limited pecuniary jurisdiction would not operate as res judicata when the same issue is directly and substantially in issue in a later suit filed in a Court of unlimited jurisdiction, vide *P. M. Kavade vs. A.B. Bokil, AIR 1971 SC 2228.* It had, therefore, become necessary to bring in the statute Explanation VIII. To cull out its scope and ambit, it must be read along with section 11, to find the purpose it seeks to serve. The law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like insolvency Court, probate Court, land acquisition Court, Rent Controller, Revenue Tribunal etc. No doubt main body of section 11 was not amended, yet the expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit."

The Apex Court in the case of *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth, AIR 1962 SC 527* has clearly held that the provision of section 10 of the Code of Civil Procedure is manadatory. In view of the aforesaid, since the identity of jurisdiction, subject-matter of the suit and parties to the litigation are substantially same, the application under section 10 of the Code of Civil Procedure ought to have been allowed.

Consequently, this Court is of the opinion that the parties to the subsequent suit are litigating under the title which was claimed by the respondents No. 1 and 2 in the earlier suit. Similarly, it is found that there is identity of jurisdiction in view of Explanation VIII contained in section 11 of the Code of Civil Procedure subject-matter of both the suits is also found to be substantially the same.

In the result, the petition stands allowed and the impugned order contained in Annx. P/1 is, hereby set aside. It is further directed that the proceedings of Subsequent suit (i.e. Civil Suit No. 8-A/03) shall remain stayed till the decision of Second Appeal No. 1420/2005.

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330. CIVIL PROCEDURE CODE, 1908 – Section 80

Suit against Government may be instituted without notice to the Government with the leave of the Court – If Court comes to the conclusion that no urgency is involved, Court must return the plaint for compliance of the mandatory notice provided u/s 80 (1) – No interim relief can be granted at that stage without hearing of the other party – No procedure is contemplated as to how to grant the leave – However, order granting leave must indicate reasons and application of mind – Superior court may also grant such leave in revision.

M/s Bajaj Hindustan Sugar & Industries Ltd. v. Balrampur Chini Mills Ltd. & Ors.

Reported in AIR 2007 SC 1906

Held:

From the above, it would be evident that a suit may be filed against the Government or a public officer without serving notice as required by Sub-section (1) with the leave of the Court. When such leave is refused, the question of institution of the suit does not arise and accordingly, no interim relief could also be granted at that stage.

The decisions cited by Mr. Shanti Bhushan on the question of implied leave was countered by Mr. Mukul Rohatgi with the decision of this Court in *State of A.P. and Ors. v. M/s Pioneer Builders, A.P.* reported in *2006 (9) SCALE 520,* wherein in paragraph 16 it has been observed as follows:

> "Thus, from a conjoint reading of Sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under Sub-section (1) is imperative except where urgent and immediate relief is to be granted by the Court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the Court. Leave of the Court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise

of power by the Court has been imposed, namely, the Court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit."

The law, in our view, has been succinctly expressed in the aforesaid judgment. The language of Section 80 (2) of the Code leads us to hold that if leave is refused by the original court, it is open to the superior courts to grant such leave as otherwise in an emergent situation a litigant may be left without remedy once such leave is refused and he is required to wait out the statutory period of two months after giving notice.

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331. CIVIL PROCEDURE CODE, 1908 – Order I Rule 10
TRANSFER OF PROPERTY ACT, 1882 – Section 52
Impleadment of party – Partition suit – Bonafide purchasers of suit property, necessary and proper parties.
Dhanalakshmi & Ors. v. P. Mohan & Ors.
Reported in AIR 2007 SC 1062

Held :

Section 52 deals with a transfer of property pending suit. In instant case, the appellants have admittedly purchased the undivided shares of the respondents Nos. 2, 3, 4 & 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other cosharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the suit, which is now pending before the Trial Court.

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332. CIVIL PROCEDURE CODE, 1908 – Order II Rule 2, Order VII Rule 11 & Order VI Rule 16
Rejection of Plaint, scope of – Particular portion of plaint cannot be rejected under O.7 R. 11 – If whole suit is barred by law then only O.7 R. 11 is applicable – Portion of plaint may be rejected if it comes within its purview – O.2 Rule 1 is mandatory in nature and enjoins the plaintiff to put the whole of the claim – O.2 Rule 2 provides its effect.
Sandeep Polymers (P) Ltd. v. Bajaj Auto Ltd. and others
Judgment dated 20.07.2007 passed by the Supreme Court in Civil Appeal No. 7749 of 2004, reported in (2007) 7 SCC 148

Held:

Order 7 Rule 11 does not justify rejection of any particular portion of the plaint. Order 6 Rule 16 is relevant in this regard.

Under Order 2 Rule 1 which contains provisions of a mandatory nature, the requirement is that the plaintiffs are duty-bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Order 2 Rule 2 further enjoins the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards. It must be clarified however that the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arise from the same transaction.

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333. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17

Application for amendment of written statement – Cannot be rejected at threshold on the ground of delay – Delay is no ground to refuse the prayer for amendment – Relevant consideration for amendment of pleadings – Merit of amendment of pleadings at this stage is not to be seen – Court has to consider whether amendment can throw light on the real controversy between the parties – Written statement may be amended to incorporate an additional ground of defence.

Andhra Bank v. ABN Amro Bank N.V. and others

Judgment dated 10.07.2007 passed by the Supreme Court in Civil Appeals No. 2946 & 2947 of 2007, reported in (2007) 6 SCC 167

Held :

Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr Kapadia, we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a perusal of the amendment application we find that the appellant in its prayer for amendment has only taken an additional defence that in view of Section 230 of the Contract Act, the suit itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the prayer for amendment of the written statement it would

not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Contract Act was or is not maintainable.

That apart it is permissible in law to amend a written statement of the defendant by which only an additional ground of defence has been taken.

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334. CIVIL PROCEDURE CODE, 1973 – Order VIII Rule 1 & Order V Rule 1 INTERPRETATION OF STATUTES :

(i) Filing of written statement within the period as provided by proviso of O.8 R.1 is directory in nature – However, extension of time beyond 90 days is not automatic – Court must record satisfaction that there is sufficient reasons for justification for departing from time fixed by O.8 Rule 1 – Court must bear in mind that time fixed by O.8 Rule 1 is a rule and departure therefrom is an exception.

(ii) Interpretation of Statutes – Even provision of law, couched in negative language implying mandatory character in the background of entire context may be held directory.

M/s R.N. Jadi & Brothers and others v. Subhashchandra
Reported in AIR 2007 SC 2571 (Three Judge Bench)

Held :

(i) A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional cases, the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen v. Sir Alfred McAlpine & Sons, (1968) 1 All E.R. 543* that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?

(ii) It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words - "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication, Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts,

when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

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335. CIVIL PROCEDURE CODE, 1908 – Order IX Rule 7

On the date of hearing, neither defendant nor his advocate appeared before the Court – Court proceeded ex parte and examined the plaintiff witness present in the Court, heard argument and posted the case for judgment – Before judgment, defendant moved an application under O.9 Rule 7 for setting aside the ex parte order – Held, application is not maintainable – However, Appellate Court can set aside the ex parte decree if sufficient reason is shown for absence on the date of hearing.

Lal Devi & Anr. v. Vaneeta Jain & Ors.

Reported in AIR 2007 SC 1889

Held:

We are not delving into the technicalities of the legal questions argued before us because we are of the view that in the facts of this case the interest of justice demands that the ex parte decree be set aside. We appreciate that the learned District Judge could not entertain an application under Order 9 Rule 7 CPC, and even the application under Order 9 Rule 13 was dismissed as not pressed. But nothing prevented the High Court from setting aside the ex parte decree in the appeal preferred against it.

Note: Judicial Officers are requested to go through the judgment reported in *Arjun Singh v. Mohinder, AIR 1964 SC 993*

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336. CONSTITUTION OF INDIA – Articles 226, 14, 15(1) & 16 (2)

SERVICE LAW :

Transfer matter – Scope of judicial scrutiny – Transfer order, if issued in malafide exercise of power or is contrary to statutory guidelines or passed by incompetent authority or amounts to victimization and hostile discrimination and not in the interest of public service or administrative exigencies, is susceptible to judicial scrutiny.

Somesh Tiwari v. Union of India and others

Reported in 2007 (3) MPLJ 162 (DB)

Held :

Transfers which are made in administrative exigencies or in public interest or for smooth functioning of the system do not warrant any interference under Articles 226 and 227 of the Constitution of India. Similarly cases which require adjudication of disputed question of facts or sifting of facts also generally do not warrant interference under Articles 226 and 227 of the Constitution of India. At this juncture, we may also profitably refer to the law laid down in the cases of

S.B.I. vs. Anjan Sanyal, (2001)5 SCC 508, National Hydroelectric Corporation, (2001)8 SCC 574, Union of India and others vs. Janardhan Debanath and another, (2004)4 SCC 245 and *State of U.P. and another vs. Siya Ram and another, (2004) 7 SCC 405* which is also to the same effect.

Conversely it is also apparent from the above mentioned judgments that a transfer order which is made in mala fide exercise of powers or is contrary to statutory guidelines governing transfer or passed by an incompetent authority or amount to victimization and hostile discrimination and which is not in the interest of public service or administrative exigencies is susceptible to judicial scrutiny. It is also settled law that State action must not suffer from "Wednesbury unreasonableness" that is, be so unreasonable as to shock the conscience of any reasonable man.

In the facts and circumstances of the present case, it is apparent that the transfer of the petitioner amounts to improper abuse of power and is in defiance of logic and accepted moral standards and is therefore so absurd that no sensible or reasonable person could ever have passed such an order. In other words it suffers from "Wednesbury unreasonableness" rendering it unsustainable.

We are of the view that the exercise of powers by the respondent is mala fide, arbitrary and suffers from "Wednesbury Unreasonableness" to the extent that it would shock the conscience of any reasonable person and is also not in the interest of public service and administration as the petitioner is being victimized and subjected to hostile discrimination only because he belongs to a particular caste and his functioning is giving am impression, to some unknown and anonymous member of another caste that he is working on caste-bias. To permit the respondents to transfer the petitioner on this ground would be violative of his fundamental right to equality before law and equal protection of the laws irrespective of his caste as guaranteed by the Constitution of India and also against the very spirit and object of the principles embodied in the Constitution of India which prohibit and prevent any person from being subjected to any discrimination, humiliation, disqualification, hardship or unjust treatment because of his caste. We would like to make it clear that we have rendered this opinion as we have held that the exercise of the power of transfer in the present case by the respondents is unconstitutional and illegal and not on the ground that the petitioner is entitled or has a right to remain posted at Bhopal.

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337. CONSTITUTION OF INDIA – Article 300-A

Right to property – Is not only a Constitutional right but also a human right.

Chairman, Indore Vikas Pradhikaran v. M/s Pure Industrial Cock & Chem. Ltd. and others

Reported in 2007 (4) MPHT 1 (SC)

Held:

The right of property is now considered to be not only a constitutional right but also a human right.

The Declaration of Human Rights (1789) enunciates under Article 17 "since the right to property is inviolable and sacred, no-one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it and just and prior indemnity has been paid". Further under Article 217 (IIII) of 10th December, 1948, adopted in the General Assembly Resolution it is stated that : (i) Everyone has the right to own property alone as well as in association with others; (ii) No-one shall be arbitrarily deprived of his property.

Earlier human rights were existed to the claim of individuals right to health, right to livelihood, right to shelter and employment etc. but now human rights have started gaining a multifacet approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights.

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338. CONTRACT ACT, 1872 – Section 70

S.70 of the Act, requirements and applicability of – Law explained.

State of M.P. and others v. Narendra Kumar Uppal

Reported in 2007 (4) MPLJ 185 (DB)

Held:

Section 70 of the Contract Act lays down that where a person 'lawfully' does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered. First requirement is that person must have acted 'lawfully' not fraudulently. Secondly that person should not have done the act 'gratuitously' and thirdly that other person must have 'enjoyed the benefit'. The word 'lawful' in the section 70 of the Contract Act applied to transaction in conformity with the principle or spirit of law whether moral or judicial. Section is not intendant to help voluntary fraudulent act, the words lawfully does something is merely bona fide act not a fraudulent act if act is not lawful, section 70 cannot be invoked. In the instant case it cannot be said that benefit was bona fide conferred by plaintiff on the defendants.

The second requirement of section 70 is that benefit done to others is not intended to be done gratuitously. It does not mean that benefit should be thrust upon him without his having option of refusing it. No person can have a right to force a benefit fraudulently upon another person.

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339. COURT FEES ACT, 1870 – Article 17 (i) of Schedule II
CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 58
Appeal from an order dismissing objection under O. 21 R. 58 of CPC – Fixed Court Fee is payable under Article 17 (i) of Schedule II of the Court Fees Act.

Smt. Manjula v. Pradeep and others
Reported in 2007 (4) MPHT 109

Held:

Article 17 (i) of Schedule II of Court Fees Act, 1870 lays down that in a suit or appeal where a summary decision or order of any Civil Court is challenged, a fixed Court fee is payable.

In the matter of *Anil Kumar v. State of Madhya Pradesh and Kaluram, reported in 1971 MPLJ Short Note 94,* wherein recovery of sales tax against a firm as land revenue, the Revenue Court brings to sale certain property alleged to belong to the firm, but the plaintiff, raised an objection that the property belonged to them and not to the firm, and the objection was dismissed, suit by the plaintiffs for a declaration that the property belongs to them, it was held that suit falls under Rule 24 of Schedule I, M.P. Land Revenue Code and it is governed by Article 17 of the Court Fees Act. Thus, in the case where the objections against attachment were dismissed was challenged in Civil Suit, the Division Bench of this Court held that in such type of suit, fixed Court fee is payable under Article 17 (i) of Second Schedule of Court Fee Act, therefore, in an appeal against the dismissal of the objections appellant cannot be asked to pay the advalorem Court fee.

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340. COURT FEES ACT, 1870 – Section 7 (iv) (d)
CIVIL PROCEDURE CODE, 1908 – Order VII Rule 11
Whether suit for mandatory injunction for directing the licensee to hand over vacant possession of the suit premises is maintainable? Held, Yes – Further held, S.7 (iv) (d) of the Court Fees Act applies to such a suit enabling plaintiff to put valuation as he wishes and to pay Court Fees on such valuation.

Smt. Saraswati @ Jaya Bichpuria v. Smt. Archana Bichpuria
Reported in 2007 (4) MPHT 131

Held:

As per the plaint averment, the plaintiff became owner of the suit property on the basis of release deed dated 12.9.2003 executed in her favour by the petitioner/defendant. The case of the plaintiff is that the defendant was allowed by her to stay in the suit premises for a short duration enabling the defendant to search and shift in another accommodation. Thus, the possession of the defendant was in the capacity of licensee. Since the licencee is neither a trespasser nor a tenant, the present suit would be clearly governed by Section

7 (iv) (d) of the Act leaving the plaintiff free to put her own valuation. In this view of the matter the present suit for mandatory injunction which is filed promptly on 7-7-2004 by the plaintiff directing the defendant licensee to surrender and give vacant possession of the suit premises to the plaintiff clearly falls within the purview of Section 7 (iv) (d) of the Act enabling the plaintiff to put her own valuation and it is not necessary for her to pay Court fees on the market value of the suit property. In the case of *Milkha Singh and others v. Diana and others, AIR 1964 Jammu & Kashmir 99* in which after dealing exhaustively in similar situation, the Division Bench has held (1) that a suit for an injunction simpliciter against a licensee whose license has been terminated is maintainable. (2) That Section 7 (iv) (d) of the Court Fees Act clearly applies to such a suit and the plaintiff is given an option of putting any valuation that he likes and the Court fee has to be paid on such valuation. (3) That where a licenser approaches the Court for an injunction within a reasonable time after the license is terminated, he is entitled to an injunction. On the other hand, if the licenser causes huge delay, the Court may refuse the discretion to grant an injunction on the ground that the licenser had not been diligent and in that case, the licenser will have to bring a suit for possession which will be governed by Section 7 (v) of the Court Fees Act.

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341. CRIMINAL PROCEDURE CODE, 1973 – Sections 53, 311 & 362

(i) Though S.53 of the Code empowers medical practitioner to examine accused at the request of police officer, Court can also exercise such power in suitable case and direct accused to give blood sample even if accused is on bail.

(ii) Court has ample power to recall a witness who had been given up or in respect of whom earlier applications were rejected – Under S.362 of the Code question of review does not arise – It operates only in case of judgment or final order – Order for recalling witness is neither judgment nor final order – However, Court should pass such order only for just decision of the case – It cannot be used to fill lacuna or merely for asking.

Sanjeev Nanda v. State of NCT of Delhi

Reported in 2007 Cr.L.J. 3786 (Delhi)

Held:

(i) The judgment reported as *Anil Anantrao Lokhande v. The State of Maharashtra, 1981 Cr.L.J: 125; Jamshed v. State of U.P., 1976 Cr.L.J. 1680 (All); Swati Lodha v. State of Rajasthan, 1991 Cr.L.J. 939 (Raj)* have held that an accused can be asked give blood sample by the Court, in the course of an inquiry or trial. It has also been held that even an accused on bail would fall within the mischief of that provision; the Court has powers to require submission of such samples. In the case of *Togirani v. State of Orissa, 2004 Cri LJ 4003* it was held that though Section 53 of the Code refers to examination of the accused by a medical

practitioner, at the request of a police officer, there is no reason why the Court should not have a wider power for the purpose of doing justice in criminal cases by issuing a direction to the police officer to collect blood sample from the accused and conduct DNA test.

(ii) An overview of the case law would show that though Courts are alive as to the stage of the trial, and as to whether the prosecution or the party seeking recourse to Section 311 had earlier examined, or cross examined the witness, and the likelihood of its being used to fill the lacunae in the case, yet, in the ultimate analysis, there is no limitation on the power of the Court, vis-à-vis the stage to which the trial may have reached, if the Court is bona fide forms an opinion that for a just decision of the case, recourse to Section 311 must be taken. It is clear that the requirement of a "just decision" of the case does not limit the action to something in the interest of any one party. As far as the question whether the order summoning Kulkarni amounting to review is concerned, Section 362, in terms cannot apply: it adverts to the final stage, as can be seen by reference to "final order" and "judgment". Further, the Court had, on 30.09.1999 recorded the prosecution's option giving up Kulkani. That cannot mean that there was some impediment, or estoppel, inhibiting the Court's exercising its power, the impugned order most certainly cannot be read as made otherwise than in bona fide exercise of such power. Consequently, I find no infirmity with the order, so far as examination of Kulkarni is concerned. Its order cannot be characterized as injudicious or arbitrary. The petitioner's contentions have to fail, on this score.

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342. CRIMINAL PROCEDURE CODE, 1973 – Section 125
MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 3
Muslim women may file application for maintenance u/s 125 of Cr.P.C – The Muslim Women (Protection of Rights on Divorce) Act applies only to divorced women and not to married women – *Talaq*, Mode and proof of – Mere plea taken in written statement that husband uttered *Talaq* thrice itself is not sufficient – Evidence must be adduced to prove that pronouncement of *Talaq* claimed at earlier date – If Court notices that there was divorce, application u/s 125 of Cr.P.C. may be treated as an application under the Act of 1986 – Liability of Muslim husband to pay compensation to his divorced wife is not confined to the *iddat* period but for future of the divorced wife.

Iqbal Bano v. State of U.P. and another

Judgment dated 05.06.2007 passed by the Supreme Court in Criminal Appeal No. 795 of 2001, reported in (2007) 6 SCC 785

Held :

The Muslim Women (Protection of Rights on Divorce) Act, 1986 only applies to divorced women and not to a woman who is not divorced. Furthermore,

proceedings under Section 125 CrPC are civil in nature. Even if the court noticed that there was a divorced Muslim woman who had made an application under Section 125 CrPC, it was open to the court to treat the same as a petition under the 1986 Act considering the beneficial nature of the legislation, especially since proceedings under Section 125 CrPC and claims made under the Muslim Women Act are tried by the same court.

A mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of talaq at the claimed earlier date and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed.

Liability of a Muslim husband to his divorced wife arising under Section 3 (1) (a) of the Muslim Women Act, 1986 to pay maintenance is not confined to the iddat period. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 (1) (a) of the Muslim Women Act, 1986.

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343. CRIMINAL PROCEDURE CODE, 1973 – Section 125
MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Sections 3, 4 & 5
Application for maintenance by Muslim wife – Amendment sought in application to incorporate facts about her previous marriage and to delete some sections of Muslim Women (Protection of Rights on Divorce) Act – Held, maintainable.

Ehsan Ansari v. State of Jharkhand & Anr.

Reported in 2007 Cr.L.J. (NOC) 766 (Jharkhand)

Held:

The proceeding under S. 125 is not strictly a criminal proceeding. Rather it is more in the nature of a civil proceeding. Amendment in the petition is therefore not prohibited and is permissible in law as long as it does not change the nature of the proceeding or causes prejudice to the other party. It may further be seen that the claim for maintenance as made by the wife is based entirely on certain asserted facts in respect of her relation with the petitioner. Fresh fact sought to be introduced by her by way of amendment to her original petition merely explains certain circumstances and anticipated controversies. The said facts are not incidental to the grounds on which the claim for maintenance against the petitioner has been advanced. Order allowing amendment does not suffer from any illegality or infirmity.

