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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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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

When this issue of JOTI Journal reaches you, we have already said goodbye to the year 2008. It has been a wonderful journey for all of us as we all had the opportunity to learn something new and to enrich ourselves with new thoughts and information for the betterment of the society.

Almost in every issue of JOTI, great emphasis was laid in improving the quality and quantity of dispensation of justice as we are facing with the great task of reducing the mounting arrears of cases. Therefore, it becomes our moral responsibility to rekindle a ray of hope in the eyes of the common man so that he does not go empty handed from the temple of justice. We have an uphill task at hand for reposing the faith and trust of the people in the efficacy of justice delivery system. The first and foremost thing that we must do is we have to set targets within ourselves for completion of the work at hand. It involves a lot of zeal, commitment, dedication, devotion and self-discipline. Instead of focusing on contemporary regular trial, we must adopt new techniques of arrears reduction like Alternate Dispute Resolution, Mediation, Plea Bargaining etc.

With this objective in mind, the Institute was associated with the National Judicial Academy, Bhopal in organizing a three day (5th to 7th December, 2008) Judicial workshop on Planning and Management for Timely Justice for West Zone comprising of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan. In this workshop around 120 Judicial Officers including all District Judges of Madhya Pradesh participated. This workshop was very significant because the participants had an opportunity to interact with one another and they came out with pioneering suggestions for providing timely justice by way of planning and management.

This year also the Institute has a hectic schedule in imparting training to the newly recruited Civil Judges Class II. Besides this, Institutional Training Programme was also arranged for Additional District Judges in which 34 Judicial Officers, (both promoted as well as directly appointed) participated.

Today, is the age of Information and Communication Technology. Its application is gaining importance rapidly in every field. Simultaneously, on the other hand, mischievous elements are violating the laws which regulate the use of technology and also using this technology to commit crimes. Resultantly, the cases relating to cyber crimes are cropping up and coming before the Courts. Therefore, to acquaint and facilitate the Judicial Officers to deal with these cases effectively, the Institute in collaboration with the office of Controller of Certifying Authorities, Department of Science and Technology, Government of India, organized a workshop on Cyber Crimes, Cyber Forensics and Digital Signature Technology in which 30 Judicial Officers of all cadres participated. This will help the Judicial Officers in dealing with the menace relating to cyber crimes.

In Part I, articles of bi-monthly training programme find place.

Part II is complete with various latest important pronouncements by the Supreme Court and by our own High Court.

In Part III important notifications regarding amendments in Legal Services Authorities Act find place.

For better implementation and administration of the provisions of the Juvenile Justice (Care & Protection of Children) Rules, 2007, the Ministry of Women and Child Development has issued a notification titled Juvenile Justice (Care & Protection of Children) Rules, 2007 by the Amendment Act 33 of 2006 which are to be administered by the States. This finds place in Part IV of the Journal.

Before parting with this issue let me wish all of you a VERY HAPPY AND PROSPEROUS NEW YEAR 2009. We must strive harder to work at a faster pace so that we infuse in the system a breath of fresh air.

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New Year's eve is like every other night; there is no pause in the march of the universe, no breathless moment of silence among created things that the passage of another twelve months may be noted; and yet no man has quite the same thoughts this evening that come with the coming of darkness on other nights.

– HAMILTON WRIGHT MABIE

PART - I

घरेलू हिंसा से महिलाओं के संरक्षण अधिनियम, 2005 के अन्तर्गत मजिस्ट्रेट तथा अन्य अधिकारीगण की भूमिका एवं सीमाएं

न्यायिक अधिकारीगण
जिला भोपाल (म.प्र.)

भारतवर्ष में लगभग 6500 महिलाएं प्रतिवर्ष दहेज दानव की भेंट हो जाती हैं या तो, उनका वध कर दिया जाता है या उन्हें जला दिया जाता है अथवा उन्हें आत्महत्या के लिए विवश किया जाता है। भारतीय दण्ड विधान में, महिलाओं पर की गई हिंसा के संबंध में अनेक दाण्डिक प्रावधान है। इसके अतिरिक्त हिन्दु विवाह अधिनियम, 1955, हिन्दु दत्तक एवं भरण पोषण अधिनियम, 1956 दहेज प्रतिषेध अधिनियम, 1961 बाल विवाह अवरोध अधिनियम, 1929 इम्मोरल ट्राफिक (प्रिवेंशन) एक्ट, 1956 प्रिवेंशन ऑफ इम्मोरल ट्राफिक एक्ट, 1972 एम.टी.पी. एक्ट, 1972 पी.एन.डी.टी. एक्ट, 1994 तथा मानव अधिकार संरक्षण अधिनियम, 1993 के द्वारा भी वांछित परिणाम प्राप्त नहीं किये जा सके हैं, भले ही महिलाओं के कल्याण के लिए भारतीय संविधान में आर्टीकल 15 एवं 16 में विशेष व्यवस्था की गई है । अंतर्राष्ट्रीय स्तर पर राष्ट्र संघ ने 1993 में, यह प्रस्ताव पारित किया कि सभी सदस्य देश महिलाओं पर होने वाली समस्त प्रकार की हिंसाओं को रोकने के लिये अपने–अपने देश में अधिनियम पारित करें और उसका प्रभावी क्रियान्वयन हो। इसी तारतम्य में ''भारत वर्ष में घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम 2005'' जिसे कि आगे अधिनियम के रूप में संबोधित किया जावेगा, पारित किया गया और उसके सफल क्रियान्वयन हेतु, ''घरेलू हिंसा से महिलाओं के संरक्षण नियम–2006'' भी निर्मित किये गये जिन्हें आगे नियम से उल्लेखित किया जावेगा। अधिनियम के वांछित प्रावधानों को समझने के लिए, निम्न परिभाषाएं अध्ययन योग्य हैं।

घरेलू हिंसा की परिभाषा में अधिनियम की धारा 3 के अंतर्गत निम्नलिखित व्यवहारों को सम्मिलित किया गया है।

1. ऐसा किसी भी तरह का दुष्ट बर्ताव जिससे पीड़ित दुखी महिला की स्वास्थ्य, सुरक्षा जीवन तथा अन्य सुख से रहने की इच्छा का हनन होता हो या ऐसा दुराचरण जो घरेलू महिला को शारीरिक या मानसिक दुख देता हो। इसमें मारपीट, भावनात्मक दुख, आर्थिक दुख तथा नाजायज शारीरिक संबंध बनाने की कोशिश गाली या ताने देना आदि शामिल है।
2. कोई इस प्रकार का अत्याचार या हिंसा, जिसमें किसी महिला को इस बात के लिए मजबूर किया जाये कि वह किसी तरह की नाजायज मांग या दहेज की पूर्ति करे ।
3. उपरोक्त वर्णित दुराचरण की कोटि का इस प्रकार का कृत्य, महिला के किसी अन्य रिश्तेदार के विरूद्ध इस उद्देश्य से कि घर में रहने वाली घरेलू महिला पर उसका दबाव पड़े। किसी अन्य प्रकार का दुख जिससे शारीरिक या मानसिक कष्ट महिला को हो। शारीरिक कष्ट में उसके स्वास्थ्य को नष्ट करने की चेष्टा, मारपीट, डराना–धमकाना तथा हर तरह के नाजायज शारीरिक संबंध बनाने की कोशिश या अपमान जो महिला की इज्जत आबरू के खिलाफ हो, वह भी शामिल है ।

4. मौखिक और भावनात्मक प्रताड़ना में, उसको अपमानित करना, उसको गाली देना या उसका उलाहना देना, इस कारण से कि उसे पुत्र या पुत्री या संतान नहीं हुई, भी शामिल है। इसी तरह की प्रताड़ना उसके किसी रिश्तेदार के विरूद्ध करना भी उसमें शामिल किया गया है।

5. आर्थिक कष्टों में शामिल है कि किसी प्रकार की ऐसी कार्यवाही जिसमें महिला को खाने–पीने के साधन कम कर दिये जायें या न दिये जाये। उसके स्वयं के कपड़े लत्ते, जेवर, बैंक में जमा राशि या अन्य सम्पत्ति से उसको बेदखल किया जाए या यह सब उससे छीन लिया जाये या निवास के लिए आवश्यक साधन या सुविधाएं उससे छीन ली जावें।

"घरेलू संबंध या रिश्तेदारी" जो कि अधिनियम की धारा 2 (एफ) में परिभाषित है से तात्पर्य यही है कि जब कोई महिला अपने आपसी रिश्तेदारी के कारण किसी मकान में रह रही है अथवा वह और अनावेदक एक ही पिता की संतान हो या उनके बीच विवाह हुआ हो अथवा महिला को गोद लिया गया हो अथवा महिला किसी अन्य प्रकार के संबंध के कारण अनावेदक के साथ संयुक्त रूप से निवास कर रही हो, इस अधिनियम के अंतर्गत है, दुखी महिला किसी भी आयु, वर्ग, जाति, धर्म, नागरिकता की हो सकती है।

अधिनियम के अंतर्गत प्रयुक्त शब्दावली "सम्मिलित परिवार का ग्रह" जो अधिनियम की धारा 2 (एस) में परिभाषित है, की परिभाषा इस प्रकार है कि, यह एक ऐसा गृह या घर या उसका भाग है जहां दुखी व्यक्ति और दोषी व्यक्ति अपने घरेलू संबंधों के कारण साथ–साथ निवास कर रहे हों या इससे आशय है, ऐसे शामिल या सम्मिलित गृह या सम्मिलित रहवास जिसमें महिला को बे रोकटोक निवास का अधिकार है भले ही उस मकान में उसका कोई मालिकाना हक हो अथवा न हो।

बसेरा गृहों/आश्रय स्थल/ संरक्षण गृह से तात्पर्य अधिनियम के प्रयोजनों के लिए राज्य शासन द्वारा अधिसूचित निवास स्थान से हैं।

अधिनियम के सफल क्रियान्वयन हेतु पुलिस अधिकारी, सेवाप्रदाता, संरक्षण अधिकारी एवं मजिस्ट्रेट की नियुक्ति का प्रावधान है तथा न्यायिक मजिस्ट्रेट को, परामर्श दाता एवं कल्याण विशेषज्ञ से सहयोग लेने के लिए भी अधिकृत किया गया है।

1. संरक्षण अधिकारी की भूमिका–

संरक्षण अधिकारी का यह उत्तरदायित्व है कि वह किसी महिला के विरूद्ध घरेलू हिंसा की जानकारी प्राप्त होने पर उस महिला को इस अधिनियम के अंतर्गत उपलब्ध हो सकने वाली सहायताओं और राहत की जानकारी दे व उसे समझाए कि न्यायालय से, घरेलू हिंसा के रोकथाम हेतु आदेश तथा क्षतिपूर्ति धन, भरण पोषण व्यय, बच्चों की देखरेख एवं चिकित्सा सुविधा हेतु आदेश प्राप्त कर सकती है। संरक्षण अधिकारी पीड़ित महिला को सहायता प्राप्त कराने के लिए सेवाभावी महिलाओं से सहयोग दिलवाएगा, विधिक सहायता अधिनियम के अंतर्गत वांछित आर्थिक सहयोग प्राप्त कराएगा तथा दोषी व्यक्तियों के विरूद्ध भारतीय दण्ड विधान की धारा–498 क के अपराध के लिए अभियोग पत्र प्रस्तुत करने में सहायता करेगा। संरक्षण अधिकारी का यह भी कर्तव्य है कि वह घरेलू हिंसा की रिपोर्ट निर्धारित प्रारूप में विधि विहित तरीके से तैयार कर संबंधित आरक्षी केन्द्र के भारसाधक पुलिस अधिकारी को व उस क्षेत्र के सेवा प्रदाता को अग्रेषित करें साथ ही अधिकारिता वाले मजिस्ट्रेट को निर्धारित प्रारूप में वांछित अनुतोष हेतु, आवेदन पत्र प्रस्तुत करें व उसके क्षेत्र में उपलब्ध संरक्षण गृहों व चिकित्सीय सुविधाओं की एक सूची निर्मित करे व पीड़ितों को आश्रय स्थल/संरक्षण गृह में

अधिवासित कराकर सूचना संबंधित मजिस्ट्रेट व आरक्षी केन्द्र को करे। ऐसे संरक्षण अधिकारी प्रत्येक जिले में नियुक्ति किये जावेंगे, जिनका क्षेत्र परिभाषित रहेगा व जहां तक हो सके ऐसे पदों पर महिलाओं को नियुक्त किया जावेगा जिससे कि पीड़ित महिला सलाह लेने में व शिकायत करने में कोई हिचक या परेशानी का अनुभव न करें। संरक्षण अधिकारी संबंधित मजिस्ट्रेट के निर्देशानुसार व उनके नियंत्रण में कार्य करेगा। संरक्षण अधिकारी के विविध कर्तव्य एवं उत्तरदायित्व है जिनका उल्लेख नियम–8 की कंडिका–1 की उपकंडिका (1) लगायत (14) में, कंडिका–2 के भाग (अ) तथा (ब) तथा नियम 10 में विस्तार पूर्वक उल्लिखित है, जो निम्नानुसार है :–

नियम 8 की कंडिका 1 की उपकंडिकाएं (1) लगायत (14)

(1) व्यथित व्यक्ति को, अधिनियम के अधीन कोई शिकायत करने के लिए यदि व्यथित व्यक्ति इस प्रकार की इच्छा व्यक्त करे, सहायता देना,

(2) अधिनियम के अधीन व्यथित व्यक्ति को प्रारूप–4 में दिये गये अधिकारों की जानकारी उपलब्ध कराना जो अंग्रेजी या स्थानीय भाषा में होगी,

(3) किसी व्यक्ति को धारा 12 या धारा 23 की उपधारा (2) या अधिनियम या उसके अधीन बनाये गये नियमों के किन्हीं उपबंधों के अधीन कोई आवेदन करने के लिए सहायता करना,

(4) धारा 12 के अधीन कोई आवेदन देने पर प्रारूप–5 में व्यथित व्यक्ति के परामर्श से उस स्थिति में अंतर्वलित खतरों का निर्धारण करने के पश्चात् ''सुरक्षा योजना'' तैयार करना जिसके अंतर्गत व्यथित व्यक्ति को और घरेलू हिंसा से निवारित करने के उपाय भी हैं, और

(5) व्यथित व्यक्ति को राज्य विधिक सहायता सेवा प्राधिकरण द्वारा विधिक सहायता उपलब्ध कराना,

(6) व्यथित व्यक्ति या किसी बालक को किसी चिकित्सा सुविधा या चिकित्सा सहायता प्राप्त करने में सहायता करना जिसके अंतर्गत चिकित्सा सुविधा प्राप्त करने के लिए परिवहन के साधन उपलब्ध कराना भी है,

(7) व्यथित व्यक्ति या किसी बालक को आश्रय के लिए परिवहन प्रदान करने के लिए सहायता करना,

(8) अधिनियम के अधीन रजिस्ट्रीकृत सेवा प्रदाताओं को सूचना देना कि अधिनियम के अधीन कार्यवाहियों में उनकी सेवाओं की अपेक्षा की जा सकेगी और अधिनियम के अधीन धारा 14 की उपधारा (1) के अधीन या धारा 15 के अधीन कल्याण विशेषज्ञों को कार्यवाहियों में परामर्शियों के रूप में उसके सदस्यों को नियुक्ति करने के लिए सेवा प्रदाताओं से आवेदन आमंत्रित करना,

(9) परामर्शदाताओं के रूप में नियुक्ति के लिए आवेदनों की संवीक्षा करना और मजिस्ट्रेट को उपलब्ध परामर्शियों की सूची भेजना,

(10) उपलब्ध परामर्शदाताओं की सूची को तीन वर्ष में एक बार नये आवेदन मांगकर पुनरीक्षित करना और उस आधार पर परामर्शदाताओं की पुनरीक्षित सूची को संबद्ध मजिस्ट्रेट को भेजना,

(11) धारा 9, धारा 12, धारा 20, धारा 21, धारा 22, धारा 23 या अधिनियम या इन नियमों के किन्हीं उपबंधों के अधीन अग्रेषित रिपोर्ट और दस्तावेजों के अभिलेख या प्रतियां रखना,

(12) व्यथित व्यक्ति और बालकों को यह सुनिश्चित करने के लिए कि व्यथित व्यक्ति का घरेलू हिंसा की घटना की रिपोर्ट के परिणाम स्वरूप उत्पीड़न नहीं किया जा रहा है या दबाव नहीं डाला जा रहा है, सभी संभव सहायता उपलब्ध कराना,

(13) व्यथित व्यक्ति या व्यक्तियों, पुलिस और सेवा प्रदाता के बीच अधिनियम या इन नियमों के अधीन उपबंधित रीति से संपर्क रखना,

(14) अपनी अधिकारिता के क्षेत्र में सेवा प्रदाताओं, चिकित्सा सुविधा और आश्रयगृहों के उचित अभिलेख रखना।

नियम 8 की कंडिका 2 की उप कंडिकाएं (क) एवं (ख)

2.– संरक्षण अधिकारी को धारा 9 की उपधारा (1) के खंड (क) से (ज) के अधीन, समनुदेशित दायित्वों और कृत्यों के अतिरिक्त प्रत्येक संरक्षण अधिकारी का निम्नलिखित कर्तव्य होगा –

(क) घरेलू हिंसा से व्यथित व्यक्तियों को अधिनियम और इन नियमों के उपबंधों के अनुसरण में संरक्षण देना,

(ख) व्यथित व्यक्ति के विरूद्ध घरेलू हिंसा की आवृतियों को रोकने के लिए, अधिनियम और इन नियमों के उपबंधों के अनुसरण में सभी युक्तियुक्त उपाय करना।

नियम 10 की कंडिका 1 की उपकंडिकाएं "क" लगायत "च" उपकंडिकाएं 2 व 3 संरक्षण अधिकारी के कतिपय अन्य कर्तव्य :–

(1) यदि मजिस्ट्रेट द्वारा लिखित में ऐसा करने का निर्देश दिया जाये तो संरक्षण अधिकारी :–

(क) साझी गृहस्थी में निवास के परिसर में निरीक्षण करेगा और आरंभिक जांच करेगा यदि न्यायालय अधिनियम के अधीन व्यथित व्यक्ति को एकपक्षीय अंतरिम राहत देने के संबंध में स्पष्टीकरण की अपेक्षा करेगा ऐसे गृह निरीक्षण के लिए आदेश पारित करेगा,

(ख) समुचित जांच करने के पश्चात उपलब्धियों, आस्तियों, बैंक खातों या न्यायालय द्वारा निदेशित किये गये किन्हीं अन्य दस्तावेजों की रिपोर्ट फाइल करेगा,

(ग) व्यथित व्यक्ति को उसके व्यक्तिगत सामान का कब्जा कराएगा जिसके अंतर्गत उपहार और आभूषण साझी गृहस्थी का सामान भी है,

(घ) व्यथित व्यक्ति को बालकों की अभिरक्षा पुनः प्राप्त कराने में सहायता देगा और उनके अधीक्षण के अधीन उनके निरीक्षण के अधिकार को, जो न्यायालय द्वारा निदेशित किये जाएं, सुनिश्चित करेगा,

(ड.) मजिस्ट्रेट द्वारा निदेशित रीति में अधिनियम के अधीन कार्यवाहियों में आदेशों जिसमें धारा 12, धारा 18, धारा 19, धारा 20, धारा 21 या धारा 23 के अधीन आदेश भी हैं, को ऐसी रीति में जो न्यायालय द्वारा निदेशित किये गये, प्रवर्तन कराने में न्यायालय की सहायता करेगा,

(च) यदि अभिकथित घरेलू हिंसा में अंतर्वलित किसी अस्त्र के अधिहरण में, यदि अपेक्षित हो, पुलिस की सहायता लेगा।

(2) संरक्षण अधिकारी ऐसे अन्य कर्तव्यों का भी अनुपालन करेगा, जो उसे राज्य सरकार या मजिस्ट्रेट द्वारा अधिनियम और इन नियमों को समय–समय पर प्रभावी करने के लिए समनुदेशित किये जाएं।

(3) मजिस्ट्रेट किसी मामले में प्रभावी अनुतोष के लिए आदेशों के अतिरिक्त, मामलों के अच्छे प्रबंधन के लिए अपनी अधिकारिता के संरक्षण अधिकारियों को साधारण व्यवहार से संबंधित निर्देश भी जारी कर सकेगा और संरक्षण अधिकारी उनको पूरा करने के लिए बाध्य होगा।

2. सेवा प्रदाता की भूमिका–

सेवा प्रदाता की भूमिका नियम 13 के अंतर्गत नियुक्त ऐसी पंजीकृत समिति या संस्था सेवा प्रदाता होगी, जो कि शासन द्वारा चिन्हित कर नियुक्त की जाती है। उसका कर्तव्य होगा कि वह घरेलू हिंसा से पीड़ित महिलाओं द्वारा चाही गई सहायता का आवेदन पत्र, उस क्षेत्र पर अधिकारिता रखने वाले मजिस्ट्रेट एवं संरक्षण अधिकारी को उपलब्ध करावें। पीड़ित महिला की चिकित्सीय जांच कराये व जांच प्रतिवेदन की प्रतिलिपि संरक्षण अधिकारी तथा संबंधित आरक्षी केन्द्र को, जहां घरेलू हिंसा की घटना हुई है, वहां भेजें। यह भी सुनिश्चित करें कि पीड़ित महिला को संरक्षण गृह में आश्रय प्राप्त हो जावे, यदि वह ऐसी अपेक्षा करती है व इस संबंध में संबंधित आरक्षी केन्द्र को सूचित करें। सेवा प्रदाता द्वारा प्रयोग में आने वाली प्रक्रिया एवं उसके द्वारा किये जाने वाले अपेक्षित सहयोग का उल्लेख नियम–14 की कंडिका। लगायत 17 में विस्तार पूर्वक उल्लिखित है जो कि निम्नानुसार है :–

(1) परामर्शदाता, न्यायालय या संरक्षण अधिकारी या दोनों के साधारण अधीक्षण के अधीन कार्य करेंगे।

(2) परामर्शदाता, व्यथित व्यक्ति या दोनों पक्षकारों की किसी सुविधाजनक स्थान पर बैठक बुलाएंगे।

(3) परामर्श के लिए बुलाए गए कारकों के अंतर्गत एक कारक यह भी होगा कि प्रत्यर्थी यह वचनबंध देगा कि वह ऐसी घरेलू हिंसा से जो परिवादी द्वारा शिकायत की गई है, दूर रहेगा और समुचित मामले में यह वचनबंध देगा कि वह मिलने का प्रयास नहीं करेगा या परामर्शदाता के समक्ष परामर्श कार्यवाहियों या सक्षम अधिकारिता के न्यायालय के आदेश से विधि या आदेश से अनुज्ञेय के सिवाय संसूचना की किसी रीति में पत्र या टेलीफोन, इलेक्ट्रानिक मेल या किसी अन्य माध्यम के द्वारा हो, संपर्क करने का प्रयास नहीं करेगा।

(4) परामर्शदाता, परामर्श कार्यवाहियों को यह ध्यान में रखते हुए संचालित करेगा कि परामर्श यह आश्वासन प्राप्त करने की प्रकृति का हो कि घरेलू हिंसा की पुनरावृत्ति नहीं होगी।

(5) प्रत्यर्थी को परामर्श के दौरान घरेलू हिंसा के अभिकथित कृत्य के लिए किसी भी प्रति–औचित्य (counter-justification) का अभिवाक् करने के लिए अनुज्ञात नहीं किया जाएगा और प्रत्यर्थी द्वारा घरेलू हिंसा के कृत्य के लिए कोई न्यायोचित परामर्श कार्यवाहियां, जो कार्यवाहियां प्रारंभ होने से पूर्व प्रत्यर्थी की जानकारी में होनी चाहिये, के भाग को अनुज्ञात नहीं किया जाएगा।

(6) प्रत्यर्थी परामर्शदाता को यह वचनबंध देगा कि वह व्यथित व्यक्ति द्वारा शिकायत में वर्णित ऐसी घरेलू हिंसा करने से अपने आपको दूर रखेगा और उपयुक्त मामलों में यह वचन देगा कि वह परामर्शदाता के समक्ष परामर्श कार्यवाहियों के सिवाय मिलने या पत्र या टेलीफोन या ई–मेल या किसी अन्य माध्यम से संसूचना करने का प्रयास नहीं करेगा।

(7) यदि व्यथित व्यक्ति इस प्रकार की इच्छा करे, तो परामर्शदाता मामले के समाधान के लिए प्रयास करेगा।

(8) परामर्शदाता के प्रयासों की सीमित परिधि में यह सम्मिलित है कि वह व्यथित व्यक्ति की शिकायत को समझे और शिकायत को सर्वोत्तम संभव रीति से दूर करे और शिकायतों को दूर करने हेतु उपचार या उपाय खोजने पर ध्यान केन्द्रित करे।

(9) परामर्शदाता व्यथित व्यक्ति की शिकायत के समाधान के लिए परामर्श के लिए पक्षकारों द्वारा सुझाये गये उपायों या उपचारों को ध्यान में रखते हुए समझौतों के निबंधनों की पुनः रचना करते हुए शिकायतों को दूर करने के उपाय सुझा कर विवाद के समाधान पर पहुंचने का प्रयास करेगा।

(10) परामर्शदाता भारतीय साक्ष्य अधिनियम 1872 या सिविल प्रक्रिया संहिता, 1908 या दण्ड प्रक्रिया संहिता, 1973 के उपबंधों द्वारा आबद्ध नहीं होगा और उसका कार्य निष्पक्षता और न्याय सिद्धान्तों से मार्ग दर्शित होगा और उसका उद्देश्य व्यथित व्यक्ति के समाधान प्रद रूप में घरेलू हिंसा को समाप्त करना होगा और परामर्शदाता इस निमित्त ऐसे प्रयास करते समय व्यथित व्यक्ति की इच्छाओं और संवेदनाओं का सम्यक ध्यान रखेगा।

(11) परामर्शदाता, मजिस्ट्रेट को समुचित कार्यवाही के लिए यथासंभव शीघ्र अपनी रिपोर्ट देगा।

(12) परामर्शदाता विवाद के समाधान पर पहुंचते समय वह समझौते के निबंधनों को अभिलिखित करेगा और उसे पक्षकारों द्वारा पृष्ठांकित कराएगा।

(13) न्यायालय, समाधान की प्रभावकारिता के बारे में समाधान हो जाने पर और पक्षकारों से आरंभिक पूछताछ करने के पश्चात् तथा ऐसे समाधान के लिए कारणों को अभिलिखित करने के पश्चात् जिसके अंतर्गत प्रत्यर्थी द्वारा घरेलू हिंसा की परिधि में आने वाले कृत्य करने की स्वीकृति पर ऐसे कृत्य की पुनरावृत्ति करने से विरत रहने के लिये प्रत्यर्थी से वचनबंध लेना सम्मिलित है, निबंधनों को शर्तों सहित या रहित स्वीकार कर सकेगा।

(14) न्यायालय का परामर्श की रिपोर्ट से समाधान हो जाने पर समझौते के निबंधनों को अभिलिखित करते हुए कोई आदेश पारित करेगा या व्यथित व्यक्ति के अनुरोध पर पक्षकारों की सहमति से समझौते के निबंधनों को उपांतरित करते हुए कोई आदेश पारित करेगा।

(15) उन दशाओं में जहां परामर्श कार्यवाहियों पर किसी समझौते के निष्कर्ष पर नहीं पहुंचा जा सकता हो वहां परामर्शदाता ऐसी कार्यवाहियों के असफल होने की रिपोर्ट न्यायालय को देगा और न्यायालय अधिनियम के उपबंधों के अनुसार मामले में कार्यवाही करेगा।

(16) मामले में कार्यवाहियों के अभिलेख सारवान अभिलेख नहीं समझे जाएंगे, जिनके आधार पर कोई संदर्भ अर्थ निकाला जा सके या केवल उसके आधार पर आदेश पारित किया जा सकेगा।

(17) न्यायालय धारा 25 के अधीन केवल यह समाधान हो जाने पर कि ऐसे किसी आदेश के लिए आवेदन बल, कपट या प्रपीड़न या किसी अन्य कारण के द्वारा निष्फल नहीं होगा, आदेश पारित करेगा और उस आदेश के ऐसे समाधान के लिए कारण अभिलिखित किए जाएंगे जिसके अंतर्गत प्रत्यर्थी द्वारा किया गया कोई वचनबंध या प्रतिभूति भी हो सकेगी।

3. मजिस्ट्रेट की भूमिका –

अधिनियम की धारा 5 के अंतर्गत पुलिस अधिकारियों "सेवा प्रदाताओ" संरक्षण अधिकारियों सहित मजिस्ट्रेट का यह कर्तव्य हैं कि यदि उन्हें घरेलू हिंसा की शिकायत प्राप्त हो या घरेलू हिंसा की घटना उनकी उपस्थिति में हो या घरेलू हिंसा की सूचना उन्हें दी गई हो तो वे व्यथित व्यक्ति को यह सूचना देंगे कि उसे यह अधिकार प्राप्त है कि वह अधिनियम के अंतर्गत विभिन्न अनुतोष प्राप्त करने हेतु आवेदन पत्र प्रस्तुत करें, उसे सेवा प्रदाता और संरक्षण अधिकारी की सेवाएं प्राप्त हो सकती हैं, उसे विधिक सेवा प्राधिकरण अधिनियम, 1987 के अंतर्गत निशुल्क विधिक सहायता प्राप्त हो सकती है, और वह जहाँ सुसंगत हो वहाँ भा.द.वि. की धारा 498– क के अंतर्गत परिवाद संस्थित कर सकती हैं।

अधिनियम की धारा 12 के अंतर्गत व्यथित व्यक्ति स्वयं या उसकी ओर से निमित्त कोई अन्य व्यक्ति या संरक्षण अधिकारी मजिस्ट्रेट के समक्ष अधिनियम के अंतर्गत अनुतोष प्राप्ति हेतु आवेदन पत्र प्रस्तुत कर सकते हैं। आवेदन पत्र प्राप्त होने पर मजिस्ट्रेट से यह अपेक्षित हैं कि सुनवाई की प्रथम तिथि ऐसी नियत करें जो सामान्यतः आवेदन प्राप्ति की तिथि से तीन दिवस से अधिक की न हो। यह भी अपेक्षित है कि मजिस्ट्रेट ऐसे आवेदन पत्र का प्रथम सुनवाई तिथि से 60 दिन की कालावधि में निराकरण का प्रयास करें।

घरेलू हिंसा की घटना सिद्ध पाये जाने पर मजिस्ट्रेट द्वारा प्रदत्त की जा सकने वाली सहायताएं :–

1 **संरक्षण आदेश**:– अधिनियम की धारा 18 के अन्तर्गत मजिस्ट्रेट को अधिकार होगा कि वह पीड़ित महिलाओं के पक्ष में संरक्षण आदेश पारित करे जिसके अंतर्गत वह अनावेदक को प्रथम दृष्टया, घरेलू हिंसा घटित होना पाये जाने पर, या घटने की संभावना होने पर, अनावेदक को निषेद्ध करेगा कि वह घरेलू हिंसा का कोई कृत्य नहीं करेगा और न ऐसे कृत्य करने में, कोई सहयोग या दुष्प्रेरित करेगा। पीड़ित महिला के नियोजन के स्थान और यदि कोई बालिका/बालक है तो उसके विद्या अध्ययन के स्थान पर अनावेदक को जाने के निषेद्ध कर सकेगा। अनावेदक पीड़ित व्यक्ति से किसी भी प्रकार से व किसी भी माध्यम से, सम्पर्क स्थापित करने से रोक सकेगा व अनावेदक एवं पीड़ित के संयुक्त खातों के संचालन और यदि खाते पृथक–पृथक हो तो उनके संचालन से निषेद्ध कर सकता है। पीड़ित महिला के अन्य आश्रित व रिश्तेदारों के प्रति हिंसा करने से रोक सकता है व अन्य जो भी संरक्षण आदेश आवश्यक हो वह भी प्रदान कर सकता है।

2. **निवास आदेश** :– अधिनियम की धारा 19 मजिस्ट्रेट को इस अधिनियम के अंतर्गत, घरेलू हिंसा से पीड़ित महिला को, संयुक्त परिवार गृह में निवास कराने के संबंध में आदेश पारित करने की शक्ति है। साथ ही पीड़ित महिला को उक्त गृह में निवास से च्युत न करे और उसके आधिपत्य में किसी भी प्रकार से बाधा उत्पन्न न करने के लिए निषेधित भी कर सकता है। अनावेदक तथा उसके रिश्तेदारों को संयुक्त परिवार गृह से दूर रहने व उसमें प्रवेश करने से निषिद्ध कर सकता है। अनावेदक को संयुक्त पारिवारिक गृह में, उसके स्वत्व को त्यागने से भी उसे निषेद्ध कर सकता है और पीड़ित महिला चाहे तो उसे वैकल्पिक व्यवस्था के अंतर्गत किराये से, एक अन्य स्थान, उसके स्तर का, अनावेदक से पीड़ित महिला को दिलाया जा सकता है, जिसका किराया भुगतान अनावेदक द्वारा किया जावेगा। पीड़ित महिला की सुरक्षा व उसके संतान की सुरक्षा के लिए अन्य आवश्यक शर्तें भी मजिस्ट्रेट, अधिरोपित कर सकता है जैसा कि अनावेदक से प्रतिभूति या प्रतीज्ञा पत्र निष्पादित कराना आदि।

अधिनियम की धारा 19 से यह प्रावधान है कि पीड़ित महिला के निवास स्थान से हट जाने अर्थात् संयुक्त निवास गृह से हट जाने का आदेश जो धारा 19 की कंडिकाएं (1) की उपकंडिका "ब" में दिया जा सकता है वह किसी महिला के विरूद्ध नहीं दिया जावेगा।

3. **मौद्रिक सहायता आदेश**:– अधिनियम की धारा 20 के अंतर्गत मजिस्ट्रेट पीड़ित महिला को मौद्रिक अनुतोष उपलब्ध करा सकता है, जिसके अंतर्गत महिला द्वारा घरेलू हिंसा के परिणाम स्वरूप हुई क्षतियों की प्रतिपूर्ति अर्जनता की हानि, चिकित्सीय व्यय, पीड़ित महिला को किसी संपत्ति या उसके उपयोग से वंचित करने या सम्पत्ति नुकसान करने या संपत्ति को नष्ट करने से हुई क्षति पूर्ति तथा पीड़ित महिला व उसके संतान आदि के भरण पोषण हेतु सहायता उपलब्ध कराया जाना अधिकृत है।

4. **अभिरक्षा आदेश** :– अधिनियम की धारा 21 के अंतर्गत मजिस्ट्रेट आवेदन पत्र की सुनवाई के किसी भी क्रम पर संतान या संतानों की अभिरक्षा, पीड़ित व्यक्ति को दे सकता है। यदि मजिस्ट्रेट संतुष्ट हो कि अनावेदक द्वारा भेंट करने पर पीड़ित या संतान को कोई क्षति नहीं होगी, तभी अनावेदक को भेंट की अनुमति दे सकते हैं।

5. **क्षतिपूर्ति आदेश** :– अधिनियम की धारा 22 के अंतर्गत मजिस्ट्रेट पीड़ित व्यक्ति द्वारा आवेदन पत्र देने पर घरेलू हिंसा से उत्पन्न मानसिक प्रताड़ना या भावनात्मक क्षति के प्रतिकर के रूप में, क्षतिपूर्ति हेतु राशि भुगतान का आदेश, अनावेदक के विरूद्ध पारित कर सकता है।

6. **अन्तरिम व एकपक्षीय आदेश** :– अधिनियम की धारा 23 के अन्तर्गत मजिस्ट्रेट को यह अधिकार है कि वह यथोचित स्थितियों में अंतरिम आदेश तथा संतोष होने पर कि अनावेदक घरेलू हिंसा का कृत्य कर रहा है या करने वाला है, एक पक्षीय आदेश भी अधिनियम की धारा–18, 19, 20, 21 या 22 के अंतर्गत प्रदान कर सकता है।

अधिनियम के अंतर्गत पारित आदेशों का प्रवर्तन

मजिस्ट्रेट द्वारा पारित किसी संरक्षण आदेश या अंतरिम संरक्षण आदेश का प्रवर्तन सुनिश्चित किये जाने के लिये उनका भंग किया जाना अधिनियम की धारा 31 के अंतर्गत अपराध होना घोषित किया गया है और उसे एक वर्ष तक के कारावास या रूपये 20,000/– तक के अर्थदण्ड से या दोनों से दण्डनीय बनाया गया हैं। उक्त अपराध अधिनियम की धारा 32 के अनुसार संज्ञेय एवं अजमानतीय है तथा अधिनियम के अंतर्गत उक्त अपराध का विचारण न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा संक्षिप्त विचारण की प्रक्रिया अनुसार और यथा संभव ऐसे मजिस्ट्रेट से किया जाना अपेक्षित है जिसके द्वारा संबंधित आदेश पारित किया गया है।

अधिनियम की धारा 31 के अंतर्गत दण्डनीय अपराध के आरोप निश्चित करते समय मजिस्ट्रेट भा.द.वि. की धारा 498–क या दहेज प्रतिशेध अधिनियम के किसी उपबंध के अधीन दण्डनीय अपराध के आरोप भी विरचित कर उक्त अपराधों का एक साथ विचारण कर सकता है। घरेलू हिंसा से महिलाओं का संरक्षण नियम 2006 के नियम 15 (6) के अनुसार मजिस्ट्रेट ऐसे प्रकरणों में भा.द.वि. की धारा 498–क या दहेज प्रतिषेध अधिनियम के किसी उपबंध के अधीन दण्डनीय अपराध का विचारण अधिनियम की धारा 31 के अंतर्गत दण्डनीय अपराध के विचारण से पृथक कर सकता है।

अधिनियम की धारा 19 के अंतर्गत निवास संबधी आदेश पारित करने पर उसके प्रभावी प्रवर्तन के लिये मजिस्ट्रेट ऐसी अतिरिक्त शर्त अधिरोपित कर सकता है या अन्य निर्देश दे सकता है जो युक्ति युक्त एवं आवश्यक प्रतीत हो। मजिस्ट्रेट प्रतिप्रार्थी (अनावेदक) से घरेलू हिंसा किया जाना रोकने हेतु प्रतिभुओं सहित या रहित बंधपत्र निष्पादित करने की अपेक्षा भी कर सकता है। इसी प्रकार मजिस्ट्रेट संबंधित आरक्षी केन्द्र के भारसाधक अधिकारी को यह निर्देश भी दे सकता है कि व्यथित व्यक्ति को संरक्षण प्रदान करें या आदेश के क्रियान्वयन में संबंधित को सहायता प्रदान करें।

अधिनियम की धारा 20 के अधीन पारित आर्थिक सहायता संबंधी आदेश के क्रियान्वयन हेतु प्रत्यर्थी के विफल रहने पर मजिस्ट्रेट उसके नियोजक या ऋणी को यह आदेश दे सकता है कि प्रत्यर्थी को देय या प्रोद्भूत मजदूरी या वेतन का भाग व्यथित को संदाय करे या न्यायालय में जमा कराएं।

अधिनियम के अंतर्गत बनाए गए नियम 6 (5) के अनुसार अधिनियम की धारा 12 के अंतर्गत प्रस्तुत आवेदन पत्र एवं पारित किये गये आदेश द.प्र.सं. की धारा 125 के प्रावधानों के अनुसार व्यहृत और प्रवर्तित होंगे। इस प्रकार मजिस्ट्रेट अधिनियम के अंतर्गत पारित किसी आदेश के अंतर्गत संदाय योग्य धन की वसूली के लिये दण्ड प्रक्रिया संहिता की धारा 421 से 431 में प्रावधानित विधि का प्रयोग कर सकता है। इसके अतिरिक्त अधिनियम के प्रभावी क्रियान्वयन के लिये अधिनियम की धारा 28 (2) न्यायालय को समर्थ बनाती है कि वह स्वयं के द्वारा निर्धारित प्रक्रिया को भी अपना सकता है।

अधिनियम की धारा 14 के अंतर्गत मजिस्ट्रेट से यह अपेक्षित है कि कार्यवाही के किसी भी प्रक्रम पर उचित प्रतीत होने पर वह दोनों पक्षों को या उनमें से किसी पक्ष को सेवा प्रदाता के किसी अर्हता प्राप्त सदस्य से परामर्श का निर्देश दें। इसके अतिरिक्त अधिनियम की धारा 15 के अधीन मजिस्ट्रेट अपने कृत्यों के निर्वहन में सहायता के प्रयोजन से परिवार कल्याण से सम्बद्ध किसी व्यक्ति को, जो यथा संभव महिला हो, की सेवाएं प्राप्त कर सकता है। प्रकरण की आवश्यकता अनुसार या किसी पक्षकार द्वारा वांछा करने पर मजिस्ट्रेट अधिनियम के अधीन की जाने वाली कार्यवाही का संचालन बंद कमरे में कर सकता है।