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344. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 156, 190 & 200
Information to police regarding commission of cognizable offence – Police is bound to register FIR – If police does not register, remedy is only to file complaint before Magistrate – Writ of Mandamus to direct police authorities to register FIR is not maintainable.
Aleque Padamsee and others v. Union of India and others
Judgment dated 18.07.2007 passed by the Supreme Court in Writ Petitions (Crl.) Nos. 11-15 of 2003, reported in (2007) 6 SCC 171

Held :

Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. As was held in All India Institute of *Medical Sciences Employeees' Union (Regd.) v. Union of India, (1996) 11 SCC 582* and reiterated in *Gangadhar Janardhan Mhatre v. State of Maharashtra, (2004) 7 SCC 768* the remedy available is as set out above by filing a complaint before the Magistrate. Though it was faintly suggested that there was conflict in the views in *All India Institute of Medical Sciences case* (supra), *Gangadhar case* (supra), *Hari Singh v. State of U.P., (2006) 5 SCC 733, Minu Kumari v. State of Bihar, (2006) 4 SCC 359 and Ramesh Kumari v. State (NCT of Delhi), (2006) 2 SCC 677,* we find that the view expressed in Ramesh Kumari case (supra) related to the action required to be taken by the police when any cognizable offence is brought to its notice. In *Ramesh Kumari case* (supra) the basic issue did not relate to the methodology to be adopted which was expressly dealt with in *All India Institute of Medical Sciences case* (supra), *Gangadhar case* (supra), *Minu Kumari case* (supra) and *Hari Singh case* (supra). The view expressed in *Ramesh Kumari case* (supra) was reiterated in *Lallan Chaudhary v. State of Bihar, (2006) 12 SCC 229.* The course available, when the police does not carry out the statutory requirements under Section 154 was directly in issue in *All India Institute of Medical Sciences case* (supra), *Gangadhar case* (supra), *Hari Singh case* (supra) and *Minu Kumari case* (supra). The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code.

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345. CRIMINAL PROCEDURE CODE, 1973 – Section 156(3)
Whether in a private complaint filed for the offence exclusively triable by the Court of Session, a Magistrate can direct the police to investigate into the matter u/s 156 (3) of the Code? Held, Yes – Law explained.
Pavan Sharma and another v. Kamalabai and another
Reported in 2007 (3) MPLJ 482

Held:

In the present case, as per the facts mentioned in the petition as well as in the copy of the complaint, it appears that about the incident happened on 16th March, 2007, one complaint has been filed by Smt. Kamla Bai, respondent No.1, against the petitioners for the offences punishable under sections 376, 354, 294 and 323 of Indian Penal Code. It has been alleged in the complaint that the daughter of the complainant was beaten by the petitioners and thereafter they committed rape on her. Without recording any evidence under sections 200 and 202 of Criminal Procedure Code the learned Magistrate vide impugned order dated 21-3-2007 directed the police under section 156(3) of Criminal Procedure to register a case and after investigation file a report in the Court. This action of the learned Magistrate has been impugned by Smt. Uma Kushwah, the learned counsel for the petitioners, on the ground that as provided under proviso A of sub-section (1) of section 202 of Criminal Procedure Code without examining the witnesses of the complainant, directing the police as aforesaid is prohibited. In support, she has drawn attention on an order of this Court passed in *Kamlesh Pathak and five others vs. State of M. P. and another, 2005(2) MPLJ 588 = 2006(1) MPJR 159* in which vide para 12 the following observation has been made by one single Bench of this Court :-

> 12. Thus, after perusing the aforesaid case laws and the language of proviso to section 202 it clearly appears that the Magistrate has no power to issue direction under section 156(3), Criminal Procedure Code in cases where offence is triable exclusively by Sessions Court and if directions are issued that would be without jurisdiction. In case a complaint is made to the Magistrate of an offence which is exclusively triable by Sessions Court it is incumbent on him to call upon the complainant to produce witnesses on which he rely and after recording their statements the Magistrate may decide whether cognizance of offence it to be taken or not. In the present case, the Court has not followed the said procedure and has directed investigation by police under section 156(3), Criminal Procedure Code.

On perusal of the order in the case of Kamlesh Pathak (supra), it appears that judgment delivered by the Apex Court in *Devrapalli Laxminarayana Reddy and others vs. Naraynaa Reddy and others, 1976 CriLJ. 1361* was neither cited nor considered by this Court. As per the facts of the case of *Devrapalli* (supra), a complaint was filed on 26th July, 1975 for the offences punishable under sections 147, 148,149, 307, 395, 448, 378 and 342 of Indian Penal Code. The offences under sections 307 and 395 were exclusively triable by the Court of Sessions. The Magistrate on receiving the complaint, forwarded the same to the police for investigation with the following endorsement - "forwarded under section 156(3) of Criminal Procedure Code to Inspector of Police, Dharmavaram,

for investigation and report on or before 5th August, 1975 - The similar objection, as has been raised in the present case, was raised on behalf of the accused persons. The matter went up to the Apex Court in which as per paras 17 to 19 following observation has been recorded :-

> "17. Section 156(3) occurs in Chapter XII, under the caption: "Information to the police and their powers to investigate"; while section 202 is in Chapter XV which bears the heading "Of complaints to Magistrate". The power to order police investigation under section 156(3) is different from the power to direct investigation conferred by section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say, in the case of a complaint regarding the commission of a cognizable offence, the power under section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of section 156 (3)
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> 18. In the instant case the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only for ordering an investigation under section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under section 200, Criminal Procedure Code, which is the first step in the procedure prescribed under that Chapter. The question of taking the next step of that procedure envisaged in section 202 did not arise instead of taking cognizance of offence, he has, in the exercise of his discretion, sent the complaint for investigation by police under section 156.
>
> 19. This being the position, section 202(1), 1st Proviso was not attracted. Indeed, it is not necessary for the decision of this case to express any final opinion on the ambit and scope of the 1st Proviso to section 202(1) of the Code of 1973. Suffice it to say, the stage at which section 202 could become operative was never reached in this case. We have therefore in keeping with the well-established practice of the Court, decided only that much which was essential for the disposal of this appeal, and no more."

The observation of the Apex Court is complete answer to the first objection raised on behalf of the petitioners. In the light of this observation, the aforesaid observation of this Court in case of *Kamlesh Pathak* (supra) does not support the contention of the petitioners.

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346. CRIMINAL PROCEDURE CODE, 1973 – Sections 156(3) & 397
Whether a Magistrate has jurisdiction u/s 156 (3) of the Act to direct CBI to register the case and investigate it? Held, No – Whether revision against order of Magistrate directly to High Court is maintainable? Held, Yes.

Central Bureau of Investigation v. State of Gujarat

Judgment dated 21.06.2007 passed by the Supreme Court in Criminal Appeal No. 1181 of 2001, reported in (2007) 6 SCC 156

Held :

We find that the High Court was not right in its approach. This Court in *CBI v. State of Rajasthan, (2001) 3 SCC 333* has laid down the principles as to whether direction can be given to CBI under Section 156(3) CrPC. It was held that magisterial power cannot be stretched under the said provision beyond directing the officer in charge of a police station to conduct the investigation and no such direction can be given to CBI. In the instant case, the first information report was already registered and in that sense Section 156 (3) CrPC had no application. There is substance in the plea of learned counsel for CBI that routine matters should not be entrusted to CBI as the investigating agencies of various States can effectively investigate such matters. Of course, where it is shown that the investigating agency is not doing proper investigation and/or that there is reason to believe that there is laxity in the investigation, a direction may be given to CBI to investigate the matter in appropriate cases. This case is not one where any complexity was involved. It was a routine case of theft of muddamal property. The learned Sessions Judge, therefore, rightly appears to have set aside the orders passed by the learned Chief Judicial Magistrate. The High Court had no basis to doubt the bona fides of CBI in moving the application before it under Section 397 CrPC. There was no bar for the High Court to entertain the said petition. The criticism levelled against CBI and its officers and cost imposed do not have any legal sanction.

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347. CRIMINAL PROCEDURE CODE, 1973 – Section 173 (8)
Further investigation – Once final report was submitted, whether permission for further investigation can be granted? Held, Yes.

N.P. Jharia v. State of M.P.

Reported in ILR 2007 MP 1119 = 2007 Cr.L.J. 3745 (SC)

Held:

It was urged that once the final report was submitted threr is no scope for further investigation. It appears that after referring to the proceedings the trial Court found that there was no substance in the plea. Before the High Court such plea was not raised. In the appeal also the main grounds relate to the defect in sanction and legality of the further investigation.

So far as the further investigation is concerned in the background of Section 173(8) of the Code of Criminal Procedure, 1973 (in short "the Code") the plea is clearly untenable.

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348. CRIMINAL PROCEDURE CODE, 1973 – Section 190

(i) Cognizance, meaning of – Law explained.

(ii) At the time of taking cognizance about an offence, if a Magistrate comes to the conclusion that a particular person against whom chargesheet (challan) has not been filed, also appears to have committed the offence, can issue process against such person even in the case which is exclusively triable by the Court of Sessions.

Veersingh and others v. State of M.P.

Reported in 2007 (3) MPLJ 580

Held:

On perusal of the provisions, it appears by Clause (b) of sub-section (1), that the Magistrate can take cognizance of any offence upon a police report of such facts. No distinction has been inserted in the provision on the point that a Magistrate shall be entitled to take cognizance of the offences Triable by him and not on those offences which are exclusively Triable by Court of Sessions. There is no dispute that the instant case is based on a police report which is covered by sub-clause (b) of sub-section (1) of section 190 of the Code. It also appears that cognizance of an offence is to be taken and not of the offenders. Meaning thereby, if the cognizance is taken on any of the offences, action is to be taken against all persons who are responsible for the offence on the basis of the material collected by investigating agency. Thus, if a Magistrate taking cognizance of an offence comes to a conclusion that the other person/s against whom no challan/report under section 173 of the Code has been filed appears responsible, he can issue process against them.

Although the word 'cognizance' has not been defined anywhere in Criminal Procedure Code, however, it is settled that when a Magistrate applies his mind on a case for taking further steps as provided by the Law, it is said that the cognizance has been taken. In the cases, exclusively triable by the Court of Sessions, a Magistrate has to take further steps as provided by the Code for supplying copies to the accused, informing the public prosecutor, remanding the accused into custody etc. and thereafter committing the case to the Court of

Sessions. For taking these steps he has to apply his mind to the case and is to take further steps as provided. He has also to apply his mind as to whether the offence is exclusively Triable by Court of Session or not. Although a Magistrate is not empowered to go into the merits of the offence at this initial stage, as to whether a particular offence under which challan has been filed by the police, is made out or not, yet for the aforesaid other considerations a Magistrate has to apply his mind and thus even if before committing of the case, he takes cognizance. In view of this at the time of taking such cognizance about an offence, if a Magistrate comes to the conclusion that a particular person against whom challan has not been filed, also appears to have committed the offence, can issue process against such person. If at this state, this step is not taken, then only at the stage of Section 319 of Criminal Procedure Code after recording evidence this step will have to be taken and by that process the witnesses already examined will have to be recalled as per the law of the day.

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349. CRIMINAL PROCEDURE CODE, 1973 – Sections 200 & 202

Cognizance of offence and issuance of process against accused – While considering the question whether prima facie case has been made out or not and whether accused should be summoned or not, it is not necessary to consider the defence of accused.

Goyal M.G. Gases Pvt. Ltd. and another v. Kamaljeet Singh Bhatia and another

Reported in 2007 (4) MPLJ 80

Held:

At this stage it is not necessary to consider the evidence of the respondents accused while considering the question whether prima facie case has been made out against them or not. The test to be applied while considering the question that accused should be summoned or not is whether there is sufficient ground for proceeding against them. The sufficiency has to be judged from the complaint, the solemn affirmation and the evidence, if any on record. The defence of the accused is not a material which has to be considered in the matter while taking cognizance. At the stage of cognizance for the statement or evidence should not be sifted and no attempt should be made to find out by critical appreciation if the alleged statement against the persons are true or not. Yet for the purpose of taking cognizance the Court is bound to apply the standards strictly to find out if the material alleged against the accused are sufficient to make out a prima facie case of the offences alleged to have been committed by them. The Magistrate has been given discretion in the matter and the same has to be exercised by him judicially.

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350. CRIMINAL PROCEDURE CODE, 1973 – Sections 200, 202, 203 & 204 Recall of issuing summons order – Once Magistrate has registered the complaint, stage under S.203 is over – Magistrate cannot recall the summoning order – Law restated.

Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and others

Judgment dated 10.04.2007 passed by the Supreme Court in Criminal Appeal No. 520 of 2007, reported in (2007) 5 SCC 54

Held:

Summons were issued by the learned Magistrate by reason of an order dated 24-7-1999. He recalled the said order. He did not have any jurisdiction in that behalf. A Magistrate does not have and, thus, cannot exercise any inherent jurisdiction.

In *Adalat Prasad v. Rooplal Jindal, (2004) 7 SCC 338* a three-Judge Bench of this Court while overruling an earlier decision of this Court in *K.M. Mathew v. State of Kerala, (1992) 1 SCC 217* stated the law thus: (SCC p. 343, paras 14 & 16)

> "14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *Mathew case* (supra) that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

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> Therefore in our opinion the observation of this Court in the case of *Mathew* (supra) that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in *Mathew case* (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

The said ratio has been reiterated by another three Judge Bench of this Court in *Subramanium Sethuraman v. State of Maharashtra, (2004) 13 SCC 324* and *N.K. Sharma v. Abhimanyu, (2005) 1 SCC 213*

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351. CRIMINAL PROCEDURE CODE, 1973 – Section 300 (1)

Bar on trial of acquitted/convicted accused again for the same offence – Ingredients of – Where the Court lacks jurisdiction to take cognizance for want of sanction, Court cannot pass order of acquittal – It can only discharge the accused – If Court while passing the order uses the phrase 'acquittal', it should be treated as order of discharge.

Balbir Singh v. State of Delhi

Judgment dated 21.06.2007 passed by the Supreme Court in Criminal Appeal No. 844 of 2002, reported in (2007) 6 SCC 226

Held :

The effect of such an order has been considered by Federal Court in *Basdeo Agarwalla v. King Emperor, AIR 1945 FC 16.* The relevant portion of the judgment reads as under :

> "That the prosecution launched without valid sanction is invalid and or that under the common law a plea of autre fois acquit or convict can only be raised where the first trial was before a court competent to pass a valid order of acquittal or conviction. Unless the earlier trial was a lawful one which might have resulted in a conviction, the accused was never in jeopardy."

The principles set out in *Basdeo Agarwalla case* (supra) were followed in *Yusofalli Mulla Noorbhoy v. King, AIR 1949 PC 264.* The factual scenario in that case was that after framing of the charge the Magistrate acquitted the accused after coming to the conclusion that the sanction as required by law was not there and the trial was incompetent. It was held that the order of acquittal was without jurisdiction and could only operate as an order of discharge because the Magistrate in such a case ought to discharge the accused on the ground that he had no jurisdiction to try him.

This Court in *Mohd. Safi v. State of W.B., AIR 1966 SC 69* observed as follows: (AIR p. 72, para 6)

"Where a court comes to such a conclusion, albeit erroneously, it is difficult to appreciate how that court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquit that person of the offence."

So far as applicability of Section 300(1) of the Code is concerned, essentially the conditions for invoking the bar are: (i) the court had jurisdiction to take cognizance and try the accused, and (ii) the court has recorded an order of conviction or acquittal and such conviction/acquittal remains in force.

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352. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Summoning accused by Court who is not chargesheeted, criteria of – It lies on the discretion of Court – Exercise of discretion – Court must be satisfied that there exists possibility of likelihood of conviction – Such satisfaction can be arrived at upon completion of cross – examination of the witness – In proper case, Court may decide such application after consideration of other evidence also.

Mohd. Shafi v. Mohd. Rafiq & Anr.

Reported in AIR 2007 SC 1899

Held:

From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are, therefore, of the view that the High Court has committed an error in passing the impugned judgment.

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353. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Cognizance u/s 319 of the Code – Evidence of witness examined during trial is material and not that collected during investigation – The new accused who is to be summoned need not be given opportunity to be heard or to cross-examine prosecution witnesses prior to summoning.

Ram Kishan Yadav and another v. State of M.P.

Reported in 2007 (4) MPLJ 144

Held:

For taking cognizance under Section 319 of Criminal Procedure Code, the evidence of the witnesses examined during trial is material and not the evidence collected during investigation. For this purpose, Court is to be hopeful that there is a reasonable prospect of the case as against the newly summoned accused ending in conviction.

On perusal of Section 319 of Criminal Procedure Code, it does not appear that before passing an order taking cognizance against a new person an opportunity of hearing is to be provided to him. It is only sufficient that if a Court during the course of any enquiry into, or trial of, an offence comes to the conclusion from the evidence that any other person not being the accused has committed any offence for which that person ought to be tried together with the accused, the Court may proceed against such person for the offence which appears against him to be committed. It is not provided that the new accused who is to be summoned is required to be heard before passing such order. As it has been expressed by the Apex Court in *Raj Kishore Prasad v. State of Bihar and another, AIR 1996 SC 1931.* The Apex Court in the case of *Rakesh v. State of Haryana, AIR 2001 SC 2521* has observed in para 13 "The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not."

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354. CRIMINAL PROCEDURE CODE, 1973 – Section 340
INDIAN PENAL CODE, 1860 – Section 193
Prosecution for perjury – Forming of the opinion that 'it is expedient in the interest of justice' is a *sine qua non* for launching prosecution – There must be a case of deliberate falsehood.

Jagdish v. Ashok Kumar Gureja
Reported in 2007 (4) MPHT 93 (DB)

Held:

Learned Counsel for the applicant submitted that there is no limitation for prosecuting a person for perjury. This may not be disputed but on reading the provision of Section 340 Cr.P.C. it is clear that before a direction either for an inquiry or for prosecution the Court has to form an opinion that it is "expedient in the interest of justice" that an inquiry should be made into any such offence. The meaning of the word "expedient in the interest of justice" is that forming of the opinion is a sine qua non for proceedings to launch a prosecution for perjury, which shows that the Court has to be careful in balancing of many factors and prosecution for perjury can be directed in the larger interest of the administration of justice in case of deliberate falsehood.

In the case of *Chajoo Ram v. Radhey Shyam and Anr. reported in AIR 1971 SC 1367,* the Supreme Court has held that indiscriminate prosecutions under Section 193, Indian Penal Code resulting in failure are likely to defeat the very object of such prosecution. It has been laid down that the prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonable, probable or likely. No doubt, giving of false evidence and filing false affidavit is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material, defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge.

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355. CRIMINAL PROCEDURE CODE, 1973 – Section 362

Whether alteration of order is permissible by a Court of co-ordinate jurisdiction? Held, No – Once a competent Court of ASJ records a finding in revision that *prima facie* case is made out u/s 307 IPC, it becomes final – It cannot be reviewed or undone by another Court of co-ordinate jurisdiction.

Pritam Prasad v. Lakhan Singh and others

Reported in 2007 (3) MPHT 546

Held:

Undoubtedly, when Additional Sessions Judge in Criminal Revision No. 263/02 concluded that the facts of the case, prima facie, disclosed the commission of offence under Section 307 IPC, it was not open to Trial Court (First Additional Sessions Judge, Bhopal) to review or recall that order and to remand the case for trial to Magistrate holding that there was no material for framing charge under Section 307 IPC.

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356. CRIMINAL PROCEDURE CODE, 1973 – Sections 389, 437 & 439

Successive prayer for bail, meaning of – Application filed earlier is not determinative factor – If second application is considered, then first application will be treated as successive prayer for bail and should be placed before the Judge, who considered the first application, for consideration.

Badam Singh and others v. State of M.P.

Reported in 2007 (4) MPHT 99 (DB)

Held:

Indeed, the relief of grant of interim suspension of sentence was allowed

to appellant Nos. 1 and 3 in second application, though it was decided first. Therefore, the prayer made in I.A. No. 11942/05 even if it is taken up for consideration later on, will amount to successive prayer. Because according to us, looking to the peculiar facts and circumstances, numbering of application is not the sole criterion and the crux of the matter is only that which prayer of consideration of application for suspension of sentence, though by way of interim measure, was taken into consideration first and, therefore, according to us, prayer made in I.A. No. 11942/05 would be deemed to be successive prayer though it is in first application. According to us, it is not the number of application which was filed earlier is the determining factor, but, the sole criterion is that when the prayer was considered first, that would be the determining factor. If during the pendency of first application on merit, another application is submitted later on for suspension of sentence on temporary basis and the prayer of suspension of sentence is considered in the second application, in that situation, the prayer to allow suspension of sentence in the first application which is already pending, would amount to successive prayer and, therefore, it should be placed before the same Bench/Judge who allowed/disallowed first prayer to grant interim bail unless the said Bench/Judge is not available for a sufficient duration.

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357. CRIMINAL PROCEDURE CODE, 1973 – Sections 397, 399 & 401
Criminal revision cannot be dismissed for default or for want of prosecution – Rule laid down for criminal appeal also applies to criminal revision.

Madan Lal Kapoor v. Rajiv Thapar and others

Judgment dated 31.08.2007 passed by the Supreme Court in Criminal Appeal No. 1150 of 2007, reported in (2007) 7 SCC 623

Held:

The matter relates to administration of criminal justice. As held by this Court, a criminal matter cannot be dismissed for default and it must be decided on merits. Only on that ground the appeal deserves to be allowed.

Thus in *Bani Singh v. State of U.P., (1996) 4 SCC 720,* a three Judge Bench of this Court held that a criminal appeal should not be dismissed in default but should be decided on merits. If despite notice neither the appellant nor his counsel is present, the Court should decide the appeal on merits. If the appellant is in jail the Court can appoint a lawyer at State expense to assist it. This would equally apply to the respondent.

In *Bani Singh's case* (supra) the Supreme Court over-ruled its earlier decision in *Ram Naresh Yadav v. State of Bihar, AIR 1987 SC 1500* in which it was held that a criminal appeal can be dismissed for default.

In *Parasuram Patel v. State of Orissa, (1994) 4 SCC 664* the Supreme Court held that a criminal appeal cannot be dismissed for default.

In our opinion the same reasoning applies to criminal revisions also, and hence a criminal revision cannot also be dismissed in default.

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358. CRIMINAL PROCEDURE CODE, 1973 – Sections 399, 401 & 203
Revisional power – Dismissal of complaint by trial Court u/s 203 of the Code – Order set aside by revisional Court with direction to register case u/s 420 IPC against accused – Not without jurisdiction.
Ashok Maheshwari Rajkamal Prakashan (P) Ltd. v. Dinesh Puranik & Anr.
Reported in 2007 Cr.L.J. (NOC) 827 (M.P.)

Held:

Revisional Court has jurisdiction under the provisions of Sections 399 and 401 of the Code of Criminal Procedure to make an order for registration of the case where the trial Magistrate has wrongly discharged the accused or dismissed the complainant under Section 203. Thus, where it was found that the trial Magistrate has wrongly dismissed the complaint under S.203 of the Cr.P.C. and he ought to have taken cognizance against the applicant/accused under the provisions of S. 420 I.P.C., order directing for registration of the case under S. 420 I.P.C. against the applicant/accused given by the revisional Court does not appear to be without jurisdiction or illegal.

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359. CRIMINAL PROCEDURE CODE, 1973 – Section 437
Bail – Cases involving threat to security of State – Bail should generally be refused – While granting bail Court should avoid detailed examination of evidence – Order disposing bail has to be reasoned – But detailed reasons touching merits of case should not be given.
Afzalkhan @ Babu Murthuzakhan Pathan v. State of Gujarat
Reported in AIR 2007 SC 2111

Held:

We are not oblivious of some of the decisions of this Court that the Courts should assign reasons while allowing or refusing an application for bail. But then it is trite that detailed reasons touching the merit of the matter should not be given, which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken.

Ordinarily, a bail application, in a case of this nature, which involves the security of the State should be rejected.

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360. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439

Bail, grant of – Primary consideration – Gravity and nature of the offence and its impact on the society – Credibility and evidential value of the witnesses at this stage is not required to be considered – Court can only go into question of *prima facie* case and cannot scrutinize evidence at this stage.

Satish Jaggi v. State of Chhattisgarh & Ors.

Reported in 2007 CrLJ 2766 (SC)

Held:

Normally in the offence of non-bailable also, bail can be granted if the facts and circumstances so demand. We have already observed that in granting bail in non-bailable offence, the primary consideration is the gravity and the nature of the offence. A reading of the order of the learned Chief Justice shows that the nature and the democratic fabric of the society was not at all considered. We are more concerned with the observations and findings recorded by the learned Chief Justice on the credibility and the evidential value of the witnesses at the stage of granting bail. By making such observations and findings, the learned Chief Justice has virtually acquitted the accused of all the criminal charges levelled against him even before the trial. The trial is in progress and if such findings are allowed to stand it would seriously prejudice the prosecution case. At the stage of granting of bail, the Court can only go into the question of the prima facie case established for granting bail. It cannot go into the question of credibility and reliability of the witnesses put-up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial.

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361. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail – Extraordinary power – Should be exercised sparingly – Grounds of – The legality of proposed arrest cannot be gone into – An interim order restraining arrest cannot be passed.

D.K. Ganesh Babu v. P.T. Manokaran & Ors.

Reported in AIR 2007 SC 1450

Held :

In *Salauddin Abdulsamad Shaikh v. State of Maharashtra (AIR 1996 SC 1042)* it was observed as follows :

> "Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be by-passed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Sessions or the

High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

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The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdiction scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code.

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362. CRIMINAL PROCEDURE CODE, 1973 – Section 464

Accused No. 1 charged u/ss 302, 304-B and 498-A of IPC – Accused No. 2 charged for having caused disappearance of evidence of above crime u/s 201 IPC – Trial Court convicted both the accused u/ss 304 and 498-A r/w/s 34 – High Court set aside the conviction in appeal but convicted accused No. 1 and 2 u/ss 302 and 201 r/w/s 34 IPC – Apex Court held offence u/s 201 IPC cannot be considered minor offence u/ss 304-B and 498-A as these offences are distinct and belong to different categories – Accused charged only u/s 201 IPC – Conviction u/s 302 is also not permissible – If accused is charged u/s 302, he may be convicted u/s 201 IPC.

Sukhram v. State of Maharashtra

Judgment dated 17.08.2007 passed by the Supreme Court in Criminal Appeal No. 1203 of 2006, reported in (2007) 7 SCC 502

Held:

We have perused the Trial Court's record. We find that though charge for offence punishable under Section 302 of IPC had been framed against appellant A-1, no such charge was framed against appellant A-2, even with the aid of Section 34 IPC. The only charge framed against A-2 was for an offence punishable under Section 201 read with Section 34 of IPC. True that Section 222 Cr.P.C. clothes the Court with the power to convict a person of an offence which is minor in comparison to the one for which he is charged and tried, but by no stretch of imagination, offences under sections 304B and 498A IPC, under

which appellant A-2 was convicted by the Trial Court, could be said to be minor offences in relation to that under Section 201 IPC, for which he was charged. In fact, the three offences are distinct and belong to different categories. The ingredients of the offences under the said Sections are vastly different. Therefore, Section 222 Cr.P.C. had no application on facts in hand.

At this juncture, we may also note that conviction of appellant A-2 by the High Court under Section 302 IPC cannot also be held to be valid when tested on the touchstone of the provision contained in Section 464(2)(a) Cr.P.C. If it was convinced that a failure of justice had, in fact, been occasioned, the High Court was required to follow the procedure laid down in the section, which was not done. That apart, even on the proven facts on record, a case for conviction under Section 302 IPC was not made out against the said appellant.

Bearing in mind this factual and legal backdrop, we are of the opinion that the High Court was not justified in convicting appellant A-2 for having committed a major offence punishable under Section 302 IPC. Nonetheless, it is well settled that notwithstanding acquittal of the said appellant of the offence under Section 302 IPC, his conviction under Section 201 IPC is still permissible. (See: Constitution Bench decision in *Smt. Kalawati and Anr. v. The State of Himachal Pradesh, AIR 1953 SC 131.*

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363. CRIMINAL PROCEDURE CODE, 1973 – Section 464
Non-framing of charge, effect of – Law explained.
Held, conviction cannot be set aside on the sole ground of non-framing of charge – Accused must establish failure of justice occasioned to him due to non-framing of a particular charge.
Dhulya @ Dhulji and others v. State of M.P.
Reported in 2007 (4) MPLJ 152 (DB)

Held:

Supreme Court in the case of *Anil Sharma and others v. State of Jharkhand, (2004) 5 SCC 679* has dealt with this legal issue and held that merely absence of charge of section 34 of the Indian Penal Code by itself would not be fatal unless prejudice to the accused is established. In this judgment, the Supreme Court has placed reliance on the earlier Supreme Court judgment passed by the Constitution Bench on Hon'ble 5 Judges, *Willie (William) Slaney v. State of M.P., AIR 1956 SC 116* as well as the judgment rendered in case of *Dhanna v. State of M.P., AIR 1996 SC 2478.*

In view of the aforesaid provision and Supreme Court dicta, the conviction of the accused cannot be set aside only on the ground of non-framing of charge. The accused has to establish failure of justice occasioned to him by non-framing of a particular charge.

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364. CRIMINAL PROCEDURE CODE, 1973 – Section 468

The period of limitation – Relevant date for computation is filing of complaint/chargesheet within time and not the date of taking cognizance – Law explained.

Japani Sahoo v. Chandra Sekhar Mohanty

Judgment dated 27.07.2007 passed by the Supreme Court in Criminal Appeal No. 942 of 2007, reported in (2007) 7 SCC 394

Held:

The two things, namely, (1) filing of complaint or initiation of criminal proceedings; and (2) taking cognizance or issuing process are totally different, distinct and independent. So far as the complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter, to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over those proceedings. Because of several reasons it may not be possible for the court or the Magistrate to issue process or take cognizance. But a complainant cannot be penalized for such delay on the part of the court nor can he be non-suited because of failure or omission by the Magistrate in taking appropriate action under CrPC. No criminal proceeding can be abruptly terminated when a complainant approaches the court well within the time prescribed by law. In such cases, the doctrine actus curiae neminem gravabit (an act of court shall prejudice none) would indeed apply. One of the first and highest duties of all courts is to take care that an act of court does no harm to suitors.

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365. CRIMINAL TRIAL:

Appreciation of evidence – Death of deceased due to burn injuries – At the time of incident she was 25 years old having a daughter of 2½ years of age and also pregnant – Immediately after the incident she raised hue and cry – She was living on first floor – Incident took place on the ground floor in the premises of accused i.e mother-in-law of deceased – Plea of suicide – Held, rightly rejected.

Maniben v. State of Gujarat

Reported in AIR 2007 SC 1932

Held:

The defence case was that the deceased had committed suicide. The defence case to that effect was disbelieved for good reasons as because she was pregnant and she had a daughter aged about 2 and ½ years. The daughter was sleeping on the first floor. Indisputably the wash room was on the ground floor. It was a common one. Her statement, therefore, that she had come to answer the call of the nature and thereafter had been going upstairs cannot be

disbelieved keeping in view the nature of the injuries. Even Mr. Raichura conceded that she must have fallen on the ground and the kerosene was poured on the front portion of her body.

Immediately, after the incident, she raised a hue and cry. Other relatives immediately came there. She was taken to the hospital and her husband was informed. Had the appellant not participated in the commission of the offence, she should have been the first person to raise a hue and cry and call her other daughter-in-laws and neighbours. Immediately after the occurrence, she was not found at her house. Both the accused were arrested at a much later stage.

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366. EASEMENTS ACT, 1882 – Section 15

Right of literal support for a building – Plaintiff cannot base his claim on ownership and easement simultaneously – May only claim as easement by prescription u/s 15 of the Act – Plaintiff is required to plead and prove necessary facts.

Deo Kumar v. Kailash Chand and others

Reported in 2007 (4) MPHT 151

Held:

It may be seen that the trite law on the subject is that a plaintiff cannot legally base his claim on ownership and easement simultaneously. He shall have to give up either of the pleas at the time of adducing evidence. This having not been done, the plaintiff cannot be permitted to base his claim on easement. It may further be seen that plaintiffs have not based their case on the right of receiving support from the disputed wall. In order to claim lateral support there ought to have been express and specific pleading.

Section 7 of the Easements Act, 1882 makes a provision for right of easement for every owner on immovable property, but the same has been found to be applicable where the land is in natural condition and is not burdened by artificial pressure like that by buildings. In the case of support to buildings, an easement may be claimed only by prescribing it under Section 15 of the Easement Act. I derive support for this purpose from Division Bench of Allahabad High Court in the case of *Bhagwan Das v. Bibi Iqbal Sultan Banu Shahar Khursheed Begum, AIR 1929 Allahabad 885.* It is observed that plaintiffs/appellants in order to make out a case of right of support to his building is required to make out a case of easement under Section 15 of the Easements Act by alleging the necessary facts. An easement has six essential characteristics :- (1) there must be a dominant and a servient tenement; (2) the easement must accommodate the dominant tenement; (3) the easements is for beneficial enjoyment of the dominant tenement; (4) the dominant and servient owners must be different persons; (5) the easement should entitle the dominant owner to do and continue to do or to prevent and continue to prevent, something in or upon or in respect of the servient tenement; and (6) that something must be certain or well defined and capable of being subject-matter of a grant.

Plaintiffs/appellants were required to plead all the necessary facts to establish that their house (dominant heritage) enjoyed the lateral support of the disputed wall for last more than 20 years as an easement without interruption. Apart from this, the plaintiffs in order to succeed for perpetual injunction on the basis of right of support is required to make out a case of imminent danger of substantial degree in case of removal of support. In the case in hand, the plaintiffs have virtually not pleaded the support enjoyed by the dominant heritage and further, they apprehended danger in case of removal of disputed wall. Division Bench of Nagpur High Court in *Surendra Singh Inder Singh and another v. Phirozshah Bairamji and another, AIR 1953 Nagpur 205* has held :-

> "(9) It is necessary to point out that pleadings in a case dealing with easement have to be very precise. As has been stated by Peacock in his 'Law Relating to Easements in British India', Third Edition at Page 608:
>
> > 'As an easement is not one of the ordinary rights of ownership, it is necessary that either party claiming or relying on an easement should plead the nature of this title thereto so as clearly to show the origin of the right, whether it arises by statutory prescription, or express or implied grant, or the old common law method of a lost grant'."

Thus, in view of the absence of the necessary averments and further in view of the necessary proof regarding acquiring the right of easement under Section 15 of the Easements Act, the plaintiffs are not found to have prescribed the right of support and eventually cannot claim right of support under Section 15 of the Easements Act.

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367. EASEMENTS ACT, 1882 – Section 60

Whether licence coupled with grant of interest in the nature of property is irrevocable? Held, Yes.

R.P. Shrivastava v. Smt. Sheela Devi and others

Reported in 2007 (4) MPLJ 102

Held:

In *Ishwarlal v. District Judge, Indore, 1990 MPLJ 579 = 1990 MPWN 21* it was laid down that licence is personal and terminated on the death of licensor. Similar view was taken in *Mohammed Khan v. Ramnarayan Misra and others, AIR 1956 Orissa 156 and in Barselal v. Badri Prasad, AIR 1922 Nagpur 162* it was held that licensee becomes trespasser after licensor's death. There is no dispute with the aforesaid preposition, however, in the instant case, facts and circumstances point out that it was a license coupled with the grant of interest in the nature of property. The surrounding circumstances make it clear that the grant was not confined but house was intended to be given for the purpose of residence not only to Bhairo Prasad and Sheelwati but also by their family in future also for the purpose of residence. Thus the license was not revocable at will.

There was license coupled with the grant of interest in the property to the defendants to reside. The grant was not limited, grant was made in favour of Bhairo Prasad and Sheelwati even if it was a void grant, the conduct of the parties indicate that it continued in the favour of the family, thus it was a nature of grant which was irrevocable.

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368. ELECTRICITY ACT, 1910 – Section 26 (6)

Meter tampering – Demand for actual consumption charges – Valid – Reference to Electrical Inspector u/s 26(6) of the Act is not required.

Sub-Divisional Officer (P), UHBVNL v. Dharam Pal

Reported in AIR 2007 SC 1214

Held:

We would like to mention that the applicability of sub-section (6) of Section 26 is attracted only when the meter is not correct. Section 26(6) will have no applicability (i) if the consumer is found to have committed a fraud with the licensee and thereby illegally extracted the supply of energy preventing or avoiding its recording, or (ii) has resorted to a trick or device whereby also the electricity is consumed by the consumer without being recorded by the meter. In effect the latter class of cases would also be one of fraud. Tampering with the meter or manipulating the supply line or breaking the body seal of the meter resulting in non-registering of the amount of energy supplied to the consumer or the electrical quantity contained in the supply are the cases which were held to be not covered by Section 26 (6), in the case of *M.P. Electricity Board v. Basantibai, (1988) 1 SCC 23* while the provision was held applicable to any case of meter being faulty due to some defect and not registering the actual consumption of electrical energy. Similar is the view taken in the case of *J.M.D. Alloys v. Bihar State Electricity Board (2003) 5 SCC 226.*

What is a correct meter? The language of sub-section (6) of Section 26 starts with – "where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct....". The dictionary meaning of the word "correct" is: Adhering or conforming to an approved or conventional standard: Conforming to or agreeing with fact: Accurate.

As to what would be a "correct" meter, there is sufficient indication in the Act and the Indian Electricity Rules, 1956 in the explanation given at the end of sub-section (7) of Section 26 of the Act and sub-rules (1) and (2) of Rule 57, quoted hereinabove. Where the meter is completely non-functional on account of any fault or having been burnt, it will not register the supply of energy at all. Since a burnt meter does not record any supply of energy, it virtually means "no meter".

What is contemplated by Section 26(6) is a running meter, but which on account of some technical defect registers the amount of energy supplied or the electrical quantity contained in the supply beyond the

prescribed limits of error. It contemplates a meter which is either running slow or fast with the result that it does not register the correct amount of energy supplied. There is an additional reason for coming to such a conclusion. Section 26(6) confers power upon the Electrical Inspector to estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct. Where the meter is running slow or fast, it will be possible for the Electrical Inspector to estimate the amount of energy supplied to the consumer by determining the extent or percentage of error in recording the supply, whether plus or minus. However, where the meter is burnt or is completely non-functional, such an exercise is not at all possible. Therefore, Section 26(6) can have no application in a case where a meter has become completely non-functional on account of any reason whatsoever."

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369. EVIDENCE ACT, 1872 – Section 24
CRIMINAL PROCEDURE CODE, 1973 – Section 311

(i) Extra judicial confession – No need to state exact words used by the accused – However, there should not be vital and material differences.

(ii) Examination of accused – Object – Questions must be framed in such a manner that even an illiterate person will be able to appreciate and understand.

Ajay Singh v. State of Maharashtra
Reported in AIR 2007 SC 2188

Held:

(i) As regards extra judicial confession, though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken by accused are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement.

(ii) The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

The word 'generally' in Sub-section (1) (b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

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370. EVIDENCE ACT, 1872 – Section 32

Dying declaration – Principle – Conviction may be based solely on dying declaration – No absolute rule can be laid down that dying declaration cannot be acted unless corroborated by independent source of evidence – Whether it should be accepted or not depends upon circumstances of the case – Previous case laws discussed.

Shakuntala v. State of Haryana

Reported in 2007 Cr.L.J. 3747 (SC)

Held:

This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

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

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja & Anr. V. The State of Madhya Pradesh, (1976) 2 SCR 764*]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh v. Ram Sagar Yadav and Ors., AIR 1985 SC 416* and *Ramavati Devi v. State of Bihar, AIR 1983 SC 164*]

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

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

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

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

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

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

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

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

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

In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration. [See *Gangotri Singh v. State of U.P., JT 1992 (2) SC 417, Govardhan Raoji Ghyare v. State of Maharashtra, JT 1993 (5) SC 87, Meesala Ramakrishan v. State of Andhra Pradesh, JT 1994 (3) SC 232 and State of Rajasthan v. Kishore, JT 1996 (2) SC 595*]

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371. EVIDENCE ACT, 1872 – Section 34

(i) Power of attorney holder – If he has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts – He cannot depose for the principal in respect of the matters which only the principal can have a personal knowledge and also for the acts done by the principal and not by him.

(ii) Entries in books of accounts regularly kept in the course of business are corroborative evidence – Entries not by themselves sufficient to charge any one with liability.

Jethanand and Company v. M/s Mohan and Company
Reported in 2007 (3) MPLJ 584

Held:

(i) The Supreme Court in the case of *Janki Vashdeo Bhojwani and another*

v. Indusind Bank Ltd. and others, 2005 (1) MPLJ 421 has specifically held that the power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. The Supreme Court further held that if the plaintiff is unable to appear in the Court, a commission for recording his evidence may be issued under the relevant provision of Civil Procedure Code. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such act, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge in respect of which the principal is entitled to be cross-examined. Since the transaction is not in personal knowledge of Vishnu Kumar Jaiswal and it is in the knowledge of plaintiff and as no partner of the plaintiff firm who has personal knowledge, has been examined, the view of this Court is that the burden has not been discharged by the plaintiff and the suit must fail.

(ii) The Supreme Court in the case of *Chandradhar Goswami and others v. Gauhati Bank Ltd., AIR 1967 SC 1058* has specifically held that no person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. The Supreme Court has further laid down the law that there has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them....The account books are not in themselves proved the liability and the liability was required to be proved by other evidence also. The entries in books of account regularly kept in the course of business though relevant are corroborative evidence and mere production and proof of these entries is not by itself sufficient to charge any one with liability and there must be some other independent evidence to prove the transaction, therefore, no reliance could be placed on these entries.

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372. EVIDENCE ACT, 1872 – Section 115

(i) Interpretation of statutes particularly consolidating statutes, effect of – Repeal and saving clause – Law explained.

(ii) Promissory estoppel, nature of – Promissory estoppel gives rise to cause of action – It indisputably creates a right and also acts on equity.

(iii) Doctrine of legitimate expectation – Basis and applicability of.

Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio and others

Judgment dated 15.5.2007 by the Supreme Court in Civil Appeal No. 2551 of 2007, reported in (2007) 5 SCC 447

Held:

The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State can not only be expressed by reason of notifications issued under the statutory provisions but also under executive instructions. The doctrine of promissory estoppel will also apply to statutory notifications. The appellants had undoubtedly been enjoying the benefit of exemption from payment of tax in respect of consumption of electrical energy.

Even a right can be preserved by reason of invocation of doctrine of promissory estoppel. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law.

The proposition that the mere issuance of an exemption notification under a provision in a fiscal statute could not create any promissory estoppel because such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions, is inapplicable where a right has already accrued; for instance, in a case where the right to exemption of tax for a fixed period accrues and the conditions for that exemption have also been fulfilled, the withdrawal of that exemption cannot affect the already accrued right.

In view of the application of doctrine of promissory estoppel in the case of the appellants, their right is not destroyed and in that view of the matter although the scheme under the T.N. Tax on Consumption or Sale of Electricity Act, 2003 is different from The Tamil Nadu Electricity Duty Act, 1939 and T.N. Electricity (Taxation on Consumption) Act, 1962 and furthermore in view of the phraseology used in Section 20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The legislature in fact has acknowledged that right to be existing in the appellants.

The emerging doctrine in this behalf *viz.* legitimate expectation of substantive benefit may also be noticed. Ordinarily, the said principle would not have any application where the legislature has enacted a statute. As the legislature in this case allowed the parties to take benefit of their existing rights having regard to the repeal and saving clause contained in Section 20(1) of the 2003 Act, the same would apply. If, thus, principle of promissory estoppel would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.

Legitimate expectation is now considered to be a part of the principles or natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying

with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit maybe held to be applicable. However, it must be clarified that it is not being laid down that the said principle is to be applied even in the face of the exercise of legislative power by the State in terms of the entries made in Schedule VII List II of the Constitution.

We are not unmindful of the fact that the 2003 Act was enacted not only to consolidate but also to rationalise the Act. Mr. Nariman takes us to various authorities in regard to the construction of a consolidating statute including *IRC v. Hinchy, 1960 AC 748, Beswick v. Beswick, 1968 AC 58 Director of Public Prosecutions v. Schildkamp, 1971 AC 1, Maunsell v. Olins, 1975 AC 373* and *Farrell v. Alexander, 1977 AC 59* to suggest that a consolidating statute is not meant to alter the law. But, in these decisions, it has also been suggested that a consolidating statute may also be an amending Act.

It is one thing to say that where the words or expressions in a statute are plainly taken from an earlier statute in pari materia, which have received judicial interpretation, it must be presumed that Parliament was aware thereof and intended it to be followed in the latter enactment. But, it is another thing to say that it is necessary or proper to resort to or consider the earlier legislations on the subject only because the consolidating Act re-enacts in an orderly form the various statutes embodying the law on the subject. (See *Williams v. Permanent Trustee Co. of New South Wales,1906 AC 249 AC at p. 252 and N.S. Bindra's Interpretation of Statutes, 10th Edn., pp. 1071-72.*)

The words "consolidate and amend" furthermore often occur in a statute in repealing provision. Such a statute is not intended to alter the law.