अधिनियम की धारा 24 मजिस्ट्रेट पर यह कर्तव्य अधिरोपित करती हैं कि अधिनियम के अंतर्गत पारित आदेश की एक–एक प्रति पक्षकारों सहित संबंधित आरक्षी केन्द्र के भारसाधक अधिकारी एवं सेवा प्रदाता को, यदि उसने घरेलू हिंसा की घटना की सूचना अंकित कराई हैं, को प्रदान करें। ऐसे किसी आदेश के पारित करने के उपरान्त सुसंगत परिस्थितियों में आदेश के परिवर्तन, उपातंरण या प्रतिसंहरण किये जाने योग्य परिवर्तन होने की दशा में अधिनियम की धारा 25 के अधीन मजिस्ट्रेट से यह अपेक्षित है कि कारण अभिलिखित करते हुए यथोचित आदेश पारित करे।

घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006 का नियम 10 मजिस्ट्रेट को समर्थ बनाता है कि एक पक्षीय अंतरिम राहत प्रदान करने हेतु स्पष्टीकरण आवश्यक होने पर वह संरक्षण अधिकारी को लिखित आदेश के माध्यम से निर्देश दे सकता है कि साझा गृहस्थी परिसर का निरीक्षण और प्रारंभिक जाँच कर प्रतिप्रार्थी की परिलब्धियों, आस्तियों, बैंक खातों या संबंधित दस्तावेजों के संबंध में न्यायालय में प्रतिवेदन प्रस्तुत करें।

न्यायालय को अधिनियम के प्रभावी प्रवर्तन में सहायता प्रदान करने हेतु संरक्षण अधिकारी एक महत्वपूर्ण इकाई हैं और वह अधिनियम या मजिस्ट्रेट द्वारा निर्देशित विधि सम्मत कर्तव्यों का उचित रूप से निष्पादन करें, यह सुनिश्चित करने के लिये अधिनियम की धारा 33 द्वारा यह प्रावधानित किया गया है कि यदि कोई संरक्षण

अधिकारी बिना किसी पर्याप्त कारण के मजिस्ट्रेट द्वारा निर्दिष्ट कर्तव्यों का निर्वहन करने में विफल रहता है या इंकार करता है तो उसे एक वर्ष तक के किसी भी कारावास से तथा रूपये 20,000/– तक के जुर्माने से या दोनों से दण्डित किया जा सकता है। किन्तु धारा 34 के अनुसार संरक्षण अधिकारी का अभियोजन राज्य शासन या प्राधिकृत अधिकारी की पूर्व मंजूरी प्राप्त किये बिना नहीं हो सकता है। ऐसी दशा में मजिस्ट्रेट से यह भी अपेक्षित हैं किसी समुचित मामले में कर्तव्य के प्रति उदासीन सरंक्षण अधिकारी के विरूद्ध कार्यवाही होना सुनिश्चित करें और आवश्यकतानुसार ऐसे संरक्षण अधिकारी के अभियोजन हेतु राज्य शासन से पूर्व मंजूरी प्राप्त करने हेतु कार्यवाही करें।

4. पुलिस अधिकारी की भूमिका–

पुलिस अधिकारी का यह कर्तव्य है कि वह संरक्षण अधिकारी सेवाप्रदाता अथवा पीड़ित महिला द्वारा घरेलू हिंसा की जानकारी देने पर तत्काल अधिनियम में निर्धारित कार्यवाही करे व घरेलू हिंसा की पुनरावृत्ति से पीड़ित महिला को सुरक्षित करने और यदि घरेलू हिंसा होने वाली है ऐसी सूचना प्राप्त हो तब तत्काल मौके पर पहुंचकर रोकथाम करने की कार्यवाही करे साथ ही मजिस्ट्रेट के नियंत्रण में उसके द्वारा दिये गये आदेशों एवं निर्देशों का पालन करें । अधिनियम की धारा 5 में भी पुलिस अधिकारी के कर्तव्यों का उल्लेख है जो निम्नानुसार है –

अधिनियम की धारा–5 में पुलिस अधिकारी, सेवाप्रदाता एवं मजिस्ट्रेट के कर्तव्यों का उल्लेख कंडिका अ लगायत् ई में निम्न रूप में उल्लिखित किया गया है :–

(अ) इस अधिनियम के अधीन, उसके अधिकार के बारे में एक आवेदन देकर संरक्षण आदेश की सहायता प्राप्त करने के लिए,

- धनीय/आर्थिक सहायता का आदेश प्राप्त करने के लिए,
- अभिरक्षा का आदेश प्राप्त करने के लिए,
- निवास का आदेश प्राप्त करने के लिए,
- प्रतिकर (क्षतिपूर्ति मुआवजा) का आदेश प्राप्त करने के लिए और
- ऐसे एक से अधिक आदेश प्राप्त करने के लिए,

(ब) सेवा प्रदाता की सेवाओं की उपलब्धता के बारे में,

(स) संरक्षण अधिकारियों की सेवाओं की उपलब्धता के बारे में,

(द) विधिक सेवाओं के प्राधिकारी वर्ग अधिनियम 1987 (क्र.39/1987) के अधीन निःशुल्क (मुफ्त) विधिक सेवाओं के उसके अधिकार के बारे में,

(ई) जहां सुसंगत हो (wherever relevant) वहां भारतीय दण्ड संहिता (क्र. 45/1860) की धारा 498–क के अधीन शिकायत/परिवाद फाईल करने के उसके अधिकार के बारे में :

परन्तु यह कि इस अधिनियम में कोई बात का किसी भी रीति में यह अर्थ नहीं लगाया जायेगा या यह व्याख्या नहीं की जावेगी कि संज्ञेय अपराध को कारित करने के बारे में इत्तिला मिलने पर विधि के अनुसार कार्यवाही करने के कर्तव्य से उसे मुक्त किया गया है या छूट मिल गई है।

5. आपात कालीन स्थितियों में कार्यवाही –

यदि संरक्षण अधिकारी या सेवा प्रदाता को ईमेल (e-mail) या दूरभाष से, पीड़ित व्यक्ति या अन्य व्यक्ति द्वारा यह सूचना प्राप्त होती है कि घरेलू हिंसा का कृत्य हो रहा है तब वह तत्काल पुलिस सहायता मांगकर घटना स्थल पर पुलिस के साथ पहुंचकर रिपोर्ट अभिलिखित करेंगे और अविलंब समुचित आदेश हेतु आवेदन मजिस्ट्रेट के समक्ष प्रस्तुत करेंगे।

6. अधिनियम की सीमाएं, व्यापकता एवं विशेषताएं –

(1) इस अधिनियम का जम्मू और काश्मीर राज्य को छोड़कर देशव्यापी विस्तार है। अनावेदक देश के किसी अन्य स्थान में, अर्थात घरेलू हिंसा घटित होने के स्थान पर अधिकारिता रखने वाले मजिस्ट्रेट के क्षेत्र अथवा राज्य से बाहर भी, व्यापार, नौकरी या निवास कर रहा हो, तब भी यदि अधिनियम की धारा 27 में उल्लिखित प्रावधानों के अनुसार, मजिस्ट्रेट को विचाराधिकार प्राप्त है, तब अधिनियम की धारा 27 की उपधारा 2 के अनुसार मजिस्ट्रेट द्वारा धारा 18, 19, 20, 21, 22 के अंतर्गत पारित आदेशों, जिनका उल्लेख ऊपर किया गया है, का क्रियान्वयन देश के किसी भी भाग में कराया जा सकता है।

(2) इसी प्रकार यही एक अधिनियम है जिसकी सुनवाई में अनावेदक पर निर्वाह किये जाने वाले सूचना पत्रों के लिए, जैसा कि नियम 12 की कंडिका (1) के खण्ड ''स'' में प्रावधान है, व्यवहार प्रक्रिया विधान के आदेश–5 तथा दण्ड प्रक्रिया विधान के अध्याय–6 में उल्लिखित सभी व्यवहारिक साधनों का उपयोग किया जा सकता है एवं उक्त प्रावधानों के अंतर्गत पारित आदेशों का वही परिणाम होगा जो कि उक्त विधानों में निर्धारित है।

(3) इस अधिनियम की धारा 12 एवं 23 (2) के अंतर्गत प्रस्तुत आवेदनों की शीघ्र सुनवाई के लिए यदि कोई अन्य प्रक्रिया उपयोगी हो सकती हो, तब वह सुनिश्चित कर, उसका उपयोग किया जा सकता है जैसा कि अधिनियम की धारा 28 की उपधारा 2 में स्पष्ट रूप से उल्लिखित है।

(4) अधिनियम की धारा 25 में भी यह प्रावधान है कि धारा 18 के अन्तर्गत दिया गया संरक्षण आदेश तब तक प्रभावशील रहेगा, जब तक कि व्यथित व्यक्ति स्वयं उसे हटाने/रिहाई के लिये आवेदन न करे ।

(5) अधिनियम की धारा 26 की उपधारा 1 में यह प्रावधान है कि इस अधिनियम की धाराओ 18, 19, 20, 21 तथा 22 के अंतर्गत प्राप्त किये जा सकने वाले आदेश, किसी अन्य वैधानिक कार्यवाही, जो कि व्यवहार न्यायालय, परिवार न्यायालय अथवा किसी दाण्डिक न्यायालय में पीड़ित महिला तथा इस अधिनियम के अंतर्गत घरेलू हिंसा कारित करने वाले के विरूद्ध लंबित हो, उस वैधानिक कार्यवाही में भी, प्राप्त किये जा सकते हैं । भले ही वैधानिक कार्यवाही इस अधिनियम के प्रभाव में आने के पूर्व से लंबित हो ।

(6) अधिनियम की धारा 32 की उपधारा–2 में यह भी प्रावधान है कि अधिनियम की धारा 31 (1) में दण्डनीय अपराध को मात्र पीड़ित महिला की साक्ष्य के आधार पर ही, सिद्ध माना जा सकता है।

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घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 के अंतर्गत पारित विभिन्न आदेशों के निष्पादन संबंधी विधि

न्यायिक अधिकारीगण
जिला – दमोह

घरेलू हिंसा से महिला संरक्षण अधिनियम 2006 का उद्देश्य महिलाओं के संविधान द्वारा प्रत्याभूत अधिकारों को प्रभावी संरक्षण प्रदान करने के लिए और उनसे संबंधित या आनुषांगिक मामलों के लिये उपबंध करना है ताकि महिलाओं के प्रति कुटुम्ब के भीतर होने वाली हिंसा से उन्हें संरक्षण प्रदान किया जा सके।

अधिनियम के अंतर्गत एक या अधिक अनुतोषों को प्राप्त करने हेतु धारा 12 के अन्तर्गत आवेदन पत्र स्वयं व्यथित व्यक्ति द्वारा अथवा उसकी ओर से किसी अन्य व्यक्ति द्वारा या संरक्षण अधिकारी द्वारा मजिस्ट्रेट के समक्ष प्रस्तुत किया जा सकता है । अधिनियम के अन्तर्गत विरचित नियम 2006 के नियम 6 (5) के अनुसार ऐसे आवेदन पत्रों को द.प.सं. की धारा 125 में प्रावधानित रीति से निराकृत किया जाएगा एवं उसी रीति से आदेशों का पालन कराया जाएगा।

प्रथम वर्ग न्यायिक मजिस्ट्रेट या महानगर मजिस्ट्रेट इस अधिनियम की धारा 18 से लेकर 22 तक के अधीन निम्नलिखित आदेश पारित कर सकता है।

(1) धारा 18 के अन्तर्गत संरक्षण आदेश;

(2) धारा 19 के अन्तर्गत निवास आदेश;

(3) धारा 20 के अन्तर्गत मौद्रिक अनुतोष;

(4) धारा 21 के अन्तर्गत अभिरक्षा आदेश;

(5) धारा 22 के अन्तर्गत प्रतिकर आदेश; तथा

(6) धारा 23 के अन्तर्गत अन्तरिम एवं एक पक्षीय आदेश

मजिस्ट्रेट द्वारा धारा 18 के अन्तर्गत संरक्षण आदेश या धारा 23 के अन्तर्गत अन्तरिम एवं एक पक्षीय आदेश पारित करने के पश्चात् यदि प्रत्यर्थी उसका पालन नहीं करता है तो व्यथित व्यक्ति मजिस्ट्रेट, पुलिस या संरक्षण अधिकारी को ऐसे भंग की शिकायत कर सकेगा। मजिस्ट्रेट द्वारा ऐसी स्थिति में प्रत्यर्थी के विरूद्ध अधिनियम की धारा 31 के अन्तर्गत दण्डनीय अपराध के संबंध में विचारण कर कार्यवाही की जा सकती है और पुलिस की स्थिति में प्रत्यर्थी के विरूद्ध डी.आई.आर. लेखबद्ध की जा सकती है और संरक्षण अधिकारी की स्थिति में संरक्षण अधिकारी व्यथित व्यक्ति को बचाने के लिये पुलिस की सहायता ले सकता है और व्यथित व्यक्ति की ओर से डी.आई.आर. लेखबद्ध कराने में व्यथित व्यक्ति की मदद कर सकता है।

धारा 31 के अन्तर्गत अपराध के लिये किसी भी भांति के 1 वर्ष तक के कारावास अथवा रूपये 20,000/– तक के अर्थदण्ड या दोनों दण्डाज्ञाएं अधिरोपित की जा सकती है। उक्त अपराध यथा संभव उसी मजिस्ट्रेट द्वारा विचारित होना अपेक्षित है जिसके आदेश को कथित रूप से भंग किया है।

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम के नियम 15 के अनुसार संरक्षण आदेश भंग करने की शिकायत व्यथित व्यक्ति मजिस्ट्रेट को या पुलिस को या संरक्षण अधिकारी को कर सकता है एवं संरक्षण अधिकारी ऐसी शिकायत संरक्षण आदेश को प्रति के साथ मजिस्ट्रेट को भेजेगा। उक्त नियम के अन्तर्गत संरक्षण अधिकारी व्यथित व्यक्ति को सहायता या उसे बचाने के लिये पुलिस सहायता भी प्राप्त कर सकता है। उक्त नियम के अनुसार किसी संरक्षण आदेश या अन्तरिम संरक्षण आदेश का भंग होने पर उसकी सूचना तत्काल स्थानीय अधिकारिता रखने वाले आरक्षी केन्द्र को दी जाना एवं उस पर अधिनियम की धारा 31 तथा 32 के अधीन यथा उपबंधित संज्ञेय अपराध के रूप में कार्यवाही की जाना अपेक्षित है।

अधिनियम के अन्तर्गत निर्मित नियम 2006 के नियम 15 (9) के अन्तर्गत यह व्यवस्था की गई है कि अधिनियम के अधीन गिरफ्तार किये गये व्यक्ति को प्रतिभूति पर मुक्त करने के समय न्यायालय अपने आदेश में निम्नांकित निर्बन्धन भी अधिरोपित कर सकता है :–

(क) अभियुक्त को घरेलू हिंसा के किसी कृत्य कारित करने की धमकी देने या करने से अवरूद्ध करने का कोई आदेश;

(ख) अभियुक्त को व्यथित व्यक्ति को परेशान करने, टेलीफोन करने या कोई संपर्क करने से रोकने का कोई आदेश;

(ग) अभियुक्त को व्यथित व्यक्ति के निवास स्थान पर किसी अन्य स्थान पर, जहां उसके जाने की संभावना हो, खाली करने या उससे दूर रहने का कोई आदेश;

(घ) कोई अग्नेय अस्त्र या कोई अन्य खतरनाक हथियार के कब्जे में रखने या उपयोग करने से प्रतिषिद्ध करने का कोई आदेश;

(ड) एल्कोहल या कोई अन्य मादक औषधि के उपयोग को प्रतिषिद्ध करने का कोई आदेश;

(छ) कोई अन्य आदेश जो व्यथित व्यक्ति के संरक्षण, सुरक्षा और पर्याप्त अनुतोष के लिए अपेक्षित हो।

इन सबके अतिरिक्त घरेलू हिंसा से महिला संरक्षण नियम, 2006 के नियम 15 (7) में यह उल्लेख किया गया है कि यदि प्रत्यर्थी द्वारा या प्रत्यर्थी की ओर से कार्य करने के लिये तात्पर्यित अन्य व्यक्ति द्वारा इस अधिनियम के अधीन न्यायालय के आदेशों के प्रत्यावर्तन में कोई भी अवरोध कारित किया जाता है तो इसे व्यथित व्यक्ति के प्रति इस अधिनियम के अधीन दिये जाने वाले संरक्षण आदेश या किसी अंतरिम संरक्षण आदेश का भंग समझा जावेगा।

अधिनियम की धारा 19 (7) के अनुसार मजिस्ट्रेट संबंधित आरक्षी केन्द्र के भारसाधक अधिकारी को संरक्षण आदेश के प्रवर्तन में सहायता के लिये निर्देश दे सकेगा।

धारा 19 के अधीन निवास आदेश देते समय मजिस्ट्रेट आदेश के प्रभावी क्रियान्वयन के लिये उसमें कोई अतिरिक्त शर्त भी अधिरोपित कर सकेगा या अन्य निर्देश पारित कर सकेगा जो उसके मत में व्यथित व्यक्ति या उसकी संतान की सुरक्षा या संरक्षण प्रदान करने के लिये युक्तियुक्त आवश्यक हो । मजिस्ट्रेट प्रत्यर्थी के विरूद्ध घरेलू हिंसा कारित करने से निवारित रहने के लिये प्रतिभुओं सहित या रहित बंधपत्र निष्पादित करने का आदेश दे सकेगा तथा ऐसा आदेश द.प्र.सं. के अध्याय VIII के अधीन हुआ आदेश समझा जाएगा और उसी

अनुसार कार्यवाही की जायेगी। इसके अलावा मजिस्ट्रेट इस अधिनियम के अनुसरण में बनाये गये नियमों में नियम 10 के अधीन संरक्षण अधिकारी को निर्देश दे सकेगा कि वह ऐसी सांझा गृहस्थी के निवास परिसर में निरीक्षण करने, प्रत्यर्थी की स्वयं की और प्रत्यर्थी और व्यथित व्यक्ति की संयुक्त आस्तियों, उपलब्धियों, बैंक खातों के संबंध में प्रतिवेदन न्यायालय में प्रत्येक सप्ताह प्रस्तुत करें तथा न्यायालय द्वारा दिये गये आदेशों के निष्पादन के संबंध में भी प्रतिवेदन न्यायालय के समक्ष प्रस्तुत करें।

धारा 19 की उपधारा (1) अथवा उपधारा (3) के अधीन कोई आदेश पारित करने पर न्यायालय निकटस्थ आरक्षी केन्द्र के प्रभारी को आदेशित कर सकेगा कि वह व्यथित व्यक्ति को संरक्षण प्रदान करे अथवा उसे आदेश के क्रियान्वयन में सहायता करें।

धारा 19 की उपधारा (1) के अधीन आदेश देते समय मजिस्ट्रेट पक्षकारों की वित्तीय आवश्यकताओं और स्त्रोतों को ध्यान में रखते हुए प्रत्यर्थी पर किराये सहित अन्य संदायों के संबंध में बाध्यताएं अधिरोपित कर सकता है।

धारा 20 के अधीन पारित मौद्रिक अनुतोष के आदेश का पालन सुनिश्चित करने के लिए अधिनियम की धारा 20 (6) में प्रावधान है कि यदि प्रत्यर्थी इस धारा के अधीन मजिस्ट्रेट द्वारा दिये गये आदेश के अनुसार संदाय करने में विफल रहता है तब मजिस्ट्रेट प्रत्यर्थी के नियोजक या देनदार को प्रत्यक्ष रूप से मजदूरियों या वेतनों के किसी भाग को या देय ऋण को या प्रत्यर्थी के जमा से प्रोद्भूत को, व्यथित व्यक्ति को संदाय करने के लिये या न्यायालय में निक्षेपित करने के लिये निर्देशित कर सकेगा तथा उस राशि का प्रत्यर्थी द्वारा संदाय मौद्रिक अनुतोष के प्रति समायोजित किया जा सकेगा। इसके अलावा धारा 9 (1) (ज) संरक्षण अधिकारी पर यह कर्तव्य अधिरोपित करती है कि वह यह सुनिश्चित करे कि धारा 20 के अधीन दिया गया मौद्रिक अनुतोष दण्ड प्रक्रिया संहिता, 1973 की प्रक्रिया (धारा 421 से 431 तक) के अनुसार अनुपालित व निष्पादित किया गया हो।

मजिस्ट्रेट धारा 21 के अधीन दिये गये अभिरक्षा आदेश का निष्पादन सुनिश्चित करने के लिए दण्ड प्रक्रिया संहिता की धारा 97 के अधीन तलाशी वारंट जारी करके, संतान के उपस्थित होने पर उसकी अभिरक्षा व्यथित व्यक्ति को दे सकता है, उसके अतिरिक्त नियम 10 (1) (घ) में संरक्षण अधिकारी का यह कर्तव्य भी है कि वह न्यायालय के आदेश को प्रवर्तित कराने में न्यायालय की सहायता और आवश्यक निरीक्षण करे जिसके लिये वह बाध्य भी हैं।

धारा 22 के अधीन पारित प्रतिकर आदेश को दण्ड प्रक्रिया संहिता की धारा 431 की सहायता से निष्पादित करवाया जा सकता है। इस अधिनियम की धारा 28 यह उपबंध करती है कि धारा 18, 19, 20, 21, 22 एवं 23 के अन्तर्गत प्रक्रिया और धारा 31 के अधीन अपराध दण्ड प्रक्रिया संहिता, 1973 के उपबंधों से अधिशासित होंगे और न्यायालय अधिनियम की धारा 12 या 23 (2) के अन्तर्गत प्रस्तुत आवेदन पत्र के निराकरण के लिए स्वयं कोई प्रक्रिया भी निर्धारित कर सकता है और दण्ड प्रक्रिया संहिता की धारा 431 यह उपबंध करती है कि दण्ड प्रक्रिया संहिता के अधीन दिये गये आदेश के आधार पर संदेय धन, जिसकी वसूली का ढंग अभिव्यक्त रूप से उपबंधित न हो, जुर्माने की भांति वसूल किया जा सकता है। अतः प्रत्यर्थी द्वारा प्रतिकर आदेश का पालन न करने पर धारा 431 द.प्र.सं. की सहायता ली जा सकती है।

अधिनियम की धारा 27 (2) यह प्रावधान करती है कि इस अधिनियम के अधीन पारित कोई भी आदेश समस्त भारत में प्रवर्तनीय होगा। यहां यह उल्लेखनीय है कि धारा (1) (2) के अनुसार अधिनियम जम्मू कश्मीर राज्य पर लागू नहीं है।

यद्यपि घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006 के नियम 6 (5) में प्रावधान है कि इस अधिनियम में दिये गये आदेशों का प्रवर्तन उसी रीति में होगा जो द.प्र.सं. 1973 की धारा 125 के अधीन अधिकथित है, परन्तु यथार्थ में यह रीति इस अधिनियम की धारा 20 में दिये गये मौद्रिक अनुतोष और धारा 22 में दिये गये प्रतिकर आदेश को निष्पादित करने में ही प्रभावकारी साबित हो सकती है।

अधिनियम की धारा 9 (1) (क) यह उपबंध करती है कि संरक्षण अधिकारी का यह कर्तव्य होगा कि वह मजिस्ट्रेट को इस अधिनियम के अधीन कार्य में सहायता प्रदान करें तथ धारा 9 (2) यह उपबंध करती है कि संरक्षण अधिकारी मजिस्ट्रेट के नियंत्रण और पर्यवेक्षण के अधीन होगा और मजिस्ट्रेट या सरकार द्वारा या इस अधिनियम के अधीन सौंपे गये कर्तव्यों को निष्पादित करेगा ।इस अधिनियम के उपबंधों को प्रभावशाली रूप से क्रियान्वित करने के लिये बनाये गये घरेलू हिंसा से महिला संरक्षण नियम, 2006 के नियम, 10 (2) में यह उपबंध भी है कि संरक्षण अधिकारी उन कर्तव्यों का निर्वहन भी करेगा जो इस अधिनियम और इसके अधीन बनाये गये नियमों को प्रभावी करने के लिये मजिस्ट्रेट द्वारा समनुदेशित किये जाये। इसी प्रकार नियम 10 (3) में यह उपबन्ध भी हैं कि मजिस्ट्रेट मामलों के अच्छे प्रबंधन के लिये अपने अधिकारिता के संरक्षण अधिकारियों को साधारण व्यवहार से संबंधित निर्देश भी जारी कर सकेगा और संरक्षण अधिकारी उनको पूरा करने के लिए बाध्य होगा। नियम 10 (1) (च) में संरक्षण अधिकारी को इस बात के लिये अधिकृत किया गया है कि वह अपने द्वारा किये जाने वाले कार्यों में पुलिस की सहायता भी ले सकता है। इस प्रकार संरक्षण अधिकारी अधि ानियम के अधीन मजिस्ट्रेट के द्वारा धारा 18, 19 एवं 21 के अधीन आदेशों का निष्पादन करवाने में अहम भूमिका निभा सकता है क्योंकि वह मजिस्ट्रेट के निर्देश एवं आदेश मानने के लिये अधिनियम के उक्त उपबंधों द्वारा बाध्य है, अतः मजिस्ट्रेट को चाहिये कि वह धारा 18, 19 एवं 21 के अधीन आदेश पारित करते समय उसी आदेश में संरक्षण अधिकारी को भी यह आदेशित करें कि वह व्यथित व्यक्ति को आदेश द्वारा दी गई सहायता या अनुतोष का निष्पादन हो जाना सुनिश्चित करें, मजिस्ट्रेट यह भी आदेशित कर सकता है कि संरक्षण अधिकारी पुलिस की सहायता ले और महिला पुलिस कर्मी के साथ प्रति सप्ताह व्यथित व्यक्ति से संपर्क करें और व्यथित व्यक्ति की वस्तुस्थिति और उसके पक्ष में दिये गये आदेशों के निष्पादन के संबंध में प्रतिवेदन प्रस्तुत करें।

इसी प्रकार अधिनियम के प्रभावी प्रवर्तन के लिये अधिनियम की धारा 33 के अंतर्गत संरक्षण अधिकारी द्वारा बिना पर्याप्त कारण के संरक्षण आदेश में मजिस्ट्रेट द्वारा निर्देशित कर्तव्य का निर्वहन न करने पर शास्ति अधिरोपित करने का प्रावधान भी किया गया 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, 2008. The Institute has received articles from various districts. A combined article regarding topic no. 1 received from Chhindwara and Harda and article regarding topic no. 2 from Bhopal are being included in this issue. Articles regarding topic no. 3 and 5 shall be included in the next issue of JOTI. As we have not received worth publishing article regarding topic no. 4, it shall be sent to other group of districts for discussion in future:

1. Explain the procedural aspects relating to trial of case of theft of energy under Electricity Act, 2003 and the extent of liability on conviction thereunder.

   विद्युत अधिनियम, 2003 के अन्तर्गत ऊर्जा चोरी के मामलों से संबंधित प्रक्रियात्मक पहलुओं एवं उनके अन्तर्गत दोषसिद्धी पर दायित्व का विस्तार समझाइयें।

2. Explain the scope of Section 156 (3) Cr.P.C.; What cautions are required to be taken by the Magistrate while exercising powers under the said provision?

   धारा 156 (3) द.प्र.सं. का क्षेत्र समझाइये। उक्त प्रावधान के अन्तर्गत शक्तियों का प्रयोग करने के समय मजिस्ट्रेट से क्या सावधानियां रखना अपेक्षित हैं ?

3. State the law relating to determination of age of juvenile in the light of provisions of Rule 12 of Juvenile Justice (Care & Protection of Children) Rules, 2007 framed by the Central Government.

   केन्द्र सरकार द्वारा बनाये गये किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2007 के नियम 12 के आलोक में किशोर की आयु निर्धारण संबंधी विधि बताईये ।

4. State the law relating to relinquishment of title. Whether relinquishment can be oral?

   स्वत्व के परित्याग संबधी विधि बताईये। क्या परित्याग मौखिक हो सकता हैं ?

5. State the procedure and scope of law relating to issuance of commission to make local investigation and law relating to its finality. Whether the report of commission called for the disposal of interim application may be considered as a piece of evidence at the time of final disposal of the case?

   स्थानीय अन्वेषण हेतु आयोग जारी करने संबंधी प्रक्रिया एवं विधि का विस्तार तथा उसकी अंतिमता संबंधी विधि समझाईये। क्या अन्तवर्ती आवेदन पत्र के निराकरण हेतु आहूत आयुक्त प्रतिवेदन को साक्ष्य के रूप में प्रकरण के अन्तिम निराकरण के समय विचार में लिया जा सकता हैं ?

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PROCEDURAL ASPECTS RELATING TO TRIAL OF CASE OF THEFT OF ELECTRICITY UNDER ELECTRICITY ACT, 2003 AND THE EXTENT OF LIABILITY ON CONVICTION THEREUNDER

Judicial Officers
Districts Chhindwara & Harda

Since the earlier enactments were found lacking, the new Electricity Act, 2003 (hereinafter known as "Act") was brought in for taking measures conducive to the new challenges in the electricity industry. The Parliament has taken the unauthorized use of electricity very seriously and created Special Courts and also special liability to curb the malady. As a result, a novel system of trial and punishment has been introduced.

The concern of our present study relates to the procedure and the sanction thereafter as the theft of electricity is not only a crime against law but it is also a social evil and encroachment in the rights of honest consumers.

Under Part XV of Indian Electricity Act, 2003, every offence punishable under Sections 135 to 140 and Section 150 can be tried only by Special Court within whose jurisdiction such offence has been committed.

Part XIV of the Act consisting of Sections 135 to 150 makes elaborate provisions regarding penalties in relation to aforesaid offences and in context of given topic, following Sections are relevant:

(i) Theft of Electricity (Section 135)

(ii) Abatement of the aforesaid offences, etc. (Section 150)

Now the procedural aspects relating to above mentioned offences can be broadly divided into following categories:

1. NATURE OF OFFENCE:

Under Section 151-B, offence punishable under Sections 135 to 140 and Section 150 have been made cognizable and non-bailable by the Electricity (Amendment) Act, 2007 i.e. Act No. 26 of 2007 (in respect of investigation of offences and procedure for their trial) and it has been held by Hon'ble the High Court of M.P. in *Fareed Baig v. State of M.P., I.L.R. (2007) M.P. 1712* that amendments made by the Amendment Act No. 26 of 2007 would operate retrospectively.

2. SPECIAL COURTS:

As per Section 154 (1) of the Act, cases relating to offences punishable under Sections 135 to 140 and Section 150 are triable only by the Special Court constituted by the State Government under Section 153 of the Act, which provides that a person can be appointed as a Judge of a Special Court called only if he was immediately before such appointment an Additional District & Sessions Judge for the expeditious disposal of the cases.

3. COGNIZANCE OF OFFENCE:

According to Section 151, Special Court can take cognizance of an offence without the accused being committed to it for trial upon a complaint in writing made by Chief Electrical Inspector or an Electrical Inspector or a licensee or the Generating Company as the case may be for this purpose. Court may also take cognizance of an offence upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure (final report/challan). [See- *Fareed Baig* (supra)].

4. JURISDICTIONAL COMPETENCE OF A SPECIAL COURT RELATING TO AN OFFENCE OTHER THAN ELECTRICITY ACT, 2003:

When same transaction involves offences not falling within the purview of the Special Act, the question arises for consideration whether a person can be tried jointly with the offence specifically covered by the Special Act? This question was considered by the Apex Court in the case of *Vivek Gupta v. Central Bureau of Investigation and another, (2003) 8 SCC 628.* In this case the Apex Court held that in view of the provisions contained in Section 223 of the Code of Criminal Procedure, such person who has not been charged with an offence under the Special Act but has been charged with an offence under the other law alongwith the accused who has been charged with such offence as well as the offence under the Special Act, can be tried jointly in the same trial by the Special Judge with the help of enabling provision contained in the Special Act.

There are specific enabling provisions under Section 36A (2) of the NDPS Act, 1985; Section 4 (3) of Prevention of Corruption Act, 1988; and Section 7 (2) of M.P. Dacaity Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981. About power of concerned Special Courts to try other offences along with the offences relating to the concerned specific Act, whereas no such enabling provision is contained in the Electricity Act, 2003 for empowering the Special Court to try other offences together with certain offences under Electricity Act, 2003. Therefore, it is clear that the Special Court constituted under Electricity Act, 2003 cannot try offences other than those mentioned under Electricity Act, 2003.

5. TRANSFER OF CASES:

Section 154 (2) provides that if it appears to any Court in the course of any inquiry or trial that offence is punishable under Sections 135 to 140 and 150 and the case is one which is triable by Special Court, then it shall transfer such case to such Special Court constituted under this Act for the area in which such case has arisen. Proviso to this Section peeps into the procedural aspect also and authorizes the Special Court to consider any evidence recorded by the Court, before transfer of the case. A further proviso enables the Special Court to record, in the interest of justice, another examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded.

6. PROCEDURE AND POWER:

Section 154 (3) provides that not withstanding anything contained in sub-section 1 of Section 260 or Section 262 of the Code of Criminal Procedure, a Special Court can try the offence referred to in Sections 135 to 140 and Section 150 in a summary way in accordance with the procedure prescribed in said Code and the provisions of Sections 262 to 265 of the said Code, shall so far as may be, apply to such trial and it shall be lawful for Special Court to pass a sentence of imprisonment for a term not exceeding five years and if looking to the nature of the offence it appears to the Special Court that it is not desirable to try such case in summary way then Special Court can proceed to decide the case in the manner provided by the provision of the CrPC for the trial of such offence.

Now in the light of Sections 153 (3) and 155 which provide that provisions of Code of Criminal Procedure insofar as they are not inconsistent with the provisions of the Act shall apply to the proceedings before the Special Court and for the purpose of the provisions of the said enactments, the Special Court shall be deemed to be a Court of Sessions and because in the procedure adopted by Sessions Court for trial there is no separate provision for summons or warrant trial in that case it appears that if a Special Court finds it undesirable to try a case in a summary way then it will follow the procedure provided for trial before Sessions Court under Chapter XVIII of the CrPC.

7. TENDERING OF PARDON:

A Special Court under Section 154 (4) may with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under Section 307 thereof.

8. PRE-TRIAL REMAND:

Regarding pre-trial remand, there is nothing in the Act or in the Rules made there under. Therefore, the question that arises in this context is whether the Judge of a Special Court under the Electricity Act, 2003 can exercise the power conferred on a Magistrate under Section 167 CrPC to authorize detention of the accused in the judicial or police custody as provided.

Section 167 of the CrPC requires that whenever such person is arrested and detained in custody and when it appears that the investigations cannot be completed within a period of 24 hours, the police officer is required to forward the accused to the Magistrate. The Magistrate

to whom the accused is forwarded, if he is not a Magistrate having jurisdiction to try the case, may authorize the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. If he has no jurisdiction to try the case and if he considers that further detention is necessary, he may order the accused to forward to any Magistrate having jurisdiction. The Magistrate having jurisdiction may authorise the detention of the accused persons otherwise than in custody of the police beyond the period of 15 days but a total period not exceeding 60 days.

No doubt the word "Judge of a Special Court" is not mentioned in Section 167, but the question is whether that would exclude Judge of a Special Court from being a Magistrate having jurisdiction to try the case?

The Special Court is empowered under Section 151 of the Act (i) to take cognizance of the offence without the accused being committed to him for trial and (ii) in trying the accused person, it is required to follow the summary procedure under Sections 262 to 265 of the CrPC as far as may be applicable.

If a Judge of Special Court who is empowered to take cognizance without committal, is not empowered to exercise powers of remanding the accused persons produced before him or release him on bail, it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiry of the period if the Magistrate having jurisdiction to try the case does not include the Judge of a Special Court, it would mean that he would have no authority to extend the period of remand or to release him on bail.

To resolve this anomalous situation, the Special Judge can be held to be a Magistrate for the purpose of Section 167 CrPC. Thus, although the words "Judge of Special Court" are not mentioned in Section 167 Cr.P.C., that would not exclude the Special Judge from being a Magistrate having jurisdiction to try the cases under Section 167 Cr PC. In this regard, provisions of Section 3 of the CrPC and Section 32 of the General Clauses Act may be referred. The provision of Section 3 of the CrPC suggest that if the context otherwise requires, the word "Magistrate" may include "Magistrates" who are not specified in the Section, read alongwith the definition of "Magistrate" in Section 32 of the General Clauses Act, the Special Judge can be held to be a Magistrate for the purpose of Section 167 CrPC. [See *State of Tamil Nadu v. Krishnaswami Naidu, AIR 1979 SC 1255*]

The Apex Court in the case of *A.R. Antulay v. R.S. Nayak, AIR 1984 SC 718* has observed that the Special Court is a Court of original criminal jurisdiction and in order to make it functionally oriented, some powers were conferred by the Statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session. Under the Code it will

enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied. (See *A.R. Antulay v. R.S. Nayak, AIR 1984 SC 718*)

In the result, on consideration of the relevant provisions of the Electricity Act, 2003 and Code of Criminal Procedure, 1973, we have no hesitation in coming to the conclusion that a Judge of a Special Court would be empowered to try cases under Section 167 of the CrPC. The Judge of a Special Court will proceed to exercise the powers that are conferred on a Magistrate having jurisdiction to try the cases.

9. URGENT MATTERS:

According to Section 154 (4) Cr.P.C where the office of the Judge of a Special Court is vacant or such Judge is absent from the ordinary place of sitting of such Special Court or he is incapacitated by illness or otherwise for the performance of his duties, any urgent business in the Special Court shall be disposed of –

(a) by a Judge, if any, exercising jurisdiction in the Special Court: i.e. any other Judge exercising the power of Special Court in the district.

The sub-section further provides that –

(b) where there is no such other Judge available, in accordance with the direction of District and Sessions Judge having jurisdiction over the ordinary place of sitting of Special Court, i.e. as per the distribution memo applicable at the relevant time.

10. COMPOUNDING OF OFFENCES:

Section 152 codifies that appropriate government or any officer authorized by it in this behalf may compound the offence with a person who has committed or is reasonably suspected of having committed an offence of theft of electricity punishable under the Act by accepting sum of money by way of compounding specified in the table given in the Section. It is noticeable that such compounding is permissible only once for any person or consumer and such acceptance of money is deemed to amount to an acquittal that such a person or consumer, if in custody in connection with that offence, shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court.

According to this provision only the offence of theft of energy is compoundable.

11. EXTENT OF LIABILITY ON CONVICTION FOR THE OFFENCE OF THEFT OF ELECTRICITY:

In this context provisions u/s 135 of the Act regarding presumption for theft of electricity is noticeable. It contends that if it is proved that any artificial mean or means not authorized by the Board or licensee or supplier, as the case may be, exist for abstraction, consumption or use of electricity

by consumer, it shall be presumed that until the contrary is proved, any abstraction, consumption or use of electricity was dishonestly caused by such consumer.

In this connection, it should be kept in mind that the provision will be applicable only when the prosecution would be able to prove that any artificial mean or means not authorized by the Board or licensee or supplier, as the case may be, existed for abstraction, consumption or use of electricity by the consumer. On failure to prove this, the provision would not apply.

The Supreme Court in the case of *Noor Aga v. State of Punjab & Haryana, AIR 2008 SCW 5964* has discussed the issue of presumption or reverse burden and held that inspite of the provision of presumption or reverse burden, the prosecution has to prove the foundational facts beyond reasonable doubt. Thereafter, the provision of presumption or reverse burden to prove innocence, would lie upon the accused and the accused need not to prove the same beyond reasonable doubt, but only by preponderance of probability.

In conclusion, it can be said that the presumption would apply only when the prosecution is able to prove the foundational facts beyond reasonable doubt.

For an offence under Section 135 of the Act, the punishment is imprisonment for a term which may extend to three years or with fine or with both. Several provisos have been appended to this basic provision. The first proviso is where the load abstracted, consumed or used or where there is an attempt to do so, does not exceed 10 KW, the fine on first conviction shall not be less than three times the financial gain. The second part of this proviso imposes fine for load exceeding 10 KW. The fine imposed on first conviction shall not be less than three times the financial gain and in the event of subsequent conviction the sentence shall be imprisonment for a term not less than six months and may extend to five years and with fine not less than six times the financial gain. In case a person is convicted in a summary trial, the Special Court may pass a sentence of imprisonment upto 5 years.

It has also been provided that in the event of second and subsequent conviction of a person in regard to the load exceeds 10 KW, he shall also be debarred from getting any supply of electricity for a period not less than three months but may extend to two years and shall also be debarred from getting electricity supply from any other source or any other generating station.

As per Section 135 (1A) where the theft of electricity is detected, the supply may immediately be disconnected by the authorized person and a complaint by such officer shall be lodged in writing relating to the commission of such offence in a police station within 24 hours of such disconnection. If the assessed amount is deposited, the electricity, without

prejudice to the obligation to lodge the complaint, supply line shall be restored within 48 hours of such deposit or payment.

12. CIVIL JURISDICTION OF THE SPECIAL COURT - CIVIL LIABILITY:

If an offence of the theft of energy is proved then u/s 154 (5) of the Act the Special Court shall determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined, whichever is less and the amount of civil liability so determined, shall be recovered as if it were a decree of civil court.

Further, it is also provided in the sub-section 6 of Section 154 of the Act that in case the civil liability so determined finally by the special court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licensee or the concerned person, as the case may be, shall be refunded by the Board or licensee or the concerned person 'as the case may be' within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime lending rate for the period from the date of such deposit till the date of payment.

In the Act, 'civil liability' means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to commission of an offence referred to in Sections 135 to 140 and Section 150

13. REVIEW:

Under Section 362 Cr.P.C. a Criminal Court cannot review its own order but u/s 157 of the Act, the Special Court may, on a petition or otherwise, and in order to prevent miscarriage of justice, review its judgment or order passed under Section 154 of the Act, but no such review petition shall be entertained except on the ground that such order was passed under mistake of fact, ignorance of any material fact or any error apparent on the face of the record:

Provided that the Special Court shall not allow any review petition and set aside its previous order or judgment without hearing the parties affected.

CONCLUSION:

The procedure as well as the liability both have attracted the legislature to counter the increasing menace of pilferage of electricity in the country. Considering the problem as cancerous, a high profile procedure and a retributive sanction is made part of the Indian legal system. This is the only legislation in which in the conclusion of a criminal trial for theft of electricity, the power to impose criminal liability as well as civil liability has been given to the Special Court concerned and also the power to review its judgment or order as per Section 157 of the Act which is not familiar otherwise to the criminal Courts.

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SCOPE OF SECTION 156(3) CR.P.C. – CAUTIONS TO BE OBSERVED BY THE MAGISTRATE WHILE EXERCISING POWERS UNDER THE SAID PROVISION

Judicial Officers
District Bhopal

The three terms "investigation", "inquiry" and "trial" denote three different stages of a criminal case. The first stage is reached when a police officer, either by himself or under order of a Magistrate, investigates into a case. The main purpose of an investigation is collection of evidence and it must be conducted by a police officer or a person enjoying the powers of a police officer or authorized by a Magistrate in his behalf or a person in authority. [See- *State v. Sant Prakash, 1976 Cr.L.J. 274 All. (FB)*]. Section 156(3) of the Code of Criminal Procedure,1973 (for brevity "the Code") occurs in Chapter XII of the Code, under the caption: *"Information to the police and their powers to investigate"*. In order to examine the scope of the said provision, Section 156 of the Code needs to be quoted, the same reads as under:-

"156. Police officer's power to investigate cognizable case.–

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned."

An investigation includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf (Section 2 (h) of the Code). An investigation starts after the police officer receives information in regard to an offence and consists generally of the following steps: (1) proceeding to the spot, (2) ascertainment of the fact and circumstances of the case, (3) discovery and arrest of the suspected offender, (4) collection of evidence relating to the commission of the offence which may consist of examination of various persons including the accused and search of place or seizure of things and (5) formation of opinion as to whether the material collected there is a case to place the accused before a Magistrate for trial. (See- *H.N. Rishbud v. State of Delhi, AIR 1955 SC 196* and *State of U.P. v. Bhagwant Kishore Joshi, AIR 1964 SC 221*).

Sub-section (1) of Section 156 of the Code empowers the Police Officer in charge of the police station to investigate cognizable offences which a Court having jurisdiction over the particular local area may inquire into and try. The jurisdiction of the concerned police station officer to investigate into the offence and the concerned Court to take cognizance of the offence are coterminous and they operate in the same field. The police has statutory right to investigate the circumstances of an alleged cognizable offence without requiring any authority from the judicial authorities. Irregularities in the conduct of investigation are not intended to vitiate the trial and same are cured under Sub-section (2). Though the police has a statutory right to investigate a cognizable offence without the sanction of any Court but further Sub-section (3) empowers a Magistrate to order an investigation.

The words used in Section 156(3) of the Code that "any Magistrate empowered under Section 190 may order an investigation", will have to be read with Section 190 of the Code itself and for doing so the Magistrate must be empowered to take cognizance on receiving complaint of all facts which constitute such offence, meaning thereby facts must be disclosed in the complaint which constitute the offence cognizable by such Magistrate. Before Section 156(3) is pressed into service by a Magistrate, he has to satisfy on the allegation made in the complaint that an offence has been committed and that he may take cognizance of an offence on such complaint. Here it cannot be said that in all cases the Magistrate should refer the complaint to the police. Where ample materials are available on record, the Magistrate should not order investigation under Section 156(3) of the Code.

On receiving complaint, Magistrate has to apply his mind to allegations in the complaint upon which he may proceed at once to take cognizance or he may order it to go to police station for being registered and investigated. The order passed by the Magistrate must indicate application of mind. The Magistrate, should not mechanically pass order directing the police to investigate the case. (See – *Ram Babu Gupta v. State of U.P., 2001 Cr.L.J. 3363, Arvindbhai Ravjibhai Patel v. State of Gujarat, 1998 Cr.L.J. 463* and *S.P. Shenbagamoorthy v. Mu. Ka. Stalin, 2003 Cr.L.J. 271*).

The expression "taking cognizance of an offence" by the Magistrate has not been defined in the Code. The Supreme Court, in the case of *D. Lakshminarayana Reddy and others v. V. Narayana Reddy and others, AIR 1976 SC 1672* held that cognizance can be said to be taken when Magistrate applies his mind for proceeding under Section 200. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190 (1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint,

the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190 (1) (a). If instead of proceeding under Chapter IX he, in exercise of his judicial discretion, has taken action of some other kind, such as issuing a search warrant for the purpose of investigation or ordering investigation by the police under Section 156 (3), he cannot be said to have taken cognizance of any offence.

A Magistrate entitled to take cognizance of an offence may order an investigation in respect of an alleged offence. But he can do so under Section 156(3) of the Code only before he has taken cognizance of the same. If he has already taken cognizance, investigation can be ordered only under Section 202 of the Code. (See – *State of Assam v. Abdul Noor, AIR 1970 SC 1365*). Where a Magistrate has examined the complainant under Section 200, he has no power to pass an order under Section 156(3). Where a Magistrate orders investigation by the police, before taking cognizance, under Section 156 (3) and receives the report thereupon, (i) he can act on the report and discharge the accused, or (ii) straightaway issue process against the accused or (iii) apply his mind to the complaint filed before him and take action under Section 190. (See –*Tula Ram v. Kishore Singh, AIR 1977 SC 2401*).

The power under Section 156 (3) is to be exercised before taking cognizance, once the Magistrate has taken cognizance, he cannot order investigation by police under Section 156 (3) as ruled in *D. Lakshminarayana Reddy's case (supra), Tula Ram's case (supra)* and *Randhir Singh Rana v. State (Delhi Admn.), AIR 1997 SC 639.* A Magistrate can order investigation under Section 156(3) only at the Pre-cognizance stage, that is to say, before taking cognizance under Sections 190 and 200 of the Code. Where the Magistrate takes cognizance of the offence on a complaint made to him and considers before issue of process to the accused that the matter should be investigated, he should order such investigation under the provision of Section 202 and not under Section 156 (3). (See- *H.N. Rishbud's case* (supra) and *Bhagwant Kishore's case* (supra).

The Apex Court in *D. Lakshminarayana Reddy's case* (supra) observed that 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 Sect. 156 (3). It may be noted further that an order made under sub-section (3) of Section 156, is in the

nature of a pre-emptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156 (1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

On the direction under Section 156(3) issued by a Magistrate, it is the duty of the officer in charge of the police station to register the FIR and proceed with it. As observed by the Supreme Court in *Madhu Bala v. Suresh Kumar and others, AIR 1997 SC 3104,* the provision of the Code do not in way stand in the way of a Magistrate to direct the police to register the case at the police station and then investigate the matter. When an order for investigation under Section 156(3) is to be made, the proper direction to police would be to register a case at the police station treating the complaint as the First Information Report and investigate into the same. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) that the FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police could take further steps contemplated in Chapter XII of the Code only thereafter. [See- *Suresh Chand Jain v. State of M.P., AIR 2001 SC 571* and *Mohd. Yousuf v. Afaq Jahan, (2006) 1 SCC 627*].

Recently in the case of Sakiri Vasu v. State of U. P., AIR 2008 SC 907, the Apex Court further expanded the scope of the provision by holding that the Magistrate can also monitor the investigation to ensure proper investigation. Provision of Section 156 (3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

Section 156(3), Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3), Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

Although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3), Cr.P.C. to order registration of a criminal offence and/or to direct the officer-in-charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same.

Even though these powers have not been expressly mentioned in Section 156 (3), Cr.P.C., we are of the opinion that they are implied in the above provision.

Hon'ble Kerala High Court in the case of Vasanthi Devi v. S. I. of Police, Kattakkada Police Station and Ors.,2008 CriLJ 2359 relying on the judgment of Sakiri Vasu (supra) held that all steps necessary to make the directions in Sakiri Vasu (supra) effective will have to be resorted to by the learned Magistrates undoubtedly. A more pro-active, dynamic and purposeful role will hereafter have to be played by the learned Magistrates to ensure that there is proper conduct of investigation.

If, the police submits a negative report under Section 173 of the Code after completing the investigation in pursuance of the direction of the Magistrate under Section 156(3), the Magistrate can still take cognizance on the original complaint under Section 190(1) (a) because the original complaint is not effaced after the direction is given under Section 156(3). (See- *H.S. Bains v. State, AIR 1980 SC 1883*). The power under Section 156(3) can be exercised even after the submission of a report under Section 173, which would mean that it is open to the Magistrate not to accept the conclusion of the Police Officer and direct further investigation. (See- *State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 326*). When the investigation so far done was incomplete, the Magistrate can direct further investigation or reinvestigation under Section 156 (3). If the Magistrate finds, on a consideration of the final report, that the investigation was unsatisfactory or incomplete, he may direct further investigation generally or in specific directions under Section 156 (3). [See –*State of Gujarat v. Shah Lakhamshi Amarshi, AIR 1966 Gujarat 283 (FB)*].

The Orissa High Court in *Laxmidhar v. State of Orissa, 2004 Cr.L.J. 2816* and the MP High Court in *Kamlesh Pathak and others v. State of M.P. and another, 2005 (2) MPLJ 588* has viewed that in a case of offence exclusively triable by Court of Session, the Magistrate has no jurisdiction to direct investigation in exercise of power under Section 156(3), he has to make inquiry himself as provided under Section 202 of the Code. But the mandate of the Apex Court is that the Magistrate has power to order investigation in a case wherein alleged offence is exclusively triable by Court of Sessions. A Magistrate, who receives a complaint disclosing offences exclusively triable by Sessions Court is not debarred from sending the same to the police for investigation under Section 156 (3) in consequence of First Proviso to Section 202(1) which operates only at the post-cognizance stage as held in *D. Lakshminarayana Reddy's case* (supra). [See - *Damodar Sharma and others v. Nathuram Jatav and others, 2007*

(2) MPHT 111 and *Pavan Sharma and others v. Kamalabai and others, 2007 (3) MPLJ 482*].

The Magisterial power cannot be stretched under Section 156(3) beyond directing the officer-in-charge of a police station to conduct the investigation. Thus a Magistrate has no power to direct Director of Central Bureau of Investigation to investigate into an offence as the Apex Court ruled in *CBI v. State of Rajasthan, (2001) 3 SCC 333* and reaffirmed the same in *Central Bureau of Investigation v. State of Gujarat (2007) 6 SCC 156.* A Magistrate can only direct an officer-in-charge of a police station to conduct such investigation and not a superior police officer, though such officer can exercise such powers by virtue of Section 36 of the Code. The M.P. High Court in *Prabhansu Kamal v. Awadesh Singh, 2002 (3) MPHT 496* held that law does not confer power upon the Magistrate for directing investigation by the authority other than the authority mentioned in CrPC. Direction by the Magistrate for investigation of the case by Lokayukt is contrary to law.

A Special Judge appointed under the Special Act has got power to refer a private complaint filed before him to the police for investigation under Section 156(3). This point is set at rest by the Supreme Court in case of *A.R. Antulay v. Ramdas Sriniwas Nayak and another, AIR 1984 SC 718* and held that "the Court of a special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented, some powers were conferred by the Statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session. Under the Code, it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied." Thus, the Special Judge has power to pass order under Section 156(3) and direct the police to investigate into a case. (See- *Satyanand and another v. Prakash Chand Jain and another, 2007 (1) MPLJ 291*).

In view of the above discussion, it is crystal clear that Magistrate has vast powers to send complaint to police for investigation u/s 156 (3) of Cr.P.C. But reckless and mechanical use may pose serious threat to personal liberty of innocent persons. The discretion vested in the Magistrate should be exercised carefully and judiciously in the interest of justice. Certain cautions are required to be observed while exercising the above powers.

In this regard, in the case of Gulab Chand Upadhyaya v. State of U.P.,2002 Cr.L.J. 2907 Allahabad High Court held that the scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example:

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved.

To illustrate by example, cases may be visualised where for production before Court at the trial –

(a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or

(b) recovery of case property is to be made and kept sealed; or

(c) recovery under Section 27 of the Evidence Act; or

(d) preparation of inquest report; or

(e) witnesses are not known and have to be found out or discovered through the process of investigation.

But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted.

It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation.

Besides, even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202 (1) Cr.P.C. order investigation, even though of a limited nature.

In the case of S. P. Shenbagamoorthy (supra) Madras High Court held that normally, the powers under S. 156(3) could be exercised by the court concerned only when the complaint under S. 200 Cr. P. C. is entertained. While entertaining the said complaint, if the court feels that the police investigation is necessary, then the investigation can be ordered under S. 156(3) Cr. P.C.

For instance, if it is a case of forgery or a theft, then it would be necessary for the court to get the help of police for recovery of documents or for recovery of the stolen articles.

Of late, it is noticed that the persons with vested interest with some oblique motive approach the court to get the direction under S.156(3) in order to make

the police to arrest the other party and harass him. Even in the cases involving civil nature and in the cases where police do not entertain the complaint, the party concerned rushes to the criminal court and files a complaint making some allegations constituting cognizable offences and wants an order under S. 156 (3) Cr.P.C.

The Courts also invariably without application of mind refer the matter for investigation under S. 156(3) Cr.P.C.

Where the police would not normally entertain and register those cases, on the strength of S. 156(3) order, they would register and investigate those cases in such a manner to achieve the desired results as expected by the complainant party.

It is sorry state of affairs that the Courts, now-a-days, shut their eyes while ordering investigation under S.156(3) without looking into the allegations in the complaint whether it requires such investigation at all.

Again in the case of Chandrika Singh v. State of U.P., 2007 CriLJ 3169 Allahabad High Court held that the Magistrate is not always bound to pass an order for register of the case and investigation after receipt of the application u/s 156(3) Cr.P.C. disclosing a cognizable offence. The Magistrate may use his discretion judiciously and if he is of the opinion that in the circumstance of the case it will be proper to treat the application as a complaint case then he may proceed according to the procedure provided under Chapter XV of Cr.P.C.

In the case of D. K. Pattanaik v. Station House Officer, 2008 CriLJ 2287 (SC) the Supreme Court held that at the pre-cognizance stage if the Magistrate is satisfied that a cognizable offence is made out, there is no necessity for him to direct any investigation by the Police.

Similarly, where the Magistrate is satisfied that the allegations in the complaint do not disclose commission of any offence, no further question arises and he will refuse to take cognizance.

The need for investigation by police is necessary only in cases where the Magistrate is prima facie satisfied that the allegations contained in the complaint point to the commission of an offence, but they require further investigation to enable him to finally decide whether to take cognizance of the offence or not.

The Magistrate is therefore, bound to apply his mind to know whether there are grounds to straight away take cognizance of the offence under S.190 Cr. P.C., or refuse to take cognizance or to direct investigation of further factsbefore taking cognizance by exercising power under S. 156(3) Cr. P.C. Without application of mind, the Magistrate cannot decide which of the above mentioned three courses, as open to him, should be adopted.

For ordering investigation by Police under S. 156(3) Cr. P.C., the Magistrate cannot act merely as a post office and he is bound to apply his mind before doing so.

The Magistrate is bound to disclose his mind by a brief indication of the reason for ordering such an investigation. Otherwise, it is not possible to know whether the Magistrate has mechanically forwarded the complaint to the Police or he had done so after application of mind.

In the State of M.P., the Rules and Orders for the guidance of Criminal Courts exist and that should be observed by a Magistrate. Instructions to a Criminal Court in respect of private complaints under Rules 113 and 114 of M.P. Rules and Orders (Criminal) must be kept in mind while exercising power under Section 156(3). Thus, in a non-cognizable case, an investigation by the police can only be ordered by a Magistrate who is not satisfied as to the truth of a complaint. In petty cases of assault, hurt, insult, trespass and the like, the complainant should be left to make out his own case and if needed the Magistrate should inquire into the case himself rather than direct the police to investigate it. In non-cognizable cases, a Magistrate should not order the police to make an investigation regarding matters which are of private rather than of public interest, although they may be of public interest and of such nature that it is not expedient to employ the agency of the police in investigating them.

In view of the above discussion, as to the scope and requisite cautions to be taken by a Magistrate while exercising powers under Section 156(3) of the Code, the following situations emerge:

(1) A Magistrate, who is empowered under Section 190 of the Code, may order an investigation. Such Magistrate must be empowered to take cognizance of the offence disclosed in the complaint.

(2) The Magistrate must be satisfied on the allegations made in the complaint that an offence has been committed and that he may take cognizance of such an offence.

(3) On receiving complaint the Magistrate must apply his mind to allegations made in the complaint. The order passed by the Magistrate must indicate application of mind. The Magistrate should not mechanically pass order directing the police to investigate the case.

(4) A Magistrate can order for investigation under Section 156(3) of the Code only before he takes cognizance. If he has already taken cognizance, investigation can be ordered only under Section 202 of the Code.

(5) The Magistrate should not in all cases refer the complaint to the police for investigation. Where ample material is available on record, an investigation should not be ordered under Section 156(3) of the Code.

(6) The Magistrate has power to order investigation under Section 156(3) of the Code in a case wherein alleged offence is exclusively triable by the Court of Sessions.

(7) The Court of a Special Judge is a Court of original criminal jurisdiction. Therefore, a Special Judge appointed under the Special Act has power to order investigation under Section 156(3) of the Code.

(8) A Magistrate can direct for investigation under Section 156(3) of the Code only to authority mentioned in the Code, that is Officer-in-charge of the police station. Therefore, a Magistrate cannot direct the Central Bureau of Investigation or Lokayukt or the like for investigating the case.

(9) The Magistrate should not order investigation in petty cases of assault, hurt, insult, trespass etc. and the investigation should not be ordered in non-cognizable cases in which the matters are of private rather than public interest or where it is not expedient to employ the police agency.

In Vasanthi Devi's case (supra) Hon'ble the Kerala High Court held that such directions should not militate against or detract against the sublime status, position of respectability and faith of the polity in the Magistracy as an unbiased and independent adjudicator of culpability. Whether the mantle of a pro-active monitor of investigation for the Magistrate shall go well with his primary duty of unbiased adjudication of culpability is a moot question which must always be borne in mind by the Magistrates while attempting to undertake the new responsibilities imposed under Sakiri Vasu (supra). The directions to be issued under Section 156 (3) Cr.P.C. must clearly reflect only the yearning and endeavour to search for truth. Such directions must eloquently declare that the Magistracy is only discharging its fundamental commitment in the pursuit for truth and justice.

In Sakiri Vasu (supra). Their Lordships have made it expressly clear that the Magistrate cannot himself investigate. Directions should not be issued which convey the impression that the Magistrate is himself investigating. Benevolent intervention to ensure that the investigation proceeds in the right direction and to ensure that there is no omission to apply the mind on any specific aspect do appear to be possible.

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Note : To make the subject more comprehensive, the Institute has supplemented the italicized portion.

विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल 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 आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

किसी आपराधिक मामले में दोषसिद्धी पर कारावास की सजा के साथ धारा 357 (3) द.प्र.सं. के अन्तर्गत व्यथित पक्षकार को प्रतिकर राशि अदायगी का आदेश देने पर विचारण न्यायालय की धारा 389 (3) द.प्र.सं. के अन्तर्गत ऐसे आदेश को निलम्बित करने या अन्यथा उसे स्थगित करने की अधिकारिता के उपयोग की सीमा क्या है?

जब भी विचारण न्यायालय द्वारा किसी अभियुक्त को दोषसिद्ध ठहराये जाने के उपरान्त कारावास की सजा के साथ अर्थदण्ड की सजा न देते हुए व्यथित पक्षकार को धारा 357 (3) द.प्र.सं. के अन्तर्गत प्रतिकर राशि देने का आदेश दिया जाता है तो अभियुक्त की ओर से धारा 389 (3) द.प्र.सं. के अन्तर्गत आवेदन पत्र प्रस्तुत कर अपील प्रस्तुत करने के सम्बन्ध में विचारण न्यायालय का समाधान करते हुए कारावास एवं प्रतिकर अदायगी के आदेश को निलम्बित किये जाने की प्रार्थना की जाती हैं।

धारा 389 (3) द.प्र.सं. के प्रावधान को देखें तो जब ऐसा अभियुक्त जमानत पर होते हुए तीन वर्ष से अनधिक की अवधि के लिए कारावास से दण्डादिष्ट किया गया है या जिस अपराध के लिए वह दोषसिद्ध किया गया वह जमानतीय है और वह जमानत पर है, तो विचारण न्यायालय उसे अपील न्यायालय से धारा 389 (1) के अधीन आदेश प्राप्त करने के लिए पर्याप्त समय देते हुए जमानत पर रिहा कर सकता है और जब तक वह ऐसे जमानत पर रिहा रहता है तब तक कारावास का दण्डादेश निलम्बित समझा जाएगा।

उपरोक्त स्थिति से यह स्पष्ट है कि विचारण न्यायालय को केवल मूल कारावास के दण्डादेश को ही निलम्बित करने का अधिकार है। इसके साथ ही यदि अर्थदण्ड का दण्डादेश भी दिया गया है तो उसे निलम्बित नहीं किया जा सकता है। ऐसी स्थिति में यदि अभियुक्त द्वारा अर्थदण्ड की राशि तत्काल जमा नहीं करायी जाती है तो विचारण न्यायालय को उसके व्यतिक्रम में दी गई कारावास की सजा भुगताये जाने हेतु ऐसे अभियुक्त को कारावास भेजना ही होगा। केवल अर्थदण्ड का ही दण्डादेश दिया गया हो तो ही उसके निलम्बन का प्रावधान धारा 424 द.प्र.सं. में हैं।

धारा 357 (3) द.प्र.सं. के अन्तर्गत प्रतिकर अदायगी के आदेश के साथ उसके व्यतिक्रम में कारावास की सजा का आदेश भी दिया जा सकता हैं। (देखें ***हरिकिशन एवं हरियाणा राज्य विरूद्ध सुखबीर सिंह एवं अन्य, ए.आई.आर. 1988 सु.को. 2127***)

प्रतिकर राशि की वसूली धारा 431 द.प्र.सं. के अनुसार अर्थदण्ड की वसूली के प्रावधान अन्तर्गत धारा 421 द.प्र.सं. के अनुसार ही की जा सकती है।

इसी परिप्रेक्ष्य में देखें तो जहाँ धारा 357 (1) द.प्र.सं. के अन्तर्गत अर्थदण्ड के दण्डादेश में से व्यथित पक्षकार को प्रतिकर अदायगी का आदेश देने का प्रावधान है, वहीं धारा 357 (2) द.प्र.स. के अन्तर्गत यह स्पष्ट कर दिया गया है कि यदि अर्थदण्ड ऐसे मामले में किया गया है जो अपीलनीय है तो ऐसा कोई संदाय अपील प्रस्तुत करने के लिए अनुज्ञात अवधि के व्यतीत होने के पूर्व या यदि अपील प्रस्तुत की जाती है तो उसके विनिश्चय के पूर्व, नहीं किया जाएगा।

लेकिन धारा 357 (3) द.प्र.सं. के अन्तर्गत प्रतिकर अदायगी के आदेश के सम्बन्ध में धारा 357 (2) द.प्र.सं. के समान अन्य कोई विशिष्ट प्रावधान नहीं होने से विचारण न्यायालय के समक्ष यह भ्रमपूर्ण स्थिति उत्पन्न होती है कि क्या धारा 389 (3) द.प्र.सं. के अन्तर्गत जब विचारण न्यायालय को कारावास के साथ दिये गये अर्थदण्ड को निलम्बित करने का अधिकार नहीं है तो धारा 357 (3) द.प्र.सं. के अन्तर्गत प्रतिकर अदायगी के आदेश को भी आदेश के साथ ही तत्काल प्रवर्तित करवाया जाना और ऐसा न हो तो अभियुक्त को इसके व्यतिक्रम में दिये गये कारावास की सजा भुगताये जाने हेतु कारावास भेजना होगा।

यह सही है कि प्रतिकर राशि की वसूली धारा 421 द.प्र.सं. के प्रावधान अनुसार ही किया जाना है लेकिन अर्थदण्ड और प्रतिकर में अन्तर है। जहाँ कारावास के साथ अधिरोपित अर्थदण्ड की अदायगी तत्काल होना आवश्यक है वहीं धारा 357 (3) द.प्र.सं. के अन्तर्गत आदेशित प्रतिकर राशि प्रकरण की परिस्थिति को देखते युक्तियुक्त होने के साथ इसके भुगतान हेतु समय दिये जाने के साथ ही यदि आवश्यक हो तो इसकी अदायगी किश्तों में करने की सुविधा भी दी जा सकती है। (देखें ***हरिकिशन एवं हरियाणा राज्य विरूद्ध सुखबीर सिंह एवं अन्य, ए.आई.आर. 1988 सु.को. 2127***)

माननीय सर्वोच्च न्यायालय द्वारा विधि दृष्टान्त ***दिलीप एस. दहानुकर विरूद्ध कोटक महिन्द्रा क.लि. एवं अन्य, (2007) 6 एस.सी.सी. 528*** में स्पष्टतया यह प्रतिपादित किया गया है कि जब धारा 357 (1) द.प्र.सं. के अन्तर्गत अर्थदण्ड में से प्रतिकर अदायगी का आदेश धारा 357 (2) द.प्र.सं. की सीमा में रहते हुए ही लागू हो सकेगा तो उसी प्रकार से धारा 357 (3) द.प्र.सं. के अन्तर्गत प्रतिकर अदायगी के मामले में भी धारा 357 (2) द.प्र.सं. का ही प्रावधान लागू होगा अर्थात ऐसी प्रतिकर राशि अपील अवधि पश्चात् या अपील होने पर उसके विनिश्चय के पश्चात् ही व्यथित पक्षकार को संदाय होगी। ऐसी स्थिति में धारा 357 (3) द.प्र.सं. के अन्तर्गत आदेशित प्रतिकर राशि को तत्काल जमा करने की अपेक्षा प्रकरण की परिस्थिति को देखते हुए कुछ शर्तों सहित उसकी अदायगी को अपीलीय न्यायालय से योग्य आदेश प्राप्त कर प्रस्तुत करने तक स्थगित किया जा सकता है अर्थात धारा 357 (3) द.प्र.सं. के अन्तर्गत आदेशित प्रतिकर राशि को तत्काल अदा न कर सकने पर अभियुक्त को इसके लिए तत्काल व्यतिक्रम में दिये गये कारावास को भुगताये जाने हेतु कारावास में भेजना आवश्यक नहीं है अदायगी हेतु राशि की मात्रा व अन्य परिस्थितियों को ध्यान में रखकर युक्तियुक्त समय अभियुक्त को प्रदान किया जा सकता है।

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किसी विशेष अधिनियम में अपराध के लिये दिये जा सकने वाले कारावास की प्रकृति विनिर्दिष्टतः न दर्शाये जाने पर कारावास की प्रकृति क्या होगी ?

किसी विशेष दाण्डिक अधिनियम में किसी अपराध के लिये कारावास का प्रावधान हो, किन्तु कारावास की प्रकृति विनिर्दिष्टतः वर्णित न हो, तब ऐसे विशेष अधिनियम के अन्तर्गत दोषी पाये गये व्यक्ति को किस प्रकृति का कारावास दिया जाये, यह भ्रम उत्पन्न हो सकता है।

किन्तु ऐसी दशा में यदि हम साधारण खण्ड अधिनियम, 1897 की धारा 3 (27) में परिभाषित 'कारावास' शब्द का अर्थ देखें तो यह स्पष्ट होता है कि कारावास से अभिप्रेत उस कारावास से है जो भारतीय दण्ड संहिता में परिभाषित है।

भारतीय दण्ड संहिता, 1860 की धारा 53 के अनुसार कारावास कठोर एवं सादा हो सकता है।

इस प्रकार यदि किसी विशेष अधिनियम में किसी अपराध के लिये कारावास की प्रकृति विनिर्दिष्टतः न भी दर्शायी गई हो तब भी ऐसे अधिनियम के अन्तर्गत दोषी पाये गये व्यक्ति को दाण्डिक न्यायालय अपने विवेकाधिकार का प्रयोग करते हुए साधारण या कठोर कारावास की दण्डाज्ञा से दण्डित कर सकता है ।

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

Thank God every morning when you get up that you've something to do which must be done, whether you like it or not, Being forced to work, and forced to do your best, will breed in you temperance, self–control, diligence, strength of will, content, and a hundred other virtues which the idle never know.

– CHARLES KINGSLEY

If you have temper which you cannot always control, learn at least to go off somewhere and wait until you have cooled off and become again rational, before you undertake to transact business or make an important decision.

– WILLIAM NICKERSON

PART - II

NOTES ON IMPORTANT JUDGMENTS

*522. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a), (c) & (f)
CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 & Order 30
Non-joinder of necessary party – Maintainability of suit – Suit premises rented to partnership firm and the firm or its partners not impleaded as a party – Effect – Held, a decree of eviction of the premises cannot be granted in favour of the plaintiff because the tenancy is in favour of a partnership firm, which means in favour of all the partners of the firm – Hence, the suit is not maintainable – Appeal allowed.
Babulal Birla (dead) through LRs Smt. Krishna Devi v. Ram Prakash Sharma
Reported in I.L.R. (2008) M.P. 2646

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*523. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a), 12 (1) (f) & 13 (1)
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17
(i) Suit for eviction was filed on the ground of arrears of rent – It was the duty of tenant to deposit the rent as required u/s 13 (1) of the Act – Tenant has not deposited rent as per requirement u/s 13 (1) of the Act and has not filed any application for condonation of delay before trial court but filed the application before first appellate court – Held, If there were default on the part of tenant, tenant ought to have filed application forthwith before the trial court explaining the circumstances in which he could not deposit the rent – First appellate court rightly rejected the application.
(ii) Trial court passed the decree against tenant on the ground of Section 12 (1) (f) of the Act – Tenant filed application under Order 6 Rule 17 CPC before first Appellate Court that landlord purchased shop in the name of his brother, in which landlord was carrying on business and necessity, if any, had come to an end – First Appellate Court considering the merits of the application rejected it – Held, merely an application was filed alleging certain facts against the landlord by itself was not sufficient to set aside the judgment and decree and remand the case – First Appellate Court after considering the registered sale deed and licence issued by Municipal Corporation found that application was frivolous and grounds stated in the application need not to be enquired into – No error found in order.
Subhash Chandra Jawa v. Subhash Gupta
Reported in I.L.R. (2008) M.P. 2388

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*524. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) & 13 (1)
CIVIL PROCEDURE CODE, 1908 – Section 11

(i) Arrears of rent – Tenant disputing rate of rent and resultantely arreas of rent – Tenant is bound to deposit such sum only on fixing the interim rent by Court – Tenant depositing entire arrears of rent within one month from the date of fixation of interim rent by Court – Subsequently also rent was deposited regularly – No decree u/s 12 (1) (a) could be passed.

(ii) *Res judicata* – In order to prove question of *res judicata* not only earlier decision but pleadings of earlier case and issues framed by such court requires to be proved – Any order passed by any authority on merits in any proceeding which is not entertainable or maintainable could not be treated as enforceable order – Any finding on merits in non-entertainable proceedings do not have effect of *res judicata.*

Bhagwati Tiwari (Smt.) and anr. v. Makhanlal Yadav and ors.
Reported in I.L.R. (2008) M.P. 2352

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*525. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f)
CIVIL PROCEDURE CODE, 1908 – Section 11
Suit for ejectment of tenant – Principles of *res judicata,* applicability of – Earlier suit was dismissed holding that the suit accommodation was rented out for non-residential purposes hence could not be got vacated for residential purposes – Subsequent suit filed for non-residential purposes on the ground of bonafide need to start business – Held, subsequent suit not barred by *res judicata* as the matter in subsequent suit was not directly and substantially in issue in the earlier suit.

Mithilesh Kumari v. Pashu Chikitsa Sahayak Shalya Prabhari, Niwari and others
Reported in 2008 (4) MPHT 346

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526. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 23-J
CIVIL PROCEDURE CODE, 1908 – Section 9
Civil Court's jurisdiction – Whether Civil Court has jurisdiction to entertain a composite suit filed by the landlady who is a widow, on different grounds including bonafide requirement comes within the purview of definition of 'specified landlord' as contained in Section 23-J of M.P. Accommodation Control Act? Held, Yes.

Smt. Sulochana v. Rajendra Singh
Reported in AIR 2008 SC 2611

Held:

Requisite averment as regards the cause of action for the said suit was made in paragraph 10 of the plaint which reads as under:-

> "(10) That, despite communicating information through notice to the defendant about having purchased the disputed shop by the plaintiff, and about bona fide and reasonable necessity of the suit/disputed shop along with possession of excess area than that of tenanted portion, along with the arrears of the rent thereof, for opening of the shop for medicines by her son Rajesh Kumar, and because of denying by the defendant to recognize the plaintiff as the owner of the disputed shop, as also because of denial by the defendant to pay the arrears of the rent as well as handing over possession of the shop, the plaintiff has been compelled to file this suit."

Section 45 of the Act excludes the jurisdiction of the civil court stating:-

> **"45. Jurisdiction of Civil Courts barred in respect of certain matters.** – (1) Save as otherwise expressly provided in this Act, no Civil Court shall entertain any suit or proceeding in so far as it relates to the fixation of standards rent in relation to any accommodation to which this Act applies or to any other matter which the Rent Controlling Authority is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Rent Controlling Authority under this Act shall be granted by any Civil Court or other authority.

(2) Nothing in sub-section (1) shall be construed as preventing a Civil Court from entertaining any suit or proceeding for the decision of any question of title to any accommodation to which this Act applies or any question as to the person or persons who are entitled to receive the rent of such accommodation."

Sub-section (6) of Section 13 of the Act, however, provides for the benefit of protection against eviction, stating:-

> *"13. When tenant can get benefit of protection against eviction.—*
>
> (6) If a tenant fails to deposit or pay any amount as required by this Section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit, appeal or proceeding, as the case may be."

Chapter III-A provides for special provisions. It is confined to eviction of tenants on grounds of bona fide requirement of different classes of landlords specified therein. A summary procedure is provided for. Recourse thereto can be taken only by the specified landlord within the meaning of the provision of Section 23-J of the Act which means a 'landlord who is a widow or divorced wife'

amongst others. Amongst others a servant of any Government including a member of defence services, would also fall within the purview of the said definition. Only a landlord who comes within the purview of the said definition is entitled to file suit on the ground of his or her bona fide requirement.

The definition of 'specified landlord' as contained in Section 23-J of the Act is not as broad as the definition of the same term as contained in Section 2 (b) thereof. A statute must be read, keeping in view the constitutional scheme of equality as adumbrated in Article 14 of the Constitution of India. Once a special benefit has been conferred on a special category of landlord, the same must receive strict construction. Even otherwise, it is well settled, that an exclusion provision must be construed strictly. A statute ousting jurisdiction of the civil court should also be strictly construed.

The jurisdiction of the civil court can thus be excluded only if the matter comes within the purview of Section 45 of the Act of Chapter III thereof. It is beyond any cavil that the application for eviction contemplated by Chapter III-A relates to an eviction of the tenant by the landlord as defined in Section 23-J of the Act.

Ex facie Section 45 of the Act has no application to the facts and circumstances of this case. Section 45 is subject to the other provisions contained therein; one of them, indisputably is Section 12 which confers jurisdiction upon the civil court to entertain a suit for eviction of the tenants subject, of course, to the case falling under one or more grounds specified therein.

It is now well settled that the provisions excluding jurisdiction of the civil court are to be strictly construed. They are not to be inferred readily. [See *Swamy Atmananda and others v. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51*].

The jurisdiction of civil court is also to be determined having regard to the averments contained in the plaint. Appellant did not proceed on the basis that she was a 'specified landlord' within the meaning of Section 23-J of the Act. Furthermore a composite suit for eviction was filed, i.e., not only on the ground of bona fide requirement but also on the ground of default of payment of rent as also denial of relationship of landlord and tenant.

It was explained as to why the civil court had the requisite jurisdiction.

Thus, any matter which stricto sensu does not come within the purview of Chapter III-A would be entertainable by a civil court.

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527. ADMINISTRATIVE LAW:

Difference between 'irregular', 'wrong' or 'illegal' order *versus* 'null and void' order explained – It depends on whether or not the authority passing the order had jurisdiction.

Deepak Agro Foods v. State of Rajasthan and others

Judgment dated 11.07.2008 passed by the Supreme Court in Civil Appeal No. 4327 of 2008, reported in (2008) 7 SCC 748

Held :

All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non est and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties. (See *Kiran Singh v. Chaman Paswan, AIR 1954 SC 340*). However, exercise of jurisdiction in a wrongful manner cannot result in a nullity – it is an illegality, capable of being cured in a duly constituted legal proceedings.

In order to appreciate the distinction between a null and void order and an illegal or irregular order, it would be profitable to notice a few decisions of this Court on the point.

In *Rafique Bibi v. Sayed Waliuddin, (2004) 1 SCC 287* explaining the distinction between null and void decree and illegal decree, this Court has said that a decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction. The Court further held that a distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable.

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***528. ARMS ACT, 1959 – Sections 25 (1B) (b) & 4**

(i) Evidence of police officer, appreciation of – This evidence, affecting the recovery, cannot be discarded merely because witnesses turned hostile.

(ii) Non-production of seized article before the Court, effect of – Even if the seizure and investigation were in accordance with law, prosecution story loses its efficacy when the article seized is not produced before the Court – Such non-production entitles the accused to the benefit of doubt.

Kalebabu v. State of Madhya Pradesh

Reported in 2008 (4) MPHT 397

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***529. BANKING REGULATION ACT, 1949 – Section 54**

Suit for damages filed by the Bank against its officer (Branch Manager) alleging that due to his negligence, the Bank suffered losses – Suit decreed by the Trial Court – Held, in view of the provision contained in Section 54 of the Banking Regulation Act, 1949, suit was not maintainable as Civil Suit by the employer against an employee cannot be filed for damages for anything which is done in good faith by an employee – Further held, on merits also no malafide has been proved by the Bank (plaintiff/appellant) on the part of its officer (defendant/respondent), therefore, the Trial Court committed error in decreeing the suit.

Arvind Kumar Vyas v. State Bank of Indore

Reported in 2008 (4) MPHT 402

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530. CIVIL PROCEDURE CODE, 1908 – Sections 2 (2) & 54

LIMITATION ACT, 1963 – Articles 136 & 137

A decree may be preliminary or final or partly preliminary or partly final – Partition decree declaring one-third share in joint family properties and requiring that partition of the agricultural land shall be effected by the Collector under Section 54 of CPC is not a final decree – Final decree distinguished from finality of a decree.

Articles 136 & 137 of Limitation Act are not applicable to application under Section 54 of CPC praying for partition of land by Collector as per the terms of a preliminary decree passed by the Court.

Bikoba Deora Gaikwad and others v. Hirabai Marutirao Ghorgare and others

Judgment dated 27.05.2008 passed by the Supreme Court in Civil Appeal No. 4174 of 2008, reported in (2008) 8 SCC 198

Held :

Looking to the definition of decree under section 2 (2) of CPC, it is clear that a decree may denote final adjudication between the parties and against which an appeal lies, but only when a suit is completely disposed of, thereby a final decree would come into being.

There cannot be any doubt whatsoever that a decree may be partly preliminary and partly final. It has not been contended that the parties have partitioned the joint properties by metes and bounds and they are in separate possession of the lands allotted to them.

Section 54 of the Code in effect and substance confers a duty upon the Court. The said provision must be read in the context of the Order XXVI Rule 13 of the Code and/or Section 51, Order XXI Rule 11 thereof. It is not in dispute that in the State of Maharashtra the practice to get the properties partitioned by

a District Collector still continues. Section 54 only provides for a ministerial functions of a court. It cannot be termed to be an execution proceeding.

A bare perusal of Section 54 read with Order XX Rule 18 of the Code leaves no manner of doubt that the application filed before the Court to send decree and papers to Collector to carry out partition was not and could not have been an application in execution. If it was not an application for execution, the question of the application of the provisions of the Limitation Act would not apply.

Reliance has been placed by Mr. Sundaravardan on *Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992.* Therein this Court was concerned with the meaning of the words 'final decision' vis-à-vis 'preliminary decree for partition' and in that factual backdrop, it was opined: (AIR pp. 994-995, para 6)

> "6. ... It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Ss. 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be 'modified and amended'. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final

decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

The distinction between 'a final decree' and 'finality of a decree' is obvious enough to merit a detailed discussion. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decrees. Section 2(2) of the Code clearly shows as to the nature of the decrees that the court may pass. It is in the aforementioned context, the applicability of the provisions of Articles 136 and 137 of the Limitation Act may be noticed.