In *Union of India v. Mohindra Supply Co., AIR 1962 SC 256* this Court observed: (AIR pp. 260-61, para 7)

> "7.... The Arbiration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi, (1895-96) 23 IA 18* observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in *Bank of England v. Vagliano Brod., 1891 AC 107* to the following effect : (All ER p. 113 E-G)
>
> 'I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood,

and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions,...'

The court in interperting a statute must therefore proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the pre-existing law; nor to add words which are not to be found in the statute, or 'for which authority is not found in the statute'. But we do not propose to dispose of the argument merely on these general considerations. In our view, even the legislative history viewed in the light of the dictum of the Privy Council in *Hurrish Chunder case Chowdry v. Kali Sundari Debia, (1882-83) 10 IA 4* does not afford any adequate justification for departing from the plain and apparent intendment of the statute."

Such construction is to be put only when it is a pure consolidating statute but there cannot be any doubt whatsoever that the same has to yield to plain words to the contrary. (See *Beswick v. Beswick, 1968 AC 58 and Grey v. IRC, 1961 AC 1.*)

However, there is no constitutional or statutory embargo that a consolidating Act must also be an amending Act. When different terms are used in the new Act, it would not be proper for the Court to refer to the provisions of a repealed statute.

We may furthermore notice that the distinction between consolidating statute and other statutes is no longer valid. It is only in certain exceptional situations that the language used in the earlier Act can be resorted to. In *G.P. Singh's Principles of Statutory Interpretation*, 10th Edn., pp. 315-16, it is stated:

"The distinction between consolidating statutes and other statutes for purposes of interpretation is being obliterated. Recent decisions have emphasised that a consolidation Act should be interpreted according to normal canons of construction and recourse to repealed enactments can be taken only to solve any ambiguity, for the process of consolidation would lose much of its point if whenever a question as to construction of a consolidating Act arose, reference had to be made to the statutes which it has consolidated and repealed. The primary rule of construction of a consolidation Act is to examine the language used in the Act itself without any reference to the repealed statutes. It is only when there is a real or substantial difficulty or

ambiguity that the court is to attempt to resolve the difficulty or ambiguity by reference to the legislation which has been repealed and re-enacted in the consolidation Act. This rule applies to all types of consolidation Acts which are now three : (1) pure consolidation i.e. re-enactment, (2) consolidation with correction and minor improvement, and (3) consolidation with Law Commission amendments. But when 'the provisions of the Act itself invited reference to the earlier law and in some cases were unintelligible without them' recourse to the earlier law for construing the Act becomes inevitable."

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373. EVIDENCE ACT, 1872 – Section 115
LIMITATION ACT, 1963 – Article 65

(i) Title cannot be vested only by reason of acquiescence or estoppel on the part of other.

(ii) Tenant's claim for possession based on title – No animus possidendi – Title by prescription cannot be claimed.

(iii) Claim for possession against tenant – Limitation – Article 65 would apply.

M/s Kamakshi Builders v. M/s Ambedkar Educational Society & Ors.

Reported in AIR 2007 SC 2191

Held:

Acquiescence did not confer any title on Respondent No.1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.

★ ★ ★

Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.

★ ★ ★

A claim of title by prescription is not tenable. It based its claim on a title. It had, therefore, prima facie, no animus possidendi.

A tenant continues to be tenant despite termination of tenancy. Article 67 would not be attracted in a case where a tenant remains a statutory tenant. In a case of this nature, Article 65 would apply. As the claim of Respondent No. 1 was based on a title, the onus was on him to prove the same. Respondent No. 1 failed to discharge the same and therefore, the learned Trial Judge, in our opinion, has committed no error in passing a decree in favour of the plaintiff.

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374. HINDU LAW:

Joint family – Severance in status – Can be caused by any co-owner expressing his unequivocal intention to separate – Such intention can be expressed by filing a suit for partition – Severance is different connotation from partition – Party may continue to possess the property jointly unless partition takes place by metes and bounds – Family settlement not acted upon by the parties – The party may file suit for partition.

M. Venkataramana Hebbar (dead) by LRs. v. M. Rajagopal Hebbar and others

Judgment dated 05.04.2007 passed by the Supreme Court in Civil Appeal No. 7061 of 2000, reported in (2007) 6 SCC 401

Held :

The execution of the said document is not in question. It is furthermore not in dispute that all the co-shareholders are not parties thereto. Any co-owner can cause a severance in the status of joint family by expressing his unequivocal intention to separate. Such intention can be expressed even by filing a suit for partition. But, despite such separation in the joint status, parties may continue to possess the lands jointly unless a partition of the joint family property takes place by metes and bounds.

For the purpose of this case, we will proceed on the assumption that the said deed of family settlement was not required to be compulsorily registered, in terms of Section 17 of the Registration Act as by reason thereof, the relinquishment of the property was to take effect in future. But there cannot be any doubt whatsoever that before the court rejects a claim of partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. By reason of the family settlement, a complete partition of the joint family property by metes and bounds purported to have taken place. One of the co-sharer, however, did not join in the said purported family settlement.

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375. HINDU LAW:

Hindu Law – Mitakshara law as administered in Bombay, Madras and Madhya Pradesh – A coparcener may alienate for value of his undivided interest in coparcenary property without the consent of the other coparcener – However, the purchaser not in possession is required to file the suit for partition to obtain possession.

Mohammad Nisar v. Rajesh Kumar and others

Reported in 2007 (3) MPLJ 494

Held:

The trial Court appears to have adjudged the sale-deeds to be void on the basis that alienation of specific portion by a coparcener was illegal. However, to

the extent of share of alienating coparcener such an alienation has to be valid as in Sagar the Bombay School applies, as opined by Full Bench of this Court in *Ramdayal vs. Manaklal, 1973 MPLJ 650* thus:

> "3. According to the Mitakshara Law as administered in Bombay, Madras and Madhya Pradesh a coparcener may sell mortgage or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other coparceners. But he has no right to alienate as his interest any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; and if he does alienate the alienation is valid to the extent only of his own interest in the alienated property. The question that arises for our consideration is as to what are the rights of the purchaser from a coparcener of a specific property when he has been put in the possession thereof. It is now well-settled that if the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the property for the benefit of the joint family, including the vendor. It is also further held in some of the cases that the purchaser is not entitled in such a suit to an order for partition either of the specific property sold to him or of the joint family properties in general, and his remedy is to file a suit for general partition. It has, however, been held by the Madras High Court and the Bombay High Court that to protect the purchaser a further direction should be added that the execution of the decree so far as it directs the purchaser to deliver possession to the plaintiff, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs, then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled. (See *Kandaswami vs. Velayatha, ILR 50 Mad 320 and Hanmandas vs. Valabhdas, ILR 43 Bom. 17 = AIR 1918 Bom. 101*). In *Shriram and others vs. Baboo and others [F. A. No. 36 of 1961, D/- 9-3-1965 (Madh Pra)*] Their Lordships have not given any reasons while giving direction in terms of the decisions of the Madras and Bombay High Courts, presumably because no decision taking a contrary view has noted by Mulla in his Commentary on Hindu Law, 12th Edn., sec. 261, where the views of the Bombay and Madras High Courts have been considered and quoted, and also because the law as to the right of coparcener of transferring his share without the consent of the other coparceners is the same in Madhya Pradesh as was applicable in erstwhile Madras and Bombay Presidencies.
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> 5. Under the circumstances, we are of the opinion that the direction of staying the execution proceedings for a certain period enabling the purchaser from a coparcener to file a partition suit and, if the suit is filed within that period, to stay the execution till the decree in the

partition suit can be legally given where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener. In other cases, such a direction may be said to be inequitable."

Thus, considering the applicability of the Bombay School in the area in question the alienation to the extent of share of Baijnath and Umashanker is held to be valid, each of them had l/4th share, however, purchaser's right to possession and equity has to be worked out in the case of partition. For reasons to be discussed hereinafter, the plea of partition set up by the defendants has not been found to be established. Thus, the decision of the trial Court adjudging the sale-deeds to be illegal and void is liable to be set aside.

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376. HINDU MARRIAGE ACT, 1955 – Section 24

Maintenance pendente lite – Order to be passed after taking into consideration petitioner's own income and income of respondent – Neglect by a spouse or refusal to maintain spouse is not a pre-condition u/s 24 of the Act – Fact that wife is voluntarily living separately and/or mere pendency of application for restitution of conjugal rights cannot debar her from claiming maintenance u/s 24 of the Act.

Sadhana Singh v. Bhagwan Das Arakh

Reported in 2007 (3) MPLJ 48

Held:

After hearing the submissions and perusing the record, this Court is of the considered opinion that the petition deserves to succeed for the following reasons :–

(i) Admittedly, the petitioner is a legally wedded wife of the respondent who has initiated proceedings under section 9 of the Hindu Marriage Act before the Trial Court. With the initiation of the proceedings under Hindu Marriage Act, 1955 (which includes the proceedings for restitution of conjugal rights under Hindu Marriage Act.), section 24 of it gets attracted which reads as follows :–

> *"Maintenance pendente lite and expenses of proceedings.* – Where in any proceeding under this Act is appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable."

(ii) A perusal of the aforesaid provision makes it clear that there must be a pending proceeding under the provisions of Hindu Marriage Act, 1955 and the wife or the husband as the case may be must have no independent income sufficient for her/him and the necessary expenses of the proceedings. The wife or husband must make an application and the Court dealing with the proceedings under the Act may order the respondent to pay to the petitioner the expenses of the proceedings and monthly during the proceeding such sum and reasonable monthly sum after taking into consideration the petitioner's own income and income of the respondent. Section 24 of the said Act does not contemplate even separate living of the spouse applying for interim maintenance and litigation expenses. Learned District Judge, Satna appears to have been carried away by the concept of section 125 of Criminal Procedure Code which is made applicable when the respondent neglects or refuses to maintain his wife. In view of the object and purpose of section 125 of Criminal Procedure Code even a bodily able husband who neglects or refuses to maintain his wife may be made liable to pay maintenance irrespective of his income. On the other hand, an order for maintenance under section 24 of the Hindu Marriage Act is liable to be passed after taking into consideration the income of the respondent. Thus, neglect by a spouse or refusal to maintain the spouse is one of the necessary ingredients while granting or declining the maintenance under section 125 of Criminal Procedure Code, but this is not a pre-condition under section 24 of the Hindu Marriage Act and interim maintenance under the said provision cannot be denied merely on ground that the wife is living with her parents in a voluntary manner. Mere pendency of the application for restitution of conjugal rights cannot debar other party from claiming maintenance under section 24. Moreover, it is not an admitted fact that the petitioner/wife is living with her parents by her own wishes. On the contrary, it has been pleaded in the application under section 24 that she was tortured by her husband who made their joint living unbearable. All these facts will have to be examined by the learned Trial Judge after recording the evidence and at this juncture it cannot be concluded that the petitioner/wife is living with her parents at her own wish.

(iii) Scope of exercise of powers under section 24 of the Hindu Marriage Act has been elucidated by the Bombay High Court in the case of *Smt. Gangu Pundlik Waghmare vs. Pundlik Maroti Waghmare and another, reported as 1979 Mh. L.J. 555 = AIR 1979 Bombay 264.* It has been held :–

> **"Section 24 of the Act which provides for payment of maintenance pendente lite and expenses of proceedings, does not in terms provide that the spouse who makes the application under that**

section would not be entitled to a relief under it if he or she is guilty of any misconduct or any marital offence. Obviously this section is enacted with the object of providing maintenance to the spouse during pendency of the proceedings, who is not otherwise able to maintain himself or herself and has to depend upon the other spouse for that purpose. The same is the object for making provision for the expenses of the proceeding. The Legislature by enacting this provision appears to have taken note of the fact that during the pendency of the proceedings under the Act, say for divorce or judicial separation, the unity of the family would be disrupted and one of the two spouses would be thrown out from the protection and shelter of the other and would be rendered without any means not only to maintain herself or himself but also to meet the expenses necessary for the proceedings which he or she has to undergo. It is in order to obviate such a hardship that the Legislature thought it fit to make a provision in the Act for maintenance pendente lite and expenses of the proceedings from the spouse who has means to pay the same, if the other has no means. If that be the purpose of the Legislature in enacting this provision, it appears that the question whether the spouse claiming relief under this section is guilty of any marital misconduct or offence would not be relevant for the purpose of directing payment. It is presumed that the proceeding which is initiated under the Act would be for divorce, judicial separation or other matters based on certain allegations with regard to the misconduct or marital offences committed by the other spouse. Now if these allegations were to be gone into at the time of deciding as to whether the applicant, under section 24 of the Act, is entitled to payment of maintenance or expenses, it would amount to prejudging the whole issue. It is needless to say that proceedings under section 24 of the Act are intended to be summary in nature and it would not be appropriate at that stage to decide if the spouse making the application under that section is or is not entitled to the said payment because of the misconduct or commission of marital offence by him or her. No doubt, it is entirely in the discretion of the Court to make or not to make an order under the said section. But that discretion has to be exercised by it on the requirements laid in that section itself and if that section does not prohibit the Court from directing payment of maintenance and expenses on the ground of misconduct, it would not be in keeping with the purpose of the section to refuse to do so merely merely in exercise of the discretion vested in the Court under that section."

(iv) An important aspect would be that the petitioner/wife has yet to submit her written statement. She may take all the permissible pleas. Thereafter, the learned Trial Judge would be required to provide opportunity to the parties to adduce evidence and decide the case on merits. Even a prima facie finding against the wife may prejudice her defence. Learned Trial Judge has not directed even to substantiate the contents of the application and reply by affidavits. No summary enquiry was held before giving a prima facie finding against the petitioner. He has not even considered the effect of police report which was lodged before the filing of petition for restitution of conjugal rights. Thus, the learned Trial Judge has resorted to certain conjectures and surmises in arriving at a prima facie finding that the petitioner is living separately at her own will and is guilty of misconduct/marital offence.

(v) In the present case it is an admitted position that the petitioner is a legally wedded wife of the respondent and their marriage has been consummated as admitted in paragraph-5 of the petition for restitution of conjugal rights. Respondent as per his own averments is a contractual teacher with Rs. 2500/- per month as salary. The petitioner has not been found with any source of income by the learned District Judge. This being so, the petitioner is entitled to maintenance pendente lite under the aforesaid provision and the learned District Judge is found to have committed an illegality in disallowing the same in the impugned manner. In this view of the matter, the impugned order is not sustainable in law and hence set aside.

(vi) Admittedly, parties to the writ petition have no child from the wedlock. Considering this, the respondent is directed to pay to the petitioner a sum of Rs. 1000/- per month as maintenance pendente lite from the date of application under section 24 of the Hindu Marriage Act.

(vii) Accordingly, the impugned order contained in Annexure/P-4 is hereby set aside to the extent of refusal to award interim maintenance. The application under section 24 is allowed and the respondent is hereby directed to pay the maintenance pendent lite in the aforesaid manner. Needless to say that the expenses of litigation awarded by the learned Trial Judge would remain payable by the respondent to the petitioner.

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377. INDIAN PENAL CODE, 1860 – Sections 96 & 105
Right of private defence – Availability – Aggressor – Determination – Presence of injuries on body of accused person, non-explanation of – Effect – Commencement of right and time to which it is available – Burden of proof – Law explained.
Krishna & Anr. v. State of U.P.
Reported in AIR 2007 SC 2452

Held:

Only question which needs to be considered, is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See *Munshi Ram and Ors. v. Delhi Administration, AIR 1968 SC 702, State of Gujarat v. Bai Fatima, AIR 1975 SC 1478, State of U.P. v. Mohd. Musheer Khan, AIR 1977 SC 2226 and Mohinder Pal Jolly v. State of Punjab, AIR 1979 SC 577. Sections 100 & 101* define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The often quoted observation of this Court in *Salim Zia v. State of U.P., AIR 1979 SC 391* runs as follows:

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See *Lakshmi Singh v. State of Bihar, AIR 1976 SC 2263*). A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.

Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In *Jai Dev. v. State of Punjab, AIR 1963 SC 612,* it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in *Biran Singh v. State of Bihar, AIR 1975 SC 87. (See: Wassan Singh v. State of Punjab, (1996) 1 SCC 458, Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N., (2002) 8 SCC 354).*

As noted in *Butta Singh v. The State of Punjab, AIR 1991 SC 1316,* a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (See *Vidhya Singh v. State of M.P., AIR 1971 SC 1857.* Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was

necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

In the illuminating words of Russel (Russel on Crime, 11th Edition Volume I at page 49):

> "....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

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378. INDIAN PENAL CODE, 1860 – Section 201

Accused was charged u/ss 302 & 201 of IPC for murder and causing disappearance of evidence of offence – Even if main offence is not established, accused can be convicted u/s 201 of the Act.

State of Karnataka v. Madesha and others

Judgment dated 01.08.2007 passed by the Supreme Court in Criminal Appeal No. 407 of 2001, reported in (2007) 7 SCC 35

Held:

It is to be noted that there can be no dispute that Section 201 would have application even if the main offence is not established in view of what has been stated in *V.L. Tresa v. State of Kerala, (2001) 3 SCC 549 and Sou. Vijaya v. State of Maharashtra, (2003) 8 SCC 296* cases.

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379. INDIAN PENAL CODE, 1860 – Section 306

Harassment of wife by husband or in-laws due to differences – Per se does not attract S. 306 r/w/s 107 – If wife commits suicide due to demand of dowry, S. 304-B may be attracted – But mere demand of dowry do not fall within the ambit of S. 107.

Bhagwan Das v. Kartar Singh and Ors.

Reported in AIR 2007 SC 2045

Held:

In our opinion the view taken by the High Court is correct. It often happens that there are disputes and discords in the matrimonial home and a wife is often harassed by the husband or her in-laws. This, however, in our opinion would not by itself and without something more attract Section 306 IPC read with Section 107 IPC.

However, in our opinion mere harassment of wife by husband due to differences per se does not attract Section 306 read with Section 107 IPC, if the wife commits suicide. Hence, we agree with the view taken by the High Court.

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380. INDIAN PENAL CODE, 1860 – Sections 364-A & 120-B

(i) Kidnapping for ransom, nature and ambit of.

It is an offence of unlawfully seizing a person and then confining him in secret place to extort ransom – Law explained.

(ii) Criminal conspiracy, ingredients of – Agreement between persons to do any unlawful act or to do a lawful act by unlawful means – Agreement may be express or implied or in part express and in part implied – Offence is committed as soon as agreement is made and continues so long as agreement persists until terminated by completion of its performance or by abandonment – Conspiracy may be proved by direct or by circumstantial evidence.

Suman Sood alias Kamal Jeet Kaur v. State of Rajasthan

Judgment dated 14.05.2007 passed by the Supreme Court in Criminal Appeal No. 867 of 2006, Reported in (2007) 5 SCC 634

Held:

(i) Section 364-A reads thus:

> "364-A. *Kidnapping for ransom, etc.* – Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

Before the above section is attracted and a person is convicted, the prosecution must prove the following ingredients:

(1) The accused must have kidnapped, abducted or detained any person;

(2)He must have kept such person under custody or detention; and

(3) Kidnapping, abduction or detention must have been for ransom. (See also *Malleshi v. State of Karnataka, (2004) 8 SCC 95)*

The term "ransom" has not been defined in the Code.

As a noun, "ransom" means "a sum of money demanded or paid for the release of a captive". As a verb, "ransom" means to "obtain the release of (someone) by paying a ransom", "detain (someone) and demand a ransom for their release". "To hold someone to ransom" means "to hold someone captive and demand payment for their release". (*Concise Oxford English Dictionary, 2002, p. 1186*)

Kidnapping for ransom is an offence of unlawfully seizing a person and then confining the person usually in a secret place, while attempting to extort ransom. This grave crime is sometimes made a capital offence. In addition to the abduction a person who acts as a go-between to collect the ransom is generally considered guilty of the crime.

According to *Advanced Law Lexicon* (3rd Edn., p. 3932):

> "Ransom is a sum of money paid for redeeming a captive or prisoner of war, or a prize. It is also used to signify a sum of money paid for the pardoning of some great offence, and or setting the offender who was imprisoned."

Stated simply, "ransom" is a sum of money to be demanded to be a paid for releasing a captive, prisoner or detenu.

(ii) In *Halsbury's Laws of England* (4th Edn., Vol. 11, para 58), it has been stated:

> "58. Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court.
>
> The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or

more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

In *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, AIR 1965 SC 682* this Court stated: (AIR p. 687, para 8)

> "The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. *There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence."*

(emphasis supplied)

In *Baburao Bajirao Patil v. State of Maharashtra, (1971) 3 SCC 432* this Court observed that there is seldom, if ever, that direct evidence of conspiracy is forthcoming. Conspiracy from its very nature is conceived and hatched in complete secrecy, for otherwise the whole purpose would be frustrated.

In *Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609,* Shetty, J. said: (SCC pp. 732-33, para 275)

> "275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

In *Nazir Khan v. State of Delhi, (2003) 8 SCC 461* this Court observed: (SCC p. 477, para 18)

> "18. Privacy and secrecy are more characteristic of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence.

It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference."

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381. INDIAN PENAL CODE, 1860 – Section 499

(i) Defamation, proof of.

(ii) Power u/s 398 of the Code – Can only be exercised when complaint was dismissed u/s 203 or under sub-section (4) of S. 204 of the Code or in case where any accused has been discharged.

Charanjitsingh v. Surendra Narayan

Reported in 2007 (4) MPLJ 181

Held:

(i) Unless the statement made by the accused or words spoken by him are proved, it is difficult to say that the accused was having any knowledge or reason to believe that by using those words or making that statement, he is going to harm the reputation of some persons.

(ii) The powers under section 398 can only be exercised in the matters when the complaint was dismissed under section 203 of the Criminal Procedure Code or sub-section (4) of section 204 of Criminal Procedure Code or in case of any person accused of an offence who has been discharged.

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382. INTELLECTUAL PROPERTY:

TRADE MARKS ACT, 1999 – Section 29

CIVIL PROCEDURE CODE, 1908 – Order XXXIX Rule 1

Passing off – Requirements – Plaintiff has to establish prior user of trade mark – Registration of similar trade mark in point of time is irrelevant consideration – Modern tort of passing off action – Similarities rather than dissimilarities have to be taken note of in the light of "phonetic similarities" – Law explained.

Heinz Italia and another v. Dabur India Ltd.

Judgment dated 18.05.2007 passed by the Supreme Court in Civil Appeal No. 2756 of 2007, reported in (2007) 6 SCC 1

Held :

In an action for passing off, the plaintiff has to establish prior user to secure injunction and the registration of the mark or similar mark in point of time is irrelevant. Modern tort of passing off has five elements i.e. (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure

the business or goodwill of another trader (in the sense that this is reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so. Further, before the use of a particular mark can be appropriated it is for the plaintiff to prove that the product that he is representing had earned a reputation in the market and that this reputation had been sought to be violated by the opposite party.

Furthermore, the principle of similarity cannot be very rigidly applied and if it can be prima facie shown that there was a dishonest intention on the part of the defendant in passing off goods, an injunction should ordinarily follow and the mere delay in bringing the matter to court is not a ground to defeat the case of the plaintiff.

Lastly, in the case of a passing-off action the similarities rather than the dissimilarities have to be taken note of by the court and the principle of phonetic "similarity" cannot be ignored and the test is as to whether a particular mark has obtained acceptability in the market so as to confuse a buyer as to the nature of product he was purchasing.

Both Glucon-D and Glucose-D are items containing glucose and it appears that there is remarkable phonetic similarity in these two words. Further, the colour scheme of Glucose-D and Glucon-D is almost identical with a happy family superimposed on both. The fact that in Glucose-D the happy family consisted of four whereas in the case of Glucon-D the family was of three is of little consequence as the colour scheme and the overall effect of the packaging has to be seen. The packaging of Glucose-D and Glucon-D is so similar that it can easily confuse a purchaser. The respondents have time and again made small changes in their packaging is an attempt to continue to mislead the purchaser and to make it more difficult for the appellants to protect their mark, which the record shows has acquired an enviable reputation in the market which is sought to be exploited by the respondent.

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383. LAW OF TORTS :

Negligence – Rule of foreseeability, applicability of – Law explained.

Saroj Basotia v. State of M.P. and others

Reported in 2007 (3) MPLJ 363 (DB)

Held:

First we consider question as to the degree of care which was necessary while organizing/performing such a play involving throwing of glass of brass and whether test of foreseeability applies and whether it was possible to prevent such an accident by the exercise of ordinary care, caution and skill.

In *Rylands vs. Fletcher, (1868) LR 3 HL 330,* one of the important examples of strict liability was considered laying down that the occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril

to prevent its escape and is liable for the direct consequences of its escape even if he has not been guilty of any negligence. In *M.C. Mehta vs. Union of India, AIR 1987 SC 1086,* the Apex Court laid down that an enterprise engaged in a hazardous or inherently dangerous activity is strictly and absolutely liable for the harm resulting from the operation of such activity. Another example of liability without fault is the liability of a master for the tort committed by his servants in the course of employment. There has to be seen the facts of each case what are duties and liabilities. In *Davis vs. Radcliffe, (1990) 2 AII ER 536,* the Privy Council inter alia laid down that it is considered preferable that the law should develop categories of negligence incrementally and by analogy with decided categories. It is also settled that defendant can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major,* or the act of God, a person is not liable if the damage is owing to *vis major,* wrongful act of a third party, plaintiff's own default. In *Williams vs. Clough, (1838) 3 H and N 258,* a master ordered a servant to take a bag of corn up a ladder which the master knew, and the servant did not know, to be unsafe, the ladder broke, and the servant was injured, the master was held liable. In *Davies vs. England, (1864) 33 LJ QB 321,* where the defendants, well knowing that certain carcasses were diseased and infectious, employed the plaintiff, who was ignorant of that fact, to cut them up whereby the plaintiff was infected by the disease and suffered injury therefrom, it was held that the defendants were liable. In *Paris vs. Stepney Borough Council, (1951) AC 367,* a workman employed as a garage hand had, to the knowledge of his employers, only one good eye. While working on the back axle of a vehicle to remove a U-bolt which had rusted-in, he struck it with a hammer and a metal chip flew off seriously injuring his good eye. He was not wearing goggles. He claimed damages against his employers in respect of that injury on the ground that they were negligent in failing to provide and require the use of goggles as part of the system of work. It was held that the employers were negligent in failing to provide the workman with protective goggles for work of this description, and that he was entitled to damages.

In a case where for want of safety appliances – the plaintiff, a window cleaner, was employed by the defendants, a firm of contractors, to clean the windows of a club, in *General Cleaning Contractors vs. Christmas, (1952) 2 All ER 1110,* it was held that the defendants were under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accident; the defendants had not discharged their duty in this respect towards the plaintiff; and, therefore, they were liable to him in respect of his injury.

In the case of dangerous employee causing injury to the plaintiff, in a claim by the plaintiff against the defendants for damages on the ground that they had failed to maintain such discipline among their employees as would protect him from dangerous horseplay, in *Hudson v. Ridge Manufacturing Co. Ltd., (1957) 2 QB 348,* it was held that as this potentially dangerous misbehaviour had been

known to the employers for a long time, and as they had failed to prevent it or remove the source of it, they were liable to the plaintiff for failing to take proper care of his safety.

The basis of the rule of foreseeability of the intervening act seems to be that if such act was foreseeable, it does not of itself eclipse the wrong of the defendant who should have, but did not provide against it. Wherever any intervening factor was itself foreseen or reasonably foreseeable by the actor, the person responsible for the act which initiated the chain of causes leading to the final result, that intervening cause is not itself, in the legal sense, a novus actus interveniens breaking the chain of causation and isolating the initial act from the final result. The test of foressability was applied in *Knightly vs. Johns, (1982) WLR 349,* the foreseeability is a test, not the test. Thus, in the first place, the intervening act may have been foreseeable, but it could still be a novus actus if sufficiently unreasonable. The negligence of a child was considered in the case of *staley vs. Suffolk Country Council and Dean Mason (unreported),* in November 26, 1985 at the Norwich High Court referred to in Law of Torts, by Cleark 16th Edition, at page 491. The midday break in a school was supervised by "dinner ladies," one of whom was injured by a tennis ball hurled inside a classroom by a boy aged between 12 and 13, who had intended to hit another boy. Both the Country Council and the boy were held liable. With regard to the latter, the test adopted by the judge was the standard of care to be expected of a boy of that age, and on the evidence he was held liable. In the case of physical damage as long as there is foreseeability of some damage to the plaintiff of the kind of which he complaints, no matter how less it may be, there need not be any foreseeability to the extent of the damage which he sustains, defendant is liable for the full extent of it, it is not necessary that extent or precise manner of incidents was foreseeable, in case there is initial negligence, how much damage has been caused, is not the test which is required to be foreseen.

In the case of inadvertent (simple) negligence, the actor is not aware of the unreasonable risk that he or she is creating, but should have foreseen and avoided it, that is also called inadvertent and simple negligence as defined in Black's Law Dictionary. Negligence has been considered in *M.S. Grewal and another vs. Deep Chand Sood and others, (2001) 8 SCC 151.* The Apex Court has laid down thus:

> "14. Negligence in common parlance means and implies "failure to exercise due care, expected of a reasonable prudent person". It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of others. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act. Negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent and a reasonable man would not do (vide Black's Law Dictionary).

Though sometimes the word "inadvertence" stands and is used as a synonym to negligence, but in effect negligence represents a state of the mind which, however, is much serious in nature than mere inadvertence. There is thus existing a differentiation between the two expressions – whereas inadvertence is a milder form of negligence, "negligence" by itself means and implies a state of mind where there is no regard for duty or the supposed care and attention which one ought to bestow. Clerk and Lindsell on Torts (18th Edn.) sets out four several requirements of the tort of negligence and the same read as below:

> "(1) The existence in law of a duty of care situation i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
>
> (2) Breach of the duty of care by the defendant i.e. that it failed to measure up to the standard set by law.
>
> (3) A causel connection between the defendant's careless conduct and the damage.
>
> (4) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."

The Apex Court inter alia has laid down that it has to be considered that inadvertence is a milder form of negligence and that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

Considering the facts of the instant case, staging of a play involving throwing of a glass of brass, a metal object, it could not be said to be 'too remote', a possibility that an object thrown would not hit the person in the audience, thus, it was incumbent upon to take reasonable care and caution so as to prevent happening of such an incident. It is apparent that glass of brass thrown hit the eye of plaintiff causing serious injury to the left eye. Plaintiff has stated that glass of brass thrown hit the eye directly, resulting into serious injury and loss of total vision of her left eye. The plaintiff was sitting in the first row. She has denied the suggestion that injury was not caused by the glass of brass. B.C. Basotia (P.W.2), husband of plaintiff, has stated that during the play actor was supposed to drink alcohol and thereafter to throw the glass in which he consumed the liquor as per the sequence, thus, it was incumbent upon the actor to ensure that metal object thrown by him fell in the nearby area. S.K. Ganguli (P.W.3) has stated that after the glass was thrown, it initially fell down on the stage, thereafter was rebounded and hit the eye of plaintiff. It is apparent that due to rash and negligent act actor had thrown glass of brass with such a force resulting into serious injury to the person sitting in the audience, thus, it was an act of sheer negligence on the part of the actor. He threw away the glass recklessly, when such play was organized where in drunken condition an object was to be thrown,

it was to be done sensibly and safely, not actually like a person who was really intoxicated having no control over the senses, it was incumbent upon the organizer to ensure that if an object was thrown, the audience was kept at the safe distance so as to oust the possibility of causing injury to any of the person. The safe distenace was not maintained, possiblity of such an incident ought to have been foreseen by the respondents. When an object had to be thrown, it could have hit any person sitting on the front row, thus, it is apparent that safe distence was also not maintained which was necessary as per the sequence in the case. Merely by the fact that on earlier occasions no such incident happened, as per test of foreseeability the negligence on the part of the defendants is not ousted. It was foreseeable that there was possibility that glass of brass thrown, may hit any person in the audience directly or after rebounding, thus, when such an object was necessary to be thrown, it was incumbent upon the respondents to assess the possibility of incident resulting from it. Whether damage was lesser or more, it was not the requirement of foreseeability. When damage was suffered, it was necessary to the defendants to pay the entire damage.

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384. LIMITATION ACT, 1963 – Section 14 & Article 54

Whether amendment application for time barred relief of specific performance can be allowed? Held, No – Law explained.

Van Vibhag Karmachari Griha Nirman Sahakari Sanstha v. Rameshchandra and others

Reported in 2007 (4) MPHT 105 (DB)

Held:

It is trite that against the breach of the contract it was necessary for the person aggrieved to seek specific performance and since the present appellant had instituted a suit only for declaration of title and perpetual injunction, the appellant ought not to have been allowed to make an amendment under Order 6 Rule 17, to incorporate the relief of specific performance.

From the above narration of facts based on record, it is manifest that the suit was filed by the present appellant on 11-2-1991 and it was only after several years that the amendment was sought by application dated 16.12.2002 to incorporate the relief of specific performance, which was allowed on 10-3.2003. Since relief of specific performance, can be claimed only within a period of three years from the date of the cause of action, in any case, the amendment to seek the relief of specific performance was not within limitation. Under these circumstances, we are of the considered view that the Trial Court did not commit any illegality in not allowing the application of the appellant, under Section 14 of the Limitation Act, and treating the suit as barred by limitation.

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385. LIMITATION ACT, 1963 – Section 27

Adverse possession, proof of – Law explained.

Krishnamurthy S. Setlur (dead) by LRs. v. O.V. Narasimha Setty and others

Reported in 2007 (3) MPLJ 15 (SC)

Held :

Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the Court.

In the matter of adverse possession, the Courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment's stated above, the impugned judgment is under section 96, Civil Procedure Code, it is not a judgment under section 100, Civil Procedure Code. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved (sic) that work is of the first Appellate Court.

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386. M.P. CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 – Rule 10

Dies non – Is a major penalty – Regular departmental enquiry is necessary prior to inflicting such a penalty.

Mahesh Kumar Shrivastava v. State of M.P. and others

Reported in 2007 (3) MPLJ 525

Held:

A Division Bench of this Court reported in *Battilal vs. Union of India and others, 2005(3) MPHT 32 (DB)* has held as under with regard to dies non:

> "The authority imposing the punishment can direct how the period when the employee was out of service shall be treated. When the Authority directs that the period will be treated 'dies non', it means

that continuity of service is maintained, but the period treated 'dies non' will not count for leave, salary, increment and pension".

It is clear from the Judgment of this Court that dies non means continuity of service but the period will not be counted for leave, salary, increment and pension. It means that due to the order of the dies non, the pension of the employee will be reduced.

It is clear from Rule 10 that major penalty includes reduction of lower time of scale of pay. In the case of dies non when the pension of an employee will be affected then certainly in my opinion it would amount to major penalty and for that purpose as per the provision of M. P. Civil Services (Classification, Control and Appeal) Rules, 1966 a regular departmental enquiry is necessary and since in the present case no regular departmental enquiry is being conducted, hence, the order of dies non is bad in law.

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387. M.P. LOWER JUDICIAL SERVICE (RECRUITMENT AND CONDITIONS) RULES, 1994 – Rule 7

Appointment by direct recruitment to the post of Civil Judge Class II – Eligibility therefor – Candidate must possess a degree in LL.B. – Candidates had appeared for LL.B. final year examination – Results not declared by University – Held, for not declaring results by University, petitioners cannot be made to suffer – Directions issued to the M.P. P.S.C. to permit petitioners to appear for examination subject to condition that they will produce proof of their having passed LL.B. final year examination before the interview.

Nikhil Kumar Godha and another v. State of M.P. and others

Reported in 2007 (4) MPLJ 77 (DB)

Held:

It is not in dispute that the petitioners have taken the LL.B. final year examination in May-June, 2007. Hence the Devi Ahilya Vishwavidyalaya should have published the results of the said examination by now and if the said University has not published the results of the final year LL.B. examination of the petitioner, the petitioners cannot be made to suffer. Under Rule 7 of the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions) Rules, 1994 under which the recruitment to 240 posts of Civil Judge Class-II is being conducted by M.P. Public Service Commission, no person is eligible for appointment by direct recruitment to the post of Civil Judge Class-II unless he possess a degree in LL.B. of any recognized University. Thus, before appointment by direct recruitment to the post of Civil Judge Class II, a candidate will have to have a degree in law of a recognized University. This being the position, no illegality will be committed if the petitioner and other candidates who have taken LL.B. final year examination and have been permitted to take the preliminary examination for the 240 posts of Civil Judge (Entry level) pursuant to the orders of this Court dated 07.03.2007

in W.P. No. 3370/2007 and W.P. No. 3428/2007, are allowed to take the Main Examination for the aforesaid posts of Civil Judge Class-II with the condition that they will produce proof of having passed LL.B. examination before the interview is conducted for selection.

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388. MOTOR VEHICLES ACT, 1988 – Sections 2 (9), 2 (30), 146 & 147-A
Insurance policy containing a clause allowing the insured (owner) to drive – Cannot be interpreted so as to cover the risk of owner driving vehicle unless additional premium was paid to cover such risk.
Smt. Usha Baghel and others v. United India Insurance Company Limited and another
Reported in 2007 (4) MPHT 180 (FB)

Held:

It is clear that the clause only specifies the persons or classes of persons entitled to drive the vehicle which is insured and it says that any person including the insured can drive the insured vehicle provided such person driving the vehicle holds an effective driving licence and is not disqualified from holding or obtaining such licence and further that the person holding an effective learner's licence may also drive the vehicle when not used for transport of goods at the time of accident and such a person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989. Such a clause by itself does not cover the risk of the owner insured and hence by virtue of this clause, the owner or the insured cannot claim compensation from the insurer for personal injuries suffered by him nor can the legal representatives of the owner/insured claim compensation for death of the owner/insured.

Merely by a clause in the policy enabling the owner of the vehicle to drive the vehicle, the risk of the owner/insured was not covered by the policy of insurance, unless additional premium was paid so as to cover the risk of owner/ owner driving the vehicle.

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389. MOTOR VEHICLES ACT, 1988 – Section 113 (2)
CIVIL PROCEDURE CODE, 1908 – Section 115
Appeal or revision against award of less than Rs. 10,000/-.– Remedy of appeal is not available – Revision u/s 115 of CPC is maintainable to assail an award passed by M.A.C.T. – Constitutional remedy under Article 226/227 is also not available.
National Insurance Co. Ltd., Gwalior and etc. v. Shrikant Vinod Tiwari and Ors.
Reported in AIR 2007 MP 98 (5 Judge Special Bench)

Held:

Motor Accident Tribunal is Court subordinate to High Court and is civil

Court. The legislature has not given right of appeal where the dispute in appeal is valued less than Rs. 10,000/-, but no express provision is made in the Act barring the recourse to revision u/s 115 of C.P.C. When the High Court is examining the correctness of the judgment, it cannot be deprived of exercising its power of revision u/s 115 of C.P.C. Thus the High Court shall continue to have powers of superintendence u/s 115 of C.P.C. upon the Tribunal, Special Statute is a self contained Code and whether a Special Act while conferring power on a sub-ordinate Court in case the decision rendered by such Court shall be final, that will only be effective in taking away a remedy by way of appeal but will not exclude the remedy or revision u/s. 115 of C.P.C.

Thus, as discussed above, the Tribunal is a Civil Court and if appeal is expressly barred under the provisions, then legality and propriety of the order can be examined in exercise of jurisdiction under Section 115, CPC. The question of law is accordingly answered as under :–

> "In the case where remedy of appeal is not available under Section 173(2) of the Motor Vehicles Act. 1988, aggrieved party has a remedy of revision under Section 115 of CPC."

We hold that since the alternative efficacious remedy under Section 115 of the CPC is available, therefore, remedy under Articles 226 and 227 of the Constitution is not available to assail an award passed by the Tribunal where value in the claim is less than Rs. 10,000/- before this Court.

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390. MOTOR VEHICLES ACT, 1988 – Sections 140 & 173

Order passed u/s 140 of the Act – Is an award and is appealable u/s 173 of the Act.

Yallwwa (Smt.) and others v. National Insurance Co. Ltd. and another

Reported in 2007 (3) MPLJ 260 (SC)

Held:

The question which is required to be considered is what would be the meaning of the term 'award' when such a contention is raised. Although in a given situation having regard to the liability of the owner of the vehicle, a Claim Tribunal need not go into the question as to whether the owner of the vehicle in question was at fault or not, but determination of the liability of the insurance company, in our opinion, stands on a different fotting. When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner, although in terms of the insurance policy or under the Act, it would not be liable therefor.

In a given case, the statutory liability of an insurance company, therefore, either may be nil or a sum lower than the amount specified under section 140 of the Act. Thus, when a separate application is filed in terms of section 140 of the Act, in terms of section 168 thereof, an insurer has to be given a notice in which

event, it goes without saying, it would be open to the insurance company to plead and prove that it is not liable at all.

Furthermore, it is not in dispute that there can be more than one award particularly when a sum paid may have to be adjusted from the final award. Keeping in view the provisions of section 168 of the Act, there cannot be any doubt whatsoever that an award for enforcing the right under section 140 of the Act is also required to be passed under section 168 only after the parties concerned have filed their pleadings and have been given a reasonable opportunity of being heard. A Claims Tribunal, thus, must be satisfied that the conditions precedent specified in section 140 of the Act have been substantiated, which is the basis for making an award.

Furthemore, evidently, the amount directed to be paid even in terms of Chapter X of the Act must as of necessity, in the event of non-complaince of directions has to be recovered in terms of section 174 of the Act. There is no other provision in the Act which takes care of such a situation. We, therefore, are of the opinion that even when objections are raised by the insurance company in regard to its liability, the Tribunal is required to render a decision upon the issue, which would attain finality and, thus, the same would be an award within the meaning of section 173 of the Act.

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391. MOTOR VEHICLES ACT, 1988 – Section 147

Point of time when policy becomes operative – Vehicle was covered by a policy which was to expire by the midnight of 07.02.1996 – Accident took place at 4.30 a.m. on 08.02.1996 – Vehicle was insured by another policy on 08.02.1996 by same insurer, specifically indicating the time of commencement as 10 a.m. – Held, Insurance Company is not liable to pay compensation.

J. Kalaivani and others v. K. Sivashankar and another

Judgment dated 16.10.2001 passed by the Supreme Court in Civil Appeal No. 7211 of 2001, reported in (2007) 7 SCC 792

Held:

This question was again considered by another three-Judge Bench of this Court in *New Delhi Assurance Co. v. Bhagwati Devi, (1998) 6 SCC 534* and after following the dictum in the earlier decision the Bench has stated thus: (SCC p. 535, para 2)

> "The principle deduced is thus clear that should there be no contract to the contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. The law on this aspect has been put to rest by this Court. There is, thus, nothing further for us to deliberate upon."

Therefore the position has become well-nigh settled. The Court has to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry, as the case may be, of the policy of insurance. The copies of the erstwhile policy as well as the present policy have been produced for our perusal, the authenticity of which has not been questioned before us. The erstwhile policy shows that it expired by the midnight of 07.02.1996 by specific terms incorporated in the policy. The next policy has clearly indicated that it had commenced only at 10.00 a.m. on 08.02.1996. The interregnum created the void in respect of the vehicle vis-à-vis the Insurance Company. The unavoidable consequence of it is that the Insurance Company cannot now be mulcted with the liability in respect of the award granted by the Tribunal.

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392. MOTOR VEHICLES ACT, 1988 – Sections 147 (1) (b), 149 (1), 58 (2) (d) & 72 (2) (VII)

Bus had seating capacity of 42 passengers – Bus was insured in terms of S. 147 (1) (b) (ii) for 42 passengers – At the time of accident bus was carrying 90 passengers – 26 died, 63 persons were injured – Whether Insurance Company may be held liable for more passengers than permitted by the Certificate of Registration? Held, 'Any passenger' u/s 147 (1) (b) (ii) must be understood as the passenger authorized to be carried in vehicle – Liability of Insurance Company cannot extend to more than the number of persons covered by the Insurance Policy – Insurer can be made liable only in respect of number of passengers for whom the insurance can be taken under the Act – How to ascertain as to whom out of the overloaded passengers covered by the Insurance Policy – Methodology innovated – Higher of the 42 onwards made be added up and the Insurance Company be directed to deposit the lump sum – Thereafter it is to be distributed proportionately amongst all the claimants and balance should be recovered from the owner of the vehicle.