Article 136 would apply when an application for execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed. An application for taking steps towards passing a final decree is not an execution application. The said provision, therefore, cannot have any application in respect thereof.

Article 137 is a residuary provision which applies when no period of limitation is provided elsewhere in the Division. An application asking the court to perform its duty in terms of Section 54 of the Code can be filed at any point of time in a case where a right to apply accrues in a decree holder. Therefore, no period of limitation is to be prescribed as there is none. This aspect of the matter has been considered in *Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande (1995) 3 SCC 413* wherein it has been held: (SCC pp 418-19, paras 82 10)

"8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

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10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to the partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all."

Recently, albeit on a different factual backdrop, this Court in *Hasham Abbas Sayyad v. Usman Abbas Sayyad, (2007) 2 SCC 355* opined: (SCC p. 360, para 9)

"9. A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree."

For the reasons aforementioned, Articles 136 and 137 of the Limitation Act, 1963 will have no application. Even otherwise, the contention of the appellants is wholly unsustainable. Such a contention had been raised even in the earlier objections. They were rejected. The appeals preferred there against have also been dismissed. In that view of the matter, the appellants could not have agitated the same issue by filing another objection.

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***531. CIVIL PROCEDURE CODE, 1908 – Section 34**
CONSTITUTION OF INDIA – Article 227
Suit filed for recovery of two lac rupees with interest @ 18% p.a. taken by defendant as loan for personal use – Trial Court decreed the suit – During execution proceedings, defendants/judgment debtors deposited principal amount with interest @ 6% p.a. – Proceedings for auction of judgment debtor's property was initiated as he had not deposited interest @ 18% p.a. – Held, in the absence of a finding as to transaction being commercial, the Trial Court had no jurisdiction to award interest @ 18% p.a. after the judgment upto realization of the amount.
Smt. Chitrarekha v. Virendra Kumar Sharma and another
Reported in 2008 (4) MPHT 365

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***532. CIVIL PROCEDURE CODE, 1908 – Section 100, Order 1 Rule 3-B (M.P. Amendment Act No. 29 of 1984)**
Any right over agriculture land – State is necessary party – Can be added at any stage – Any suit between two parties relating to any right over agricultural land even without any relief against the State – The State of M.P. necessary party – But a plaintiff cannot be non-

suited on that ground – State can be added as party at any stage on which the objection is taken.

Sitaram v. Radheshyam

Reported in I.L.R. (2008) M.P. 2631

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*533. CIVIL PROCEDURE CODE, 1908 – Section 115

SPECIFIC RELIEF ACT, 1963 – Section 28

Agreement for sale of immovable property – Award of arbitrator directing execution of sale deed – Rejection of application for rescission of contract – Revision – There was no unreasonable delay on the part of non-applicant No. 1 to approach court for enforcing award – Delay attributed to applicants themselves – Held, the rise in price relating to immovable property agreed to be conveyed to non-applicant No. 1 would not be relevant to deny relief of specific performance – No ground for interference in order of trial court made out – Revision dismissed.

Mohanlal Garg v. M/s Chaudhary Builders Pvt. Ltd. and Ors.

Reported in I.L.R. (2008) M.P. 2720

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*534. CIVIL PROCEDURE CODE, 1908 – Section 115

ARBITRATION AND CONCILIATION ACT, 1996 – Section 8

Arbitration Clause – Applicant filed suit for declaration and injunction – Counterclaim by defendant – Applicant permitted to withdraw suit – Counterclaim entertained as suit – On first date of that suit objection for referring dispute to arbitration filed – Rejection – Objection qualifies the expression "the first statement on the substance of dispute" of Section 8 of the Act – Held, rejection of objection not sustainable – Dispute referred to arbitration – Revision allowed.

Charanjit Kaur (Smt.) v. S.R. Cable

Reported in I.L.R. (2008) M.P. 2445

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*535. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 8 & Order 23 Rule 3

Compromise in representative suit – Suit for injunction filed in representative capacity – During pendency, suit compromised by some plaintiffs – Compromise signed by counsel and not by all plaintiffs – Trial Court rejected application to record compromise – Held, compromise signed by counsel was valid as nobody raised objection even after publication of notice in newspaper – Trial Court has exercised jurisdiction vested in it improperly and acted illegally or with material irregularity – Order set-aside – Revision allowed. *AIR 1947 Nag. 17, AIR 1975 SC 2002, AIR 2006 SC 2628, (1992) 1 SCC 31 (ref.)*

Indian Oil Corporation Limited & ors. v. Ramesh & ors.

Reported in I.L.R. (2008) M.P. NOC 66

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***536. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 & Order 41 Rule 33**

Power of appellate Court – The appellate Court has been conferred with the power not withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, then appellate court in exercise of powers vested under Order 41 Rule 33 can pass an order in favour of the respondents or parties although the respondents have not preferred any appeal or objection.

Principles – Amendment of plaint and amendment of written statement are not necessarily governed by exactly the same principles though some general principles are common to both but the rule that the plaintiff cannot be allowed to amend the pleadings so as to alter materially or substitute his cause of action of the nature of his claim as necessarily no counter part in law related to written statement – The courts are inclined to be more liberal in allowing the amendment of the written statement than of plaint and question of prejudice is less likely to operate on the same rigour in the former than the latter.

Sushil Kumar Kanungo & ors. v. M.P. Rajya Sahkari Bank Maryadit & ors.

Reported in I.L.R. (2008) M.P. 2238

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537. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 7

Matrimonial dispute, trial of – Application for setting aside exparte order filed by petitioner (wife) dismissed by the Trial Court treating the dispute as an ordinary civil dispute – Held, a petition for divorce is not like other commercial suit – It cannot be treated as an ordinary civil dispute – A humanitarian approach is required to be adopted by Courts – Application to set aside exparte order allowed.

Asha v. Omprakash

Reported in 2008 (4) MPLJ 160

Held :

It is apparent from the impugned order that the trial Court has treated the dispute between the parties as an ordinary civil dispute and as such adjudicated the application filed by the petitioner-wife as having been filed by an ordinary defendant who is an adversary to the plaintiff.

The trial Court has completely ignored the fact that the dispute between the parties was a matrimonial dispute and while adjudicating the said dispute, a humanitarian approach had to be adopted. The aforesaid position of law stands well settled by various judgments of the Apex Court. In the case of *Balwinder Kaur v. Hardeep Singh, (1997) 11 SCC 701*, it was observed by the Apex Court as follows:

"9. A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law. One may refer to the Objects and Reasons which led to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence.

These further note :

"The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails".

It was further observed by the Supreme Court in the aforesaid case that the Rules of procedure are meant to subserve the cause of justice and not to frustrate it. The Supreme Court further observed as follows:

"15. Section 23 of the Hindu Marriage Act mandates the court before granting decree for divorce, whether defended or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief and (2) the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also cast on the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-section (3) of Section 23 of the Act, the court can even refer the matter to any person named by the parties for the

purpose of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all courts trying matrimonial matters."

It is thus apparent that the entire approach adopted by the trial court in dealing with the application filed by the petitioner-wife was on a misconception of the controversy between the parties and it had not been kept in view that the suit did not involve a commercial transaction but was a matrimonial dispute.

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538. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 90, Order 21 Rules 64, 66, 67 & 69 and Order 34 Rule 5

Provisions of Order 21 relating to the execution of decree are not applicable for the execution of decree passed under Order 34 of Code of Civil Procedure in a suit relating to mortgage of immovable property.

Mohd. Aleem v. Bank of India & 4 Ors.

Reported in 2008 (III) MPJR 388

Held :

The suits relating to the mortgaged property are governed by the provisions of Order 34 of the CPC and the decree of such is also governed by the same. In such premises, the proceeding of final decree is carried-out under the same provision and not under the provision of Order 21 of the CPC. In other words the provision of Order 21 relating to the execution of the other decree are not applicable for the execution of the decree passed under Order 34 of the CPC. Such question was also answered by the Apex Court in the matter of *S. Sivaprakasam v. B.V. Muniraj and another, (1997) 9 SCC 636* in which it was held as under :

> "6. ..... The procedure under Order 34 is entirely distinct and different from the procedure prescribed under Order 21. Order 21 deals with execution of decrees and orders and objections therein other than those relating to the property covered in mortgage decree. Order 34 is a special procedure prescribed relating to mortgages. Therefore, the procedure prescribed under Order 21 Rule 92 has no application as regards the passing of final decree under Order 34 Rule 5 CPC. Thus considered, we hold that the action taken by the executing court is not vitiated by any error of law, warranting interference."

The same principle is followed by this court in the matter of *Suraj Singh v. Union Bank of India and others* passed in Civil Revision No. 786/2004 vide order dated 27.02.2002.

In view of the aforesaid dictum the Order 21 and its Rules of CPC was not applicable for execution of the impugned decree then the objection filed by the appellants under Order 21 Rule 90 of the CPC was also not entertainable and

in that background the approach of the executing court appears to be in accordance with law, although such approach is based on appreciation of the facts is some different manner keeping in view the provision of Order 21 of the CPC.

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539. CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 4, 5, 9, 10-A & 11
LIMITATION ACT, 1963 – Section 5

(i) Abatement accrues by operation of law but nevertheless abatement requires judicial cognizance to put an end to a case as having abated to all or against a particular respondent/ defendent.

(ii) Principles applicable for considering application of condonation of delay and setting aside abatement summarized.

Perumon Bhagvathy Devasom, Perinadu Village v. Bhargavi Amma (dead) by LRs and others

Judgment dated 11.07.2008 passed by the Supreme Court in Civil Appeal No. 4440 of 2008, reported in (2008) 8 SCC 321

Held :

(i) Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependant upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless 'abatement' requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has 'abated', nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others).

The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

Note : The Apex Court has considered various case laws in this case viz., *Shakuntala Devi Jain v. Kuntal Kumari, AIR 1969 SC 575, Krishna v. Chathappan, 1890 ILR 13 Mad 269, N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123, Union of India v. Ram Charan, AIR 1964 SC 215, Ram Nath Sao v. Gobardhan Sao, (2002) 3 SCC 195* and *State of Madhya Pradesh v. S.S. Akolkar, (1996) 2 SCC 568.* Readers are requested to go through the above mentioned case laws.

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540. CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 4 & 5 r/w Rule 11 and Section 96

(i) Judgment against a dead person not represented is a nullity and inoperative.

(ii) When right to sue survives – Legal representatives of a deceased respondent have to be brought on record before the Court can proceed further in the appeal as the provisions of Order 22 Rules 4 and 5 of CPC are mandatory – If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute – Impleadment of legal representatives in suit/appeal – Purpose – Held, it is for limited purpose of representation of the estate of the deceased for adjudication of a case and not for the purpose of determination of proprietary rights – Proprietary rights to be determined by way of separate suit.

Jaladi Suguna (deceased) through LRs. v. Satya Sai Central Trust and others

Judgment dated 05.05.2008 passed by the Supreme Court in Civil Appeal No. 3375 of 2008, reported in (2008) 8 SCC 521

Held :

'Legal representative' according to its definition in section 2(11) of CPC, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Thus, a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative.

Order 22 CPC inter alia deals with death of parties. Rule 4 relates to the procedure in case of death of one of several defendants or of the sole defendant. Rule 5 relates to determination of question as to legal representative. Rule 11 relates to application of Order 20 to appeals.

When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent - plaintiff on record, will be a nullity.

Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only

when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-a-vis other rival claimants to the estate of the deceased.

The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided alongwith the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record.

The decree passed in favour of plaintiff can be set aside in an appeal filed by the aggrieved party but only after hearing the plaintiff who had secured the decree. Pronouncement of a case in a judgment can be only when the case has been heard.

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541. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 23
TRANSFER OF PROPERTY ACT, 1882 – Section 52
SPECIFIC RELIEF ACT, 1963 – Sections 19 & 20
Two persons purchased the same property by separate agreements with the seller – Both purchasers filed separate suits for specific performance of sale and impleaded each other as a party in both the suits – One purchaser entered into compromise with the seller and on the basis of it a consent decree was passed – The other purchaser was not being party in the compromise suit not bound by the consent decree.
The suit filed by other purchaser would be continued – If any transfer is made on the basis of such consent decree, the provisions of

Section 52 ofTransfer of Property Act and Section 19 of Specific Relief Act would attract.

Arjan Singh v. Punit Ahluwalia and others

Reported in AIR 2008 SC 2718

Held:

Where two suits for specific performance of agreement for sale were filed in respect of same suit property and the two purchasers – appellant and other purchaser were impleaded in suits filed by each other and a consent decree was passed in suit filed by other purchaser according to terms of compromise between him and owner of property which was not signed by appellant, the compromise could be said to have entered under first part of R. 3 of O. 23 and would not be binding on appellant. The appellant had a rival claim. The suit filed by him was required to be considered together. The Court could exercise its discretionary jurisdiction in one of the suits or the other, having regard to S. 20 of the Specific Relief Act, 1963. By reason of a compromise or otherwise, the claim of the appellant could not have been defeated. Moreover, the suit would be hit by the doctrine of *lis pendens*, as adumbrated under Section 52 of the Transfer of Property Act. The said deed of sale would not come in the Court's way in passing a decree in favour of the appellant. Its validity or otherwise would not be necessary to be considered as the appellant was not bound thereby. Said other purchaser would be deemed to be aware of the pendency of the suit. Even Section 19 of the Specific Relief Act will be attracted.

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542. CIVIL PROCEDURE CODE, 1908 – Order 38 Rule 5

Suit for declaration, injunction, recovery of possession and mesne profits with regard to land filed by the plaintiff – Plaintiffs have proved that they have substantive right in their favour – Defendants are enjoying the benefits of the suit property – Defendants published advertisement with regard to sale of their other land – It was necessary to attach some property of defendants or they should furnish security – Defendants directed to furnish security before the Trial Court.

Dharampal (dead) through LRs. Smt. Ashima Syal and another v. Hari Chandra @ Harish Chandra (dead) through LRs. Suresh Kumar Choudhary and others

Reported in 2008 (4) MPHT 510

Held :

It is clear from the facts that the litigation went upto the Hon'ble Supreme Court. The Hon'ble Supreme Court in Civil Appeal No. 4361/2007, reported in *Harichand v. Dharampal Singh Baba and others, (2007) 8 SCC 493* has held that Janki Bai was the owner of the suit property. It has further held by the Hon'ble Supreme Court that Shiv Singh had no right in the suit property relevant findings of the Hon'ble Supreme Court are as under:—

"7. So far as the present suit is concerned, this was wholly misconceived and engineered by the plaintiff on the basis of so-called family settlement. In fact, the rights of the parties having matured in Civil Suit No. 25 of 1962 wherein the High Court took the view in second appeal that the position of Bapu Saheb Temak nothing but of the manager and in that connection they relied on the regency order dated 17.11.1931 and indicated that Bapu Saheb Temak was never appointed as a Manager and, therefore, so far as the right of Smt. Janki Bai was concerned, the same stood affirmed. The subsequent suit brought by Shiv Singh was totally misconceived as on the basis of the so-called family settlement once the rights of the parties have matured by operation of the decision of the High Court, there was no occasion for the present suit being filed on the basis of the so-called family settlement. When the land did not belong to Bapu Saheb Temak or his son, Shiv Singh, there was no occasion for the so-called family settlement. Family settlement could only be if one has lawful right over that property and then alone family settlement could be executed. When there was no lawful right of the parties over the property, there was no occasion for the suit being filed on that basis. Therefore, in our opinion, the view taken by the High Court appears to be correct that Janki Bai was the owner of the property. When Bapu Saheb Temak was only the Manager of the property and the real owner was Janki Bai, the suit filed by Shiv Singh was rightly dismissed in the first appeal by the High Court setting aside the judgment and decree passed by the Trial Court."

In the aforesaid proceedings in the First Appeal before the High Court Harichand was permitted as conductor of the case he contested the case upto the Supreme Court. The same Harichand is the defendant in the present case. He is said to get the right in the property on the basis of agreement which is said to be executed by Shiv Singh when the Hon'ble Supreme Court has already held that Shiv Singh had no right in the suit property then certainly *prima facie* in my opinion, the petitioners have right of ownership in the suit property. Admittedly defendants are in possession over the suit property. It is a land of 36,000 sq.ft. having two room house. It is situated at Gwalior. Hence *prima facie* it cannot be said that the petitioners/plaintiffs have no case for *mesne* profit. The respondents have been enjoying the benefit of possession for a number of years.

The Hon'ble Supreme Court reported in *Raman Tech. & Process Engg. Co. and another v. Solanki Traders, 2008 (1) MPHT 426 (SC)* has held as under with regard to exercising of powers under Order 38 Rule 5 of the CPC.:

"5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of Court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premise to another premise or removal of machinery to another premise by itself is not a ground for granting attachment before judgment. A plaintiff should show, *prima facie*, that his claim is *bona fide* and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before the judgment."

As per the principle of law laid down by the Hon'ble Supreme Court, in my opinion petitioners/plaintiffs have proved that they have substantive right in their favour and *prima facie* defendants are enjoying the benefits of the suit property. The defendants further published an advertisement with regard to sale of other land, which is of the ownership of the defendants. Copy of the advertisement has been filed as Annexure P-7. In such circumstances, it is necessary to attach some property of the defendant or they may furnish some security to the satisfaction of the Trial Court.

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***543. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27**

Application under Order 41 Rule 27 of CPC filed in the pending civil appeal – Appeal should be decided along with such application.

M/s Eastern Equipment & Sales Ltd. v. ING. Yash Kumar Khanna

Reported in AIR 2008 SC 2360

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544. CONSTITUTION OF INDIA – Articles 19 (1) (a) & (2)
WORDS AND PHRASES:

(i) Municipal law and rules regarding erection of advertisement hoardings at public/private places – The Act and Rules regulate putting up of hoarding which is objectionable, destructive or obstructive in character but do not regulate advertisement – Not violative of the Fundamental Rights guaranteed under Articles 19 (1) (a) and (2) of the Constitution of India of a person.

(ii) 'Obstructive' and 'hazardous', meaning and difference there in explained.

Novva Ads v. Secretary, Department of Municipal Administration and Water Supply and another

Judgment dated 09.04.2008 passed by the Supreme Court in Civil Appeal No. 2702 of 2008, reported in (2008) 8 SCC 42

Held :

(i) Section 326-A defines "hoardings" to mean "any screen or board at any place whether public or private used or intended to be used for exhibiting advertisements."

So far as public places are concerned, the State has a full right to regulate them, as they vest in the State as trustee for the public. The State can impose such limitations on the user of public places as may be necessary to protect the public generally. (See *Saghir Ahmad v. State of U.P., AIR 1954 SC 728*)

Hoardings erected on private places also require to be licensed and regulated as they generally abut on and are visible on public roads and public places. Hoardings erected on a private building may obstruct public roads when put up on private buildings; they may be dangerous to the building and to the public; they may be hazardous and dangerous to the smooth flow of traffic by distracting traffic, and their content may be obscene or objectionable. It is, therefore, not correct that hoardings on private places do not require to be regulated by licensing provisions.

Rule 6 of the 2003 Rules put restrictions on the size of hoardings, on their height, the spacing, etc. and the requirement for erection on steel frames. Rule 10 restricts the hoardings to be put on certain places such as educational institutions, places of worship, hospitals, corners of roads, in front of places of historical and aesthetic importance.

The power to license is not unfettered and is guided by the above considerations. Under Rule 11 an appeal lies in the State Government for refusing the grant or renewal of licences. Section 326-J of the Act empowers the District Collector to prohibit the erection of hazardous hoardings and hoardings which are hazardous and a disturbance to the safe traffic movement so as to adversely affect the free and safe flow of traffic. The power under Section 326-J is not arbitrary as held by the Supreme Court in *M.C. Mehta v.*

Union of India, (1998) 1 SCC 363 on an identical provision relating to case of hoardings in New Delhi. Any action taken under Section 326-J must be taken by observing the principles of natural justice and supported by reasons. An appeal against the order of the District Collector for action under Section 326-J lies to the State Government under Section 326-H. There cannot be a presumption of misuse of power merely because discretion is conferred on a public authority for the exercise/use of the power. In *P. Narayana Bhat v. State of T.N., (2001) 4 SCC 554,* this Court has negatived the contention that the power of the licensing authorities is arbitrary and unguided.

(ii) Section 326-J of the Act prohibits erection of certain hoardings which are hazardous. The expression "hazardous" as an adjective, connotes something that is "risky" or "dangerous" vide *Black's Law Dictionary*, 8th Edn., p. 736.

The expression "obstruction" means "something that impedes or hinders". The expression, however, has varied sets of meaning and is not necessarily confined to physical obstruction only.

It has been held that "Obstructing" the police, includes anything which makes it more difficult for the police to carry out their duties and is not confined to mere physical obstructions, vide *Hinchliffe v. Sheldon,(1955) 1 WLR 1207.*

Obstruction has a wider meaning than mere physical obstruction and it includes tangible and identifiable obstruction and even a protest is obstructing.

In *Collector of Central Excise and Customs v. Paradip Port Trust, (1990) 4 SCC 250* this Court, construing the expression "obstruction" appearing in Section 133 of the Customs Act, 1962 has been pleased to hold: (SCC p. 255 para 13)

> "13. ...On the authority of *Hinchliffe v. Sheldon* it can be said that obstruction is not confined to physical obstruction and it includes anything which makes it more difficult for the police or public servant to carry out their duties."

The expression 'obstruction' in Rule 3(iii) would, therefore, include any act which impedes the free and safe movement of the traffic, pedestrians and vehicles. Such an act may well be, by reason of what is displayed on the hoardings. If the subject-matter that is displayed in such hoardings attracts attention of the drivers of vehicles and which, in turn, impedes free and safe movement of traffic such a hoarding would clearly come under the meaning "obstruction" contemplated under Rule 3(iii) of the Rules.

It is to be noted that there is certainly some difference between "hazardous" and "obstruction" though there may be some amount of overlapping. What is hazardous cannot have definite terms. So in that sense, Legislature had thought it wise to use the expression 'obstruction' so that it can be brought within manageable standards. The ultimate objective is safe traffic movement and free and safe flow of traffic.

The fact that the hoarding is on building or private land does not take away the regulatory measures relating to hoardings. There can be cases where because of the size and the height, it can be dangerous to public and also be hazardous. There is no structural safeguard in respect of such hoardings. There has to be regulatory measures. As has been rightly contended by learned counsel for the respondents, the Act and the Advertisement Rules do not regulate advertisement. They regulate putting up of any hoarding which is found to be objectionable, destructive or obstructive in character.

It cannot be said that there is infringement of freedom of speech. The content, effect and the purpose of the statute clearly show that it is not intended to be so.

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***545. CONSTITUTION OF INDIA – Article 226**

Compassionate appointment – Father of petitioner died on 18.12.1985 in harness – On obtaining majority petitioner applied for compassionate appointment on 01.09.2000 – Appointment – Cancellation of appointment on ground of subsequent policy dated 22.01.2007 in which compassionate appointment can be given only in case minor attains majority within 7 years of death of employee – Held, policy prevailing at the time of application for compassionate appointment shall be applicable and not the policy which came into existence subsequently – Order of cancellation of appointment quashed – Petition allowed. ***2002 (3) MPLJ 242*** **(ref.)**

Rakesh Jaju (Gupta) v. State of M.P. and ors.

Reported in I.L.R. (2008) M.P. NOC 81

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***546. CONSTITUTION OF INDIA – Article 226**

Recovery from terminal benefits – Due to clerical error benefit of two increments was extended to petitioner's husband – Order for recovery from terminal benefits – Held, benefit of increments was not extended in favour of petitioner's husband on account of any fraud or misrepresentation on his part – Recovery could not be made – Order of recovery quashed – Petition allowed.

In view of the judgment of the Supreme Court in the case of *Sahibram v. State of Haryana, (1994) 2 SCC 52* and in case of *Shyambabu Verma v. Union of India, (1994) 2 SCC 521* any amount paid erroneously or on the basis of wrong interpretation of rules or misconception cannot be recovered. It can only be recovered if such payment was made as a result of any fraud or misrepresentation on the part of the employee.

Devkunwar (Smt.) v. State of M.P. and ors.

Reported in I.L.R. (2008) M.P. NOC 76

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*547. CONSTITUTION OF INDIA – Article 311

Compulsory retirement – Scope of interference – Petitioner remained absent unauthorisedly without leave and thereafter did not join at his transferred post inspite of receiving instructions – Held, the conduct of petitioner is not becoming that of an employee and that it has resulted in loss of faith, trust and loss of confidence in him – Punishment of compulsory retirement is not harsh or grossly disproportionate – Order does not suffer from any kind of perversity or wednesbury unreasonableness – Petition dismissed.

Hari Krishna Verma v. The District & Sessions Judge & ors.

Reported in I.L.R. (2008) M.P. 2231

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*548. CONSUMER PROTECTION ACT, 1986 :

Motor Insurance claim – Insured value of a vehicle cannot be reduced in accident claim in an immeasurable manner – Insurance Company is bound by the value put on the vehicle while renewing the policy.

Dharmendra Goel v. Oriental Insurance Company Limited

Judgment dated 30.07.2008 passed by the Supreme Court in Civil Appeal No. 4720 of 2008, reported in (2008) 8 SCC 279

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*549. COURT FEES ACT, 1870 – Section 7 (iv) (c) & Article 17 (iii) of Schedule II

CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

CONSTITUTON OF INDIA – Article 227

Suit for declaring an order as illegal which forfeited security amount deposited by the plaintiff – The Trial Court directed the plaintiff to pay ad valorem Court Fee on forfeited amount – Held, since security amount not being in possession of the plaintiff, mere suit for declaration would not be enough – Plaintiff has to pray for its refund – The trial Court rightly directed the plaintiff to pay ad valorem Court fee on the amount of security deposit.

M/s Bansal Highway v. General Manager, Gramin Sadak Vikas Pradhikaran Pariyojna Kriyanvayan and others

Reported in 2008 (4) MPHT 457

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550. CRIMINAL PROCEDURE CODE, 1973 – Sections 41 (2), 102, 451 & 457

INCOME TAX ACT, 1961 – Sections 132 (A) & 293

Seizure – Rs. 14,50,000/- seized on the suspicion of theft but no crime registered – Warrant of authorization issued u/s 132 (A) of the Act – Application under Sections 451 and 457 of the Code rejected by JMFC, but allowed by ASJ in revision – Order challenged before the High Court – Held, after issuance of warrant of authorization by the Income Tax Department, in absence of any crime having been registered –

The Magistrate or the police has no jurisdiction to deal with the money and the money has to be handed over to the Income Tax Department for its disposal in accordance with Law – M.Cr.C. allowed.

Director of Income Tax (Investigation) v. State of M.P.
Reported in I.L.R. (2008) M.P. 2483

Held:

From the perusal of the judgment passed by the Division Bench in *Union of India v. Incharge Police Station, Janakganj and others, 1990 JLJ 734* cited on behalf of the petitioner, it appears that this case is covered by Single Bench Judgment of this Court in *Biaora Constructions (P) Ltd. v. Director of Income Tax (Investigation) and others dated 12.09.2005.* In that case also the amount was seized by the police. Thereafter authorization under Section 132 (A) of the Act was issued and when ignoring the same, the learned Magistrate did not handover the amount to the petitioner, that order was set aside. The part of the observation of the Court in para-9 being relevant is reproduced hereinbelow: –

> "According to us the police officer, who had seized the money from respondent No.3, on being served with the order of the Income Tax Authority and Warrant of Authorisation, and for that matter learned Magistrate also suffered statutory handicap to deal with the money in any other manner than as contemplated under the special law enacted as aforesaid. Be it noted in this connection that the police had not registered any crime against respondent No. 3 and the Income Tax Department on being apprised of the seizure had laid claim to that money and to custody thereof in accordance with provisions aforequoted. Neither S.H.O. Janakganj Police Station nor learned Magistrate had any jurisdiction to enquire into the validity of the Warrant of Authorisation for delivery of that money to the Income Tax Officer concerned namely, Shri Khanduja nor of the competence of the Officer issuing that Warrant of Authorisation."

This case is covered by the observation of the Division Bench of this Court in the aforementioned order, which ought to be followed.

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***551. CRIMINAL PROCEDURE CODE, 1973 – Section 154**
EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Sections 300 & 304 Part II

(i) Entire Family involved in the incident – Delay not fatal.

(ii) More accused persons involved – Discrepancies in statement of witnesses are normal circumstances.

(iii) Accused fully armed came to the place of the incident with the object – Caused serious injuries to the deceased – Matter does not fall under Section 304 Part II of IPC.

Serious incident happened in village at 4.30 p.m. – Entire family was involved and they first attended the seriously injured person of their family – FIR lodged by the wife of the deceased at about 11.45 p.m. on the same day at police station – Held, delay of few hours in this background has been substantially explained and cannot be said to be unreasonable.

In such a matter where more accused persons are involved, discrepancies between the statement of the eye witnesses *inter se* of the occurrence in normal circumstance – It would be unreasonable to expect a witness to give a picture perfect report of the injuries caused by each witness to the deceased or the injured more particularly where it has been proved on record that the injuries had been caused by several accused armed with different kinds of weapons – With the passage of time the memory of an eye witness tends to dim and it is perhaps difficult for a witness to recall events with precision.

It is clear from the record that the accused had come to the place of incident fully armed with the object to sort things out with the deceased as he was creating problems for them and their father over the land in question and to remove him from the scene once and for all – Furthermore, in the light of the serious injuries caused to the deceased and to PW3 Devendrappa the matter does not fall within the ambit of Section 304 Part II of the IPC.

Chandrappa & Ors. v. State of Karnataka

Reported in AIR 2008 SC 2323

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552. CRIMINAL PROCEDURE CODE, 1973 – Section 156 (3)

Power to order investigation under Section 156 (3) of CrPC, exercise of – Magistrate has to proceed and pass the order on the basis of material on record of that particular case – He is not supposed to remember and pass the order in a case on the basis of facts of any other case much less on his personal memory – Before passing order under Section 156 (3) CrPC, Magistrate ought to express in the order if he prima facie found that the complaint is disclosing a cognizable case.

In reference v. Alok Singhai and another

Reported in 2008 (4) MPHT 292

Held :

The action for taking up this matter as suo motu revision arose when the Deputy Secretary of Lokayukta Office sent a letter dated 27.06.2008 to the Registrar General of High Court on the direction of Lokayukta with a view to inform the real state of affairs of the case. In the said letter, it was mentioned that the Director General of Special Police Establishment had filed a complaint against Alok Singhai and Narendra Bhavasar on 12.06.2008 under Sections

182, 193, 199 and 211 of the Indian Penal Code in the Court of Shri D.K. Singh, JMFC, Bhopal. After hearing the arguments on the said complaint, on 16.06.2008 learned Magistrate fixed the case for orders on 26.06.2008. Thereafter, Alok Singhai and Narendra Bhavasar filed a complaint against Lokayukta and his wife before Shri D.K. Singh, JMFC, Bhopal on 18.06.2008. Learned Magistrate finding that he had no jurisdiction to entertain the complaint, returned it to the complainants under Section 201 of the Code of Criminal Procedure for its presentation to the proper Court. On 19.06.2008, Alok Singhai and Narendra Bhavasar then filed the present complaint against Lokayukta and his wife under Sections 420, 465, 467 and 471/34 of the Indian Penal Code in the Court of Shri D.K. Singh, whereupon he passed an order under Section 156 (3) of the Code of Criminal Procedure directing the Officer Incharge of Police Station Kohefiza to register the First Information Report if a cognizable offence is found and to file report in this regard.

It is well settled that the Magistrate has to proceed and pass the orders in a case on the basis of material on record of that particular case. He is not supposed to remember and pass the orders in a case on the basis of facts of any other case much less on his personal memory. Even if another complaint was filed by the Director General, SPE against the complainants alleging that the allegations made by the complainants against Lokayukta and his wife were false and were actuated with *mala fides*, the complainants were not debarred from filing the complaint before the Magistrate. In *Anandwardhan and another v. Pandurang and others, (2005) 11 SCC 195,* the Apex Court observed:—

> "We do not wish to make any comments about the investigation of the case or the result of the investigation. The law provides that if the police fails to investigate a case arising from a first information report lodged before it disclosing commission of a cognizable offence, it is open to the informant/complainant to move the Magistrate concerned for appropriate order under Section 156 CrPC, or may file a complaint and obtain appropriate orders from him for issuance of process against the accused for trial. If the grievance of the respondent was that the police was not properly investigating his case, or that the report made by the police was wrong or based on no investigation whatsoever, it was open to him to move the Magistrate concerned."

Even if the first complaint filed by the complainant was returned by the Magistrate to the complainants on the ground that he had no jurisdiction to entertain the same as commission of offence under Section 13 (1) (d) of the Prevention of Corruption Act was alleged, it did not debar the Magistrate to entertain the complaint again, if those allegations were omitted by the complainants in the second complaint.

It is apparent that learned Magistrate instead of taking recourse to examine the complainants and record their evidence, simply passed an order under Section 156 (3) of the Code of Criminal Procedure with a direction to the Police to register the First Information Report if a cognizable offence is found to have been committed on the facts alleged in the complaint. The learned Magistrate even did not direct the Police to register the First Information Report.

In *Madhu Bala v. Suresh Kumar and others, AIR 1997 SC 3104*, the Apex Court held that: —

> "Whenever a Magistrate directs an investigation on a 'complaint' the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the Police Rules. Therefore, the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under Section 156 (3) cannot be said to be legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156 (1) of the Code which empowers the Police to investigate into a cognizable 'case' and the Rules framed under the Police Act, 1861 it (the Police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of Magistrate to direct the police to register a case at the police station and then investigate into the same."
>
> "When a written complaint disclosing a cognizable offence is made before a Magistrate, he may take a cognizance upon the same under Section 190 (1) (a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police State under Section 156 (3) for investigation. Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173 (2) on which a Magistrate may take cognizance under Section 190 (1) (b) but not under 190 (1) (a)."

It is true that the learned Magistrate ought to have expressed in the order if he *prima facie* found the complaint disclosing a cognizable case, before passing the order under Section 156 (3) of the Code of Criminal Procedure, but he left it on the police to register the First Information Report if it found the commission of a cognizable offence on the facts alleged in the complaint, but every mistake does not necessarily call for correction.

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*553. CRIMINAL PROCEDURE CODE, 1973 – Sections 161 & 162
EVIDENCE ACT, 1872 – Section 3
CRIMINAL TRIAL:
PRACTICE & PROCEDURE:

(i) It is well settled that the contents of the spot map prepared by police at the instance of a witness would be considered as the statement of the witness recorded u/s 161 of the Code – Contents of the map can be used u/s 161 of the Code for impeaching the testimony of witness on whose instance it was prepared.

(ii) Counter case – The basic principle of criminal jurisprudence is that each case is to be decided on the basis of its own oral and documentary evidence adduced by either party and not extraneous material (i.e. evidence produced in counter case) can be taken into consideration.

Narayan & ors. v. State of M.P.
Reported in I.L.R. (2008) M.P. 2401

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*554. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 & 482
Further investigation – Quashing of proceedings – Charge sheet filed against applicant before Special Judge returned back for presentation before the Court of Special Magistrate – Fresh charge-sheet filed after recording statements of discharged accused person as witnesses – Held, C.B.I. could have conducted further investigation only with due permission of Court – However, merely because C.B.I. had conducted further investigation without prior permission, it would not be sufficient to vitiate cognizance unless it is shown that such an investigation has caused any prejudice to applicants or had resulted in miscarriage of justice – Petition dismissed.

Shamsher Singh Mangat (Lt. Col.) v. State of M.P.
Reported in I.L.R. (2008) M.P. 2141

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*555. CRIMINAL PROCEDURE CODE, 1973 – Sections 177, 178 & 179
DOWRY PROHIBITION ACT, 1961 – Section 4 r/w Section 6
Territorial jurisdiction – Offence alleged to have committed in Ujjain and complaint filed at Vidisha wherein non-applicant residing with her parents – Held, the venue of enquiry or trial of case is determined by averments made in complaint – The question of jurisdiction is question of law and fact and it needs enquiry – Cannot be interfered by the High Court.

Neeraj Rathore v. Smt. Pramodin Rathore
Reported in I.L.R. (2008) M.P. 2734

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*556. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 & 120-B

Private complaint under Sections 406, 420 and 120-B IPC filed against accused Nos. 1, 2 and 3 alleging that accused No. 1 executed agreement to sell and accused Nos. 2 and 3, who are sons of accused No. 1, were also present at the time of execution of agreement – It was also alleged that accused no. 1 did not honour the agreement and the accused persons cheated the complainants – CJM ordered police to investigate the matter under Section 156 (3) of CrPC – Against it petition under Section 482 CrPC filed praying for quashing of criminal proceedings – Held, criminal proceedings against accused no. 2 and 3 were wholly unwarranted as the basic ingredients of offence under Sections 406, 420 and 120-B of IPC are altogether missing – Proceedings against accused no. 2 and 3 ordered to be quashed.

Tej Singh and others v. Rewa Ram and others

Reported in 2008 (4) MPHT 267

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*557. CRIMINAL PROCEDURE CODE, 1973 – Sections 216 & 217

PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (1) (d) & (2)

(i) Alteration of charges – Charge sheet filed against applicants and other accused persons under Sections 420, 467, 468, 471, 120-B of IPC and Section 13 (1) (d) r/w/s 13 (2) of the Prevention of Corruption Act – No charge under Section 13 (1) (d) & (2) of the Act framed against applicants although the same was framed against some of co-accused persons – Charges can be altered or added at any time – Framing of charge under Section 13 (1) (d) & (2) of the Prevention of Corruption Act not illegal.

(ii) Recall of witnesses when charge altered – Charges altered or added by trial court – Interest of prosecution and defence of accused to be safeguarded by permitting them to further examining or cross-examine the witnesses – Order refusing to recall witnesses set aside.

Manjulata Tiwari (Smt.) and anr. v. State of M.P.

Reported in I.L.R. (2008) M.P. 2731

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558. CRIMINAL PROCEDURE CODE, 1973 – Sections 244 & 246 (6)

Scope of Sections 244 & 246 (6) – The power of Magistrate should not be fettered either under Section 244 or 246 (6) of CrPC and full latitude should be given to the Magistrate to exercise the discretion to entertain supplementary list of witnesses – But while accepting the supplementary list, the Magistrate shall exercise his discretion judicially for advancement of the cause of justice and not to give a handle to the complainant to harass the accused – Also the discretion conferred on Magistrate should only be used in appropriate cases for reasons to be recorded.

Sayeeda Farhana Shamim v. State of Bihar and another

Judgment dated 16.05.2008 passed by the Supreme Court in Criminal Appeal No. 928 of 2008, reported in (2008) 8 SCC 218

Held :

The question is whether a supplementary list of witnesses can be furnished by the complainant and the Magistrate can summon those witnesses to be examined. The question is whatever witnesses who have been examined under Section 244 Cr.P.C., whether the Magistrate cannot entertain any further list of witnesses to be examined by the complainant to substantiate his allegation in the complaint. It is true that under Section 244 Cr.P.C. if the charge is framed, then the prosecution has to examine the evidence produced by it in support of its case. After that the accused will have the right to cross-examine and the matter will proceed to be decided under Section 246. But before the matter is decided and during the pendency of the trial can the Magistrate entertain any petition filed by the prosecution for examining additional evidence in support of its case.

It may be mentioned here that the discretion of the Magistrate is no where fettered by any of the provisions contained in Cr PC. Section 244 Cr.P.C. reads as under:

> **"244. Evidence for prosecution.** — (1) When, in any warrant- case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.
>
> (2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing."

The expression used, as 'the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution'. Similarly, sub-section (6) of Section 246 Cr.P.C. reads as under:

> "(6) The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any); they shall also be discharged."

The expression used as, 'the evidence of any remaining witnesses for the prosecution shall next be taken'. Therefore, the Magistrate has discretion, before he closes the trial, to summon the witnesses if it advances the cause of justice. Here we want to say a word of caution that the discretion which has been conferred on the Magistrate under Section 244(2) and Section 246(6) Cr.P.C. should be used in appropriate cases for reasons to be recorded. The discretion

should not be used fancifully and for a mala fide purpose to harass the accused. It is quite possible that sometimes when the complainant fails to substantiate the allegation, he may resort to dilatory tactics and thereby harass the accused by giving supplementary list to prolong the continuance of the case. This should be checked but in case it is found that in fact the application for summoning the additional witnesses is made for bona fide purpose and to substantiate the allegations made in the complaint, then the Magistrate may exercise such power in appropriate case.

The consensus opinion in this regard of the High Courts of Andhra Pradesh in *Jamuna Rani v. S. Krishna Kumar, 1993 Cri LJ 32,* Allahabad High Court in *Nawal Kishore Shukla v. State of U.P., 1992 Cri LJ 1554,* by Madras High Court in *S. Vivekanantham v. R. Vishwanathan, 1977 Cri LJ 425* and by Bombay High Court in *State of Bombay v. Janardhan, AIR 1960 Bom 513* appears to be more sound.

It appears to be that the power of the Magistrate should not be fettered either under Section 244 or under sub-section (6) of Section 246 of the Cr.P.C. and full latitude should be given to the Magistrate to exercise the discretion to entertain a supplementary list. But as we have already added a word of caution that while accepting the supplementary list the Magistrate shall exercise its discretion judiciously for the advancement of the cause of justice and not to give a handle to the complainant to harass the accused.

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***559. CRIMINAL PROCEDURE CODE, 1973 – Section 319**

Section 319 of the Code empowers a Court to proceed against any person not shown to be an accused if it appears from the evidence that such person has also committed an offence for which he can be tried together with the accused.

The primary object underlying Section 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously – Justice and convenience both require that cognizance against the newly added accused should be taken in the same case and in the same manner as against the original accused – The power must be regarded and conceded as incidental and ancillary to the main power to take cognizance as part of normal process in the administration of criminal justice.

It is also settled law that power under Section 319 can be exercised either on an application made to the court or by the court *suo motu* – It is in the discretion of the court to take an action under the said section and the court is expected to exercise the discretion judicially and judiciously having regard to the facts and circumstances of each case. Section 319 of the Code nowhere states that such an application can be filed by a person other than the accused – It also does not prescribe any time-limit within which such application should be filed in the court. Even persons who have been dropped by the police during

investigation but against whom evidence showing their involvement in the offence come before the criminal court are included in the said expression. [See *Joginder Singh v. State of Punjab, (1979) 1 SCC 345*] Similarly in *MCD v. Ram Kishan Rohtagi, (1983) 1 SCC 1*, it was held that even if previously the High Court by invoking Section 482 of the CrPC quashed the proceedings against some persons, it will not prevent the trial court from exercising its discretion under Section 319 of CrPC if it is fully satisfied that the case for taking cognizance against them has been made out on the additional evidence led before it.

In *Lok Ram v. Nihal, (2006) 10 SCC 192* it was held that power under Section 319 of the Code can be exercised by the court *suo motu* or on an application by someone including accused already before it – If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused – The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case – Undisputedly, it is an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier –The word 'evidence' in Section 319 contemplates the evidence of witnesses given in court. Under sub-section (4) (b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced – That would show that by virtue of sub-section (4) (b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned.

Bholu Ram v. State of Punjab and another

Judgment dated 29.08.2008 passed by the Supreme Court in Criminal Appeal No. 8067 of 2004, reported in (2008) 9 SCC 140

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560. CRIMINAL PROCEDURE CODE, 1973 – Section 320

Compounding of offence – Date of offence is relevant for consideration – If the offence was compoundable on the date of incidence, then it may be allowed to compound even though it was made non-compoundable subsequently.

Mohd. Abdul Sufan Laskar and others v. State of Assam

Judgment dated 25.08.2008 passed by the Supreme Court in Criminal Appeal No. 1343 of 2008, reported in (2008) 9 SCC 333

Held:

Sub-section (8) of Section 320 of the Code expressly enacts that where the composition of an offence under this section is recorded by the court, it

shall have effect of an acquittal of the accused with whom the offence has been compounded.

Under the Code, as originally enacted in 1973, an offence punishable under Section 324 IPC (voluntarily causing hurt by dangerous weapons or means) was made compoundable with the leave of the court. The said entry read as under:

"TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused."

It is no doubt true as stated by the learned counsel for the appellants even at the time of preliminary hearing of this matter that by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005) the above entry has been deleted. In other words, an offence of voluntarily causing hurt by dangerous weapons or means punishable under Section 324 IPC is no more compoundable. The Amendment Act of 2005 came into force from 23.6.2006.

As we have already noted, according to the prosecution, the appellants had committed the offence on 15.6.1995. In view of the above fact, in our opinion, Act 25 of 2005 has no application to the facts of the case. We, therefore, see no ground to refuse permission as sought by the parties who have compromised the offence which was compoundable under the Code as it stood in 1995. If it is so, compounding can be permitted and the accused (the appellants) can be acquitted.

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561. CRIMINAL PROCEDURE CODE, 1973 – Sections 340 & 344

(i) Salient features, purpose and essential ingredients of Sections 340 and 344 explained – The purpose is to eradicate the evil of perjury.

(ii) This object can be achieved now as it is open to Courts to take recourse of Section 340 (1) in cases in which they have failed to take action under Section 344 – The object of Section 344 is to further arm the Court with the weapon to deal with more flagrant caes and not to take away the weapon already in its possession.

Mahila Vinod Kumari v. State of Madhya Pradesh

Judgment dated 11.07.2008 passed by the Supreme Court in SLP (Crl.) No. 4950 of 2008, reported in (2008) 8 SCC 34

Held :

Section 344 of Criminal Procedure Code introduces an additional alternative procedure to punish perjury by the very court before which it is committed in place of old Section 479-A which did not have the desired effect to eradicate the evils of perjury. The salient features of this new provision are:

(1) Special powers have been conferred on two specified courts, namely, the Court of Session and Magistrate of the First Class, to take cognizance of an offence of perjury committed by a witness in a proceeding before it instead of filing a complaint before a Magistrate and try and punish the offender by following the procedure of summary trials. For summary trial, see Chapter 21.

(2) This power is to be exercised after having the matter considered by the court only at the time of delivery of the judgment or final order.

(3) The offender shall be given a reasonable opportunity of showing cause before he is punished.

(4) The maximum sentence that may be imposed is 3 months' imprisonment or a fine up to Rs. 500 or both.

(5) The order of the Court is appealable (vide section 351).

(6) The procedure in this section is an alternative to one under Sections 340-343. The court has been given an option to proceed to punish summarily under this section or to resort to ordinary procedure by way of complaint under Section 340 so that, as for instance, where the court is of the opinion that perjury committed is likely to raise complicated questions or deserves more severe punishment than that permitted under this section or the case is otherwise of such a nature or for some reasons considered to be such that the case should be disposed of under the ordinary procedure which would be more appropriate, the court may choose to do so [vide sub-section (3)].

(7) Further proceedings of any trial initiated under this section shall be stayed and thus, any sentence imposed shall also not be executed until the disposal of an appeal or revision against the judgment or order in the main proceedings in which the witness gave perjured evidence or fabricated false evidence [vide sub-section section (4)].

For exercising the powers under the section the court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence.

The second condition is that the court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the

witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. [See *Narayanswami v. State of Maharashtra, (1971) 2 SCC 182*].

The object of the provision is to deal with the evil of perjury in a summary way.

The purpose of enacting Section 344 CrPC appears to be to further arm the court with a weapon to deal with more flagrant cases and not to take away the weapon already in its possession. The object of the legislature underlying enactment of the provisions is that the evil of perjury and fabrication of evidence has to be eradicated and can be better achieved now as it is open to courts to take recourse to Section 340 (1) in cases in which they have failed to take action under Section 344 CrPC.

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562. CRIMINAL PROCEDURE CODE, 1973 – Section 378

Appeal against acquittal – Interference permissible only when compelling and substantial reasons for doing so existed – Otherwise not.

Syed Peda Aowialia v. Public Prosecutor, High Court of A.P., Hyderabad

Reported in AIR 2008 SC 2573

Held:

There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See *Bhagwan Singh and Ors. v. State of Madhya Pradesh (2002 (2) Supreme 567)*]. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra, AIR 1973 SC 2622, Ramesh Babulal Doshi v. State*

of Gujarat, 1996 (4) Supreme 167, Jaswant Singh v. State of Haryana, 2000 (3) Supreme 320, Raj Kishore Jha v. State of Bihar and Ors., 2003 (7) Supreme 152, State of Punjab v. Karnail Singh, 2003 (5) Supreme 508, State of Punjab v. Pohla Singh and Anr., 2003 (7) Supreme 17 and V.N. Ratheesh v. State of Kerala, 2006 (10) SCC 617.

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***563. CRIMINAL PROCEDURE CODE, 1973 – Section 386**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
EVIDENCE ACT, 1872 – Section 114 Illustration (f)
GENERAL CLAUSES ACT, 1897 – Section 27

(i) Court shall decide the appeal on merits, cannot dismiss for default – Appeal against acquittal filed by complainant – On two dates respondent (accused) and his counsel were not present – Even after intimating the date by issuance of special post card, respondent and his counsel not present – High Court heard appeal on merits in absence of respondent as well as his counsel.

(ii) Dishonour of cheque – Notice by registered post on correct address – Postman tried to deliver on several dates – Notice returned with remark 'addressee not available' – Presumption about service not rebutted – Held, notice duly served – Order of conviction passed by trial court upheld – Appeal allowed.

Mujaffar Hussain Mansoori v. Devendra Trivedi
Reported in I.L.R. (2008) M.P. 2687

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564. CRIMINAL PROCEDURE CODE, 1973 – Sections 397/401, 164, 281 & 463
EVIDENCE ACT, 1872 – Section 24
Recording of confession – Provisions of Sections 164 and 281 of CrPC, non-compliance of – Trial Court administered oath to the accused while recording confession – Held, the Court is required to find out whether the non-compliance has injured the accused in his defence – Further held, administering the oath simplicitor cannot be said to have injured the accused in his defence on merit of the case in hand.

Madhu Sonkar (Smt.) v. State of M.P. & Ors.
Reported in 2008 (IV) MPJR 38 (DB)

Held :

Administering of oath to an accused is prohibited. However, at the same time the Apex Court has not laid down in *Babubhai Udesing Parmar v. State of Gujarat, AIR 2007 SC 420* and *Brijbasi Lal Shrivastava v. State of Madhya Pradesh, AIR 1979 SC 1080* that if oath is administered, statement will be rendered wholly inadmissible. Considering the provision of Section 463 of CrPC, it is apparent that if any Court before which a confession or other statement is made, evidence

against an accused person is recorded, or purporting to be recorded under Section 164 or Section 281, finds that any of the provisions of either of such Sections have not been complied with by the Magistrate recording the statement, take evidence in regard to such non-compliance, and may, if satisfied that "such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement". The provisions of Section 463(1) makes it clear that non-compliance of the provision is fatal in case it has caused injury to the accused in his defence on merit. Though there was non-compliance in the instant case inasmuch as oath was administered, it was violative of Section 164 (5) of CrPC, it may not be fatal. The evidentiary value of such confessional statement is required to be considered and Court is required to find that such non-compliance has injured the accused in his defence on merits and whether he duly made statement recorded. In our opinion, such statement may be admitted in case it has not caused prejudice on merit in the facts of the case to the accused. In the instant case, accused Shamim had retracted the confession (P-59) by way of filing application (D-4), after 6 days it was recorded. He never felt bounden by oath which was administered wrongly to him and oath has to be simply ignored. The administering the oath simplicitor cannot be said to have injured the accused in his defence on merit in the instant case. We disagree with the finding recorded by the Court below that due to administering of the oath, the confessional statement (P-59) was rendered inadmissible. We respectfully disagree with the view expressed in *Philips v. State of Karnataka, 1980 CriLJ 171* by Karnataka High Court and *State v. Suram Singh, 1976 CriLJ 96* by Jammu & Kashmir High Court. In our opinion it has to be seen whether administering of the oath has injured the accused in his defence on merit of a case.

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565 CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439
INDIAN PENAL CODE, 1860 – Sections 409 & 465
Offence under Section 409 of IPC – Competency of Court to consider regular bail application – Held, since the offence under Section 409 IPC is punishable with imprisonment of life, the Court of Sessions would be the competent Court and not the Magistrate's Court.
Ram Kishor Saket v. The State of M.P.
Reported in 2008 (4) MPHT 461

Held :

In case of *Gurcharan Singh v. State (Delhi Admn.), AIR 1978 SC 179,* the Apex Court observed as under:—

> "Section 439 (1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under Section 439 (1) CrPC against granting of bail by the High Court or the Court of Session

imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439 (1) CrPC of the new Code."

The decision of the Apex Court while observing about the course of a bail application which is to take generally, it appears to me, did not intend to confer jurisdiction on a Court without jurisdiction under the Statute. Naturally, therefore, the Apex Court made it clear that "The High Court or the Court of Session *will have to exercise* its judicial discretion in considering the question of granting of bail under Section 439 (1) CrPC of the new Code." In the context, the observation that "it is, however, legitimate to suppose that the High Court or the Court of Session *will be approached by an accused only after he has failed before the Magistrate....."* appears to be words of caution and warning against the abuse of the provision of the bail, without intending to compel an accused to first necessarily go before a Court (Magistrate) without jurisdiction before approaching one endowed with jurisdiction.

Since the Police had registered the case under Sections 409 and 465 of the Indian Penal Code, the applicant was justified in supposing that his bail application under Section 437 (1) of the Code of Criminal Procedure before the Magistrate would be an entirely futile exercise for want of jurisdiction. In the present case, while granting bail to the applicant under Section 438 of the Code of Criminal Procedure, this Court observed that the applicant may move an application for regular bail before the Competent Court, then the learned Additional Sessions Judge ought not to have dismissed the application filed by the applicant as not maintainable. Since the offence under Section 409 IPC is punishable with imprisonment for life, *prima facie,* the Court of Sessions would be the Competent Court for the purpose of regular bail application.

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***566. CRIMINAL TRIAL:**

CRIMINAL PROCEDURE CODE, 1973 – Sections 211 to 213 & 313 Improper charge was framed that death was caused by setting deceased on fire after pouring kerosene oil on her despite medical evidence that death was caused due to asphyxia as a result of smothering and burns on deceased's person were post mortem – Whereas during examination of the accused persons under Section 313 CrPC, questions put to them relating to the cause of death was due to smothering as per medical evidence – But looking to the charge framed, this question does not arise for explanation – Such casual approach in framing charge and questioning the accused under Section 313 deprecated.

Basavaraja and others v. State of Karnataka
Judgment dated 22.09.2008 passed by the Supreme Court in Criminal Appeal No. 1 of 2002, reported in (2008) 9 SCC 329

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567. CRIMINAL TRIAL :

CRIMINAL PROCEDURE CODE, 1973 – Sections 320 & 357
Reduction of sentence and leniency for a convict under Sections 279 and 304-A – Factual considerations and extent of leniency enunciated – Relief to victim – Rationale and importance of reasonable compensation to victim of crime under Section 357 of CrPC and principles for determination there of reiterated.

Manish Jalan v. State of Karnataka
Judgment dated 11.07.2008 passed by the Supreme Court in Criminal Appeal No. 1066 of 2008, reported in (2008) 8 SCC 225

Held :

The law which enables the Court to direct payment of compensation to the dependants is found in Section 357 of CrPC. Sub-section (1) of Section 357 clothes the Court with the power to award compensation to a victim of the offence out of the sentence of fine imposed on the accused. Sub-section (3) of the Section contemplates that when a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused to pay by way of compensation, such amount, as may be specified in the order, to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. In other words, sub-section (1) provides for application of an amount of fine as compensation when it forms part of the sentence whereas under sub-section (3) the Court can direct the convicted person to pay compensation even in cases where fine does not form part of the sentence. The power vested in the Appellate Court or the High Court or the Court of Sessions (in revision) to award compensation under sub-section (3) of Section 357 CrPC is wide and is in addition to any other sentence which may be awarded on conviction of a person. Needless to add that it is no substitute for sentence on conviction.

Though a comprehensive provision enabling the Court to direct payment of compensation has been in existence all through but the experience has shown that the provision has rarely attracted the attention of the Courts. Time and again the Courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not very heartening. On this aspect, Law Commission in its 42nd Report at para 3.17, *inter alia*, observed:

> "We have a fairly comprehensive provision for payment of compensation to the injured party under Section 545 of the Criminal Procedure Code. It is regrettable that our courts

> do not exercise their salutary powers under this Section as freely and liberally as could be desired. The Section has, no doubt, its limitations. Its application depends, in the first instance, on whether the Court considers a substantial fine proper punishment for the offence. In the more serious cases, the Court may think that a heavy fine in addition to imprisonment for a long term is not justifiable, especially when the public prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf."

In *Hari Singh v. Sukhbir Singh & Ors., (1988) 4 SCC 551,* while emphasising the need for making liberal use of the provisions contained in Section 357 CrPC, this Court has observed thus: (SCC p. 558, para 10)

> "10. ...It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system."

However, in awarding compensation, it is necessary for the Court to decide if the case is a fit one in which compensation deserves to be awarded. If the Court is convinced that compensation should be paid, then quantum of compensation is to be determined by taking into consideration the nature of the crime, the injury suffered and the capacity of the convict to pay compensation etc. It goes without saying that the amount of compensation has to be reasonable, which the person concerned is able to pay. If the accused is not in a position to pay the compensation to the injured or his dependents to which they are held to be entitled to, there could be no reason for the Court to direct such compensation. (See: *Sarwan Singh v. State of Punjab, (1978) 4 SCC 111*).

Very recently in *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528* explaining the scope and the purpose of imposition of fine and/or grant of compensation, this Court observed as follows : (SCC p. 545, para 38)

> "38. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of accused to pay the same must be judged. A fortiori, an enquiry in this behalf

even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub- Section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a judge."

True that in the instant case the appellant has been found to be guilty of offences punishable under Sections 279 and 304A IPC for driving rashly and negligently on a public street and his act unfortunately resulted in the loss of a precious human life. But it is pertinent to note that there was no allegation against the appellant that at the time of accident, he was under the influence of liquor or any other substance impairing his driving skills. It was a rash and negligent act simplicitor and not a case of driving in an inebriated condition which is, undoubtedly despicable aggravated offence warranting stricter and harsher punishment.

Having regard to all these facts and bearing in mind the fact that the mother of the victim has no grievance against the appellant and has prayed for some compensation, we are of the view that a lenient view can be taken in the matter and the sentence of imprisonment can be reduced. We are of the opinion that the ends of justice would be met if the sentence of imprisonment is reduced to the period already undergone but in addition thereto, the appellant should be directed to pay an amount of Rs. 1,00,000/- to the mother of the deceased by way of compensation. Learned counsel for the appellant, in fact, indicated that his client was willing to pay that much amount. We order accordingly.

Accordingly, the conviction of the appellant under Sections 279 and 304A IPC is maintained. However, the substantive sentence of imprisonment is reduced to the period already undergone. Imposition of fine is also affirmed. Besides, the appellant shall pay an amount of Rs. 1,00,000/- to the mother of the victim, namely, Smt. H. Sunanda Prabhu, by way of compensation within three months from today. If the appellant fails to pay the said amount within the stipulated time, the same shall be recovered as per the procedure prescribed under Section 431 CrPC and be paid to Smt. H. Sunanda Prabhu.

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***568. EVIDENCE ACT, 1872 – Section 3**

Interested/relative witness – Non-examination of public witness.

It will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise credit-worthy, cannot be

relied upon unless corroborated by public witnesses – Insofar as the question of credit-worthiness of the evidence of relatives of the victim is concerned, it is well settled that though the Court has to scrutinize such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution – The relationship per se does not effect the credibility of a witness – Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an 'interested' witness – It is trite that the term 'interested' postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive. [Also see: *Dalip Singh v. State of Punjab, AIR 1953 SC 364, Masalti v. State of U.P., AIR 1965 SC 202, Guli Chand and others v. State of Rajasthan, AIR 1974 SC 276, State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh, AIR 1973 SC 2407, Rizan and another v. State of Chhattisgarh, through the Chief Secretary, Government of Chhattisgarh, Raipur, Chhattisgarh, 2003 AIR SCW 469 and Namdeo v. State of Maharashtra, 2007 AIR SCW 1835*]

Ashok Kumar Chaudhary & Ors. v. State of Bihar

Reported in AIR 2008 SC 2436

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*569. EVIDENCE ACT, 1872 – Section 3

Tutored witnesses – When tutoring or reading over the police statement is admitted by witnesses – Denial of giving statement on the basis of tutoring is of no consequence – Trial court wrongly discarded admission of tutoring.

Nathu v. State of M.P.

Reported in I.L.R. (2008) M.P. 2682

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*570. EVIDENCE ACT, 1872 – Section 32

INDIAN PENAL CODE, 1860 – Sections 302 & 326

CRIMINAL PROCEDURE CODE, 1973 – Sections 328 & 335

Murder – Death caused due to septicemia after the incident of causing burn injuries – The act falls under Section 300 IPC.

(i) Murder vis-a-vis voluntarily causing grievous hurt by dangerous weapons or means – The accused threw kerosene from the plastic can on the deceased and set him on fire – Death occurred due to septicemia on account of burn injuries after six days of the incident – Held, septicemia may occur due to various reasons including burn injuries – The act of setting another person on fire is so imminently dangerous an act that the accused must be

having knowledge that he was in all probability likely to cause the death of the person concerned – The act of the accused fall within fourth clause to Section 300 IPC – The act of the accused, in other words, was culpable homicide amounting to murder even if he did not intend to cause the death – The contention of the defence side, that the act of the accused came under the ambit of Section 326 IPC, held to be devoid of any substance.

(ii) Dying declaration, reliability of – Three dying declarations, in the form of dehati Nalishi, statement recorded by Executive Magistrate and police statement under Section 161 CrPC, were available – The deceased was having no enmity with the accused – The deceased had no reason to falsely implicate the accused – Although the deceased was suffering from 70-80% burns, he was in a position to speak – Single infirmity attached with declarations, as per the record was that dehati Nalithi and dying declaration recorded by the Magistrate were recorded in between five minutes interval whereas the distance was such that the Magistrate would have required 15 to 20 minutes to reach the hospital where dying declaration was recorded – Held, the infirmity by itself would not be a ground to hold the dying declaration and the dehati Nalishi to be suspicious documents.

(iii) Plea regarding unsoundness of mind, consideration of – The accused appeared to be a normal person from his conduct etc. on the first three dates of appearance before the Trial Judge – For the first time, on the next date when the case was fixed for evidence, the application under Sections 328 and 335 of CrPC was moved on behalf of the accused that he is of unsound mind – The application was rejected by the Trial Court – Rejection of application held to be proper.

The State of Madhya Pradesh v. Koushal Prasad Jaiswal
Reported in 2008 (4) MPHT 170 (DB)

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*571. EVIDENCE ACT, 1872 – Section 32
CRIMINAL PROCEDURE CODE, 1973 – Section 154
Where the declarant survives, the statement of a person recorded as dying declaration remains nothing more than that of a former statement and cannot be used as substantive evidence.

Rajesh v. State of M.P.
Reported in 2008 (4) MPHT 298

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***572. EVIDENCE ACT, 1872 – Sections 40, 41, 42 & 43**

Relevancy of previous order, judgment, decree in a litigation – Held, as per Section 40 of the Act, a previous judgment is relevant if it creates a bar for second suit such as *res judicata* – As per Section 41, previous judgment in a suit for probate, matrimonial, admiralty or insolvency can be relevant for subsequent suit – As per Section 42, previous judgment is relevant in a subsequent suit if previous judgment is of public nature – As per Section 43, previous judgment is relevant in a subsequent suit if previous judgment is a fact in issue – Appeal dismissed.

Kallu & ors. v. Antulal & ors.

Reported in I.L.R. (2008) M.P. 2381

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573. EVIDENCE ACT, 1872 – Section 63 (2)

Whether conviction can be based on secondary evidence (photocopy of original complementary pass) to hold that the original pass was forged – Held, Yes, as original complementary pass is being in possession of the applicant (accused) and complementary pass was handed over by the applicant himself to the conductor who got the photocopy made.

Pramod v. State of M.P.

Reported in I.L.R. (2008) M.P. 2466

Held:

The basic objection raised by the Counsel for the petitioner in this petition that requires to be adjudicated is that whether the conviction of the accused for offence under Section 420 of the IPC can be based on a piece of secondary evidence i.e. forged pass being a photocopy and the original never been produced in the Court. The photocopy has not been compared to the original as required under Section 63 (2) of the Evidence Act according to Counsel.

Counsel for the respondent-State, on the other hand has opposed the submissions of the Counsel for the petitioner stating that under Section 63 (2) of the Evidence Act, there is a provisions that if the copy is made by an automatic and mechanical process from the original, then such secondary evidence can be accepted and from the testimony of PW-2 Chandrashekhar and PW 1 Haribhai Patel, it is evident that the original pass was handed over by the accused at the bus depot at Indore and the photocopy of the same was prepared by the corporation officials, then there is no getting away from the fact that the copy of the pass made from the original as observed by both the Courts below and hence admissible in evidence. Counsel stated that there is a tendency of the govt. employees to avail of free transport and the accused has gone to the extreme length of using a forged document for traveling without fare. Moreover, the Counsel has stated that the offence was completely established on the basis of documentary evidence. The pass was said to have number 1300 whereas

only 232 passes had been issued in the year 1991 and the pass was issued on 31.12.91 which is evident from the testimony of PW-6 Shri Raj Verma, the Public Relations Officer of the Corporation and thus there is no getting away from the fact that the accused petitioner was guilty as charged. Counsel for the State Govt. urged that the Appellate Court has also taken a sympathetic view and reduced the sentence from two years rigorous imprisonment to six months rigorous imprisonment and the petitioner accused did not require any further sympathy; prayed for dismissal of the revision.

The question has been more than adequately answered by the Counsel for the respondent-State. On perusal of Section 63 (2) of the Evidence Act reads as under:

> **"Secondary evidence:** Secondary evidence means and includes –
>
> (2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies."

Then, the matter has also been dealt with in detail by the Trial Court that the automatic and mechanical process utilized for deriving a copy of the original can be accepted as secondary evidence and there is no need to compare the original for there are minimal chances of interpolation and thus objections raised by the Counsel for the petitioner are demolished and the conviction can be based on such secondary evidence.

Moreover, the prosecution has established the fact that the complimentary pass issued by the Corporation was handed over in front of the conductor Chandrashekhar PW-2 and corroborated by PW-1 Haribhai Patel, who had got the photocopy made, then under the circumstances, I find that there is no need to doubt the veracity of Ex.-P/8, which was used as secondary evidence to establish the offence of forgery, since it was natural under the circumstances that the original being in possession of the accused would never see the light of the day. The impugned judgment is based on cogent and valid reasons.

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***574. FAMILY COURTS ACT, 1984 – Section 10**
CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 10-A
Divorce proceedings were pending before Family Court – As there was serious dispute in respect of parentage of the girl child, at the instance of Respondent/Applicant (husband), DNA test was conducted at the Centre for DNA Finger Printing and Diagnostics (CDFP), Hyderabad in respect of the petitioner/non-applicant (wife), respondent/applicant and the child – Allegations were made against the authorities who had conducted DNA test even before the report could be submitted – Prayer was made for ordering second DNA test – The Director CDFD conducted inquiry into the matter and also suggested the concerning Court for conducting second DNA test in the matter – The Family Court directed for DNA test from a laboratory

situated in Delhi as suggested by the respondent – Being aggrieved by the order, the petitioner/non-applicant (wife) filed Writ Petition challenging the order on the ground that the Family Court has erred in law and facts in ordering second DNA test – The respondent husband also challenged the same order contending that the Family Court has ordered for second DNA test, there appears to be no justification in calling the first DNA report – Held, the Family Court having left with no other choice ordered for a second DNA test keeping in view the letter written by the Director CDFD – However, the Family Court was not justified in ordering for DNA test from a place of choice of the husband of the petitioner – DNA test directed to be conducted at CFSC, Chandigarh – Further held, once the Director CDFD himself has admitted that fresh DNA test has to be done in the matter and the report of the first DNA test cannot be taken on record and has to be ignored in toto.

Amar Sharma v. Smt. Seema Sharma

Reported in 2008 (4) MPHT 526

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575. GUARDIANS AND WARDS ACT, 1890 – Sections 7 & 17
HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 4, 6 & 13
HINDU MARRIAGE ACT, 1955 – Section 26
Custody of minor – Selection of guardian – Paramount consideration is the welfare of the child and not statutory rights of parents – Court exercising 'parens patriae' jurisdiction – Principles governing custody of minor children reiterated.

Nil Ratan Kundu and another v. Abhijit Kundu

Judgment dated 08.08.2008 passed by the Supreme Court in Civil Appeal No. 4960 of 2008, reported in (2008) 9 SCC 413

Held :

English Law:

In *Halsbury's Laws of England,* 4th Edn., Vol. 24, Para 511 at p. 217, it has been stated:

> "511. .... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534, p. 229)

In *McGrath (infants) Re, (1893) 1 Ch 143,* Lindley, L.J. observed: (Ch p. 148)

> "...The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

American Law:

The law in the United States is also not different. In *American Jurisprudence,* 2nd Edn., Vol. 39, Para 31, p. 34, it is stated:

> "As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield."
>
> The child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.
>
> In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.
>
> The primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

Indian Law :

The provisions of custody and guardianship of a child are in Sections 7 and 17 of the Guardians and Wards Act, 1890, in Sections 4 and 6 of the Hindu Minority and Guardians Act, 1956 and in Section 26 of Hindu Marriage Act of 1955. Going through these provisions and the previous pronouncements of the Apex Court in *Saraswatibai Shripad Ved v, Shripad Vasanji Ved, AIR 1941 Bom 103, Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840, Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698, Mausami Moitra Ganguli v. Jayant Ganguli, Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573* and of various High Courts in determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

It is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter that is relevant, but the 'positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

A child is not property or commodity. Issues relating to custody of minors and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

The final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. *Normally,* therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.

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***576. HINDU SUCCESSION ACT, 1956 – Section 23**
HINDU SUCCESSION (AMENDMENT) ACT, 2005
SUCCESSION ACT, 1925 – Section 63

(i) Right of female in succession – Bar to file a partition suit – Held, on perusal of the Amendment Act, 2005, it is clear that intention of the legislature is to bring female and male heirs on equal footing – By omitting Section 23 of the Act, 1956 no new right is created in favour of female, but only a bar of filing a suit is lifted – The female had a share in the property even before coming into force of Hindu Succession (Amendment) Act, 2005, but only restriction of their right shall bar for filing a suit for partition in the property which is kept by the family members, and the said bar is lifted – In view of this fact, the said bar will operate retrospectively and benefit of the said omission can be extended to the present appellant – Appeal allowed.

(ii) Execution of unprivileged Wills – Proof of Will – It is necessary that witnesses must have seen the testator signing the Will in his presence.

Shakuntala Devi Singhal v. Goverdhan Das
Reported in I.L.R. (2008) M.P. 2641

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***577. INDIAN PENAL CODE, 1860 – Sections 147, 149, 294, 341, 323, 506-B & 307**
CRIMINAL PROCEDURE CODE, 1973 – Sections 169 & 482
CONSTITUTION OF INDIA – Article 20 (2)
Powers of Magistrate when Final Report is in favour of the accused persons – It is true that the Final Report is not binding on the Magistrate and if the Magistrate differs from the opinion of the I.O., he can take cognizance or order for further investigation, but that action of Magistrate is judicial action and at that stage while decision

on the Final Report the Magistrate has to act judicially as a Court – When a final report is submitted in favour the accused persons and the investigation agency is of the view that no case is made out for prosecuting the accused and *prima facie*, evidence is defiance, if the Magistrate wants to hear complainant it is obligatory on the part of the Magistrate to also hear the accused person – If any protest petition is filed it has to be treated as a complaint and law requires Magistrate to record statement of complainant and his witnesses.

Rajkumar v. State of M.P.

Reported in I.L.R. (2008) M.P. 2478

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*578. INDIAN PENAL CODE, 1860 – Sections 186 & 375 fourthly and 376

Appellant accused marrying complainant during subsistence of his first marriage and cohabiting with her for about 4 years – Since he was already married, the subsequent marriage has no sanctity in law and is void *ab initio* – In any event the appellant accused could not have lawfully married the complainant – Bare reading of clause fourthly of Section 375 IPC makes this position clear – Therefore, conviction under Section 376 IPC and sentence of 3 years and compensation of Rs. 1,00,000/- held proper, supported by sufficient and adequate reasons taking note of the peculiar facts of the case more particularly the knowledge of the complainant about the accused being a married man.

Bhupinder Singh v. Union Territory of Chandigarh

Judgment dated 10.07.2008 passed by the Supreme Court in Criminal Appeal No. 1047 of 2008, reported in (2008) 8 SCC 531

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*579. INDIAN PENAL CODE, 1860 – Section 302

Murder – Dying declaration – Reliability – Appellant convicted only on the basis of dying declaration – Held, when there is doubtful evidence whether the maker of dying declaration i.e. deceased was fully conscious or not – Court can consider the medical evidence and if the court is not satisfied that the deceased was in fit mental condition or there are contradictions in the opinion of the doctor vis-à-vis opinion of the eye witnesses – In such circumstances in a particular case that requires corroboration and if there is no corroborative evidence, the same can be discarded – If the evidence is reliable and trustworthy the conviction can be based thereon – Appeal allowed – Appellant acquitted.

Karan Singh v. State of M.P.

Reported in I.L.R. (2008) M.P. 2698

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*580. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 32
Dying declaration – Appellant had burnt his wife and son by pouring kerosene oil over them – Dying declaration of wife was recorded at Hospital by Executive Magistrate – Wife and son succumbed to burn injuries – Appellant has been convicted for committing murder of his wife – Conviction challenged in appeal – Held, presence of appellant on the scene at the time of occurrence is proved by reliable evidence – Magistrate and doctor deposed that deceased remained fully conscious during her statement and was in a fit condition to give statement – No inconsistency in the timings of recording of dying declaration and medical examination – No inconsistency in dying declaration and *dehati nalishi* – No ground to suspect that Magistrate would himself manipulate the dying declaration as he had no *animus* against appellant – Declaration is true and voluntary – Conviction upheld – Appeal dismissed.
Avinash @ Gudda v. State of M.P.
Reported in I.L.R. (2008) M.P. 2431

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*581. INDIAN PENAL CODE, 1860 – Sections 323, 147, 149 & 342
SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)
Offences under both the Acts are different.
Accused persons were charged under Sections 147, 323 r/w/s 149 and 342 of IPC and also under Section 3 (1) (x) of the Act – No finding given by the Trial Court in respect of offences punishable under IPC – However the Trial Court observed that offences under Sections 147, 323 r/w/s 149 and 342 of IPC are covered by the provisions of Section 3 (1) (x) of the Act, hence no separate sentence is required under the provisions of IPC – Accused persons were convicted under Section 3 (1) (x) of the Act and sentenced to undergo 1 year rigorous imprisonment and fine of Rs. 500/- with default stipulation – Held, offence under Section 3 (1) (x) of the Act and offence under Sections 147, 323 r/w/s 149 and 342 of IPC are distinct offences and offences under Sections 147, 323 r/w/s 149 and 342 of IPC are not covered by provisions of Section 3 (1) (x) of the Act – Case remitted back to the Trial Court to rehear arguments to record findings regarding offences under Sections 147, 323/149 and 342 IPC and also to record fresh finding for offences under Section 3 (1) (x) of the Act.
Nathu and others v. State of Madhya Pradesh
Reported in 2008 (4) MPHT 325

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582. INDIAN PENAL CODE, 1860 – Sections 363, 366 & 376
Evidence regarding the proof of the age of prosecutrix – On the basis of oral, documentary and medical evidence – How to be appreciated.
State of Maharashtra v. Gajanan Hemant Janardhan Wankhede
Judgment dated 09.07.2008 passed by the Supreme Court in Criminal Appeal No. 492 of 2001, reported in (2008) 8 SCC 38

Held :

The trial court found that the prosecutrix was aged about 16 years and, therefore, the consent of the prosecutrix was of no consequence. The High Court held that there was consent and additionally, the girl was more than 16 years of age. With reference to the evidence of a doctor (PW 9) it was held that since the medical evidence shows that the age of the girl was above 14 years and below 16 years with an error margin of one year, the school leaving certificate and the school register were of no consequence. Accordingly, it directed acquittal as noted above.

Undisputedly, the school records revealed the date of birth of the victim to be 4.6.1976. This was the position as indicated in the school leaving certificate (Ext. 25) and the school register. The High Court noted that in the school register the date of birth was indicated to be 4.6.1976. It also noticed that the father of the victim stated that the girl was 14 years old. The High Court held that the correct date of birth is not recorded and only the school leaving certificate indicated that the date of birth of the victim was 4.6.1976. The evidence of the witnesses indicated that the entry was made on the basis of the horoscope. The High Court held that since the horoscope was not produced the prosecution has failed to establish its case. No reason has been indicated by the High Court to discard the documentary evidence produced i.e. school leaving certificate and the school register.

The headmaster of the school also deposed and produced the records before the trial court. The High Court held that the entry in the school register was not in the handwriting of the headmaster and he could not have deposed about the date of birth. There was no basis for the High Court to conclude that the entry cannot be taken to be above suspicion. On the basis of the evidence of the headmaster and the original school leaving certificate and the school register which were produced, the High Court came to abrupt conclusion that normally for various reasons the guardians do understate the age of their children at the time of admission in the school. There was no material or basis for coming to this conclusion. The High Court in the absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive.

Interestingly, no question was put to the victim in cross-examination about the date of birth. The High Court also noted that no document was produced at the time of admission and a horoscope was purportedly produced. There is no

requirement that at the time of admission documents are to be produced as regards the age of the student. Practically, there was no analysis of the evidence on record and abrupt conclusions, mostly based on surmises, were arrived at. The inevitable conclusion is that the judgment of the High Court is unsustainable, deserves to be set aside which we direct. The respondent shall surrender to custody to serve the remainder of the sentences.

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***583. INDIAN PENAL CODE, 1860 – Section 376**

Rape – Consent and submission – Difference – There is a difference between consent and submission – Every consent involves a submission, but the converse does not follow, and a mere act of submission does not involve consent – Consent of woman in order to relieve an act of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with existing capacity and power to withdraw the assent according to one's will or pleasure – Therefore, a woman is said to consent only when she freely agrees to submit herself, while in a free and unconstrained possession of physical and moral power to act in a manner she wanted.

Kaptan Singh v. State of M.P.

Reported in I.L.R. (2008) M.P. 2715

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584. INDIAN PENAL CODE, 1860 – Section 376

Sentence – When protector becomes violator, the offence assumes greater degree of vulnerability – Still worse when a father rapes his own daughter – Unpardonable offence – Morally loathsome, deprave and abhorrent criminal act – Duty of Court to protect society from heinous and shocking crimes by passing appropriate sentence emphasized – Sentence of life imprisonment and fine of Rs. 1,000/- with default stipulation held, proper.

Siriya alias Shri Lal v. State of Madhya Pradesh

Judgment dated 13.05.2008 passed by the Supreme Court in Criminal Appeal No. 870 of 2008, reported in (2008) 8 SCC 72

Held :

There can never be more shocking, depraved and heinous crime than when the father is charged of having raped his own daughter. He not only delicts the law but, it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter reposes trust to protect her. Charged of raping his own daughter under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber.

The case at hand shows to what bottomless pit of depravation and lust a person can go down. As indicated at the threshold, the custodian of the trust

has betrayed the same. The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent. The case at hand is a sad reflection on the present day society where a most platonic relationship has been soiled by the pervert and degrading act of the father. The evidence on records clinchingly nails the appellant as the offender.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that : 'State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society: . Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Nadu, (1991) 3 SCC 471.*

Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a

sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle McGautha v. State of California, 402 US 183 (1970)* that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

These aspects were highlighted in *Shailesh Jasvantbhai and Anr. v. State of Gujarat and Ors., (2006) 2 SCC 359* and *State of Karnataka v. Raju, AIR 2007 SC 3225.*

In this case, the accused's lustful acts have indelible scar not only physically but also emotionally on the victim. No sympathy or leniency is called for.

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***585. INDIAN PENAL CODE, 1860 – Section 394**

Constructive/vicarious liability under Section 394 IPC describes punishment for voluntarily causing hurt in committing or attempting to commit robbery.

Section 394 describes punishment for voluntarily causing hurt in committing or attempting to commit robbery – The offence under this Section is more serious offence than one under Section 392– Section 394 postulates and contemplates the causing of harm during commission of robbery or in attempting to commit robbery when such causing of hurt is hardly necessary to facilitate the commission of robbery– Section 394 applies to cases where during the course of robbery voluntary hurt is caused– Section 394 classifies two distinct class of persons– Firstly, those who actually cause hurt and secondly, those who do not actually cause hurt but are "jointly concerned" in the commission of offence of robbery– The second class of persons may not be concerned in the causing of hurt, but they become liable independently of the knowledge of its likelihood or a reasonable belief in its probability.

Aslam alias Deewan v. State of Rajasthan

Judgment dated 25.09.2008 passed by the Supreme Court in Criminal Appeal No. 1531 of 2008, reported in (2008) 9 SCC 227

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***586. JUVENILE JUSTICE ACT, 1986 – Section 2 (h)**

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 2 (k)

INDIAN PENAL CODE, 1860 – Section 376

EVIDENCE ACT, 1872 – Section 3

(i) Juvenile – Appellant failed to raise any objection about his age before the committal court or the trial court – The fact of age cannot be considered at the appellate stage because the objection in respect of age, is raised for the first in appellate court – This argument is not tenable that appellant was juvenile on the date of incident and juvenile court was competent to try case.

(ii) Rape – *"Mere Sath Usne Galat Kam Kiya"* – In dying declaration prosecutrix disclosed that when she went to answer call of nature, appellant caught hold of her from behind and swathe her mouth and then *Mere Sath Usne Galat Kam Kiya* – Held, if the words used by prosecutrix are considered coupled with other circumstances, it becomes clear that prosecutrix wanted to say that accused ravished her.