National Insurance Co. Ltd. v. Anjana Shyam and others

Reported in 2007 ACJ 2129

Held :

Section 58 of the Act makes special provisions in regard to transport vehicles. Sub-section (2) provides that a registering authority, when registering a transport vehicle, shall enter in the record of registration and in the certificate of registration various particulars. Clause (d) provides that if the vehicle is used or adapted to be used for carriage of passengers, the number of passengers for whom accommodation is provided. Thus the registration of vehicle, which alone makes it usable on the road, records the number of passengers to be carried and the certificate of registration also contains that entry. So, an insurance company insuring the passengers carried in a vehicle in terms of section 147

(1) (b) (ii) of the Act, can only insure such number of passengers as are shown in the certificate of registration. The position is reinforced by section 72 of the Act, which deals with grant of stage carriage permits. Sub-section (2) provides that when a permit is decided to be granted for a stage carriage, the Regional Transport Authority can attach to the permit one or more of the condition specified therein. Clause (vii) is the condition regarding the maximum number of passengers that may be carried in a stage carriage. Overloading also invites a consequence which can be termed penal. Section 86 of the Act provides for cancellation of a permit if any condition contained in the permit is breached. Therefore, the apparent wide words of section 147 (1) (b) (ii) of the Act have to be construed harmoniously with the other provisions of the Act, namely sections 58 and 72 of the Act. As early as in 1846, Dr. Lushington in Queen v. Eduljee Byranjee, (1846) 3 MIA 468, posited that to ascertain the true meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself. This court has accepted this approach in innumerable cases. Thus, the expression 'any passenger' must be understood as the passenger authorized to be carried in the vehicle and 'use of the vehicle' as permitted use of the vehicle. Affording of insurance for more number of passengers than permitted, would be illegal since in that case the manifest intention would be the overloading of the vehicle, something not contemplated by law. Thus, it is not possible to accept a contention that insurance can be taken to cover more passengers than permitted by the certificate of registration and the permit as a stage carriage and that it will cover all the passengers overloaded. Of course, in these cases, there is no dispute that the insurance cover took in only the permitted number of passengers.

In this situation, the insurance taken out for the number of permitted passengers can alone determine the liability of the insurance company in respect of those passengers. In terms of section 149 of the Act, the duty of the insurer is only to satisfy judgments and awards against the person insured in respect of the third party risk. Obviously, this is to the extent the third party risk is coverable and is covered. Section 149 of the Act speaks of judgment or award being obtained against any person insured by the policy and the liability of the insurer to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder subject to any claim the insurer may have against the owner of the vehicle. Section 149 could not be understood as compelling an insurance company to make payment of amounts covered by decrees not only in respect of the number of persons covered by the policy itself but even in respect of those who are not covered by the policy and who have been loaded into the vehicle against the terms of the permit and against the terms of the condition of registration of the vehicle and in terms of violation of a statute.

In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer

would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner and meet the claims of third parties subject to the exceptions provided in section 149 (2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a staged carriage insured in terms of section 147 (1) (b) (ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom the insurance can be taken under the Act and for whom insurance has been taken place as a fact and not in respect of other passengers involved in the accident in a case of overloading.

Then arises the question, how to determine the compensation payable or how to quantify the compensation since there is no means of ascertaining who out of the overloaded passengers constitute the passengers covered by the insurance policy as permitted to be carried by the permit itself? As this court has indicated, the purpose of the Act is to bring benefit to the third parties who are either injured or dead in an accident. It serves a social purpose. Keeping that in mind, we think that the practical and proper course would be to hold that the insurance company, in such a case, would be bound to cover the higher of the various awards and will be compelled to deposit the higher of the amounts of compensation awarded to the extent of the number of passengers covered by the insurance policy. Illustratively, we may put it like this. In the case on hand, 42 passengers were the permitted passengers and they are the ones who have been insured by the insurance company. 90 persons have either died or got injured in the accident. Awards have been passed for varied sums. The Tribunal should take into account, the higher of the 42 awards made, add them up and direct the insurance company to deposit that lump sum. Thus, the liability of the insurance company would be to pay the compensation awarded to 42 out of the 90 passengers. It is to ensure that the maximum benefit is derived by the insurance taken for the passengers of the vehicle, that we hold that the 42 awards to be satisfied by the insurance company would be the 42 awards in the descending order starting from the highest of the awards. In other words, the higher of the 42 awards will be taken into account and it would be the sum total of those higher 42 awards that would be the amount that the insurance company would be liable to deposit. It will be for the Tribunal thereafter to direct distribution of the money so deposited by the insurance company proportionately to all the claimants, here all the 90 and leave all the claimants to recover the balance from the owner of the vehicle. In such cases, it will be necessary for the Tribunal,

even at the initial stage, to make appropriate orders to ensure that the amount could be recovered from the owner by ordering attachment or by passing other restrictive orders against the owner so as to ensure the satisfaction in full of the awards that may be passed ultimately.

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393. MOTOR VEHICLES ACT, 1988 – Section 158 (6)
CENTRAL MOTOR VEHICLES RULES, 1989 – Rule 159
The information of motor vehicle accident involving death or bodily injuries by police to Tribunal is mandatory – Direction issued to Government to instruct the police officer to ensure compliance and take action against erring officials.

General Insurance Council & Ors. v. State of Andhra Pradesh & Ors.

Reported in AIR 2007 SC 2696

Held:

There is substance in the plea of Mr. G.N. Vahanvati, learned Solicitor General for the petitioner that if action in terms of Section 158 (6) is taken, it will rule out filing of false claim petitions and the job of the Claims Tribunals will become easier. It is stated by learned counsel that a large number of cases alleging sufficient injuries are being filed long after the accidents and this is adding to the pendency of the claims petitions. If action in terms of Section 158 (6) is taken, it will reduce considerably the filing of false claims. It has been highlighted in the writ petition as follows:

"26. Some salient facts which have emerged from a detailed study on a macro level which are relevant for the purposes of the instant writ Petition may be noticed:

26.1 As on date there are about 1.5 million cases pending in different Tribunals/High Courts/Supreme Court;

26.2 About 4 lakh new cases involving injury/death under the Motor Vehicles Act, 1988 are reported every year;

26.3 Claims under the Motor Vehicles Act, 1988 are reported after about 7 months from the date of accident;

26.4 Delay in reporting the claim promotes exaggeration and frauds;

26.5 Delay in reporting the claim makes investigation and fact verification extremely difficult;

26.6 Adjudication of cases take about 3 to 5 years;

26.7 Petitioners – Insurance Companies suffer on account of higher claim cost on account of delay in the adjudication of the claim petitions;

26.8 Strict implementation of Section 158(6) shall ensure speedier reporting to Insurance companies which in turn will ensure expeditious and efficient settlement of claims."

The language used in sub-section (6) of Section 158 mandates the police officer to forward a copy of the report to the Claims Tribunal having jurisdiction and to the concerned insurance company "as soon as any information regarding any accident involving death or bodily injury is recorded or a report under Section 158 is completed by the police officer."

Use of the expression 'as soon as' implies that there has to be promptitude in action. To do a thing 'as soon as possible' means to do it within a reasonable time, with an understanding to do it within the shortest possible time. [Per *Dysant, J. in King's Old County Ltd. v. Liquid Carbonic Can. Corporation Ltd., (1942) 2 WWR 603*]. 'As and when' and 'as soon as' are almost synonymous. Whenever these expressions are used in respect of time and place, they denote contemporaneous notion. 'As soon as' and 'forthwith' both are to be normally understood as allowing reasonable time, but latter is more peremptory than the former. But urgency is the hallmark of both expressions. Expression 'as soon as' may be stretched to mean 'as soon as' practicable. It has to be forwarded with promptitude.

Since there is a mandatory requirement to act in the manner provided in Section 158(6) there is no justifiable reason as to why the requirement is not being followed.

It is, therefore, directed that all the State Governments and the Union Territories shall instruct, if not already done, all concerned police officers about the need to comply with the requirement of Section 158(6) keeping in view the requirement indicated in Rule 159 and in Form 54. Periodical checking shall be done by the Inspector General of Police concerned to ensure that the requirements are being complied with. In case there is non-compliance, appropriate action shall be taken against the erring officials. The Department of Transport and Highway shall make periodical verification to ensure that action is being taken and in case of any deviation immediately bring the same to the notice of the concerned State Government/Union Territories so that necessary action can be taken against the concerned officials.

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394. MOTOR VEHICLES ACT, 1988 – Sections 165 (1) & 166

Motor accident – Tanker dashed against the truck going ahead due to application of brake all of a sudden by driver of the truck and due to failure of the tanker driver to maintain safe distance – Owner of the tanker made a claim in respect of damage to the property against its insurer – Held, such a claim is not made with respect to damage to property of a third party therefore it is not maintainable before Accident Claims Tribunal – Owner may file claim before Civil Court.

United India Insurance Co. v. Sandeep Kumar Gupta

Reported in 2007 (3) MPLJ 559

Held:

Tanker No. MKF 1329 met with an accident with the truck going ahead. The driver of the truck applied brake all of a sudden and due to that, the tanker dashed with the truck. A report of the accident was lodged at Police Station Mogaht Road, Khandwa. Compensation of Rs. 44,882 was claimed on account of the damage to the tanker. The insurer admitted the liability to make payment on the basis of survey on record. However it was case of the negligence of the driver of the tanker. The driver of the tanker had failed to maintain safe distance with the truck.

A Division Bench of this Court in The *New India Assurance Co. Ltd., Gwalior vs. P.N. Vijaywargiya and others, AIR 1992 M.P. 122* has laid down thus :-

> "10. The claim for compensation in respect of accidents involving the death or bodily injury may relate to the insured and/or a third person. However, the claim for compensation involving damages to any property to be entertainable before the Claims Tribunal must relate to a third party only and not the insured. The proviso provides for an option lying with the claimant. Where claim for compensation in respect of damage to property exceed rupees two thousand which would necessarily be of a third party (and not the insured), the claimant may have it adjudicated upon by the Tribunal or may have it referred to a Civil Court for adjudication. Where the claim does not exceed rupees two thousand it has to be tried by the Claims Tribunal. Section 110-F bars the jurisdiction of Civil Court where the claim is entertainable by a Claims Tribunal and a Claims Tribunal has been constituted for that area.
>
> 27. We answer the reference in the following terms :-
>
> "With effect from 2nd March, 1970, the date of coming into force of the Motor Vehicles (Amendment) Act, 1969 (Act No. 56 of 1969), a claim for compensation suffered for damage caused to property preferred by a third party in all circumstances can be tried by Motor Accidents Claims Tribunal in respect of accident where claim is preferred or preferable also for bodily injury suffered or death caused."

The Apex Court has considered the question recently in *Oriental Insurance Co. Ltd. v. Smt. Jhuma Saha and others, 2007 AIR SCW 859* and has held thus :-

> "10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. In *Dhanraj v. New India Assurance Co. Ltd. and Anr. (2004) 8 SCC 553 = 2004 AIR SCW 5438,* it is stated as follows:

> 8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.
>
> 10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words 'premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is no such insurance."

In view of decision of Division Bench of this Court in The *New India Assurance Co. Ltd., Gwalior vs. P.N. Vijaywargiya and others* (supra) particularly para 10 of the decision quoted above, I find that remedy of the owner to file claim before the Civil Court not under section 166 of Motor Vehicles Act.

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395. MOTOR VEHICLES ACT, 1908 – Section 166

Compensation – Quantum – Method of determination in case of children of tender age – Due to uncertainty with regard to academic pursuits, achievements in career etc., assessment of income cannot be on estimated basis – Death of 14 year old boy in motor accident – Award of Tribunal granting compensation of Rs. 1,00,000/- – Held, proper – Moreso when mother is only survivor.

Kaushlya Devi v. Karan Arora & Ors.

Reported in AIR 2007 SC 1912

Held:

In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parent's claim and prospective loss will find a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of *Taff Vale Rly. v. Jenkin, (1913) AC 1, and Lord Atkinson* said thus:

> "..... all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of

fact - there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence; but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from them." [See *Lata Wadhwa and Ors. v. State of Bihar and Ors., (2001) 8 SCC 197*]

This Court in *Lata Wadhwa's case* (supra) while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years.

In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.

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396. MOTOR VEHICLE ACT, 1988 – Sections 166, 2(14), 2(44) & 2(46) Tractor is not 'goods carriage' vehicle – Tractor attached with trolley – When may be 'goods carriage' and when not? Law explained.

Oriental Insurance Co. Ltd. v. Brij Mohan & Ors.

Reported in AIR 2007 SC 1971

Held:

In *National Insurance Co. Ltd. v. V. Chinnamma and others, (2004) 8 SCC 697,* this Court held: (SCC pp. 701-02, paras 14-16)

"14. An insurance for an owner of the goods or his authorized representative travelling in a vehicle became compulsory only with effect from 14-11-1994 i.e. from the date of coming into force of amending Act 54 of 1994.

15. Furthermore, a tractor is not even a goods carriage. The expression 'goods carriage' has been defined in Section 2(14) to mean

'any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods'

whereas 'tractor' has been defined in Section 2(44) to mean'

a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a roadroller'.

'Trailer' has been defined in Section 2(46) to mean

'any vehicle, other than a semi-trailer and a sidecar, drawn or intended to be drawn by a motor vehicle'.

16 . A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purposes, unless registered otherwise. It may be, as has been contended by Mrs K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to the market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of 'goods carriage' as contained in Section 2(14) of the Motor Vehicles Act, the case would be covered by the decision of this Court in *New India Assurance Co. Ltd. v. Asha Rani and others, (2003) 2 SCC 223* and other decisions following the same, as the accident had taken place on 24-11-1991 i.e. much prior to coming into force of the 1994 amendment."

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397. MOTOR VEHICLES ACT, 1988 – Section 166
EVIDENCE ACT, 1872 – Section 61

(i) Rashness and negligence, proof of – Law explained.
Held, proof of rashness and negligence on the part of driver of the vehicle is a *sine qua non* for maintaining an application u/s 166 of the Act.

(ii) Proof of a document – Objection as to admissibility – Must be raised at appropriate time – Once a part of the contents of the document is admitted in evidence then the party bringing it on record cannot be permitted to contend that the other contents had not been proved.

Oriental Insurance Co. Ltd. v. Premlata Shukla and others
Reported in 2007 (3) MPHT 225 (SC)

Held :

Where an accident occurs owing to rash and negligent driving by the driver

of the vehicle, resulting in sufferance of injury or death by any third party, the driver would be liable to pay compensation therefore. Owner of the vehicle in terms of the Act also becomes liable under the 1988 Act. In the event vehicle is insured, which in the case of a third party, having regard to sub-section (2) of Section 147 of the Act, is mandatory in character, the Insurance Company would statutorily be enjoined to indemnify the owner.

The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act.

In *Narbada Devi Gupta v. Birendra Kumar Jaiswal and another, (2003) 8 SCC 745,* whereupon reliance has been place, this Court held that contents of a document are not automatically proved only because the same is marked as an Exhibit. There is no dispute with regard to the said legal proposition.

However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the documents been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In *Hukam Singh, and others v. Smt. Udham Kaur 1969 PLR 908,* the law was correctly been laid down by the Punjab and Haryana High Court stating :–

> "8. Mr. G.C. Mittal, learned Counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D-1 produced by him. The Additional District Judge while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all

have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the Trial Court in letting in a certified copy of the previous deposition of Ram partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a Court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to appropriate and reprobate."

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398. MOTOR VEHICLES ACT, 1988 – Sections 168 & 173

Accident took place due to composite negligence of the drivers of the motor cycle and of a truck – Two girls were travelling as pillion riders on the motor cycle and died owing to injuries sustained in the accident – Deceased girls were not at fault – Tribunal deducted 30% amount out of compensation payable to LRs of deceased girls – Deeming it is to be paid by the owner, driver and insurer of motor cycle – Held, deceased were third parties and no deduction could be made from compensation – In such circumstances whole amount can be recovered from the owner, driver and insurer of one of the vehicles.

Munnalal Halwai and another v. Lallan Tiwari and others

Reported in 2007 (3) MPHT 221 (DB)

Held :

Coming to question of legality of deduction of 30% compensation made by Tribunal out of the amount payable, we find that deceased Shilpi and Laxmi were not responsible for accident, they were third parties and in the case of third party, law has been settled by Full Bench of this Court in *Sushila Bhadoriya and others Vs. M.P.S.R.T.C. and another, 2005, ACJ 831* that it is not necessary to sue all the joint tort feasors, it is open to sue any of them and to recover entire compensation from one of the joint tort feasors, it is open to the tort feasor to settle *inter se* liability in appropriate proceedings. Full Bench of this Court in *Sushila Bhadoriya and others Vs. M.P.S.R.T.C. and another* (supra), has laid down thus :–

"27. To sum up, we hold as under :–

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both

the vehicles. The claimant may implead the owner, driver and insurer of both the vehicles. The claimant may implead the owner, driver and insurer of both the vehicles or any one of them.

(ii) There cannot be apportionment of the liability of joint tort feasors. In case both the joint tort feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of law, there is no necessity to apportion the *inter se* liability of joint tort feasors."

In view of aforesaid, we hold that deduction of 30% amount made by the Tribunal was not proper, however, we deem it proper to place in on record that in another appeal (M.A. No. 587/06) a Division Bench of this Court has found that negligence of Ramesh Halwai was 20% and 80% was that of Lallan Tiwari, driver of the truck. We are adopting the extent of negligent to the aforesaid extent, but on account of negligence of Ramesh Halwai, no deduction is permissible to be made out of the amount payable on account of death of Shilpi and Laxmi as they were not responsible for the accident.

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399. N.D.P.S. ACT, 1985 – Section 37

Bail, grant of – Conditions prescribed u/s 37 (1) (b) (ii) must be fulfilled – Expression 'reasonable grounds' u/s 37 (1) (b) (ii), meaning of – Further held, before granting bail Court must record finding that accused is not likely to commit any offence.

Union of India v. Shiv Shanker Kesari

Judgment dated 14.09.2007 passed by the Supreme Court in Criminal Appeal No. 1223 of 2007, reported in (2007) 7 SCC 798

Held:

As Section 37 (1) (b) (ii) of the NDPS Act, 1985 itself provides that no person shall be granted bail unless the two conditions are satisfied. They are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

The expression used in Section 37 (1) (b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable cause for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

The Court while considering the application for bail with reference to Section 37 of the NDPS Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused

on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

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400. N.D.P.S. ACT, 1985 – Sections 42 and 43

CRIMINAL TRIAL :

(i) **Difference between seizure u/ss 42 and 43, applicability of – S.42 applies where search has to be made between sunset and sunrise and in relation to any drug or psychotropic substance which is kept concealed in any building, conveyance or place – S. 43 applies where search and seizure has to be made in public place – Information required to be taken down in writing and send a copy thereof to immediate superior officer within 72 hours only in cases covered by S. 42 and not in cases falling u/s 43.**

(ii) **Search and seizure – Illegality in – Effect of – Is not always fatal to prosecution case – It would have a bearing on the appreciation of evidence of the witness and other materials depending on the facts of each case – Non-examination of independent witnesses to search, effect of – Held, not always fatal to prosecution – In such cases evidence of witnesses should be scrutinized carefully after applying the rule of caution.**

Ravindran alias John v. Superintendent of Customs

Judgment dated 14.05.2007 passed by the Supreme Court in Criminal Appeal No. 1201 of 2005, reported in (2007) 6 SCC 410

Held :

(i) The appellant was arrested at the bus-stand. The appellant was, therefore, not searched and arrested in exercise of power of arrest, search, and seizure under Section 42 of the Act. Section 42 applies to a case where the officers concerned on information received, or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance, etc. and which is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset, enter into and search any building, conveyance or place. They are also vested with the power of search and seizure and authorised to arrest the person whom they have reason to believe to have committed any offence punishable under this Act. The facts of this case disclose that the arrest and seizure took place at the bus-stand and not in any building, conveyance or enclosed place. The High Court has rightly held that the case was covered by Section 43 of the Act which

does not require the information of any person to be taken down in writing. Similarly, there is no requirement that the officer concerned must send a copy thereof to his immediate official superior within 72 hours. We, therefore, hold in agreement with the High Court that Section 42 of the Act was not attracted to the facts of the case. It is, therefore, unnecessary to burden this judgment with decisions cited at the Bar regarding the effect of non-compliance with Section 42 of the Act.

(ii) Learned counsel for the appellant argued that the two independent witnesses in whose presence he had been searched were not examined at the trial. Reliance was placed on an observation contained in para 28 of the report in *State of W.B. v. Babu Chakraborthy, (2004) 12 SCC 201.* In the instant case it is not disputed that two independent witnesses were associated when the search was conducted. The search was, therefore, conducted in accordance with law. But it is argued that failure to examine the two witnesses is fatal to the case of the prosecution. In our view, this is not the correct legal position. Even where independent evidence is not examined in the course of the trial the effect is that the evidence of the official witnesses may be approached with suspicion and the court may insist on corroboration of their evidence. In *Koluttumottil Razak v. State of Kerala, (2000) 4 SCC 465* this Court observed:(SCC p. 468, para 7)

> "7. In the present case, unfortunately, apart from the evidence of the police officers there is absolutely no independent evidence to ensure confidence in our mind that the search was in fact conducted by PW 1 as he has claimed. As his evidence is required to be approached with suspicion due to violation of Section 42 of the Act we may require corroboration from independent sources that is lacking in this case."

In *M. Prabhulal v. Asstt. Directorate of Revenue Intelligence, (2003) 8 SCC 449* a similar question was raised in the context of the provisions of the NDPS Act. This Court held: (SCC p. 452, para 6)

> "6. Next, the learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in *Pradeep Narayan Madgaonkar v. State of Maharashtra, (1995) 4 SCC 255.* In the decision relied upon while observing that prudence dictates that evidence of police witnesses needs to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought."