Annu alias Anoop Kumar v. State of M.P.

Reported in I.L.R. (2008) M.P. 2435

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587. LABOUR LAW:

INDUSTRIAL DISPUTES ACT, 1947 – Section 11-A

SPECIFIC RELIEF ACT, 1963 – Section 14 (1) (b)

STATE BANK OF INDIA ACT, 1955 – Section 43 (1)

(i) Termination of service, relief of – Damages or reinstatement depends upon nature of employment – Whether it is governed by contract or statute or statutory rules – Law explained.

(ii) Temporary misappropriation of customer's money by a bank manager is a serious matter – Request for reducing the punishment of removal from service rejected.

State Bank of India and others v. S.N. Goyal

Judgment dated 02.05.2008 passed by the Supreme Court in Civil Appeal No. 4243 of 2004, reported in (2008) 8 SCC 92

Held :

(i) Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable,

having regard to the bar contained in section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. The three well recognized exceptions to this rule are:

(i) where a civil servant is removed from service in contravention of the provisions of Article 311 of the Constitution of India (or any law made under Article 309);

(ii) where a workman having the protection of Industrial Disputes Act, 1947 is wrongly terminated from service; and

(iii) where an employee of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules.

There is thus a clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief — damages or reinstatement with consequential reliefs — is whether the employment is governed purely by contract or by a statute or statutory rules. Even where the employer is a statutory body, where the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable. Conversely, where the employer is a non-statutory body, but the employment is governed by a statute or statutory rules, a declaration that the termination is null and void and that the employee should be reinstated can be granted by courts. (Vide *Dr. S. Dutt v. University of Delhi, AIR 1958 SC 1050; UP Warehousing Corporation v. Chandra Kiran Tyagi, (1969) 2 SCC 838; Sirsi Municipality v. Cecelia Kom Francies Tellis, (1973) 1 SCC 409; Vaish Degree College v. Lakshmi Narain, (1976) 2 SCC 58; J. Tiwari v. Jawala Devi Vidya Mandir, AIR 1981 SC122* and *Dipak Kumar Biswas v. Director of Public Instruction, AIR 1987 SC 1422*).

In this case the appellant is a statutory body established under the State Bank of India Act, 1955 and the contract of employment was governed by the State Bank of India Officers Service Rules, which are statutory rules framed under section 43(1) of the said Act. The respondent approached the civil court alleging that his removal from service was in violation of the said statutory rules. When an employee of a statutory body whose service is terminated pleads that such termination is in violation of statutory rules governing his employment, an action for declaration that the termination is invalid and that he is deemed to continue in service is maintainable and will not be barred by section 14 of the Specific Relief Act.

(ii) At the relevant point of time the respondent was functioning as a Branch Manager. A Bank survives on the trust of its clientele and constituents. The position of the Manager of a Bank is a matter of great trust. The employees of

the Bank in particular the Manager are expected to act with absolute integrity and honesty in handling the funds of the customers/borrowers of the Bank. Any misappropriation, even temporary, of the funds of the Bank or its customers/ borrowers constitutes a serious misconduct, inviting severe punishment. When a borrower makes any payment towards a loan, the Manager of the Bank receiving such amount is required to credit it immediately to the borrower's account. If the matter is to be viewed lightly or leniently it will encourage other Bank employees to indulge in such activities thereby undermining the entire banking system. The request for reducing the punishment is misconceived and rejected.

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***588. LABOUR LAWS (AMENDMENT) AND MISCELLANEOUS PROVISIONS ACT, 2002 (M.P.)**

CONSTITUTION OF INDIA – Articles 14 & 21

Whether the M.P. Labour Laws (Amendment) and Miscellaneous Provisions Act, 2002 (26 o 2003), is ultra vires by which power to try offences under labour laws has been taken away from Labour Courts and conferred on regular Courts? Held, Yes – Further held – The M.P. Labour Laws (Amendment) and Miscellaneous Provisions Act, 1981, restored the powers of the Labour Courts to try offences under Labour laws –This was done realizing the fact that Labour Courts were having expertise in labour laws and were familiar with the object and provisions of various labour laws – The Amendment Act of 2002 is arbitrary and defeats the object for which it was enacted – Right to speedy trial is a fundamental right falling under Article 21 of the Constitution – Such right is being defeated by the Amendment Act of 2002 – The Amendment Act of 2002 therefore, held, ultra vires.

Labour Bar Association, Satna v. State of Madhya Pradesh and another

Reported in 2008 (4) MPHT 228 (DB)

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***589. LAND ACQUISITION ACT, 1894 – Section 4**

Transfer of land after notification is void – After the issuance of the notification under Section 4 (1) for the acquisition of the land, any transfer made or encumbrance created by the owner thereof would be deemed to be void and would not be binding on the Government. [Also see *U.P. Jal Nigam v. Kalra Properties (P) Ltd., (1996) 3 SCC 124* and *Sneh Prabha v. State of U.P., (1996) 7 SCC 426*].

Meera Sahni v. Lieutenant Governor of Delhi and others

Judgment dated 15.07.2008 passed by the Supreme Court in Civil Appeal No. 3413 of 2001, reported in (2008) 9 SCC 177

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***590. LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 20**

Jurisdiction of Lok Adalat – Order of apportionment without consent of claimants not legal – The case has to be returned to the Claims Tribunal.

The deceased died in a road accident while he was traveling in a truck – The wife of the deceased submitted claim case before claim Tribunal – Mother, sister and brother of the deceased who were respondents in the claim case filed by the wife of the deceased also filed their claim case jointly – Both the cases were taken up in Lok Adalat where in the wife of the deceased gave her consent for compromise at a sum of Rs. 5 lacs – The Lok Adalat in its award, directed the New India Insurance Co. (respondent no. 2) to pay sum of Rs. 5 lacs towards compensation – It was further directed in the award that the wife, mother, sister and brother of the deceased would be entitled to equal share in the amount of compensation – Thereafter the wife of the deceased vide application stated before the Tribunal that the apportionment of the compensation in equal share would not be proper and the same was never consented to by her before Lok Adalat and prayed for making division of amount of compensation in proper manner – The Tribunal dismissed the aforesaid application – In a Writ Petition filed by the wife of the deceased challenging the aforesaid order of the Tribunal, the other claimants contended that the award of the Lok Adalat can be challenged on ground of fraud or malafide only – Held, the order on the basis of a compromise/ settlement before the Lok Adalat shall be guided by the principles of justice, equity, fair play and other legal principles as mandated in Section 20 (4) of the Legal Services Authorities Act – Without taking all the necessary factors into consideration, it cannot be said that the Lok Adalat while making an order of equal apportionment of the amount of compensation amongst the claimant was guided by the principles of justice, equity, fair play and other legal principles which include the degree of dependency which is an important factor for determining the apportionment – The petitioner has disputed the jurisdiction of Lok Adalat on the ground of absence of consent with regard to apportionment of the amount of compensation; hence present petition is maintainable – Further held, existence of compromise or settlement between the parties is sine qua non for the exercise of powers by Lok Adalat – In case of absence of compromise or settlement, the Lok Adalat is obliged to return the record of the case to the Court concerned for disposal in accordance with law – Consequently, the direction of equal proportionment set aside with a direction to the Tribunal to decide the apportionment of the amount of compensation amongst the claimants in accordance with law afresh.

Saira Bano v. Bitthal Balu Godekar and others

Reported in 2008 (4) MPHT 204

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*591. LIMITATION ACT, 1963 – Section 5
CIVIL PROCEDURE CODE, 1908 – Section 96
Condonation of delay in filing appeal – Delay of 6¼ years in filing appeal – Plaintiff/respondent filed suit for declaration and perpetual injunction – Appellant engaged counsel – O.I.C. became patient of cancer and was unable to devote sufficient time – Counsel not engaged by appellant cross examined plaintiff's witnesses and subsequently pleaded 'No objection' on the date which was fixed for appellant's evidence – Counsel engaged by appellant is no more, never informed about the date – Appellant came to know about *ex parte* decree only when the same was filed by respondent in another suit – Appeal was filed after a delay of 6¼ years – Held, sufficient cause should be construed liberally as the justice should not be lost in technicalities – Length of delay is not relevant factor – When sufficient cause is made out, the interest of opposite party may be compensated by imposing cost – Delay of 6 ¼ years condoned with cost of Rs. 10,000/-.

International Association of Lions Clubs v. Dr. Jagjit Singh Khanna

Reported in I.L.R. (2008) M.P. 2342

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*592. MOTOR VEHICLES ACT, 1988 – Sections 10, 14 (2) (a) & 149 (2) (a) (ii)
Section 14 (2) (a) provides that a driving licence issued or renewed under the Act shall in case of a licence to drive a transport vehicle will be effective for a period of 3 years whereas in the case of any other vehicle it can be issued or removed for a period of 20 years from the date of issuance or renewal – Accident caused by goods transport vehicle (auto rickshaw delivery van) – Driving licence granted to the driver was for 20 years, thus clearly shows that he was not granted a valid driving licence for driving a transport vehicle – Hence was not holding an effective driving licence in terms of Section 10 of the Motor Vehicles Act, 1988 at the time of accident – Insurance Company is not liable.

New India Assurance Company Limited v. Roshanben Rahemansha Fakir and another

Judgment dated 12.05.2008 passed by the Supreme Court in Civil Appeal No. 3496 of 2008, reported in (2008) 8 SCC 253

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*593. MOTOR VEHICLES ACT, 1988 – Section 15
Renewal of driving licence – Accident occurred on 13.06.2000 – Licence of driver expired on 02.02.1999 – Application for renewal of licence made more than 30 days after the date of expiry – Licence renewed on 23.06.2000 – Held, driver was not possessing valid licence

at the time of accident – Insurance Company not liable. *2007 ACJ 1067* (Ref.)

Kalu v. Bansilal

Reported in I.L.R. (2008) M.P. NOC 78

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*594. MOTOR VEHICLES ACT, 1988 – Sections 147 & 149 (2) (a) (ii)

(i) On the date of accident i.e. 16.03.2000 the driver of the truck (heavy goods vehicle) involved was holding licence to drive only light transport vehicle whereas it required the licence to drive heavy goods vehicle – Insurance Company is not liable to pay compensation – The owner could not have checked or verified the licence for driving a heavy goods vehicle – In fact in this case the owner is not even stepped into the witness box to say anything in this regard.

(ii) Deceased, a vegetable vendor, was driving in 'goods carriage' for collecting empty vegetable boxes – He was not driving in the truck as owner of the goods with the vegetables – So Insurance Company would not be liable for any compensation as the provision of Section 147 do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger driving in a goods vehicle.

National Insurance Company Limited v. Kaushalaya Devi and others

Judgment dated 13.05.2008 passed by the Supreme Court in Civil Appeal No. 3542 of 2008, reported in (2008) 8 SCC 246

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*595. MOTOR VEHICLES ACT, 1988 – Sections 149 (2) (a) (ii) & 15 (1) first proviso

Vehicle involved in accident was being driven by a person having driving licence from 11.02.1990 to 10.02.1993 and again from 07.02.1996 to 07.02.1999 but not on the day of accident i.e. 27.01.1996 – In view of Section 15 (1) first proviso, subsequent renewal of licence from 07.02.1996 was with prospective effect and therefore, did not cover the day of the accident – Hence driver was not duly licenced on the day of the accident and therefore, insurer's liability was excluded – High Court directed insurer to make payment in the first instance and then recover the amount from driver and owner of the vehicle – The direction of High Court was upheld.

Ram Babu Tiwari v. United India Insurance Company Limited and others

Judgment dated 01.08.2008 passed by the Supreme Court in Civil Appeal No. 4749 of 2008, reported in (2008) 8 SCC 165

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*596. MOTOR VEHICLES ACT, 1988 – Section 166

Legal representative, connotation of – Deceased, a divorced lady, met with a motor accident, sustained injuries and resultantly died on the spot – Brother of the deceased preferred his claim before MACT – Husband of the deceased was impleaded as respondent No. 4, during pendency of claim – The Tribunal dismissed the claim holding that the brother could not be termed as the legal representative of the deceased – Held, long back divorce had taken place in between the deceased and her husband, as per prevailed customs of the community, resultantly the respondent No. 4 ceased to be the husband of the deceased from the date of divorce cannot be treated either husband or legal representative or heir of the deceased – Further held, as mother, father or any children of the deceased were not alive on her death, the real brother of the deceased and heir of her father comes under the category of her heir and legal representative – He is the only person in whose favour the claim could have been awarded by the Tribunal.

Ramu v. Narsi and others

Reported in 2008 (3) MPLJ 496

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*597. MOTOR VEHICLES ACT, 1988 – Sections 166

Compensation – Composite negligence – Deceased was travelling in matador which was hit by truck – In claim case truck driver remained *ex parte* – Tribunal dismissed the petition on the ground that appellant has not impleaded owner and insurer of matador – Held, even if it is assumed that driver of Matador was negligent then too so far as appellants are concerned it was case of composite negligence and claim petition cannot be dismissed for non-impleading owner, driver and insurer of matador – Appeal allowed.

Compensation – Appellants are brothers of deceased – Although appellants were not financially dependent on deceased but it cannot be denied that in number of respect they were dependent on the deceased and entitled for compensation – Since appellants are financially well settled, Rs. 1,50,000/- compensation awarded.

Gajanand & ors. v. Virendra Singh & ors.

Reported in I.L.R. (2008) M.P. NOC 72

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598. MOTOR VEHICLES ACT, 1988 – Section 166

EMPLOYEES STATE INSURANCE ACT, 1948 – Section 53

Whether grant of compensation under Employees State Insurance Act bars award of compensation under the Motor Vehicles Act? Held, No – Further held, under Section 53 of Employees State Insurance Act, a bar is created against receiving compensation for the

'employment injury' and not against grant of compensation to victims of road accident under the Motor Vehicles Act.

Ahmed Khan v. Sher Khan and others

Reported in 2008 (4) MPHT 372

Held :

From the evidence available on record it is clear that it was a case of collision between the two vehicles; one being driven by the appellant and driver of the other vehicle was Respondent No. 2 - Sirajkhan. Later, vehicle was covered under the insurance policy. Besides the monthly disability pension, the appellant has also got lump-sum amount as he had sustained fracture in tibia and fibula in the lower region of the body. Learned Counsel for Respondent No. 3 submitted that Section 168 of the 1988 Act speaks about payment of just amount of compensation which the appellant under the ESI Act has already received. We are afraid that such a contention could not be acceded to because 1948 Act is a piece of welfare measurement and, it does not debar victim of a road accident to ask for compensation under the Law of Torts. It does not exempt the insurance company from the claim of a third party. If contention of learned Counsel for Respondent No. 3 – Insurance Company is accepted, then that would amount to putting a premium on the misconduct committed by the driver of the offending vehicle responsible for causing the accident. This is exactly what has been held by the learned Single Judge of Rajasthan High Court as reported in *Oriental Insurance Company Ltd. v. Mohan Kanwar & Others, 2007 ACJ 420.* We are in respectful agreement with the view taken by the Rajasthan High Court.

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***599. MOTOR VEHICLES ACT, 1988 – Section 166**

EVIDENCE ACT, 1872 – Section 102

Burden of proof – Eye witness lodged FIR that a truck had hit motorcycle killing the driver – Police filed charge sheet that involvement of truck not proved however bus had caused the accident – Driver and owner of bus remained *ex parte* before Claims Tribunal – Tribunal passed award in favour of claimants – Held it was the duty of claimants to examine the I.O. to prove that on what particular evidence he recorded a finding that the truck was not involved in the accident and in fact the bus has caused the accident – Non-examination of I.O. and first informant would give a dent to the claim.

National Insurance Company Ltd. v. Smt. Setubai & ors.

Reported in I.L.R. (2008) M.P. 2367 (DB)

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***600. MOTOR VEHICLES ACT, 1988 – Section 168**

Injury case – Injured girl aged 12 years suffered permanent disability in left leg – She would remain crippled throughout life – Deviation from the structured formula may be resorted to in exceptional cases.

In a case where injury to victims requires periodical medical expenses in future, the Tribunal should consider such eventuality and fix the compensation accordingly at the time of passing final award because law does not permit passing of any other award or review on this ground after the final award.

Compensation for injury, suffering and permanent disability assessed to Rs. 2,25,000 by presuming income to be about Rs. 15,000/- p.a. and applying multiplier of 15 and for future treatment a further sum of Rs. 75,000/- also awarded.

Sapna v. United India Insurance Co. Ltd. & Anr.

Reported in AIR 2008 SC 2281

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***601. MOTOR VEHICLES ACT, 1988 – Section 168**

Person driving vehicle without licence – Itself no negligence.

If a person drives a vehicle without a licence, he commits an offence – The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident – It has been held by the courts below that it was the driver of the mini-truck which was being driven rashly and negligently – It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently – If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

Sudhir Kumar Rana v. Surinder Singh & Ors.

Reported in AIR 2008 SC 2405

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602. MOTOR VEHICLES ACT, 1988 –Section 169

CIVIL PROCEDURE CODE, 1908 – Order 21

Executing Court, powers of – Whether the executing Court has power to impose certain conditions which have not been mentioned in the award and decree? Held, No.

Prem Narayan Bhagel and others v. Banchandra and others

Reported in 2008 (4) MPLJ 148

Held :

Section 147 of the Motor Vehicles Act, 1988 prescribes procedure with regard to recovery of amount from Insurer as arrears of Land Revenue. The State Government has also framed Rules, named as "the Madhya Pradesh Motor Vehicles Rules, 1994" (hereinafter referred to as 'the Rules of 1994') in exercise of powers conferred by Sections 28, 38, 65, 95, 96, 107, 111, 138, 159, 176, 211, and 213 of the Motor Vehicles Act, 1988 (No. 59 of 1988). Rule 240 thereof prescribes procedure to be followed by the Claims Tribunal in holding enquiries, which is as under: –

> *"240. Procedure to be followed by Claims Tribunal in holding enquiries*– Application of certain provisions of Code of Civil Procedure, 1908; save as otherwise expressly provided in the Act or these rules, the following provisions of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) namely, those contained in Order V, Rules 9 to 13 and 15 to 20, Order IX, Order XVIII, Rules 3 to 10, Order XVI, Rules 2 to 21, Order XVII, Order XXI and Order XXIII, Rules 1 to 3 shall apply to proceedings before a Claims Tribunal insofar as they may be applicable thereto."

Order XXI of the Code of Civil Procedure prescribes procedure with regard to execution of decrees and orders. It is clear from the aforesaid provisions that the Executive Court while executing the award passed under the provisions of Motor Vehicles Act bound by the provisions of Order XXI of the Code of Civil Procedure.

The Hon'ble Supreme Court in *V. Ramaswami Aiyengar and others v. T.N.V. Kailasa Thevar, AIR (33) 1951 SC 189* has held as under with regard to powers of the Executing Court: —

> *"(a) Civil Procedure Code, 1908, S. 38 — Powers of Executing Court.* – The duty of an Executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation. (Para 8)"

The aforesaid principle has further been affirmed by Hon'ble the Supreme Court in *Topanmal Chhotamal v. M/s Kundomal Gangaram and others, AIR 1960 SC 388.*

In *Rameshwar Dass Gupta v. State of U.P. and another, (1996) 5 SCC 728* the Hon'ble Supreme Court held as under : —

> "An executing court cannot travel beyond the order or decree under execution. It gets jurisdiction only to execute the order in accordance with the procedure laid down under Order 21 Civil Procedure Code. In view of the fact that it was a money claim, what was to be computed was the arrears of the salary, gratuity and pension after computation of his promotional benefits in accordance with the service law. That having been done and the court having decided the entitlement of the decree-holder, the executing court exceeded its jurisdiction in stepping out and granting a decree for interest which was not part of the decree for execution on the ground of delay in payment or for unreasonable stand taken in execution. The order of the executing Court was without jurisdiction and therefore, void.

Though the High Court normally exercises its revisional jurisdiction under Section 115 Civil Procedure Code, but once it is held that the executing court has exceeded its jurisdiction, it is but the duty of the High Court to correct the same. Therefore, there was no illegality in the order passed by the High Court in interfering with the setting aside the order directing payment of interest."

It is true that in some judgments with regard to the Motor Vehicles Act cited by the learned counsel for respondent No. 3, Hon'ble the Supreme Court has passed the observation that the Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. The relevant direction is as under issued by the Hon'ble Supreme Court in *National Insurance Co. Ltd. v. Kusum Rai and others, 2006 ACJ 1336*:

"16. In *Nanjappan, 2004 ACJ 721 (SC)*, this court opined :

'(8) Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in *Baljit Kaur's case, 2004 ACJ 428 (SC)*, that the insurer shall pay the quantum of compensation fixed by the Claims Tribunal, about which there was no dispute raised, to respondents-claimants, within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the concerned Regional Transport Authority. The executing court shall pass appropriate orders in accordance with the law as to the manner in which the insured, the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs.' "

However, the aforesaid directions have been issued by Hon'ble the Supreme Court on an appeal filed by the Insurance Company against the award passed by the Claims Tribunal and against the order passed by the High Court in appeal.

In the present case, the question before this Court is that whether the Executing Court has power to impose certain conditions which have not been mentioned in the award and decree. In the present case the Executing Court has imposed a condition that the amount of compensation as awarded by the Claims Tribunal shall not be paid to the claimants-petitioners until and unless the owner of the offending vehicle shall not furnish a security before the Tribunal of the aforesaid amount. There is no such direction issued by the Claims Tribunal in the award. In my opinion, as per the principle of law laid down by Hon'ble the Supreme Court, quoted above, the Executing Court has no power to impose such conditions.

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***603. MOTOR VEHICLES ACT, 1988 – Section 171**

Interest payable – Duty of Tribunals on accident compensation.

Under Section 171 a duty is laid on the Tribunal to consider the question of interest separately with due regard to the facts and circumstances of the case. It was clearly held in the said decision that the provision of payment of interest is discretionary and cannot be bound by rules.

No rate of interest is fixed under Section 171 of the Act and the duty has been bestowed upon the Court to determine such rate of interest. In order to determine such interest rates, the rates of fixed deposit prevalent in the nationalized banks should be considered.

In *Kaushnuma Begaum (Smt.) and others v. New India Assurance Co. Ltd. & others, (2001) 2 SCC 9, United India Insurance Co. Ltd. and others v. Patricia Jean Mahajan and others, (2002) 6 SCC 281 and Abati Bezbaruah v. Dy. Director General, Geological Survey of India and another, (2003) 3 SCC 148* the rate of interest was awarded @ 9% p.a. whereas in the year 2005 *in Tamil Nadu State Transport Corpn. Ltd. v. S. Rajapriya, (2005) 6 SCC 236* again taking note of the then prevailing rate of interest on bank deposits, the rate of interest was altered from 9% p.a. to 7.5% p.a..

In similar situation in this case also the claimants held entitled to interest @ 7.5% p.a. as award was passed in the year 2005.

Dharampal & Ors. v. U.P. State Road Transport Corporation

Reported in AIR 2008 SC 2312

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***604. N.D.P.S. ACT, 1985 – Sections 2 (xv), 2 (xviii), 41 (2), 42 (2), 43 & 57**

(i) Sections 2 (xv) and 2 (xviii) defines 'opium' and 'poppy straw' respectively – Licence for opium cannot be presumed for poppy straw also – They are not interchangeable as Section 2 (xiv) clearly makes out a distinction between opium and poppy straw.

(ii) **Where a Gazetted Officer empowered u/s 41 (2) himself conducted the search, arrested the accused and seized the contraband, it was not necessary to comply with sub-section (2) of Section 42 – Section 43 relates to power of seizure and arrest in a public place – Any officers of any of the departments mentioned in Section 42 is empowered to seize contraband and detention and search in any public place or in transit on existence of ingredients stated in Section 43 – It can thus be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41 (2) requires an officer to be so – A Gazetted Officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted Officer.**

(iii) **Record of secret information and report of arrest and seizure sent to the superior officer under Section 57 not required to be produced in Court unless asked for by the defence – There is no statutory requirement to produce such record in the Court as a matter of course.**

Union of India v. Satrohan

Judgment dated 14.07.2008 passed by the Supreme Court in Criminal Appeal No. 1145 of 2001, reported in (2008) 8 SCC 313

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*605. **N.D.P.S. ACT, 1985 – Sections 42 & 44**

Recovery of the opium from the possession of the appellant/ accused stands proved and established by cogent and reliable evidence led in the trial – Senior police officer (DCP) also puts his seal on the said parcels of opium and till the date the parcels of sample were received by chemical examiner, the seal put on the said parcels was intact – Held, it proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant/accused – In view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant/ accused.

Hardip Singh v. State of Punjab

Judgment dated 20.08.2008 passed by the Supreme Court in Criminal Appeal No. 737 of 2007, reported in (2008) 8 SCC 557

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***606. N.D.P.S. ACT, 1985 – Section 50**

(i) Evidence of official witness at railway station – On suspicion accused was stopped and after following required precautions and procedure, was searched – Contraband opium 1½ kg. recovered and after taking 25 grams of opium as sample, remaining opium was put in tin box, properly sealed and taken into possession vide memo Exh. P-3 attested by prosecution witness – Held, plea of non-compliance of S.50 is without substance – The language of Section 50 is clear that the search has to be in relation to a person as contrasted to search of an article – This position was settled beyond doubt by the Constitution Bench in State of Punjab v. Baldev Singh, (1996) 6 SCC 172. [Also see *Kalema Tumba v. State of Maharashtra, (1999) 8 SCC 257, Gurbax Singh v. State of Haryana, (2001) 3 SCC 28 and Madan Lal v. State of H.P., (2003) 7 SCC 465*]

(ii) Sole independent witness about the seizure did not support the prosecution version but no material was brought on record to discredit the evidence of the official witness – Further, these official witnesses categorically stated that no independent person was willing to depose as witness – The ultimate question is whether the evidence of official witness suffer from any infirmity? Held, official witness reliable.

State of Haryana v. Mai Ram

Judgment dated 31.07.2008 passed by the Supreme Court in Criminal Appeal No. 211 of 2001, reported in (2008) 8 SCC 292

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607. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CIVIL PROCEDURE CODE, 1908 – Sections 9 & 10
CRIMINAL PROCEDURE CODE, 1973 – Sections 357 (1) (b) & (5)

(i) Civil suit, for recovery of money dues as well as criminal complaint under Section 138 of NI Act for the same cause of action, is maintainable.

(ii) Compensation paid or recovered under Section 357 (5) of CrPC in a criminal case should have been taken into account by Civil Court while passing decree for awarding of compensation to the defendant on the same cause of action.

D. Purushotama Reddy and another v. K. Sateesh

Judgment dated 01.08.2008 passed by the Supreme Court in Civil Appeal No. 4751 of 2008, reported in (2008) 8 SCC 505

(i) A suit for recovery of money due from a borrower indisputably is maintainable at the instance of the creditor. It is furthermore beyond any doubt or dispute that for the same cause of action complaint petition under terms of Section 138 of the Act would also be maintainable.

(ii) In terms of sub-section (1) of Section 357 of the Code, a criminal court is empowered to direct that out of the amount recovered from an accused by way of fine, compensation of a specified amount may be directed to be paid for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by a person in a Civil Court. It is, therefore, evident that the amount of compensation could have been directed to be paid by the criminal court as the same was recoverable by the respondent as against the appellants in a civil court also. Such an order can also be passed by the Appellate Court or by the High Court or by the Court of Sessions when exercising its power of revision.

Sub-section (5) of Section 357 of the Code, which is relevant for our purpose, reads as under:

> *"357. Order to pay compensation –*
>
> ★ ★ ★
>
> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

Evidently, a duty has been cast upon the civil courts to take into account the sum paid or recovered as compensation in terms of Section 357 of the Code. It is futile to urge that on the date on which the civil court passed the decree the appellants were not convicted. As noticed hereinbefore, the appeal is a continuation of the suit and in that view of the matter as the appellants had in total deposited a sum of Rs. 4,00,000/-, i.e., Rs. 2,10,000/- in the criminal proceeding and Rs. 1,90,000/- in the civil proceedings, out of which a sum of Rs. 3,09,000/- has been withdrawn by the respondent, the High Court was obligated to take the same into consideration. In other words, having regard to the provisions of Sub-section (5) of Section 357 of the Code, a duty was cast upon the High Court to take into account the fact that a sum of Rs. 2,00,000/- had already been paid by the appellants to the respondent. Concededly, both the proceedings were maintainable. Law recognizes the same. The Parliament must have the situation of this nature in mind while enacting Clause (b) of Sub-section (1) of Section 357 of the Code and Sub-section (5) thereof.

Sub-section (5) of Section 357 of the Code casts a duty upon the court. It was for the Trial Court/High Court to take the same into consideration. Such consideration was required to be bestowed despite the fact that the said provision was not brought to its notice.

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608. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 140 & 141

(i) Post dated cheque becoming due for payment after its signatory had resigned from Directorship of the Company and had given intimation to the complainant about his resignation and responsibility for the offence of dishonour of post

dated cheque issued on behalf of Company – Liability of persons, who at the time of commission of offence, were in charge of and were responsible to the Company for conduct of business.

(ii) Such person (first respondent) impleaded as co-accused without any specific averments in the complaint about his liability – Pleading must be sufficient to specify role of individual person impleaded as accused – Penal provisions have to be construed strictly – Discharge of such person from array of accused persons – Not interfered.

DCM Financial Services Limited v. J.N. Sareen and another
Judgment dated 13.05.2008 passed by the Supreme Court in Criminal Appeal No. 875 of 2008, reported in (2008) 8 SCC 1

Held :

Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance with the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act. [See *K. Srikanth Singh v. North East Securities Ltd., (2007) 12 SCC 788.*]

We may also notice that this Court in *N.K. Wahi v. Shekhar Singh, (2007) 9 SCC 481* has observed: (SCC p. 483, para 8)

> "8. To launch a prosecution therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

The cheque in question was admittedly a post-dated one. It was signed on 3.4.1995. It was presented only sometime in June 1998. In the meantime the first respondent had resigned from the directorship of the Company. The complaint petition was filed on or about 20.8.1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. The appellant was, therefore, aware thereof. Despite having the knowledge, the first respondent was impleaded as one of the accused in the complaint as a Director in charge of the affairs of the Company on the date of

commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorized signatory he will be deemed to be person in-charge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. [See also *Saroj Kumar Poddar v. State (NCT of Delhi), (2007) 3 SCC 693, Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi, (2007) 5 SCC 54* and *Raghu Lakshminarayanan v. Fine Tubes, (2007) 5 SCC 103*]

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609. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142
CRIMINAL PROCEDURE CODE, 1973 – Section 200

(i) Complaint made in writing by proprietary concern signed by power of attorney holder of the proprietor is maintainable – For criminal complaint under Section 138, the requirement of Section 142 is that it should be in writing and the name of the complainant should be name of payee or the holder in due course.

(ii) Where proprietor of the proprietary concern has personal knowledge of the prosecution and the proprietor has signed the complaint, it has to be exercised under Section 200 of CrPC but where the Attorney Holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, then such attorney holder is to be examined as complainant – Moreover, where the cheque is drawn in the name of the proprietor of a proprietary concern, but an employee of such concern (who is not an attorney holder) has knowledge of the transaction, the payee as complainant and the employee who has knowledge of the transaction, may both have to be examined.

Shankar Finance and Investments v. State of Andhra Pradesh and others

Judgment dated 26.06.2008 passed by the Supreme Court in Criminal Appeal No. 1449 of 2003, reported in (2008) 8 SCC 536

Held :

Section 190 of Code of Criminal Procedure ('the Code', for short) enables a Magistrate to take cognizance of an offence upon receiving a complaint of

facts which constitutes such offence. Section 200 of the Code requires the Magistrate taking cognizance of an offence on complaint, to examine upon oath the complainant and the witness present, if any. Section 142 of the Act provides that notwithstanding anything contained in the Code, no Court shall take cognizance of any offence punishable under Section 138 of the Act except upon a complaint, *in writing*, made by the *payee or*, as the case may be, *the holder in due course* of the cheque.

The payee of the cheque is M/s Shankar Finance & Investments. The complaint is filed by "M/s Shankar Finance & Investments, a proprietary concern of Sri Atmakuri Sankara Rao, represented by its power of attorney holder Sri Thamada Satyanarayana". It is therefore evident that the complaint is in the name of and on behalf of the payee.

Section 142 (a) of the Act requires that no Court shall take cognizance of any offence punishable under Section 138 except upon a *complaint made in writing by the payee.* Thus the two requirements are that (a) the complaint should be made in writing (in contradistinction from an oral complaint); and (b) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, is M/s Shankar Finance & Investments. Once the complaint is in the name of the 'payee' and is in writing, the requirements of Section 142 are fulfilled. Who should represent the payee where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by Section 142, but by the general law.

As contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its shareholders, a proprietary concern is not a legal entity distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name. In civil law where an individual carries on business in a name or style other than his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name. Therefore, if the appellant in this case had to file a civil suit, the proper description of the plaintiff should be "Atmakuri Sankara Rao carrying on business under the name and style of M/s Shankar Finance & Investments, a sole proprietary concern". But we are not dealing with a civil suit. We are dealing with a criminal complaint to which the special requirements of Section 142 of the Act apply. Section 142 requires that the complainant should be payee. The payee is M/s Shankar Finance & Investments. Therefore in a criminal complaint relating to an offence under Section 138 of the Act, it is permissible to lodge the complaint in the name of the proprietary concern itself.

The next question is where a proprietary concern carries on business through an attorney holder, whether the attorney holder can lodge the complaint? The attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the

initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity. Therefore where the payee is a proprietary concern, the complaint can be filed: (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee';(ii) The proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. It follows that in this case the complaint could have been validly filed by describing the complainant in any one of the following four methods:

> "Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments"
>
> *or*
>
> "M/s. Shankar Finance & Investments a sole proprietary concern represented by its proprietor Atmakuri Shankara Rao"
>
> *or*
>
> "Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments, represented by his attorney holder Thamada Satyanarayana"
>
> *or*
>
> "M/s. Shankar Finance & Investments, a proprietary concern of Atmakuri Shankara Rao, represented by his attorney holder Thamada Satyanarayana".

What would have been improper is for the Attorney holder Thamada Satyanarayana to file the complaint in his own name as if he was the complainant.

This Court has always recognized that the power of attorney holder can initiate criminal proceedings on behalf of his principal. (See *Ram Chandra Prasad Sharma v. State of Bihar, AIR 1967 SC 349*)

Where the proprietor of the proprietary concern has personal knowledge of the transaction and the proprietor has signed the complaint, he has to be examined under Section 200 of the Code. A power-of-attorney holder of the complainant who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the payee-complainant payee, there is no reason why the attorney holder cannot be examined as the complainant. We may, in this connection, refer to the decision of this Court in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd., 2005 (2) SCC 217*, where the scope of an attorney holder 'acting' on behalf of the principal in a civil suit governed by Code of Civil Procedure was examined. This Court observed: (*Janki Vashdeo Bhojwani (supra) SCC p. 222, para 13*)

"13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC *confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument.* The term "acts" would not include deposing in place and instead of the principal. *In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, 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 of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." [Emphasis supplied]

The principle underlying the said observations will apply to cases under Section 138 of the Act.

In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined. Of course, where the cheque is drawn in the name of the proprietor of a proprietary concern, but an employee of such concern (who is not an attorney holder) has knowledge of the transaction, the payee as complainant and the employee who has knowledge of the transaction, may both have to be examined.

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610. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142 (a) Complaint u/s 138 N.I. Act, presentation of – May be signed and presented by Advocate of complainant on his behalf.

Kewal Kumar Jaggi v. Vinod Kumar Sahu

Reported in 2008 (4) MPLJ 213

Held :

It is clear that the complaint under Section 138 of the Act, 1881 should be in writing. Further it is settled position that power of attorney of payee or a holder in due course can file complaint. (Relied on *S.P. Sampathy v. Manju Gupta, 2002 CrLJ 2621*). If a power of attorney holder can file a complaint on behalf of complainant so Counsel can also act on behalf of his client. If this capacity is not recognized, it will cause inconvenience and loss to the parties as well as

delay the progress of proceedings in Court. It is no where held that complaint shall be filed with signature of the complainant. According to Section 142, the complaint should be in writing and legislature did not emphasize that such complaint should also be signed by the complainant. But it does not mean that the complaint can be filed without signatures or there is no necessity of putting the signatures of complainant or his advocate but not much stretch is provided on signatures.

Further it is held by the Apex Court in the case of *Uday Shankar Triyar v. Ram Kalewar Prasad Singh and another, AIR 2006 SC 269*: —

> "17. Non compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are : —
>
> (i) Where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.
>
> (ii) Where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it.
>
> (iii) Where the non-compliance or violation is proved to be deliberate or mischievous.
>
> (iv) Where the rectification of defect would affect the case on merits or will affect the jurisdiction of the Court.
>
> (v) In case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

It is clear that no prejudice has been caused to the applicants because the complaints under Section 138 of Act 1881 were signed by complainant's Advocate instead of complainant. Further this Court in *Smt. Shashi Shrivastava v. Jagdish Singh Kushwaha, 2008 (4) MPLJ 229 = 2007 (4) MPHT 480* where the complaint under Section 138 of Act 1881 was filed without any signature even then this Court permitted complainant to cure the defect with a remedy to put his signature for curing the defect within 15 days and further directed that this remedy will not become barred by time merely on this technical ground based on mistake. Whereas non-applicant cases are on better footing. Learned Advocate of complainant has filed these complaints on the basis of Vakalatnama or memo of

appearance duly signed by non-applicants will not make any difference till it is challenged by the non-applicants.

On going through the relevant portion of memo of appearance duly signed by non-applicant is as under : —

"I/we have been duly engaged, instructed and authorized by non-applicants." The four words, "duly engaged, instructed and authorized" are very important. Every word in the memo of appearance has to be given due weightage and it makes clear that non-applicant has made a clear and loud declaration about engagement and authorization of Shri Surendra Verma on their behalf.

Authorise means. – To empower, to give a right or authority to act, to endow with authority or effective legal power, warrant or right to permit a thing to be done in the future, it has a mandatory effect or meaning, implying a direction to act.

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***611. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 Proviso (b) (as existed prior to the amendment brought into w.e.f. 06.02.2003)**
INDIAN PENAL CODE, 1860 – Section 420
Demand notice within15 days of the receipt of information from the Bank – Bank means drawee bank and not collecting bank – Delay on the part of the collecting bank in forwarding the intimation given by drawee bank not sufficient to extend the statutory period of limitation. *(2001) 3 SCC 609 (rel.)*
Cheating – Even after introduction of S.138 of N.I. Act, prosecution u/s 420 of I.P.C. for dishonour of cheque is maintainable – Mere fact that cheque was dishonoured by itself would not mean that accused has cheated the complainant – But only when the allegations show that the accused had a dishonest intention not to pay even at the time of issuance of cheque in question. *2002 DCR 499, (2007) 7 SCC 373, (2006) 9 SCC 601 (rel.)*
Govind Singh Parmar v. Jai Prakash Mishra
Reported in I.L.R. (2008) M.P. NOC 64

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***612. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16 (1) (a) (i)**
PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rules 17 & 18
Whether the entire quantity of article of food stored in the container required to be stirred at the time of taking sample? Held, if it was a usual practice to stir entire quantity of *dahi* stored in a container before sale, it ought to have been done before selling to Food Inspector also – Accused cannot blame anybody and raise it as a technical defence to escape liability – Revision dismissed. *1986 CrLJ 719, 2001 (1) FAC 234, 1989 (1) CrLC 576 (Ker.)* **(Ref.)**
Om Prakash Agrawal v. State of M.P.
Reported in I.L.R. (2008) M.P. NOC 73

●

613. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 20 (1) Notification dated 31.12.1959 and 19.10.1983 authorising Food Inspector to institute prosecution – Food Inspector was competent to file complaint.

Tulsiram v. State of M.P.

Reported in I.L.R. (2008) M.P. 2462

Held:

The main contention of the Counsel for the applicant was that the Food Inspector was not authorized to file the complaint or undertake investigation, since according to the notification of 19/10/1983, the power had not been conferred on the Food Inspector. Counsel stated that the entire prosecution was without the authority of law and prayed for setting aside of both the impugned orders.

Counsel for the respondent-State on the other hand, has placed his reliance on *Gopal Ramniranjan v. State of M.P., 1991 MPLJ 960,* whereby this Court had held that the notification no. 7770 XVII dated 31st December, 1959 had neither been amended nor modified and in view of this fact, the Food Inspector was competent to file complaint even without sanction of the Assistant Public Prosecutor, Food and Medicine of without prior approval of the Local Authority, and therefore, the complaint had been legally and validly filed.

To bolster his submissions, as also relied on *Kaliram v. State of M.P., 1994 (I) MPJR SN 4* whereby the same principle had been upheld by the Court by stating that where there is general authorization of Food Inspector to institute or give consent for prosecution then under the circumstances, complaint filed by the Food Inspector is competent, stating that the evidence of the Food Inspector was corroborated by the public analyst reports Ex. P/7 as well as the central laboratory report. Counsel also stated the Food Inspector was duly authorized vide Ex.-P/1 & P/2 and granted sanction vide Ex. P/8 for prosecution under the Prevention of Food Adulteration Act, had been duly filed vide Ex. P/8 by the prosecution. And since there was no doubt having found the sample to be adulterated, minimum sentence had been imposed by the Trial Court which was upheld by the Appellate Court and the revision did not require any interference.

On considering the said submissions, the record and the impugned judgment, I find that the judgment of the Appellate Court is quite detailed and based on cogent and valid reasons. The first objection raised by the Counsels regarding competency of the Food Inspector to file complaint has been more than adequately answered by relying on several authorities by the Appellate Court and detailed analysis of the empowerment of the Food Inspector under the law has been duly considered. Referring to para no. 6 of the impugned judgment, I find that the Appellate Court has placed proper reliance on the judgment of this Court in the matter of *Shivprasad v. State of M.P., 2004 (I) MPJR 190* and *Ramprasad v. State of M.P., 2003 (1) ANJ 117* whereby the

competency of the Food Inspector has been considered and the same controversy was raised and duly answered and the Food Inspector has been found to be competent to file the said complaint.

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614. REGISTRATION ACT, 1908 – Section 17 (2) (vi)

Compromise decree, necessity of registration – When property, which was not subject matter of the suit was given in lieu of disputed property, the same would constitute the transfer of property – Registration is a must.

K. Raghunandan & Ors. v. Ali Hussain Sabir & Ors.

Reported in AIR 2008 SC 2337

Held:

Appellants have given up their claim of 150 yards of land which was to be on the rear side of the property and in lieu thereof the passage was exclusively given to the plaintiffs – appellants. Thus, the appellants have rested its case on the basis of an exchange of land between the plaintiffs and defendants. The High Court opined that as by reason thereof an inference can be drawn that the defendants who had been in possession of the passage had given up their rights in lieu of 150 yards of land, the same would constitute a transfer of property and, thus, necessitated registration. It was in the aforementioned situation the High Court relied upon the decision of this Court in *Bhoop Singh v. Ram Singh Major and others, (1995) 5 SCC 709*

A statute must be construed having regard to the purpose and object thereof. Sub–section (1) of Section 17 of the Act makes registration of the documents compulsory. Sub–section (2) of Section 17 of the Act excludes only the applications of Clauses (b) and (c) and not clause (e) of Sub–section (1) of Section 17. If a right is created by a compromise decree or is extinguished, it must compulsorily be registered. Clause (vi) is an exception to the exception. If the latter part of Clause (vi) of Sub–section (2) of Section 17 of the Act applies, the first part thereof shall not apply. As in this case not only there exists a dispute with regard to the title of the parties over the passage and the passage, itself, having not found the part of the compromise, we do not find any infirmity in the impugned judgment.

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615. REGISTRATION ACT, 1908 – Section 49 (c) and proviso

TRANSFER OF PROPERTY ACT, 1882 – Sections 107 & 108 (o)

RENT CONTROL & EVICTION:

Change of user and purpose of letting, explained. A document required to be registered – If unregistered is not admissible in evidence but can be used for any collateral transaction/purpose – Circumstances reiterated.

The purpose of letting out the property would be residential or non-residential or for a particular business etc – The property leased out for residential use by particular officer of the Company – Company may allot the premises to its own officer for the same user after vacation –This does not amount to change of user within the meaning of Section 108 (o) of Transfer of Property Act.

K.B. Saha and Sons Private Limited v. Development Consultant Limited

Judgment dated 12.05.2009 passed by the Supreme Court in Civil Appeal No. 5659 of 2002, reported in (2008) 8 SCC 564

Held :

Section 49 of Registration Act, 1908 clearly provides that a document purporting to be a lease and required to be registered under Section 107 of Transfer of Property Act, 1881 will not be admissible in evidence if the same is not registered. Proviso to this section, however, as noted hereinabove, provides that an unregistered lease deed may be looked into as evidence of collateral facts. Mr. Mukherjee, learned counsel for the appellant argued before us that the tenancy in question was exclusively granted for the benefit of the named officer and his family and unless the landlord gave his consent, no other person could use it and such condition in the lease agreement is admissible for ascertaining the purpose of allotting the suit premises which according to the appellant is a collateral fact.

In *Haran Chandra Chakravarti v. Kaliprasanna Sarkar, AIR 1932 Cal 83(2)*, it was held that the terms of a compulsorily registrable instrument are nothing less than a transaction affecting the property comprised in it. It was also held that to use such an instrument for the purpose of proving such a term would not be using it for a collateral purpose and that the question as to who is the tenant and on what terms he has been created a tenant are not collateral facts but they are important terms of the contract of tenancy, which cannot be proved by admission of an unregistered lease deed into evidence.

In *Ratan Lal v. Hari Shankar, AIR 1980 All 180* while discussing the meaning of the term "collateral purpose", the High Court had observed as follows :- (AIR pp. 180-81, para 4)

> "4. The second contention was that the partition deed, even if it was not registered could certainly be looked into for a collateral purpose,... but the collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished the right to immovable property .....term 'collateral purpose' would not permit the party to establish any of these acts from the deed."

In *Bajaj Auto Limited v. Behari Lal Kohli, AIR 1989 SC 1806,* this Court observed that if a document is inadmissible for non-registration, all its terms are inadmissible including the one dealing with landlord's permission to his tenant to sub-let. It was also held in that decision that if a decree purporting to create a lease is inadmissible in evidence for want of registration, none of the terms of the lease can be admitted in evidence and that to use a document for the purpose of proving an important clause in the lease is not using it as a collateral purpose.

In *Rana Vidya Bhushan Singh v. Ratiram, (1969) 1 UJ 86 (SC),* the following has been laid down :

> "A document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting immovable property, but it may be admitted as evidence of collateral facts, or for any collateral purpose, that is for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. As stated by Mulla in his *Indian Registration Act,* 7th En., at p. 189 :
>
> > "The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court of Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it."

From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:-

1. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

Section 108 (o) of the Transfer of Property Act clearly provides that the lessee must not use or permit another to use the property for a purpose other than that for which it was let out or leased.

Section 108(o) requires the lessee to use the property as a man of ordinary prudence would use his property and not to use it for a purpose different to that for which it was leased. It is true that under Section 108 (o) of the Transfer of Property Act, "use of the property for the purpose other than that for which it was leased i.e. 'change of user' is not permitted." Therefore, we have to consider whether in the backdrop of the facts of this case, violation of Clause 9 of the lease agreement, even if it is held that it can be looked into for collateral purposes, would be 'change of user' or not. In other words, we have to find whether the expression 'change of user' would cover a situation wherein the property is let out for a particular named officer and for none else and despite this condition, the same is given to someone else, or would it cover and be limited to the cases where property is leased out for a residential or non- residential purpose or for a particular business and despite such express conditions, the property is used for the purpose other than that specified. We are of the view that letting out or leasing out the property for a particular named officer cannot be the 'purpose' of letting. The purpose of letting out would be residential or non-residential or for a particular business etc.

Therefore, in the present case, we are of the view that although the premises were leased out exclusively for the named officer of the respondent, the fact that it was subsequently used for the residence of some other officer of the respondent would not constitute 'change of user' so as to be hit by Section 108 (o) of the Transfer of Property Act.

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***616. RENT CONTROL AND EVICTION:**

Bonafide requirement of landlord – Landlord was due to retire within a short period – His requirement of premises to run a business with his wife and daughter both pardanashin ladies, could not be denied only on the contention that pardanashin ladies could not do business. For readymade garment business experience, specialized technical education or separate office or place of preparation of readymade garment or godown are not required.

Similarly, this is not a ground to deny the eviction that the landlord belongs to upper class of society having facilities of car etc. – If he wanted to get himself engaged in doing some business, it could not

be held that he would not be entitled to possession of property for doing business since he was rich and even without doing any business, he could maintain himself.

It is no doubt true that tenancy was created before about 50 years – But that should not be ground for depriving the landlord in doing business if the requirement of the landlord is bonafide and reasonable.

Shamshad Ahmad and others v. Tilak Raj Bajaj (deceased) through LRs. and others

Judgment dated 11.09.2008 passed by the Supreme Court in Civil Appeal No. 8067 of 2004, reported in (2008) 9 SCC 1

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617. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)

WORDS & PHRASES :

(i) Applicability of Section 3 (1) (x) of the Act – Calling a member of Scheduled Caste a 'chamar' with intent to insult or humiliate him in a place within public view is certainly an offence under Section 3 (1) (x).

(ii) In this regard popular meaning of the word to be adopted where etymological meaning may frustrate the object of the Act.

(iii) 'Place within public view' is distinct from the word 'Public place'

Swaran Singh and others v. State through standing Counsel and another

Judgment dated 18.08.2008 passed by the Supreme Court in Criminal Appeal No. 1287 of 2008, reported in (2008) 8 SCC 435

Held :

(i) It is true that chamar is the name of a caste among Hindus who were traditionally persons who made leather goods by handicraft. The word "chamar" is derived from the Hindu word 'चमड़ा' which means leather.

Before the coming of the British into India, the chamars were a stable socio-economic group who were engaged in manufacturing leather goods by handicraft.

When the British conquered India they introduced the products of their mill industry into India, and exorbitantly raised the export duties on the Indian handicraft products. Thereby they practically destroyed the handicraft industry in India.

The Chamars also suffered terribly during this period. The British industries e.g. Bata almost completely destroyed the vocation of the Chamars, with the result that while they were a relatively respectable section of society before the coming of British rule (because they could earn their livelihood through

manufacture of leather goods) subsequently they sank in the social ladder and went down to the lowest strata in society, because they lost their livelihood and became unemployed.

(ii) It may be mentioned that when we interpret section 3(1)(x) of the Act we have to see the purpose for which the Act was enacted. It was obviously made to prevent indignities, humiliation and harassment to the members of SC/ST community, as is evident from the Statement of Objects & Reasons of the Act. Hence, while interpreting section 3(1)(x) of the Act, we have to take into account the popular meaning of the word 'Chamar' which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.

This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word 'Chamar' when addressing a member of the Scheduled Caste, even if that person in fact belongs to the 'Chamar' caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity — so many religions, castes, ethnic and lingual groups, etc. — all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united.

In our opinion, calling a member of the Scheduled Caste 'Chamar' with intent to insult or humiliate him in a place within public view is certainly an offence under section 3(1)(x) of the Act. Whether there was intent to insult or humiliate by using the word 'Chamar' will of course depend on the context in which it was used.

Our Constitution provides for equality which includes special help and care for the oppressed and weaker sections of society who have been historically down trodden. The SC/ST communities in our opinion are also equal citizens of the country, and are entitled to a life of dignity in view of Article 21 of the Constitution as interpreted by this Court. In the age of democracy no people and no community should be treated as being inferior. However, the truth is that in many parts of our country persons belonging to SC/ST are oppressed, humiliated and insulted. This is a disgrace to our country.

(iii) Learned counsel then contended that the alleged act was not committed in a public place and hence does not come within the purview of section 3(1)(x) of the Act. In this connection it may be noted that the aforesaid provision does not use the expression 'public place', but instead the expression used is 'in any place within public view'. In our opinion there is a clear distinction between the two expressions.

It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by appellants 2 and 3 (by calling him a 'Chamar') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression 'place within public view' with the expression 'public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies.

In this connection it may be mentioned that in America to use the word 'Nigger' today for an African-American is regarded as highly offensive and is totally unacceptable, even if it was acceptable 50 years ago. In our opinion, even if the word 'Chamar' was not regarded offensive at one time in our country, today it is certainly a highly offensive word when used in a derogatory sense to insult and humiliate a person. Hence, it should never be used with that intent. The use of the word 'Chamar' will certainly attract section 3(1)(x) of the Act, if from the context it appears that it was used in a derogatory sense to insult or humiliate a member of the SC/ST.

The caste system is a curse on our nation and the sooner it is destroyed the better. In fact it is dividing our country at a time when we must all be united as Indians if we wish to face the gigantic problems confronting us e.g. poverty, unemployment, price rise, corruption, etc. The Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989 is a salutary legislative measure in that direction.

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***618. SERVICE LAW :**

Confidential report – Communication of grading – All gradings whether 'very good', 'good', 'average' or 'poor' are required to be communicated to employees working in Government offices, whether in civil, judicial, police or other services (except in military), Statutory bodies, Public Service Undertakings or other State instrumentalities within a reasonable period – Where Constitutional obligations and principles of natural justice and fairness apply, the employee concerned would know about the assessment of his work and

conduct by his superiors which would enable him to improve his work in future and he would also get an opportunity of making a representation for improvement of his grading if he feels it is unjustified because when comparative merits is being considered for promotion, even a person having 'good' grading certainly has lesser chance of promotion than a person having 'very good' or 'outstanding' grading.

Even an 'outstanding' entry should be communicated since that would boost morale of an employee and make him work harder – This rule prevails even if there may be no rule or Government order requiring communication to entry or even if there is a Rule/Government order prohibiting it because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution requires such communication – Article 14 of the Constitution overrides all Rules or Government orders.

Dev Dutt v. Union of India and others

Judgment dated 12.05.2008 passed by the Supreme Court in Civil Appeal No. 7631 of 2002, reported in (2008) 8 SCC 725

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619. SERVICE LAW :

Departmental enquiry should not be a mere formality – Basic principles of natural justice have to be followed – A witness cannot be the Enquiry Officer – The department should take first step to lead evidence (before arraigning) against a delinquent – Copy of Enquiry Officer's report alongwith material relied on should be given to the delinquent

State of Uttaranchal and others v. Kharak Singh

Judgment dated 13.08.2008 passed by the Supreme Court in Civil Appeal No. 4531 of 2007, reported in (2008) 8 SCC 236

Held :

If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eyewitness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should

the workman be asked whether he wants to give any explanation about the evidence led against him.

Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry *viz.*, before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry.

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

Another infirmity in the report of the enquiry officer is that he concluded the enquiry holding that all the charges have been proved and he recommended for dismissal of the delinquent from service.

This Court in a series of decisions has pointed out that it is for the punishing/ disciplinary authority to impose appropriate punishment and enquiry officer has no role in awarding punishment. (See *A.N. D'Silva v. Union of India, AIR 1962 SC 1130*)

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***620. SERVICE LAW:**

Entries in ACR, communication of – Every entry, whether poor, fair, average, good or very good must be communicated to the employee concerned so that he may have opportunity, if being aggrieved, of making representation against it.

R.T. Panthare v. The State of Madhya Pradesh & another

Reported in 2008 (4) MPHT 197

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621. SERVICE LAW :

WORDS & PHRASES :

Words 'Promote' and 'Promotion', connotation of – Whether criteria laid down for promotion can be made applicable for granting benefit of time bound promotion pay scale? Held, Yes.

State of M.P. and others v. Subhash Chandra Agrawal

Reported in 2008 (3) MPLJ 586 (DB)

Held :

In the case of *State of Rajasthan v. Fateh Chand Soni, (1996) 1 SCC 562*, the Apex Court in para 8 of its judgment has held that the High Court, in our opinion, was not right in holding that promotion can only be to a higher post in the Service and appointment to a higher scale of an officer holding the same post does not constitute promotion. In the literal sense the word 'promote' means 'to advance to a higher position, grade, or honour.' So also 'promotion' means 'advancement or preferment in honour, dignity, rank or grade'. 'Promotion' thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression 'promotion' has been understood in the wider sense and it has been held that 'promotion can be either to a higher pay scale or to a higher post.'

Thus, reasoning given by the learned Single Judge that the criteria laid down for promotion cannot be made applicable for granting benefit of time bound promotion pay scale, cannot be accepted.

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622. SPECIFIC RELIEF ACT, 1963 – Section 9
CONTRACT ACT, 1872 – Section 55
TRANSFER OF PROPERTY ACT, 1882 – Section 58

(i) If the sale and agreement to repurchase the same are embodied in separate documents then the transaction cannot be a mortgage, whether the documents are contemporaneously executed or not.

(ii) In such a case of agreement of reconveyance, time must be treated as essence of the contract.

Gauri Shankar Prasad and others v. Brahma Nand Singh
Judgment dated 11.07.2008 passed by the Supreme Court in Civil Appeal No. 1756 of 2002, reported in (2008) 8 SCC 287

Held:

This Court has in several cases held that if sale and agreement to repurchase are embodied in separate documents, it cannot be a case of mortgage and in such cases relating to reconveyance time is always the essence of the contract. (See *Chunchun Jha v. Ebadat Ali, AIR 1954 SC 345).* In *Bismillah Begum v. Rahmatullah Khan, AIR 1998 SC 970* it was held as follows:

> "We may also add that in contracts relating to reconveyance of property time is always the essence of the contract as laid down by the Federal Court in *Shanmugam Pillai v. Annalakshmi Ammal, AIR 1950 FC 38* and also laid down by this Court in *Caltex (India) Ltd. v. Bhagwan Devi Marodia, AIR 1969 SC 405.* The relevant passage in the judgment of this Court in *Caltex (India) Ltd.* (supra) at AIR p. 407 in para 3 reads as follows:

'3. At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain.

"An option for the renewal of a lease, or for the purchase or repurchase of property must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." ' "

In *Chunchun case* (supra) it was observed as follows: (AIR p. 347, para 8)

"8. ...If the sale and agreement to repurchase are embodied in separate documents then the transaction cannot be a mortgage, whether the documents are contemporaneously executed or not."

In the case of agreement of repurchase, the conditions of repurchase must be construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as the time must be treated as being of the essence of the contract in the case of an agreement of reconveyance."

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***623. STAMP ACT, 1899 – Section 2 (14) & 33**

'Instrument' though agreement for sale of immovable property was alleged by an oral agreement but during trial document (a letter) containing the terms and conditions of the agreement was produced – Existence of oral agreement not proved satisfactorily – Document (letter) containing terms and conditions was held an agreement for sale and instrument under Section 2 (14) of the Stamp Act, 1899 and directed to impound before making it as an exhibit. [*Brij Mohan v. Sugra Begum, (1990) 4 SCC 147*]

Gopi Krishna Trivedi v. Sudama Prasad Ojha

Judgment dated 01.09.2008 passed by the Supreme Court in Civil Appeal No. 5414 of 2008, reported in (2008) 9 SCC 401

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624. SUCCESSION ACT, 1925 – Sections 63, 64 & 87

(i) Absence of the appendix which formed an integral part of the Will were not in existence at the time of execution of the Will – Will is incomplete and the intention of the testator cannot be factuated – Suspicious circumstances itself are sufficient to hold the Will as not being duly proved.

(ii) Execution of Will – Requires to be proved lime any other document but the statutory conditions imposed by reason of Section 63 (c) of the Act and Section 68 of the Indian Evidence Act cannot be ignored.

Anil Kak v. Kumari Sharada Raje and Ors.

Reported in AIR 2008 SC 2195

Held:

Section 64 of the Act reads as under:

> **"64. Incorporation of papers by reference** – If a testator, in a Will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the Will or codicil in which it is referred to."

The rule of incorporation by reference is well–known. One document is incorporated by reference in another when it is referred to, as if it would form an integral part thereof. [See *Sarabjit Rick Singh v. Union of India, 2007 (14) SCALE 263*]

Principle of incorporation by reference was evolved so as to avoid unnecessary repetition of the same documents again and again in different parts of the original document. For invoking the said principle, a document must be in existence. It cannot be brought into existence later on. The executor of a document must know what the other document which he intends to incorporate in the Will contains.

In *Halsbury's Laws of England, Fourth Edition, Paragraph 817 at pages 433–34,* it is stated:

> *"Incorporation of documents:* In certain cases documents referred to in a testator's Will or codicil, though not themselves duly executed, may be incorporated in the Will and included in the probate...."

Such a document must be strictly identified with the description contained in the Will but extrinsic evidence is admissible for the purpose of identification. The reference must be to a document as an existing document and not to one which is to come into existence at a future date. The onus of proving the identity of the document and its existence at the date of the Will lies upon the party seeking to establish it. But the Court will draw inferences from the circumstances surrounding the execution of the Will.

If the appendices formed an integral part of the Will and in their absence the Will was not complete, then the intention of the testator cannot be effectuated. A distinction must be made between an incomplete Will and a complete Will although intention of the testator cannot be effectuated.

The testator's intention is collected from a consideration of the whole Will and not from a part of it. If two parts of the same Will are wholly irreconcilable, the court of law would not be in a position to come to a finding that the Will dated 4.11.1992 could be given effect to irrespective of the appendices. In construing a Will, no doubt all possible contingencies are required to be taken into consideration. Even if a part is invalid, the entire document need not be invalidated, only if it forms a severable part. [See *Bajrang Factory Ltd. and Another v. University of Calcutta and Others, (2007) 7 SCC 183*]

In *Halsbury's Laws of England,* Fourth edition, Volume 50, page 332– 33, it is stated:

> *"462. Leading principle of construction:* – The leading principle of construction which is applicable to all Wills without qualification and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole Will taken in connection with any evidence properly admissible, and the meaning of the Will and of every part of it is determined according to that intention."

In *P. Manavala Chetty and five Ors. v. P. Ramanujam Chetty and Anr., (1971)1MLJ127,* a single judge of the Madras High Court on the duty of the court of construction to give intention to the wishes of the testator opined:

> "It is the obvious duty of the Court to ascertain and give effect to the true intentions of the testator and also avoid any construction of the Will which will defeat or frustrate or bring about a situation which is directly contrary to the intentions of the testator. At the same time, it must be borne in mind that there are obvious limits to this doctrine that the Court should try to ascertain and give effect to the intentions of the testator. The law requires a Will to be in writing and it cannot, consistently with this doctrine, permit parol evidence or evidence of collateral circumstances to be adduced to contradict or add to or vary the contents of such a Will. No evidence, however powerful it may be, can be given in a Court of construction in order to complete an incomplete Will, or project back a valid Will, if the terms and conditions of the written Will are useless and in–effective to amount to a valid bequest, or to prove any intention or wish of the testator not found in the Will...."

In the instant case the Will refers to appendices indicating that the distribution shall be in terms thereof, it is difficult to comprehend as to how without the same, the Will can be said to be a complete one so as to effectuate the intention of the testator. The intention of the testator in other words must be

found out from the entire Will. It has to be read as a whole. An endeavour should be made to give effect to each part of it. Only when one part cannot be given effect to, having regard to another part, the doctrine of purposive construction as also the general principles of construction of deed may be given effect to. In the instant case, the document is one. It is inseparable. Whereas the principal document provides for the broad division, the principles of division laid down therein would be followed if the appendices are to be taken recourse to. If the principles of equality as has been suggested by the learned counsel is to be given effect to, it was expected that the testatrix intended to confer the same benefit or the benefit having same value or nearabout to be conferred on each of the legatees.

In effect and substance, the purported directions contained in the appendices which did not see the light of the day on the date of execution of the Will, make the application of the directions of the testatrix wholly impossible to be carried out. In a case of this nature, however, in our opinion, Section 87 of the Act will have no application.

Furthermore, the Will is surrounded by suspicious circumstances.

The execution of a Will does not only mean proving of the signatures of the executors and the attesting witnesses. It means something more. A Will is not an ordinary document. It although requires to be proved like any other documents but the statutory conditions imposed by reason of Section 63(c) of the Act and Section 68 of the Indian Evidence Act cannot be ignored.

In *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors. 2006 (14) SCALE 186*, this Court held:

> "Section 63 of the Indian Succession Act lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian Evidence Act postulates the mode and manner of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi,* on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable...."

As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

It may be true that deprivation of a due share by the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

Unlike other documents, even *animus attestandi* is a necessary ingredient for proving the attestation.

The court is, thus, required to adopt a rational approach in a situation of this nature. Once the court is required to satisfy its conscience, existence of suspicious circumstances play a prominent role. The Will, as noticed hereinbefore, is in two parts. Whereas the first part deals with the property belonging to the husband of the testatrix, the second part deals with the properties which purportedly belongs to her. Distribution of assets, however, was not specifically stated in the Will. They were to be made as per the appendices annexed thereto. The appendices which were required to be read as a part of the main Will so as to effectuate the intention of the testatrix have not been proved. The Will by its own cannot be given effect to. The Will must be read along with the appendices. No doubt in construing a Will arm chair rule is to be adopted. The Will was, therefore, not complete. It is not correct to contend that the appendices were very much in existence at the time when the Will was executed. Existence of a document must mean the actual existence.

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***625. TENANCY AND LAND LAWS:**

Entries in revenue records – In jamabandi – Does not confer title Revenue records are relevant only for fiscal purpose – Substantive right of title and of ownership on contesting claimants during mutation procedings can be decided by a competent civil court in appropriate proceedings [Also see *Suraj Bhan v. Financial Commissioner, (2007) 6 SCC 186*]

Rajinder Singh v. State of Jammu and Kashmir and others

Judgment dated 11.07.2008 passed by the Supreme Court in Civil Appeal No. 5269 of 2003, reported in (2008) 9 SCC 368

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NOTE : Asterisk (*) denotes brief notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING ADDING SOME MORE OCCUPATIONS IN THE SCHEDULE OF THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

No. S.O. 1109 (E), dated May 8, 2008. – In exercise of the powers conferred by Section 4 of the Child Labour (Prohibition and Regularion) Act, 1986 (61 of 1986), the Central Government hereby gives of its intention to add the following occupations in the Schedule to the said Act, namely :-

In the Schedule to the said Act, -

(1) in Part A, under the heading "Occupations", after item (IS) and the entries relating thereto, the following item and entries shall be added, namely:-

"(16) Diving";

(2) in Part B, under the heading "Processes", after item (57) and the entries relating thereto, the following items and the entries shall be added, namely :-

"(58) Processes involving exposure to excessive heat (e.g. working near furnace) and cold;

(59) Mechanised fishing;

(60) Food Processing;

(61) Beverage Industry;

(62) Timber handling and loading;

(63) Mechanical Lumbering;

(64) Warehousing;

(65) Processes involving exposure to free silica such as state, pencil industry, stone grinding, slate stone mining, stone quarries, agate industry.".

[Published in the Gazette of India, Extraordinary Part II, Section 3 (ii), No. 629, dated 8th May, 2008.]

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NOTIFICATION REGARDING AMENDMENT IN THE INSTRUCTIONS TO ORGANIZE PERMANENT AND CONTINUOUS LOK ADALAT UNDER LOK ADALAT SCHEME, 1997

Notification No. 17- Estt.- SLSA-2008 dated the 13th March 2008. – In exercise of the powers conferred by clause (g) of Section 2 read with clauses

(a) and (b) of sub-section (2) of Section 7 of the **Legal Services Authorities Act, 1987 (No. 39 of 1987),** the Madhya Pradesh Legal Sevices Authority hereby further makes the following amendment in the **"Instructions to Organize Permanent and Continuous Lok Adalat under Lok Adalat Scheme, 1997"**, namely :–

AMENDMENT

In the said 'Instructions,–

After the existing Proviso to sub-clause (a) of clause 1 of "Part II for District Authorities", the following proviso shall be inserted, namely :–

"Provided further that the Lok Adalat can also be organized after Court hours on such days as may be specified by the Chief Justice of the High court."

[Published in M.P. Rajpatra Part I dated 16-5-2008 Page 1206]

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NOTIFICATION REGARDING AMENDMENTS IN THE LOK ADALAT SCHEME, 1997

Notification No. 17-Esst.-SLSA-2008 dated the 13th May, 2008.– In exercise of the powers conferred by clause (g) of Section 2 read with clauses (a) and (b) of sub-section (2) of Section 7 of the **Legal Services Authorities Act, 1987 (No. 39 of 1987),** the Madhya Pradesh Legal Services Authority hereby makes the following **amendments in the "Lok Adalat Scheme, 1997"**, nemely :–

AMENDMENT

In the aforesaid Scheme, –

After the clause (3) of the "Scheme 12, Remunerations to officers and staff of the Lok Adalat" the following clauses (4) and (5) shall be inserted, namely :–

"(4) The Staff of the Lok Adalats held at High Court, District and Tehsil levels shall also be entitled to remuneration at such rates as may be fixed by the Patron-in-Chief.

(5) The Judicial Officer and Staff of the Lok Adalats organized at Taluk/ Tehsil and District levels after Court hours, shall also be entitled to Honorarium/Remuneration at such rates as may be fixed by the Patron-in-Chief."

[Published in M.P. Rajpatra Part I dated 16-5-2008 Page 1206]

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NOTIFICATION REGARDING AMENDMENTS IN THE MADHYA PRADESH (CARE & PROTECTION OF CHILDREN) RULES, 2003

Notification No. F-3-20-2008-XXVI-2 dated the 3rd October, 2008. – In exercise of the powers conferred by Section 68 of the **Juvenile Justice (Care and Protection of Children) Act, 2000 (No. 56 of 2000),** the State Government, hereby, makes the following **amendment in the Madhya Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2003,** namely :–

AMENDMENTS

In the said rules, –

1. (1) for the word "abandoned" wherever it occurs, the words "abandoned or surrendered" shall be substituted.

(2) The word "Matron" wherever it occurs shall be omitted.

2. (1) for clause (b) of rule 2, the following clause shall be substituted, namely :–

"(b) 'Adoption' means the process through which the adopted child is permanently separated from his biological parents ahd become the legitimate child to his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship.".

(2) after clause (u) of rule 2, the followig clause shall be added, namely :–

"(v) Court means Principal Civil Court of the District.".

3. In rule 7, –

(1) in sub-rule (1), for the words "premises of a abservation home", the words "premises of a observation home or the place determined by the District Collector" shall be substituted.

(2) after sub-rule (3), the following sub-rule shall be added, namely :–

"(4) the Chief Judicial Magistrate shall review the pendency of cases of the Board at every six month, and shall direct the Board to increase the frequency of its sitting or may cause the constitution of additional Board.".

4. In rule 9, –

(1) for sub-rule (5), the following sub-rule shall be substituted, namely :–

"(5) as soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit of the designated Police Officer who shall produce the juvenile before the Board without any loss of time but within a

period of twenty four hours of his apprehension excluding the time necessary for the journey, from the place where the Juveile was apprehended to the Board:

Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in a Jail."

(2) after sub-rule (15), the following sub-rule shall be added, namely :–

"(16) (i) 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 a 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 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 the Act and these rules even if the juvenile has ceased to be so one or before the date of commencement of the Act.

(ii) if the court finds a person to be juvenile on the date of commission of the offence under sub-rule (i), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.".

5. In rule 10, –

(1) in sub-rule (4), for the words "or on personal bond by the child", the words "of on personal bond by the child or placed under the supervision of a Probation Officer" shall be substituted.

(2) after sub-rule (18), the following sub-rule shall be added, namely :–

"(18) (a) Whenever the Board orders the juvenile to perform community service, the Juvenile Police Officer shall handover the juvenile to the incharge of the institution where juvenile has been ordered to perform the community service. The juvenile shall come daily for community service for such period as mentioned in the order of the Board. That the Juvenile Welfare Officer shall keep a watch that the juvenile

is performing community service daily or not. If the juvenile fails to come daily then the Juvenile Welfare Officer shall report to the Board. The places of community services may be Government hospitals, old age homes and institutions related to the mentally and physically challenged children.".

(3) in sub-rule (21), for the words "children in need of care and protection", the words "child in need of care and protection and juvenile in conflict with law" shall be substituted.

6. In rule 16, –

(1) in sub-rule (1), for the words "by the Government", the words "by the District Collector" shall be substituted.

(2) after sub-rule (4), the following sub-rules shall be added, namely :–

"(5) The State Government shall review the pendency of cases of the committee at every six months, and shall direct the committee to increase the frequency of its sitting or may cause the constituion of additional committees.

(6) After the completion of the inquiry if the committee is of the opinion that the said child has not family or ostensible support or is in continued need of care and protection, it may allow to the child to remain in the childen's home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.".

7. In rule 19, –

(1) in clause (d), the words "authorized by the State Government" shall be omitted.

(2) after clause (e), the following proviso shall be added, namely :–

"Provided that the child shall be produced before the committee without any loss of time within the period of 24 hours excluding the time necessary for the journey.".

8. In sub-rule (2) of rule 43, for the words and figure "under Section 8, 9, 34, 37 and 44 of the Act", the words and figure "under Section 8,9,34,37,41 and 44 of the Act" shall be substituted.

9. After rule 43, the following rule shall be inserted, namely :–

"43-A. Registration of Institutions. – Every institution, whether run by the Government or by the voluntary organization for children in need of care and protection shall be registered under the Act in such manner as specified in rule 43.".

10. In sub-rule (3) of rule 61, for the words "not exceeding seven days", the words "generally not exceeding seven days" shall be substituted.

11. After sub-rule (1) of rule 62, the following sub-rule shall be inserted, namely :–

"(1-A) The State Government may by an order direct that any child or the juvenile transferred from any children's home or special home outside the States children's home, special home or institution with the consultation of concerned State and with the prior intimation to the Committee or Board as the case may be, and such order shall be deemed to be operative for the competent authority of the area where the child or juvenile is sent.".

12. For sub-rule (10) of rule 78, the following sub-rule shall be substituted, namely :–

(10) Court in Adoption. In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations have been carried out as are required for giving such children in adoption.".

13. After rule 88, the following rule shall be inserted, namely :–

"88-A. The State Advisory Board constituted in sub-rule (1) of rule 88 shall also function as State Child Protection Unit for the purpose of Section 62-A of the Act, the terms and conditions of such unit shall be same as provided in rule 88.".

14. After rule 89, the following rule shall be inserted, namely :–

"89-A. The District Advisory Board constituted in sub-rule (1) of rule 89 shall also function as District Child Protection Unit in every district for the purposes of Section 62-A of the Act, the terms and conditions of such unit shall be same as provided in rule 89.".

15. In Form XIX, for the word "certification" wherever it occurs, the words and sign "Certification/Registration" shall be substituted.

[Published in M.P. Rajpatra (Asadharan) dated 4-10-2008 page 1284 (2-4)]

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007

New Delhi, the 26th day of October , 2007

Rules under the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000) (as amended by the Amendment Act 33 of 2006) to be administered by the States

[For better implementation and administration of the provisions of the said Act in its true spirit and substance]

CHAPTER - I
PRELIMINARY

1. Short title and commencement.– (1) These rules may be called the Juvenile Justice (Care and Protection of Children) Rules, 2007.

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

2. Definition.– In these rules, unless the context otherwise requires-

(a) *"abandoned"* means an unaccompanied and deserted child who is declared abandoned by the Committee after due inquiry;

(b) *"Act"* means the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) as amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 (33 of 2006);

(c) *"best interest of the child"* means a decision taken to ensure the physical, emotional, intellectual, social and moral development of juvenile or child;

(d) *"child friendly"* means any process and interpretation, attitude, environment and treatment, that is humane, considerate and in the best interest of the child;

(e) *"community service"* implies service rendered to the society by juveniles in conflict with law in lieu of other judicial remedies and penalties, which is not degrading and dehumanizing.

Examples of this may include:

(i) cleaning a park;

(ii) getting involved with Habitat for Humanity;

(iii) serving the elderly in nursing homes;

(iv) helping out a local fire or police department;

(v) helping out at a local hospital or nursing home; and

(vi) serving disabled children.

(f) *"detention"* in case of juveniles in conflict with law means "protective custody" in line with the principles of restorative justice;

(g) *"Form"* means the form annexed to these rules;

(h) *"individual care plan"* is a comprehensive development plan for a juvenile or child based on age specific and gender specific needs and the case history of the juvenile or child, prepared in consultation with the juvenile or child, in order to restore the juvenile's or child's self-esteem, dignity and self-worth and nurture him into a responsible citizen and accordingly the plan shall address the following needs of a juvenile or a child:

(i) Health needs;

(ii) Emotional and psychological needs;

(iii) Educational and training needs;

(iv) Leisure, creativity and play;

(v) Attachments and relationships;

(vi) Protection from all kinds of abuse, neglect and maltreatment;

(vii) Social mainstreaming; and

(viii) Follow-up post release and restoration.

(i) *"institution"* means an observation home, or a special home, or a children's home or a shelter home set up, certified or recognized and registered under sections 8, 9, 34, sub-section (3) of section 34 and section 37 of the Act respectively;

(j) *"Officer-in-charge"* or such other nomenclature as issued by the State Government, means a person appointed for the control and management of the institution;

(k) *"orphan"* means a child who is without parents or willing and capable legal or natural guardian;

(l) *"place of safety"* means any institution set up and recognized under sub-section (3) of section 12 and sub-section (1) of section 16 of the Act for juvenile in conflict with law or children;

(m) *"recognised"* means a person found fit by the competent authority or, an institution found fit by the State Government on the recommendation of the competent authority as per clauses (h) and (i) of section (2) of the Act; or, recognition of an institution or agency

or voluntary organisation by the State Government to operate as a children's home, observation home and special home; or a shelter home, specialised adoption agency or after care organization under sub-section (1) of section 37, sub-section (4) of section 41 and clause (a) of section 44 of the Act;

(n) *"registered"* means all institutions or agencies or voluntary organisations providing residential care to children in need of care and protection registered under sub-section (3) of section 34;

(o) *"State Government"* in relation to a Union Territory means the Administrator of that Union Territory appointed by the President under article 239 of the Constitution;

(p) *"street and working children"* means children without ostensible means of livelihood, care, protection and support in accordance with the provisions laid down under clause (d) (1) of section 2 of the Act;

(q) *"surrendered child"* means a child, who in the opinion of the Committee, is relinquished on account of physical, emotional and social factors beyond the control of the parent or guardian;

(r) all words and expressions defined in the Act and used, but not defined in these rules, shall have the same meaning as assigned to them in the Act.

CHAPTER - II
FUNDAMENTAL PRINCIPLES OF JUVENILE JUSTICE AND PROTECTION OF CHILDREN

3. Fundamental principles to be followed in administration of these rules.– (1) The State Government, the Juvenile Justice Board, the Child Welfare Committee or other competent authorities or agencies, as the case may be, while implementing the provisions of these rules shall abide and be guided by the principles, specified in sub-rule (2).

(2) The following principles shall, interalia, be fundamental to the application, interpretation and implementation of the Act and the rules made hereunder:

I. **Principle of presumption of innocence.**– (a) A juvenile or child or juvenile in conflict with law is presumed to be innocent of any malafide or criminal intent up to the age of eighteen years.

(b) The juvenile's or juvenile's in conflict with law or child's right to presumption of innocence shall be respected throughout the process of justice and protection, from the initial contact to alternative care, including aftercare.

(c) Any unlawful conduct of a juvenile or a child or a juvenile in conflict with law which is done for survival, or is due to environmental or situational factors or is done under control of adults, or peer groups, is ought to be covered by the principles of innocence.

(d) The basic components of presumption of innocence are:

(i) Age of innocence: Age of innocence is the age below which a juvenile or child or a juvenile in conflict with law cannot be subjected to the criminal justice system. The Beijing Rule 4(1) clearly lays down that "the beginning of the age of criminal responsibility shall not be fixed at too low an age level bearing in mind the facts of mental and intellectual maturity". In consonance with this principle, the mental and intellectual maturity of juvenile or child or a juvenile in conflict with law below eighteen years is considered insufficient through out the world.

(ii) Procedural protection of innocence: All procedural safeguards that are guaranteed by the Constitution and other statutes to the adults and that go in to strengthen the juvenile's or child's right to presumption of innocence shall be guaranteed to juveniles or the children or juveniles in conflict with law.

(iii) Provisions of Legal aid and Guardian Ad Litem: Juveniles in conflict with law have a right to be informed about the accusations against them and a right to be legally represented. Provisions must be made for guardian ad litem, legal aid and other such assistance through legal services at State expense. This shall also include such juveniles right to present his case before the competent authority on his own.

II **Principle of dignity and worth.–** (a) Treatment that is consistent with the child's sense of dignity and worth is a fundamental principle of juvenile justice. This principle reflects the fundamental human right enshrined in Article 1 of the Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights. Respect of dignity includes not being humiliated, personal identity, boundaries and space being respected, not being labeled and stigmatized, being offered information and choices and not being blamed for their acts.

(b) The juvenile's or child's right to dignity and worth has to be respected and protected throughout the entire process of dealing with the child from the first contact with law enforcement agencies to the implementation of all measures for dealing with the child.

III. **Principle of Right to be heard.–** Every child's right to express his views freely in all matters affecting his interest shall be fully respected

through every stage in the process of juvenile justice. Children's right to be heard shall include creation of developmentally appropriate tools and processes of interacting with the child, promoting children's active involvement in decisions regarding their own lives and providing opportunities for discussion and debate.

IV. **Principle of Best Interest.**– (a) In all decisions taken within the context of administration of juvenile justice, the principle of best interest of the juvenile or the juvenile in conflict with law or child shall be the primary consideration.

(b) The principle of best interest of the juvenile or juvenile in conflict with law or child shall mean for instance that the traditional objectives of criminal justice, retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice.

(c) This principle seeks to ensure physical, emotional, intellectual, social and moral development of a juvenile in conflict with law or child so as to ensure the safety, well being and permanence for each child and thus enable each child to survive and reach his or her full potential.

V. **Principle of family responsibility.**– (a) The primary responsibility of bringing up children, providing care, support and protection shall be with the biological parents. However, in exceptional situations, this responsibility may be bestowed on willing adoptive or foster parents.