In the instant case we find that the courts below have critically scrutinised the evidence of the prosecution witnesses applying the rule of caution and we find no reason to disagree with their findings.

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401. N.D.P.S. ACT, 1985 – Sections 50 & 55

(i) **Search and seizure – Mere asking the accused whether he would like to be searched by Gazetted Officer or Magistrate or by whom he was apprehended, is not sufficient compliance of S. 50 of the Act – Accused must be informed that they have legal right to be searched in presence of Gazetted Officer or Magistrate.**

(ii) **Seizure of contraband – Sample – Procedure – 2kg smack in four plastic bags seized – Two samples should have been taken from each packet i.e. total 8 packets – Mixing all the four bags and taking two sample packets from entire quantity – Erroneous procedure – It cannot be presumed that all four packets were of smack powder.**

Kesharimal R. Mahajan v. State of Madhya Pradesh
Reported in 2007 Cr.L.J. (NOC) 696 (M.P)

Held:

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.50 – Search and seizure – On receiving secret information accused on two motorcycles were apprehended and searched – Large quantity of contraband seized from person of accused – Notice under S. 50 alleged to be given to accused – Not supported/proved by independent witnesses – It is nowhere written in notice that accused were informed about their legal right to be searched in presence of Gazetted Officer or Magistrate – Amounts to non-compliance with S.50 – Accused entitled to be acquitted; on that ground.

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Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.55 – Seizure of contraband – Sample – Procedure – 2 Kg. Smack in four plastic bags seized from Jacket in four plastic bags seized from Jacket worn by accused No. 2 – Seizing Officer should have taken two samples from each packet i.e. total 8 packets - Instead he mixed seized smack in all four bags and took two samples from entire quantity – Erroneous – It cannot be presumed that all four packets contained smack powder.

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402. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 139, 118 (a) & 38**
Presumption u/ss 139 and 118 (a) is rebuttable – Whether presumption is rebutted or not depends upon case to case – Rebuttal of presumption is not beyond reasonable doubt but should be tested on preponderance of probabilities – It can be rebutted by material brought on record as well as by circumstances upon which the accused relies.

Kamla S. v. Vidhyadharan M.J. and another
Judgment dated 20.02.2007 passed by the Supreme Court in Criminal Appeal No. 233 of 2007, reported in (2007) 5 SCC 264

Held:

The Act contains provisions raising presumption as regards the negotiable

instruments under Section 118 (a) of the Act as also under Section 139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case.

The nature and extent of such presumption came up for consideration before this Court in *M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39* wherein it was held: (SCC p. 50, para 30)

> "30. Applying the said definitions of 'proved' or 'disproved' to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefor can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on the accused is not as high as that of the prosecution, it was held: (SCC p. 51, para 33)

> "33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

It was further observed that: (SCC p. 52, paras 38-39)

> "38. If for the purpose of civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a 'fortiori' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.
>
> 39. A presumption is a legal or factual assumption drawn from the existence of certain facts."

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403. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
GENERAL CLAUSES ACT, 1897 – Section 27
Compliance of giving a notice u/s 138 (b) of N.I. Act – Notice is sent by registered post by correctly addressing the drawer – Presumption raised u/s 27 of the General Clauses Act that notice is deemed to have been effected – It is not necessary to aver in the complaint that

notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved – However, presumption is rebuttable – Course open to drawer – He can within 15 days of the receipt of the summons, may make payment of the cheque amount and pray for rejection of complaint – If accused does not make payment within 15 days of receipt of summons, he cannot contend that there was no proper service of notice required u/s 138 of the N.I. Act.

C.C. Alavi Haji v. Palapetty Muhammed and another

Judgment dated 18.05.2007 passed by the Supreme Court in Criminal Appeal No. 767 of 2007, reported in (2007) 6 SCC 555

Held :

It is not necessary to aver in the complaint under Section 138 of the NI Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

Any drawer who claims that he did not receive the notice sent by post, can within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the General Clauses Act and Section 114 of the Evidence Act.

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404. PRECEDENTS :

Conception of precedent, principles of – Law explained.

(i) A decision is an authority for what it actually decided – What is the essence in a decision is its ratio and every observation found therein and not what logically flows from observations made therein.

(ii) Ratio of any decision is to be understood in the background of the facts of that case.

Ashok Bisen and others v. State of M.P. and others

Reported in 2007 (3) MPHT 267 (DB)

Held:

(i) In the case of *Uttaranchal Road Tronsport Corporation and others v. Mansaram National, AIR 2006 SC 2840,* the Apex Court has laid down the principles with regard to the conception of precedent. The relevant portion is as under :–

> "According to the well settled theory of precedents, every decision contains three basic postulates –

(i) findings of material facts, direct and inferential. An inferential finding of facts is the interference which the Judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts;

(iii) judgments based on combined effect of the above. A decision is an authority for what it actually decided. What is of the essence in a decision is its ratio and every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. [See state of Orissa vs. Sudhansu Sekhar Misra and others (AIR 1968 SC 647) and Union of India and others vs. Dhanwanti Devi and others, (1996) 6 SCC 44]. A case is a prcedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Queen vs. Leathem,* (1901) AC 495 (HL), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

(ii) In this context, we may refer with profit to the decision rendered in *Ambica Quarry Works etc. Vs. State of Gujarat and others, AIR 1987 SC 1073,* whereby it has been held as under :-

> "The ratio of any decision has to be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically flows from it." (Quoted from the placitum)

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405. PREVENTION OF CORRUPTION ACT, 1947 – Sections 4 & 5 (1) (d) Presumption regarding acceptance of illegal gratification – Once it is proved that the amount has been received, it is immaterial whether the said acceptance of amount was for him or for someone else – It is also not relevant whether accused was or not in a position to oblige the complainant – Though presumption is rebuttable but accused has to lead evidence to rebutt – Merely by saying 'false involvement', the onus is not discharged.

Girja Prasad (dead) by LRs. v. State of M.P.

Judgment dated 27.08.2007 passed by the Supreme Court in Criminal Appeal No. 885 of 2002, reported in (2007) 7 SCC 625

Held:

In our opinion, once the finding was recorded by the Trial Court that the accused had accepted the amount, it was wholly immaterial whether the said acceptance of amount was for him or for someone else. Even if an accused accepts the amount for 'someone else', he commits an offence.

The Trial Court observed that the presumption is not 'absolute', but is rebuttable and the accused can prove otherwise for getting rid of such presumption. This is true. But, in our view, the Trial Court lost sight of the fact that the case of the accused was of 'total denial' and of 'false involvement'. The presumption, in the circumstances, could not be said to have been rebutted by the accused.

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406. PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1) (e) Acquisition of assets disproportionate to known source of income – Special Court of which place has jurisdiction? In this regard situs of property may or may not have relevance – If situs of property has relevance for ascertaining his known source of income and disproportionate assets, Special Court, where property is situated, would have jurisdiction irrespective of the fact whether officer during check period was posted there or not.

V.K. Puri v. Central Bureau of Investigation

Judgment dated 27.04.2007 passed by the Supreme Court in Criminal Appeal No. 635 of 2007, reported in (2007) 6 SCC 91

Held :

For the purpose of proving the offence under Section 13 (1) (e) of the PC Act, 1988, on the one hand, known sources of income must be ascertained vis-à-vis the possession of property or resources which were disproportionate to the known sources of income of public servant and the inability of the public servant to account for it, on the other. One of the ingredients of the said offence is known sources of income. What is material therefor is that the criminal misconduct had been committed during the period the accused held office and not the places where he had held offices.

Each court, where a part of the offence has been committed, would be entitled to try an accused. The 1988 Act does not bar application of Section 178 CrPC. If application of Section 178 CrPC is not barred, the fact that the appellant has a part of his known sources of income at Delhi, would confer jurisdiction upon the Delhi Courts.

In a case involving Section 13 (1) (e) of the 1988 Act, what is necessary is as to whether keeping in view the period in question, commonly known as check period, the public servant has acquired wealth which is disproportionate to his known sources of income. It has nothing to do with individual case of bribery. It

has nothing to do with a series of acts culminated into an offence. In a case of this nature, the question of completion of any offence does not arise. A distinction exists between a case filed under Sections 13 (1) (c) and 13 (1) (d) of the 1988 Act, on the one hand and Section 13 (1) (e) thereof, on the other. The appellant is not accused of commission of offences under Sections 13 (1) (c) and 13 (1) (d). No other person has been charged with the offence of abetment and conspiracy. The question of finding out the place where the offence was completed, thus, does not arise in this case.

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407. PREVENTION OF CORRUPTION ACT, 1988 – Section 19

Sanction for prosecution – At the time of commission of offence accused was public servant – After departmental enquiry he was dismissed from service – Later on, chargesheet was filed without sanction from appropriate authority because accused was ceased to be public servant on the date of chargesheet – On appeal, order of dismissal was set aside and accused reinstated – Whether prosecution without sanction, in such case, bad in the eye of law? Held, No.

B.S. Goraya v. U.T. Chandigarh

Judgment dated 23.07.2007 passed by the Supreme Court in Criminal Appeal No. 1205 of 1999, reported in (2007) 6 SCC 397

Held :

Again in *CIT v. Elphinstone Spg. and Wvg. Mills Co. Ltd., AIR 1960 SC 1016* it was held that the fiction cannot be carried further from what it is intended for. The view was reiterated in *K.S. Dharmadatan v. Central Govt., (1979) 4 SCC 204* where the factual situation is almost identical. The factual position was that the appellant in that case was being prosecuted for commission of offence punishable under Sections 120-B, 420, 471 of the Indian Penal Code, 1860 (in short "IPC") and Section 5(1) of the Prevention of Corruption Act, 1947 (in short "the old Act"). At the time the charge-sheet was filed and the cognizance was taken by the Special Judge the appellant in that case had ceased to be a public officer. He filed an appeal before the President of India against the removal from service which was allowed by order dated 25-9-1972 and the order of removal from service was set aside. On his reinstatement the appellant filed application before the Special Judge praying that all further proceedings be dropped inasmuch as the prosecution against him was initiated in the absence of proper and valid sanction. The Special Judge as well as the High Court rejected the prayer. Before this Court the point raised was that the appellant must be deemed to be in service with effect from the date from which the departmental proceedings were initiated against him and therefore he was a public servant at the time the cognizance was taken by the Special Judge as no sanction under Section 6 of the old Act was obtained, the proceedings were void ab initio. This contention was not accepted by this Court with the observation that it is too well

settled that the deeming fiction should be confined only for the purpose for which it is meant.

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408. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 2 (q), 12, 18, 31 & 32

(i) Application u/s 12 of the Act – Not maintainable against ladies.

(ii) Protection order – Can be passed u/s 18 of the Act only – Breach thereof amounts to an offence and is punishable u/s 31 of the Act.

(iii) Expression 'complaint' appearing in S. 2 (q) of the Act, meaning of – Law explained.

Ajay Kant and others v. Smt. Alka Sharma

Reported in 2007 (4) MPHT 62

Held:

(i) As provided by Section 2 (q) of the Act, such application under Section 12 of the Act cannot be filed against the petitioner Nos. 3 & 4 who are the ladies. In Section 2 (q) of the Act the term respondent has been defined as under :-

> "(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

Thus, it is provided by this definition that an application can be filed by an aggrieved person including the respondent claiming relief under the Act only against the adult male person. However, as per the proviso appended to this provision, a wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner.

(ii) Section 31 of the Act provides penalty for breach of protection order passed by the Magistrate, which is punishable as an offence. A protection order can only be passed under Section 18 of the Act.

(iii) The word "complaint" as appeared in the definition of respondent under Section 2 (q) of the Act has not been defined anywhere in the Act Although it is not provided that the definition of complaint can be considered the same as provided under the Cr.P.C. but at the same time it is also not prohibited. In view of this, the definition of complaint can appropriately be seen in Cr.P.C. which goes as under :-

> "2. (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

It is clear by this definition that a complaint as provided in Cr.P.C. can only be for an offence. As mentioned hereinabove only to offences have been mentioned in this Act and those are (1) under Section 31 and (2) under Section 33. It appears that this word "complaint" appeared in the definition of respondent has been used for initiating proceedings for those two offences and an aggrieved wife or female living in a relationship in the nature of a marriage has been given a right to file a complaint against a relative of the husband or the male partner. This word complaint cannot be considered beyond the scope of the main provision of this Section which has been defined in first part of Section 2 (q) that is for any relief under this Act. As provided in Section 31 of the Act, a complaint can be filed against a person who has not complied with a protection order or interim protection order.

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409. RAILWAYS ACT, 1989 – Sections 123 (c) & 124-A

Untoward incident and negligence by passenger – Difference between – Law explained.

Immediately after deceased boarded the train, it moved with jerk due to which deceased fell down – Clearly an untoward incident.

Merely because entry was made from non-platform side, it is not negligence of deceased – Claim for compensation accepted.

Ramesh Kuraria v. Union of India

Reported in AIR 2007 MP 106 (DB)

Held:

Coming to the facts of instant case, the evidence has been adduced by claimant, no evidence in rebuttal was adduced by the railways. When we appreciate the evidence on record, we find that Shri Durgesh Nandan, an eye witness, has stated in his cross-examination that immediately after the deceased boarded the train, the train moved with a jerk due to which deceased fell down. He has also stated in Para 3 of his deposition that most of the bogies were jammed and packed with firewood bundles kept by woodcutters. Hence, deceased went to back side of the train to board. In view of aforesaid, it is clear that it is clearly an untoward incident as contemplated under Section 123 (c) (2) read with Section 124-A of Railways Act. Thus, railway cannot escape the liability to make payment of compensation. Deceased was not negligent. On the other hand, it is clear that railways has failed to provide the clear passage to board the train as wooden logs were kept due to which the way was obstructed. It is not a case of negligence on part of deceased who was carrying a valid ticket to travel which is also the finding of the learned Claims Tribunal. Statement is supported by parents of the deceased, namely, Shri Ramesh Kuraria and Smt. Meena Kuraria. The railways has failed to adduce any evidence to show that it was a self-inflicted injury, merely that entry was made from offside of the platform, that is, from the nonplatform side, it cannot be said to be negligence of deceased as there was no way to board into the bogies due to wooden logs which used to be kept regularly by wood-cutters, it was duty of railways to ensure that no such

wooden logs are put in the way just on the doors in routine manner so as to make it impossible to board the train. Train was started all of a sudden with a jerk, it was the reason due to which deceased felldown, it cannot be said that he was negligent in any manner, it cannot be said to be a case of self-inflicted injury as contended by Shri Rajneesh Gupta, learned counsel appearing for respondent. No evidence was adduced by the respondent to show that it was a case of self-inflicted injury, burden to bring case under Section 124-A Clause (a) to (e) was on railways. Thus, we award compensation of Rs. 4,00,000/- (Rs. Four Lacs only) as prescribed in Schedule framed under Rule 3 of the Railways Accidents And Untoward Incidents (Compensation) Rules, 1990. We also award interest at the rate of 6% per annum from the date of application as the rate of interests have gone down substantially though learned counsel on behalf of appellant has prayed for 7.5% interest on the strength of decision in *S. Bhagyalaxmi v. Union of India, 2006 ACJ 1559 : AIR 2006 Bom 53* which we decline. Cost of Rs. 2,000/- is also awarded to appellant.

●

410. REGISTRATION ACT, 1908 – Sections 60 & 61
EVIDENCE ACT, 1872 – Section 90

(i) Registration of document, proof of – Endorsement regarding registration – Is due compliance of Ss. 60 & 61 of Registration Act.

(ii) 30 years old document if produced from proper custody may presume to be genuine and correct unless otherwise proved – Law explained.

Ramrati Sharma and another v. Smt. Sheela Sharma and another

Reported in 2007 (3) MPLJ 589

Held:

Perused document Ex. D/1. On its last page, there is endorsement regarding registration. The Granth number and page number are given in the endorsement and it has been mentioned that the document has been registered. This certificate is due compliance of sections 60 and 61 of the Registration Act. Consequently, the arguments advanced by learned counsel for the appellants are devoid of substance. The document Ex. D/1 is sale deed dated 12.04.1957 and it has been registered on 13.04.1957. This document is more than 30 years old. As per section 90 of the Indian Evidence Act, if any document more than 30 years old is produced in evidence from proper custody, then it will be presumed that signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and that it was duly executed and attested by the person by whom it purports to be executed and attested, the genuineness and truthfulness of contents of the document shall be presumed, correct unless otherwise proved.

●

411. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (xi)

Proof of caste – Mere statement of aggrieved person that he belongs to Scheduled Caste and accused does not belong to Scheduled Caste or Tribe – Held, not sufficient – Prosecution has to prove it by producing other documentary evidence, caste certificate etc. – Further held, merely because statement of aggrieved person not challenged by cross – examination by itself not sufficient to prove the offence.

Manohar Sawai Rathod v. State of Maharashtra

Reported in 2007 Cr.L.J. (NOC) 785 (Bombay)

Held:

Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act, (33 of 1989), Section 3 (1) (xi) – Offence under – Aggrieved person belonged to Scheduled Caste or Scheduled Tribe – Proof – Mere statement of aggrieved person that he belongs to Scheduled Caste and accused does not belong to Scheduled caste of Scheduled Tribe, not sufficien' – Prosecution has to prove it by producing other documentary evidence, Caste Certificate etc. – Merely because statement of aggrieved person not challenged in cross examination by itself not sufficient to prove the offence. 1999 (2) Mh LJ 36, Followed.

●

412. SERVICE LAW :

Confidential report, scope of Judicial review – Law explained.

While exercising power of judicial review, Court cannot act as an appellate authority – It is required to be seen that arbitrarily any officer should not be punished because of the malafides of the Reporting Officer or Accepting Officer.

P. Bhargava v. Union of India and others

Reported in 2007 (3) MPLJ 150

Held:

In this context it would be profitable to refer to the scope of judicial review in such matters. The Apex Court in *State of M.P. and others vs. Vishnu Dutta (VS) Dubey and others, 1995 (supp) 4 SCC 461* has laid down that the Court cannot rewrite the confidential report, the performance has to be assessed by the Officer, in the hierarchy of the administration. The Courts exercising the powers of judicial review also cannot act as an appellate authority over the assessment of performance of an incumbent.

Thus, scope of judicial review in the case of confidential report is very limited. While exercising the powers of judicial review the Courts have to see that arbitrarily any officer should not be punished because of the mala fides of the Reporting Officer or Accepting Officer. The confidential report shows that the petitioner has never discussed that the Reporting Officer had consulted him

on any policy matters nor he shared any relevant information voluntarily. Petitioner also changed the decision taken by the Reporting Officer and destroyed/changed substantially without informing him. There are certain other comments which are mentioned and the reading of the whole of the general assessment by the Reporting Officer with regard to performance of the petitioner indicate that his performance was not satisfactory.

As we have carefully perused the file, we are of the view that the matter with regard to petitioner's consideration was considered at the level of Cabinet Secretary, Dy. Prime Minister and Prime Minister and at all levels the remarks have been approved. We do not find that all the authorities could have any mala fide against the petitioner particularly when writing of the confidential report in the present case series of officers were involved. Petitioner in the present case has also not alleged any mala fide against the Reporting Officer in the absence of any mala fides or otherwise, the remarks which have been approved at all levels at the time of considering the representation also, the confidential report of the petitioner, the same was confirmed and was not directed to be expunged.

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413. SERVICE LAW:

M.P. CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1966 - FR 22(D)

Deputation – Person appointed on higher post from one Government Department to another – Question of higher pay – Held – FR 22(D) of the Rules of 1966 apply to only regular promotion to the post and not applicable to cases of deputation – However, if he is fixed at the higher salary without any misrepresentation or fraud on his part then excess pay cannot be recovered without issuing any show cause notice.

Babulal Jain v. State of M.P. and others

Judgment dated 24.04.2007 passed by the Supreme Court in Civil Appeal No. 2125 of 2007, reported in (2007) 6 SCC 180

Held :

Fundamental Rule 22(D) refers to regular promotion to a post. It does not contemplate a situation of this nature. It is not applicable to a case of deputation. It certainly would not apply where a purported order of promotion has been effected from one cadre to the other and that too without following the statutory rules.

Thus, for all intent and purport, he was only deputed to that post. Having been placed on deputation to a post which carries higher responsibilities, some allowance could have been granted in his favour, but he could not have been placed on a higher scale of pay.

However, in a case of this nature, no recovery should be directed to be made. The appellant has discharged higher responsibilities. It is not a case

where he obtained higher salary on committing any fraud or misrepresentation. The mistake, if any, took place on a misconception of law. He was at least entitled to some allowances. In refixing his pay, his claim to that effect has not been considered. He has since retired. A sum of Rs. 22,000 has been recovered from him. Such recovery has been effected without issuing any show-cause notice. His case on merit in this behalf had not been considered by the Government and even by the Tribunal.

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414. SUCCESSION ACT, 1925 – Section 59
TRANSFER OF PROPERTY ACT, 1882 – Section 6 (d)
Will – Whether shebaitship can be subject matter of Will? Held, Yes – Further held, it is not a transfer – No bar u/s 6 (d) of the Transfer of Property Act.
S. Rathinam @ Kuppamuthu & Ors. v. L.S. Mariappan & Ors.
Reported in AIR 2007 SC 2134

Held:

A Will denotes a testamentary document. It means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is in its own nature ambulatory and revocable during his life.

A testator by his Will, may make any disposition of his property subject to the condition that the same should not be inconsistent with the laws or contrary to the policy of the State. A Will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing. It is not a transfer but a mode of devolution. [See *Beru Ram and Ors. v. Shankar Dass and Ors. AIR 1999 J & K 55*].

Sabyasachi Mukharji, J. in his concurring Judgment stated the law thus:

> "..... In my opinion it is well-settled by the authorities that shebaitship is a property which is heritable. The devolution of the office of shebait depends on the terms of the deed or the Will or on the endowment or the act by which the deity was installed and property consecrated or given to the deity, where there is no provision in the endowment or in the deed or Will made by the founder as to the succession or where the mode of succession in the deed or the Will or endowment comes to an end, the title to the property or to the management and control of the property as the case may be, follows the ordinary rules of inheritance according to Hindu law...."

A Will being not a transfer, the bar contained in Section 6(d) of the Transfer of Property Act, in our opinion, will have no application. We, therefore, agree with the findings of the Division Bench of the High Court that the Will is valid in law.

●

415. SUCCESSION ACT, 1925 – Section 63
REGISTRATION ACT, 1918 – Section 52
EVIDENCE ACT, 1872 – Section 71

(i) Attesting witness – A person put his signature before the testatrix had put her thumb on the Will and also not aware of any other person attesting the Will, cannot be said to be attesting witness within the meaning of S. 63 (c) of Succession Act.

(ii) Execution of Will – Not a mere formality – Evidence should be of the effect that Will was made over and explained to the testatrix and she had put her thumb impression as admission thereof.

(iii) Whether a certificate by Sub-Registrar at the time of registration may be treated as attestation? Held, if an authority signs a document in compliance of statutory duty does not become attesting witness.

(iv) Proof when attesting witness denies the attestation – Applicability of – An attesting witness denies or does not recollect execution of the document then it may be proved by other evidence – However, in case where attesting witness examined, fails to prove the due execution of Will, it cannot be said that witness denies or does not recollect the execution.

Benga Behera & Anr. v. Braja Kishore Nanda & Ors.
Reported in AIR 2007 SC 1975

Held:

If he had put his signature before the testatrix had put her thumb impression on the sale deed and the Will, he does not answer the requirement of attesting witness. He was not aware of any other person attesting the Will and the sale deed. P.W. 9 therefore, failed to prove execution or attestation of the Will. Not only he did not take any instruction from the testatrix before the Will was scribed, but the same was done on the dictation of P.W. 7. There is nothing on record to show that the testatrix understood the meaning, purport and contents of the Will. She had put her thumb impression in his presence. There is nothing on record to show that the Will was read over and explained to the testatrix and she had put her thumb impression upon understanding the contents and purport of the Will and put her thumb impression as admission thereof. A certificate to that effect was in ordinary course required to be given by the scribe of the Will, particularly when the same had been found to be given by him in the sale deed executed by her on the same day which was marked as Ext. 16.

Section 71 of the Evidence Act provides for one of the exceptions where it is not possible to strictly comply with the requirements of S. 68. Sections 69, 70 and 71 are exceptions to S. 68. Section 69 provides for proof of a document where no attesting witness is found. Section 70 provides for admission of execution by party to attesting document. Section 71 deals with a situation where the attesting witness denies or does not recollect the execution of the document and only in that eventuality, the document's execution may be proved by other evidence.

We may notice that this Court in *Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91* laid down the law on interpretation and applications of S. 71 of the Act in the following terms :

> "11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of S. 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the Will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the Will. Its execution may be proved by other evidence. Aid of S. 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the Will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the Court. It is clear from the language of S.71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under Cl. (c) of S. 63 of the Succession Act, it cannot be said that the will is proved as per S. 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the Will....."
>
> (Emphasis supplied)

A question has also been raised as to whether a certificate by Sub-Registrar at the time of registration proves attestation. A Sub-Registrar in the matter of registration of a document acts under the provisions of the Registration Act, 1908 (1908 Act). Section 52 of the 1908 Act prescribes the duty of Registering Officer when document is presented in terms thereof. The signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation. Section 58 prescribes the particulars to be endorsed on documents admitted to registration, such as:

> "(a) Signature of the person admitting the execution of the document;
>
> (b) Any money or delivery of goods made in presence of Registering Officer in reference to the execution of the document shall be endorsed by the Registering Officer in the document presented for Registration.
>
> Therefore, this is the only duty cast on the Registering Authority to endorse on the Will, i.e. to endorse only the admission or execution by the person who presented the document for registration. The

compliance of this provision leads to the legal presumption that the document was registered and nothing else."

If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of S. 3 of the Transfer of Property Act and S. 63 of the Succession Act. The term 'attestation' means:

> "to attest" is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument (ii) each of them has signed the instrument in presence of the executant.
>
> "Animus attestandi" is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness.

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416. TENANCY AND LAND LAWS:

Entries in Jamabandi Khatauni and Right of Records, value of – It does not confer title on person whose name appears in that record – It has only fiscal purpose i.e. payment of land revenue – No ownership is conferred on the basis of records.

Suraj Bhan and others v. Financial Commissioner and others

Judgment dated 16.04.2007 passed by the Supreme Court in Civil Appeal No. 1971 of 2007, reported in (2007) 6 SCC 186

Held :

There is an additional reason as to why we need not interfere with that order under Article 136 of the Constitution. It is well settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. It is settled law that entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent civil court (vide *Jattu Ram v. Hakam Singh, (1993) 4 SCC 403*). As already noted earlier, civil proceedings in regard to genuineness of will are pending with the High Court of Delhi. In the circumstances, we see no reason to interfere with the order passed by the High Court in the writ petition.

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417. TRANSFER OF PROPERTY ACT, 1882 – Sections 59, 62 & 111 (f)
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12

A suit for redemption to get possession is maintainable if the tenant/ mortgager surrenders the tenancy which depends upon the terms and conditions of the mortgage.

Tarachand v. Sagarbai alias Chaiyalibai

Judgment dated 09.05.2007 passed by the Supreme Court in Civil Appeal No. 2411 of 2007, reported in (2007) 5 SCC 392

Held :

Indisputably, the relationship of the parties were governed by the provisions of the 1961 Act. It contains a non obstinate clause protecting the rights of the tenant. The right of a tenant, however, would be available provided the tenancy continues. Once, the tenant ceases to be a tenant, question of applicability of the said Act would not arise.

Whether the rights of a tenant would give way to rights of a mortgagor would essentially depend upon the terms and conditions of the mortgage. If the tenant surrenders the tenancy either explicitly or by necessary implication, the terms of the deed of mortgage shall prevail. Having surrendered the tenancy, it would not lie in the mouth of a mortgagee to contend that as he had been a tenant, he would be entitled to the rights of a tenant.

The right of a usufructuary mortgagor to redeem the mortgage and recover possession is well known, and with a view to enforce the same, a mortgagor may file a suit foe redemption or may take recourse to the summary process of deposit and notice under Section 83 of the Transfer of Property Act.

A suit for redemption is essentially a suit for recovery of possession. When a debt is satisfied out of the usufructs of the property or otherwise, the mortgagor recovers possession on his title.

●

418. TRANSFER OF PROPERTY ACT, 1882 – Section 106
CIVIL PROCEDURE CODE, 1908 – Order XXI Rules 65 & 92
REGISTRATION ACT, 1908 – Sections 17(1) (b) (c) & 17 (2) (xii)

(i) Lease, essential ingredients of – Duration of lease – Lease deed permits the lessee to hold the land forever subject to the right of lessor to resume the land by giving one month's unconditional notice – No time period is fixed and no premium or consideration is fixed – Absolute discretion to resume the land at any time without assigning any reason – Cannot be construed as lease in perpetuity – At the best it can be construed as tenancy at will.

(ii) Public auction in pursuance of an order of the Court – Auction purchaser derives title on confirmation of sale – Sale certificate is issued evidencing such sale and title – No further deed is required for passing the title – Certificate granted by Civil or Revenue Officer – Does not fall under the category of 'non testamentary' documents so not required to be registered.

B. Arvind Kumar v. Govt. of India and others

Judgment dated 28.05.2007 passed by the Supreme Court in Civil Appeal No. 3540 of 2002, reported in (2007) 5 SCC 745

Held :

(i) The essential ingredients of a lease are : (a) there should be a transfer of a right to enjoy an immovable property; (b) such transfer may be for a certain

tremor in perpetuity; (c) the transfer should be in consideration of a premium or rent; (d) the transfer should be a bilateral transaction, the transferee accepting the terms of transfer.

To decide the duration of the lease, the deed has to be read as a whole. The deed dated 30.9.1921 does not specify any duration, but permits the lessee to hold the land forever subject to the right of the lessor to resume the land by giving one month's notice. There is no grant in perpetuity. The right of the lessor to resume the land by giving a month's notice, is unconditional at the absolute will and discretion of the lessor, whenever he desires. These terms indicate that though the instrument was termed as a lease, it only granted permissive occupation terminable at the will of the owner, and therefore, at best a tenancy at will. The absolute discretion to resume the land at any time without assigning any reason, and absence of any express grant in perpetuity and absence of any consideration, militates against the instrument being construed as a lease in perpetuity. The learned counsel for the appellant submitted that courts have taken the view that existence of a mere provision for forfeiture for non-payment of rent or other specified breach, in a deed granting permanent lease, will not make the lease non-permanent. Such line of decisions, may not assist the appellant as a provision for determination of the lease for a specified breach, is no way comparable to reservation of an absolute right to resume at will without assigning any reason, in a lease without consideration. We, therefore, affirms the finding that Ext. P-1, is not a lease in perpetuity. We, however, desist from examining the further question whether the lease itself was invalid for want of consideration, as such a contention was not raised in the written statement nor urged before the trial court or the High Court.

(ii) When a property is sold by public auction in pursuance of an order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. A sale certificate is issued to the purchaser only when the sale becomes absolute. The sale certificate is merely the evidence of such title. It is well settled that when an auction-purchaser derives title on confirmation of sale in his favour, and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. In this case, the sale certificate itself was registered, though such a sale certificate issued by a court or an officer authorised by the court, does not require registration. Section 17(2) (xii) off the Registration Act, 1908 specifically provides that a certificate of sale granted to any purchaser of any property sold by a public auction by a Civil or Revenue Officer does not fall under the category of non-testamentary documents which require registration under sub-sections (b) and (c) of Section 17(1) of the said Act.

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419. TRANSFER OF PROPERTY ACT, 1882 – Sections 122 & 123 EVIDENCE ACT, 1872 – Sections 17 to 21

(i) Valid gift, ingredients of – Law explained.

(ii) Admissions are substantive evidence, though they are not conclusive proof of the matters – When an explanations is made in respect of admission, then it does not bind a party to whom it amounts to estoppel.

Vrindavan and others v. Jai Pratap and others

Reported in 2007 (3) MPLJ 177

Held :

(i) Sections 122 and 123 of Transfer of Property Act, (hereinafter referred to as 'Act' for short) provides gift and the manner in which gift is to be made. For ready reference sections 122 and 123 of Act are quoted as under :–

> "122. *"Gift"* – "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.
>
> Acceptance when to be made – Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.
>
> 123. *Transfer how effected* – For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

In this case there is no evidence that the aforesaid gift was accepted on behalf of donee by Mahadev, because at that time Jaipratap was minor and was not in a position to accept the gift. Apart from section 123 of the Act a "gift" is to be made by a registered instrument and in this case in absence of any registered document as required under section 123 of the Act the aforesaid "gift" cannot be treated as a valid gift. The aforesaid document was compulsorily registrable and require stamp duty. In absence of which the document which has been produced before this Court under Order 41 Rule 27, Civil Procedure Code, cannot be accepted. And the application accordingly in this regard is rejected.

(ii) Now the question remains whether the pleading in the previous suit may be treated as an admission and on the basis of this whether the suit of plaintiff may be dismissed. The Apex Court in *Sita Ram Bhau Patil vs. Ramchandra Nago Patil and another, (1977) 2 SCC 49* considered that the admission before being used

against any person must not only be proved, but also the party must be confronted at the stage of cross-examination with its previous admission. For ready reference certain paragraphs of the aforesaid judgment are quoted as under :–

"15. The decision of this Court in *Bharat Singh's* case is that :

Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted.

Admissions proved are said in the decision to be admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether the party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions.

16. Counsel for the appellant submitted that the respondent even though not confronted with the admission would be bound by his admissions and the appellant would be entitled to rely on the admissions as admissible. There is the observation in the very next sentence in the aforesaid decision of this Court that "the purpose of contradicting the witness under section 145 of the Evidence Act is very much different from the purpose of proving the admissi[on] it, therefore, follows that admission is relevant and it has to be [pr]oved before it becomes evidence.

17. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of section 145 of the Evidence Act. The provisions in the Indian Evidence Act that 'admission is not conclusive proof' are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission ? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule" (See *Bal Gangdhar Tilak vs. Shrinivas Pandit*). The Judicial Committee in that case said, "It has to be observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed". The general principle is that before and person is to be faced with any statement he should be given an opportunity to see that statement and to answer the same. The specific statutory provision is contained in section 145 of the Indian Evidence Act that "A witness may be cross-examined as to previous

statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him". Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him."

In this case the plaint and written statement of previous suit were not proved by the respondents in accordance with law. Apart from this the aforesaid admission has been explained by the plaintiffs that in the previous suit, no relief was sought against the plaintiffs, so the aforesaid written statement was filed by the plaintiffs to support Mathura. This explanation has been considered by the trial Court and found that the aforesaid explanation is acceptable and found admission explained. When an explanation is made in respect of admission, then it does not bind a party to whom it amounts to estoppel. The aforesaid admission has to be determined by keeping in view the circumstances in which it was made and to whom it was made. Recently the Apex Court in *Rakesh Wadhawan and others vs. Jagdamba Industrial Corporation and others, (2002) 5 SCC 440* held thus :–

"The Appellate Authority, in arriving at a finding to the contrary, was deeply impressed by the fact that in the family litigation for partition of the property, the plaintiffs therein had alleged rate of rent of these premises as Rs. 1800 p.m. and this averment was not disputed by the landlord herein, who was one of the defendants therein. The Appellate Court overlooked some very relevant facts. The plaintiffs in the partition suit were not the landlords realizing the rent; that was the landlord herein who was realizing the rent from the tenants. By an interim order the Civil Court had restrained the tenants from making payment of rent to the litigating parties and had directed the rent to be deposited in the Court so as to be available for distribution to the party found entitled at the end to release of the rent. The written statement filed in the civil suit by the plaintiff landlord herein did not contain any admission as such; there was a mere failure to object. In that suit, rent payable by the tenants herein was not a subject-matter of controversy; it was a side issue. *Admission is only a piece of evidence and can be explained; it does not conclusively bind a party unless it amounts to an estoppel. Value of an admission has to be determined by keeping in view the circumstances in which it was made and to whom.* A mere failure to object cannot be placed on a footing higher than an admission. If the two clear-cut admissions made by the tenants, referred to hereinabove, were to be weighed against the landlord's mere failure to object about a wrong averment as to rate of rent in a case where it was not a point in issue, then no interference other

than the one of the rate of rent being Rs. 2000 p.m. could have been drawn. To that extent, the finding arrived at by the Appellate Authority suffers from perversity and should have been set aside by the High Court even in exercise of revisional jurisdiction. On the material available on record, no inference other than the rent of the suit premises being Rs. 2000 p.m., excluding water and electricity charges, can be drawn. We hold it accordingly." (Emphasis supplied)

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420. WILD LIFE (PROTECTION) ACT, 1972 – Sections 50(1), (2), (3-A), (4) & 39 Vehicle/articles seized under the Act – Power of Magistrate to release – Magistrate cannot exercise power u/s 457 Cr.P.C. – However, Magistrate is empowered u/s 451 Cr.P.C. to release when property is produced before him – Magistrate is required to consider statutory mandate that the seized property become the property of State – Application cannot be allowed in routine course.

State of U.P. and another v. Lalloo Singh

Judgment dated 20.07.2007 passed by the Supreme Court in Criminal Appeal No. 963 of 2001, reported in (2007) 7 SCC 334

Held:

In view of the clear language of Sub-section (1) of Section 50, Section 457 of the Code has no application. But there is another provision which also is relevant i.e. Section 451 of the Code that relates to the order for custody and disposal of the property pending trial in certain cases. It provides that when any property is produced before any criminal Court, during any enquiry or trial, the Court may make such order as it thinks fit for proper custody of such property pending the conclusion of the enquiry or the trial. It also provides for action to be taken when the property is subject to speedy and natural decay. If the Court otherwise thinks it expedient to do so, the Court may after recording such evidence as it thinks fit may pass orders for sale of the property or disposal thereof.

The real complexity of the issue arises as to what is the effect of the expression "to be dealt with according to law", as appearing in Sub-section (4) of Section 50 of the Act.

Learned Counsel for the appellant-State has submitted that when the property on seizure becomes the property of the Government, the Magistrate cannot pass any order for release thereof or interim custody thereof.

For appreciating this contention reference is necessary to Section 39 of the Act. Clause (d) of Sub-section (1) of Section 39 deals with a situation when any vehicle, vessel, weapon, trap or tool has been used for committing an offence and has been seized under the provisions of the Act. The twin conditions are that the vehicle, etc. must have been used for committing an offence and has been seized. Mere seizure of the property without any material to show that the same has been used for committing an offence does not make the seized

property, the property of the Government. At this juncture, it is also to be noted that under Sub-section (1) of Section 50 action can be taken if the official concerned has reasonable grounds for believing that any person has committed an offence under the Act. In other words, there has to be a reasonable ground for belief that an offence has been committed. When any person is detained, or things seized are taken before the magistrate, he has the power to deal with the same "in accordance with law". There is a significant addition in Sub-section (4) by Act 16 of 2003 i.e. requirement of intimation to the Chief Wild Life Wardon or the officer authorized in this regard as to the action to be taken by the Magistrate when the seized property is taken before a Magistrate. A combined reading of the omitted Sub-section (2) and the substituted Sub-section (3-A) of the Section 50 makes the position clear that prior to the omission, the officials under the Act had the power to direct release of the seized article. Under Sub-section (1), the power for giving temporary custody subject to the condition that the same shall be produced if and when required by the magistrate is indicative of the fact that the Magistrate can pass appropriate orders in respect of the purported seized property which is taken before him.

While dealing with an application for temporary release of custody, there cannot be a complete adjudication of the issues involved as the same is a matter for trial. While dealing with the application the Magistrate has to take into account the statutory mandate that the seized property becomes the property of the State Government when the same has been used for commission of an offence under the Act and has been seized.

It appears that insertion in Sub-section (4) relating to the intimation to the Chief Wild Life officer or the officer authorized by him is intended to give official concerned an opportunity of placing relevant materials on record before the Magistrate passes any order relating to release or custody. In appropriate cases on consideration of materials placed before him, prayer for such release or custody can be rejected.

It is to be noted that under Sub-section (1) of Section 50 for the purpose of entry, seizure, arrest and detention the official has to form the belief on reasonable grounds that the person has committed an offence under the Act. The Magistrate is, therefore, required to consider these aspects while dealing with the application as noted above. It cannot be a routine exercise. As noted above, the High Court is not justified in holding that Section 457 of the Code has application.

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421. WORDS & PHRASES :

Expression 'cause of action', meaning of – Law explained.

Cause of action is a bundle of essential facts necessary for the plaintiff to prove before he can succeed.

Alchemist Ltd. and another v. State Bank of Sikkim and others

Reported in 2007 (3) MPLJ 284 (SC)

Held :

It may be stated that the expression 'cause of action' has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908. It may, however, be described as a bundle of *essential* facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to judgment in his favour. Cause of action thus gives occasion for and forms the foundation of the suit.

The classic definition of the expression 'cause of action' is found in *Cooke vs. Gill, (1873) 8 CP 107 = 42 LJ PC 98,* wherein Lord Brett observed :

> "'Cause of action' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court".

For every action, there has to be a cause of action. If there is no cause of action, the plaint or petition has to be dismissed.

Mr. Soli J. Sorabjee, Senior Advocate appearing for the appellant Company placed strong reliance on *A.B.C. Laminart Pvt. Ltd. and anr. vs. A.P. Agencies, Salem, (1989) 2 SCC 163= AIR 1989 SC 1239 = JT 1989 (2) SC 38* and submitted that the High Court had committed an error of law and of jurisdiction in holding that no part of cause of action could be said to have arisen within the territorial jurisdiction of the High Court of Punjab and Haryana. He particularly referred to the following observations :

> "A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff".

It is clear that for the purpose of deciding whether facts averred by the petitioner-appellant, would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a *material, essential, or integral* part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'Part of cause of action', nothing less than that.

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PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING REMITTANCE OF COURT FEES PAYABLE IN SUITS BY STATE GOVERNMENT

No. F.17 (E) 34 (1)/05/21-B(II).– In exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (No. 7 of 1870) and in supersession of this Department's Notification No. F.17 (e) 34-05 (II), dated 17th May, 2005, the State Government hereby remits in whole of the State of Madhya Pradesh, the Court Fees payable in the cases filed by the State Government before a Court of competent jurisdiction.

Explanation: (a) "Court of competent jurisdiction" includes High Court of Madhya Pradesh, District Court, Session's Court, Chief Judicial Magistrate's Court, Magistrate's Court, Special Courts, Tribunal, Arbitration Tribunal, Boards, Board of Revenue, Revenue Courts Forum and any other Court, which the State Government may specify, by notification, from time to time, where any Court Fee is required to be paid;

(b) "Cases" includes writ petition, Application, Suits, Appeals, Counter claims, counter Appeal, Revision, Review, Miscellaneous applications in pending cases and Vakalatnama filed on behalf of the State Government, Rejoinders, Caveat, Process Fee etc.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,

सही/–

(सत्येन्द्र कुमार सिंह)

अपर सचिव,

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

भोपाल

न्यायिक अधिकारियों द्वारा लिये जाने वाले वाहन अग्रिम पर ब्याज दर के निर्धारण संबंधी ज्ञापन

मध्यप्रदेश शासन
वित्त विभाग
(मंत्रालय)

क्रमांक एल–9–2/2005/ब–7/चार भोपाल, दिनाँक 8 जनवरी, 2007

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, मध्यप्रदेश ग्वालियर,
समस्त विभागाध्यक्ष/समस्त संभागीय आयुक्त/समस्त जिलाध्यक्ष,
मध्यप्रदेश।

विषयः– न्यायिक सेवा के सदस्यों को दिये जाने वाले वाहन अग्रिम पर ब्याज दर का निर्धारण।

राज्य शासन द्वारा निर्णय लिया गया है कि न्यायिक सेवा के सदस्यों को स्वयं का मोटर वाहन क्रय किये जाने हेतु रूपये 2.50 लाख तक ऋण राज्य शासन द्वारा दिया जावेगा। वाहन क्रय अग्रिम के लिए 9.50 प्रतिशत वार्षिक ब्याज दर वित्तीय वर्ष 2006–07 के लिये निर्धारित की जाती हैं।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार

सही/–
(अजय चौबे)
अवर सचिव, मध्यप्रदेश शासन, वित्त विभाग

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