(b) All decision making for the child should involve the family of origin unless it is not in the best interest of the child to do so.

(c) The family-biological, adoptive or foster (in that order), must be held responsible and provide necessary care, support and protection to the juvenile or child under their care and custody under the Act, unless the best interest measures or mandates dictate otherwise.

VI. **Principle of Safety (no harm, no abuse, no neglect, no exploitation and no maltreatment).**– (a) At all stages, from the initial contact till such time he remains in contact with the care and protection system, and thereafter, the juvenile or child or juvenile in conflict with law shall not be subjected to any harm, abuse, neglect, maltreatment, corporal punishment or solitary or otherwise any confinement in jails and extreme care shall be taken to avoid any harm to the sensitivity of the juvenile or the child.

(b) The state has a greater responsibility for ensuring safety of every child in its care and protection, without resorting to restrictive measures and processes in the name of care and protection.

VII. **Positive measures.–** (a) Provisions must be made to enable positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other mainstream community institutions or processes, for the purpose of promoting the well-being of the juvenile or child through individual care plans carefully worked out.

(b) The positive measures shall aim at reducing vulnerabilities and reducing the need for intervention under the law, as well as effective, fair and humane dealing of the juvenile or child.

(c) The positive measures shall include avenues for health, education, relationships, livelihoods, leisure, creativity and play.

(d) Such positive measures must facilitate the development of identity for the child and provide them with an inclusive and enabling environment.

VIII. **Principle of non-stigmatizing semantics, decisions and actions.–** The non-stigmatizing semantics of the Act must be strictly adhered to, and the use of adversarial or accusatory words, such as, arrest, remand, accused, charge sheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody or jail is prohibited in the processes pertaining to the child or juvenile in conflict with law under the Act.

IX. **Principle of non-waiver of rights.–** (a) No waiver of rights of the child or juvenile in conflict with law, whether by himself or the competent authority or anyone acting or claiming to act on behalf of the juvenile or child, is either permissible or valid.

(b) Non-exercise of a fundamental right does not amount to waiver.

X. **Principle of equality and non-discrimination.–** (a) There shall be no discrimination against a child or juvenile in conflict with law on the basis of age, sex, place of birth, disability, health, status, race, ethnicity, religion, caste, cultural practices, work, activity or behaviour of the juvenile or child or that of his parents or guardians, or the civil and political status of the juvenile or child.

(b) Equality of access, equality of opportunity, equality in treatment under the Act shall be guaranteed to every child or juvenile in conflict with law.

XI. **Principle of right to privacy and confidentiality.–** The juvenile's or child's right to privacy and confidentiality shall be protected by all means and through all the stages of the proceedings and care and protection processes.

XII. **Principle of last resort.–** Institutionalization of a child or juvenile in conflict with law shall be a step of the last resort after reasonable inquiry and that too for the minimum possible duration.

XIII. **Principle of repatriation and restoration.**– (a) Every juvenile or child or juvenile in conflict with law has the right to be re-united with his family and restored back to the same socio-economic and cultural status that such juvenile or child enjoyed before coming within the purview of the Act or becoming vulnerable to any form of neglect, abuse or exploitation.

(b) Any juvenile or child, who has lost contact with his family, shall be eligible for protection under the Act and shall be repatriated and restored, at the earliest, to his family, unless such repatriation and restoration is likely to be against the best interest of the juvenile or the child.

XIV. **Principle of Fresh Start.**– (a) The principle of fresh start promotes new beginning for the child or juvenile in conflict with law by ensuring erasure of his past records.

(b) The State shall seek to promote measures for dealing with children alleged or recognized as having impinged the penal law, without resorting to judicial proceedings.

CHAPTER - III
JUVENILE IN CONFLICT WITH LAW

4 to 9. .....

10. Functions of the Board.– The Board shall perform the following functions to achieve the objectives of the Act, namely:-

(a) adjudicate and dispose cases of juveniles in conflict with law;

(b) take cognizance of crimes committed under section 23 to 28 of the Act;

(c) monitoring institutions for juveniles in conflict with law and seeking compliance from them in cases of any noticeable lapses and improvement based on suggestions of the Board;

(d) deal with non-compliance on the part of concerned government functionaries or functionaries of voluntary organizations, as the case may be, in accordance with due process of law;

(e) pass necessary direction to the district authority and police to create or provide necessary infrastructure or facilities so that minimum standards of justice and treatment are maintained in the spirit of the Act;

(f) maintain liaison with the Committee in respect of cases needing care and protection;

(g) liaison with Boards in other districts to facilitate speedy inquiry and disposal of cases through due process of law;

(h) take suitable action for dealing with unforeseen situations that may arise in the implementation of the Act and remove such difficulties in the best interest of the juvenile;

(i) send quarterly information about juveniles in conflict with law produced before them, to the District, State Child Protection Unit, the State Government and also to the Chief Judicial Magistrate or Chief Metropolitan Magistrate for review under sub-section (2) of section 14 of the Act;

(j) any other function assigned by the State Government from time to time relating with juveniles in conflict with law.

11. Pre and Post-Production action of police and other agencies.– (1) As soon as a juvenile alleged to be in conflict with law is apprehended by the police, the concerned police officer shall inform:

(a) the designated Juvenile or the Child Welfare Officer in the nearest police station to take charge of the matter;

(b) the parents or guardian of the juvenile alleged to be in conflict with law about the apprehension of the juvenile, about the address of the Board where the juvenile will be produced and the date and time when the parents or guardian need to be present before the Board;

(c) the concerned probation officer, of such apprehension to enable him to obtain information regarding social background of the juvenile and other material circumstances likely to be of assistance to the Board for conducting the inquiry.

(2) Soon after apprehension, the juvenile shall be placed under the charge of the Juvenile or Child Welfare Officer from the nearest police station, who shall produce the juvenile before the Board within twenty four hours as per sub-section (1) of section 10 of the Act and where such Juvenile or the Child Welfare Officer has not been designated as per provisions laid down under sub-section (2) of section 63 of the Act or is not available for some official reasons, the police officer who had apprehended the juvenile shall produce him before the Board.

(3) The police apprehending a juvenile in conflict with law shall in no case send the juvenile in lock-up or delay his charge being transferred to the Juvenile or the Child Welfare Officer from the nearest police station, if such an officer has been designated.

(4) A list of all designated Juvenile or the Child Welfare Officers in a district and members of Special Juvenile Police Unit with contact details shall be prominently displayed in every police station.

(5) For gathering the best available information it shall be incumbent upon the Police or the Juvenile or the Child Welfare Officer from the nearest police station, to contact the parents or guardians of the juvenile and also apprise them of the juvenile's law breaking behaviour.

(6) The police or the Juvenile or the Child Welfare Officer from the nearest police station, shall also record the social background of the juvenile and circumstances of apprehension and offence alleged to have been committed in the case diary of each juvenile, which shall be forwarded to the Board forthwith.

(7) The police or the Juvenile or the Child Welfare Officer from the nearest police station, shall exercise the power of apprehending the juvenile only in cases of his alleged involvement in serious offences (entailing a punishment of more than 7 years imprisonment for adults).

(8) In such cases where apprehension apparently seems to be in the interest of the juvenile, the police or the Juvenile or the Child Welfare Officer from the nearest police station, shall rather treat the juvenile as a child in need of care and protection and produce him before the Board, clearly explaining the juvenile's need for care and protection in its report and seek appropriate orders from the Board under rule 13 (1) (b) of these rules.

(9) For all other cases involving offences of non-serious nature (entailing a punishment of less than 7 years imprisonment for adults) and cases where apprehension is not necessary in the interest of the juvenile, the police or the Juvenile or the Child Welfare Officer from the nearest police station, shall intimate the parents or guardian of the juvenile about forwarding the information regarding nature of offence alleged to be committed by their child or ward along with his socio-economic background to the Board, which shall have the power to call the juvenile for subsequent hearings.

(10) In case the Board is not sitting, the juvenile in conflict with law shall be produced before the single member of the Board as per the provisions laid down under the sub-section (2) of section 5 of the Act.

(11) In dealing with cases of juveniles in conflict with law the Police or the Juvenile or the Child Welfare Officer from the nearest police station, shall not be required to register an FIR or file a charge-sheet, except where the offence alleged to have been committed by the juvenile is of a serious nature such as rape, murder or when such offence is alleged to have been committed jointly with adults; instead, in matters involving simple offences, the Police or the Juvenile or the Child Welfare Officer from the nearest police station shall record information regarding the offence alleged to have been committed by the juvenile in the general daily diary followed by a report containing social background of the juvenile and circumstances of apprehension and the alleged offence and forward it to the Board before the first hearing.

(12) The State Government shall recognize only such voluntary organizations that are in a position to provide the services of probation, counseling, case work, a safe place and also associate with the Police or the Juvenile or the Child Welfare Officer from the Special Juvenile Police Unit, and have the capacity, facilities and expertise to do so as protection agencies that may assist the Police or the Juvenile or the Child Welfare Officer from the police at the time of apprehension, in preparation of the report containing social background of the juvenile and circumstances of apprehension and the alleged offence, in taking charge of the juvenile until production before the Board, and in actual production of the juvenile before the Board within twenty-four hours.

(13) The Police or the Juvenile or the Child Welfare Officer from the Special Juvenile Police Unit, or the recognized voluntary organization shall be responsible for the safety and provision of food and basic amenities to the juveniles apprehended or kept under their charge during the period such juveniles are with them.

(14) When a juvenile is produced before an individual member of the Board, and an order obtained, such order shall need ratification by the Board in its next meeting.

12. Procedure to be followed in determination of Age.– (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact

assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and while passing orders in such case, shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in subrule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

13. Post-production processes by the Board.– (1) On production of the juvenile before the Board, the report containing social background of the juvenile and circumstances of apprehension and offence alleged to have been committed provided by the officers, individuals, agencies producing the juvenile shall be reviewed by the Board, and the Board shall pass the following order in the first summary inquiry on the same day, namely:-

(a) dispose off the case, if the evidence of his conflict with law appears to be unfounded or where the juvenile is involved in trivial law breaking;

(b) transfer to the Committee, matters concerning juveniles clearly stated to be in need of care and protection in the police report submitted to the Board at the time of production of the juvenile;

(c) release the juvenile in the supervision or custody of fit persons or fit institutions or probation officers as the case may be, through an order in **Form-I,** with a direction to appear or present a juvenile for an inquiry on a next date;

(d) detain the juvenile in an Observation Home or fit institution pending inquiry, only in cases of juvenile's involvement in serious offences as per an order in **Form-II;**

(e) in all cases of release pending inquiry, the Board shall notify the next date of hearing, not later than 15 days of the first summary enquiry and also seek social investigation report from the concerned Probation Officer through an order in **Form-III;**

(2) The Board shall take the following steps to ensure fair and speedy inquiry, namely:-

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the juvenile in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act the proceedings shall be conducted in as simple a manner as possible and care shall be taken to ensure that the juvenile, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every juvenile brought before the Board shall be given the opportunity to be heard and participate in his inquiry;

(d) cases of petty offences, if not disposed off by the Special Juvenile Police Unit or at the police station itself, may be disposed off by the Board through summary proceedings or inquiry, while in cases of heinous offences entailing punishment of 7 years or more, due process of inquiry in detail may follow;

(e) even in cases of inquiry pertaining to serious offences the Board shall follow the procedure of trial in summons cases.

(3) When witnesses are produced for examination in inquiry relating to a juvenile in conflict with law, the Board shall keep in mind that the inquiry is not to be conducted in the spirit of strict adversarial proceedings and it shall use the powers conferred by section 165 of the Indian Evidence Act, 1872 (1 of 1872) so as to question the juvenile and proceed with the presumptions that favour the juvenile's right to be restored.

(4) While examining a juvenile in conflict with law and recording his statement, the Board shall address the juvenile in a child-friendly manner in order to put the juvenile at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence of which the juvenile is accused, but also in respect of the home and social surroundings and the influence to which the juvenile might have been subjected.

(5) The Board may take into account the report of the police containing circumstances of apprehension and offence alleged to have been committed and the social investigation report in **Form-IV** prepared by the Probation officer or the voluntary organization on the orders of the Board as per **Form-III,** along with the evidence produced by the parties for arriving at a conclusion about the juvenile.

(6) Every inquiry by the Board shall be completed within a period of four months after the first summary inquiry and only in exceptional cases involving trans-national criminality, large number of accused and inordinate delay in production of witnesses, the period of inquiry may be extended by two months on recording of reasons by the Board.

(7) In all other cases except where the nature of alleged offence is serious, delay beyond four to six months shall lead to the termination of the proceedings.

(8) Where the proceedings are delayed beyond six months on account of serious nature of the offence alleged to have been committed by the juvenile, the Board shall send a periodic report of the case to the Chief Judicial Magistrate or Chief Metropolitan Magistrate stating the reason for delay as well as steps being taken to expedite the matter.

14. Legal Aid. (1) The proceedings before the Board shall be conducted in non adversarial environment, but with due regard to all the due process guarantees such as right to counsel and free legal aid.

(2) The Board shall ensure that the Legal Officer in the District Child Protection Unit and the State Legal Aid Services Authority shall extend free legal services to all the juvenile in conflict with law.

(3) The Legal Officer in the District Child Protection Unit and the State Legal Aid Services Authority shall be under an obligation to provide legal services sought by the Board.

(4) In the event of shortfall in the State Legal Aid Services support, the Board shall be responsible for seeking legal services from recognized voluntary legal services organisations or the university legal services clinics.

(5) The Board may also deploy the services of the student legal services volunteers and nongovernmental organisation volunteers in para-legal tasks such as contacting the parents of juveniles in conflict with law and gathering relevant social and rehabilitative information about the juveniles.

15. Completion of Inquiry and Dispositional Alternatives. – (1) The Board shall complete every inquiry within the stipulated time of four months and on recording a finding about juvenile's involvement in the alleged offence, pass one of the seven dispositional orders enumerated in section 15 of the Act.

(2) Before passing an order, the Board shall obtain a social investigation report prepared by the probation officer or by a recognized voluntary organization ordered to do so by the Board, and take the findings of the report into account.

(3) All dispositional orders passed by the Board shall necessarily include an individual care plan for the concerned juvenile in conflict with law, prepared by a probation officer or voluntary organization on the basis of interaction with the juvenile and his family where possible.

(4) Where the Board decides to release the juvenile after advice and admonition or after participation in group counseling or orders him to perform community service, necessary direction may also be made by the Board to the District or State Child Protection Unit or the State Government for arranging such individual counselling, group counseling and community service.

(5) Where the Board decides to release the juvenile in conflict with law on probation and place him under the care of the parent or guardian or fit person, the person in whose custody the juvenile is released may be required to submit a written undertaking in **Form-V** for the good behaviour and well-being of the juvenile for a maximum period of three years.

(6) The Board may order release of a juvenile in conflict with law on execution of a personal bond without surety in **Form VI.**

(7) In the event of placement of a juvenile in conflict with law in care of a fit institution or special home, the Board shall keep in mind that the fit institution or special home is located nearest to the place of residence of the juvenile's parent or guardian.

(8) The Board, where it releases a juvenile in conflict with law on probation and places him under the care of parent or guardian or fit person or where the juvenile is released on probation and placed under the care of fit institution, may order that the juvenile be placed under the supervision of a probation officer. The period of supervision shall be a maximum of three years.

(9) Where the Board decides that a juvenile in conflict with law ought to be treated as a child in need of care and protection, it shall make necessary orders for production of such juvenile before the nearest Committee for suitable care, protection and rehabilitation.

(10) Where it appears to the Board that the juvenile in conflict with law has not complied with probation conditions, it may order the juvenile to be sent for detention in a special home.

(11) Where a juvenile in conflict with law who has attained the age of sixteen years and the offence committed by him is of such a serious nature that in the satisfaction of the Board, it is neither in the interest of the juvenile himself nor in the interest of other juveniles of the special home, the Board may order the juvenile to be kept in a place of safety and in a manner considered most appropriate by it.

(12) The State Government shall make arrangement for complying with the detention of special category of juveniles in conflict with law in place of safety other than the special home.

(13) In no case the period of detention shall exceed beyond the maximum period provided in clause (g) of sub-section (1) of section 15 of the Act.

16. Institutions for juveniles in conflict with law.– (1) The State Government or the voluntary organisation recognised by that State Government shall set up separate observation homes or special homes for boys and girls.

(2) The observation homes or special homes shall set up separate residential facilities for boys and girls up to 12 years, 13-15 years and 16 years and above.

(3) Every institution shall keep a copy of the Act, the rules made by the Central Government and the State rules if any, for use by both staff, juveniles and children residing therein.

(4) The State Governments in collaboration with civil society shall develop and make available simplified and child friendly versions of the Act and the rules in regional languages.

(5) All facilities and services for juveniles in conflict with law shall be made available and maintained as per the provisions of the Act and the State rules. In case the State rules have not been notified, the provisions of these rules shall apply.

17. .....

18. Procedure to be followed in respect of sections 21, 22, 23, 24, 25 and 26 of the Act. .– (1) In the event of violation of provisions laid down under section 21 of the Act,-

(a) the Board shall take cognizance of such violation by print or electronic media and shall initiate necessary inquiry and pass appropriate orders as per provisions contained in sub-section (2) of section 21 of the Act; and

(b) where the National or the State Commission for Protection of Child Rights takes suo motu cognizance of violation under section 21 of the Act, it shall inform the District or the State Child Protection Unit of the concerned district and the State directing them to initiate necessary action through the Board.

(2) In the event of an escape of a juvenile in conflict with law or a child, the following action shall be taken within twenty-four hours,-

(a) the Officer-in-Charge of any institution shall immediately send a report to the area Police Station or Special Juvenile Police Unit along with the details and description of the juvenile or child, with identification

marks and a photograph, with a copy to the Board, District Child Protection Unit and other authorities concerned;

(b) the Officer-in—charge of institutions other than shelter homes or drop-in-centres shall send the guards or concerned staff in search of the juvenile, at places like railway stations, bus stands and other places where the juvenile is likely to go;

(c) the parents or guardians shall be informed immediately about such escape; and

(d) the Officer-in-charge of an institution other than a shelter home or drop-in-centre shall hold an inquiry about such escape and send his report to the Board or Committee and the authorities concerned and the report shall be placed before the Management Committee set up under rule 55 of these rules in the next meeting for review.

(3) The offences against a juvenile in conflict with law or a child specified in sections 23, 24, 25 and 26 shall be either bailable or non-bailable besides being cognizable under the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and the procedures shall apply on the Police, the Board and the concerned authorities and functionaries accordingly.

CHAPTER - IV
CHILD IN NEED OF CARE AND PROTECTION

19 to 31. .....

CHAPTER - V
REHABILITATION AND SOCIAL REINTEGRATION

32 to 39. .....

CHAPTER - VI
STAINDARDS OF CARE FOR INSTITUTIONS

40 to 58. .....

59. Death of a juvenile or child.– On the occurrence of any case of death or suicide in an institution the procedure to be adopted shall be as under: -

(1) In the event of an unnatural death or suicide of a juvenile or child in an institution it is imperative for the institution to ensure that an inquest and post-mortem examination is held at the earliest.

(2) In case of natural death or due to illness of a juvenile or child, the Officer-in-charge shall obtain a report of the Medical Officer stating the cause of death and a written intimation about the death shall be given immediately to

the nearest Police Station, the Board or Committee, the National or State Commission for Protection of Child Rights, District Child Protection Unit or State Child Protection Unit or any other concerned authority and the parents or guardians or relatives of the juvenile or child.

(3) Whenever a sudden or violent death or death from suicide or accident takes place, immediate information shall be given by the case-worker or probation officer or welfare officer to the Officer-in-Charge and the Medical Officer and the Officer-in-Charge shall immediately inform the nearest police station, Board or Committee and parents or guardians or relatives of the deceased juvenile or child.

(4) If a juvenile or child dies within twenty four hours of his admission to the institution, the Officer-in-charge of the institution shall report the matter to the officer-in-charge of the Police Station having jurisdiction and the District Medical Officer or the nearest Government Hospital and the parents or guardians or relatives of such juvenile or child without delay.

(5) The Officer-in-charge shall also immediately give intimation to nearest Magistrate empowered to hold inquests and to the Board or as the case may be the Committee.

(6) The Officer-in-Charge and the Medical Officer at the institution shall record the circumstances of the death of the child and send a report to the concerned Magistrate, the Officer-in-charge of the police station having jurisdiction, the Committee and the District Medical Officer or the nearest government hospital where the dead body of the juvenile or child is sent for examination, inspection and determination of the cause of death and the Officer-incharge and the Medical Officer shall also record in writing their views on the cause of the death if any, and submit it to the concerned Magistrate and the Officer-in-charge of the police station having jurisdiction.

(7) The officer-in-charge and the Medical Officer shall make themselves available for any inquiries initiated by the police or the Magistrate concerning the cause of death and other details regarding such juvenile or child.

(8) As soon as the inquest is held, the body shall be handed over to the parents or guardian or relatives or, in the absence of any claimant, the last rituals shall be performed under the supervision of the officer-in-charge in accordance with the known religion of the juvenile or child.

60. Abuse and exploitation of the juvenile or child.– (1) Every institution shall have systems of ensuring that there is no abuse, neglect and maltreatment and this shall include the staff being aware of what constitutes abuse, neglect and maltreatment as well as early indicators of abuse, neglect and maltreatment and how to respond to these.

(2) In the event of any physical, sexual or emotional abuse, including neglect of juveniles and children in an institution by those responsible for care and protection, the following action shall be taken:

(i) the incidence of abuse and exploitation must be reported by any staff member of the institution immediately to the Officer-in-Charge on receiving such information;

(ii) when an allegation of physical, sexual or emotional abuse comes to the knowledge of the Officer-in-Charge, a report shall be placed before the Board or Committee, who in turn, shall order for special investigation;

(iii) the Board or Committee shall direct the local police station or Special Juvenile Police Unit to register a case, take due cognizance of such occurrences and conduct necessary investigations;

(iv) the Board or Committee shall take necessary steps to ensure completion of all inquiry and provide legal aid as well as counselling to the juvenile or child victim;

(v) the Board or Committee shall transfer such a juvenile or child to another institution or place of safety or fit person;

(vi) the Officer-in-charge of the institution shall also inform the chairperson of the management committee and place a copy of the report of the incident and subsequent action taken before the management committee in its next meeting;

(vii) in the event of any other crime committed in respect of juveniles or children in institutions, the Board or Committee shall take cognizance and arrange for necessary investigation to be carried out by the local police station or Special Juvenile Police Unit;

(viii) the Board or Committee may consult Children's Committee setup in each institution to enquire into the fact of abuse and exploitation as well as seek assistance from relevant voluntary organizations, child rights experts, mental health experts or crisis intervention centres in dealing with matters of abuse and exploitation of juveniles or children in an institution.

61. Juvenile or Child suffering from dangerous diseases or mental health problems.– (1) When a juvenile or a child placed under the care of a fit person or a fit institution under the provisions of the Act, is found to be suffering from a disease or physical or mental health problems requiring prolonged medical treatment, or is found addicted to a narcotic drug or psychotropic substance, the juvenile or the child may be sent by an order of the competent authority to an appropriate place for such period as may be certified by medical

officer to be necessary for proper treatment of the juvenile or the child or for the remainder of the term for which he has to stay.

(2) When the juvenile or the child is cured of the disease or physical or mental health problems, the competent authority may, if the juvenile or child is still liable to stay, order the juvenile or the child to be placed back in the care of fit person or institution from where the juvenile or child was removed for treatment and if the juvenile or the child is no longer liable to be kept under them care of fit person or institution, the competent authority may order him to be discharged.

(3) The order of restoration of a juvenile or a child suffering from an infectious or contagious disease to his parents or guardian shall be based on the principle of best interest of the juvenile or child, keeping in mind the risk of stigmatization and discrimination and discontinuation of treatment.

(4) Where there is no organization either within the jurisdiction of the competent authority, or nearby District or State for care and protection of juveniles or children suffering from serious psychiatric or physical disorder and infection, as required under section 58 of the Act, necessary organization shall be set up by the State Government at such places, as it may deem fit to cater to the special needs of such juveniles or children.

62. Leave of absence of a juvenile or child.– (1) A juvenile or child in an institution may be allowed to go on leave of absence or released under supervision for examination or admission, special occasions like marriage or emergencies like death or accident or serious illness in the family.

(2) While the leave of absence for short period generally not exceeding seven days excluding the journey time may be recommended by the Officer-in-charge, but granting of such leave shall be by the Board or Committee.

(3) The parents or guardian of the juvenile or the Officer-in-charge on behalf of the juvenile or child may submit an application to the Board or Committee requesting for relieving the juvenile or child on leave, stating clearly the purpose for the leave and the period of leave.

(4) While considering the application of leave of absence, the Board or Committee shall hear the juvenile or child or the parents or guardians of the juvenile or child and if the Board or Committee considers that granting of such leave is in the interest of the juvenile or child, appropriate order shall be made and the Board or Committee may call for a report from the probation officer or child welfare officer in case the preliminary information gathered from the juvenile or child or concerned parent or guardian is not sufficient for the purpose.

(5) While issuing orders sanctioning the leave of absence or relieving under supervision, as the case may be, the competent authority shall mention the period of leave and the conditions attached to the leave order, and if any of these conditions are not complied with during the leave period, the juvenile or child may be called back to the institution.

(6) The parent or guardian shall arrange to escort the juvenile or child from and to the institution and where this is not possible, the Officer-in-charge may arrange to escort the juvenile or child to the place of the family and back. In case the parents or guardian is willing to arrange escort but does not have requisite financial means, the Officer-in-charge shall arrange for the traveling expenses as admissible under the rules.

(7) If the juvenile or child runs away from the family during the leave period, the parent or guardian is required to inform the Officer-in-charge of the institution immediately, and try to trace the juvenile or child and if found, the juvenile or child shall be brought back to the institution immediately.

(8) If the juvenile or child is not found within twenty four hours, the Officer-in-Charge shall report the matter to the nearest police station and missing person's bureau, but no adverse disciplinary action shall be taken against the juvenile or child and procedure laid down under the Act shall be followed.

(9) If the parent or guardian does not take proper care of the juvenile or child during the leave period or does not bring the juvenile or child back to the institution within the stipulated period, such leave may be refused on later occasions.

(10) If the juvenile or child does not return to the institution on expiry of the sanctioned leave, the Board or Committee shall refer the case to police for taking charge of the juvenile and bring him back to the institution.

(11) The period of such leave shall be counted as a part of the period of stay in the institution and the time which elapses after the failure of a juvenile to return to the institution within the stipulated period, shall be excluded while computing the period of his stay in the institution.

63. .....

64. .....

65. Restoration and Follow-up.– (1) The order for restoration of the juvenile or child shall be made by the Board or Committee on the basis of a fair hearing of the juvenile or child and his parents or guardian, as well as on the reports of the Probation Officers or Child Welfare Officers or non-governmental organisations directed by the Board or Committee to conduct the home study and any other relevant document or report brought before the Board or Committee for deciding the matter.

(2) The Board or Committee shall send a copy of the restoration order along with a copy of the for escort as per **Form XXII** to the District Child Protection Unit or State Government who shall provide funds for restoration of the juvenile or child.

(3) Every restoration shall be planned for as part of the individual care plans prepared by the case-workers or counsellors or child welfare officers or probation officer, as the case may be, and shall be based on the review and recommendations of the Management Committee set up under rule 55 of these rules.

(4) Besides police, the Board or Committee shall seek collaboration with non-governmental organisations to accompany juveniles or children back to their family for restoration.

(5) In case of girls, the juvenile or child shall necessarily be accompanied by female escorts.

(6) The expenses incurred on restoration of a juvenile or child, including travel and other incidental expenses, shall be borne by the District Child Protection Unit or State Government.

(7) When a juvenile or child expresses his unwillingness to be restored back to the family, the Board or Committee shall make a note of it in its records in writing and such juvenile or child shall not be coerced or persuaded to go back to the family, particularly if the social investigation report of the child welfare officer or probation officer establishes that restoration to family may not be in the best interest of the juvenile or child or, if the parents or guardians refuse to accept the juvenile or child back.

(8) A follow-up plan shall be prepared as part of the individual care plans by the Child Welfare Officers or Probation Officers or non-governmental organisations assigned by the Board or Committee to assist in restoration of the child.

(9) A quarterly follow-up report shall be submitted to the Board or Committee by the concerned Child Welfare Officer or Probation Officer or non-governmental organisation for a period of two years with a copy to the officer-in-charge of the institution from where the juvenile or child is restored.

(10) The follow-up report shall clearly state the situation of the juvenile or child post restoration and the juvenile's or child's needs to be met by the State Government in order to reduce further vulnerability of the juvenile or child.

(11) The officer-in-charge shall file the follow-up report in the case-file of the juvenile or child and place the report before the management committee set up under rule 55 of these rules in its next meeting.

(12) The officer-in-charge shall also send a copy of the follow-up reports to the District Child Protection Unit.

(13) Where a follow-up is not possible due to unavailability of government functionaries or nongovernmental organisations, the concerned District Child Protection Unit shall provide necessary assistance and support to the concerned Board or Committee.

66 to 68. .....

CHAPTER - VII
MISCELLANEOUS

69. to 72. .....

73. Admission of outsiders. .– (1) No stranger shall be admitted to the premises of the institution, except with the permission of the Officer- in-charge or on an order from the Board or Committee.

(2) In special cases, where parents or guardians have travelled a long distance from another state or district, the Officer-in-Charge shall allow parents or guardians entry into the premises and a meeting with their children, provided they possess proper identification and are not reported to have subjected the juvenile or child to abuse and exploitation.

74. Identity Photos. .– (1) On admission to a home established under the Act, every juvenile or child shall be photographed

(2) One photograph shall be kept in the case file of the juvenile or the child, one shall be fixed with the index card, a copy shall be kept in an album serially numbered with the negative in another album, and a copy of the photograph shall be sent to the Board or Committee as case may be, as well as to the district or State Child Protection Unit.

(3) In case of a child missing from an institution or in case of lost children received by an institution, a photograph of the child with relevant details shall be sent to the missing person's bureau and the local police station.

75. Police Officers to be in plain clothes.– While dealing with a juvenile or a child under the provisions of the Act and the rules made thereunder, except at the time of arrest, the Police Officer shall wear plain clothes and not the police uniform.

76. Prohibition on the use of handcuffs and fetters.– No child or the juvenile in conflict with law dealt with under the provisions of the Act and the rules made there under shall be handcuffed or fettered.

77. Procedure to be followed by a Magistrate not empowered under the Act.– (1) When any juvenile or child is produced before a Magistrate other than Board or Committee, and the Magistrate is of the opinion that such person is a juvenile or child, he shall record his reasons and send the juvenile or child to the appropriate competent authority.

(2) In case of a juvenile produced before a Magistrate not empowered under this Act, such Magistrate shall direct the case to be transferred to the Board for inquiry and disposal.

(3) In case of a child in need of care and protection produced as a victim of a crime before a Magistrate not empowered under the Act, such Magistrate shall transfer the matter concerning care and protection, rehabilitation and restoration of the child to the appropriate Committee.

78. Transfer.– (1) During the inquiry, if it is found that the juvenile or child hails from a place outside the jurisdiction of the Board or Committee, the Board or Committee shall order the transfer of the juvenile or child and send a copy of the order to the State Government or State or District Child Protection Unit.

Provided that:

(i) such transfer is in the best interest of the juvenile or child;

(ii) no child shall be transferred or proposed to be transferred only on the ground that the child has created problems or, has become difficult to be managed in the existing institution or, is suffering from a chronic or terminal illness or, on account of disability;

(iii) such transfer shall only take place after the completion of evidence and cross; examination that may be required in a legal proceeding involving a juvenile or child; and

(iv) the reasons for and circumstances of such transfer are recorded in writing.

(2) The State Government or State or District Child Protection Unit shall accordingly:

(i) send the information of transfer to the appropriate competent authority having jurisdiction over the area where the child is ordered to be transferred by the Board or Committee; and

(ii) send a copy of the information to the Officer-in-charge of the institution where the child is placed for care and protection at the time of the transfer order.

(3) On receipt of copy of the information from the State Government or State or District Child Protection Unit, the Officer-in-charge shall arrange to escort the child at government expenses to the place or person as specified in the order.

(4) On such transfer, case file and records of the juvenile or child shall be sent along with the juvenile or child.

79. Procedure for sending a juvenile or child outside the jurisdiction of the competent authority.– (1) In the case of a juvenile or a child whose ordinary place of residence lies outside the jurisdiction of the competent authority, and if the competent authority considers it necessary to take action under section 50 of the Act, it shall direct a probation officer or case worker or child welfare

officer, as the case may be, to make enquiries as to the fitness and willingness of the relative or other person to receive the juvenile or the child at the ordinary place of residence, and whether such relative or other fit person can exercise proper care and control over the juvenile or the child.

(2) Where a juvenile or child is ordered to be sent to the ordinary place of residence or to a relative or fit person, execution of a bond by the juvenile or child without any surety, in **Form VI,** is necessary along with an undertaking by the said relative or fit person in **Form V** or **IX** as the case may be.

(3) Any breach of a bond or undertaking or of both given under sub-rule (2) of this rule, shall render the juvenile liable to be brought before the competent authority, who may make an order directing the juvenile to be sent to an institution home.

(4) Any juvenile or a child, who is a foreign national and who has lost contact with his family shall also be entitled for protection.

(5) The juvenile or the child, who is a foreign national, shall be repatriated, at the earliest, to the country of his origin in co-ordination with the respective Embassy or High Commission.

(6) The Board or Committee shall keep the Ministry of External Affairs informed about repatriation of every juvenile or child of foreign nationality carried out on the orders of the Board or Committee.

(7) A copy of the order passed by the competent authority under section 50 of the Act shall be sent to-

(a) the probation officer or child welfare officer who was directed to submit a report under sub-rule (1) of this rule;

(b) the probation officer or child welfare officer, if any, having jurisdiction over the place where the juvenile or the child is to be sent;

(c) the competent authority having jurisdiction over the place where the juvenile or the child is to be sent; and

(d) the relative or the person who is to receive the juvenile or the child.

(8) During the pendency of the order under sub-rule (6) of this rule, the juvenile or the child shall be sent by the competent authority to an observation home or children's home as the case may be.

(9) Where the competent authority considers it expedient to send the juvenile or the child back to his ordinary place of residence under section 50, the competent authority shall inform the relative or the fit person, who is to receive the juvenile or the child accordingly; and shall invite the said relative or fit person to come to the home, to take charge of the juvenile or the child on such date, as may be specified by the competent authority.

(10) The competent authority inviting the said relative or fit person under sub-rule (8) of this rule may also direct, if necessary, the payment to be made by the Officer-in-charge of the home, of the actual expenses of the relative or fit person's journey both ways, by the appropriate class and the juvenile's or child's journey from the home to his ordinary place of residence, at the time of sending the juvenile or the child.

(11) If the relative or the fit person fails to come to take charge of the juvenile or the child on the specified date, the juvenile or the child shall be taken to his ordinary place of residence by the escort of the observation home and in the case of a girl, at least one escort shall be a female.

80. to 82. .....

83. Setting up of Juvenile Justice Board.– The State Government shall set up by notification in Official Gazette, Juvenile Justice Board in every district, with requisite infrastructure, personnel, besides the Principal Magistrate and Members and Finances as listed below:

(1) Infrastructure shall consist of a Board Room, waiting room for children, a room for Principal Magistrate and Members, a record room, room for Probation Officers, waiting room for parents and visitors, safe drinking water facility and toilets.

(2) The State Government shall provide necessary human resource support for every Board, including probation officer, steno-typist or computer operator, peon, *safai karamchari.*

84. Special Juvenile Police Unit.– (1) The State Government shall appoint a Special Juvenile Police Unit at the District level within four months of the notification of these rules and the unit shall consist of a juvenile or child welfare officer of the rank of police inspector and two paid social workers having experience of working in the field of child welfare, of whom one shall be a woman.

(2) The District Child Protection Unit or the State Government shall provide services of its two social workers to the Special Juvenile Police Unit for discharging their duties.

(3) The juvenile or child welfare officer at the police station shall be a person with aptitude and appropriate training and orientation to handle the cases of juveniles or children in terms of the provisions of the Act.

(4) The transfer and posting of the designated Juvenile or Child Welfare Officer shall be within the Special Juvenile Police Units of other police stations or district unit, unless there is an exceptional case of promotion and in such cases, other police officer must be designated and deputed in the unit so that there is no shortfall.

(5) Special Juvenile Police Unit at district level shall coordinate and function as a watch-dog for providing legal protection against all kinds of cruelty, abuse and exploitation of child or juvenile.

(6) The unit shall take serious cognizance of adult perpetrators of crimes against children and see to it that they are without delay apprehended and booked under the appropriate provisions of the law and for this purpose the district level units shall maintain liaison with other units of police station.

(7) The Special Juvenile Police Units shall seek assistance from the voluntary organizations, *panchayats* and *gramsabhas* or Resident Welfare Associations in identifying juveniles in conflict with law as well as reporting cases of violence against children, child neglect and child abuse.

(8) The Special Juvenile Police Units shall particularly seek assistance from voluntary organizations recognized as protection agencies by the State Government for the purpose of assisting Special Juvenile Police Units and local police stations at the time of apprehension, in preparation of necessary reports, for taking charge of juveniles until production and at the time of production before the Board as per rule 11 (12) of these rules.

(9) The Superintendent of Police in a district shall head the Special Juvenile Police Unit and oversee its functioning from time to time.

(10) A Nodal Officer from Police not less than the rank of Inspector General of Police shall be designated in each State to coordinate and upgrade role of police on all issues pertaining to care and protection of children or juveniles under Act.

(11) Any police officer found guilty, after due inquiry, of torturing a child, mentally or physically, shall be liable to be removed from service, besides being prosecuted for the offence.

85. Honorary or Voluntary Welfare Officers and Probation Officers.– To augment the existing probation service, honorary or voluntary welfare officers and probation officers may be appointed from the voluntary organization and social workers found fit for the purpose by the competent authority and their services may also be co-opted into the implementation machinery by the orders of the competent authority.

86. .....

87. Duties of a Probation Officer or Child Welfare Officer or Case Worker.– (1) Every probation officer or child welfare officer or case-worker shall carry out all directions given by the Board or Committee or concerned authority and shall perform the following duties, functions and responsibilities:

(a) making social investigation of the juvenile **(Form IV)** or the child **(Form XIII)** through personal interview and from the family, social agencies and other sources;

(b) attending the proceedings of the Board or Committee and submitting reports as and when required;

(c) clarifying problems of the juvenile or the child and dealing with their difficulties in institutional life;

(d) participating in the orientation, monitoring, education, vocational and rehabilitation programmes;

(e) establishing co-operation and understanding between the juvenile or the child and the Officer- in-charge;

(f) assisting the juvenile or the child to develop contacts with family and also providing assistance to family members;

(g) developing a care plan for every child in consultation with the juvenile or child and following up its implementation;

(h) participating in the pre-release programme and helping the juvenile or the child to establish contacts which can provide emotional and social support to juvenile or child after their release;

(i) establishing linkages with voluntary workers and organizations to facilitate rehabilitation and social reintegration of juveniles and to ensure the necessary follow-up;

(j) follow-up of juveniles after their release and extending help and guidance to them;

(k) visiting regularly the residence of the juvenile or child under their supervision and also places of employment or school attended by such juvenile or child and submitting fortnightly reports as prescribed in **Form XXI;**

(l) accompanying juveniles or children where ever possible, from the office of the Board to observation home, special home, children's home or fit person, as the case may be; and

(m) maintaining case file and such registers as may be specified from time to time.

(2) On receipt of information from the Police or Juvenile or Child Welfare Officer of the Police under clause (b) of section 13 of the Act, the probation officer shall inquire into the antecedents and family history of the juvenile or the child and such other material circumstances, as may be necessary and submit a social investigation report as early as possible, in **Form IV** or **XIII,** to the Board.

88 to 95. .....

96. Application of these Rules.– It is hereby declared that until the new rules conforming to these rules are framed by the State Government concerned under section 68 of the Act, these rules shall mutatis mutandis apply in that State.

97. Pending Cases.– (1) No juvenile in conflict with law or a child shall be denied the benefits of the Act and the rules made thereunder.

(2) All pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.

(3) Any juvenile in conflict with law, or a child shall be given the benefits under sub-rule (1) of this rule, and it is hereby clarified that such benefits shall be made available to all those accused who were juvenile or a child at the time of commission of an offence, even if they cease to be a juvenile or a child during the pendency of any inquiry or trial.

(4) While computing the period of detention or stay or sentence of a juvenile in conflict with law or of a child, all such period which the juvenile or the child has already spent in custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the court or the Board.

98. Disposed off cases of juveniles in conflict with law.– The State Government or as the case may be the Board may, either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provisions contained in the Act and rule 12 of these rules and pass an appropriate order in the interest of the juvenile in conflict with law under section 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in section 15 of the said Act.

99. Disposal of records or documents.– The records or documents in respect of a juvenile or a child or a juvenile in conflict with law shall be kept in a safe place for a period of seven years and no longer, and thereafter be destroyed by the Officer-in-charge or Board or Committee, as the case may be.

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